IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CAUSE NO: G0136 OF 2017

BETWEEN:

DEX LTD

PLAINTIFF

AND:

NOEL CHRISTIAN

DEFENDANT

Appearances:	**Mr. James Kennedy of KSG Attorneys for the Plaintiff**
	Mr. Colm Flannigan of Nelson & Co, Attorneys at Law for the Defendant
Before:	**The Hon. Justice Cheryll Richards Q.C.**
Heard:	**20th September 2019**
Draft Judgment:	**28th October 2019**

HEADNOTE

Civil Division – Civil Law *– Issue as to whether variation of contract or forbearance by Creditor. Application for indemnity costs to be awarded.*

JUDGMENT

INTRODUCTION

1. The Plaintiff Company, Dex Limited, operates out of registered offices in George Town, Grand Cayman and is in the business of private lending. It offers loans to persons who are unable to obtain financing from larger banking institutions and thus charges a higher rate of interest than the banks.[1]

2. Between September 2013 and the 29th April 2014, the Plaintiff, and the Defendant, Noel Christian, entered into a series of written loan agreements. By these agreements the Plaintiff agreed to lend to the Defendant various sums of money. The terms of payment included monthly interest as well as default interest, both at an interest rate of 23 percent on the sums loaned. The Defendant defaulted on the loans.

3. By Writ of Summons filed on the 21st August 2017, the Plaintiff claimed repayment from the Defendant of the sum of $23,000.00 together with legal fees of $5,146.60 and pre and post judgment interest from 1st September 2014 at the contractual rate of 23%. The total sum then outstanding at the date of the filing of the writ was $43,857.17.

4. On the 19th September 2017, the Defendant acknowledged service and indicated an intention to defend. On the 29th September 2017, he filed a Defence in which he admitted the principal amount of the debt but asserted that he had been advised orally by Mr. Rex Rankine, a Director of Dex Ltd. that he would not have to repay any amounts other than the principal loan. He also asserted that the interest rate of 23% amounted to a penalty and is not enforceable.

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[1] Witness Statement of Rex Rankine dated 18th October 2017, paragraph 5

5. By Summons filed on the 25th October 2017, the Plaintiff applied for Summary Judgment pursuant to GCR O.14 r.1 in respect of the principal sum claimed, on the basis of the Defendant's admission as to the principal debt.

6. By Consent Order made on the 26th January 2018, Summary Judgment was granted to the Plaintiff as to the principal sum of $23,000.00. The remainder of the claim was to proceed to trial. Both Parties filed witness statements and submissions which identified the single issue between them as being whether Mr. Rankine had made oral representations to the Defendant that he would not have to pay any interest on the sums borrowed. Mr. Rankine denied making such statements except for on one occasion on the 27th August 2014 when at a meeting with the Defendant he agreed, on behalf of the Plaintiff, to the refinancing of the Defendant's previously unpaid loans by way of a fresh consolidated loan with all past outstanding interest being waived. Following this meeting a formal agreement was prepared and signed by all parties.[2]

7. On the morning of trial, the Court was advised that the issue between the parties had narrowed even further and was no longer whether or not interest was in fact payable. The sole question between the parties which requires resolution is whether the interest had been reduced from 23% to 14 %. The differing calculations between the parties is as follows:

The Plaintiff:	
Interest Rate Claimed	23%
Date of Loan	1st September 2014
Date of trial	20th September 2019
Number of days	1845
Daily interest	$14.49
Total interest due	$26,739.86
The Defendant:	

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[2] Witness Statement of Rex Rankine dated 18th October 2017, paragraphs 8 to 12.

Interest Rate Claimed	14%
Date of Loan	1st September 2014
Date of trial	20th September 2019
Number of days	1845
Daily interest	$8.79
Total interest due	$16,231.97

8. Both parties agreed that oral evidence was not required and that resolution of the issue as to whether the relevant Agreement had been varied was dependent on the construction of two letters sent by Mr. Rex Rankine on behalf of the Plaintiff to the Defendant on the 25th and 30th April 2015.

