

**IN THE SUPREME COURT OF BELIZE, A. D. 2014**

**Claim No. 238 OF 2012**

	<b>(Karl Wade</b>	<b>CLAIMANTS</b>
	<b>(Irene Wade</b>	
<b>BETWEEN</b>	<b>(And</b>	
	<b>(SED Enterprises Ltd.</b>	<b>DEFENDANTS</b>
	<b>(Heritage Bank Ltd.</b>	

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***BEFORE THE HONOURABLE MADAM JUSTICE MICHELLE ARANA***

**Mr. Anthony Sylvestre of Musa and Balderamos for the Claimants**

**Mrs. Julie Ann Ellis Bradley of Barrow and Williams for the First Defendant**

**Mr. Andrew Marshalleck, SC, of Barrow and Company for the Second Defendant**

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**J U D G M E N T**

1. This is a claim for specific performance of an agreement for sale of property known as Parcel 637, Block 16, Caribbean Shores, and in the alternative, an order directing the First Defendant to transfer the property into the names of the Claimants. The claim also seeks damages against the First Defendant for breach of contract, damages against the Second Defendant for

misrepresentation, special damages against the Defendants jointly and severally, forfeiture of deposit paid by the First Defendant, costs and interest.

### **The Facts**

2. i) Claimants, Karl Wade and Irene Wade, were the registered proprietors of the freehold property known as and situate at Parcel 637, Block 16, Caribbean Shores Registration Section ("the Property") until the 21<sup>st</sup> day of November, 2011.
- ii) On February 28<sup>th</sup>, 2011, the first named Claimant Karl Wade entered into an oral agreement with Salvador Awe of the First Defendant Company SED Enterprises Ltd. wherein the Claimants agreed to sell and the Defendant Company agreed to purchase the Property for \$600,000. The First Defendant Company represented to the Claimants that it would require a loan from its bank to fund the purchase.
- (ii) Pursuant to the agreement Salvador Awe made a down payment of \$10,000 towards the purchase of the property to Karl Wade. Mr. Wade signed a note confirming receipt of the \$10,000 as a "fully refundable good faith deposit".
- (iii) SED Enterprises Ltd. then applied to the Second Defendant, Heritage Bank for a loan to fund the purchase of the property.
- (iv) On 27<sup>th</sup> October, 2011 Heritage Bank wrote SED Enterprises Ltd. and Karl Wade saying that it had conditionally approved a credit facility in the amount of \$500,000 to fund the purchase of the Property.
- (v) On the 21<sup>st</sup> November, 2011 the Claimants and/or their servant or agent transferred the Property to SED Enterprises Ltd. The Claimants state that they did so in reliance of the letter they received from Heritage Bank dated October

27<sup>th</sup>, 2011. The Claimants also state that they were not specifically informed by either SED Enterprises Ltd. nor by Heritage Bank of any specific requirement of Central Bank approval for the credit facility.

- (vi) The loan to SED Enterprises Ltd. was not approved by the Central Bank, hence Heritage Bank did not disburse the loan.
- (vii) SED Enterprises Ltd. was not able to obtain a loan to fund the purchase.

### **Legal Issues**

3. (a) Whether it was a condition precedent of the Agreement between the Claimants and the First Defendant company that the First Defendant Company was to obtain a loan from Heritage Bank to fund the purchase of the Property;
- (b) Whether the approval of the Central Bank was a condition precedent to the 2<sup>nd</sup> Defendant Company's disbursement of the loan to the First Defendant Company;
- (c) What is the legal effect of the non-fulfillment of the said conditions precedent;
- (d) Whether, in the absence of an agreement for forfeiture, the sum of \$10,000 paid toward the purchase of the Property may be forfeited, or

alternatively, whether the said sum is refundable and should be returned to the First Defendant Company, the precedent having failed;

(e) Whether the Claimants acted prematurely by transferring the Property to the First Defendant Company prior to the unconditional approval of the loan based on the Second Defendant's letter;

(f) Whether the Claimants remain the beneficial owners of the said Property despite the said transfer;

(g) What quantum of damages are the successful parties entitled to;

(h) Whether the \$10,000 can be set off from the damages claimed by the Claimant.

