

IN THE SUPREME COURT OF BELIZE, A.D. 2013

CLAIM NO: 349 of 2013

BETWEEN

SANDRA RIVEROLL

CLAIMANT

AND

SCOTIABANK (BELIZE) LIMITED

DEFENDANT

Keywords: Loan by Bank; Business and Residential Mortgage;
Mistake in Payment of Loan;

Whole-Life Insurance Policy; Disappearance of
Policy Holder; Up-Stamping of Mortgage;
Presumption of Death; Reimbursed for Payments to
Bank on Presumption of Death; Compulsion, threats
and Coercion By a Bank; Default on Loan Payment;
Doctrine of Relation Back; Obligation to Pay Loan
where There is Presumption of Death;

Restitution; Recovery of Money Paid under a
Mistake.

Before the Honourable Mr. Justice Courtney A Abel in Open Court

Hearing Dates: 20th February 2014
14th May 2014
20th June 2014

Appearances:

Mrs. Ashanti Arthurs Martin for the Claimant.

Mr. Edwin Flowers S.C. for the Defendant.

JUDGMENT
Delivered on the 20th day of June 2014

Introduction

- [1] On the 30th September 2001 the Claimant's husband, along with his brother-in-law together with two employees, disappeared from the brother-in-law's farm in the Stann Creek District of Belize, never to be seen again. He was later legally presumed to have died on this date.
- [2] This unusual case involves consideration of the financial consequences to the Claimant in her relationship with her bank, the Defendant, arising from her husband's disappearances, and what financial liabilities flow or arise in relation to loans which the Claimant had with the Defendant as between the Claimant and the Defendant, from such disappearance.
- [3] The Claimant had commenced this claim against the Defendant in relation to \$67,977.72 which the Claimant claims that she mistakenly paid to the Defendant between the disappearance of the Claimant's husband and October 2010 when the High Court ordered that the husband's death may be presumed as of the date of the disappearance.
- [4] The Claimant claims that she should not have paid this sum of \$67,977.72 and that it should therefore be credited to her as against another loan which she had with the Defendant.
- [5] The Defendant denies that the Claimant is entitled to have this sum returned or credited to her and that any loss should be borne by the Claimant not the Defendant.

Background

- [6] The background facts of the present case, which is almost either largely uncontested or unchallenged, can be set out fairly briefly. If these facts, which I now set out, are disputed in any material particular (which I do not anticipate) then they may be considered summary findings of facts by me.

- [7] The Claimant and her husband in 1997 became the owners of a lot of land in Orange Walk District of Belize¹, and the Claimant (in her sole name) in 2000 became the owner of a lot on Park Street, Orange Walk Town². These lots of land subsequently became known respectively as Parcels 3772 and 1896, Block 4 in the Orange Walk Town Registration Section. The former has remained vacant (and I will hereafter refer to it as “the vacant lot”) and the latter was subsequently built on with a residential building as the Claimant’s home (and I will hereafter refer to it as “the residential lot”).
- [8] In or around 1998 the Claimant and her husband applied for and were granted a small business loan of \$15,000.00 partly³ secured by a Deed of Mortgage over the vacant lot (which I will refer to as (“the business mortgage”) which loan over the years⁴ increased to \$67,496.00, and was eventually brought down to \$60,340.52⁵.
- [9] On the 7th February 2001 the Claimant executed a Deed of Mortgage with the Defendant (“the residential mortgage”) of a residential loan in the sum of \$103,000.00., (“the residential loan”) to build a home on the residential lot securing repayment of it with the residential lot⁶.
- [10] On the 14th September 2001, in relation to the residential loan the Claimant and her husband signed a promissory note with the Defendant to repay the residential loan and they both purchased and signed a joint life insurance coverage through the Defendant of up to \$200,000.00 bearing the name the Scotia Loan Life Insurance Program, to secure the repayment of this loan in the event of the death of either of them as borrowers (“the life insurance policy”).

¹ Lot 842 by virtue of Minister’s Fiat Grant No. 623 of 1997.

² By Deed of Conveyance dated 16th August 2000 and Deed of Rectification made the 13th day of January 2001.

³ As security of \$7,000.00.

⁴ 19th April 2002 increased by \$10,000.00; 11th March 2003 increased by \$5,000.00; on 30th April 2004 increased by \$25,000.00; 31st March 2005 increased by \$4,820.00. In or around 28th April 2005 the loan was consolidated with a term loan of approximately \$25,000.00 and a smaller loan of \$4,820.00 all of which then stood at \$67,496.00.

⁵ At the time when the Claimant made her last payment on the 13th September 2006.

⁶ It is not clear on the evidence but it has been suggested by the Defendant that the residence on the residential lot was completed in September 2001.

[11] The Enrollment Form for the life insurance policy⁷ stated as follows:

- (1) In the event of the death of the principal borrower or co-borrower where joint coverage is purchased, the Insurer will pay to the Bank the Insured loan balance, principal and accrued interest, outstanding on the date of death, with respect to all insured loans, up to the total maximum amount of insurance, as specified in the group policy mentioned in the Certificate of Creditor. Life Insurance issued to the Borrower and as indicated above. In event of any inconsistency between the maximum amount of insurance specified in the group Policy and the maximum amount of insurance specified above, the group policy shall prevail” (No. 9, Terms and Conditions).
- (2) The maximum amount of insurance for the mortgage was BZ\$200,000.00.
- (3) The Benefit is that ‘the indebtedness then outstanding at the date of death where the initial or the renegotiated amount of the Mortgage Loan is BZ\$200,000.00 or less or, the proportion of the indebtedness then outstanding at the date of death the BZ\$200,000.00 bears to the initial or renegotiated amount of the loan, where such amount exceeds BZ\$200,000.00 will be paid to the Bank upon receipt of satisfactory proof of death of the insured Borrower and approval of the Claim, in accordance with all the terms and conditions of the Group Policy (see BENEFIT)
- (4) As to eligibility, insurance is only available on loans which are not in arrears at the time of the enrollment. The Borrower must be at least 18 years of age in order to apply for coverage, but must not have attained 65 years of age. Borrowers who have previously waived, or who have previously been declined for, coverage are not eligible.
- (5) The insurance policy commenced on 14th September, 2001, the date the application for insurance was completed.

