IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF GUYANA

CCJ Appeal No CV 4 of 2010
GY Civil Appeal No 75 of 2005

BETWEEN

GUYANA BANK FOR TRADE AND INDUSTRY **APPELLANT**

AND

DESIREE ALLEYNE **RESPONDENT**

Before The Right Honourable and the Honourables	**Mr Justice de la Bastide, President** **Mr Justice Saunders** **Madame Justice Bernard** **Mr Justice Hayton** **Mr Justice Anderson**

Appearances

Mr Kamal Ramkarran and Mr Nikhil Ramkarran for the Appellant

Mr Lyndon Amsterdam and Mr Carlton Amsterdam for the Respondent

JUDGMENT
of
The Rt. Honourable Mr Justice Michael de la Bastide and the Honourable Justices Saunders, Bernard, Hayton and Anderson
delivered by
the Honourable Mr Justice Hayton
on the 28th day of March, 2011

An Overview

[1] This was a simple case of a bank suing a company director who was alleged to have guaranteed the liability of the company to the bank for a sum of up to $10 million. The main contention of the director was that she knew nothing of this guarantee, not having signed and initialled it. In a short judgment that hinged upon the credibility of the witnesses, the judge found the director liable for $10 million with interest, though not dealing as fully with the evidence as he ought to have done in a perfect world.

[2] There was an appeal. By a majority of 2:1 the judgment was reversed and a re-trial was ordered. Leave to appeal to this Court was granted. Neither side supported a re-trial. Counsel for the respondent director sought outright dismissal of the bank's claim. Counsel for the bank sought affirmation of the trial judge's orders.

[3] He submitted that this Court should uphold the judge's findings that the director had duly signed the guarantee and that the company was liable beyond the sum of $10 million that the director had guaranteed, taking account of computer printouts of the company's indebtedness to the bank when no objection had been taken to their admissibility. The bank had made a demand for payment but the director had refused to pay anything and so the orders of the trial judge should be restored. Counsel further submitted that the majority of the Court of Appeal had rightly rejected the director's claim, in a late amendment to her Notice of Appeal, that the writ served on her in Jamaica and the judgment were nullities because no leave had been granted by a judge for *issue* of the writ against a person resident abroad, though leave had earlier been granted by a judge to serve the writ on the director at her address in Jamaica. Steps already taken in the proceedings must surely amount to a waiver of the irregularity and a submission to the jurisdiction of the Guyanese courts.

[4] For the reasons given below this Court accepts these submissions on behalf of the bank.

The Background

[5] In August 1996 a Guyanese company, Wilzon Enterprises Inc. ("the Company") was concerned to borrow money from the Guyana Bank for Trade and Industry ("the Bank"). The Bank was prepared to lend on the basis of each of the three directors of the Company entering into personal guarantees of the Company's borrowings up to a limit of $10 million. Ms Desiree Alleyne ("the Defendant"), an attorney at law, was one of the directors, though resident in Jamaica.

[6] In a standard form guarantee, that on its face appeared to have been signed and initialled by the Defendant in the presence of a Jamaican Notary Mr Vincent Chen ("Mr Chen"), "the undersigned" by clause 24 agreed irrevocably to submit to the jurisdiction of the Guyanese High Court in any legal action in connection with the guarantee and agreed that any proceedings should be sufficiently served if delivered to "Ms Desiree Alleyne, 40 Devon Square, Kingston, Jamaica".

[7] On 10 January 2002 the Bank filed an ex parte originating summons seeking "leave *to serve* a specially indorsed writ of summons in an action by it against Desiree Alleyne out of the jurisdiction by way of DHL Courier Service" on her "at the address of 40 Devon Square, Kingston, Jamaica or at such other address out of the jurisdiction at which she may be situate". The summons was supported by an affidavit of Mr John Tracey, exhibiting the guarantee and a draft writ claiming that Wilzon Enterprises was on 26 November 2001 indebted to the Bank in the sum of $13,955,029. The draft writ also alleged that the defendant had become liable for $10 million plus interest, demand having been made of the Defendant for that amount by letter of 26 November 2001.

[8] On 5 February 2002 Moore J granted the requested leave to serve the writ out of the jurisdiction and directed that the date for appearance by the Defendant in Bail Court was to be 25 March 2002 at 9 a.m. Taking account of this, the Registrar on 11 February 2002 issued writ No. 208-S of 2002 directing the Defendant of 40 Devon Square, Kingston, Jamaica to appear at that time and place and stating that, in default of the Defendant so doing, "the plaintiff may proceed therein and judgment may be given against you in your absence".

