REPUBLIC OF TRINIDAD AND TOBAGO

Civil Appeal No: 94 of 2010

IN THE COURT OF APPEAL

BETWEEN

APUA FUNDING LIMITED
THE GOVERNMENT OF ANTIGUA AND BARBUDA

APPELLANTS

AND

RBTT TRUST LIMITED

RESPONDENT

PANEL: **A. Mendonça, J.A.**
P. Jamadar, J.A.
N. Bereaux, J.A.

APPEARANCES: **Mr. R. Martineau, S.C. and Mr. K. Garcia appeared for the Appellants**
Mr. A. Fitzpatrick, S.C. and Mr. J. Mootoo appeared for the Respondent

DATE DELIVERED: November 6th, 2015

I agree with the judgment of Mendonça, J.A. and have nothing to add.

P. Jamadar,
Justice of Appeal

I too agree

N. Bereaux,
Justice of Appeal

JUDGMENT

Delivered by A. Mendonça, J.A.

1. This is an appeal from the judgment of Rajnauth-Lee, J whereby she granted summary judgment in favour of the Respondent, RBTT Trust Limited (the respondent) against the appellants APUA Funding Limited (APUA Funding) and the Government of Antigua and Barbuda (the Government) (together referred to as the appellants) in the following terms:

    1. there shall be summary judgment for the respondent against APUA Funding on its whole claim of US$6,862,436.00 with interest thereon at the rate of 13 percent per annum from June 11th 2007 and until payment pursuant to Part 15 of the Civil Proceedings Rules (the CPR);

    2. there shall be summary judgment for the respondent against the Government on its whole claim with interest thereon at the rate of 13 percent per annum from June 11th 2007 until payment pursuant to Part 15 of the CPR; and

    3. APUA Funding and the Government shall pay to the respondent the costs of the claim to be quantified by the Court on a date to be fixed.

2. The claim of the respondent arose out of a 2004 bond transaction arranged by RBTT Merchant Bank Limited (the Merchant Bank) for the purpose of refinancing existing facilities held or arranged at the Merchant Bank. The bonds, in the aggregate value of US$16,500,000.00 were offered to selected persons in accordance with a subscription agreement dated March 12th 2004 and by a trust deed of the same date between APUA Funding and the respondent under which the respondent was appointed the trustee. In accordance with the terms of the subscription agreement the Merchant Bank procured the subscription and payment of the bonds which were duly issued on March 12th, 2004.

3. Pursuant to the terms of the bond transaction, the payment of the bonds was secured by, *inter alia*, a guarantee and indemnity dated March 12th 2004 given by the Government in favour of the respondent on behalf of itself and as trustee for the bondholders and by a security agreement. Under the guarantee and indemnity the Government, in order to induce the bondholders to purchase the bonds, irrevocably and unconditionally guaranteed, *inter alia*, to pay to the trustee on demand, all monies and liabilities which were then or at any time thereafter due and owning or incurred to or in favour of the trustee and the bondholders under

or in connection with the bonds, the trust deed and the other security instruments which included the security agreement. I will refer to the guarantee and the indemnity in more detail later in this judgment.

4. Under the security agreement APUA Funding assigned to the respondent as *trustee* absolutely for its benefit and for the benefit of the bondholders all its rights, title and interest in, *inter alia*, a certain agreement dated July 27th 1987 made among Antigua Public Utilities Authority (the Authority), Cable and Wireless (West Indies) Limited and the Government as amended by two subsequent agreements made among the said parties (the agreement as amended is hereinafter referred to as the revenue sharing agreement). Under the revenue sharing agreement it was agreed, *inter alia*, that Cable and Wireless (West Indies) Limited shall pay to the Authority a portion of the revenues derived by it from international telephone calls originating in or terminating in Antigua and Barbuda.

5. By an agreement dated September 28th 1998 (hereinafter referred to as the sale of receivables agreement) and made between the Government, the Authority and APUA Funding the Authority sold, transferred and assigned to APUA Funding, in consideration of the sum of US$11,392,500, all its' rights, title and benefit arising out of or evidenced by the revenue sharing agreement. By the security agreement, therefore, APUA Funding's rights, title and interest in the sale of receivables agreement was assigned to the respondent as trustee for its benefit and that of the bondholders as security for the payment and discharge of APUA Funding's obligations under the trust deed and the bonds.

6. It was an express term of the trust deed that on the 12th day of March, June, September and December (commencing June 22nd 2004 and continuing until maturity of the bonds) APUA Funding will pay to the order of the respondent as trustee under the trust deed the sum of US$1,096,281.28 (the quarterly instalment) representing the amount owing in respect of principal and interest on the bonds. In breach of its obligation APUA Funding failed to deposit into the debt service account established under the terms of the security agreement the quarterly instalments which became due on September 12th 2006 and March 12th 2007.

7. By letter dated May 10th 2007 the Authority wrote to the respondent advising that it considered unlawful the issue of the bonds and proposed to call all of the transactions

connected therewith into question by appropriate legal proceedings. The Government had earlier written to the Merchant Bank referring to "*certain questionable transactions carried out by Royal Merchant Bank and Finance Company Limited and APUA Funding Limited which calls for special investigation particularly given the fact that funds due to the Public Utilities Authority were diverted to APUA Funding Limited and utilized for purposes outside of the statutory remit of the Authority."*

8. On June 11th 2007 the trustee notified APUA Funding that an event of default had occurred under the trust deed and declared the entire amount then outstanding on the bonds immediately due and payable. On the same date the trustee demanded payment of the outstanding amount from the Government under the guarantee and indemnity. Both APUA Funding and the Government failed to pay the outstanding amount or any part thereof. Accordingly the respondent began these proceedings on June 29th 2007 in which it claimed a) as trustee for the bondholders against APUA Funding under the trust deed the amount for which summary judgment was given and b) as trustee for the bondholders and for its own benefit against the Government under the guarantee and indemnity the amount for which summary judgment was given.

9. APUA Funding and the Government filed a joint defence. In their defence they averred that APUA Funding is a sham corporation set up for the purpose of unlawfully siphoning off funds due to the Authority. They alleged that the trust deed, guarantee and indemnity and security agreement were part of a device to defraud the Authority of monies due to it. As particulars of the fraud, APUA Funding and the Government alleged that:

a) in contravention of the Public Utilities Act of Antigua and Barbuda (the Act) there was devised a scheme to dispose illegally of the funds of the Authority derived from the Authority's telephone revenues for the purpose beyond the lawful powers, duties and obligations of the Authority;

b) APUA Funding was established by public officials of Antigua and Barbuda responsible for the Authority, for the purpose of unlawfully removing funds from the ownership and/or control of the Authority to be used for purposes not authorised by the Act;

c) APUA Funding was a sham created for the sole purpose of being an instrument to misappropriate illegally the funds of the Authority;

d) the sale of receivables agreement was executed as part of a plan whereby the Government purported to construct illegally a market place in Antigua with the lawful and proper monies of the Authority. The Authority received no consideration for the sale of its receivables;

e) from the time the sale of receivables agreement was executed the respondent took control of the funds of the Authority derived from the revenue sharing agreement with powers of disposition without reference to the Authority and without regard to the Act;

f) the execution of the guarantee by the Government was procured as part of a device to defraud the Authority of monies due to it, namely, the said receivables under the revenue sharing agreement, and accordingly the guarantee and indemnity is unlawful;

g) the respondent knew or ought to have known or would have discovered on due inquiry that APUA Funding was not a genuine private corporation with limited liability, that it had no shareholders and no assets and was created to divert the monies of the Authority to improper and illegal purposes by means of the sale of receivables agreement which was illegal and void having regard to the provisions of the Act;

h) that APUA Funding was in no position in accordance with proper banking practice to satisfy the respondent that it had assets or funds to make a genuine purchase of assets from the Authority either as permitted by the Act or otherwise;

i) that the Act did not authorise the creation of APUA Funding for the disposal of the corporate assets of the Authority, the ownership, management, control and administration of which were regulated by the provisions of the Act.

10. APUA Funding and the Government further alleged that the subscription agreement, the trust deed and the security agreement were part of a plan to cause the telephone revenues of the Authority to be misapplied for illegal and improper purposes without regard to the Act and in particular the provisions of the Act with respect to financial control and the laying of information before the chambers of the Antigua and Barbuda legislature. It was therefore a device to enable the revenues of the Authority to be misused and misapplied without accountability and to avoid constitutional and legal procedures for government revenue and expenditure or the imposition of financial burdens upon public funds as well as legal procedures concerning the revenues and expenditure of the Authority.