⁷ A copy of the life insurance policy, and of its full terms, was not presented to this court in evidence.

- [12] The Claimant's husband was a wholesaler who would spend his week days making deliveries in various districts, and would return to Orange Walk on the weekends.
- [13] On the weekend of 30th September 2001, however, just over two weeks after the loan was signed, the Claimant's husband and his two employees, in order to complete deliveries in the Stann Creek District of Belize, decided to stay at his brother-in-law's farm in this district apparently with the intent to return to Orange Walk for his son's birthday on 4th October 2001.
- [14] But on 30th September 2001 all three persons disappeared from the farm and following subsequent investigation by the police, disappeared without trace.
- [15] The Claimant testified to suspicious circumstances surrounding the disappearance of her husband including that he ordinarily returned home every Friday and (as already noted) that he intended to be back in Orange Walk on Thursday 4th October 2001 for his son's birthday and despite police investigation, the Claimant's husband was never found.
- [16] The Claimant testified, which I accept, that in or about 2002 she attended at the Defendant's Orange Walk Branch and spoke to Ms. Espadas, the loan officer, about the loan and realizing at that point that her husband would not be returning home she queried what could be done about the residential loan. Ms. Espadas promised to consult the Belize City branch and obtain instructions as to what could be done.
- [17] At a subsequent meeting the Claimant was informed by Ms. Espadas, that there was no way that the Bank could be certain that her husband had died, that until 7 years had expired she should continue to make payments on the residential loan.
- [18] Apparently due to the fact that the Claimant's husband had gone missing and that his body was never found, the insurance policy effected through the Bank was not 'immediately activated' as the insurance Company apparently indicated that payment could not be made until after seven years had passed from the date of disappearance.
- [19] The Claimant testified:

- (a) That she was advised by officers of the Defendant to wait 7 years before she could petition the Court for a declaration that her husband should be presumed dead. But that in the meantime she, the Claimant, should continue to make the monthly payments towards the residential loan secured by the residential lot by the residential mortgage until the expiration of 7 years when the Claimant's husband could be presumed dead.
- (b) That she was informed by the Bank that she was obliged to continue to make the payments, otherwise the Bank would foreclose on the mortgage over her home and her home would be sold in satisfaction of the debt.
- (c) That she was further advised by the Bank that if she continued to make the payments and her husband was presumed dead, the insurance company would pay the residential loan and the Claimant would be reimbursed for payments made to the Bank after the date of presumed death (the Defendant denies this allegation).
- (d) That she therefore made the payments under the belief that she was obliged to do so until her husband was presumed dead.
- (e) That as a result of compulsion and coercion of the Defendant, who threatened to foreclose on the Claimant's home if payments were not made that she made the payments on the residential loan⁸.

[20] No doubt, however, that the Claimant, even without any compulsion or coercion from the Defendant, would have felt that the threat would have always been looming over her that if she defaulted on the payments on the loans the Defendant would move to enforce its securities which it held.

[21] The Claimant business has a children's clothing store in Orange Walk from which she earns her living. However, due to the financial strain to pay the residential loan, according to the Claimant, she could not properly stock her store.

⁸ [1] The Defendant denies that the Defendant or any of its representatives coerced the Claimant into making her loan payments to the Defendant. This aspect of the Claimant's case will therefore be dealt with separately as it has been contested.

- [22] As a result of the financial strain on her, the Claimant alleges, which I accept, that in 2004 and 2005 she had to obtain a Small Business Loan from the Defendant to finance her business.
- [23] Thereafter, apparently, the Claimant increased the business line of credit to secure \$44,820.00 plus a business loan of \$25,000.00 as a result of which increase the residential mortgage was bit by bit upstamped to \$160,000.00⁹. The decision to upstamp the residential mortgage as security was taken, it was accepted by the only witness for the Defendant, and which I therefore accept, by the Defendant, and was done without the knowledge of the Claimant.
- [24] I also accept that on or around the 18th day of October, 2005, the Claimant did inform the Bank that she was in the process of selling the vacant lot to her brother for \$10,000.00 in an effort to reduce her indebtedness to the Bank which sale was expected to have finalized by the 24th day of October, 2005, and thus agreed to make installment payments of \$1,400.00 towards her loans and to resume such payments in November of 2005.
- [25] The Defendant therefore made payments, even if sporadically, on the residential loan, until in or about 4th July 2006 when she could no longer afford to make further payments when at this time she realized that she could no longer afford to pay the loans and re-stock her business from the income she generated from the business and it was a result of this situation that she did not therefore do so.
- [26] As at 13th September 2006 the business loan stood at \$60,340.52. This sum is approximately \$7,000.00 less than the Claimant paid towards the residential loan, at the insistence of the Bank.
- [27] I am also prepared to accept that the Claimant again, in or around the 29th day of January, 2007, made a payment arrangement with the Defendant and agreed to pay \$300.00 towards her business loan and committed to increasing that sum within six months thereafter.

⁹ In or around the 15th day of May, 2002, by the sum of \$10,000.00; in or around the 26th day of March, 2003 by the sum of \$10,000.00; in or around the 11th day of May, 2004, by the sum of \$31,000.00; and, in or around the 7th day of June, 2005, by the sum of \$6,000.00.

[28] Furthermore, by July 2007 the Claimant had already paid \$67, 977.72 on the residential loan which, no doubt, she expected, for whatever reason, to be returned to her when the insurance company paid out the residential loan, or otherwise credited the business loan.