### **The Evidence**

4. At the trial, the Claimants called one witness, the first named Claimant, Karl Wade. In his witness statement Mr. Wade stated that he owns the Property along with the second named Claimant Irene Wade. He said Mr. Awe had expressed an interest in purchasing the Property and had indicated that he would be in a position to do so once financing had been obtained from his bank. Mr. Wade said that by February 28<sup>th</sup>, 2011, he and Mr. Awe had

entered into an agreement for the purchase of the Property. He said they agreed that there would be a \$10,000 good faith down-payment towards the purchase price of \$600,000. He also states in his witness statement at paragraph 6 that *“it was the intention of the parties that the \$10,000 would be refunded in the event that the first defendant was not interested in purchasing the property again. Time was always of the essence and the first defendant would within a reasonable time communicate its intention to not proceed with the sale.”* He goes on to state at paragraph 8 that he understood from the terms of the letter sent to him by Heritage Bank on October 27<sup>th</sup>, 2011, that he was required to execute a transfer of the Property in the name of the First Defendant. Mr. Wade said he therefore took steps to transfer property to SED Enterprises Ltd. He said that after receiving this letter from the bank, Mr. Awe called him and told him that the bank had approved the loan, the \$10,000 deposit paid by him in February 2011 will now go towards the purchase price, and additional funds will be secured to pay the balance of the purchase price. Mr. Wade said that based on these developments he transferred the Property to SED Enterprises Ltd. and incurred expenses of \$16,530 to the government as stamp duty and \$2000 for fees paid to land consultant Thomas Morrison.

On February 7<sup>th</sup>, 2011, Mr. Wade's attorney wrote to Heritage Bank to inform them that he had complied with their instruction to transfer the Property to SED Enterprises Ltd.

In response Heritage Bank wrote to Mr. Wade on 10<sup>th</sup> February, 2012 stating that two of the conditions in the letter of 27<sup>th</sup> October, 2011 had not been met and that SED Enterprises Ltd. was informed of this. Mr. Wade said that at no time prior to effecting the transfer and even months after did either of the Defendants communicate to him that the loan was in abeyance because Central Bank approval had not been met. He has refused to execute documents prepared by SED Enterprises Ltd. for a transfer of the Property back to himself because the issue of stamp duty and expenses incurred by him for the transfer to SED Enterprises Ltd. remains outstanding.

Mr. Marshalleck, SC, on behalf of Heritage Bank cross examined Mr. Wade at trial. Mr. Wade admitted that he did not seek the advice of a lawyer on how best to attend to the sale of his property. The witness said that he was not looking for a sale, but having found one he decided to attend to the transaction on his own. Mr. Wade was asked if he remembers being

informed about the conditions that needed to be satisfied before the bank would pay out the loan. He said he can remember that he was instructed by the letter from Heritage Bank to transfer the land in the party's name and *"a couple other stuff he was supposed to do"*. Mr. Wade was shown the letter by counsel and he read the letter aloud in court.

"October 27, 2011

Mr. Karl & Irene Wade  
6210 Keating Crescent  
Button Wood Bay  
Belize City, Belize

Dear Mr. & Mrs. Wade,

Re: SED Enterprises Limited

At the request of our above captioned customer, we are pleased to confirm that we have agreed a credit facility for \$500,000 to purchase Parcel No. 637 Block 16 being Caribbean Shores Registration Section from your good selves. We also inform that payment will be made directly to you subject to the following conditions:

1. Receipt of the land title in the name of SED Enterprises Limited.
2. The execution of the mortgage in favor of Heritage Bank Ltd.
3. Receipt of any licenses and approvals that might be required from the Authorities or Regulators.

Please feel free to contact the undersigned should you have any questions or concerns.

Sincerely,

---

Sharima Hoare (Mrs.)  
Corporate Relationship Officer

CC: SED Enterprises Limited"

He was asked if he had any questions or concerns about the contents of the letter after he had read it; he said he did not, so he did not contact Ms. Hoare or anyone from the bank. He was then asked to point out to the court the portion of the letter which he claimed the bank had instructed him to transfer the title to SED Enterprises Ltd. Mr. Wade said, “*No. 1: Receipt of the Land title in the name of SED Enterprises Ltd*”. He was questioned as follows:

*“Q. Is it correct, Mr. Wade, that the letter is telling you that the proceeds of the loan would be disbursed when those three conditions have been fulfilled? Isn’t that what the bank is telling you there?”*

*A. Yes.*

*Q. And none of them is that the title is to be transferred. But what about the other two? Don’t those have to be satisfied as well?”*

*A. The other two -- there was no licence so it could have been -- to operate. There was no licence so --*

*Q. What licence you are talking about?”*

*A. It says, ‘Receipt of any licenses and approvals that might be required ...’*

*Q. Which might be required from the authorities or the regulators.*

*A. And there was none. And there was none.*

*Q. You interpreted that to mean a licence or an approval to operate your property as a rental property? That’s what you interpreted that to mean? That’s what I think I am getting from you.*

*A. I think there was no licence about wanting to approve the apartments. There was actually none. So as far as I am concerned --*

*Q. So you thought that had to do with the apartment?*

*A. To my knowledge, yes, there was none.*

*Q. Don't you understand that to mean licenses and approvals to the bank to give the loan?*

*A. Not to my knowledge.*

*Q. That's not what you understand the letter to be saying?*

*A. No."*

It was later put to the witness that the licences and approvals outlined to him in the letter was for the grant of the loan, not to operate the apartment. Mr. Wade disagreed. He also disagreed with Counsel's suggestion that he had misunderstood the letter. He insisted that it was the bank's responsibility to execute the mortgage after title was transferred to SED Enterprises Ltd.