11. APUA Funding and the Government further pleaded in their defence that the monies derived from the bonds were used for the purpose of refinancing existing facilities which the respondent knew or ought to have known were to be repaid out of the receivables under the

sale of receivables agreement and were granted by the Merchant Bank for the purpose of financing the sale of receivables agreement and loans made by the Merchant Bank to APUA Funding. They contended that the use of the receivables under the sale of receivables agreement for the financing of the bonds was illegal and for an improper purpose. They further say that the sale of receivables was in breach of the Act and constituted dishonest assistance on the part of the respondent in the misappropriation of the Authority's funds and that the trust deed and deed of guarantee were not enforceable as by those instruments and the security agreement the respondent was involved in the knowing receipt of trust property, ie the Authority's funds, and or dealt with the trust property in breach of trust and or knowingly assisted in the dishonest misappropriation of the trust property.

12. In the premises APUA Funding and the Government alleged that the guarantee and indemnity, and the trust deed were not enforceable against them and the respondent was not entitled to the relief claimed or any relief.

13. Subsequent to the filing of the defence on behalf of APUA Funding and the Government, the respondent applied for summary judgment against them under Part 15 of the CPR. In support of the application for summary judgment the respondent filed an affidavit sworn by Aliyah Jagessar who at the time was one of the respondent's managers. That affidavit essentially verified the facts as pleaded by the respondent in the statement of case, which are essentially those, set out earlier in this judgment, and summarised the defence of APUA Funding and the Government.

14. In opposition to the application for summary judgment the appellants filed an affidavit sworn by Foster Derrick who at the time was one of the directors of APUA Funding. The central allegations contained in the affidavit are:

i. The Authority was established by the Act. Under the Act the Authority was given the exclusive rights to provide telephone service within Antigua and Barbuda and to perform services incidental thereto.

ii. The Authority derived its revenues from among other services the provision of a national telephone service within Antigua and Barbuda. The Act provided for the manner in which the revenue of the Authority was to be applied.

iii. Cable and Wireless (West Indies) Limited was given an exclusive licence to provide external telecommunications services in Antigua and Barbuda.

iv. With the exception of calls originating from public booths located at the offices of Cable and Wireless (West Indies) Ltd. in Antigua and Barbuda all overseas calls terminating or originating within Antigua and Barbuda utilized the facilities of both Cable and Wireless and the Authority and in consideration thereof Cable and Wireless pays to the Authority a proportion of the revenue derived from such calls.

v. The monthly revenue generated under the revenue sharing agreement at the time of its making was approximately EC$ 2,000,000.

vi. On August 11th 1998 APUA Funding was incorporated and in the month following its incorporation entered into the sale of receivables agreement with the Authority and the Government by which funding purported to purchase from the Authority all its revenues then due and thereafter to become due from Cable and Wireless (West Indies) under the revenue sharing agreement. According to the sale of receivables agreement APUA Funding agreed to pay the sum of US$11,392,500.00 to the Authority but the Authority received no consideration and was made to give away its assets.

vii. APUA Funding was incorporated for the specific and illegal purpose of receiving and siphoning off the Authority's revenues under the revenue sharing agreement making them available to the then Government to enable them to purportedly construct a market complex in St John's, Antigua.

viii. APUA Funding is a sham corporation with no bank account, no assets and no audited or any financial statements. Being a sham corporation it had no means whatever of purchasing the Authority's revenues under the revenue sharing agreement. Accordingly, a scheme was devised to raise the funds by which APUA Funding would be enabled to purportedly purchase the Authority's receivables. That scheme involved the issue of bonds in 1998 to raise the finance for the purported purchase of the Authority's receivables. The bond issue was to be arranged by the Merchant Bank and as part of the scheme they were to act as trustees for the bondholders.

ix. In the course of that scheme the Government entered into a guarantee and indemnity agreement with the Merchant Bank as trustees of the bondholders dated September 28th 1998. Other agreements were also executed including a trust deed and a security agreement. All the agreements created as part of this scheme were prepared by the same firm of attorneys.

x. The monies derived from the 1998 bond issue were not made payable to APUA Funding but were taken hold of by the then government of Antigua and Barbuda and used to purportedly build a market complex in St. John's Antigua. The Authority's receivables under the revenue sharing agreement were used as security to secure repayment of the 1998 bonds and were in fact applied towards redemption of those bonds.

xi. In the result, not only was the Authority illegally deprived of its revenues and its revenues applied to illegal purposes in breach of the Act, but the Authority never received any compensation or consideration for the loss of its revenues under the revenue sharing agreement.

xii. Apart from the illegal use of the Authority's revenue under the revenue sharing agreement to secure the construction of the market place, the Government caused APUA Funding repeatedly to put up the Authority's revenues under the revenue sharing agreement as security for the use by the Government for purposes not authorised by and having nothing to do with the Act. In each case the Authority's revenues under the revenue sharing agreement were used to repay and ultimately to refinance the borrowings. Four such transactions were referred to and among them is the subject 2004 bond transaction.

xiii. In respect of the 2004 bond transaction, Mr. Derrick alleged that the trust deed, the guarantee, the indemnity, the subscription agreement and the security agreement were all part of a scheme connected with defrauding the Authority and its revenues and committing a fraud upon the Act by the use of APUA Funding as the instrumentality/puppet through which to siphon off and give away the revenues of the Authority and for the application of such revenues for purposes other than those set out or authorised by the Act.

xiv. The trustee must have known or ought to have known upon reasonable inquiry of the illegal and *ultra virus* purposes for which the revenue under the revenue sharing agreement had been put and were by the trust deed continuing to be put. If the respondent did not know, it certainly ought to have known unless it abstained deliberately from reasonable enquiry or chose to shut its eyes to the obvious. Mr. Derrick set out several reasons for these allegations. These are essentially that the respondent being a party to the trust deed, the guarantee and indemnity, and the security agreement would have known of the sale of receivables agreement and the revenue sharing agreement and that on the face of those documents it should be obvious that the revenues of the Authority had been taken away from it and given to APUA Funding; that the respondent must know that the Authority was incorporated for the purposes specified in the Act and that under the Act its' revenues could only be used for purposes specified therein; that the bonds issued pursuant to the trust deed would have been used for the purposes of refinancing existing facilities about which the respondent would have been expected to make inquiries; the attorneys who prepared the 2004 trust deed, the guarantee and indemnity and security agreement were the same attorneys who prepared the documents relating to the 1998 bond issue and in those circumstances the respondent must have known that it had assigned to it, as security for the repayment of the bondholders, revenues which belonged to the Authority but which had been taken away and given to APUA Funding; that Merchant Bank and the respondent belonged to the same group of companies; that a Mr. Sookoo was a director of both the respondent and the Merchant Bank and that a Ms. Lakhan was the secretary of both the respondent and the Merchant Bank at the date of the 2004 trust deed, the guarantee and indemnity and the security agreement.

15. Mr. Derrick further alleged that because of financial information APUA Funding was required to give to the respondent, the respondent must have known that APUA Funding was a shell and no more than a sham.

16. Mr. Derrick in his affidavit referred to two other points which were also pleaded in the defence. First he stated that the Government is an independent and sovereign State and has not given its consent to be sued by the respondent and accordingly could not be sued in this jurisdiction. Secondly he said that the guarantee and indemnity was never submitted to the Parliament of Antigua and Barbuda as is required under the laws of Antigua and Barbuda and was therefore invalid and unenforceable.

17. Both these points were argued before the Judge who found them without any merit so as to defeat the respondent's application for summary judgment. Before this Court the first point as to jurisdiction of this Court was not pursued and was expressly abandoned. As to the allegation that the guarantee was not submitted to the Parliament of Antigua and Barbuda it was conceded that that was actually erroneous and the guarantee and indemnity had in fact been submitted to the Parliament of Antigua and Barbuda and was approved by it. That ground of defence was therefore not pursued and was also abandoned.

18. The Judge held that the respondent succeeded on its application for summary judgment. The Judge found that the guarantee and indemnity of the Government was in the nature of a performance bond or performance guarantee. In those circumstances the only defence to a claim under it would be clear fraud on the part of the party making the demand for payment i.e. the respondent. No such defence had been made out in this case. The Judge held that the sale of receivables agreement was not contrary to the Act. As such, the contention that the sale of receivables agreement was illegal and part of a device to misappropriate the Authority's funds and/or involved the respondent in accessory liability for dishonest assistance and or knowing receipt necessarily failed. The Judge also held that if the sale of receivables agreement was illegal the claim against the Government and APUA Funding was not founded on any illegality but on the guarantee and indemnity and the trust deed and accordingly the Court will aid in the recovery of the sum claimed. Further the appellants could not rely on their own illegality against the trustee and the bondholders. In any event if the sale of the Authority's receivables was illegal it did not go to the heart of the transaction but was part of the security arrangements and if any part of the security arrangements was illegal that part

could be severed being collateral and ancillary to the main transaction which was the raising of financing by the issue of bonds. The Judge further held that even if there was an illegality it was not suggested that the bondholders (as opposed to the respondent as trustee) had any knowledge of it and as the cause of action was that of the bondholders and not the trustee, the illegality could not be fatal to the claim.