[29] The Defendant's Legal Counsel in a correspondence to the Claimant dated 29th May 2008, stated that:

"We are further of the opinion that in the circumstances of this case it was your client's duty to continue to make the payment of principal and interest up to the end of September 2008 when the presumption of death would arise.

Although there is no presumption as to the date of death within the seven year period, as a rule the date of disappearance is a more probable date of death than any other time during the seven years. Therefore the 20th September 2001 would be the date of death, and the insurance payment would be the principal and interest owing at that date. Any principal and interest due would be taken by the Bank and the excess paid over to your client."

[30] By Order of the Belize Supreme Court dated 7th October 2010, the Claimant's husband was indeed presumed to be dead as at 30th September, 2001.

[31] On 3rd January 2011 the insurance company duly paid off the sum of \$92,190.24 or \$94,069.81¹⁰ towards the residential loan in settlement of the claim¹¹, leaving a balance of \$55,611.22 of accumulated interest - which latter sum was written off or waived by the bank closing off the indebtedness to the Defendant, as it relates to the residential loan.

[32] To date the Claimant has not been credited with the monies (\$55,611.22) she paid to the Bank after 30th September 2001 when her husband was presumed dead, nor has the Bank credited these monies to the business loan.

¹⁰ The precise amount being unclear but uncontroversial.

¹¹ Although at the date of the Claimant's presumed death the loan principal on the residential loan had been \$103,000.00.

- [33] As at the 23rd day of September, 2013, the outstanding balance owed by the Claimant to the Defendant for the business loan totaled \$158,715.99, which, the Defendant claims remains due and payable by the Claimant to the Defendant with both the vacant and the residential lots remaining as security for the said indebtedness.
- [34] The Defendant denies being liable to the Claimant as alleged or at all and alleges it should therefore be awarded its costs in defending this claim.

The Court Proceedings

- [35] On the 19th June 2013 the Claimant filed an Application, supported by the First Affidavit of the Claimant, for an urgent Injunction against the Defendant to restrain the Defendant from selling the Claimants two parcels of land (the vacant and the residential lot).
- [36] This injunction application was heard on the 22nd July and a consent order was made on the 21st June in which the Defendant undertook not to proceed with a proposed auction of the Claimant's property and also consented to certain directions for the further progress of the case until the return date on the 19th July 2013.
- [37] On the 5th July 2013, pursuant to directions given by the Court, the Claimant filed a Fixed Date Claim Form, supported by a 2nd Affidavit of the Claimant, against the Defendant, claiming various Declarations and orders.
- [38] On the 19th July 2013, again by consent, certain directions were given for the parties to further progress the case and for a further case management conference on the 4th November 2013.
- [39] On the 27th August 2013, pursuant to directions given by the court, the Claimant filed and served an Amended Fixed Date Claim Form supported by a Third Affidavit of the Claimant.
- [40] In the Amended Fixed Date Claim Form the Claimant sought the following reliefs:
- (1) A Declaration that the Claimant's liability and obligation to pay Residential Loan No. 61204 in the sum of \$103,000.00 was extinguished on 30th

September 2001, the presumed date of death of the Claimant's husband and insured co-borrower of the said loan.

- (2) Repayment of the sum of \$67,977.72 being money paid by the Claimant to the Defendant between the period 15th October 2001 and 4th July 2006 under the mistaken belief that the Claimant was obligated to make loan payments until the expiration of 7 years from 30th September 2001 when her husband would be presumed dead.
- (3) Alternatively, repayment of the sum of \$67,977.72 being money paid by the Claimant to the Defendant between the period 15th October 2001 and 4th July 2006 at the compulsion and coercion of the Defendant when it had no legal entitlement to receive and retain the said money.
- (4) Alternatively, a Declaration that the Defendant wrongly received the sum of \$67,977.72 from the Claimant and holds same in trust for the Claimant.
- (5) A Declaration that the Defendant was obligated to apply funds held in trust for the Claimant against the Small Business Loan.
- (6) An Order directing the Defendant to apply the said sum of \$67,977.72 against the Claimant's Small Business Loan with the Defendant.
- (7) Alternatively, an Order that the Defendant returns the sum of \$67,977.72 to the Claimant, together with interest thereon.
- (8) Interest on the said sum of \$67,977.72 pursuant to sections 166 and 167 of the Supreme Court of Judicature Act.
- (9) Such further and other relief as may be just.
- (10) Costs.

[41] On the 27th September 2013 the Defendant filed and served an Affidavit in Answer, of Elsie Benavidez, the manager of its Belama Branch.

[42] At the 1st hearing on the 4th November 2014 it was agreed that the issue of liability in the claim be first and separately tried before the issue of quantum and directions

was given for service of further Affidavits, agreement of costs, and the trial of the preliminary issue.

[43] The Claimant then filed and served in response the following Affidavits in support of its claim:

- (1) The Fourth Affidavit of the Claimant sworn to and filed herein on the 11th October 2013.
- (2) The Affidavit of Hernan Urbina, the Claimant's father, sworn to on the 28th November 2013 and filed herein on the 29th November 2013.
- (3) The Affidavit of Eda Carballo, a good friend of the Claimant, also sworn to on the 28th November 2013 and filed herein on the 29th November 2013.

[44] The Defendant, as directed by the Court, filed and served on the Claimant a Pre-Trial Memorandum on the 30th January 2014 (which contained statement of the nature of the proceedings, details of admissions made, its factual and legal contentions, a statement of the issues to be determined at the trial, and its legal submissions supported by legal authorities).

[45] The Claimant served detailed Skeleton Arguments dated 20th February 2014 supported, with its authorities, on the day that the case came up for trial.

[46] Both Counsel for the parties agreed that the main thrust of the Claimant's case can be determined by the court on the basis of the uncontested evidence.

