

**IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction**

**ON APPEAL FROM THE COURT OF APPEAL OF THE CO-OPERATIVE
REPUBLIC OF GUYANA**

**CCJ Appeal No CV 9 of 2011
GY Civil Appeal No 40 of 2009**

BETWEEN

**GUYANA FURNITURE MANUFACTURING
LIMITED**

APPELLANT

AND

ROBERT RAMCHARAN

1ST RESPONDENT

**NATIONAL BANK OF INDUSTRY
AND COMMERCE**

2ND RESPONDENT

**Before The Right Honourable
And The Honourables**

**Mr Justice Dennis Byron, President
Mr Justice Saunders
Mme Justice Bernard
Mr Justice Wit
Mr Justice Anderson**

Appearances

Dr Fenton Ramsahoye SC, Mr Roopnarine Satram and Mr C V Satram for the Appellant

Mr Robin M Stoby QC and Mr Edward A Luckhoo QC for the First Named Respondent

Mr Rafiq Turhan Khan for the Second Named Respondent

JUDGMENT

of

The President and Justices Saunders, Bernard, Wit and Anderson

Delivered by

The Honourable Mme Justice Bernard

on the 27th day of July, 2012

[1] The appeal to this Court is from the Court of Appeal of Guyana dismissing an appeal against the judgment of Chang, C.J. (ag.) who had earlier dismissed the Appellant's claim against the Respondents at a trial in the High Court. The controversy surrounds two debentures executed by the Appellant, Guyana Furniture Manufacturing Ltd. (the Company). The first debenture was with the Inter-American Investment Corporation (IIC) (not a party to the proceedings) and later the second with the second-named Respondents, the National Bank of Industry and Commerce (the Bank). The first-named Respondent, Robert Ramcharan, is a receiver/manager appointed by the Bank.

Background

[2] On 5th March, 1993 the Company executed the first debenture in favour of IIC for the sum of US\$500,000 (approximately GUY\$63,000,000) with a charge on the Company's property situate at 55 Beterverwagting, East Coast Demerara, and its equipment therein. Under the terms of IIC's debenture, if the capital sum became due then IIC, as the debenture holder, could appoint a receiver/manager of the Company's property as the Company's agent.

[3] On 13th October, 1998 the Company executed another debenture, this time in favour of the Bank for the sum of GUY\$90,000,000, charged on the same property and equipment. Clause 8 of the terms of the Bank's debenture specified the rates of commission on the gross amount of all monies received by a receiver, if so appointed. If no rate was specified the default rate was to be payment at a rate of 5%, and if another rate were agreed to it could not exceed 10%. Under a deed of priorities executed on 24th June, 1999 the debentures in favour of IIC and the Bank ranked *pari passu*, which means they ranked equally.

[4] The Company at some point in time defaulted on its payments to the Bank. On 24th October, 2001 the Bank appointed Mr. Ramcharan as receiver/manager of the

charged property of the Company, in accordance with the terms of the debenture at an agreed commission of 1% of all monies received by him. This was increased to 3% on 8th April, 2002 after agreement between Mr. Ramcharan and the Bank, allegedly due to an arrangement for Mr. Ramcharan to assume additional responsibility for management of the Company in order to improve its profitability. Mr. Ramcharan's increased commission of 3% took effect in March 2002, effective on all the monies received up to that point. Later, on 26th August, 2002 the first debenture holder, IIC, appointed one Maurice Solomon at an agreed commission rate of 4% in accordance with the terms of its debenture.

- [5] In the result, there were now two receivers of the Company's property, a situation which has contributed in some measure to the disputes which have arisen between the Company and Mr. Ramcharan. Mr. Ramcharan operated as Receiver from October 2001 until February 2004, when the receivership came to an end. Mr. Solomon was active as Receiver from January 2003 until February 2004, overlapping Mr. Ramcharan for his entire year of service. There was no testimony from Mr. Solomon regarding the extent of his involvement, but Mr. Ramcharan indicated that they shared responsibilities until February 2004 when the receivership came to an end.

Proceedings in the High Court and Court of Appeal

- [6] In an action filed in the High Court the Company made two claims against Mr. Ramcharan. First, for the sum of GUY\$11,100,888 allegedly over-collected by him as a result of the increase in his rate of commission from 1% to 3%. The Company contended then and throughout all subsequent proceedings that the increase of Mr. Ramcharan's commission was unlawful, as the commission could not be varied without the Company's consent. Second, the Company claimed US\$21,592 or its equivalent, allegedly wrongfully and unlawfully paid out of the Company's export retention fund to Mr. Solomon as a commission for monies received during his one-year service as Receiver. The Company alleged that Mr.

Ramcharan knew that Mr. Solomon had been paid by the IIC, and so the additional payment by Mr. Ramcharan out of the Company's export retention fund was wrongfully made. Having heard evidence from the Company's Managing Director, Mr. Mohabir Singh and Mr. Ramcharan, the learned Chief Justice (ag.) dismissed the entire claim, except for an unrelated award of GUY\$19,459 calculated as an overpayment to Mr. Ramcharan.