THE AGREEMENT

9. The relevant Loan Agreement is dated 27th August 2014 (the day of the meeting referenced above) and in so far as may be material provides as follows:

> *Condition and Purpose:*
> *Clause 2.2*
> *The Lender will (in consideration of the Borrower agreeing to repay the Loan on the terms of the Agreement) advance up to the amount of twenty three thousand dollars ($23,000.00) in full to the Borrower in respect of the Borrower's specified or agreed purpose of refinancing existing loans.*
>
> *Repayment of Indebtedness:*
> *Clause 3.1*
> *The Borrower shall pay interest, effective 1 September 2014, monthly, starting with the first month's interest to be paid on 30 September 2014 at the rate of twenty three percent (23.0%) per annum. On 1 March 2015, or before at the Borrower's option, a new loan Agreement will be signed by the Borrower to refinance this loan over a period of 36 months, with equal monthly payments to cover principal and interest.*
>
> *Clause 3.2*
> *Should the Lender waive the right to repayment on the Repayment Date under [3.1] above the Loan together with all Indebtedness shall be payable upon demand by the Lender.*
>
> *Default Interest*
> *Clause 4.1*
> *Interest at the rate of twenty three per cent (23.0%) per annum shall accrue from the Repayment Date of the Loan (to the extent that the Loan has not been repaid pursuant to*

clause [3.1]) compounded monthly on the last day of each month and calculated both before and after demand or judgment on a daily basis and a year of [365] days.

Clause 4.4
Notwithstanding any provision to the contrary, the Lender shall be entitled to defer or waive any or all payment of interest on the Loan by the Company pursuant to this Agreement."

Events of Default
Clause 10.1
The Lender shall be entitled at any time after the occurrence of an Event of Default by notice in writing to the Borrower to declare that the Indebtedness has become immediately due and payable whereupon the same shall become immediately due and payable and the Borrower shall immediately pay the same to the Lender.
Clause 10.2
An event of Default occurs by:
(1) On any default by the Borrower in paying when due any payment under this Agreement;

Modifications:
Clause 15.9
This Agreement may be amended or modified in whole or in part at any time by agreement in writing executed in the same manner and by the same persons as this agreement.

The Letters

10. The first letter from Mr. Rankine on behalf of the Plaintiff to the Defendant is dated 25th April 2015 and states *inter alia*:

"Dear Noel,

We confirm that you called us yesterday as a result of the letter dated 9th April 2015 sent to you by our Attorneys...
You have said that you are only working at... three nights per week. On 13 February we sent you an E-mail confirming our telephone conversation in which you offered to pay the full $23,000 owing to Dex Ltd. if we would waive the accrued interest. We said, in that E-Mail that we accept your offer provided the funds are paid by bank draft no later than 16 February 2015. We have heard nothing since about the $23,000 that you said that you had available.
.....
During our telephone conversation of today, you said that you agree to repay the $23,000 owing but only if we reduce the interest rate to 14 % per annum and agree to equal monthly payments over 36 months, with such payments to be made direct to our bank account at... commencing 31 May 2015.

As set out in [Attorneys] letter to you of 9 April, the amount owing is $23,000.00 plus interest of $3,188.49 to 9 April, plus daily interest of $14.49 since that date i.e. $217.35 to today, plus our legal fees of $378.00 making a total of $26, 783.84.

If you will agree to what we have set out above, with all other terms and conditions of the original Loan Agreement dated 27 April 2014 to remain in force, we are willing to recalculate the accrued interest at the rate of 14% per annum from 1 September 2014 to 30 April 2015, assuming that you would make your first payment on 31 May 2015. That would then be $2,134.90. Adding the legal fees of $378.00, then the monthly payment to repay $25, 512.90 over 36 months would be $871.97. However we reserve the right to proceed with legal action to recover the amount owing should you not make the agreed monthly payments.

Please confirm your agreement by signing and returning to us a copy of this letter by Wednesday 29 April 2015. This offer is null and void if you do not sign and return a copy of this letter by that date."

11. There then followed a second letter from Mr. Rankine to the Defendant dated 30th April 2015. That letter also required confirmation of the agreement of the Defendant, to be evidenced by return of a copy letter with his signature. It was agreed at the hearing that the letter exhibited in the trial bundle[3] bore the signature of the Defendant. It states inter alia:

"Dear Noel,
Further to our letter dated 25 April 2015, we wish to confirm our subsequent telephone conversation of this morning.