[47] As noted above much of the factual evidence of the parties agree in all material particulars but where there has been a contest in relation to them it has concerned secondary issues relating to whether the Defendant (by its employees) informed the Claimant that she would be reimbursed for payments made to her loan account during the time of her husband's disappearance or coerced the Claimant into making such loan payments.

The Issues to be determined at the trial of the Preliminary Issue.

[48] The legal issues for determination at the trial of the preliminary issue are:

- (a) Whether the Claimant had any legal obligation to continue to pay the residential mortgage after the disappearance of her husband on the 30th September 2001 in accordance with the mortgage deed of the 7th February 2001?
- (b) Whether the Defendant was obliged to automatically freeze the mortgage payments after the disappearance of the Claimant's husband?
- (c) Whether the Claimant in paying approximately \$67,977.72 to the Bank after the disappearance of her husband was mistaken in her belief in so doing that she was obliged to do so, and the Defendant wrongfully received such payments from the Claimant and in consequence is entitled to recover the said monies?
- (d) Whether, even if not on the ground of mistake, the Claimant has a right to recover the sum of \$67,977.72 paid to the Bank as monies had and received?
- (e) Whether the Defendant was obliged to apply the moneys paid by the Claimant towards the business loan?

[49] As noted above the factual evidence in dispute concerns whether the Defendant (by its employees) informed the Claimant that she would be reimbursed for payments made to her loan account during the time of her husband's disappearance or in any way coerced or threatened the Claimant into making such loan payments.

Whether the Defendant (by its employees) informed the Claimant that she would be reimbursed for payments made to her loan account during the time of her husband's disappearance or in any way coerced or threatened the Claimant into making such loan payments.

[50] The Claimant testified that she made the payments on the residential loans because:

- (a) She was laboring under the mistaken belief that she was obliged to do so as a result of the Defendant's officers advising her that as her husband could

not be presumed dead until the expiration of 7 years after his disappearance.

- (b) She had to do so.
- (c) Out of fear that if the payments were not made the Defendant would foreclose on her properties including the house in which she and her son resided.
- (d) In the belief that when death was presumed the insurance would pay off the loan as it stood at the date of her husband's death.

[51] The Claimant testified that she was informed by the Defendant's officers that, once the insurance company made the payment, she would be reimbursed for monies that she had paid between the date of her husband's disappearance and the date he is declared to be dead.

[52] The Claimant relied on correspondence from the Defendant's Counsel dated 29th May 2008 in which the Defendant's Counsel stated that "*30th September 2001 would be the date of death, and the insurance payment would be the principal and interest owing at that date.*"

[53] The Claimant specifically accepted in her evidence that it was in April 2002 (approximately 7 months after her husband had disappeared), that she first approached the bank for an additional advance on the business loan, as at that time she could not bear the financial burden of having to support her family, meet the residential loan payments and re-stock her business, when the Defendant's officer, Ms. Espadas, informed her that the Defendant had confirmed that she must continue making the monthly loan payments as the Defendant could not be certain that her husband had died until the 7 years passed.

[54] The Claimant testified that on several occasions thereafter, another officer of the Defendant, one Ms. Benavidez, repeated the Defendant's position that she must continue making the payments for the residential loan; and maintained, in the face of the Defendant's denial, that the Defendant did coerce her to make payments.

- [55] The Claimant further testified that a further officer of the Defendant, not only the above officers of the Defendant's Orange Walk Branch, but an officer of the Belize City Branch, Mr. Elvis Perez, told her that she must make the payments, and that she distinctly recalled that during a meeting with this officer he recommended that she ask family and friends for assistance to meet her obligations.
- [56] Further, the Claimant testified that if she was late with any payment she was bombarded with phone calls from the Belize City branch and was notified that if she did not make the payment the loan would go into default and she would lose her home, and as a result of which she, the Claimant, eventually had to sell her jewelry, her vehicle and even had to sacrifice her son's high school education to try to meet loan payments and even borrowed from family and friends to make the loan payments, including from her father, who loaned her money on several occasions, so that she could keep her home.
- [57] The Claimant accepted in her testimony, that the Defendant's officer at Orange Walk sympathized with her situation, which was felt to be unique, but nonetheless explained that there was nothing the Bank could do, in the interim, until the 7 years had passed and her husband could be presumed dead.
- [58] The Claimant relied not only on the oral position of the Defendant but also on the written correspondence of the Defendant, in particular a letter from Counsel for the Defendant who wrote to the Claimant's then attorney, Mr. Oscar Sabido SC, and advised that "*in the circumstances of this case it was your clients' duty to continue to make the payment of principal and interest up to the end of September 2008 when the presumption of death would arise.*"
- [59] The Claimant testified that she did not become aware of the mistake and the fact that she had no legal obligation to make loan payments to the Defendant until in or about April or May 2008 when she was advised by Mr. Oscar Sabido, Attorney-at-Law, who accordingly demanded that the Defendant re-imburse her for monies paid towards principal and interest after 30th September 2001.
- [60] Under cross-examination the Claimant, however, insisted that if the residential loan had been frozen she would not have had to borrow; that she could easily have

managed her business loan and let the insurance take care of the residential loan but she needed to service both loans, which the Defendant's officers explained to her had to be serviced.

[61] The Claimant's father Hernan Urbina gave unchallenged testimony that in or about September 2008:

- (a) The Claimant contacted him and requested that he accompany her to a meeting at Scotia Bank.
- (b) That the Claimant was going through a hard time as she was struggling with her business and could not make payments to the bank.
- (c) He had loaned monies to the Claimant to assist her in meeting payment obligations to the bank.
- (d) That on 30th September 2008 the Defendant's officer, at a meeting at which he was present, mentioned (more than once he claimed) that the Claimant's case is a unique case and testified that the Defendant's officer stated that neither she nor the Belize City branch knew how to handle the case, but that notwithstanding the uniqueness of the case, the Claimant must continue to make payments on the loan until she obtained a death certificate for her husband.
- (e) The Defendant's officer, Ms. Benavidez, then reviewed the Claimant's loan history and compared the total amount the Claimant had paid up to that date, versus her total indebtedness, and wrote this information on a yellow paper (which was produced to the court and exhibited), which he (the witness) dated on the same day so that they could recall when he and the Claimant had that conversation with this officer.