5. Mr. Wade was also cross examined by Mrs. Bradley for SED Enterprises Ltd. He was asked about the amount of rent that he collects from the Property and he said that there are 10 units at \$600 per month each for a total of \$6000 per month when all units are occupied. He admits that he continues to collect rent and has not turned over any of that rent to SED Enterprises Ltd. When the building is not fully occupied, rent would be approximately \$4000 per month. He also conceded that the agreement with SED

Enterprises Ltd. had been that the deposit of \$10,000 would be fully refundable. He was asked to read Exhibit KW1 (the memorandum of the deposit) in court.

“Belize

28<sup>th</sup> February, 2011

I, Karl Wade, of 6210 Keating Crescent, Buttonwood Bay, Belize City hereby verify the receipt of \$10,000.00 Bze from Salvador Awe, of 2.5 Miles Northern Highway, Belize City as a fully refundable good faith deposit and down payment towards the purchase of my apartment complex situated at Campus Avenue, West Landivar, Belize City.

\_\_\_\_\_  
Karl Wade

\_\_\_\_\_  
Date

\_\_\_\_\_  
Salvador Awe

\_\_\_\_\_  
Date”

It was then put to the witness that the document contained nothing about the person no longer being interested in purchasing the property. He replied saying that the deposit was made “*subject to conditions*”. He later explained that he understood that the deposit was “*subject to securing the loan*”. He denied that he had said that he had sought advice from one Thomas Morrison Land Consultant. He said Mr. Morrison took the land documents from him and executed the transfer of title to SED Enterprises Ltd. on Mr. Wade’s behalf.

Upon re-examination Mr. Wade said he has received no further communication from the bank after the letter dated October 27<sup>th</sup>, 2011. Nor has he had any further communication from SED Enterprises Ltd. that they were not interested in purchasing the property again.

6. The First Defendant's sole witness was Salvador Awe, Director of SED Enterprises Ltd. In Mr. Awe's witness statement he said that he is employed by Insurance Corporation of Belize Ltd as an Enterprise Risk Manager, and that he had gone to the Claimants' property after a hurricane to discuss insurance business. This was in February 2011. During the conversation, Mr. Wade mentioned to Mr. Awe that he was interested in selling the Property for \$600,000 and that the Property generates approximately \$6,000 per month in rental income. Additional income also came from coin machines used by the tenants of the Property. Mr. Awe said he told Mr. Wade that he would discuss with his partners as he could not purchase the property on his own. The witness said that he then informed Mr. Wade that he had discussed with his partners and that they had agreed to get a loan from Heritage Bank to finance the purchase. Mr. Awe states that he

made it clear to Mr. Wade at all times that the First Defendant Company did not have the money and that only if they obtained a loan could the Company purchase the property. He states that it was an express and fundamental condition that the First Defendant Company was to obtain a loan from Heritage Bank for the purchase of the Property. Mr. Awe said that he offered to pay Mr. Wade a good faith deposit to show that they were serious about purchasing the property, provided that the deposit would be fully refundable. He said that Mr. Wade accepted the sum of \$10,000 paid by Mr. Awe on behalf of SED Enterprises Ltd. and issued a receipt in accordance with the agreement as a “*fully refundable good faith deposit*”, Exhibit SA 2.

7. Mr. Awe then describes his efforts to obtain the loan from Heritage Bank. He said that after going through the bank’s loan approval process he received a letter dated 27<sup>th</sup> October, 2011 from the bank (Exhibit SA 3) stating that Heritage Bank had conditionally approved a credit facility in the said amount expressly subject to two conditions:

- (1) Any necessary legal or regulatory consents/permits being obtained including approval from the Central Bank of Belize under Section 21 of the Banks and Financial Institutions Act 1995;

- (2) The security requirements and instruments being completed and fully in place.

Mr. Awe stated that on or about 18<sup>th</sup> November, 2011, the Claimants informed him that they had requested and received a letter from Heritage Bank dated October 27<sup>th</sup>, 2011 (Exhibit SA 4) indicating that it had conditionally approved the loan to SED Enterprises Ltd. subject to three conditions.

“(1.) Receipt of the land title in the name of SED Enterprises Limited;

(2.) The execution of the mortgage in favor of Heritage Bank Ltd;

(3.) Receipt of any licenses and approvals that might be required from the Authorities or Regulators.”