[9] Judgment in default of appearance was indeed given against the Defendant on 25 March 2002, but on 2 April 2002 she filed a summons to set it aside so that she could defend the proceedings. The summons claimed that her counsel had made a mistake as to the date of the hearing, that the writ had been served at her address in Jamaica on one Dillion Alleyne, and not on her, and that she had a good defence to the claim. Thus there should be a rehearing and she should be granted leave to file and serve a Defence. She then obtained by consent an order setting aside the judgment and permitting her to defend the proceedings. Her affidavit of Defence of 13 June 2003 and the Bank's Affidavit of Reply of 28 August 2003 were ordered to be deemed pleadings for a full trial of the Bank's action.

[10] The Defence denied the claim that the guarantee bore the Defendant's signature, let alone that she had signed it in the presence of Mr Chen. Paragraph 6 further denied that the two witnesses, who appeared to have signed the guarantee held by the Bank, could possibly have witnessed the alleged signing of the guarantee by the Defendant in Jamaica when the two witnesses lived in Guyana and did not appear to have visited Mr Chen in Jamaica. Moreover, paragraph 7 denied the authenticity of the initials "DA" appearing on the last page of the guarantee on the basis that the Defendant habitually used the initials "DCA". Paragraph 8 stated "No admission is made as to any alleged loss or damage suffered by the Bank".

[11] The Bank's Reply denied that there had been forgery of the Defendant's signature or initials. It alleged that the Defendant's sister, Ms Dawn Yearwood ("Ms Yearwood"), the Secretary to the Company, had as intermediary provided the Bank with the guarantee and that a Jamaican Notary, Mr Chen, had witnessed the Defendant signing the guarantee after requiring photographic identification of her. The Reply admitted that the signatures of the two bank employees, placed in the two spaces for the signatures of witnesses to the guarantor's signature, were placed there in Guyana due to a misapprehension, but alleged that this did not affect the validity of the guarantee.

The main evidence at the trial

[12] At the trial before Roy J on 24 and 25 August 2004 the key issue was whether or not the Defendant had signed the guarantee. This hinged upon the credibility of three witnesses, the Defendant in her own defence and, for the Bank, Ms Shaleeza Shaw ("Ms Shaw") and Mr Chen, whose testimony was assisted by his retention of copies of two documents.

[13] Ms Shaw testified that she was in charge of the Credit and Collaterals division of the Bank and had been dealing with the Company as a Junior Supervisor in the loans department in 1996. She had interacted with the Company Secretary, Ms Yearwood, so that the latter would get the guarantee signed by the Defendant before a Notary Public in Jamaica as a witness and then return it to Ms Shaw. This appeared to have occurred, but Ms Shaw and a junior colleague, Mrs Yvonne Persaud, thereafter signed the guarantee form as if they had witnessed the Defendant's signature, when they had not done so. Before the standard form guarantee was sent for signature to Jamaica someone had typed beside the two spaces for two witnesses "S. SHAW (MISS) C/O GBTI, WATER STREET" and "Y PERSAUD (MRS) C/O GBTI, WATER STREET". Ms Shaw and Mrs Persaud had in error placed their signatures in the spaces provided. The 9 August date on the guarantee had also been typed in beforehand.

[14] Ms Shaw further testified that in 1998 the indebtedness of the Company was in the vicinity of $11.1 million before repayments stopped and the Company was placed in receivership by the Bank. The other two directors, who had also each guaranteed the indebtedness of the Bank up to a limit of $10 million, had been sued and had had judgments entered against them. During the luncheon adjournment on 24 August Ms Shaw had, at the judge's suggestion, gone to the Bank to obtain further evidence of the Company's indebtedness. At 2 pm she gave evidence, tendering computer printouts of the Company's account with the Bank. When asked by the judge if he objected to the admission of the printouts, counsel for the Defendant chose not to object. The Record shows that Ms Shaw said of the statement of account "It was prepared by one of my staff from the computer system from our records (No

objection). TAM ExhibitC1-C17. The balance of account is $24,321,270". Ms Shaw was briefly cross-examined on the printouts without anything emerging to undermine their accuracy.

[15] Mr Chen testified that on 19 August 1996 the Defendant attended his office for the purpose of his witnessing her sign the contract of guarantee, the subject matter of the proceedings. He testified that it was the Defendant who attended his office and signed the guarantee and that he had identified her from her Jamaican driving licence containing her photograph and her signature, and, in accordance with his office practice, he had retained photocopies of the licence and the guarantee, which were admitted as evidence. At the end of the standard form guarantee in a place typed in for him by his secretary and bearing the date 19 August 1996 he signed as a witness of the Defendant's signature.