19. Rule 15.2 of the CPR provides, *inter alia*, that the Court may give summary judgment on the whole or part of a claim if it considers that on an application by the claimant, the defendant has no realistic prospect of success in his defence to the claim or part of the claim. The principles applicable to an application by a claimant for summary judgment had been conveniently set out in the **Federal Republic of Nigeria v Santolina Investment Corporation and Ors.** [2007] EWHC 437 where at paragraph 4 the Judge (Lewison, J.) stated:

> *"(i) The court must consider whether the defendant has a "realistic" as opposed to a "fanciful" prospect of success:* ***Swain v Hillman*** *[2001] 1 ALLER 91, [2000] PIQR p. 51;*
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> *(ii) A "realistic" defence is one that carries some degree of conviction. This means that is more than merely arguable:* ***ED & F Man Liquid Products v Patel*** *[2003] EWCA Civ. 472 at 8.*
>
> *(iii) In reaching its conclusion the court must not conduct a "mini trial":* ***Swain v Hillman****;*
>
> *(iv) This does not mean that the court must take at face value and without analysis everything that a defendant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents:* ***ED&F Man Liquid Products v Patel*** *at 10;*
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> *(v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial:* ***Royal Brompton Hospital NHS Trust v Hammond (No. 5)*** *[2001] EWCA civ. 550 [2001] Lloyd's Rep PN 526;*
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> *(vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that*

a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: ***Doncaster Pharmaceuticals Group Ltd. v Bolton Pharmaceuticals Pharmaceutical Co. 100 Ltd.*** *[2007] FSR 63;*

(vii) Although there is no longer an absolute bar on obtaining summary judgement when fraud is alleged, the fact that a claim is based on fraud is a relevant factor. The risk of the finding of dishonesty may itself provide a compelling reason for allowing a case to proceed to trial, even where the case look strong on the papers: ***Wrexham Association Football Club Ltd. v Crucialmove Ltd.*** *[2006] EWCA Civ. 237 at 57."*

20. In **Easyair Ltd. (t/a Openair) v Opal Telecom Ltd**. [2009] EWHC 339 (Ch) Lewison, J. in relation to an application by a defendant to strike out a claim added the following consideration (at para 15) which I think is equally relevant to an application by a claimant for summary judgment:

"*On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and the parties have had an adequate opportunity to address this in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that it is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it will be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction..."*

21. It is evident from the above that the summary judgment application is not meant to dispense with the need for trial where there are issues which should be investigated at trial, but as Lord Woolf MR noted in **Swain v Hillman** (at 94):

"It is important that a judge in appropriate cases should make use of the powers contained in Part 24 (the English equivalent to our Part 15). In doing so he or she gives effect to the overriding objectives contained in part 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is the claimant's interests to know as soon possible that is the position. Likewise, if a claim is bound to succeed, a claimant should know that as soon as possible."

22. Since it is claimed by the respondent (with which the Judge agreed but is challenged in this appeal) that the Government's guarantee and indemnity on which the claim by the respondent against the Government is founded is in the nature of a performance bond or performance guarantee (the terms may be used interchangeably), it is appropriate to consider the manner in which rule 15.2 applies in relation to an application for summary judgment under a performance bond or guarantee.

23. A performance bond or guarantee is an unconditional undertaking to pay a specific sum of money. It is often payable on a simple demand. It stands on the same footing as a letter of credit. Where the beneficiary of such a performance bond or guarantee seeks payment in accordance with its terms, the giver of the bond or guarantee must pay regardless of the state of affairs between the parties in the underlying transaction, which in this case would be the bond transaction involving APUA Funding, the Government and the respondent. It therefore differs from a conventional guarantee where a claim under the guarantee can be defeated by any defence open to the party whose performance is being guaranteed. The only basis on which the giver of the bond or guarantee may refuse to pay is where there is clear fraud of which he has noticed. In **Edward Owen Engineering Limited v Barclays Bank International Limited** [1978] 1 Q.B. 159 Lord Denning, M. R stated (at p. 171):

> *"All this leads to the conclusion that the performance guarantee stands on a similar footing to a letter of credit. A bank which gives the performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contracted obligation or not; nor would the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand if so stipulated, without proof or conditions. The only exception is where there is clear fraud of which the bank has notice."*

24. In **Boliventer Oil v Chase Manhattan Bank and Ors**. [1984] 1 Lloyd's Rep. 251, Sir John Donaldson M.R. set out the fraud exception, in a case relating to a claim for an injunction but which is relevant here as well, in these terms:

> *"The only exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear both as to the fact of fraud and as to the bank's knowledge."*

25. Where therefore there is a performance bond or performance guarantee the person or entity giving the bond or guarantee may only properly refuse to pay where there is clear evidence that the demand for payment was fraudulent . This has influenced the approach to an application for summary judgment on a performance bond or guarantee.

26. In **Enka Insaat Ve Sanayi A.S v Banca Popolare Dell'Alto Adige SPE** [2009] EWHC 2410, the question arose as to the manner in which Part 24 (part 15 of the CPR) should be applied on an application for summary judgment against a bank on a performance guarantee. The Judge (Teare J.) after reviewing the authorities concluded that the appropriate test is whether the banks in that case could show that there is real prospect that it will establish at the trial that the only realistic inference is that the fraud exception applies. The Judge stated (at paras. 24 and 25):

> *"24. In my judgment the test to be applied must be that of a "real prospect" because that is the test set out in CPR Part 24. I do not consider that this court is bound to apply a "heightened test" because courts in [**Solo Industries UK Limited v Canara Bank** [2001] 1WLR 1800 and [**Banque Saudi Fransi v Lear Siegler Services Inc**.[2007] 2 Lloyd's Rep. 47] were not considering a claim against a bank under a guarantee where the defence was that the demand was said to be fraudulent. I therefore consider that the test in the present context is whether there is a real prospect that the banks will establish a trial that the only realistic inference is that the fraud exception applies, that is, the Enka [which was entitled to and made the demands under the guarantee] could not honestly have believed in the validity of its demand.*
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> *25. However, there is considerable support for the view, which I accept, that in applying that test the Court must be mindful of the principle that banks, when sued on a letter of credit or performance bond or guarantee, need particularly cogent evidence to establish the fraud exception...."*

27. I accept that as a correct statement of the test on an application for summary judgment on a performance bond or guarantee. What has to be established by cogent evidence is that there is a realistic prospect that the giver of the bond or guarantee will establish at trial that the only realistic inference is that the fraud exception applies.

28. In **Banque Saudi Fransi v Lear Siegler Services Inc,** supra, the Court of Appeal of England considered what the defendant had to establish to succeed in an application for summary judgment in a claim by a bank on a counter indemnity, which the bank had obtained

in respect of any payment made by it under a performance bond. The Court was of the opinion that in such a claim the Court must ask whether the defendant has shown that there is a real prospect that it will be able to prove the fraud exception at the trial - that is to say that the beneficiary did not honestly believe that it had a right to make a demand under the performance bond. This seems to be a somewhat different test than that stipulated in the **Enka** case in relation to claims against a bank, notwithstanding that the counter indemnity in that matter was in the nature of performance guarantee. That might suggest that in claims on a performance bond provided by persons or entities other than a bank the test is not as strict as that where the bank provides the guarantee. I however see no proper basis to say that if the guarantee and indemnity of the Government is in the nature of a performance bond or guarantee the appropriate test is not as stipulated in the **Enka** case.

29. If therefore the guarantee and indemnity of the Government is in the nature of a performance bond or guarantee as the Judge found, the test in the case of the Government in an application under Part 15 for summary judgment is whether there is a real prospect that it will establish at the trial that the only realistic inference was that the fraud except applies. The question that then arises is whether the Judge was correct in finding that the Government's guarantee and indemnity is in the nature of a performance bond.

30. Counsel for the appellants contended that the Judge erred in concluding that the guarantee and indemnity was in the nature of performance bond. He argued that the document is a guarantee with indemnity provisions.