Mr. Awe said that the Claimants informed them that their representative Thomas Morrison had prepared the relevant instrument of transfer for the said Property and that they required the Directors of SED Enterprises Ltd. to sign on behalf of the company. He and Mr. Dufy Nunez signed the instrument of transfer on 18<sup>th</sup> November, 2011. Mr. Awe makes it clear that Thomas Morrison acted at all times as the agent of the Claimants and on their instructions. The witness said that he was informed that the loan was

not approved by Central Bank, and they could not proceed with granting the loan facility to the First Defendant Company.

Mr. Awe said that the Claimants continue to exercise all rights over the property as their own, including collecting rent of approximately \$6000 per month and other income from the Property. He said that the First Defendant Company received a letter from the Claimants attorneys on April 20<sup>th</sup>, 2012 threatening legal action, seeking balance of purchase price for the Property and demanding forfeiture of the deposit. The Defendant Company's attorney responded by informing the Claimants that it was a condition of the sale that the First Defendant Company obtain financing from the Second Defendant Company for purchase of the Property. By a letter dated 3<sup>rd</sup> August, 2012 the Second Defendant's attorneys informed the First Defendant's attorneys that as Central Bank had not approved the credit facility, Heritage Bank would not be able to provide the facility to SED Enterprises Ltd. Mr. Awe says that the First Defendant Company has not been able to secure financing from any other institution for the purchase of the Property, and that it had done everything reasonably required to obtain approval of a loan to fund the purchase. He also states that SED Enterprises Ltd. is prepared to sign any document to reverse the transfer back to the

Claimants. He testified that contrary to what Mr. Wade is saying, the deposit was fully refundable, and the financing from the bank was a condition to the purchase of the property, not to the “refundability” of the deposit.

Mr. Awe was cross-examined by Mr. Sylvestre on behalf of the Claimants. It was put to him that the first time he asked for the refund of the deposit was after he received this claim. He said he did not remember. He admitted that he never made a formal request for the return of the deposit, but the document/receipt speaks for itself and it is fully refundable. Mr. Awe said that he communicated with Mr. Wade that they were unable to secure the loan for property around August or September 2012 after SED Enterprises Ltd. got letter from Heritage Bank saying they would not be able to provide the loan. He admitted that he knew from 2011 that the loan was not approved by Heritage Bank, but they had been trying to secure the loan from other institutions. Mr. Awe admitted that he went of his own volition to Mr. Morrison’s office to sign the transfer instrument at Mr. Wade’s request. He also admitted that he did not tell Mr. Wade not to effect the transfer on November 18<sup>th</sup>, 2011. He was asked about a letter (Exhibit SA 7) sent to Heritage Bank by his attorneys dated June 7<sup>th</sup>, 2012 which said that,

*“On your instructions, the Vendors proceeded to procure land title in the name of SED Enterprises Ltd. as directed and have been submitted same to you”*. Mr. Awe said that it was his understanding that it was Heritage Bank who instructed Mr. Wade to transfer title to SED Enterprises Ltd. However, he did not concede to counsel’s suggestion that it was SED’s instruction to Heritage Bank that prompted the Bank to write the letter dated 27<sup>th</sup> October, 2011 to Mr. Wade. The witness said he could not speak for the Bank; and that he never instructed the Bank to write Mr. Wade. Under re-examination by Mrs. Bradley, he clarified that at the time he signed the transfer of land documents in 2011 he was not aware of the loan not being approved. He said he got that information from the bank in 2012. He also stated that he had no discussions with Mr. Wade about the refund of the deposit during the time that his attorneys were communicating with the bank on his behalf.

8. The Second Defendant called one witness. Sharima Hoare stated in her witness statement that she is a Corporate Relationship Officer at Heritage Bank, and that she was at all material times responsible for attending to the processing of the loan facility agreement by the Second Defendant in favor of the First Defendant to purchase the property of the Claimants. She said

that in a letter dated October 27<sup>th</sup>, 2011 she informed the Claimants of the approval of the proposed loan of \$500,000 by Heritage Bank to SED Enterprises Ltd. to purchase the Property (Exhibit SH 1). On 23<sup>rd</sup> November, 2011 she was informed by Central Bank that they would not consider approval of the loan facility in the terms proposed and the Central Bank outlined a number of terms which they considered necessary. SED Enterprises Ltd. was not in a position to meet those terms. Heritage Bank therefore refused to provide the loan to SED Enterprises Ltd. She said that the terms of the facility agreement expressly stated that the facility was expressly subject to the securing of the necessary regulatory approvals including approval from the Central Bank of Belize.