[62] The Claimant's father further testified that in or about 2010 he also accompanied the Claimant to a meeting at Scotia Bank in Belize City, and that during that meeting:

- (a) The Claimant was informed that she had a balance and the Bank wanted to know how she would pay.

- (b) The Claimant then informed the officer that the loan was to be paid by the insurance company.
- (c) That the bank was to reimburse her for moneys spent in trying to keep payments current, and after which;
- (d) The officer then insisted that there was a balance and he needed to know how much the Claimant could pay and then encouraged the Claimant to borrow from family and friends to pay the loan.

[63] The Claimants father also personally confirmed that the Defendant had pressured the Claimant to make payments on the loan, both before and also after the Claimant had obtained the Order of the Court declaring that her husband was dead.

[64] The Claimant's good friend of over 30 years, one Eda Carballo, also testified on the Claimant's behalf and gave unchallenged testimony that:

- (a) She was aware in 2001 of the Claimant's husband's disappearance and the emotional and financial difficulties which the Claimant experienced as a result and of the assistance which the witness gave to the Claimant.
- (b) In or about 2004 and 2005 the Claimant started to default on her loan obligations;
- (c) She was present with the Claimant on many occasions when persons would call on behalf of the Defendant to demand payment from the Claimant, who at some point became so frustrated that she would refuse to answer her phone as she knew it would be collectors on behalf of the Defendant.

[65] Ms. Elsie Benavidez, was the only witness for the Defendant and under cross-examination accepted that:

- (a) The decision of which property to upstamp was a decision of the Defendant by looking at the value of the property; and as she considered the vacant lot could not take any more, the residential lot was used to secure the business loan even though the business and residential loan accounts were kept separate.

- (b) The principal on the residential loan remained at \$103,000.00.
- (c) The Claimant was advised what would happen if she did not continue to make the payments which was that the insurance could not accept a claim from the Defendant unless a death certificate was presented and that if the Claimant defaulted on the loan the Defendant would enforce the security – would seek to sell to recover the loan.
- (d) The insurance policy covered the amount of principal and interest up to date of death.
- (e) The Defendant waived the interest outstanding which was \$55,000.00 and
- (f) If the Claimant did not pay the \$67,000 she would have had that to pay on the business loan.

The Court's Findings of Fact in Relation to the Disputed Issues

[66] I accept, on balance, the Claimant's evidence that the Defendant's officers did advise her (the Claimant):

- (a) That as her husband could not be presumed dead until the expiration of 7 years after his disappearance she had to make payments on the residential loans until after 7 years when the Claimant's husband could be presumed dead and that when death was presumed the insurance would pay off the loan as it stood at the date of her husband's death
- (b) She would be reimbursed for monies that she had paid between the date of her husband's disappearance and the date he was declared to be dead.
- (c) When she was late with payments she received phone calls from the Defendant (by it officer(s)) and was informed that if she did not make the payment she would lose her home.
- (d) As a result of which the Claimant eventually had to sell her items, borrow money from her father and others and made other sacrifices to try to meet the loan payments.

- [67] Much of the Claimant's evidence from the witness box and under cross-examination was forthright and convincing and was amply supported by the unchallenged evidence of her witnesses, most of which this court carefully considered and eventually accepted (even though such evidence might ordinarily be viewed with some suspicion and even discounted coming as it does from her close relative and a very close friend).
- [68] Although I have made these findings, on the contested facts, I do not find however, that such mistaken advice did rise to the level of coercion or threats by the Defendant to make the loan payments on the business or residential loan.
- [69] It seems to me to be one thing to say and accept on the balance of probabilities that there was erroneous or mistaken advice given but quite another thing to say that such error or mistake rises to the level of threats or coercion.
- [70] For threats or coercion to be found the court would have, in my view, to treat the Claimant as not having any responsibility to seek legal advice and take her own legal advice and recourse which I believe the Claimant was at all times free to do - and in fact did eventually. The Claimant has to take some responsibility for her own actions which she was free to do at all times to protect her own interest.
- [71] It is one thing to acknowledge that a bank has a responsibility to its customers to advise them to seek their own legal advice or if it gives such advice to ensure that it is not erroneous or mistaken; but another matter entirely to suggest that by its servants or agents or manager giving such advice (in an area that may be novel or does not readily admit of a routine answer) that such advice amounts to threat or coercion.
- [72] In any event there was clear evidence that the Defendant was somewhat sympathetic to the Claimant's situation and ultimately by waiving a lot of interest was far from threatening or coercive in its approach to the Claimant.
- [73] For the Court to arrive at a finding of threat or coercion there would have, in my view, to be cogent evidence of bad faith or mala fides on the part of the Defendant which, in my view, was completely absent on the facts of this case.

The factual and legal contentions of the parties to the proceedings

- [74] The Claimant alleges that had the Bank not demanded payment in the intervening 7 years while the Claimant awaited the Order or presumed death from the Court, the Claimant would have had the use and benefit of the \$67,977.72 paid to the Bank, and would not have incurred a principal debt of \$60,340.52 which, as of 30th October 2012, stood at \$149,670.09 and continues to accrue interest at 18% per annum.
- [75] The Claimant claims that the Defendant should not have collected payments to the residential loan during the 7 year period that it took the Insurance to pay, and what was paid should have been applied to her business loan.
- [76] The Defendant contends that there is an outstanding balance due by the Claimant to the Defendant on the business loan which totals \$158,715.99 which remains due and payable by the Claimant to the Defendant and that parcels 1896 and 3772 remain as security for this indebtedness.
- [77] There has been no counterclaim by the Defendant for the sum which the Defendant alleges the Claimant owes it and that the Defendant is free to realize this sum by executing its security.
- [78] I will now set out fully the legal position in relation to their case.