31. What is the true nature of the document is of course a matter of construction. It is the Court's task to determine the nature of the document by looking at it as a whole without any preconceptions as to what it is (see **Gold Coast Ltd. v Caja de Ahorros del Mediterraneo and Ors**. [2001] EWCA Civ 1806). In doing so the Court is concerned with the main burden of the instrument.

32. It is important to bear in mind as I have mentioned earlier that a performance bond or guarantee is an unconditional undertaking to pay a specific sum of money. It creates a primary liability on the part of the issuer of the bond. As I have said, it is treated on the same footing as a letter of credit. In contrast under a conventional contract of guarantee the guarantor

assumes a secondary liability to answer for the debtor who remains primarily liable (see **Chitty on Contracts** (29th Ed.) Vol. 2 p. 1528 para 44-013). Another important feature of the performance bond or guarantee is that, as I have also mentioned, it is not concerned with the state of affairs between the parties in the underlying transaction. So for example in **Gulf Bank KSC v Mitsubishi Heavy Industries Ltd. (No. 2)** [1994] 2 Ll R 145, it was held that even if the underlying transaction might never have had legal effect the bank was still liable to pay the beneficiary under the bond. The obligation of the issuer to pay therefore arises on the assertion of liability by the beneficiary rather than an actual liability.

33. Where therefore the instrument contains provisions creating a primary liability to pay that will point to it being a performance bond. But it may not necessarily be so. In **Marubeni Hong Kong and South China Ltd. v Government of Mongolia** [2005] 1 WLR 2497, the instrument contained a provision that the issuer "*unconditionally pledges to pay to you upon your simple demand all amounts payable"*. It was held that the instrument was not a performance bond because those words were qualified by language which indicated that the obligation only arose if the amounts payable were not paid when the same became due. The Court of Appeal held that the wording was more appropriate to a secondary obligation, that is one conditional upon default of the buyer. This case illustrates the importance with construing the document as a whole.

34. In the **Marubeni** case the Court of Appeal of England had to consider whether a guarantee issued by the Mongolian Central Bank on behalf of the Mongolian Government was in the nature of or equivalent to a performance bond or whether it was a secondary or conditional promise to act as a surety. The Court of Appeal was of the view that in all the cases relied upon by the claimant in that case the relevant instruments which were claimed to be performance bonds were issued by banks and were described or assumed to be of that nature. The Court considered that those cases provided no useful analogy for interpreting a document not issued by a bank and which contained no overt indication of an intention to create a performance bond or anything analogous to it. The Court of Appeal was of the opinion that in the absence of such overt language in a document outside the banking context there was a presumption against the document being a performance bond or guarantee. The question in those circumstances was whether there was a sufficient indication in the wording of the instrument to displace that presumption. I think this is an appropriate approach to the

interpretation of the Government's guarantee and indemnity in this case. The question then is whether the language of the guarantee and indemnity is sufficient to displace the presumption that it is not a performance bond.

35. The guarantee and indemnity is expressed to be made by the Government in favour of the trust and the bondholders. It contains two recitals. The first states that APUA Funding has determined to raise the sum US$16,500,000.00 by the creation of bonds for the purpose of refinancing facilities held or arranged at the Merchant Bank and the second that it is a condition for the subscription of the bonds by the bondholders that the Government guarantee the paying of all amounts due under the bonds and the trust deed. The guarantee contains a definition clause at clause 1.2 and clause 1.3(a) provides that references to the guarantee are to include the indemnity at 3.3.

36. The primary obligations of the Government are found at clause 3 of the guarantee and indemnity and this clause is as follows:

> *"3.1 As consideration for the Bondholders subscribing for the Bonds to enable the Issuer to raise the funds to refinance existing facilities held at or arranged by RBTT Merchant Bank Limited and for other good and valuable consideration and the payment to the government of the sum of US$1.00 (the benefit and receipt of which the Guarantor acknowledge) the Guarantor irrevocably and unconditionally undertakes the obligations and liabilities set out in clause 3.2 and clause 3.3*
>
> *3.2 The Guarantor irrevocably and unconditionally guarantees:*
>
> *(a) to pay to the Trustee on demand, and in the currency in which the same falls due for payment, all monies and liabilities which are now or at any time hereafter shall become due, owing or incurred to or in favour of the Trustee and the Bondholders under or in connection with the Bonds, the Trust Deed and the other Security Instruments; and*
>
> *(b) the due and punctual observance, performance and discharge by the Issuer of all of its obligations and liabilities under the Revenue Sharing Agreement.*
>
> *3.3 The Guarantor as principal obligor and as a separate and independent obligation from its obligations and liabilities under clause 3.2, irrevocably and unconditionally agrees to indemnify the Trustee and the Bondholders in full on demand against any reasonable losses, costs, and expenses suffered or incurred by the Trustee and the Bondholders arising from or in connection with any of:*
>
> *(a) the Trustee's entering into the Trust Deed;*

(b) any of the provisions of the Sale of Receivables or the Revenue Sharing Agreement being or becoming void, voidable, invalid or unenforceable; or

(c) the failure of the Issuer fully and promptly to perform and discharge any of its obligations and liabilities under the Revenue Sharing Agreement;

3.4 The Guarantor hereby agrees to indemnify and keep indemnified the Trustee and the Bondholders (to the extent not indemnified under the Sale of Receivables or as otherwise indemnified under this Guarantee) on demand by the Trustee against all reasonable losses, actions, claims, costs, charges, expenses and liabilities suffered or incurred by the Trustee and the Bondholders in relation to this Guarantee (including the costs, charges and expenses incurred in the enforcement of any of the provisions of this Guarantee or occasioned by any breach by the Guarantor of any of its obligations to the Trustee and the Bondholders under this Guarantee).

37. Clause 4.1 provides that:

"The Gaurantor acknowledges and agrees that this guarantee is and at all times shall be a continuing security and shall extend to cover the ultimate balance due at any time from the Issuer to the Trustee and the Bondholders under or in respect of the Bonds, the Trust Deed and the other Security Instruments and any of the transactions contemplated thereby."

38. Clause 4.2 is as follows:

"4.2 The Guarantor acknowledges and agrees that none of its liabilities under this Guarantee shall be reduced, discharged or otherwise adversely affected by:

(a) any variation, extension, discharge, compromise, dealing with, exchange or renewal of any right or remedy which the Trustee may now or hereafter have from or against the Issuer and any other person in respect of any of the obligations and liabilities of the Issuer and any other person under and in respect of the Trust Deed and the other Security Instruments;

(b) any act or omission by the Trustee or any other person in taking up , perfecting or enforcing any security or guarantee from or against the Issuer and any other person;

(c) any termination, amendment, variation, novation or supplement of or to the Revenue Sharing Agreement or the Sale of Receivables or the Trust Deed or the other Security Instruments;

(d) any grant of time, indulgence, waiver or concession to the Authority, the Licence on the Principal Debtor and any other person;

(e) any of the administration, insolvency, bankruptcy, liquidation, winding-up, incapacity, limitation, disability, the discharge by operation of law and any change in the constitution, name and style of the Issuer, the Licensee and any other person;

(f) any invalidity, illegality, unenforceability, irregularity or frustration of any actual or purported obligations of the Issuer, the Licensee and any other person;

(g) any claim or enforcement of payment from the Issuer and any other person; or

(h) any act or omission which would not have discharged or affected the liability of any of the Guarantor had it been a principal debtor instead of guarantor or indemnitor or by anything done or omitted by any person which but for this provision might operate to exonerate or discharge or otherwise reduce or extinguish any of the Guarantor's liability under this Guarantee."

39. Clause 4.3 has as its rubric "primary obligation" and it is as follows:

"4.3 (a) The obligations and liabilities expressed to be undertaken by the Guarantor under this Guarantee are those of primary obligor and not merely as a surety;

(b) The Trustee shall not be obliged before taking steps to enforce any of its rights and remedies under this Guarantee;

(i) to take action or obtain judgment in any court against the Principal debtor and another person;

(ii) to make or file any claim in a bankruptcy, liquidation administration or insolvency of the issuer, the Licensee and any other person; or

(iii) To make demand, enforce or seek to enforce any claim, right or remedy against the Issuer, the Licensee and any other person.

40. In the clauses of the guarantee and indemnity the "Issuer" is a reference to APUA Funding and the 'Licensee" refers to Cable and Wireless (West Indies) Ltd.