9. Ms. Hoare was cross-examined by Mr. Sylvestre on behalf of the Claimants. She admitted that the letter dated 27<sup>th</sup> October, 2011 sent by Heritage Bank to Karl and Irene Wade was sent on the instructions of the First Defendant SED Enterprises Ltd. She also admitted that that is why the letter is copied to SED Enterprises Ltd. The witness was shown Exhibit SH 3, the commitment letter, and she agreed that this letter which sets out the terms and conditions of the proposed loan was never sent to Mr. Wade. She agreed with counsel's suggestion that Mr. and Mrs. Wade were not a party

to the agreement between SED Enterprises Ltd. and Heritage Bank. Ms. Hoare also admitted that Heritage Bank did not send any follow up letter to Mr. Wade advising him that Central Bank had not approved the loan. The bank only informed SED Enterprises Ltd. She was also asked specifically about the letter dated October 27<sup>th</sup>, 2011 that she had sent to Mr. and Mrs. Wade and whether the third condition *“receipts of licenses and approvals that might be required from the Authorities and Regulators”* mentioned in that letter had the word *“bank”* included. She said no but it’s a letter from the bank so it is understood.

### **Legal Submissions**

#### **10. Claimant’s Legal Submissions**

On behalf of the Claimants, Mr. Sylvestre submits that the evidence shows that SED Enterprises Ltd. communicated with the Claimants after the letter was sent by Heritage Bank on October 27<sup>th</sup>, 2011. Learned Counsel also contends that this letter did not expressly state that the credit facility would require Central Bank approval. Mr. Awe voluntarily executed the transfer on November 18<sup>th</sup>, 2011 on behalf of SED Enterprises Ltd. Mr. Awe also called the First Claimant after receipt of the letter from Heritage Bank dated October 27<sup>th</sup>, 2011 and told him that since the Bank had given

approval for a loan of \$500,000, the \$10,000 would go towards the purchase price and he would be receiving the additional \$90,000 to satisfy the purchase price of \$600,000.

Mr. Sylvestre therefore argues that by the words and conduct of SED Enterprises Ltd., the Claimant was induced to proceed to effect the transfer. In addition, the First Defendant did not caution the Claimants not to effect the transfer, even though Mr. Awe admitted under cross-examination that he knew from 2011 that Heritage Bank would not approve the loan. He also argues that the written contract of February 28<sup>th</sup>, 2011 between the Claimants and the First Defendant does not stipulate that the obtaining of financing from the Second Defendant is a condition precedent for effecting the contract. He cites ***Chitty on Contracts*** Vol. 1 at para. 28-007 as follows:

*"The law takes the view that the purchaser of a particular piece of land or of a particular house (however ordinary) cannot, on the vendor's breach obtain a satisfactory substitute, so that specific performance is available to him ... A vendor of land, too, can get specific performance, for damages will not adequately compensate him if he cannot easily find another purchaser or if he is anxious to rid himself of burdens attached to the land."*

Mr. Sylvestre submits that while the Claimants have been in possession of the property they remain intent on giving effect to the agreement for sale.

Mr. Wade has testified that prior to his commencing this claim: *“There was nothing communicated to me that they were not interested in purchasing the property again.”* In addition the Claimants have been unable to effect another sale since the title is in the name of the First Defendant.

Learned Counsel for the Claimants then asks in the alternative, for an order that the property be transferred back to the Claimants, special damages (having conceded that general damages are not appropriate since the Claimants remain in possession) and forfeiture of the deposit.

Mr. Sylvestre submits that the First Defendant’s conduct with respect to the transfer of property and the circumstances of this case should cause the court to order special damages in the amount of \$18,530.00 paid by Mr. Wade as stamp duty and government fees. (Exhibits KW 6 and KW 7)

He also asks the Court to order that the deposit of \$10,000 paid by Mr. Awe on behalf of SED Enterprises Ltd. towards the purchase price be forfeited.

Mr. Sylvestre argues that contrary to the submissions of the First Defendant, there does not need to be an express provision in the contract for forfeiture to arise. He cites *Halsbury’s Laws of England* Vol. 42 4<sup>th</sup> Edition at para 244:

**“Deposit.** A deposit paid under a contract for sale serves two purposes: if the sale is completed it counts as part payment of the purchase money, but primarily it is a security for the performance of the contract, and it is usual to provide expressly that, if the purchaser fails to observe the conditions of the contract, the deposit is to be forfeited to the vendor. However, such a provision is not necessary, and unless the contract taken as a whole shows an intention to exclude forfeiture, the vendor is entitled, by virtue of the deposit, to retain it as forfeited, if the contract goes off due to the purchaser’s default ...”

