

**IN THE SOUTH GAUTENG HIGH COURT OF SOUTH AFRICA
(JOHANNESBURG)**

Case No: 2011/43229

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: Yes
<u>28 October 2013</u> DATE	 _____ SIGNATURE

In the matter between:

RODEL FINANCIAL SERVICES (PTY) LTD

Plaintiff

And

STUPEL & BERMAN INC

1st Defendant

BERMAN, MICHAEL

2nd Defendant

JUDGMENT

C. J. CLAASSEN J:

[1] This claim, stripped to its very bare essentials, was instituted by a financial institution for the repayment of bridging finance that it advanced to the seller of

immovable property pending payment of the purchase price and transfer of the property to the purchaser. The financial institution issued summons against the conveyancing attorney arising from a written instruction to pay the proceeds of the transaction to the financial institution (the lender) as opposed to the seller (the borrower).

- [2] No evidence was led since the parties agreed to a stated case upon which their respective contentions were advanced in argument. Before dealing with the stated case, however, it is necessary to deal with some preliminary issues.

THE ROLE PLAYERS

- [3] When reading the papers, I found the references to the various role players somewhat confusing. For my own sake and that of the reader of this judgment, I deemed it appropriate to explain the references to the various *dramatis personae* made in the papers.

1. The plaintiff, who issued summons, is a financial institution known as Rodel Financial Services (Pty) Ltd (“Rodel”). In terms of two discounting agreements dated 31 August 2010 and 2 September 2010, Rodel advanced bridging finance in the amounts of R850 000.00 and R550 000.00 respectively to the seller of a certain immovable property. Apart from differing amounts, the two discounting agreements were subject to the same terms and conditions¹ consisting of fifteen clauses. Attached to each agreement is a schedule headed “SALE PROCEEDS” and “UNDERTAKING BY CONVEYANCER”.² In the papers Rodel are represented by Tamryn Flowers (“Tammy”), Tammy Hall³, Chantal

¹ For a more legible copy of the terms and conditions, see Exhibit “A” pp. 101 – 107

² For a more legible copy of these two documents, see Exhibit “A” pp. 99 – 100

³ See Exhibit “A” p. 66. Tamryn Flowers and Tammy Hall might be the same person.

Davecharran,⁴ and Jacques Morkel.⁵ Rodel is also represented by its attorneys of record, Norman Berger and Partners Inc.

2. Amber Falcon Prop 3 (Pty) Ltd (“AFP”) is the seller of the immovable property Erf 416 Norwood, situate at corner of 93 Frances and Grant Road, Norwood, in extent 991 square metres and held under title deed T31831/2006 (the “Norwood property”). This property was sold on auction by the auctioneers, Alliance Group, on 9 February 2010 for an amount of R7 200 000.00.⁶ AFP is referred to in the documents interchangeably as “the client” and/or “the seller”. Where necessary I will insert in brackets the acronym “AFP” when quoting from the various documents in order to dispel any confusion as to who is being referred to. It was to AFP that Rodel advanced the two amounts in terms of the two discounting agreements. In the documents AFP is represented by Julius Blumenthal, Nathan Blumenthal, Joy Moraine⁷ and the first and second defendants. Subsequently AFP employed new attorneys, i.e. Bieldermands Inc.
3. The purchaser of the Norwood property at the auction was originally “SHAAHID MAHOMED AKOOB or NOMINY” (sic).⁸ It is common cause that Mr Akoob subsequently nominated Cross Atlantic Properties 186 (Pty) Ltd as the purchaser.⁹ I will refer to Cross Atlantic Properties as “CAP”. In the papers it was represented by attorneys Ismail Ayob and Partners.¹⁰

⁴ See Exhibit “A” p. 50B

⁵ See Exhibit “A” p. 58

⁶ See the Auction Sale Agreement, Exhibit “A” pp. 1 – 12

⁷ See Exhibit “A” pp. 15A, 46 and 57

⁸ See Exhibit “A” p. 10

⁹ See Exhibit “A” p. 42A paragraph 3.1

¹⁰ See Exhibit “A” p. 55

4. Mercantile Bank Ltd was the existing bond holder in terms of a continuing covering mortgage bond number B2302/2009, registered against the Norwood property.¹¹
5. The first defendant is Stupel and Berman Incorporated who was appointed the conveyancing attorneys, not in terms of the Auction Sale Agreement, but subsequent thereto by AFP. Such appointment is confirmed in the correspondence¹² and the discounting agreements.¹³ In the correspondence Stupel and Berman Inc are also referred to as the “Conveyancer” and interchangeably represented by Marietjie de Lange,¹⁴ Mr Michael Berman,¹⁵ Maureen Matthee¹⁶ and David Pretorius.¹⁷ Mr Berman signed the “Conveyancing Undertakings” forming part of the two discounting agreements.
6. Bieldermaans Inc are the second set of attorneys who acted on behalf of AFP as from approximately February 2011.¹⁸

THE CONTRACTS

[4] The story began in 2010 when AFP decided to sell its immovable property in Norwood. As previously stated, this property had been bonded by AFP in favour of Mercantile Bank Ltd during 2009. The property was placed on auction and sold by the auctioneers on 9 February 2010 for R7 200 000.00. AFP expected payment of the net proceeds of the sale in due course, but pending that, it

¹¹ See Exhibit “B” p. 87A

¹² See Exhibit “A” p. 14, a letter dated 23 March 2010 from Mercantile Bank Ltd to Stupel and Berman Inc in their capacity as the conveyancing attorneys responsible for the cancellation of the bond registered over the immovable property.

¹³ See Exhibit “A” p. 16 where Mr Berman signed as “Conveyancer (for transfer duty/rates, Attorney in his capacity as Conveyancer and as duly authorised representative of the Client” (AFP); p. 17 where he signed the discounting application form; p. 18 where he signed above the words “Signature of Conveyancer”.

¹⁴ See Exhibit “A” p. 50C

¹⁵ See Exhibit “A” p. 55

¹⁶ See Exhibit “A” p. 59

¹⁷ See Exhibit “A” p. 76A

¹⁸ See Exhibit “A” p. 77

required bridging finance, presumably to pay for the transfer costs. In order to obtain such interim finance, AFP concluded the two discount agreements with Rodel on 31 August and 2 September 2010 respectively. Both agreements were in respect of the sale of the Norwood property. In each transaction the “proceeds” of the sale are calculated after deduction of the bond cancellation amount and other amounts from the sale price of R7 200 000.00. The sale price of R7 200 000.00 was to be paid by the CAP from the proceeds of a new bond in the amount of R6 840 000.00 plus the deposit held in trust in the amount of R360 000.00 amounting in total to R7 200 000.00.

- [5] In the schedule to the first discount agreement concluded between Rodel and AFP on 31 August 2010, the net proceeds due to AFP from the sale of the Norwood property were calculated as being R2 369 408.00. That amount was, of course, more than adequate to secure the repayment by AFP to Rodel of the latter’s first payment of the bridging finance in the amount of R850 000.00 plus any discounting fees. These fees were to be calculated at 0.133% per day, i.e. amounting to R1 130.60 per day.¹⁹
- [6] In the schedule to the second discounting agreement, the net proceeds of the sale were calculated at a lesser amount of R1 369 408.00 after deduction of a further undertaking in the amount of R1 000 000.00.²⁰ Upon this second calculation of the proceeds of the sale, it was apparent that a further amount of bridging finance could be made available to AFP. Hence, a further amount of R550 000.00 was agreed to as a first payment of bridging finance on the second discounting agreement.
- [7] The two first payments in terms of the discounting agreements amounted in total to bridging finance advanced to AFP by Rodel in the amount of R1 400 000.00. This amount plus discounting fees would still have been less than the net

¹⁹ See Exhibit “A” pp. 16 and 20

²⁰ See Exhibit “A” p. 43

proceeds of the sale of the Norwood property, due to AFP.²¹ As security for due repayment to Rodel of the R1 400 000.00 plus discounting fees, the two agreements and their schedules expressly recorded cessions of the proceeds of the sale of the Norwood property to Rodel in the following terms:

“By my/our signature of this Schedule to the Discounting Agreement: I/we acknowledged that I/we have read, understood and accepted the Discounting Terms and Conditions, a copy of which have been made available to me/us, and I/we hereby **cede, transfer and make over to Rodel my/our right, title and interest in and to the Proceeds** against payment of the First Payment.”²² (Emphasis added)

- [8] Just immediately below the aforesaid cession, the schedule was signed on behalf of AFP by Joy Moraine, on behalf of the conveyancer by Mr Berman and by someone on behalf of Rodel whose signature is illegible.²³
- [9] In addition, Rodel obtained further security for the repayment of the amounts plus the discounting fees advanced, in terms of a suretyship signed by one of the directors of AFP, Mr Julius Blumenthal.²⁴ The suretyship is also attached to the schedule in each of the discounting agreements.
- [10] In order to facilitate repayment of the amount due to Rodel from the proceeds of the sale, the parties agreed to an undertaking by the conveyancer to make payment direct to Rodel from the net proceeds of the sale of the Norwood property within 72 hours of registration of transfer. Such undertaking was duly signed by Mr Berman on 31 August 2010 in respect of the first discounting agreement and on 2 September 2010 in respect of the second discounting agreement.²⁵ The terms of this undertaking are as follows:

“UNDERTAKING BY CONVEYANCER

²¹ See Exhibit “A” p. 43

²² See Exhibit “A” pp. 16 and 45. In clause 2 of the agreements, these cessions are repeated to which reference will be made later in this judgment.