[16] The Defendant categorically denied that she had signed or initialled the guarantee, saying that, anyhow, she always used the initials "DCA" not "DA", but provided no evidence to support this. She asserted she had never been in Mr Chen's office and had never met him before 2003. She had no knowledge of any borrowing by the Company. She raised queries concerning a typed date of 9 August 1996 appearing on the guarantee form when 19 August 1996 appeared beside Mr Chen's signature, and concerning her signature not appearing in the place provided beside Mr Chen's signature but above it under the printed words "For and on behalf of the Company". She admitted, however, that the copy that Mr Chen had of her driving licence in 1996 was a true copy. She was unable to explain how Mr Chen could have copies both of her 1996 driving licence and of the guarantee if she had not attended his office to sign the guarantee.

The judgment of Roy J

[17] Roy J was much influenced by the Defendant's failure to explain away how Mr Chen could have produced copies of the guarantee and the driving licence if the Defendant had not visited him to sign the guarantee. He also found that the signatures on the driving licence and the guarantee bore a "striking similarity" to one another. The judge was impressed with the evidence of Mr Chen and Ms Shaw and preferred their

evidence to that of the Defendant, even though acknowledging that the Defendant was a Magistrate in Jamaica and Mr Chen, qualified as an English solicitor, a British Columbian solicitor and barrister and a Jamaican attorney and Notary Public, had been convicted for fraud by decisions of a Magistrate that were under appeal.

[18] The judge did not deal with the Defendant's unsupported testimony that she signed her initials "DCA", not "DA" as appeared on the guarantee and Mr Chen's copy thereof.

[19] The judge concluded his brief judgment by stating that the Bank had "established the requisite standard and evidential burden of proof in these proceedings and judgment will be entered accordingly"– for $10 million with interest at 22.75% from 26 November 2001 (the date on which it was alleged in paragraph 2 of the Bank's Statement of Claim that the Bank had by letter made written demand for payment on the Defendant).

[20] It seems that the judge was conscious that his written judgment of 15 July 2005 was rather brief because he concluded it by stating "The Court reserves the right to expand on this judgment in the event of an appeal." In the event he never expanded on his judgment. After all, once the Notice of Appeal had been filed on 10 August, he became *functus officio* and could never take steps to improve his judgment to make it less susceptible to a successful appeal. It is not possible to deliver a written judgment in two instalments. A judge must give one judgment dealing with the major issues of dispute raised in the pleadings so that the parties can be in a position to determine whether or not an appeal might be worthwhile. He need not, however, write a lengthy judgment to cover every minor issue where his conclusions on the major issues clearly carry the day.

The Appeal to the Court of Appeal

[21] The Defendant on 10 August 2005 filed a Notice of Appeal to contend that the computer printouts of an alleged statement of accounts between the Bank and the Company were inadmissible and that the judge's findings that the Defendant had signed the guarantee and was liable for $10 million with interest was against the

weight of the evidence. By amended Notice of 6 May 2009 the appeal raised a preliminary point for the first time: that the judgment of Roy J was a nullity because he had no jurisdiction to hear the matter as the Registrar had no authority to issue the writ against someone resident outside Guyana without the leave of a Court or Judge for its *issue* (as opposed to its *service*) outside the jurisdiction. Near the end of the hearing before the Court of Appeal Bovell-Drakes J (an additional judge of the Court of Appeal) raised the point that it appeared that the Bank had failed to provide evidence that a written demand for payment had been duly made of the Defendant.

[22] Singh C (ag) firmly supported the judge's findings and would have dismissed the appeal. In his view no evidence of a written demand for payment was needed when the allegation in the Statement of Claim that such a demand dated 26 November 2001 had been made of the Defendant was not denied or was "not admitted" in the Defence. It was far too late to dispute the issue of the writ as the Defendant had submitted to the jurisdiction, and there was sufficient evidence of the company's indebtedness even though the computer printouts were inadmissible for non-compliance with the procedure in s 91 of the Evidence Act, Cap 5.03, (as substituted by the Evidence (Amendment) Act 2002).