Mr. Sylvestre submits that the memorandum speaks to a *“fully refundable good faith deposit and down payment”* but the First Defendant’s conduct cannot be regarded as *“good faith”*. He recounts the evidence of the First Defendant’s behavior in this transaction, e.g., instructing the bank to inform the Claimants that loan had been approved, knowing that there was a real risk that Central Bank would not approve the loan due to existing aggregate loans they had with Heritage Bank, calling Mr. Wade and telling him that the deposit would go towards the purchase price and that they would get the additional \$90,000 to complete the purchase price, knowing that Central Bank had not approved the loan from 2011 but not saying anything to Mr. Wade until 2012. Mr. Sylvestre argues that the memorandum shows as a whole an intention for forfeiture in the event of bad faith on the part of the First Defendant and the accompanying receipt

referred to the deposit as a “*good faith deposit and down payment*”; the receipt goes into more detail in respect of the purchase price of the property while the memorandum does not. The receipt makes no mention of the down payment being refundable. He cites ***Halsbury’s Laws of England*** Vol 42 4<sup>th</sup> ed. at para 246 as follows:

“Where the contract gives the vendor no express right of forfeiture, the right is exercisable when, without default on the vendor’s part the purchaser has expressly or impliedly repudiated the contract ...”

Mr. Sylvestre argues that that is what has occurred in this case. The First Defendant repudiated the contract having failed to provide the balance of the purchase price. In addition, the First Defendant has not provided the balance of consideration even at the date of instituting the claim that is April 2012 and being five months after the transfer was effected.

Mr. Sylvestre also claims damages against the Second Defendant for misrepresentation. He claims that the Second Defendant, Heritage Bank made representations which induced Mr. Wade to transfer the property to SED Enterprises Ltd. He states that it is beyond dispute that the bank issued a letter to the Claimants dated October 27<sup>th</sup>, 2011 based on instructions of the First Defendant. Mr. Wade in his evidence explained that he took the bank’s letter to mean that he was instructed to execute the transfer in the

name of SED Enterprises Ltd. in order for payment to be made directly to him. Mr. Wade also explained that he had no knowledge that there was a real risk of Central Bank approval would not be obtained given the size of Heritage Bank's aggregate existing loan portfolio with SED Enterprises Ltd. He contends that that was non-disclosure of a material fact by Heritage Bank to the Claimants.

Mr. Sylvestre argues that the letter sent by Heritage Bank to Mr. Wade was ambiguous. He cites para 747 of *Halsbury's laws of England* cited above as follows:

"747. Where the representation genuinely and reasonably can have more than one meaning, the representee must show in which of the possible senses he understood it, and that in that sense it was false. Where he is able to do so, the fact that it might have been understood in a different sense, which is not false, will not avail the representor ..."

Mr. Sylvestre submits that the letter of October 27<sup>th</sup>, 2011 is genuinely and reasonably capable of more than one meaning. He points out the fact that the First Defendant interpreted the letter in the same vein as the Claimants as is seen from the First Defendant's attorney correspondence dated June 7<sup>th</sup>, 2012 to Heritage Bank (Exhibit SA 7).

"Our Ref: 07/2302/12

7<sup>th</sup> June, 2012

Heritage Bank Limited  
106 Princess Margaret Drive  
Belize City,  
Belize

**Attention: Mrs. Sharima Hoare**

Dear Mrs. Hoare,

We write on behalf of SED Enterprises Limited with respect to the captioned.

We are instructed that on October 27, 2011 you agreed to grant a facility of \$500,000 to our client for the purchase of a property owned by Karl and Irene Wade ("Vendors") on the terms set out in Commitment Letter of the same date. We are further advised that you proceeded to issue a letter to the Vendors wherein you advised of the agreed credit facility and required, inter alia, that they provide to you 'land title in the name of SED Enterprises Limited' as a condition for payment to be made directly to them.

**On your instructions**, the Vendors proceeded to procure land title in the name SED Enterprises Limited as directed and have submitted same to you. We are advised by the Vendor's Attorney however that payment has not been made to date and that you have indicated that two conditions remains outstanding to be fulfilled by our client.

Our client has advised that it has complied with all conditions which were the basis of the agreement of October 27, 2011. **If the Bank has resolved not to disburse the loan on the agreed terms the Bank may wish to consider reimbursing the Vendor's expenses incurred on the bank's instructions and undertaking the cost of transferring the property back to the Vendors.**

The vendors have intimated that they will proceed to file a suit against our client and the bank should payment not be received promptly.

We look forward to hearing from you soonest and trust that this matter may be resolved amicably.

Yours faithfully,  
BARROW & WILLIAMS

Julie-Ann Ellis Bradley

JEB/kg" (emphasis mine)

Learned Counsel argues that the Second Defendant, having said to the Claimants that a credit facility had been approved and further instructed the transfer of the property in the name of the First Defendant was obliged to further say and disclose to the Claimants that the First Defendant's aggregate loans with the Second Defendant were such that Central Bank approval would be necessary and that there was a real risk that the approval would not be obtained given the size of its aggregate existing loan portfolio with the Second Defendant at the time. He submits that Heritage Bank's silence amounted in law to negligent misrepresentation which was material and induced the Claimants to transfer the Property to the First Defendant without awaiting full payment. He says that the representation relied on is that the Claimants were to transfer the property in the name of the First Defendant before payment could be made to them. The inducement was the prospects of receiving payment.