²³ See Exhibit “A” p. 20. In terms of clause 1.23 of the Terms and Conditions, it is recorded that Rodel signed the Schedule

²⁴ See Exhibit “A” p. 21 in respect of the first discounting agreement and p. 46 in respect of the second discounting agreement

²⁵ See Exhibit “A” pp. 18 and 44

1. We are currently attending to the registration of the abovementioned property transfer, arising out of the sale agreement entered into between the parties referred to above.
2. The sale agreement is **valid and enforceable in law** and there are, to our knowledge, no attachments or interdicts registered against the Property.
3. All suspensive conditions in respect of the above transfer had been fulfilled, and we know of no further impediment or encumbrance that would **delay** or hinder the registration of transfer of this transaction.
4. The Client (AFP) has entered into a discounting agreement with Rodel Financial Services (Pty) Ltd, whereby Rodel has agreed to purchase the Proceeds arising from the above transaction on registration of transfer.
5. The balance owing to the mortgagee is as set out above.
6. **No further undertakings** have been/will be made or given which **would reduce the Proceeds** on registration of transfer.
7. We acknowledge that the Client (AFP) has furnished us with **an irrevocable instruction to pay to Rodel, from the Proceeds, the full amount payable in terms of the said discounting agreement for which amount we will request a settlement quote from Rodel** immediately upon registration of transfer.
8. **We hereby undertake to pay to Rodel from the Proceeds the above amount within 72 hours of registration of transfer/receipt of funds, unless prevented by interdict or operation of law.**
9. We undertake to inform Rodel forthwith if the Client (AFP) lodges with us a request to uplift this file, or **terminates or attempts to terminate our mandate to act on its behalf, which act we understand to be a breach of the agreement with the Client (AFP).**
10. In the event of a cancellation of the sale for whatsoever reason where the funds provided by Rodel have been utilised for the payment of transfer duty or rates and taxes, **we will pay to Rodel all and any monies received in respect of the refund of transfer duty or rates and taxes paid**, subject to a maximum amount equal to the first payment together with discounting fees thereon, if applicable.
11. **We undertake to keep you advised of all material and important developments in regard to the transaction.**
12. The signatory hereto is authorised, on behalf of this firm, to bind the firm and its partners/directors in respect of the above undertaking.”(Emphasis added)

[11] As previously stated the discounting terms and conditions contained fifteen clauses. The relevant clauses for this case are the following:

“INTERPRETATION

1. In this agreement, if applicable, and unless the context indicates the contrary intention, the words and expressions recorded below shall bear the meanings assigned to them, cognate expressions bear corresponding meanings, and the provisions of clauses 1.27 to 1.31 shall apply in the interpretation of this Agreement.
- 1.1 “Agreement” – means these Terms and Conditions **together with the Schedule** as signed by the Client (AFP) and Rodel.
- 1.5 “Bond Settlement Amount” – means the amount due and payable by the Client (AFP) to the Mortgagee as at the Transfer Date to cancel the Mortgage Bond as set out in the Schedule.
- 1.7 “Claim” – means: (i) In the case of a Sale Transaction, the **Client’s (AFP) legal rights to claim payment of that portion of the Proceeds** as is set out in the Schedule upon the registration of the transfer of the transfer of the Property into the name of the Purchaser; and (ii)... (irrelevant)
- 1.8 “Client” (AFP) – means the party who is selling the Claim to Rodel and who is referred to as such in the Schedule.
- 1.9 “Conveyancer” – means: (i) In the case of a Sale Transaction, the person, **firm or entity appointed by the Client (AFP)** to attend to the registration of the transfer of the Property pursuant to the Sale Agreement in the appropriate Deeds Registry, and all matters incidental thereto; and (ii) ... (irrelevant).
- 1.10 “Discounting Fee” – means the fee payable by the Client (AFP) to Rodel as calculated and determined in accordance with and as set out in the Schedule.
- 1.11 “First Payment” – means the initial amount payable by Rodel to the Client (AFP) as set out in the Schedule.
- 1.16 “Proceeds” – means: (i) In the case of a Sale Transaction, **the amount realised by the Client (AFP) from the sale of the Property to the Purchaser (CAP) which amount will become due and payable to the Client (AFP) on the date upon which transfer of the Property is registered in the name of the Purchaser, after deducting the Bond Settlement Amount, Agent’s Commission and any other amounts payable by the Client (AFP)** as a direct result of the sale of the Property as more fully set out in the Schedule; and (ii) ... (irrelevant).
- 1.17 “Purchase Price” – means **the consideration payable by Rodel** to the Client (AFP) as determined in accordance with the terms of this Agreement, for the Claim, **as set out in the Schedule**.
- 1.18 “Purchaser” (CAP) – means the purchaser of the Property as described in the Sale Agreement.
- 1.21 “Sale Agreement” – means the written agreement between the Client (AFP) and the Purchaser (CAP) in terms of which the Client (AFP) sells the Property to the Purchaser (CAP) thereby giving rise to the Claim.

- 1.22 “Sale Transaction” – means the transaction in terms of which a Claim arises pursuant to the sale by the Client (AFP) of his immovable property.
- 1.23 “the Schedule” – means the Schedule of information relating to the sale of the Client’s (AFP) Claim to Rodel, which has been signed by the Client (AFP) and Rodel **and which is subject to these Terms and Conditions.**
- 1.31 This Agreement incorporates the Schedule, which Schedule will have the same force and effect as if set out in the body of this Agreement.
2. **SALE AND CESSION**
- 2.1 The Client (AFP) hereby sells **the Claim** to Rodel and Rodel hereby purchases the same upon and subject to the terms and conditions recorded in this Agreement.
- 2.2 **By executing the Schedule, the Client (AFP) hereby cedes, transfers and makes over to Rodel his right, title and interest in and to the Claim** and Rodel hereby accepts such cession upon the terms and conditions recorded herein.
- 2.3 The Client (AFP) shall authorise and instruct the Conveyancer in writing to pay to Rodel an amount equal to the First Payment and the Discounting Fee and shall procure that the Conveyancer furnishes Rodel with a **written undertaking**, in a form acceptable to Rodel, in terms of which the Conveyancer **irrevocably undertakes to pay to Rodel such amount on the Registration Date.**
3. **ASSUMPTION OF OBLIGATIONS AND OWNERSHIP AND RIGHT OF RODEL TO CANCEL THIS AGREEMENT**
- 3.2 **Ownership in and to the Claim** shall pass to Rodel upon payment by Rodel of the First Payment as set out in the Schedule and the cession and transfer shall thereupon be of full force and effect without any further act of delivery being required.
4. **PAYMENT OF THE PURCHASE PRICE**
- 4.1 Rodel shall pay the First Payment as set out in the Schedule to the Client (AFP) within 2 (two) business days after receiving the written undertaking from the Conveyancer and such other security or documentation as Rodel may reasonably require.
- 4.2 The Purchase Price shall be reduced by an amount equal to the Discounting Fee as at the Settlement Date.
5. **WARRANTIES – SALE TRANSACTION**
- 5.10 The Client (AFP) is not aware of any fact, matter or circumstance pertaining to the Client (AFP) or the Property, which might prevent the Property from being transferred to the Purchaser (CAP) in accordance with the Sale Agreement or which might cause the **Registration Date to be delayed by more than 90 (ninety) days** after the Signature Date and shall forthwith notify Rodel in writing in the event of the Sale Agreement being cancelled, or if any dispute arises between the parties thereto, or any reason

exists as to why the registration of the transfer may not proceed within the **90 (ninety) day period** referred to above.

- 5.11 The full amount of the Proceeds will be payable to the Client upon the registration of the transfer of the Property into the name of the Purchaser (CAP).
- 5.12 The Client (AFP) shall forthwith do all such things and pay all such amounts as the Conveyancer may require in order to cancel the Mortgage Bond and procure the **expeditious transfer** of the Property to the Purchaser (CAP)...
- 5.14 **The Client (AFP) shall not terminate or cancel the instructions to the Conveyancer to attend to the registration of transfer without Rodel's prior written consent.**
- 5.19 **The Claim or any part thereof is not subject to a prior cession, pledge or similar encumbrance.**

The Client (AFP) acknowledges that Rodel has entered into this Agreement in **reliance of the warranties set out in this clause, all of which are material**, and that if any of the warranties are or become, **to any extent, inaccurate or breached**, the client (AFP) will have committed a **fraud** against Rodel.

7. TERMINATION

Rodel may summarily terminate this Agreement without payment of compensation or other damages caused to the Client (AFP) solely by such termination by giving notice in writing to the Client (AFP) if anyone or more the following events or, which Rodel recently anticipates is likely to occur for any reason:

In the case of a sale transaction:

- 7.1 The Client (AFP) commits any breach of any of its obligations under this Agreement and/or the Sale Agreement or fails to fulfil, the terms of the Sale Agreement in any respect; or
- 7.2 Any warranty, representation or undertaking given herein is to any extent inaccurate or has been breached; or
- 7.5 The Sale Agreement has not become or will cease to be of force or effect, whether by cancellation or otherwise; or
- 7.6 The Registration Date does not occur for any reason whatsoever within a period of 90 (ninety) days after the Signature Date;...

8. CONSEQUENCES OF TERMINATION

8.1 If this agreement is cancelled then:

- 8.1.1 All rights acquired by Rodel in terms of the cession referred to in clause 2 of this Agreement shall be deemed to have been ceded and transferred back to the Client (AFP) upon and against compliance by the Client (AFP) with clause 8.1.3 and all other outstanding obligations in terms of this Agreement.