You stated that you are agreeable to pay the amount owing, as set out in our letter of 25 April. However, after reviewing your financial position you would like to make changes to the repayment. You would like to start monthly payments on 30 June 2015 with the amount owing amortised over 48 months, rather than 36 months. You said that by way of lump sum payments you will repay the amount owing within 36 months.

This will mean that interest of $273.47 for the month of May will have to be added to the figure mentioned in our last letter. The total then is $25,786.37. Monthly payments amortised over 48 months, will be $704.65."

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[3] Page 156 of the trial bundle

VARIATION OR WAIVER

12. The Defendant submitted that Clause 4.4 of the Loan Agreement dated 27th August 2014 provides for the unilateral option of the Lender to waive or defer any or all payments of interest. Further that the letters should be construed as a unilateral waiver, varying the interest rate across the board to 14 %. Mr. Rankine in that first letter sets out the contents of a conversation with the Defendant in which the Defendant offered to repay the amount in full, should there be a waiver of all the interest. The offer was accepted but the condition was not satisfied. The second letter refers to another telephone conversation which took place and the calculations therein reflect an interest rate of 14%. There were no conditions attached to that latter proposal other than that the Defendant should sign and return the letter, which he did. On the basis of this, says the Defendant, the appropriate interest rate to be paid is 14% because both parties agreed to that on the 30th April 2015 and the Lender was entitled to unilaterally vary the interest rate as he did.

13. In support of his submissions, Counsel for the Defendant referred the Court to ***Chitty on Contracts 33rd Ed.***, paragraph 22-039. It is stated therein that at common law a contract may validly give to one contracting party the power to unilaterally vary the obligation of the parties to the contract. The power may be limited in cases where the variation sought to be made is for a dishonest or improper purpose, (***Nash and Staunton v. Paragon Finance Plc***[4]). This is not the position in the instant matter.

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14. The Plaintiff in response argued that the letters did not amount to a variation of the Loan Agreement. It was urged that they amount to no more than forbearance and that the terms of

[4] [2001] EWCA Civ 1466

the original Loan Agreement remained in effect. One party was saying by the letters that it would forbear its legal rights *if and only if* payment were made.

15. It was further submitted that there was no consideration flowing in order for the variation to be effective and that the context also has to be considered. This included that the Defendant had been orally refusing to pay his debt unless adjustments were made.

16. Counsel for the Plaintiff placed reliance on paragraph 22-035 of ***Chitty on Contracts 33rd Ed.*** which provides as follows:

> *"The agreement which varies the terms of an existing contract must be supported by consideration. In many cases, consideration can be found in the mutual abandonment of existing rights or the conferment of new benefits by each party on the other. For example, an alteration of the money of account in a contract proposed or made by one party and accepted by the other is binding on both parties, since either may benefit from the variation. Alternatively, consideration may be found in the assumption of additional obligations or the incurring of liability to an increased detriment. The position is more difficult in the case of an agreement whereby one party undertakes an additional obligation, but the other party is merely bound to perform his existing obligations, or an agreement whereby one party undertakes an additional obligation, but for the benefit of that party alone. There is a line of authority of respectable antiquity which supports the view that in such a case the agreement will not be effective to vary the contract because no consideration is present. But a more liberal approach has been adopted in more recent cases and the courts have been prepared to find consideration and enforce the agreement where it has conferred a practical benefit upon the promisor. A mere forbearance or concession afforded by one party to the other for the latter's convenience and at his request does not constitute a variation, although it may be effective as a waiver or in equity. Such a forbearance or concession need not be supported by consideration, and can be made orally even when the contract is one which is required to be made or evidenced in writing."*

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17. As I understood the argument, it was that the letters themselves did not purport to be a waiver or deferral of interest payments pursuant to Clause 4.4. The issue therefore is whether they constitute a variation of the Agreement in the form required by Clause 15.9.