The Law

- [79] It would appear that the insurance policy was a whole-life policy and is usually made payable when, and upon, reasonable proof of the death of the assured, which ought to be satisfactory to the directors of the insurance company¹².
- [80] It is to be noted that reasonable proof need not involve “the technical rules applied in a court of justice”¹³.
- [81] Where the evidence is not clear of death of an insured the company is reasonably entitled to the protection of an order of the court in this situation. But in relation to

¹² See MacGillivray on Insurance Law (relating to all risks other than marine) Ninth Edition 1997 Paragraph 24-1

¹³ Ibid where the case of Wilson v. Esquimalt, etc Ry [1922] 1 A. C.. 202, is quoted as authority for this proposition.

the determination of this question of reasonableness, the insurance company is somewhat protected in law, if they decline to pay in a doubtful case, as they will be entitled to deduct from the sum insured the costs incurred by them in defending an action¹⁴.

- [82] It is also to be noted that, material to the unusual circumstances of the present case, where a person has disappeared and there is no direct evidence that such evidence of death can be obtained, a court may grant leave to swear the death, and:

“..his death may be proved (1) by circumstantial evidence, that is proof of facts from which a jury might reasonably infer the fact of death; or (2) a presumption of law which arises after the expiry of seven years from the time a person was last seen or heard of.

For the prima facie presumption of death to arise, there must in general be evidence that those who would be likely to hear of the missing person., if alive, have not heard of him and evidence that reasonable enquiries have been made by advertisement and otherwise in or about the place or places where he was last seen or heard of, where he was likely to have gone. The presumption does not arise if a person disappears in circumstances which lead to the inference that even if he were alive, it would be unlikely that his friends or relatives would hear of him.¹⁵

- [83] Notice of any application for leave to swear to death must be given to any insurance company which has insured the missing person’s life and if the company successfully resists the application, it may be allowed its costs against the applicant¹⁶.

¹⁴ Ibid where the case of Doyle v. City of Glasgow Life (1884) 53 I.J. Ch. 527, is quoted as authority for this proposition.

¹⁵ Ibid. Paragraph 24-5 **Presumption of death.**

¹⁶ Ibid. Para 24-9

[84] Once death is actually established, on a balance of probabilities, then the court will grant a decree, specifying the date and time of death so far as ascertainable, based on the evidence¹⁷.

[85] It is to be noted that where an order for leave to swear to death is made by a court an insurance company is, however, nevertheless, not bound by any such order of the court giving leave to swear to death, but may be penalized in costs.

[86] It would appear that the way that an insurance company may be able to protect itself, if it is doubtful about the evidence surrounding the alleged death of an insured person:

“without prejudice to a subsequent denial of liability” and “offer to pay the sum assured in exchange for an undertaking on the part of the payee to refund it if the life assured should afterwards be proved to be alive or for such further or other security for repayment as it may think fit to demand”¹⁸.

[87] Alternatively, if the monies are paid then it may have to be refunded, in this case by the Defendant, to the insurance company as a payment made under a mistake of fact, if the life assured is later found not to have died¹⁹.

[88] In *Kleinworth Benson Ltd. v Lincoln City Council et al*²⁰ the House of Lords, particularly its leading decision Lord Goff of Chieveley²¹ recognized the general right of a party to recover money paid under a mistake, whether of fact or law, subject to defences available in the law of restitution²² (i.e. such as ‘change of position’, ‘compromise’, ‘settlement of an honest claim’ and others: some of which are in the process of development by the courts²³).

¹⁷ Ibid Paragraph 24-15

¹⁸ Ibid Paragraph 24-10 where this device was recommended in relation to the presumed death of a man or woman in active service serving in one of the fighting services in wartime.

¹⁹ Ibid Paragraph 24-13.

²⁰ [1999] 2 AC 349.

²¹ Ibid Page 365 in the process of which decision he debunked the so-called ‘declaratory theory of judicial decisions’ between page 377 – 379.

²² Ibid page 375 at H.

²³ Ibid Page 382 at G-H.

[89] As submitted by Counsel for the Claimant, Lord Hope of Craigworth does indeed set out at pages 407 – 411 a helpful distillation of the principles relating to mistake and unjust enrichment as a consequence of payments made by mistake, when he states:

“Subject to any defences that may arise from the circumstances, a claim for restitution of money paid under a mistake raises three questions. (1) Was there a mistake? (2) Did the mistake cause the payment? And (3) did the payee have a right to receive the sum which was paid to him?”

The first question arises because the mistake provides the cause of action for recovery of the money had and received by the payee. Unless the payer can prove that he acted under a mistake, he cannot maintain an action for money had and received on this ground. The second question arises because it will not be enough for the payer to prove that he made a mistake. He must prove that he would not have made the payment had he known of his mistake at the time when it was made. If the payer would have made the payment even if he had known of his mistake, the sum paid is not recoverable on the ground of that mistake. The third question arises because the payee cannot be said to have been unjustly enriched if he was entitled to receive the sum paid to him. The payer may have been mistaken as to the grounds on which the sum was due to the payee, but his mistake will not provide a ground for its recovery if the payee can show that he was entitled to it on some other ground.

...

In my opinion the proper starting point for an examination of this issue is the principle on which the claim for restitution of these payments is founded, which is that of unjust enrichment. The essence of this principle is that it is unjust for a person to retain a

benefit which he has received at the expense of another, without any legal ground to justify its retention, which that other person did not intend him to receive ...