[23] Cummings-Edwards JA, however, held that the issue of the writ without the requisite leave was a nullity, though believing that the writ had been issued *before* Moore J had granted leave to serve the writ outside the jurisdiction, while it was actually issued *after* Moore J had exercised his judicial discretion. Furthermore, the computer printouts were held to be inadmissible: counsel could not consent to the admission of what she considered to be mandatory procedures for the admission of computer printouts. There were also weaknesses in the trial judge's fact-finding so as to justify a re-trial.

[24] Bovell-Drakes J held that it was far too late to raise the irregularity as to the issue of the writ as the Defendant had submitted to the jurisdiction. The action, however, could not succeed because there had been a failure to prove the extent of the indebtedness of the Company, the computer printouts being inadmissible, and a failure to prove despatch of a written demand for payment to the Defendant, while

there were weaknesses in the judge's fact-finding sufficient to justify a re-trial. A re-trial was therefore ordered by a majority of the Court.

The Appeal before the CCJ

[25] On the basis of the majority's findings a re-trial should not have been ordered. Once Cummings-Edwards JA had held that the writ and thus the judgment were nullities and Bovell-Drakes J had held that there had been a failure to prove the indebtedness of the Company and also the despatch of a written demand in circumstances in which proof of a demand was necessary, the appeal should have been allowed and the action dismissed.

[26] It transpired that before this Court there were four issues to determine. (1) Was the issue of the writ without leave a nullity or was it an irregularity that had been waived? (2) Did the Defendant sign the guarantee? (3) Was it necessary for the Bank to lead evidence of a demand for payment? (4) Was the indebtedness of the Company to the Bank sufficiently proved?

Was the issue of the writ without leave a nullity or an irregularity that had been waived?

[27] In a case requiring a grant of leave to issue and to serve a writ on a person outside the jurisdiction it is self-evident that there should be the need for the cautious exercise of a judicial discretion. A Guyanese judge should be careful in granting such leave in the light of the possibility of embarrassing Guyana in its relations with another sovereign State and of the inconvenience and annoyance caused to a citizen or resident of such other State by being forced to come to Guyana to defend his rights: see *Greene v Greene*[1] and *Tyne Improvement Commissioners v Armement SA (The Brabo) No 2*[2].

[1] [1975] 25 WIR 35 at 37 per Williams J
[2] [1949] AC 326 at 350 per Lord Simonds

[28] Order 3 r 11 provides "A writ of summons for service out of the jurisdiction, or of which notice is to be given out of the jurisdiction, shall not be issued without leave of the Court or a Judge". It contains no guidance for counsel as to how to obtain this leave, though Order 9 does provide extensive guidance in rules 1 to 4 as to how to obtain leave to *serve* a writ out of the jurisdiction. It thus appears to be the practice, when wanting to bring proceedings against a person resident abroad, to seek leave both to issue and to serve the writ. For some reason this did not occur in the current proceedings where no problem would have arisen if the order of Moore J had contained two extra words "issue and" so that there was a grant of "leave to *issue and* serve".

[29] What could or should the Defendant have done about this? Order 10 r 20(2) entitles a defendant before entering an appearance or within seven days thereafter to take out a summons to strike out the writ on the ground that:

(a) the court has no jurisdiction to determine all or part of the plaintiff's claim; or

(b) the issue or service of the writ was irregular; or

(c) an order giving leave to serve the writ or notice of the writ out of the jurisdiction ought not to have been made.

[30] Order 54 rules 1 and 2 are also relevant

> "1. Non-compliance with any of these Rules ... shall not render any proceedings void unless the Court or a Judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court or Judge shall think fit.
>
> 2. No application to set aside any proceedings for irregularity shall be allowed unless made within reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity."

[31] Thus, if she wanted to dispute the issue of the writ, the Defendant should have applied promptly under Order 10 r 20(2)(b) to have it struck out for non-compliance with Order 3 r 11. Instead, the Defendant accepted the writ as if regularly issued and providing for service abroad, when on 2 April 2002 she filed a summons to set aside the judgment in default of appearance given against her on 25 March 2002 on grounds set out above at [9]. Subsequently, she obtained by consent an order setting aside the judgment and permitting her to defend the proceedings. After a two day trial judgment

was given against her on 15 July 2005, but it was not until her Notice of Appeal was amended on 6 May 2009 that it was first argued that the issue of the writ was a nullity, no leave to issue it having been granted by the Court, so that the Court had no jurisdiction to hear the case.