18. The contents of the letters are relatively clear. If all the other elements are satisfied, they could amount to a variation. (See ***Woodhouse AC Israel Cocoa Ltd. SA v. Nigerian Produce Marketing*** *Co.*)[5]

19. The element of consideration which is raised by the Plaintiff is not without ambiguity. The case of ***Foakes v. Beer***[6] sets out the base principle that there is an absence of consideration where a creditor alters the agreed terms of payment and that such alteration will not prevent the creditor from seeking to enforce the whole of the debt. The case held that:

> *"An agreement between judgment debtor and creditor, that in consideration of the debtor paying down part of the judgment debt and costs, and on condition of his paying to the creditor or his nominee the residue by instalments, the creditor will not take any proceedings on the judgment, is nudum pactum, being without consideration, and does not prevent the creditor after payment of the whole debt and costs from proceeding to enforce payment of the interest upon the judgment."*

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20. In the more recent case of ***MWB Business Exchange Centres Ltd. v. Rock Advertising Ltd***[7] the United Kingdom Supreme Court adverted to the decision in ***Foakes v. Beer.*** The Court referred to cases decided thereafter which concluded that consideration could be found in the 'practical expectation of benefit' and expressed the view that the case of ***Foakes v. Beer*** may need re-examination at a later time before an enlarged panel of the Court. Having determined the issue in ***MWB Business Exchange Centres Ltd. v. Rock Advertising Ltd*** on the basis of the legal effectiveness of a clause prohibiting oral modification, Lord Sumption stated:

> ***"[18]*** *That makes it unnecessary to deal with consideration. It is also, I think, undesirable to do so. The issue is a difficult one. The only consideration which MWB can be said to have been given for accepting a less advantageous schedule of payments was (i) the prospect that the payments were more likely to be made if they were loaded onto the back end of the contract term, and (ii) the fact that MWB would be less likely to have the premises left vacant on its hands while it sought a new licensee. These were both expectations of practical value, but neither was a*

[5] [1972] A.C. 741
[6] 1884 9 AC 605
[7] [2018] 4 All ER 21

contractual entitlement. In Williams v Roffey Bros & Nicholls (Contractors) Ltd [1990] 1 All ER 512, [1991] 1 QB 1, the Court of Appeal held that an expectation of commercial advantage was good consideration. The problem about this was that practical expectation of benefit was the very thing which the House of Lords held not to be adequate consideration in Foakes v Beer (1884) 9 App Cas 605, [1881–85] All ER Rep 106: see in particular (1884) 9 App Cas 605 at 622, [1881–85] All ER Rep 106 at 115 per Lord Blackburn. There are arguable points of distinction, although the arguments are somewhat forced. A differently constituted Court of Appeal made these points in Re Selectmove Ltd [1995] 2 All ER 531, [1995] 1 WLR 474, and declined to follow Williams v Roffey. The reality is that any decision on this point is likely to involve a re-examination of the decision in Foakes v Beer. It is probably ripe for re-examination. But if it is to be overruled or its effect substantially modified, it should be before an enlarged panel of the court and in a case where the decision would be more than obiter dictum."

21. In the case of ***Vanbergen v. St Edmunds Properties Ltd.***[8], the plaintiff debtor had agreed with the solicitors for the defendants that he would pay the amount of the debt into a certain bank by a certain time and that he would not be subject to a bankruptcy notice if he did so. The plaintiff paid the funds but because the solicitors were unaware that he had done so at the agreed time, he was served with a notice. He brought an action for damages for breach of the agreement. At the hearing, the defendants argued that the agreement was not enforceable in law on the basis of the established principle that a promise to pay a sum which the debtor is already bound in law to pay does not afford consideration to support a contract.