- 8.1.3 **The Client (AFP) shall refund to Rodel in full any amount or amounts paid by Rodel to the Client (AFP) or any other person on its behalf in respect of the Purchase Price, together with interest thereon, at the Interest Rate calculated from the date of each such payment by Rodel to the date of such refund by the Client (AFP).**
- 8.2 On termination of this Agreement by Rodel pursuant to clause 7, Rodel shall be entitled (without prejudice to any other rights or remedies it may have) to recover from the Client (AFP) the amount of all damages and loss suffered by Rodel as a result (directly or indirectly) of the Client's (AFP) failure, **together with all sums previously paid to the Client (AFP) under or in connection with this Agreement.** (Emphasis added)

[12] In simple terms, the discounting agreement concluded between Rodel and AFP is a loan agreement of a sum of money repayable from the net proceeds of the sale together with certain fees calculated at a daily rate, by AFP to Rodel upon the registration of transfer of the Norwood property in the name of CAP. The schedule describes in detail the sum to be advanced (the First Payment, which in effect constitutes the “bridging finance”) on loan to AFP. It also describes the discounting fee calculated at a daily rate of R1130-50 which will be added to the amount advanced on the settlement date in order to establish the amount to be repaid to Rodel upon the registration date. The additional features of the discounting agreement indicate:

1. As security for the repayment of the loan plus discounting fees, the parties agreed to cede to Rodel the entire net proceeds of the sale of the property from which it will calculate a settlement figure due to AFP after deducting from the net proceeds the amount due to Rodel. This amount constitutes Rodel's “Claim” to payment from “that portion of the proceeds set out in the schedule.” Thus, the net proceeds of the sale will be reduced with the total loan (R1 400 000-00) and the discounting fees and such balance will then be paid to AFP after the conveyancer received the “settlement quote from Rodel immediately upon registration of transfer”.²⁶

²⁶ See clauses 1.7, 1.17, 2.1, 2.2, 2.3 and 4.2 of the discounting agreement as read with paragraph 6 of the schedule, “Calculation of Proceeds”, and clause 7 of the Conveyancer's Undertaking

2. The “Proceeds” is the net amount of the sale price of the Norwood property due to AFP as defined in the contract, meaning the amount realised (R7 200 000-00) from the sale of the property less the cost of cancellation of the existing bond in favour of Mercantile Bank Ltd (R R5 005 287-99), agent’s commission and any other amount payable by AFP arising from the sale of the property. In the present case the schedule to the first discounting agreement dated 31 August 2010 determines this amount as being R2 369 408-00.²⁷ In regard to the second discounting agreement, the net proceeds is stated as being R1 369 408-00 after a further amount of R1 000 000-00 was deducted from the sale price, described as “Other undertakings”. It is not known what this “other undertaking” was for but it is of no consequence as the sale price mentioned in the second schedule remains at R7 200 000-00 from which is deducted the cancellation costs of the bond in the same amount of R5 005 287-99 as in the first schedule.²⁸

3. In order to secure repayment from the net proceeds to Rodel, the agreement records an obligation²⁹ by AFP to instruct its conveyancer in writing to pay Rodel an amount equal to the loan and discounting fee. AFP is further obliged to furnish Rodel with a written undertaking from the conveyancer wherein he “irrevocably undertakes to pay Rodel such amount on the Registration Date.” This contractual undertaking by AFP is reflected in clause 7 of the “Conveyancer’s Undertaking” which was signed by Mr Berman.³⁰

4. The agreement between Rodel and AFP further contains a warranty that the entire transaction will be speedily completed. The parties did not expect the finalisation to take more than 3 months.³¹ Both counsel referred to this as

²⁷ See paragraph 6 of the schedule

²⁸ See Exhibit “A” pp. 16 and 45

²⁹ See clause 2.3

³⁰ See clause 2.3 of the discounting agreement as read with clause 7 of the undertaking by Mr Berman.

³¹ See clauses 5.10, 5.12 as read with the schedule which calculates the discounting fee not on an annual basis but on a daily basis. This suggests that the loan plus discounting fees were due to be repaid within 90 days

an understanding between the parties that it would constitute an “in and out” contractual regime.

5. AFP also warranted that it would not terminate the conveyancer’s mandate to affect the registration “without Rodel’s prior written consent.”³² Any attempt to cancel the conveyancer’s mandate without Rodel’s prior written consent would constitute a breach of the agreement between AFP and Rodel. This contractual term is mirrored in clause 9 of the Conveyancer’s Undertaking.
6. The agreement contains a warranty by AFP that the “Claim” to the net proceeds ceded to Rodel “is not subject to a prior cession, pledge or similar encumbrance”.³³ This clause will be relevant in order to deal with the defendants’ contention that an alleged prior cession of the proceeds to the bondholder, invalidated Rodel’s claim to the proceeds.
7. The agreement expressly declares these warranties to be material and that any breach thereof would constitute a fraud committed by AFP against Rodel.³⁴
8. The agreement expressly provides for the obligation to repay the full amounts (together with interest) which was paid by Rodel to AFP, to survive any cancellation of the agreement.³⁵ The parties further agreed that even if the sale of the Norwood property is cancelled, that in itself would not release the Conveyancer from repaying certain amounts to Rodel.³⁶

THE BACKGROUND FACTS

³² See clause 5.14 of the discounting agreement

³³ See clause 5.19 of the discounting agreement

³⁴ See the last unnumbered portion of clause 5 of the agreement

³⁵ See clauses 8.1.3 and 8.2 of the agreement

³⁶ See clause 10 of the Conveyancer’s Undertaking

October 2010

- [13] CAP, as purchaser of the Norwood property, substantially delayed the finalisation of the transaction due to its refusal to make VAT payments on the purchase price. A dispute arose between CAP and AFP as to whose liability it was to pay VAT, CAP contending that the South African Revenue Services should have zero rated the transaction.
- [14] As a result of this delay, AFP cancelled the agreement of sale with CAP. On 22 October 2010³⁷ Mr Nathan Blumenthal acting on behalf of AFP wrote a letter to Mr Jacques Morkel of Rodel confirming that; (i) they had cancelled the sale of the Norwood property concluded with CAP due to the latter's delay in paying the VAT; (ii) the repayment of the monies are still due to Rodel and apologising for the delay in repaying; (iii) the loan is well secured as they are reselling the property at R8.2 million in a more buoyant market; and (iv) Stupel and Berman will remain on board to attend to the next auction sale which was set for 24 November 2010.
- [15] On the same day, 22 October 2010³⁸, Stupel and Berman informed Rodel in writing of the developments in an e-mail as follows:

“We understand that you have already received a communication from Mr Nathan Blumenthal for and on behalf of Amber Falcon Properties advising you that the seller (Amber Falcon Properties 3 (Pty) Ltd) has elected to cancel the transaction as the Purchaser has not complied with its obligations to effect payment of the Value Added Tax to the Department of Inland Revenue.

We further understand that he has contacted the Alliance Group who originally sold the property who are immediately re-selling same (we understand that the property is quite saleable and a higher price will be sought).

Accordingly, **this notification to you is given in line with the undertaking that was given to you to keep you informed of important developments in regard to the transaction.**” (Emphasis added)

³⁷ See Exhibit “A” p. 58

³⁸ See Exhibit “A” p. 59

It will be noted that in this letter Stupel & Berman gave no indication of any intent to withdraw their undertaking given to Rodel. On the contrary, by complying with the duty to inform Rodel of important developments, they are actually confirming that they are still bound by the terms of their undertaking. Coupled with the advice of Mr Blumenthal that “the transferring attorneys Stupel & Berman will remain on board”, there was at this stage no reason for Rodel to be concerned about the direct repayment as promised by the conveyancers in their written undertaking.

[16] On 25 October 2010³⁹ Mr Blumenthal sent a further e-mail to Rodel confirming that the next auction was to be held on 24 November 2010 and further advising:

“I have instructed our offices **as well as those of the transferring attorneys, Stupel & Berman** that you are to be **privy** to any documentation pertaining to this transaction (Alliance mandate, recent rental property details etc.) should you so wish.” (Emphasis added)

The import of this letter can be none other than a confirmation to Rodel that the same contractual regime will remain in place as that which followed on the original sale of the Norwood property. This instruction was also not countermanded by AFP at this stage.

November 2010

[17] Unbeknown to Rodel, CAP launched an urgent application on 8 November 2010 to interdict AFP, Auction Alliance and Stupel & Berman from proceeding with the auction on 24 November 2010. The application was successful and an interim order was issued on 24 November 2010 interdicting the sale on auction of the Norwood property.⁴⁰ In accordance with a discovered internal note, it appears that on 26 November 2010,⁴¹ Mr Berman verbally informed Rodel that the auction set for 24 November 2010 did not go ahead as the previous purchaser

³⁹ See Exhibit “A” p. 63

⁴⁰ See Exhibit “A” pp. 64-5

⁴¹ See Exhibit “A” p. 95

was “contending the resale”. The note indicates that Mr Berman informed Rodel that a new purchaser might be lined up and that Rodel “shouldn’t worry”. In my view, this constituted a further affirmation by Mr Berman, in line with that of AFP that the discounting agreements and the conveyancer’s undertaking were still in place.

January 2011

[18] On 25 January 2011⁴² the urgent interdict applied for was settled. In terms of a letter from Stupel & Berman to Ismail Ayob and Partners, the attorneys acting for CAP, the settlement was recorded as follows:

- “2. We confirm that our client has agreed **to settle the matter** on the following terms:
 - 2.1 That the **respective parties will follow through with the transfer of the property;**
 - 2.2 That your client will contribute R50 000.00 towards our client’s legal costs;
 - 2.3 That your client will pay on demand the VAT for the transfer of the property; and
 - 2.4 That our client will endeavour to obtain the required SARS clearance.
- 3. In light of the above we shall proceed to remove the matter from the roll and we shall serve the necessary notice on your offices as soon as possible.”(Emphasis added)

As I understand this letter, the parties revoked the cancellation of the sale of the Norwood property and decided to continue therewith subject only to certain additional undertakings as to payment of legal costs for the interdict application and to attempt to obtain a zero clearance certificate from SARS. In effect, the parties continued with the original sale of the Norwood property. AFP and CAP did not enter into a new written contract (as provided by law) for sale of the Norwood property.