[32] We agree with Singh C and Bovell-Drakes J, relying upon *Preston v Lamont*[3], *Boyle v Sacker*[4]and *Fry v Moore*[5], that failure to obtain the Court's leave for the issue of a writ for service abroad concerns the propriety of the issue of the writ and not the jurisdiction of the Court. The Court clearly has jurisdiction to hear claims involving breach of Guyanese contracts. It is not as if the jurisdiction does not exist because jurisdiction is exclusively vested in some other body (as in *Wilkinson v Barking Corporation*[6]) or the defendant is a deceased individual (as in *Tetlow v Orela Ltd*[7]) or a company regarded as non-existent after its liquidation (as in *Lazard Brothers & Co v Midland Bank Ltd*[8]).

[33] The Defendant's filing of her summons on 2 April 2002 reveals that she had clearly and unequivocally agreed to a trial in Guyana, taking her chance of success or failure on the merits of a case falling squarely within the jurisdiction of the High Court of Guyana. Having thus submitted to the jurisdiction, it was far too late to raise the irregularity of the issue of the writ in the amended Notice of Appeal in May 2009.

[34] The case most in point is *Fry v Moore*[9], where the writ as issued was the ordinary one for service within the jurisdiction, though the defendant was resident abroad. Lindley LJ pointed out that the plaintiff might have kept the writ so as properly to serve it on the defendant if he should come within the jurisdiction. Similarly, the Bank could have used the ordinary writ as a basis for serving the Defendant if she visited Guyana. The plaintiff in *Fry* proceeded to obtain an order for substituted service on the defendant's brother resident in England and served the writ on him.

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[3] (1876) 1 Ex D 361
[4] (1888) 39 Ch D 269
[5] (1889) 23 QBD 395
[6] [1948] 1 All ER 564 at 567
[7] [1920] 2 Ch 24
[8] [1933] AC 289
[9] (1889) 23 QBD 395

[35] The order for substituted service was wrongly made because if a writ cannot be served personally at the time it is issued there can be no question of substituted service. As a result of the substituted service on the defendant's brother the plaintiff obtained a judgment in default of appearance. The defendant then had a solicitor take out a summons for an order that the judgment be set aside and the plaintiff deliver a Statement of Claim, so that the defendant might defend the action. The defendant later raised the point that the order for substituted service was a nullity.

[36] The Court of Appeal held that by taking out the summons the defendant had waived the irregularity of the substituted service order and so submitted to the jurisdiction. This was despite the fact that the bad substituted service order had enabled the "go-by" to be given to the rules for service out of the jurisdiction designed to safeguard relationships with foreign states and to protect residents of a foreign state from an extra-territorial jurisdiction causing them great inconvenience and annoyance.

[37] One feature of this case not found in *Fry v Moore* is that since Moore J granted an unchallenged leave to *serve* the writ abroad before the writ was issued, one can assume that he directed his mind to the considerations which govern the discretion to subject a person abroad to the jurisdiction in which the proceedings are brought. For this reason the case for overlooking the irregularity is stronger here than in *Fry v Moore*. Cummings-Edwards JA, in coming to her conclusion that the writ was a nullity, appears to have been influenced by her misapprehension at [20] that the writ had been issued *before* (not after) Moore J had granted leave to serve the writ in Jamaica. The authorities upon which she relied for allegedly helpful dicta were cases in which the defendant had also taken timely steps to challenge the relevant writs or orders granting leave and had not taken any other step with knowledge of the irregularity.

Did the Defendant sign the guarantee?

[38] As Cummings-Edwards JA correctly stated at [43] of her judgment, "The cases emphasise that if a trial judge comes to conclusions on questions of credibility after seeing and hearing witnesses and forming his opinion, only by reason of some very

telling factors or compelling circumstances will an appellate court differ from such conclusions".

[39] The trial judge, having heard Ms Shaw and Mr Chen, preferred their evidence to that of the Defendant. The Bank started with the legal and evidential burden of proving its case against the Defendant but once there was credible evidence that Mr Chen had retained a copy of the Defendant's driving licence and a copy of the guarantee apparently signed by the Defendant in Mr Chen's presence, an evidential burden fell upon the Defendant to explain away the obvious natural inference that she had signed the guarantee in Mr Chen's presence.

[40] She could provide no satisfactory explanation for Mr Chen having a copy of either document, but she sought to exploit discrepancies between the copy of the guarantee and the guarantee and to allege the signature thereon was not hers (and thus was a forgery) and the initials were not placed there by her.