### **First Defendant's Legal Submissions**

11. On behalf of SED Enterprises Ltd., Mrs. Ellis-Bradley submits that the First Defendant denies that the Claimants are entitled to any of the relief sought except that the First Defendant does not object to the property being transferred to the names of the Claimants and have taken steps to enable the transfer to proceed. She states that the transfer has not occurred because of the Claimants' insistence that costs of this transfer (from the First Defendant to the Claimants) and also of the initial transfer (from the Claimants to the First Defendant) should be borne by the Defendants. The First Defendant counterclaims for the return of its deposit.

Mrs. Ellis-Bradley argues that the unrebutted and uncontradicted evidence of the First Defendant Company was that the First Defendant Company expressly stated to the First Claimant that it did not have the money to purchase the Property and could only do so if it obtained a loan to fund said purchase. She submits that the evidence from the First Claimant corroborates this fact when he said in court that the First Defendant Company had indicated to him that it *"would be in a position to purchase the Property once financing had been obtained from its bank"*. The evidence therefore shows that it has always been the unequivocal intention of the parties that the Agreement would come to fruition *only if* the First

Defendant Company was able to obtain a loan for the purchase. The said loan was thus a condition precedent to the purchase, which remains unfulfilled with no real prospect of success.

Mrs. Ellis Bradley contends that the legal effect of the non-fulfillment of a condition precedent is that the parties are not bound by the terms of the Agreement, since it is inherent in the definition of a condition precedent that liability to perform the terms of an agreement only arises on the happening of a further event: *Chitty on Contracts* 925<sup>TH</sup> Ed. Sweet and Maxwell London 1987 Vol 1.

“The liability of one or both of the contracting parties may become effective only if certain facts are ascertained to exist or upon the happening of some further event.”

Learned Counsel submits that if the event does not occur, the agreement will not take effect, and the parties will be under no duty to perform its terms. In other words the contract becomes binding when the condition precedent is fulfilled. Until then, no agreement exists. Mrs. Bradley argues that since SED Enterprises Ltd. (through no fault of its own) was unable to obtain the loan, which was a condition precedent to the Agreement, then no binding contract existed and the parties are not bound by its terms.

On the question of the deposit, Mrs. Ellis Bradley contends that the deposit should be returned to the First Defendant. She cites ***Halsbury's Laws of England*** as follows:

*"Where agreement has been reached subject to contract and a deposit has been paid, the deposit must be repaid if no binding contract exists."*

She also cites ***Barnsley's Conveyancing Law & Practice*** Third Edition London Butterworths 1988:

*"A purchase of land was expressed to be conditional upon the vendor's obtaining a renewal of certain leases. The Judicial Committee of the Privy Council took the view that until the condition was satisfied, no contract for sale could come into existence. Since the date fixed for completion had passed without the condition being fulfilled, the purchaser was entitled to the return of his deposit."*

Mrs. Bradley argues that since the transaction did not reach the stage of a binding contract, the condition precedent having failed, the deposit ought to be returned to the First Defendant. She also points out that there is no forfeiture clause indicating that the parties have agreed expressly or impliedly that the deposit would not be recoverable if the purchaser defaults. On the contrary, the parties have expressly agreed in a written memorandum that the deposit would be "*fully refundable*". She cites ***Phipson on Evidence*** 17 Ed. Sweet and Maxwell at para. 42-12:

*“When a transaction has been reduced to, or recorded in, writing either by requirement of law, or agreement of the parties, extrinsic evidence is, in general, inadmissible to contradict, vary, add to, or subtract from the terms of the document.”*

And at para. 42-13:

*“The grounds of exclusion commonly given are: 1) that to admit inferior evidence when the law requires superior would be to nullify the law; and 2) that when the parties have deliberately put their agreement into writing, it is conclusively presumed between themselves and their privies that they intend the writing to form a full and final statement of their intentions, and one which should be placed beyond the reach of future controversy, bad faith or treacherous memory.”*

Mrs. Ellis Bradley submits that a very heavy burden falls on the Claimants to displace the intention of the parties as clearly expressed in the written document dated 28<sup>th</sup> February, 2011 and signed by them; she also submits that the Claimants have failed to displace this burden.