41. Clause 11 of the guarantee and indemnity is as follows:

"Any demand or notification or certificate given by the Trustee specifying amounts due and payable under or in connection with any of the provisions of this Guarantee shall, in the absence of manifest error be conclusive and binding on the Guarantors."

42. There are clauses in the guarantee and indemnity that tend to support a construction that the Government undertook a secondary liability. For example clause 4.2 contains several provisions that are found in a conventional guarantee and would not be necessary if the document were a performance bond of guarantee. Also at clause 3.2(b) the Government *"irrevocably and unconditionally guarantees the due and punctual observance, performance and discharge by the Issuer of its obligations and liabilities"* under the revenue sharing agreement is also indicative of a secondary liability. It is also the fact that the document itself

is not described as a performance guarantee. These all point in favour of presumption that the guarantee or indemnity is not intended to be a performance bond or guarantee.

43. On the other hand there are provisions which show that the Government undertook a primary liability which was independent on the underlying transaction and which it had to meet on demand.

44. At the outset of the guarantee before the party's clause it is noted that the giver of the guarantee might become liable "*instead of or as well as the principle debtor*". This is an indication that the liability of the Government is not a secondary liability as it might become liable instead of the principal. Under clause 3.3 the Government's obligations are those of a principal obligor and not a surety.

45. The existence of a primary liability is also evident at 4.3(a) which refers to **all** the obligations and liabilities undertaken by the guarantor. Those are expressed to be undertaken as a primary obligor and not merely as a surety. So, pursuant to that clause the Government is the primary obligor in respect of all its obligations and liabilities contained in the guarantee and indemnity. It is therefore in the position of a principal debtor under the document.

46. Although clause 4.2 contains provisions that may be found in a conventional guarantee for the protection of the creditor, it is relevant to the question under consideration that under clause 4.2(f) none of the Government's liabilities shall be reduced, discharged or otherwise adversely affected by any invalidity, illegality, unenforceability, irregularity or frustration of any actual or purported obligation of the Issuer, the licensee and any other person. The intent is that the Government's obligations under the guarantee and indemnity shall be independent of the underlying transaction and it is evident at 4.3 that it has assumed its obligations as the principle debtor.

47. Those provisions in my view lean in favour of the discharge of the presumption against the guarantee and indemnity being a performance bond or guarantee. But there is also clause 11 which I think adds more strength to the position that the presumption is rebutted. Under that clause the Government agreed that any demand, notification or certificate given by the trustee specifying amounts due and payable under or in connection with any of the provisions of the guarantee and indemnity shall in the absence of manifest error be conclusive and

binding on it. The effect of this clause is that apart from manifest error the Government binds itself to pay on demand the amounts specified by the demand.

48. In **I.I.G. Capital LLC v Van Der Merwe and Anor.** [2008] EWCA Civ 542 an instrument containing a similar clause which provided that "*a certificate in writing signed by a duly authorized officer or officers of the lender stating the amount at any particular time due and payable by the Guarantor under this guarantee shall save for manifest error be conclusive and binding on the Guarantor for the purposes thereof".* In the Court below the judge regarded this clause as akin to a conclusive evidence clause and referred with approval to the following passage in O'Donovan and Phillips, **The Modern Contract of Guarantee**, (English ed.) (2003) at para 5-107 which was as follows:

> *"The extraordinary effect of... the more usual conclusive evidence clause, in the context of a guarantee, however, is that the guarantee which is not phrased in terms of a performance bond payable simply on demand without proof of default becomes analogous to such a guarantee as a result of the inclusion of this clause."*

(This passage appears in the later edition; (see O'Donovan and Phillips, **The Modern Contract of Guarantee** (2nd English ed.) at para 5-151).

49. The Court of Appeal in agreement with the judge was of the view that this clause put the matter beyond doubt and any presumption that the instrument was a guarantee as opposed to a performance bond was clearly rebutted. It did not matter that the clause excepted manifest error which the Court accepted meant an error that is obviously and easily demonstrable without extensive investigation.

50. Similarly here I am of the view that clause 11, which is similar to the clause under consideration in **Van Der Merwe,** put the matter beyond doubt. Any presumption in favour of the instrument not being a performance bond in my judgment has been rebutted by the language used in the guarantee and indemnity.

51. I therefore agree with the Judge that the guarantee and indemnity in this case is in the nature of a performance bond or guarantee.

52. In the circumstances the Government would need to establish on the claim against it on the guarantee and indemnity that there is a real prospect that it will establish at the trial of this action that the only realistic inference is that the fraud exception applies, that is to say that the respondent could not honestly have believed in the validity of its demand under the guarantee and indemnity. In relation to APUA Funding, it will need to establish that it has a realistic prospect of success on the defence raised by it.

53. The essence of the defence of APUA Funding and the Government is that APUA Funding was incorporated for the specific illegal and ultra vires purpose of siphoning off revenue from the revenue sharing agreement and making that available to the Government. The trustee, the guarantee and indemnity and the security agreement were all executed as part of an ongoing plan to defraud the Authority of its revenues under the revenue sharing agreement by the use of APUA Funding as the puppet or instrument by which to siphon off and divert the telephone revenues of the Authority. The respondent knew or ought to have known of this. It was this illegal diversion and the knowledge of the respondent that it was so that involved the respondent in accessory liability for breach of trust for knowing receipt of trust property or knowing assistance in the dishonest misappropriation of the Authority's funds. Central to this defence is the contention that the sale of receivables agreement is contrary to the Act and therefore illegal. That was the instrument of the fraudulent scheme to illegally and fraudulently deprive the Authority of its revenues. Whether the appellants are able to make good that proposition depends on the proper construction of the Act. This is a foreign Act. There was no evidence as to the interpretation of the Act. It was, however, agreed between the parties that in the absence of such evidence the Act fell to be interpreted as if it was a local passed by the Parliament of this jurisdiction.

54. For the purposes of this appeal the relevant provisions of the Act are as follows:

> *"3. (1) There is hereby established a body to be called the Public Utilities Authority which shall be a body corporate with perpetual succession and a common seal with power to purchase, take, hold and dispose of land and other property, to enter into contracts, to sue and be sued in its said name and to do all things necessary for the purposes of this Act.*
>
> *4. (1) Upon the date of coming into operation of this Act all lands, buildings, installations, equipment and all other forms of property, whether real or personal and*

all interests therein, of whatsoever nature, belonging to the Government in Antigua and Barbuda and used exclusively for the purposes of:

(a) the Electricity Division;
(b) the Telephone Department; and
(c) the Water Division

shall become vested in the Authority;

(2) Notwithstanding any of the provisions of this Act, except with the prior written permission-

(a) of the Governor General acting in accordance with the advice of the Cabinet, the Authority shall not dispose of by sale, lease, sub-lease, mortgage, easement, or otherwise any land or interest in land vested in the Authority;

(b) of the Cabinet, the Authority shall not dispose of by sale, bailment, or otherwise, or turn to account, any personal property or interest therein vested in the Authority.

(12) The Authority may, from time to time, borrow by way of overdraft or otherwise such sums as the Authority may require for meeting its obligations and discharging its functions under this Act.

13. (1) The revenue of the Authority for any financial year shall be applied in defraying the following charges;

(a) the remuneration, fees and allowances of the members of the Authority or of any committee thereof;
(b) the salaries, fees, remuneration and gratuities, including payments for maintenance of the Provident Fund or Pension fund authorised by this Act, of the officers, or agents and employees, and technical and other advisers, of the Authority;

(c)working expenses, and expenditures on, or provision for, the maintenance of the property and of any of the works of the Authority, and the insurance of the same and the discharge of the functions of the Authority properly chargeable to revenue account;

(d)interest on any debenture and debenture stock or other security issued, and on any loan raised by the Authority;

(e)sums required to be transferred to a sinking fund or otherwise set aside for the purpose of making provision for the redemption of debentures or debenture stock or other security or the repayment of other borrowed money;

(f) such sums as it may be deemed appropriate to set aside in respect of depreciation on the property of the Authority having regard to the amount set aside out of the revenue under paragraph (e);

(g)any other expenditures authorised by the Authority and properly chargeable to revenue account.

(2) The balance of the revenue of the Authority shall be applied to the creation of reserve funds to finance future modernisation and expansion.

14. Funds of the Authority not immediately required to be expended in the meeting of any obligations or the discharge of any functions of the Authority may be invested from time to time in securities approved by the Minister responsible for finance for investment by the Authority."

55. The trial Judge found that the sale of receivables agreement was not contrary to the Act. She was of the view that it was a sale of a chose in action which was a personal property within the meaning of section 4(2)(b) and in respect of which Cabinet had given its' permission.