⁴² See Exhibit “A” p. 68

February 2011

[19] In an e-mail dated 3 February 2011⁴³ Mr Nathan Blumenthal misinformed Rodel about the state of affairs. Instead of informing Rodel that the interdict proceedings had become settled and that the parties agreed to proceed with the sale, he stated the opposite. He offered an amount of R1.520 million to Rodel in payment of the bridging finance and discounting fee. Be that as it may, the email constituted an acceptance that the obligation to repay the bridging finance was still alive and well even after a purported cancellation of the sale of the Norwood property.

[20] In accordance with the internal note of Rodel, it would also appear that on 3 February 2011 Mr Berman spoke to someone at Rodel informing them that they were going ahead with the first buyer and they were only waiting for him to pay the transfer duty. This is consistent with the interpretation of the parties' conduct as stated in paragraph [18] above. The note also records that Mr Blumenthal misinformed Rodel by stating that they had lost the court case which was not true as the matter became settled. The representative of Rodel who drafted the internal note informed Mr Blumenthal that Rodel intended to "hand him over", presumably to Rodel's attorneys.

[21] The very next day, 4 February 2011, Rodel's attorney of record addressed a registered letter to AFP cancelling the agreement concluded between the parties on 31 August 2010. Since there is a dispute as whether or not the documents show that Rodel cancelled both discounting agreements, it is necessary to refer to the content of this letter. It states:

- "1. Our client (Rodel) hereby cancels the **Agreement** entered into between you (AFP) and our client on **31 August 2010**.
2. We have been instructed to demand from you, as we hereby do, payment of the **sums** of R850 000.00 **and** R550 000.00 plus the discounting fee of 0.133% per day on the amount of **R850 000.00 from 31 August 2010 to date**

⁴³ See Exhibit "A: pp. 70 and 71

of payment, both days inclusive and on the amount of R550 000.00 from 2nd September 2011 to date of payment, both days inclusive, in regard to the **monies** lent and advanced to you pursuant to Discounting **Agreements** entered into between yourself and our client on **31 August 2010** within 20 days from date hereof. The **amount** outstanding as at 3 February 2011 is the sum of **R1 690 870.00.**” (Emphasis added)

[22] It is immediately noticeable that the letter is ambiguous. Paragraph 1 refers to “Agreement” in the singular and only to the agreement dated 31 August 2010. However, paragraph 2 of the letter refers to the two amounts of R850 000.00 and R550 000.00 plus discounting fees calculated from both 31 August 2010 and 2 September 2011 on the two respective amounts. It also refers to “monies lent in advance to you pursuant to Discounting Agreements” in the plural, but then state that it was concluded on 31 August 2010 only. The last sentence of paragraph 2 again indicates that the amount outstanding includes both amounts of bridging finance plus a discounting fee amounting to R1 690 871.00.

[23] The understanding of AFP of the import of this letter is recorded in a letter dated 17 February 2011.⁴⁴ This letter records the following:

“I refer to your letter dated 04 February 2011 (received only after that date).

We inform you that we have appointed Attorneys Bieldermands Incorporated, namely Mr Pieter Bieldermand, **to dispose of the matter.**

We confirm that we accept your cancellation of the **Agreement.**” (Emphasis added)

The letter poignantly refers to a cancellation of “the Agreement” (singular). This letter also implies that a new attorney has been appointed to dispose of this matter. It is unclear as to whether the “matter” to be disposed of refers to the sale of the Norwood property or the discount agreements. However, whichever meaning is to be ascribed to this letter, as between Rodel and AFP, the latter had a continuing obligation to repay the bridging finance and any lawful release of the conveyancers, required the prior written consent from Rodel.

⁴⁴ See Exhibit “A” p. 74

[24] In a further letter of even date⁴⁵, Mr Blumenthal on behalf of AFP, wrote Rodel's attorneys of record stating that liability for payment of the amount claimed in Rodel's letter of 4 February 2011 is denied and a request is made to refer the matter 'to a Dispute Resolution Agent, Consumer Court, Ombudsman, etc.'

[25] Also on 17 February 2011⁴⁶, Stupel & Berman sent "copies of the signed undertaking for Rodel" made by it to AFP. This constitutes a further admission by Stupel and Berman that the undertaking to pay the proceeds of the sale, was given "for Rodel" and not only to AFP.

[26] Mr Blumenthal, acting on behalf of AFP, addressed a letter dated 21 February 2011⁴⁷, signed by Joy Moraine on his behalf, to Stupel & Berman confirming that "Rodel have indeed cancelled the Agreement" (singular) and that "such cancellation" was accepted by AFP. The letter further stated:

"Following the above, we request that you withdraw your Letter of Undertaking to Rodel and insofar as any other arrangements/negotiations with Rodel are concerned – kindly deemed same to be cancelled."

[27] Also on 21 February 2011, Bieldermaans Inc acting on behalf of AFP wrote two letters, one to Rodel's attorneys of record and one to Stupel & Berman. In both these letters Bieldermaans only addresses the cancellation of one discounting agreement dated 31 August 2010. The letter written to Norman Berger and Partners Inc⁴⁸ reads as follows:

"We acknowledge receipt of your letter dated 4 February 2011 addressed to our client Amber Falcon Properties 3 (Pty) Ltd (hereinafter referred to as 'our client') and handed to us for our attention and reply.

Our client notes that your client has given formal notice of cancellation of the Discounting **Agreement** concluded between our respective clients on **31st August 2010**. Our client hereby accepts the cancellation and no longer regards it as bound by the terms and conditions of the said **Agreement**.

⁴⁵ See Exhibit "A" p. 75

⁴⁶ See Exhibit "A" p. 76A

⁴⁷ See Exhibit "A" p. 76B

⁴⁸ See Exhibit "A" p. 77

We are further instructed to advise attorneys Stupel & Berman Inc of the foregoing. We have instructed Stupel & Berman on behalf of our client to withdraw any and all undertakings given by them in terms of the aforesaid **Agreement**. This instruction is *inter alia* as a result of your client's cancellation of the **Agreement**." (Emphasis added)

The letter written by Bieldermands Inc to Stupel & Berman⁴⁹ reads as follows:

"We are instructed that **you assist our client** in your capacity as Conveyancer in the sale of our client's property known as Erf 416 Norwood. Our client entered into a **discounting agreement** with Rodel Financial Services on the **31st August 2010** in terms of which our client obtained '*bridging finance*'. We understand that you issued certain undertakings on behalf of our client **in favour of** Rodel Financial Services (Pty) Ltd.

We enclose herewith a copy of a letter dated 4 February 2011 which our client has received from attorneys Norman Berger and Partners Inc representing Rodel Financial Services (Pty) Ltd. As you will note, the attorneys on behalf of their client have cancelled the Discounting **Agreement**.

We enclose herewith a copy of our letter in response thereto in terms of which our client has accepted the cancellation. In the circumstances we hereby formally instruct you, on behalf of our client, not to proceed any further with any undertakings **given in favour of** Rodel Financial Services (Pty) Ltd. You are requested to immediately withdraw and all undertakings given by you in terms of the aforesaid Discounting **Agreement**." (Emphasis added)

[28] In response to the aforesaid instructions, Stupel & Berman addressed a letter dated 24 February 2011⁵⁰ to Rodel wherein the following is stated:

- "1. As you are aware, we are attending to the above transfer of Erf 416 Norwood from Amber Falcon Property (Pty) Ltd to Cross Atlantic Properties 186 (Pty) Ltd.
2. We attach hereto a copy of a fax dated 21 February 2011 from Bieldermands Inc Attorneys wherein they instruct us to immediately withdraw any and all undertakings given by us in terms of a Discounting **Agreement** concluded between Rodel Financial Services (Pty) Ltd and Amber Falcon Properties 3 (Pty) Ltd.
3. In the circumstances we are **compelled** to give effect to the mandate/instruction of Amber Falcon Property 3 (Pty) Ltd and hereby withdraw from the **undertaking** given by us as Conveyancers in the above **transaction** on the **27th September 2010**." (Emphasis added)

⁴⁹ See Exhibit "A" pp. 78 and 78A

⁵⁰ See Exhibit "A" p. 80

Stupel & Berman in the above letter also refers to “a Discounting Agreement” (singular) and purport to withdraw from “the undertaking” (singular) in the “above transaction” (singular). It does not, however, withdraw as the “Conveyancer” whose duty it is to procure the transfer of the Norwood property. In paragraph 2 of the letter they do, however, attach and rely upon Bieldermands’ letter of 21 February 2011⁵¹ which speaks of a single discounting agreement which was dated 31 August 2010 as having been cancelled. It is further common cause that the date of “27th September 2010” referred to in paragraph 3 in this letter is incorrect.

March 2011

[29] Unbeknown to Rodel, Stupel & Berman (still acting as conveyancer) lodged transfer documents for the Norwood property with the Registrar of Deeds on 8 March 2011. It is common cause that transfer of the Norwood property into the name of CAP occurred on 17 March 2011. Neither of these events was told to Rodel.

[30] Rodel then sought to exercise its rights against AFP arising from the discounting agreements and also against Mr Julius Blumenthal arising from the suretyship that he had signed in favour of Rodel. On 16 March 2011⁵² Rodel as plaintiff issued summons against them. Contrary to Rodel’s attitude that only one discounting agreement was cancelled, it alleged in paragraph 8 of the particulars of claim that it had cancelled both agreements⁵³ relying for such cancellation on the letter of 4 February 2011 sent by registered post by Norman Berger and Partners Inc to AFP, referred to earlier. Blumenthal and AFP filed a notice of intention to defend.

⁵¹ See Exhibit “A” pp. 78 and 78A

⁵² See Exhibit “C” p. 1

⁵³ See Exhibit “C” p. 5

[31] It is common cause that Stupel and Berman paid the net proceeds of the sale of the Norwood property to AFP on 30 March 2011.⁵⁴ Nothing was paid to Rodel.