22. Lord Hanworth M. R. identified the essential question as being whether there was any sort of advantage or independent benefit, actual or contingent of such a kind as might be good and valuable consideration to the creditors. The learned Judge stated the summary principle as being that :

> *"A creditor cannot bind himself by a simple agreement to accept a smaller sum in lieu of an ascertained debt of larger amount, such an agreement being nudum pactum. But if there be any benefit, or even any legal possibility of benefit to the creditor thrown in, that additional weight will turn the scale and render the consideration sufficient to support the*

[8] [1993] 2 KB 223

agreement." That is dealing with the case where there is to be a smaller sum in lieu of an ascertained sum by agreement, but where there is an agreement to pay the sum due the same principle applies. Lord Selborne, in Foakes v. Beer [15] , the latest case which investigated this principle of the law, deals with it in this way. In that case there was an agreement between judgment debtor and creditor, that in consideration of the debtor paying down part of the judgment debt and costs, and on condition of his paying to the creditor or his nominee the residue by instalments the creditor would not take any proceedings on the judgment. The question was whether that was a valid agreement or a nudum pactum, and it was held that it was merely a nudum pactum, being made without consideration. There Lord Selborne, in concluding his speech upon the point under consideration, said [16] : "What is called 'any benefit, or even any legal possibility of benefit,' in Mr. Smith's notes to Cumber v. Wane [17] , is not (as I conceive) that sort of benefit which a creditor may derive from getting payment of part of the money due to him from a debtor who might otherwise keep him at arm's length, or possibly become insolvent, but is some independent benefit, actual or contingent, of a kind which might in law be a good and valuable consideration for any other sort of agreement not under seal." We have, therefore, to consider whether the agreement that was made here on July 6 was an agreement to do anything else than simply to pay on Friday, July 8, into the hand of the creditors the sum which was already ascertained and in respect of which there was not only the legal liability, but a duty enforceable by any mode of execution against the debtor."

23. The learned Judge concluded that the creditor obtained no advantage in that case which could be deemed a consideration such that it could be said that a new contract had been made.

24. In ***Williams v. Roffey Bros. & Nicholls (Contractors) Ltd.***[9], the defendants had subcontracted the plaintiff to carry out carpentry work on a block of flats at a price of GBP 20,000.00. In the course of the work, the plaintiff got into financial difficulty and sought an uplift in the sum. An oral agreement was reached that he would receive an additional sum of GBP 10,300. The defendants later declined to pay the additional sum agreed. The issue was whether the oral agreement constituted an enforceable contract, and as to whether there was any consideration attached. The English Court of Appeal upheld the decision of the trial judge that that there was consideration for the variation. The Court stated that this could be said to arise where there was

[9][1991] 1 Q.B. 1

some resulting commercial advantage to the defendants who were seeking to have the carpentry work completed on time.

25. Glidewell L.J. reviewed a number of cases and concluded that:

> *"The present state of the law on this subject can be expressed in the following proposition: (i) if A has entered into a contract with B to do work for, or to supply goods or services to, B in return for payment by B; and (ii) at some stage before A has completely performed his obligations under the contract B has reason to doubt whether A will, or will be able to, complete his side of the bargain; and (iii) B thereupon promises A an additional payment in return for A's promise to perform his contractual obligations on time; and (iv) as a result of giving his promise, B obtains in practice a benefit, or obviates a disbenefit; and (v) B's promise is not given as a result of economic duress or fraud on the part of A; then (vi) the benefit to B is capable of being consideration for B's promise, so that the promise will be legally binding."*

26. Russell LJ noted that the plaintiff had not undertaken any additional work to that required by his contract but expressed the view that the terms had been altered by a variation which was supported by a pragmatic approach to the relationship between the parties. The learned Judge stated:

> *"A gratuitous promise, pure and simple, remains unenforceable unless given under seal. But where, as in this case, a party undertakes to make a payment because by so doing it will gain an advantage arising out of the continuing relationship with the promisee the new bargain will not fail for want of consideration."*

27. Purchas LJ stated that the modern approach to the question of consideration would be:

> "*... that where there were benefits derived by each party to a contract of variation even though one party did not suffer a detriment this would not be fatal to the establishing of sufficient consideration to support the agreement. If both parties benefit from an agreement it is not necessary that each also suffers a detriment*".