### **Second Defendant’s Legal Submissions**

12. Mr. Marshalleck, SC, on behalf of the Second Defendant submits that the sole issue between the Claimants and the Second Defendant is whether there was any misrepresentation made by the Second Defendant to the Claimants which can conceivably give rise to any cause of action for damages against the Second Defendant. He cites ***Halsbury’s Laws of England*** 4<sup>th</sup> Ed Vol. 31 at para. 755 et. seq. in stating that a person

complaining of having been misled by a misrepresentation to his injury cannot recover damages from the representor in respect of the injury suffered unless he can show that: 1) the representation was not only false but fraudulent; or 2) it was negligent or 3) it was made by another party to the contract who is unable to prove that the facts represented were true.

Mr. Marshalleck, SC, argues that nowhere was it alleged or proven at trial or even suggested that the representations made by the Second Defendant were i) false or ii) fraudulent, both of which would need to be established to found a claim for damages against the Second Defendant. There was also no allegation of negligent misrepresentation on the pleadings or in the evidence, and the Second Defendant was never a party to the contract for sale of the property. None of the bases for a claim for damages for misrepresentation as described in the extract from *Halsbury* cited above can or have been made out. The evidence of Mr. Wade at trial made it clear that the Claimants opted to rely on the lay advice of Land Consultant Thomas Morrison in attending to the transaction, and that he in fact misunderstood the conditions set forth in the letter from the Second Defendant. Mr. Wade was free to contact the Second Defendant for any clarifications he may have required with regard to the letter. In Mr. Wade's

eagerness to close the transaction, he chose not to seek any clarification from Heritage Bank as to the matter of the required approvals before effecting the transfer of title to the property. The representations made by Heritage Bank to the Claimants were in fact true and the condition for regulatory approval was and has still not been satisfied. The Claimants chose to effect the transfer before first satisfying themselves that the required regulatory approvals referred to in the letter from the Second Defendant were in hand and that is a risk they chose to take. They must now bear the consequences.

### **Decision**

13. Having reviewed all the evidence and submissions in this matter, I agree fully with the submissions of Mr. Marshalleck, SC, that there has been absolutely no misrepresentation established by the Claimants. The language of the letter dated October 27<sup>th</sup>, 2011 sent by Heritage Bank to the Claimants is very clear: the issue of the loan was **subject to** the conditions set out in the letter, and the bank would disburse the loan *only if* those three conditions were satisfied. The statements made by the bank in the letter are true and remain true so there was no misrepresentation. I must state that I do not agree with Mr. Sylvestre's contention that Heritage

Bank was under a duty to disclose to Mr. Wade the size of its loan portfolio with SED Enterprises Ltd. The First Defendant is a client of Heritage Bank, and as such, the bank has a duty to protect the privacy of its client, and is under no duty to reveal the nature or extent of its business with its customers. I do not agree with the argument made by Mr. Sylvestre that the bank should have revealed to Mr. Wade that the size of its existing aggregate portfolio with SED Enterprises Ltd. was such that it was unlikely that Central Bank would approve the loan, and that that silence amounted in law to negligent misrepresentation. With all due respect to the arguments of Learned Counsel, I do not see how Heritage Bank could be under any obligation to disclose the nature and extent of its business with its client to a third party who is a stranger to their business relationship; on the contrary, if the bank had done so, it would almost certainly run afoul of banking laws and regulations which jealously guard the privacy of its clients. There was no misrepresentation by Heritage Bank.

I also agree with Mrs. Ellis Bradley's submission that the obtaining of the loan was a condition precedent to the Agreement between the parties being valid. As the condition precedent was not performed, the legal effect is that the contract did not come into existence, so there was nothing to

breach. I find that Mr. Wade misinterpreted the letter and acted to his own detriment by rushing to transfer the property and incurring expenses without first ascertaining (through his attorneys) whether the conditions laid out expressly in the bank's letter had been met. I therefore find that there is no liability on either SED Enterprises Ltd. or Heritage Bank on this issue so there will be no order as to specific performance or damages. I order that SED Enterprises Ltd. is to transfer the property back to the Claimants, and the cost of such transfer will be at the Claimants' expense.

On the question of whether the deposit should be returned, I agree with Mrs. Ellis Bradley that the intention of the parties was clearly expressed by the memorandum which stated that the deposit would be fully refundable. However, I also take note of and agree with Mr. Sylvester's point that this was a **good faith** deposit and that the behavior of SED Enterprises Ltd. showed bad faith, e.g., in signing the transfer in 2011, calling Mr. Wade after the bank's conditional approval of the loan to tell him that they would be getting the balance of \$90,000 for the purchase price, knowing Heritage Bank had not approved the loan since 2011 but not saying anything to Mr. Wade, then not advising Mr. Wade that they were no longer interested in purchasing the property even up to the date of this suit in April 2012. I

do not see how that behavior on the part of SED Enterprises Ltd. could amount to good faith. The deposit of \$10,000 is therefore forfeited.

Each party to bear own costs.

***Dated this 14<sup>th</sup> day of November, 2014***

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**Michelle Arana  
Supreme Court Judge**