What, then, is the function of mistake in the field of restitution on the ground of unjust enrichment? The answer, one may say, is that its function is to show that the benefit which has been received was an unintended benefit. A declaration of intention to confer the benefit, even if unenforceable, will be enough to justify the retention of the enrichment. A mistake, on the other hand, will be enough to justify the restitutionary remedy, on the ground that a benefit which cannot be legally justified should not be retained where it was a mistaken and thus unintended benefit.

*... But in simple terms, the law looks for the absence of a legal justification for the enrichment: Zweigert and Kötz, p. 232. If the payer paid in the mistaken belief that he was under a duty to pay, it is prima facie unjust that the payee should be allowed to retain what he received. But the burden of proving that the payer knew that there was no duty, and was not mistaken, is on the recipient: Englard, *International Encyclopedia of Comparative Law* (1991), vol. X, pp. 8-9, para. 5-13. Mistake in this context means lack of knowledge, and it makes no difference whether this is of fact or of law: Englard, p. 18, para. 5-30. As for the concept of enrichment, a person is enriched when he receives a payment which the payer was not bound by any obligation to make to him. The payee is entitled to retain the payment if it was made to him voluntarily, as in the case of a gift. The enrichment is unjust if the person who made the payment did not do so voluntarily and there was no obligation to confer the benefit: Zweigert and Kotz, p. 261²⁴. ”*

²⁴ Ibid at t pages 407 – 408.

[90] Further, as noted by Counsel for the Claimant, Lord Hope does indeed, instructively, add that:

“The mistake may have been caused by a failure to take advice, by omitting to examine the available information or by misunderstanding the information which has been obtained. Or it may have been due to a failure to predict correctly how the court would determine issues which were unresolved at the time of the payment, or even to foresee that there was an issue which would have to be resolved by the court. As Mason C.J. said in the David Securities case, at p. 374, the concept of mistake includes cases of sheer ignorance as well as of positive but incorrect belief.”²⁵

[91] Following the dicta of Lord Hope, at common law the Court is entitled to ask to ground a claim for repayment of monies paid under a mistake of fact or law, for repayment in restitution:(1) Was there a mistake? (2) Did the mistake cause the payment? And (3) did the Bank have a right to receive the sum which was paid to it?

[92] In this latter circumstance it is probable that the Claimant would, subject to any applicable limitation period, remain liable for the losses which the Defendant has incurred as a result of any payment.

[93] In the context of any discussion of the limitation period, which as correctly observed by Counsel for the Claimant has not been raised by the Defendant, it is to be noted, that Section 32(a) of the Limitation Act provides where:

“the action is for relief from the consequences of a mistake, the period of limitation shall not begin to run until the plaintiff has discovered themistake, or could with reasonable diligence have discovered it.”

[94] It is also to be noted that after, and not before, the expiry of the seven year period there is no presumption as to the date of death and onus of proving the date of death within the seven year period would lie on the person alleging it.

²⁵ Ibid at page 410.

[95] The Claimant relies on the UK case of *Hickman v Upsall*²⁶, in which a tenant for life assigned her life interest to a mortgagee to secure the repayment of certain advances. She went on a pedestrian tour and was never heard from again. The Court determined that she was presumed dead soon after June 1866. Sir Charles Hall VC stated that:

*“I do not think, however, that I ought to presume in favor of the Petitioners who rely upon presumption of death, that she died before the June payment became due; but I do presume that she died soon afterwards, and hold that nothing became payable to the mortgagee after that time. The mortgagee will, therefore, not be entitled to any moneys accruing due after June, and the Petitioners will be entitled to the property and income from that period.”*²⁷

[96] The Claimant therefore, rightly submitted, that the Court determined in 1876 that the life tenant was presumed dead shortly after June 1866, and that in respect of the mortgage, *“nothing became payable to the mortgagee after that time.”* That the debt was therefore extinguished upon the death of the life tenant.

[97] Furthermore, in the same case of *Hickman v Upsall*²⁸, which was then being reconsidered by the then Vice Lord Chancellor Hall, after the mortgagee had entered into possession of the rents of mortgaged property for the purpose of keeping down interest and balance owed by the life tenant who had gone missing, and was subsequently declared dead, the Court had to consider whether the mortgagee was liable to account for rents and profits received for the period post the date that the life tenant was presumed dead. The Court held that the Statute of Limitation did not apply and that the mortgagee must account for rents received post the date that the life tenant had been presumed dead. Hall VC stated, in relation to the equitable equivalent of the common law limitation, laches, that:

“Laches cannot be imputed to the Petitioners, inasmuch as it was not possible for them to come to the Court before presumption of

²⁶ [1875] LR 20 Eq. 136.

²⁷ Ibid at t page 140.

²⁸ [1876] 2 Ch D 617.

*death arose. The case is not, in my judgment, within the Statute of Limitations ... which restricts the institution of suits or actions for arrears of rent to six years; therefore the Petitioners are entitled to an account as prayed ...*²⁹”

[98] In *Maskell v Horner*³⁰ the English Court of Appeal determined that where monies had been paid to avoid seizure of goods and the payments had not been made voluntarily, the payer is entitled to recover monies paid. Lord Reading CJ observed:

*“If a person pays money, which he is not bound to pay, under the compulsion of urgent and pressing necessity or of seizure, actual or threatened, of his goods he can recover it as money had and received. The money is paid not under duress in the strict sense of the term, as that implies duress of person, but under the pressure of seizure or detention of goods which is analogous to that of duress. Payment under such pressure establishes that the payment is not made voluntarily to close the transaction (per Lord Abinger C.B. and per Parke B. in *Atlee v. Backhouse*) The payment is made for the purpose of averting a threatened evil and is made not with the intention of giving up a right but under immediate necessity and with the intention of preserving the right to dispute the legality of the demand (per Tindal C.J. in *Valpy v. Manley*).³¹”*

[99] Also in this same case Lord Reading CJ added:

“I doubt whether Rowlatt J. intended to find that there must be anything in the shape of an express notice or declaration to the defendant of the plaintiff's intention to keep alive his right to recover. It is clear, and was indeed admitted at the Bar, that no express words are necessary and that the circumstances attending the payments and the conduct of the plaintiff when making them

²⁹ Ibid at page 620

³⁰ [1915] 3 KB 106.