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28. In the case of ***Re Selectmove Ltd*** [10] the English Court of Appeal expressed the view that the decision in ***Williams v. Roffey Bros. & Nicholls (Contractors) Ltd*** as to practical benefits amounting to consideration was to be confined to matters involving the supply of goods and services and did not apply to a situation involving a debtor. The Court held that:

> *"It was settled law that a promise to pay a sum which a debtor was already bound by law to pay was not good consideration. The principle that a promise to perform an existing obligation could amount to good consideration provided that there were practical benefits to the promisee was confined to cases where the obligation involved was a supply of goods or services. It would be impossible, consistently with the doctrine of precedent, for that principle to be extended to an obligation to make a payment. Accordingly, even if there had been an agreement between the company and the Revenue, it was unenforceable for want of consideration (see p 538 g to j and p 539 f g, post); Foakes v Beer [1881–5] All ER Rep 106 followed; Williams v Roffey Bros & Nicholls (Contractors) Ltd [1990] 1 All ER 512 distinguished."*

29. In the Grand Court in the case of ***In the matter of Jukebox L.P.***[11] the Court distinguished the case of ***Williams v Roffey Bros & Nicholls (Contractors) Ltd.*** The circumstances in that case involved an alleged oral agreement whereby a commercial lender was said to have suspended its rights to repayment of a loan. The Learned Chief Justice referred to such an oral agreement as making no commercial sense and being devoid of consideration, it being inexplicable that the lender whose very existence depended on the proper conduct of commercial lending activity could have entered into same.

30. Against the background of these cases, I accept the submissions of the Plaintiff that there was no consideration attached to the letters sent by the Plaintiff to the Defendant. The Plaintiff's argument is in effect that the purported change in interest rates was a change made without

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[10] [1995] 2 ALL ER 531
[11] [2009] CILR Note 32, Cause 292 of 2009, judgment of 8th October 2009

consideration which could not serve to irrevocably alter the rights of the Plaintiff under the Agreement. [12] It was therefore no more than forbearance.

31. The absence of consideration may well be of limited assistance in resolving the issue between the parties. The Agreement expressly provides that the Plaintiff had unilateral power to waive interest rates. In so far as the Agreement uses the word "waiver" rather than "variation" of interest rates, the distinction in the resulting effect may be a narrow but important one. The initial outcome in either case would have been a change in interest rates from 23% to 14%. On the strength of the letters, the Defendant would have been entitled to make monthly repayments going forward at the rate of 14 % percent interest. The important question is what the position is if it is no more than a waiver as distinct from a formal variation.

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32. According to ***Chitty on Contracts, 33rd Ed.*** para. 22-044, a waiver is distinguishable from a variation by the absence of consideration and may be analogous to an estoppel which in order to be effective must not only be clear and unequivocal but the other party must either have acted upon it or altered his position in reliance on it.

33. In ***WJ Alan & Co. Ltd El Nasr Export & Import Co[13].*** Lord Denning M.R. stated:

> *"The principle of waiver is simply this: If one party, by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict legal rights when it would be inequitable for him to do so: see Plasticmoda Societa per Azioni v. Davidsons (Manchester) Ltd. [1952] 1 Lloyd's Rep. 527 , 539. There may be no consideration moving from him who benefits by the waiver. There may be no detriment to him by acting on it. There may be nothing in writing. Nevertheless, the one who waives his strict rights cannot afterwards insist on them. His strict rights are at any rate suspended so long as the waiver lasts. He may on occasion be able to revert to his strict legal rights for the future by giving reasonable notice in that behalf, or otherwise making it plain by his conduct that he will thereafter insist upon them: Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd. [1955] 1 W.L.R. 761. But*

[12] Paragraph 4-083 of Chitty on Contracts 33rd Ed.
[13] [1972] 2 Q.B. 189

there are cases where no withdrawal is possible. It may be too late to withdraw: or it cannot be done without injustice to the other party. In that event he is bound by his waiver. He will not be allowed to revert to his strict legal rights. He can only enforce them subject to the waiver he has made."

36. I accept the submission of the Plaintiff that the legal position is that the Defendant cannot place reliance on the waiver (if waiver it was) when he did not act upon it. In this case the Defendant made no payments following on from the 30th April 2015 correspondence. It follows that the Plaintiff would have been entitled to enforce the debt in terms of the Agreement at the interest rate of 23%.