May 2011

[32] On 10 May 2011⁵⁵ summary judgment was applied for by Rodel wherein Mr Jacques Morkel stated under oath that he could positively swear to the facts set out in the summons. He also confirmed the indebtedness in the claimed amount of bridging finance plus discounting fees due on both the sums of R850 000.00 and R550 000.00.⁵⁶

June 2011

[33] On 17 June 2011 Rodel was awarded summary judgment against AFP and Mr Blumenthal in the amount of R1 763 489.00 plus discounting fees, interest and costs.⁵⁷ Although Blumenthal and AFP instructed attorneys to apply for leave to appeal this judgment⁵⁸, such application was not proceeded with.

July 2011

[34] On 25 July 2011⁵⁹ Rodel's attorneys of record sent a letter to Stupel & Berman informing them that judgment had been obtained against APF and reminded them of their irrevocable undertaking they had given to make payment to Rodel. The letter also records that Rodel never consented to the release of Stupel & Berman from their undertaking and that the unilateral attempt to do so was never accepted or condoned. They demanded payment of the amount by no later than Tuesday 26 July 2011.

⁵⁴ See the Stated Case *infra* paragraph 1.34

⁵⁵ See Exhibit "C" p. 33

⁵⁶ See Exhibit "C" pp. 36-7

⁵⁷ See Exhibit "A" p. 84

⁵⁸ See Exhibit "A" p. 92

⁵⁹ See Exhibit "A" p. 85

[35] On 28 July 2011⁶⁰ Rodel’s attorneys of record received a letter from Stupel & Berman wherein – (i) they denied acting for AFP or Blumenthal, stating that Bieldermands was their attorney; (ii) they contended that the sale agreement of the Norwood property was cancelled but after the urgent application to enforce it, the matter was settled and “the Purchaser (CAP) and Seller (AFP) agreed to reinstate the agreement (in essence a new agreement)”; (iii) they expressed the view that “by reason of the cancellation of the agreement (notwithstanding reinstatement) our undertaking automatically expired”; (iv) they relied on the cancellation by Rodel of the discounting agreement with AFP, alleging that the undertakings therefor fell away “by operation of law”; (v) they contended that the undertaking was not “an irrevocable undertaking to pay” but merely an “acknowledgement” by them that the “Seller (AFP) provided us with an irrevocable instruction to pay”; (vi) they also contended that AFP had instructed them to withdraw from such an undertaking; and finally, (vii) they denied owing any amounts to Rodel.

September and October 2011

[36] On 29 September 2011⁶¹ Rodel’s attorneys of record caused a writ of execution to be issued in terms of the judgment obtained against Mr Blumenthal and AFP.

[37] On 19 October 2011 the sheriff served the writ on AFP at its registered office which was the same address as the chosen *domicilium citandi et executandi* i.e. 52 Grant Avenue, Norwood, Johannesburg of AFP. To date both AFP and Blumenthal have failed to make payment of the writ.

November 2011

⁶⁰ See Exhibit “A” pp. 87 – 89

⁶¹ See Exhibit “A” p. 93

[38] As a result, Rodel issued summons against Stupel & Berman as first defendant and Mr Berman as second defendant on 14 November 2011. The parties filed pleadings and the defendants have raised various defences.⁶²

THE STATED CASE

[39] The stated case reads as follows:

“A: TAKE NOTICE THAT:

1. By agreement between the parties and subject to the leave of this Honourable Court, the issues between the parties as set out in the pleadings are to be determined as a stated case.
2. The parties have agreed upon a written statement of facts in the form of a Special Case for the adjudication of the Court; and
3. The agreed facts and questions of law between the parties and their contentions thereon are set out hereunder.

B: IT IS AGREED:

1. THE FACTS (RULE 33(2)(a))

- 1.1 The parties are agreed that as part of the facts which may be taken into account by this Honourable Court, regard may be had to all of the documents in exhibit “A”. It is agreed that the documents are what they purport to be and regard may be had to the contents thereof as if their authors had testified as to their content (such documents are not annexed hereto but are to be taken as if they have, for the purposes of Rule 33 (2) (a)).
- 1.2 In addition to the documents contained in exhibit “A”, the following shall be added thereto and handed to the Court as exhibit “C”:
 - 1.2.1 the summons issued by Rodel Financial Services (Pty) Ltd (“**Rodel**”) against Amber Falcon (“**the Client**”) and Julius Blumenthal; and
 - 1.2.2 the Heads of Argument which were submitted on behalf of Rodel in obtaining summary judgment against the Client and Julius Blumenthal
- 1.3 Without derogating from what is in the documents in exhibit “A” the following facts are agreed upon.
- 1.4 That on 31st August 2010, the Client and Rodel entered into a bridging finance agreement in terms whereof Rodel paid to the Client the sum of R850 000.00 on the terms and conditions as set out more fully in exhibit “A” (“**the first discounting agreement**”).
- 1.5 That on 2nd September 2010, the Client and Rodel Financial Services

⁶² See Annexure “B” which contains all the pleadings including a replication and rejoinder as well as further particulars for trial

(Pty) Ltd (“**Rodel**”) entered into a bridging finance agreement in terms whereof Rodel paid to the Client the sum of R550 000.00 on the terms and conditions as set out more fully in exhibit “A” (“**the second discounting agreement**”).

- 1.6 That pursuant to and **as a condition** for entering into the first and second discounting agreements with the Client, Stupel & Berman Incorporated (“**the Conveyancing attorneys**”), represented by Michael Berman (“**Berman**”) furnished written undertakings in favour of Rodel as set out more fully in exhibit “A”.
- 1.7 The defendants were never furnished with, nor were they aware of the “Discounting Terms and Conditions” which pertained to and governed the first and second discounting agreements.
- 1.8 The discounting agreements were concluded pursuant to a sale of certain immovable property from the Client to Cross Atlantic (Pty) Ltd (“**the Purchaser**”).
- 1.9 In terms of the terms and conditions of the respective discounting agreements, Rodel purchased “the claims” as defined.
- 1.10 On 2 February 2009 the Client had caused a mortgage bond in the form as it appears as annexure “P1” to the defendants’ plea to be registered over the property in favour of Mercantile Bank Limited.
- 1.11 Rodel complied with all of its obligations in terms of the agreements to the Client.
- 1.12. On the 22nd October 2010, Nathan Blumenthal (“**Nathan**”), sent an email on behalf of the Client to Rodel in which he *inter alia* informed Rodel that:
 - 1.12.1. the Client had cancelled the abovementioned Sale Agreement of the Property as a result of the failure of the Purchaser to *inter alia* pay the VAT payable in terms of clause 4.7 of the Sale Agreement;
 - 1.12.2. the Property was being re-marketed at a higher price and would be auctioned on 24 November 2010;
 - 1.12.3. the advance from Rodel was well secured;
 - 1.12.4. the First Defendant “*will remain on board and attend to the next sale and transfer thereof*”.
- 1.13 On 22 October 2010 Jacques Morkel advised Nathan, *inter alia*, that : “We are comfortable with the situation as explained by you. Please keep us posted on further developments and let me know as soon as you get a date for the next auction”
- 1.14. On the 22nd October 2010, the Conveyancing Attorney sent an email to Rodel in which it confirmed the Client had cancelled the Sale Agreement of the Property and that it was being re-sold and stated that this notification was given to Rodel in line with the undertaking that was given to Rodel by the Conveyancing Attorney to keep Rodel “**informed of important developments in regard to the transaction**”.
- 1.15 On the 8th November 2010, the Purchaser instituted, under case number 45304/2010, an urgent application against the Client, Auction Alliance and the Conveyancing Attorney, *inter alia* seeking to interdict the disposal of the property by the Client pending an order directing the client to take such steps as are necessary to effect registration of transfer of the

property from the client to the purchaser, Cross Atlantic in terms of the sale agreement against payment of the purchase price, VAT or transfer duty as may be required by SARS and such other amount as are payable in terms of the sale agreement.

- 1.15 On 24 November 2010, this Honourable Court granted an interim order *inter alia*:-
 - 1.15.1 interdicting the Client from disposing of or alienating the property;
 - 1.15.2 interdicting and restraining the Conveyancing Attorney from releasing any monies held in trust to the Client or any other person.
- 1.16 At all material times hereto the Conveyancing Attorney acted on its own behalf and on behalf of the Client in opposing the interdict proceedings.
- 1.17 On 5 January 2011, Tammy Parkinson of Rodel sent an e-mail to Nathan in which she requested an update on the matter and enquired ***“what is going to happen with this transaction as you mentioned that you will more than likely be proceeding with the original sale?”***.
- 1.18. On 25 January 2011, Berman on behalf of the Conveyancing Attorney and the Client recorded in writing the settlement of the interdict proceedings and which includes ***“the respective parties will follow through with the transfer of the property”*** as is set out in exhibit “A”. This letter was sent by the Conveyancing Attorneys to the purchaser, Cross Atlantic. the settlement was confirmed by the purchaser’s conveyancers on the 21 January 2011
- 1.19. On 3rd February 2011, Tammy Parkinson of Rodel was advised telephonically by Berman that the sale between the Client and Cross Atlantic would be proceeding and that they were waiting for the purchaser to pay transfer duty.
- 1.20. On 3rd February 2011, Tammy Parkinson of Rodel was advised telephonically by Nathan that the Court case had been lost and that he had a settlement agreement that he wished to look over before he took a decision on whether he would accept such an offer. He was told that Rodel had to hand him over.
- 1.21. On 3rd February 2011, Nathan sent an e-mail to Rodel as set out in exhibit “A” stating as follows:-
 - 1.21.1. ***“we clearly have a situation on our hands in that the Courts have indeed granted the Purchaser’s (sic) their order to prevent the property from being re-auctioned;***
 - 1.21.2. ***the sale can be held in limbo anything from six to twelve months;***
 - 1.21.3. ***the bond holders are threatening to foreclose;***
 - 1.21.4. ***we are unable to proceed with the sale of the property to a third party;***
 - 1.21.5. ***Precarious indeed. I am currently negotiating with the sellers, to settle the matter and to proceed with the sale;***
 - 1.21.6. ***the only way forward, it seems is that the bondholder agrees to a settlement figure less than they are claiming;***