- [7] With regard to the claim that Mr. Ramcharan's commission could not be varied without the consent of the Company, after a review of the evidence and relevant case law, the learned Chief Justice (ag.) found no provision in the debenture executed by the Bank precluding it from varying the commission that was contractually fixed between the Bank and Mr. Ramcharan. With regard to the alleged payment of commission to Mr. Solomon, the Chief Justice (ag.) found that there was absolutely no evidence of any payment of any such commission by IIC to Mr. Solomon, and no evidential basis for finding that Mr. Solomon was paid US\$21,592 by IIC, let alone for finding that Mr. Ramcharan knew of any such payment. While payment of US\$21,000 was made to Mr. Solomon from the Company's export retention fund as the latter's commission on gross monies received during his one-year tenure as Receiver, the Chief Justice (ag.) concluded that it was the Company which was rightly responsible for paying Mr. Solomon's 4% commission. Mr. Ramcharan could not be found to have acted wrongfully or unlawfully by paying Mr. Solomon his commission out of monies received on behalf of the Company, whether from the export retention fund or otherwise.
- [8] The same issues that were decided by the Chief Justice (ag.) arose again for determination before the Court of Appeal, and after extensive arguments the appeal was dismissed.
- [9] After a review of the findings of both Courts below, this Court has identified two issues which need to be determined:

- i. Whether the variation of Mr. Ramcharan's commission from 1% to 3% in the absence of the specific consent of the Company was lawful, and
- ii. Whether payment of commissions to the two receivers appointed under separate debentures was lawfully made from all monies collected on behalf of the Company.

Variation of Commission

- [10] Mr. Ramcharan's increased commission to 3% did not find favour with the Company, which deemed it unlawful in that the alleged tripartite arrangement under the second debenture for the payment of 1% remuneration was contractually binding on the Company and its funds; hence it could not be varied without its involvement.
- [11] The Company's contention overlooks the fact that the relationship arising out of the appointment of a receiver, though involving the mortgagor (the Company), the debenture holder/mortgagee (the Bank) and the Receiver, is legally a relationship between the Bank and the Receiver to the exclusion of the Company. Clause 8 of the debenture executed by the Company and the Bank on 13th October, 1998 specifically stipulated that the receiver, appointed at the option of the Bank, was the agent of the Company, which was solely liable for his acts and remuneration. The receiver was granted the power to sell and recover all income on behalf of the Company.
- [12] This situation differs substantially from the usual relationship of principal and agent. Notwithstanding the fact that the receiver may be in a very narrow sense an agent of the mortgagor under the terms of the debenture, the Company has no control over the receiver except to pay the fees agreed upon between the receiver and the debenture holder upon his appointment. This was made clear and

discussed fully in *Gomba Holdings UK Ltd v Minorities Finance Ltd*¹ where it was indicated that the receiver in the course of the receivership performs duties on behalf of the debenture holder as well as the mortgagor. The company in effect surrenders all rights to the debenture holder upon its default under the terms of the debenture, and the company's only obligation is payment of the agreed commission to the receiver. The schizophrenic nature of this form of agency is that it enables the receiver to exercise powers conferred upon him under the debenture without recourse to the company, his primary duty being to the debenture holder, and not to the company of which he is an agent.

[13] On the issue of the increase of Mr. Ramcharan's commission, Counsel for the Company advanced the argument that it was a unilateral change of a contractual arrangement which operated to the Company's disadvantage. The fact that the initial appointment of Mr. Ramcharan was reflected in a document executed solely by the Bank, and which fixed the commission at 1%, was overlooked.

[14] Discussion on an increase of that commission to 3% took place between the Bank and Mr. Ramcharan. Nothing in the debenture required the Company to be involved in either fixing or increasing the commission. The outer limit of the commission was fixed at 10% thereby permitting an increase of any rate below that percentage on terms mutually agreed upon between the Bank and Mr. Ramcharan. The earlier as well as the later commission were at all times the result of bilateral agreement between the Bank and Mr. Ramcharan which necessitated no involvement of the Company. The Managing Director of the Company, Mr. Mohabir Singh, admitted as much under cross-examination when he agreed that he was not required by the debenture to be consulted before the commission was fixed by the Bank.

[15] In further consideration of the variation of the agreed commission, the Chief Justice (ag.) made reference to Section 279(d) of the Companies Act of Guyana

¹ [1988] 1 WLR 1231

which empowers a court upon application by a receiver, whether appointed by the court or under an instrument, or upon an application by an interested person, to make an order if it seems fit, fixing the remuneration of the receiver. The Chief Justice (ag.) made a comparison with Section 371 of the English Companies Act of 1948 with somewhat similar provisions.