37. If I am wrong as to the conclusion on consideration, either as to there being a need for same or the absence of same, in that it can be said that there was some consideration however nebulous, for example good commercial relations or the anticipated practical benefit of more timely repayment of the debt, and thus wrong as to whether the letters amounted to a waiver as distinct from a variation, for the reasons set out below, in my view this will have limited impact on the ultimate conclusion.

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NATURE OF THE VARIATION OR WAIVER

38. A second argument made by the Plaintiff was that even if there were a variation, the variation would be to Clause 3, which refers to monthly interest payments and not to clause 4 of the Agreement which refers to default interest.

39. Counsel on behalf of the Plaintiff submitted that the letter of 30th April 2015, suggests that payments were to commence on 30th June 2015. No payments were made and thus the default

clause in the contract became effective. It was submitted that this is an entirely separate clause in the event of default and constitutes a separate legal obligation. There had been no variation of default interest, as this could not be said to have been contemplated by the letters. In the event of default on the loan, the default term of the contract would be triggered. To the extent that the Defendant can benefit from a variation, it is only for a one month period to June 2015. Thereafter he fell into default at an interest rate of 23% as all other conditions of the Agreement remained in force.

40. The Defendant in reply submitted that the level of interest in both circumstances was the same and that at the point in time of the letters, the Defendant was already in default so that the default provision had been triggered by then. Counsel submitted that at the point of the first letter, it should be construed as relating to both sets of interest. Further that the Plaintiff must have been talking about default interest because the Defendant had in fact defaulted. Thus there was non-payment so that the letter of 25th April 2015 must be referring to default interest.

41. I find it difficult to accept the submissions of the Defendant on this aspect. In my view the letter of 25th April 2015 can only be a reference to the monthly interest. It is plain from the wording of it, that at the urging of the borrower the parties were electing to renegotiate. In effect this was an attempt to re-set the position by reducing the monthly interest rate and determining new monthly payments going forward. Significantly, the letter clearly states that "*all other terms and conditions of the original loan agreement dated 27th August 2014 remain in force*".

42. I conclude that the Defendant has not satisfied me on balance that this letter of 25th April 2015 has anything to do with default interest payments.

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SATISFACTION OF CONDITIONS

43. The Plaintiff's further argument was that in any event the Defendant failed to make any payments at all and that when he so failed the Agreement reverted back to its original terms. The Defendant did not meet the condition for variation to be triggered as he had made no payments as agreed. The two letters can only be read to mean that the Plaintiff intended to take legal action upon *the original terms* if the Defendant did not comply with the newly agreed terms.

44. The Defendant submitted in response that the second letter did not make the new interest rate subject to any condition and does not refer to reverting to the original terms as did the first. While this is correct, the second letter referred to one change, to wit pushing back the start date as proposed in the first letter, to June 2015 at the request of the Defendant and amortizing over 48 months rather than 36 months. Importantly it refers to the first letter and sets out what the sole requested change would mean.

45. I accept the submission of the Plaintiff on this point that the second letter of 30th April 2015 can only be read in light of the first letter of 25th April 2015. It follows that both were subject to the caveat that all other terms and conditions as per the original Agreement remained in force. Further the clear import of the letters is that if the Defendant failed to meet the condition of commencement of repayments, the Agreement reverted back to its original terms and back into the hands of the Plaintiff's Attorneys for proceeding with legal action.

46. Having defaulted on the loan and with legal action being imminent, the debtor secured adjustments to the monthly interest rates on the loan on the basis of a promise to commence repayments. He did not keep his promise and now claims that although he did not keep his

promise, the creditor is obliged to maintain the adjustment made. This claim is not reflective of the position set out in the letters.

CONCLUSION

47. I conclude there was no consideration such as to make the letters enforceable as a variation of the contract. This may not be as significant a factor as the Agreement specifically provided for the waiver of interest rates at the unilateral option of the Plaintiff. The determinative factor in my view is that, on the plain reading of the letters, any possible variation (or waiver) was specifically as to monthly payments going forward. Thus the letters can only be construed as referring to Clause 3 of the Agreement and of note is that they (read together) contained an express statement that all other terms and conditions remained in force. The default interest term which therefore remained unchanged was triggered for a second time when in June 2015, the Defendant failed to pay the new monthly sum as agreed.