[41] Cummings-Edwards JA wanted the case to be re-heard because she was worried about the guarantee bearing two inconsistent dates and containing signatures of two witnesses which were not on the copy guarantee. The recorded evidence of Ms Shaw indicates, however, that the *pro forma* guarantee was sent to Mr Chen already dated 9 August and with the names of Ms Shaw and Mrs Persaud typed in as witnesses. It was then, according to Mr Chen, signed by the Defendant in his presence on 19 August and he signed it in the space where his name as a witness had been typed in by his secretary. It was after Mr. Chen forwarded the original guarantee to the Bank, having retained a copy, that according to Ms Shaw's evidence she and Mrs Persaud, without thinking, inserted their signatures in the spaces provided on the guarantee form for the signatures of witnesses. This was the practice that would normally be adopted when a person attended the Bank to sign a guarantee. In any event, under s 17 of the Civil Law Act Cap 6:01 witnesses' signatures are not required for the enforceability of a contract of guarantee so long as such contract can be proved to have been signed by the apparent guarantor (or someone lawfully authorised by him), and the oral testimony of Mr Chen proved this.

[42] Bovell-Drakes J also wanted the case to be re-heard and unjustifiably raised a point not hitherto pursued by the Defendant's counsel, namely the appearance on the copy guarantee of a handwritten "initial" and "sign", not apparent on the actual guarantee. The most obvious explanation is that this was instructional guidance for the prospective signatory. If the point had been pursued at trial by cross-examining Ms Shaw, it may well be that she would have given evidence that these words had been pencilled in as guidance; she had then tidied up the actual guarantee by rubbing out the pencilled words, just as she and Mrs Persaud had 'tidied up' by inserting their signatures in the spaces provided next to their typed names. Bovell-Drakes J also worried about the trial judge not having dealt with the Defendant's oral testimony that the initials "DA" on the guarantee and copy guarantee were not hers because she used the initials "DCA". The judge, however, only had her word for this and if he had disbelieved her evidence about her signature it would naturally follow that he would equally have disbelieved her about her initials.

[43] Finally, Bovell-Drakes J considered that the failure to ask Mr Chen to give evidence that the actual guarantee produced in court was the actual document signed before him by the Defendant meant "there was no admissible evidence before the Court on which the Judge could have reasonably found that the signature appearing on the *res* was the appellant's". We disagree. Mr Chen had stated that the woman who signed the guarantee before him (of which he retained a copy) was the woman in the photo on the driving licence (of which he also retained a copy) and which the Defendant had admitted was a true copy of her licence. The judge could see for himself that, if one disregards what was added to or erased from the document after it left Mr Chen's office, the guarantee on its face was identical to the copy of the guarantee produced by Mr Chen. More than that, a careful comparison of the two documents shows that Mr Chen's signature and the signature and initials of the Defendant are in exactly the same position in the two documents. Apart from that, Mr Chen's signature attesting the Defendant's signature on the guarantee produced by the Bank identified it as the document signed by her before him.

[44] In our view this was certainly not a case where there were any exceptional circumstances to justify interfering with the judge's finding of fact. Indeed, there was more than ample evidence to justify his finding. Thus if he had found that the

Defendant had not signed the guarantee this finding would have been so far against the weight of the evidence that we would not have allowed it to stand.

Was there any need to adduce evidence that a demand had been made?

[45] Paragraph 2 of the Statement of Claim states:

> "On 26 November 2001 Wilzon Enterprises Inc. was in default of payment of its indebtedness to the plaintiff which stood in an amount in excess of the guarantee limit of $10,000,000: (ten million dollars) and by letter of the said date the plaintiff through its attorneys-at-law made demand on the defendant that she honour her obligations under the aforementioned guarantee by paying the said sum to it, but the second-named defendant has failed to comply with the said demand."

[46] In the Defendant's Defence she focused only upon denying that she had placed her signature and initials upon the guarantee. She also stated at the end of her Defence: "No admission is made as to any alleged loss or damage suffered by the Plaintiff," thereby requiring the Bank to prove the Company's indebtedness to it.

[47] Nowhere in the Defence is it denied or not admitted that the letter of demand dated 26 November 2001 was sent to or received by the Defendant. As a consequence, the matter of the demand was not aired before the trial judge nor raised in the Defendant's Notice of Appeal, as amended. The Defendant's counsel only fully dealt with this in his further written submissions after the Court of Appeal hearing. This was as a result of Bovell-Drakes J near the end of the hearing indicating that it appeared "that the respondents failed to adduce evidence to show that they had despatched the written demand to the appellant".