- 1.21.7. ***ourselves (the Seller) agrees to less money and abandonment of our claims;***
- 1.21.8. ***the attorneys have already agreed to a substantial reduction of their account.”***
- 1.22 On 4th February 2011, Rodel, through its attorneys Norman Berger and Partners, sent a letter of cancellation which only referred to the first discounting agreement and demanded payment of the amounts due in terms of both discounting agreements.
- 1.23 On 17 February 2011 the Client advised Rodel that it had appointed Attorneys Bielderman to dispose of the matter, and confirmed that it accepted Rodel’s cancellation.
- 1.24 On the 21st February 2011, the Client wrote to the Conveyancing Attorney with a ***“request that you withdraw your Letter of Undertaking to Rodel and insofar as any other arrangements / negotiations with Rodel are concerned – kindly deem same to be cancelled”***.
- 1.25 Also on 21 February 2011, Rodel’s attorneys of record received a letter from Bieldermand Inc. in which Rodel was informed *inter alia* that the Client accepted the cancellation of the first Discounting Agreement and no longer regarded itself bound by the terms and conditions of the said Discounting Agreement.
- 1.26 Also on 21 February 2011, Bieldermands, on behalf of the Client, formally instructed the Conveyancing Attorneys not to proceed further with any undertakings given in favour of Rodel, and requested them to immediately withdraw any and all undertakings given by them.
- 1.27 On the 24th February 2011, the Conveyancing Attorneys sent Rodel’s attorneys of record a letter in which they:
 - 1.27.1 Recorded that, as Rodel were aware, they were attending to the relevant transfer;
 - 1.27.2 referred to the fax dated 21 February 2011 from Bieldermands Inc. wherein Bieldermands Inc. instructed them to withdraw the abovementioned undertakings given by them and informed Rodel’s attorneys of their withdrawal from ***“the undertaking given on 27 September 2010”***. The reference to 27 September 2010 is an obvious error.
- 1.28 Vis-à-vis the defendants, the first time the plaintiff reacted or responded in any way to that letter of 24 February 2010 was by way of its attorneys’ letter of 25 July 2010 to which reference is made below. In the intervening period, the plaintiff pursued the remedies available to it, against the Client and Julius Blumenthal.
- 1.29 Despite demand the Client failed to refund Rodel any amount paid by Rodel to the Client in respect of the Purchase Price and failed to pay Rodel any discounting fees thereon.
- 1.30 On 8th March 2011, the documents relating to the transfer of Erf 416, Norwood from the Client to Cross Atlantic were lodged in the deeds office.
- 1.31 On the 16th March 2011, Rodel caused a Combined Summons to be issued by this Honourable Court under Case No. 2011/11100 against the Client and Julius Blumenthal for payment of the amount of the sum of R1 783 489.00 plus discounting fees and interest in respect of the amount

due to Rodel in terms of the abovementioned Discounting Agreements. In its particulars of claim, Rodel alleged that both discounting agreements had been cancelled and claimed the outstanding amounts under both agreements.

- 1.32 Service of the abovementioned Combined Summons was affected on the Client and Julius Blumenthal on 23 March 2011.
- 1.33 On the 17th March 2011, the following occurred, without Rodel's knowledge:
 - 1.33.1 transfer of the Property was registered in the name of Cross Atlantic;
 - 1.33.2 payment of the purchase price for the Property was made by Cross Atlantic to the Conveyancing Attorneys.
- 1.34 The Conveyancing Attorneys paid the net proceeds of the sale of the property to the Client on the 30th March 2011.
- 1.35 On the 31st March 2011, the attorneys of record of the Client entered into an Appearance to Defend the Combined Summons.
- 1.36 On the 11th April 2011, the attorneys of record of Rodel served a Notice of Set Down in terms of Rule 32(2) of an Application for Summary Judgment in respect of the abovementioned Combined Summons for hearing on 10 May 2011. It was accompanied by an affidavit which confirmed the allegations contained in the particulars of claim.
- 1.37 On the 10th May 2011, the attorneys of record of Rodel received an AFFIDAVIT IN OPPOSITION TO APPLICATION FOR SUMMARY JUDGMENT and the hearing of the Application was postponed to 17 May 2011 with the Client to pay the wasted costs.
- 1.38 On the 17th May 2011, the Application for Summary Judgment was heard by Acting Judge G. Rautenbach and on 17 June 2011 he handed down his judgment in favour of Rodel in the sum of R1 763 489.00 plus discounting fees and interest and costs as set out in the judgment.
- 1.39 To date, neither the Client nor Julius Blumenthal has complied with the abovementioned Order.
- 1.40 On the 25th July 2011, Rodel's attorneys of record sent a letter to the Conveyancing Attorneys in which they *inter alia*:
 - 1.40.1 Informed them that judgment had been obtained against the Client in terms of the judgment which it attached;
 - 1.40.2 reminded the Conveyancing Attorneys of the irrevocable undertaking they had made to pay Rodel;
 - 1.40.3 stated that Rodel never consented to release the Conveyancing Attorneys from their undertaking and that their unilateral attempt to withdraw from such undertaking was never accepted or condoned; and
 - 1.40.4 demanded payment of the judgment debt by close of business on 26 July 2011.
- 1.41 On the 28th July 2011, Rodel's attorneys of record received a letter from the Conveyancing Attorneys in which they *inter alia* informed them that:

- 1.41.1 by reason of the cancellation by Rodel of the Discounting Agreement, by operation of law the undertaking provided by them fell away;
- 1.41.2 the first defendant did not provide an irrevocable undertaking to pay, but merely acknowledged that the client provided them with an irrevocable instruction to pay.
- 1.41.3 they had been instructed by the Client to withdraw from such undertaking which they had done on 24 February 2011; and
- 1.41.4 they denied any legal obligation to pay Rodel any sum whatsoever.
- 1.42 On the 29th September 2011, Rodel's attorneys caused a Writ of Execution in terms of the abovementioned judgment to be issued against the Client and Julius Blumenthal.
- 1.43 On the 19th October 2011, the Sheriff of this Court served the Writ of Execution on the Client at its registered office by affixing a copy of the original to the main door of such registered office as a result of not being able to find a responsible employee or other person thereat willing to accept service.
- 1.44 In deciding the parties' respective legal contentions it is noted that Rodel withdraws its contentions that the Defendants applied to Rodel on behalf of the Client for bridging finance pursuant to the sale of Erf 416, Norwood ("*the property*") to Cross Atlantic (the purchaser), that the Defendants initiated the application for bridging finance and that the defendants represented the clients in entering into the bridging finance agreements.
- 1.45 Furthermore, the plaintiff also withdraws its alternative delictual claim.

2. THE LEGAL ISSUES TO BE DETERMINED

- 2.1 Whether or not, in the circumstances of this matter, the claim in respect of immovable property can be ceded by the seller to a third party in a discount sale agreement or whether such cession amounts to a partial cession of a debt.
- 2.2 Whether or not Rodel acquired good and valid title to the claim as defined in the discounting agreements;
- 2.3 Whether or not the Conveyancing Attorney was pursuant to the first and second discounting agreements entitled to and did, in fact, withdraw the undertaking/s given;
- 2.4 Whether or not Rodel has a good and valid claim against the Conveyancing Attorney and Berman in the circumstances.

3. THE CONTENTIONS FOR THE PARTIES

The full contentions of each of the parties are contained in their respective Heads of Argument. Without derogating therefrom or limiting such contentions in any way, a summary thereof is set out below.

The Plaintiff contends:

- 3.1 that the cession of the claim and proceeds to Rodel is valid and does not amount to a partial cession of a debt;
- 3.2 that the undertakings given by the Conveyancing Attorneys on the 31st August 2010 and the 2nd September 2010 and Berman constituted a

separate and distinct legal agreement between Rodel and the Conveyancing Attorney/Berman, that remained valid and binding whether or not the first or the second discounting agreements were cancelled;

3.3 that the second discounting agreement was never validly cancelled nor did the client accept any cancellation thereof;

3.4 that the undertakings given by the Conveyancing Attorneys and Berman survived the cancellation of the first discounting agreement, but in any event since the second discounting agreement was never cancelled the undertaking furnished in terms of the second discounting agreement remained of full force and effect;

3.5 that the undertaking on the part of the Conveyancing Attorneys to keep Rodel advised of important and material developments was breached; and

3.6 that the undertaking to pay Rodel the claim within 72 hours of registration of transfer was breached;

3.7 that the conveyancing attorneys and/or Berman should be fixed with constructive knowledge of the Terms and Conditions of the Discounting Agreements.

The Defendants contend:

3.7 that the agreement of sale entered into between the client and Cross Atlantic on the 9th February 2010 was cancelled;

3.8 that the Client ceded a portion of the proceeds to Rodel;

3.8 that on a proper interpretation and construction of the discounting agreement this cession amounted to a partial cession and, by virtue of the lack of consent from Cross Atlantic, it is for that reason enforceable and invalid;

3.9 that the undertakings given pursuant to an invalid partial cession, and as part of the discounting agreements, are unenforceable and invalid;

3.10 that the claim as defined was not capable of being ceded to Rodel because on the 2nd February 2009 the Client had caused a covering mortgage bond over the property to be registered in favour of Mercantile Bank. It is alleged that in terms of this bond the Client had already ceded the entire proceeds to Mercantile Bank and the purported cessions as contained in the Discounting Agreements were invalid and unenforceable thus rendering the Discounting Agreements invalid and unenforceable.