56. Counsel for the appellants submitted that the Judge was wrong to conclude that the sale of receivables agreement was within the Act. He submitted that section 4(2)(b) is a general provision dealing with the Authority's property. Section 13 was however a specific provision that dealt with revenue. Section 13 therefore describes the purposes to which the Authority's revenues can put. The effect of that is that section 4(2)(b) does not authorise the Authority to dispose of its revenue other than for the purposes specified in section 13 so that Cabinet could not lawfully give permission for the sale of the Authority's revenues unless it was to be used for a section 13 purpose and it was clear in this case that was not so. A construction of section 4(2)(b) that authorises the Authority to otherwise dispose of its revenues is wrong. Counsel therefore submitted that the sale of receivables agreement in this case was illegal as the monies were not used for a section 13 purpose.

57. Counsel for the respondent submitted that the sale of receivables agreement did not fall afoul of section 4(2)(b). It was a sale by the permission of Cabinet of a chose in action which is a species of personal property under section 4(2)(b). Section 13 does not refer to such property. It refers to revenue in hand and not a right to revenue in future. Simply put a right to income *in futuro* does not constitute revenue.

58. By the sale of receivables agreement the Authority transferred or assigned to APUA Funding all present and future rights, titles and interests arising out of the revenue sharing agreement as well as all book or other debts receivables or revenues both present and future

under the revenue sharing agreement. It was not disputed that the sale of the right title and interest to future debts and receivables under the revenue sharing agreement is a sale of a chose in action. It is also not disputed that personal property within section 4(2)(b) includes a chose of action. Nor was there any dispute that the permission of Cabinet contemplated by the section had been obtained. What was disputed is whether Cabinet could have lawfully given permission for the sale of the Authority's rights under the revenue sharing agreement.

59. I do not think that section 13 is applicable to income or revenue that may be earned in the future and does not in my opinion trump or restrict the power of the Authority to dispose of its property under section 4(2)(b). I therefore agree with the submissions of the respondent.

60. Section 3 (1) of the Act gives the Authority the general power to hold and dispose of land and other property. This section does not restrict the power of the Authority in relation to the disposal of its property. That restriction is found at section 4(2)(b). The restriction there stipulated in relation to personal property is that the Authority, notwithstanding any other provision of the Act, may not dispose of its property by sale, *inter alia,* except with the prior written permission of the Cabinet. This section does not seek to put any other restraint on the ability of the Authority to dispose of its personal property and certainly does not seek to limit the personal property of which the Authority may dispose. The only restriction on the general power of the Authority under section 3 (1) to dispose of its personal property is that Cabinet's permission must be obtained under section 4(2).

61. Section 13 also does not prohibit the sale of the Authority's property. This section is specific to the application of the revenue of the Authority in any given financial year. In other words it refers to income or revenue in hand in that financial year and lists the expenses in a financial year that are to be met from revenue in that financial year. So for example section 13(1)(b) provides that the revenue of the Authority for any financial year shall be applied in defraying salaries among other expenses. It could not be the intention that the salaries in a given financial year are to be met by revenue earned in later years. Section13 (2) is also indicative that what section 13 refers to is revenue earned or in hand in a financial year. That section provides that the balance of revenue after meeting the expenses identified in section 13 (1) shall be applied to the creation of reserve funds to finance future modernisation and expansion. That section can only be referring to revenue earned in a given financial year after

meeting the expenses incurred in that year. In my view it is obvious that the purport of the section is to stipulate how the revenue in hand in any financial year is to be applied and that is to say it is to be applied to defray the detailed expenses in section 13 for that year.

62. In my judgment therefore section 13 refers to revenue earned by the Authority in any financial year and does not extend to revenue or other income that might be earned in the future. It follows that it does not refer to future streams of income the right to which may be disposed of without contravening the provisions of section 13. I agree with Counsel for the appellant that simply put a right to income *in futuro* does not constitute revenue within the meaning of section 13.

63. In the circumstances I agree with the Judge's finding on this issue. The sale of receivables agreement does not offend the Act. That conclusion removes what I consider to be the central pillar of the appellants' defence without which they cannot succeed. On the appellants' case the sale of receivables agreement was at the heart of the fraudulent device. Once it is established that the sale of receivables agreement is lawful then the appellants' allegations that it was an unlawful and an illegal and fraudulent device cannot stand and its contentions that the funds of the Authority were illegally and fraudulently siphoned off and unlawfully misappropriated to the use of the Government and that the respondent as a consequence is involved in accessory liability for breach of trust are devoid of any basis. In those circumstances, it seems to me, that the defence of the Government and APUA Funding must necessarily fail.

64. In addition to establishing the illegality of the sale of receivables agreement, the appellants' case in fraud also rests on the knowledge of the illegality by the respondent. Having failed to establish that the sale of receivables agreement offends the Act the Government's defence fails. The question whether the respondent knew of the illegality logically does not arise. But in any event I do not consider that there is any evidence that the respondent knew or must have known of the illegality as the appellants alleged.

65. The appellants' case as to the knowledge of the respondent is based on allegations that the respondent knew of the sale of receivables agreement and the revenue sharing agreement, what the monies under the sale of receivables agreement were being used for and of the

provisions of the Act. But these matters do not amount to evidence that the respondent knew or ought to have known of the illegality or that it arguable that it is so. This can be hardly surprising as this Court and the trial Judge have concluded that the sale of receivables agreement is not contrary to the Act. So at the very least if it is illegal it is not apparent that it is so and the appellants would need to do more than say the respondent was aware of the Act and of the sale of receivables agreement and what the money was being used for. It should be borne in mind that the sale of receivables agreement came to existence in 1998 at the time of the bond issue of that year in respect of which the Merchant Bank was the trustee and remained unchallenged for a number of years. There is no allegation that the Merchant Bank knew the sale of receivables agreement to be illegal. If that is so there is no real prospect that the respondent would have known that to be so or ought to have known it to be so when it came to refinance existing liabilities six years later in which the sale of receivables agreement had a part to play.

66. The appellant says that the respondent would have been expected to make inquiries about the existing facilities. It is reasonable to expect that the respondent would make inquiries about the amount owing but I think that it is entirely fanciful that it would have made inquiries as to the legality of the transactions relating to the existing liabilities particularly in the circumstances where the sale of receivables agreement stood unchallenged for six years, and was openly discussed in the Parliament of Antigua and Barbuda. Even if inquiries were made into the existing facilities, other than the allegation that the consideration for the sale of receivables did not get to the Authority which I will refer to below, it has not been suggested that were used other than for their intended purposes so as to alert the respondent to any fraudulent design.

67. I am of the view that even if the sale of receivables agreement were illegal as offending the provisions of the Act I do not think that there is a real prospect of success on the appellants' defence of fraud. The evidence before the court on the summary judgment application does not achieve that minimum standard. Of course the Government has a greater burden to discharge as it must show that there is a real prospect that it will establish at the trial that the only realistic inference is that the respondent could not honestly have believed in the validity of its demand. That is not possible to say on the evidence and there is no basis for

assuming there is other evidence that can reasonably be expected to be available at the trial that would alter that position.

68. This applies also to the defence based on accessory liability for breach of trust as what the appellants must at the trial establish is that the respondent acted dishonestly by the ordinary standards of reasonable and honest people and was itself aware that by those standards it was acting dishonestly (see **Twinsectra Ltd v Yardley and ors** [2002] A.C. 164). This would involve establishing the not only the illegality of the sale of receivables agreement but that the respondent knew that it was so and nonetheless participated in the bond transaction. There is no realistic prospect that the appellants will establish that.

69. But even if the respondent knew of the illegality and assuming it to be so, the question arises whether that amounts to a defence to the claim.