[48] There was no need for this intervention. The fundamental function of pleadings is to ensure that by close of pleadings the matters in issue are clearly determined so that the parties can decide in advance of trial what evidence they will need to adduce to achieve a satisfactory result. To narrow down the issues in dispute, the Guyanese High Court Rules Order 17 rr 13 and 19 state:-

> "13. Every allegation of fact in any pleading, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted except as against an infant, lunatic, or person of unsound mind not so found by inquisition."
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> "19. It shall not be sufficient for a defendant in his defence to deny generally the grounds alleged by the statement of claim, or for a plaintiff in his reply to deny generally the grounds alleged in a defence by way of counterclaim, but each party must deal specifically with each allegation of fact of which he does not admit the truth."

[49] These two rules reflect the traditional rules of pleading so that, as made clear in Bullen and Leake and Jacob, Precedents of Pleading 12th ed. at page 4 (with italics added):-

> "Any fact in the statement of claim which is admitted in the defence because it is expressly admitted or because it is *impliedly admitted by the omission of the defendant to traverse it expressly* ceases to be in controversy between the parties, and no evidence will be required or admitted to prove such a fact."

[50] It was thus not open to the Defendant to deny that an appropriate written demand to honour the guarantee had been despatched to her.

Was the extent of the indebtedness of the Bank sufficiently proved?

[51] For the Bank to succeed in claiming $10 million with interest under the guarantee it needed to prove that the Company owed it an amount of $10 million or more. To this end, computer printouts were tendered in evidence at 2 p.m. on 24 August 2004 by Ms Shaw so as to make it clear that on 23 August there was due from the Company to the Bank $24,321,270 as stated by her.

[52] It was at the suggestion of Roy J that Ms Shaw had obtained these printouts over the luncheon adjournment so as to help ascertain the up-to-date amount of the Company's liability. The Defendant's counsel in his written submissions to this Court frankly admits that, because of Roy J's "determination to get to the truth", he did not object when he was specifically asked by Roy J if he had any objection to the printouts being admitted into evidence. He then cross-examined Ms Shaw on them without being able to undermine their accuracy.

[53] The Defendant's counsel could have invoked s. 91 of the Evidence Act, as substituted by the Evidence (Amendment) Act 2002, which enables printouts to be admitted if there is a written certificate or oral evidence of the proper functioning of the computer from the person responsible for computer operations. In the absence of the requisite certificate or oral evidence of the computer supervisor, he could successfully have objected to admission of the printouts. Does this matter once he has consented, or not objected, to admission of the printouts? According to him and the Court of Appeal it does matter: if conditions enabling particular evidence to be admitted are not satisfied, then such evidence cannot become admissible by counsel's consent or failure to object.

[54] Singh C simply accepted that the printouts were not admissible, but held that this was irrelevant as Ms Shaw's *viva voce* testimony sufficed. Cummings-Edwards JA, on the basis that the printouts had been received into evidence by consent, merely asserted at [45] that counsel could never consent to evidence being admitted in breach of mandatory statutory procedures like those in s 91 of the Evidence Act. Bovell-Drakes J upheld the Defendant's counsel's submission that when the judge admitted the printout into evidence he did so contrary to law. Bovell-Drakes J relied only on English criminal law cases dealing with a criminal law statute, the Police and Criminal Evidence Act 1984 ("PACE"), which has in s 69 and para 8 of Part II of the Third Schedule provisions that he believed "substantially" reflect the same requirements as s 91.

[55] Section 69, however, provides that in criminal proceedings "a statement in a document produced by a computer shall *not be admissible* as evidence of any fact stated therein *unless*" certain conditions are satisfied, while s 91 of the Evidence Act merely states that "In any civil proceedings, a statement contained in a document produced by a computer *is* admissible" if certain conditions are satisfied. Evidential rules for criminal law proceedings have always been much stricter than those for civil law and cannot be waived. After all, the liberty of the subject is involved.

[56] In civil cases, in the interests of a speedy but fair trial of the real issues in dispute, a defendant can always agree to admit particular facts without the need for any formal proof. For a variety of reasons counsel may also choose not to object to evidence that

is strictly inadmissible. By foregoing an objection which may serve no purpose in the long run counsel can facilitate the expeditious determination of trials. Does the case law prevent this? In dealing with these matters, by s 4 of the Evidence Act, the rules and principles of the common law relating to evidence are applicable in Guyana, subject to any contrary provision in Guyanese legislation.