3.11 that the undertakings do not constitute separate and enforceable agreements between Rodel and the Conveyancing Attorneys and Berman;

3.12 that they were obliged by virtue of their obligations as attorneys to follow and adhere to the instructions of the Client to withdraw the undertakings they have given to Rodel;

3.13 that both the first and second discounting agreements were cancelled on the 4th February 2011;

3.14 that the undertakings were of no force and effect for the reasons set out above and hence the Conveyancing Attorneys and Berman were not in breach of any obligation to Rodel;

3.15 that Rodel's failure to dispute the withdrawal of the undertaking relating to the first discounting agreement on the 24th February 2011 amounted to a waiver of its right to enforce the undertaking *alternatively* whether Rodel is estopped from enforcing compliance with the undertaking;

3.16 that Rodel by electing to institute action against the Client and the surety forfeited its right to institute action against the Defendants.

3.17 The Defendant informed the Plaintiff of all relevant facts and circumstances pertaining to the conveyancing transaction".

3.18 That the Plaintiff represented to the Defendant that both discounting agreements had been cancelled.

4. THE ISSUES TO BE ADJUDICATED

- 4.1 Whether the cession of the claim to the proceeds arising out of the sale transaction between the client and Cross Atlantic Properties were legally acquired and remained the sole property of Rodel.
- 4.2 Whether the undertakings given by the Conveyancing Attorney and Berman are separate agreements.
- 4.3 Whether the second discounting agreement was ever cancelled.
- 4.4 Whether the undertaking/s that arose from the first *and second* discounting agreements ceased to be of force or effect upon the cancellation of that/those agreement/s if cancelled.
- 4.5 Whether the Conveyancing Attorneys and Berman breached the terms of their undertakings by failing to:-
 - 4.5.1 advise Rodel of all relevant facts and circumstances;
 - 4.5.2 pay the claim to Rodel notwithstanding the transfer of the property and receipt of the proceeds arising out of the sale.
- 4.6 Whether Rodel accepted the withdrawal of the undertakings and, if not, whether it waived or is estopped from asserting any rights it may have in terms of the undertakings.
- 4.7 Whether any breach/es by the defendants are causally connected to the plaintiff's loss.

5. THE COURT'S RULING

- 5.1 If the Court finds in favour of Rodel then judgment in the sum of R1 763 489.00 plus interest at the rate 15.5% per annum from the 18th March 2011 to date of payment plus costs of suit which costs are to include the costs consequent upon the employment of two counsel.
- 5.2 If the Court finds in favour of the Conveyancing Attorneys and Berman then the action is to be dismissed with costs, which costs are to include the costs consequent upon the employment of two counsel."

THE LEGAL ISSUES TO BE DECIDED

[40] Despite the sequence of the legal issues as set out in paragraph 2 of the stated case, I find it more convenient to deal with them as follows:

1. The legal nature of the Conveyancer's undertaking.
2. The alleged cancellation of the discount agreements.
3. The validity of the cession of net proceeds of the sale of the Norwood property.

The Conveyancer's Undertaking

[41] It would appear to me that the parties failed to address the true nature of the undertakings contained in the schedule to the discounting agreements. It is important to understand the true nature of such undertakings in order to establish whether or not it was in fact irrevocable either by AFP and/or by Stupel & Berman. As previously noted, the defendants' contention is that the undertaking was revocable at the instance of AFP on the basis that Stupel & Berman acted as their agent for the transfer of the property into the name of the purchaser (CAP). On the other hand the plaintiff contended that the true nature of the agreement is a stand-alone undertaking by Stupel & Berman which was neither revocable by AFP or Stupel & Berman themselves.

[42] The proper legal construct of this agreement, in my view, can be gleaned from the schedule attached to the discounting agreements. It will be remembered that both schedules were signed by three parties namely AFP, Stupel & Berman and Rodel.⁶³ When doing so, the three parties by mutual consent entered into a tripartite agreement. The crux of the matter is to establish the capacity in which Stupel & Berman became party to this tripartite agreement.

[43] It is clear that Stupel & Berman signed the schedule as the party responsible for the transfer of the property and in the capacity as agent acting on behalf of AFP, the seller of the property. In one sense, AFP acted as the principal and Stupel & Berman as the agent for the purpose of transferring the property to CAP and payment of the net proceeds. At common law such agent's authority may freely

⁶³ See Exhibit "A" p. 20

be terminated by the principal even if it is stated to be irrevocable.⁶⁴ To the aforesaid general rule there are, however, certain exceptions. These exceptions apply even if the authority granted to the agent is **not** expressed to be irrevocable. One of the recognised exceptions is where the authority “is coupled with an interest”⁶⁵, to which I shall return.

[44] The action of the parties in simultaneously signing the schedule could result in their tripartite agreement being interpreted as a *stipulatio alterii*. It could be argued that AFP and Stupel & Berman were willing to allow Rodel by its acceptance of the schedule to obtain payment of the net proceeds direct from Stupel & Berman instead of via AFP. However, whether the parties’ actions are to be regarded as such is not material for purposes of coming to a conclusion in this matter⁶⁶. What is of importance is to establish the extent of the respective rights vis-à-vis one another of the three parties to the tripartite agreement.

[45] In answering the aforesaid question it is helpful to note what was said by Broome and Nienaber JJ in **Consolidated Frame Cotton Corporation Ltd** *supra* at 25C – E:

“There is authority for the proposition that, where the agent’s authority forms an **integral part of an overall transaction**, be it between the agent and the principal, or **between the agent, the principal and other parties**, the principal is no longer at liberty to alter or revoke it unilaterally, at least not, one should perhaps add, if the authority cannot be severed from the overall agreement without changing its sense.”⁶⁷ (Emphasis added)

[46] At common law the third person to whom payment is authorised (in this case Rodel) was known in the Roman law as an *adiectus solutionis causa*. The

⁶⁴ See **Joel Malamed and Hurwitz v Cleveland Estates (Pty) Ltd; Joel Malamed and Hurwitz v Vornor Investments (Pty) Ltd** 1984 (3) SA 155 (A) at 171D – G; **The Firs Investment Ltd v Levi Bros Estates (Pty) Ltd** 1984 (2) SA 881 (A) at 886D; **Pretorius v Erasmus** 1975 (2) SA 765 (T)

⁶⁵ See **Natal Bank Ltd v Natorp and Registrar of Deeds** 1908 (TS) 1016; **Ward v Barrett NO and Another** 1962 (4) SA 732 (N) at 737; **Consolidated Frame Cotton Corporation Ltd v Sithole and Others** 1985 (2) SA 18 (NPD) at 22I – 23A per Broome and Nienaber JJ

⁶⁶ See **Estate Greenberg v Rosenberg and Greenberg** 1925 TPD 924 at 929 – 930 where it also was found unnecessary to analyse the transaction within the perimeters of a particular kind of contract

⁶⁷ See also **Administrator, Natal v Magill, Grant & Nell (Pty) Ltd (in Liquidation)** 1969 (1) SA 660 (A) at 669B – F

adiectus was not entitled to sue as his right was restricted to the receipt of payment only, but the right of the debtor (in this case Stupel & Berman) to pay the *adiectus*, when conferred as an integral part of the contract between the debtor (AFP) and the creditor (Rodel) could not ordinarily be revoked. In this regard Pothier in his work “Obligations” paragraph 489 lucidly expounded the position thus:

“A person to whom the creditor has indicated the payment to be made by the agreement itself, is very different from one who has merely an authority from the creditor to receive. The power of paying to a person having a simple authority ceases by revocation of the authority notified to the debtor, which the creditor may make at pleasure...

On the contrary, the right of paying to the person indicated by the agreement being **founded upon the agreement itself, of which it constitutes a part**, and which cannot be derogated from, but by mutual consent, the creditor cannot deprive the debtor of it, and the debtor, **notwithstanding any prohibition of the creditor**, may according to the law of the agreement, pay to the person indicated;...”⁶⁸ (Emphasis added)

[47] In order to apply the aforesaid common law principle to the facts of this case, it is necessary to understand that Rodel as an *adiectus* is a person other than the creditor (AFP) to whom by agreement between the parties the debtor (Stupel & Berman in respect of the net proceeds), is obliged to pay what is due to the creditor in respect of the net proceeds (AFP). In regard to the discounting agreement, Rodel is AFP’s creditor and AFP the debtor in respect of the repayment of the bridging finance plus discounting fees.

[48] In order for the recognised exception to apply to the tripartite agreement in the present instance, Rodel and conveyancers must be shown to have an interest in the overall contract.⁶⁹ In my view, the overall contract is the sale agreement of the Norwood property which is linked to the two discounting agreements granting the seller of the property bridging finance repayable from the net proceeds of the sale direct to the lender by the agent of the borrower. In this

⁶⁸ As quoted in **Norman Kennedy v Norman Kennedy Ltd; Judicial Managers, Norman Kennedy Ltd NO v Reinforcing Steel Co, Ltd and Others** 1947 (1) SA 790 (CPD) per Ogilvie Thompson AJ at 802; **Cassim v Latha** 1930 TPD 659

⁶⁹ See **Kopman and Another v Benjamin** 1951 (1) SA 822 (W) at 886

contractual arrangement, it is clear that Rodel had a material interest in the net proceeds which was to emanate from the sale of the Norwood property. But for such sale, Rodel would not have been involved in concluding these discounting agreements with AFP. It is also common cause that Rodel had an interest in the payment of the net proceeds directly to it by Stupel & Berman in terms of the instruction by Blumenthal to Stupel & Berman on 25 October 2010 that Rodel is “to be **privy** to any documentation pertaining to this transaction...”