70. The respondent submitted before the trial Judge that even if the respondent had knowledge of the illegality that knowledge could not be imputed to the bondholders as the respondent was acting as trustee of the bondholders and not as their agent. As such the knowledge of the trustee was irrelevant and what had to be shown if the appellants were to establish a real prospect of success was that it was arguable that the bondholders had knowledge of the illegality. There was however no allegation that the bondholders had any such knowledge. The appellants in fact did not contend that the bondholders had knowledge. They however argued that since the cause of action was that of the respondent and not that of the bondholders, the claim could not succeed. It was sufficient to show that there was an arguable case that the respondent had knowledge of the illegality. The trial Judge did not agree that the cause of action was that of the trustee. She noted that from the provisions of the trust deed there can be no doubt that the respondent is acting as trustee for the bondholders and that the cause of action is that of the bondholders. Her analysis is set out in her judgment as follows (at para. 94):

> *"...RBTT Trust was expressly constituted a trustee under the Trust Deed with all the powers conferred on trustees by the Trustee Ordinance Ch. 8 No. 3 of the laws of Trinidad and Tobago [clause 17.1]. By recital C of the Trust Deed, RBTT Trust agreed to act as Trustee of the Trust Deed for the benefit of the bondholders on and subject to the terms and conditions set out in the Trust Deed. Further, by clause 6.1 of the Trust Deed, at any time following an event of default, RBTT Trust may institute*

proceedings for recovery of the amounts due. By Clause 6.4, no bondholders shall be entitled to institute proceedings against APUA Funding. Clause 6.4 goes on to provide however that where RBTT Trust, having become bound to proceed to recover the amounts due by enforcing the rights of the bondholders, fails to do so within a reasonable time, then any such bondholder may, on giving an indemnity satisfactory to RBTT Trust, in the name of RBTT Trust, himself institute proceedings to recover the amounts due by enforcing the rights of the bondholders under the Security Instruments in respect of the bonds. In addition, all the relevant documents in this transaction refer to RBTT Trust as the Trustee for the bondholders."

Accordingly she held that any knowledge of the respondent of any illegality could not be imputed to the bondholders and in any case cannot be fatal to this claim.

71. The appellants relied on the same arguments before this Court as they advanced before the trial Judge. I, however, agree with the Judge's conclusion for the reasons given by her that the cause of action is that of the bondholders and the respondent is acting as trustee and not as agent. It should follow that in those circumstances the knowledge of the respondent could not be imputed to the bondholders. It is relevant to note that, as before the trial Judge, the appellants were not contending that the bondholders had any knowledge of the illegality. The appellants, however, also submitted that it does not matter whether that the bondholders had knowledge of the illegality or whether the cause of action was that of the bondholders or the trustee. That would make no difference because any defence that is available against the trustee is also available against the bondholders. Counsel referred to two cases in support of this proposition. The first is **Gibson v Winter** (1833) 5 B&AD 97 and the other is **Evans v Edmonds** (1853) 13 CD 777 which applied **Gibson v Winter**.

72. The head note to **Gibson v Winter** is as follows:

"A trustee suing as a plaintiff in a Court of Law, must be treated in all respects as a party to the cause, and any defence against him is a defence in that action against the cestui que trust, who uses his name; and, therefore, where a broker, in whose name a policy of insurance under seal was effected, brought covenant, and the defendant's pleaded payment to the plaintiff according to the tenor and effect of the policy, and the proof was, that after the lost happened, the assurers paid the amount to the broker by allowing him credit for premiums due from him to them, it was held that although that was no payment as between the assured and assurers, it was good payment as between the plaintiff on the record and the defendants; and, therefore, an answer to the action."

73. Dennan, C.J. who delivered a judgment of the Court said:

"The plaintiff, though he sues as a trustee of another, must, in a Court of Law, be treated in all respects as the party in the cause: if there is a defence against him, there is a defence against the cestui que trust who uses his name; and the plaintiff cannot be permitted to say for the benefit of another that his own act is void, which he cannot say for the benefit of himself."

74. In **Evans v Edmonds** the husband covenanted to pay certain quarterly payments to A as trustee for his wife. In an action by the trustee for the recovery of outstanding payments due to the wife the husband pleaded that he was induced by A to enter into the covenant on the false and fraudulent representation that the wife was a virtuous and moral person and that he was also a virtuous and moral person and fit to be trustee. It however turned out that A had an affair with the wife. It was contended by A that he was a trustee only and as the wife was not a party to the fraud, judgment should be in his favour. That submission was rejected by the Court. Jervis, C.J. said:

"As to the objection urged by the plaintiff's counsel on moving for the rule, that the plaintiff is a trustee only, and that the cestui que trust does not appear by this record to have been any party to the fraud, I think the case of **Gibson v Winter** affords sufficient answer. *A court of law can only look to the legal rights of the litigant parties. The plaintiff is suing upon a covenant which he has by means of a fraud induced the defendant to enter into with him."*

75. **Gibson v Winter** was considered in **Ryan v Smith** [1972] R.C.S. 343. The headnote to that case is as follows:

"*The defendant M, a solicitor and the respondent G became the owners of certain lands and subsequently caused a company to be incorporated (NH Limited) to which they conveyed the lands in return for one thousand common shares. M and G desired to obtain the sum of $40,000.00 for the purpose of developing the lands. The appellant's father (A) and another person (B) provided this sum and gave it to the appellant. The appellant, who was a student at law articled to M, thereupon entered into an agreement dated March 13th 1958, with G and M for the purchase of 200 shares in NH Limited and in this agreement G, L and M made several covenants. On the same day and by a document which was drafted by M, the appellant declared that he held the 200 common shares which he had purchased under the agreement in trust for the beneficiaries A and B.*

The documents were executed contemporaneously; the $40,000.00 was duly paid by the appellant and was shared by M and G. Thereafter, M and G. Operated the company dishonestly and as a result of their machinations the shares in NH Limited became worthless. The appellant, who had continued as an articled student and later became a

law partner of M had also continued to take an active part in the operation of NH Limited, brought an action in his capacity as trustee against G and M. The trial judge held that the defendants had breached the agreement of March 13th 1958 and awarded the appellant $40,000.00. On an appeal by G the Court of Appeal allowed the appeal and dismissed the action against G. The judgment of trial against M was a default judgment and M did not appeal to the Court of Appeal.

Held: the appeal should be allowed and judgment given in favour of the appellant for the sum of $40.000.00 subject to the direction that the judgment should be specifically limited to a judgment in favour of the appellant as trustee.

As found by the Court below the law practice in which the appellant and M were partners was so interwoven with the affairs with the particular company that the fraud of M with respect to that company was the fraud vicariously of the appellant. The case had to be decided on the basis that the appellant, in his personal capacity, both vicariously as a partner of the law firm and through his own actions, was involved in the fraud upon the company.

The Court, adopting the result arrived at in ***Wetmore v Porter*** *(1833), 92 N.Y.R. 76 was of the opinion that a plaintiff suing in a capacity as a trustee is entitled to recover on that basis despite the fact that there may be a claim by the defendant against him on a personal basis. In the present case the appellant acted in the purchase of the shares and entering into the agreement of March 13th 1958 as trustee and did so to the knowledge of M and G. Therefore, despite the appellant's character as a partner of M and so vicariously liable for M's actions, and despite his various actions in reference to the affairs of the company, it was held that he should be entitled to assert his rights as trustee.*

The conduct of M and G made impossible the carrying out of the contract between the appellant and them and therefore the appellant only as trustee, was entitled to damages.

76. Spence, J. who gave a judgment of the Court stated (at p 356):

> *"...a plaintiff suing in a capacity as a trustee is entitled to recover on that basis the fact that there may be a claim by the defendant against him on a personal basis and therefore that* ***Gibson v Winter,*** *representing as I believe it does common law without regard for equitable remedies is not applicable."*

77. I agree with that conclusion. It is evident in both **Gibson v Winter** *and* **Evans v Edmonds** that the emphasis was on a plaintiff suing in a court of law. I believe that that is a reference to a court sitting as a court of law and not a court exercising an equitable jurisdiction. I am of the view that on equitable principles the trustee is not debarred from recovering as trustee where there may be a defence against him on a personal basis. In this case, therefore, if the respondent, with knowledge of the illegality, proceeded with the bond

transaction that would not be good defence against the bondholders. However, in this case it must be noted that the respondent is among the bondholders. The consequence of that, it seems to me, would be that if the respondent had knowledge of the illegality, that would provide an answer to part of the claim only.

78. However, as I have said earlier, the appellants have failed to establish that there was any illegality or knowledge of it on the part of the respondent. There are other elements of the appellants' case namely that the sale of receivables agreement was not properly executed by the Authority and at the time there were no commissioners appointed to the Authority and that APUA Funding had no bank accounts. Those matters in my judgment do not establish there is a realistic prospect of establishing fraud or accessory liability much less a realistic prospect that the Government will establish at the trial that the only realistic inference is that the respondent could not honestly have believed in the validity of its demand. As Counsel for the respondent correctly submitted some of those matters might affect the enforceability of the sale of receivables agreement but does not make it illegal or fraudulent much less the entire 2004 bond transaction.

79. There was also the allegation that the Authority did not receive the consideration for the sale of its receivables as provided for under the sale of receivables agreement but I do not understand the appellants as contending that the trustee or for that matter Merchant Bank had any knowledge of that.