[57] Lord Porter, in delivering the first speech in the House of Lords in *Tyne Improvement Commissioners v Armement Anversois SA (The Brabo) No 2*[10] makes the position clear. The facts, so far as they were known, appeared only in an affidavit which could have been held inadmissible for non-compliance with the Rules of Court if objection had been taken. Lord Porter stated "This affidavit is, it is true, technically defective in that it does not state the sources of information relied on and is in very condensed form, but no objection was taken on either ground at the original hearing and therefore in my view full effect must be given to its contents", as, indeed, it was by all their Lordships in that case.

[58] Lord Porter cited no authority, but he could have relied upon two old English cases. In *Goslin v Corry*[11], Tindall CJ stated "whenever counsel allow evidence to be given that is not strictly and properly admissible they must submit to all the consequences which result", while Cresswell J stated[12] "If counsel think proper to permit evidence to be given that is not strictly admissible they cannot afterwards require it to be withdrawn." In *Gilbert v Endean*[13] Cotton LJ stated "Where in the court below the evidence not being strictly admissible, if the person against whom it is read does not object but treats it as admissible, then before the Court of Appeal, in my judgment, he is not at liberty to complain of the order [of the court below] on the ground that the evidence was not admissible".

[59] The English common law position is reflected in the common law in Australia summarised in C T McCormick's Law of Evidence (1954) para 54 as follows[14]

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[10] [1949] AC 326 at 337
[11] (1844) 135 ER 143, 7 Manning & Granger 342 at 345
[12] Ibid at 347
[13] (1878) LR 9 Ch D 259 at 269
[14] Approved by Asprey JA of the New South Wales Court of Appeal in *McLennan v Taylor* (1966) 85 WN (Pt 1) 525 at 540 and cited and applied by Samuels JA in *Jones v Sutherland* (1979) 40 LGRA 323 at 331, [1979] 2 NSWLR 206 at 219

> "A failure to make a sufficient objection to evidence which is incompetent waives .... any ground of complaint of the admission of the evidence. But it has another effect, equally important. If the evidence is received without objection, it becomes part of the evidence in the case, and is usable as proof to the extent of whatever rational persuasive power it may have. The fact that it was inadmissible does not prevent its use as proof so far as it may have probative value."

[60] Thus, unless clearly prohibited by some exceptional statute, counsel in civil cases are free to choose to consent (or not object) to the admission of evidence that would be inadmissible if objection were taken and, if they so choose, the evidence must be given its full probative value and no objection to its admission may be taken on appeal.

[61] The computer printouts were thus duly adduced as evidence of the Bank's indebtedness when no objection was taken by the Defendant's counsel. If, however, he had objected to the admission of the computer printouts it seems very likely that Roy J would have given leave on an application by the Bank's counsel for the appropriate certificate or oral evidence to be proffered on the following day, 25 August 2004, when Mr Chen was re-examined and the Defendant gave her evidence.

[62] This factor brings the situation within that dealt with by Gibbs J (Mason and Aicken JJ concurring) in the High Court of Australia in *Hughes v National Trustees Executors and Agency Co of Australasia*[15]. Gibbs J stated, "where one party by his conduct at the trial has led the other to believe that evidence, although hearsay, may be treated as evidence of the facts stated, and the other in reliance on that belief has refrained from adducing proper evidence, the former party is precluded from objecting to the use of the evidence to prove the facts stated".

[63] Once Ms Shaw had testified that the balance due from the Company to the Bank was in excess of $10 million and provided the computer printouts in support of this Roy J was entitled to decide on a balance of probability that the Company at the material time owed the Bank an amount exceeding the $10 million for which the Defendant was liable under the guarantee. The printouts reveal standard form Bank accounts detailing a continuous chain of transactions from 23 April 1996 to 23 August 2004

[15] [1979] HCA 2, (1979) CLR 134 at 153

and containing nothing to doubt the operation of the computer or the accuracy of the accounts.

Conclusion

[64] All the issues raised on this appeal having been determined in favour of the Bank, the appeal against the order of the Court of Appeal is allowed. The judgment of Roy J is restored and so is his order that the Defendant do pay the Bank the sum of $10 million with interest thereon at the rate of 22.75% per annum from 26 November 2001 until payment, with costs fixed in the sum of $150,000. The Defendant must also pay the Bank's costs in the Court of Appeal and the costs of this appeal, to be taxed if not agreed.

/s/ M.A de la Bastide

The Rt. Hon. Michael de la Bastide, President

/s/ A. Saunders

The Hon. Mr. Justice Saunders

/s/ D. P. Bernard

The Hon. Mme. Justice Bernard

/s/ D. Hayton

The Hon. Mr. Justice Hayton

/s/ Winston Anderson

The Hon. Mr. Justice Anderson