- [49] Similarly, Stupel and Berman as agent of AFP, had an interest in executing the transfer and causing payment of the net proceeds correctly in order for it to be lawfully entitled to its conveyancing fees. Its interest is recorded in the Conveyancer’s Undertaking. In terms of clause 1 of this undertaking, Stupel and Berman are involved in the sale of the Norwood property. In terms of clauses 2 and 3 thereof, they warrant to Rodel that such sale is valid, enforceable in law with no impediment that would hinder or delay the transfer. Any breach of this warranty would necessarily involve Stupel and Berman in a claim for damages and/or the loss of their fees. This can only mean that the conveyancers are aware of the fact that time was of the essence for Rodel to recoup the bridging finance and fees, expeditiously. This is further confirmed by Clause 4 of the undertaking which records the conveyancer’s knowledge and understanding of the agreement between Rodel and AFP, i.e. that it is a discounting agreement in terms whereof Rodel had bought the proceeds of the sale of the Norwood property which would otherwise be due and payable to AFP. Stupel and Berman have an interest in expediting the conclusion of the transaction in order to prevent them from being held negligent for delaying the payment of the proceeds. In terms of clause 6, the conveyancer understands that it is important for Rodel that the proceeds of the sale be not reduced by any further undertakings. Breach of this warranty could potentially also mulct them in litigation with Rodel. Clauses 7 and 8 record the fact that Rodel is entitled to the “full amount payable in terms of the said discounting agreement” as determined by a settlement quote to be supplied by Rodel to the conveyancer. It further records the “irrevocable instruction to pay to

Rodel from the Proceeds” such full amount within 72 hours after registration of transfer occurs. Payment of the proceeds in breach of this clause would also place the conveyancers at risk to be sued by Rodel. This obligation can only be nullified by “interdict or operation of law.” It is common cause that no such prohibitive interdict is present in this case.

[50] In my view, these facts clearly indicate that the tripartite agreement intended Rodel to be privy to the sale agreement of the Norwood property as well as the agency agreement between AFP as seller and Stupel & Berman as its agent and conveyancer. The mere knowledge of the fact that Rodel had taken cession of the net proceeds stipulated for just above the signature of the conveyancer on the schedule as read with clause 4 of the undertaking, is indicative that Stupel & Berman were aware that the net proceeds belonged to Rodel and that Rodel as such had a very material interest in receiving payment in order for its bridging finance and discounting fees to be set off against such proceeds before any outstanding balance is paid over to AFP. The signature of the schedule by both Rodel and Stupel and Berman, in my view, confirms the reciprocal contractual duties between them.

[51] The common law explained as above and applied to the facts of this case would have entitled Rodel to claim payment of the proceeds from AFP’s agent, Stupel & Berman, even if the undertaking did not stipulate for it to be irrevocable. By common law it became irrevocable because of the interest of both Rodel and the conveyancer in the overall transaction involving a sale of immovable property and the grant of bridging finance coupled thereto. As such, AFP was, at common law, not entitled to revoke the authority of Stupel & Berman to make payment of the net proceeds to Rodel. In my view, the tripartite agreement concluded between the parties, overrides the contract of principal and agent between AFP and Stupel & Berman as far as the payment of the net proceeds is concerned. As such, I agree that the irrevocable undertaking was a “stand-alone” agreement between Rodel and the conveyancers. Stupel & Berman was therefore obliged to

refuse AFP's instruction to withdraw the irrevocable undertaking to pay the proceeds to Rodel. Had Stupel & Berman paid to Rodel the amount of bridging finances plus discounting fees after receipt of the settlement quote, it would have extinguished the debt due by AFP to Rodel. Stupel & Berman would possibly have a claim for damages against AFP for having unlawfully instructed it to withdraw the irrevocable undertaking to pay. Alternatively Stupel & Berman could and should have protected its rights by filing an interpleader notice in terms of Rule 58 of the Uniform Rules of Court.

- [52] In conclusion it is therefore my view that in the circumstances of this case, the parties intended the undertaking to pay direct to Rodel to be irrevocable both at common law as well as in terms of the express provisions of the schedule to the discounting agreements.

Cancellation of the Agreements

- [53] It then becomes necessary to determine if the Conveyancer's Undertaking has fallen by the wayside due to lawful cancellations of the discounting agreements. As stated previously in this judgment, I am of the view that the purported cancellation of the discounting agreement or agreements by Rodel is at best ambiguous. Such purported ambiguous cancellation was not regarded by AFP as an unlawful repudiation of the discounting agreements. It merely stated that it accepted the cancellation without distinguishing whether it regarded such cancellation to be effective in regard to one or both contracts. The conduct of AFP through its attorneys in the correspondence, clearly indicates that they intended at most to accept the cancellation only of the first discounting agreement dated 31 August 2010.

- [54] Furthermore, if AFP wanted to validly cancel one or both the discounting agreements, it would have had to tender restitution of the amounts loaned from Rodel plus interest thereon as stipulated in clause 8 of the Terms and Conditions.

As previously stated, this clause survives any cancellation or purported cancellation. The rights of the parties are to be determined solely by reference to the extant agreement.⁷⁰ Failure to tender such return, rendered its purported acceptance of the ambiguous cancellation invalid. Failure to tender or explain why no tender is made, makes AFP's claim that the contracts were properly cancelled fatally defective.⁷¹

[55] Can an ambiguous cancellation of a contract be "accepted" by the other contracting party? Based on basic principles of the law of contract any consensual cancellation of a contract is subject to the parties' minds meeting. In my view the parties' minds could never have met correspondingly where the purported cancellation is ambiguous and the alleged "acceptance" thereof does not eradicate any ambiguity. I therefore hold that there was no valid cancellation of the first discounting agreement. However, even if I am wrong in this conclusion, then at very best, the second contract was never cancelled.

[56] That being the case, I am of the view that the defendants cannot rely on the cancellation or purported cancellation by Rodel as the basis for alleging that the conveyancer's undertaking terminated by operation of law. In my view, the two contracts were severable, each with their own terms and conditions and for differing amounts serving a specific purpose⁷². Neither party argued the contrary.

[57] The fact that Rodel's representative Mr Jacques Morkel regarded the cancellation to have been in respect of both contracts is neither here nor there. What his personal view may have been is irrelevant. The conduct of the parties has to be gleaned from their outward conduct. At no stage did the parties' minds meet that both contracts were cancelled other than a unilateral allegation to that effect by Mr Jacques Morkel. In my view, the circumstances of this case are

⁷⁰ See **Cash Converters Southern Africa (Pty) Ltd v Rosebud Western Province Franchise (Pty) Ltd** 2002 (5) SA 494 (SCA) at 502H

⁷¹ See **Sackstein NO v Proudfoot SA (Pty) Ltd** 2006 (6) SA 358 (SCA) at par [11] p. 362G – 363B

⁷² See **Cash Converters** *supra* Para. [23] p. 502

insufficient for a conclusion that both discounting agreements were cancelled. The contention by the defendants that there was such a cancellation is therefore rejected on the papers.

The Cession

[58] The argument advanced by counsel for the defendants that there was a partial cession which was unenforceable in law, is not convincing. On the one hand the defendants wish to extricate themselves from the effects of the terms and conditions of the discounting agreements by alleging that the terms and conditions were never presented to them⁷³, but on the other they wish to rely upon clause 1.7 of the terms and conditions stating that the claim which was ceded constituted “a **portion** of the proceeds as set out in the schedule”. In my view the defendants cannot reprobate and approbate. In any event, if one looks at the schedule, it is clear that “the Proceeds” is a net amount after deduction of certain other amounts. It is not a “portion” of the proceeds.

[59] Furthermore, in terms of clause 5.19 of the terms and conditions of contract, AFP warranted to Rodel that such claim was not subject to a prior cession, pledge or similar encumbrance. If the defendants wished to rely on clause 1.7, then such clause is to be read in the light of the warranty contained in clause 5.19 plus the statement that any breach of such warranty will constitute a fraud against Rodel as stated in the last portion of clause 5. To allow the defendants to rely upon a partial or prior cession would constitute a fraud on Rodel which this court cannot countenance.

[60] The argument by the defendants’ counsel that Rodel is estopped from denying that it had cancelled the agreements can also not be accepted. Rodel was entitled to pursue its remedies against AFP and Blumenthal. In doing so, no representation was made that it had forsaken its remedies against the defendants.

⁷³ See paragraph 1.7 of the stated case

The remedy against the defendants in terms of the undertaking was not agreed to as an alternative to the remedies against AFP and Blumenthal in terms of the discounting agreements. If they were in the alternative, an argument could have been entertained that opting for one may have excluded reliance on the other. In any event, the defendants changed their position by paying the proceeds to AFP not because of Rodel's conduct in pursuing its remedies against AFP and Blumenthal. The defendants changed their position because of adhering to what they perceived to be a lawful instruction to withdraw from the undertaking received from AFP. In these circumstances estoppel cannot therefore be applied against Rodel to prevent it from suing the defendants.

CONCLUSION

[61] I am of the view that the contentions of Rodel in the stated case are sound and should be upheld whereas those by the defendants are to be rejected. I do, however, agree that no case has been made out against Mr Berman personally. It is clear from clause 12 of the undertaking that he signed it not in his personal capacity but on behalf of his firm, the first defendant.

[62] I therefore find in favour of the plaintiff and make the following order:

- a. Judgment is entered against the first defendant in the amount of R1 763 489.00 plus interest at the rate of 15.5% per annum as from 18 March 2011 to date of payment.
- b. Costs of suit which are to include the costs consequent upon the employment of two counsel wherever applicable.
- c. The second defendant is absolved from the instance with costs which are to include the costs of two counsel where applicable.

DATED THE 28TH DAY OF October 2013 AT JOHANNESBURG



C. J. CLAASSEN
JUDGE OF THE HIGH COURT

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The trial was conducted from 8 October 2013 to 9 October 2013