³¹ Ibid at page 118.

may be a sufficient indication to the defendant that the payments were not made with the intention of closing the transactions.³²”

Determination

- [100] I have concluded that the facts of the present case, in relation to the policy of insurance, is a grey area of the law, not specifically contemplated by the expressed terms of the insurance policy because the disappearance of a person insured by the whole life policy (especially on the facts of this case) did not immediately prove the death of such person.
- [101] I consider however, that the question that should have arisen on the facts of the present case, was whether there was reasonable proof of the death of the Claimant’s husband such that the policy ought to have been proved in or around 30th September 2001.
- [102] I consider that on the uncontested evidence before the Defendant and the insurance company, there was sufficient proof of the death for the insurance company to have paid the policy or advised that the Claimant seek to obtain a Court Order – which the Claimant could, but not necessarily would, have obtained. The Claimant, on the facts of this case, could therefore have immediately (without necessarily waiting 7 years) sought an order from the Court for leave to swear to death to take advantage of any legal presumption of death.
- [103] Alternatively the monies could have been paid out on the insurance policy to the Defendant on condition that the Claimant (or the Defendant) repays any monies paid if the Claimant’s husband later reappeared.
- [104] In any event, I find that in the circumstances of the present case once the Order of the Belize Supreme Court was made on the 7th October 2010, that the Claimant’s husband was presumed dead as of 30th September 2001, which order clearly relates back to the date of his disappearance, and there was therefore no liability for the Claimant to have continued making payments on the residential loan as of this

³² Ibid at pages 119 – 120.

date, and therefore ought not to have been advised by the Defendant to continue making payment to the Defendant on the residential loan.

[105] As a result, I find on the uncontested or unchallenged evidence before the court, the Defendant's advice, exhortation, or even insistence that the Claimant make payments on the residential loan was wrong, misguided and mistaken, both as a question of law and maybe also as a question of fact. The Claimant ought not to have been required to make any payments on the residential loan in circumstances where she and her husband had taken out a policy to cover or protect them, which risk did in fact materialize by the death (as later determined) of her husband.

[106] Unfortunately the advice given by the Defendant (by its servants or agents) which it ought not to have given, prejudiced the Claimant such that, in the circumstances of the present case, the Claimant was unnecessarily and consequentially obliged to take out business loans and eventually went into default with dire consequence to the Claimant.

[107] As a further result the court, in my view, cannot sanction the Defendant now seeking to take any enforcement steps against the Claimant for default of such business loan, which default most likely would not have arisen but for the erroneous advice and by which the Defendant would be unjustly enriched if it were allowed to benefit from such mistaken advice, which it gave the Claimant. This erroneous advice has put the Claimant in an unfair disadvantage with regard to her obligations to the very same Defendant. This would be quite an inequitable and unconscionable result.

[108] I therefore find that the Defendant is liable for any loss which the Claimant suffered by reason of the Defendant's mistaken insistence that the Claimant make payments to the Defendant.

[109] It seems to me that, in any event, the insurance policy which the Claimant had entered into through the Defendant, up to a limit of \$200, 000.00 together with the position which it appears (on the evidence before me) of the insurance company insisting on the expiry of 7 years to take advantage of the presumption, may in fact have provided some indemnity or protection to the Defendant as against the

Claimant. But this is not a determination I am in a position to make in the present proceedings as the insurance company is not a party to the present proceedings and were therefore not in a position to defend itself against any such claim.

[110] It follows that I do not accept the Defendant's submission that, following the disappearance of the Claimant's husband because the Claimant incurred her indebtedness on the business loan, the Claimant is liable for the indebtedness. This submission ignores completely the necessary result or implication of the Defendant imparting its error on the Claimant (for the continued payment of the residential loan post the disappearance of the Claimant's husband) and disregards the Defendant's culpability in this regard.

[111] Had the Defendant simply said nothing the situation may have been a little different but that is not the position on the undisputed facts of the present case.

[112] I therefore find that on the agreed (or uncontested) facts of the present case, the residential loan ought to have been frozen, pending determination of the position of the disappearance of the Claimant's husband, or have been paid out; but that the Defendant was not entitled to demand that the Claimant make payment on the residential loan.

[113] I find also that by the Claimant and Defendant taking out the policy of insurance, they were protecting themselves from the eventuality which occurred, the death or presumed death of either of them (including the Claimant's husband) and the Claimant is entitled to the protection of the policy obtained through the Defendant and to the cover which it ought to have provided.

[114] All of the above findings are on the basis of the un-uncontested, unchallenged or summary findings of facts as I have determined or found them to be, which if I am found to be wrong about, I will further and in addition make determinations based on the contested facts as I have found them.

[115] Based on the contested facts of the case as found by me, I am of the view that my findings fortify and reinforce my findings on the uncontested facts, and further confirm that the Claimant should succeed in her claim (without the need of a

finding of coercion or of threats by the Defendant) on the preliminary issue of liability.

Costs

[116] In the circumstances of the present case, including the conduct of the Defendant as I have found, I have determined that the Claimant is entitled to be paid her costs on the trial of the preliminary issue to be agreed or assessed.

Disposition

[117] For the reasons given above, I order judgment to the Claimant against the Defendant on the preliminary issue with costs to be agreed or assessed.

[118] I anticipate that the issue of quantum, now that liability has been determined, may be agreed by the parties but I am prepared to now give directions for the assessment of damages.

The Hon Mr. Justice Courtney A. Abel