80. The trial Judge also considered the contention of the respondent that assuming there was an illegality the Court could sever the illegality, namely the sale of receivables agreement, with the result that the trust deed and the guarantee and indemnity were unaffected by such illegality. The judge agreed with the respondent. She relied on the authority of **Carney v Herbert** [1985] A.C. 301 and concluded that the sale of receivables agreement could be severed from the transaction.

81. In **Carney v Herbert** there was an agreement for the sale of the plaintiff's shares in A Limited, which was a subsidiary of N Limited, to I Limited. The purchase price payable to the plaintiffs was secured by a personal guarantee of the defendant and mortgages by N Limited over its property. Since the mortgages involved the provision of security by a subsidiary in

connection with the purchase of shares in its holding company they were illegal. The plaintiffs brought an action under the guarantee of the defendant claiming the unpaid purchase price on the shares. The trial Judge gave judgment for the plaintiffs holding that although the mortgages were illegal they could be severed. There was an eventual appeal to the Privy Council. It was held that the sale agreements, mortgages and guarantee were part of a single transaction and the question whether the lawful part of the contract could be severed from the unlawful part was a matter of construction which did not depend upon whether the plaintiffs would have entered into the contract in its severed form at the time the contract was concluded; that the mortgages which were illegal and void, were ancillary to the overall transaction and could be severed, and since the nature of the illegality did not preclude the plaintiffs on the ground of public policy from enforcing the sale agreements against I Limited and the guarantee against the defendant, the defendant was liable to the plaintiffs for the unpaid instalments of the purchase price.

82. Lord Brightman who gave the advice of the Board said that questions of severability are often not difficult and there are no set rules which will decide all cases. To some extent each case depends on its own circumstances. He however stated that in considering whether the illegal part can be severed:

> *"There are therefore two matters to be considered where a contract contains an illegal term, first, whether as a matter of construction the lawful part of the contract can be severed from the unlawful part, thus enabling the plaintiff to sue on a promise unaffected by any illegality; secondly whether despite severability there is bar to enforceability arising out of the nature of the illegality."*

83. He concluded that the contract was basically one for the sale by the plaintiffs to the defendant of the company's shares. The mortgages like the guarantee were ancillary to that contract for the sole purpose of enforcing due performance of the contract by the purchaser. He then stated:

> *"The defendant wanted only the shares in Airfoil. The plaintiffs wanted only the purchase money. It made no difference to the plaintiffs, or to the nature of the transaction, what security was provided so long as it was satisfactory security. The mortgage did not go to the heart of the transaction and its elimination would leave unchanged the subject matter of the contract and the primary obligations of the vendors and the purchaser. The debenture is therefore capable of being severed from the remainder of the transaction and its illegality does not taint the whole contract. There is*

no public policy objection to the enforcement of the contract from which the debenture has been divorced.

84. The trial Judge was of the view that the sale of receivables agreement did not go to the heart of the transaction and that its elimination would leave unchanged the primary obligations of the parties and in particular of the appellants to repay the bonds. To the extent, therefore, that any part of the security arrangements including the security agreement was illegal, this illegality can be severed being collateral or ancillary to the main transaction.

85. The appellants submitted that the sale of receivables agreement was part of the security arrangements which were part of a web of transactions designed to siphon off the revenues of the Authority. The appellants further argued that the evidence before the Court established that the security arrangements which included the assignment of the sale of receivables went to the heart of the transaction and in any event that was a matter which could only be determined after hearing evidence at a full trial.

86. The sale of receivables agreement was concluded in 1998. It was by that agreement the Authority's receivables would have passed to APUA Funding. In those circumstances it cannot reasonably be said that the documents in relation to the 2004 bond issue including the trust deed, the indemnity and guarantee and the security agreement were executed for the siphoning off of the revenues of the Authority. However, the sale of receivables agreement was an important part of the bond transaction. It represented the only income or revenue of APUA Funding and hence the ability to repay the bonds. I think that it is arguable that it went to the heart of the transaction, and I agree with the appellants that the severability of the sale of receivables agreement could not have been determined at this stage.

87. The Judge also considered the submission of the respondent that assuming without admitting the illegality contended for by the appellants, namely the illegal diversion of the Authority's revenues, the Court will only deny its assistance to a claimant seeking to enforce a cause of action on grounds of public policy, if the claimant was implicated in the illegality and founded his action upon an immoral or illegal act. In this case the respondent contended that its claim is made against the Government under the guarantee and indemnity and against APUA Funding under the trust deed. There was no need to rely on the illegality in order to enforce the cause of action. The Judge accepted that submission and held that even if there

was illegality, the respondent did not found his claim against the Government or APUA Funding on any illegal transaction but on the trust deed and the guarantee and indemnity and so were entitled to succeed.

88. I think in the circumstances of this case the Judge was correct to come to that conclusion. In **Standard Chartered v Pakistan National Shipping Corporation and Ors. (No. 2)** (2001) Lloyd's Rep. 218 and Aldous, L.J (at para 7) stated:

> "*There is in my view but one principle that is applicable to actions based upon contract, tort or recovery of property. It is, that public policy requires that the courts will not lend their aim to a man who founds his action upon an immoral or illegal act. The action will not be founded upon an immoral or illegal act, if it can be pleaded and proved without reliance upon such an act."*

89. In this case even if the sale of receivables agreement is illegal, the respondent has placed no reliance on that. Its cause of action is not based upon it. It is based upon the guarantee and indemnity and the trust deed. The respondent in my view is entitled to succeed even if the sale of receivables agreement was contrary to the Act.

90. It was further submitted by the respondent that even if the sale of receivables agreement were illegal, a demand under the guarantee and indemnity could not be fraudulent because it was expressly recognised in the guarantee and indemnity at clause 4.2(f) that any illegality of any actual or purported obligations of APUA Funding or any other person would not affect the liabilities of the Government under the guarantee and indemnity. The respondent relied on two authorities for that proposition, namely, **Gulf Bank K.S.C. v Mitsubishi Heavy Industries Ltd (No. 2)**, supra, and **Standard Bank London v Canara Bank** [2002} WL 1310836.

91. In the **Gulf Bank** case a clause in the counter indemnity given by Mitsubishi to the bank to induce it to provide a payment guarantee provided that its obligation shall not be discharged or diminished by any variation or amendment to any guarantee or by any total or partial invalidity, illegality or unenforceability thereof. It was conceded that that clause applied to and covered a guarantee which had become invalid after issue. It was, however, submitted that it could not cover a guarantee that had been invalid from the beginning. The court did not accept that submission. It was held that there was no ground for distinguishing between illegality,

invalidity or unenforceability from the beginning and illegality, invalidity or unenforceability at some later stage.

92. In the **Standard Bank** case the clause in the guarantee given by Canara was in essence the same as clause 4.2(f). In relation to that clause and the liability of Canara under the guarantee the court said (at para 69):

> *"It is apparent from this clause that the parties to the guarantee had turned their minds to the possibility that the purchase contract might fail for various reasons, some within and some outside the control of the parties to it. More importantly, perhaps, they contemplated the possibility that contract might be altogether invalid or unenforceable as a matter of law. They agreed, however, that in none of these cases should Canara's liability under the guarantee be affected. This is the strongest of indications not simply that the guarantee was intended to be independent of the purchase contract, but that it was intended to be independent of the legal efficacy of the purchase contract. The fact that Canara's liability was to remain unaffected by the invalidity, illegality or unenforceability of the purchase contract is a clear indication that the existence of enforceable obligations between Dravya and Solo under the purchase contract was not in any sense a prerequisite of its liability under the guarantee."*

93. The judge was of the view that a demand under the guarantee must be met even if the underlying contract was invalid and that would be so even in a case where the beneficiary knew that the underlying transaction was void or unenforceable because that is what the guarantee contemplates.

94. In my judgment both those cases support the respondent's submission. Where the performance guarantee contemplates that a demand can be made notwithstanding that the underlying transaction is illegal, invalid or unenforceable it cannot be fraudulent for that reason because that is what the guarantee contemplates. So in this case where the guarantee provides that the obligations of the Government shall not be adversely affected by any invalidity illegality or unenforceability of any obligations of APUA Funding or any other person, a demand under the guarantee cannot be fraudulent because the sale of receivables agreement is illegal. This provides a further ground on which the defence of the Government must fail.

95. In view of the above and in my opinion the Judge was correct to grant summary judgment against the appellants. In the circumstances I would dismiss the appeal with costs to be paid by the appellants to the respondent determined at two-thirds of the costs awarded in the Court below on the application for summary judgment.

A. Mendonça,
Justice of Appeal