48. In any event in so far as the letters can be construed as amounting to a unilateral waiver of the interest rates on the part of the Plaintiff, (which did not require consideration), the Defendant failed to act upon the waiver in any way and most importantly he did not meet the condition of payment which was set out therein.

49. The Defendant elected to raise no additional issues in response to the claim and elected not to give evidence in proof of his case. There is no other evidence before the Court on this aspect. As invited by the parties, the case is determined on the basis of the contents of the two letters detailed above.

50. I accept both the primary and secondary arguments put forward by the Plaintiff and conclude that the Defendant is liable to pay default interest on the Loan at 23% as agreed to in Clause 4 of the original Loan Agreement and that he owes the sum of $26,739.86 as at the date of this hearing.

COSTS

51. At the hearing, the Plaintiff indicated that contractual costs at the point of issue of the proceedings would not be pursued. However an application was made for costs on an indemnity basis for costs subsequently incurred. It was submitted that the Defendant had pursued the matter only to abandon his position as to an oral variation of the Agreement on the very day of trial.

52. In response, Counsel on behalf of the Defendant submitted that the Plaintiff had also abandoned part of its claim in respect of the matter and that the focus of the Defendant had been on the entirety of the claim as pleaded by the Plaintiff. While the Defendant has to accept that he agreed to pay some interest, there had been no reference to the letters on the Plaintiff's case.

53. In the cited case of ***Al Sadik v. Investcorp Bank BSC and Five Others***, Jones J. considered the Court's powers to make indemnity costs pursuant to GCR O.62 r.4(11) and 11(2). He noted that while the application of both rules depends upon establishing that a party has behaved improperly, unreasonably or negligently in some way, he thought that the aim of these rules is to deal with substantive misconduct either by a party or procedural misconduct by a party or his attorney which causes their opponent to waste money on legal fees and expenses which would not otherwise have been incurred.

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54. The learned Judge referred to the decision of Kellock J. in ***Nike Real Estate Ltd. v. De Bruyne***[14] as a case with circumstances illustrative of substantive misconduct. In that case an order for indemnity costs was made against the defendant where a key witness had lied to the Court and the Court found that its process had been abused because the witnesses had colluded together in advance of the trial and put forward a deliberately dishonest case.

55. In relation to procedural misconduct, Jones J, said:

> *"14 In my judgment, a proceeding, or some identifiable part of it, can only be said to have been conducted "improperly" within the meaning of r.4 (11) if the court is satisfied, in all the circumstances of the case, that a party has invoked the court's jurisdiction illegitimately or abused the process in a way which attracts moral condemnation. A party who asserts a cause of action when he knows that he has no legitimate basis for doing so is acting improperly. Pursuing an action for some ulterior motive is an abuse of the process which may be categorized as improper."*

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56. The learned Judge noted further that unreasonable conduct falling short of impropriety can lead to an indemnity costs order under r.4.11 if it can be characterized as substantive misconduct.

57. In the case of ***Bennett v. Attorney General***, Henderson J. discussed the difference between maintaining a defence which is merely weak and unlikely to succeed and maintaining one which is manifestly hopeless. The learned Judge stated that advancing a case which is merely weak or unlikely to succeed, may not be unreasonable in the typical case. Weak cases would succeed from time to time and a litigant may prefer to have a judicial determination on a matter rather than accept the advice of his attorneys. He then stated:

> *"There are also cases which are hopeless and which appear that way to anyone with the requisite legal training. It is open to a judge to determine that it was unreasonable to bring such a claim or advance such a defence. The usual result of such a finding is that the unsuccessful party will pay costs on an indemnity basis."*

[14] [2002] CILR 233

58. In this case I do not think that the conduct of the Defendant rises to the level which should attract indemnity costs. While it is unfortunate that the change in position on the facts was only put forward at the last minute after there had been much preparatory work on the case, ultimately he pursued a legal argument which did not succeed but was at least arguable.

59. The Defendant should pay the costs of the Plaintiff on the standard basis to be taxed if not agreed.

Dated this the 9th day of November 2019

Honourable Justice Cheryll Richards Q.C.
Judge of the Grand Court