[16] What gave rise to this was consideration of *dicta* of Hoffmann J in *Re Potters Oils Ltd.* (No. 2)² querying whether he should exercise the power conferred by Section 371 to fix a receiver's remuneration which had already been agreed upon between the relevant parties. Having not been referred to any authority by Counsel which indicated the principles on which the power should be exercised, Hoffmann J concluded that the Section conferred two separate discretions, both appearing to be unfettered, the first being whether to interfere at all, and the second having exercised the first, the discretion as to the amount. It is apposite to note that in the circumstances of that case the learned judge concluded that there was no basis to justify the court exercising its discretion, particularly having regard to the fact that the remuneration was less than the maximum stipulated in the debenture and was not unreasonable.

[17] Obviously, this gave the learned Chief Justice (ag.) some food for thought as he posed the question to himself whether he should interfere with the remuneration which had been contractually fixed by the Bank and Mr. Ramcharan, and he declined to do so. Counsel's argument was that any increase in the remuneration could only be regarded as a case of the remuneration being fixed anew thereby requiring the court's intervention. The Company, however, had taken no action to approach the court for over 2½ years after the increase was discovered, an observation made by the Chief Justice (ag.) and with which the Court of Appeal expressed full agreement.

² [1986] 1 WLR 201

[18] Although never pleaded nor supported by evidence, the Chief Justice (ag.) at the urging of Counsel for the Company, addressed the issue of whether a fiduciary duty was owed by Mr. Ramcharan to the Company, and made short shrift of it. He refused to make any finding on the ground that relief for breach of a fiduciary duty had no place in an action filed by way of a specially endorsed writ for a liquidated claim, a conclusion with which the Court of Appeal agreed, and which we shall not disturb.

Calculation of Commission

[19] The second issue is whether payment of commissions to the two receivers appointed under separate debentures was lawfully made from all monies collected on behalf of the Company.

[20] A perusal of the IIC debenture, which was executed by the Company, indicates that, not unlike the Bank's debenture, the Company alone is liable for Mr. Solomon's remuneration. Hence, it is more than passing strange, if not unbelievable, that the Company, through its director Mr. Mohabir Singh, would assert that the IIC was responsible for the payment of Mr. Solomon's commission of 4%, and that Mr. Ramcharan had no authority to pay that commission. There was no evidence that IIC paid Mr. Solomon itself. According to a deed of priorities executed on 24th June, 1999, the first and second debentures ranked *pari passu*, which, as noted, means that they ranked equally. In this regard each receiver was entitled to receive his commission from assets of the charged property at the rate agreed upon between the debenture holder and the receiver. It may have been burdensome for the Company, but it is a burden which it freely undertook and which it had to bear. Fortunately for the Company the two appointed Receivers operated simultaneously only for one year (January 2003 to February 2004), according to Mr. Ramcharan.

- [21] Having two receivers appointed under two debentures, though not appointed simultaneously, does raise an additional issue concerning the method of calculation of the commissions to both receivers, having regard to the fact that they ranked *pari passu*. During the period of receivership all of the Company's bank accounts were held in the name of the two Receivers. Mr. Ramcharan's testimony was that the total sum of GUY\$493,702,781 was collected during the entire period of his receivership, and this was supported by Mr. Mohabir Singh. Mr. Ramcharan also revealed that the first part of his commission was based on monies received from October 2001 to December 2002, which apparently totalled GUY\$285,000,000. As noted, Mr. Ramcharan's increased commission of 3% had taken effect on March 2002, effective on all the monies received. During the second part of Mr. Ramcharan's operations, from January 2003 to February 2004, the round sum of GUY\$210,000,000 was used as a basis to calculate commission for both Mr. Ramcharan and Mr. Solomon. Mr. Ramcharan was paid 3% of GUY\$105,000,000 (one-half) and Mr. Solomon 4% of the other half. Payment of US\$21,000 was made to Mr. Solomon from the Company's export retention fund, in accordance with IIC's debenture.
- [22] In relation to Mr. Ramcharan's responsibilities under his debenture, the Company's argument, though not explicitly stated, seems to be that the two debentures created two first charges on the assets of the Company, and hence Mr. Ramcharan was obligated to collect monies for both debenture holders even though no receiver had been appointed under IIC's debenture; consequently his commission should have been based on 50% of the monies received by him during his entire operation as Receiver. Of course, the answer to this is that a charge is only triggered when a receiver is appointed.
- [23] Clause 8 of the Bank's debenture authorises the receiver to retain "out of any money" received by him, a commission at such rate not exceeding 10% of the gross amount of such money received. Nothing in this debenture, under which Mr. Ramcharan was appointed, required him to have regard to other debentures to

which the Company's property was subject during the period when he was the sole receiver and when no receiver had been appointed under the other debenture. He was fully entitled to be paid his commission of 1% and later 3% on the gross amount of all monies received regardless of other debentures. He owed a duty to act only on behalf of the debenture holder who appointed him. He was the sole receiver of the Company's property from October 2001 to December 2002, for which he received commissions from the monies received during that period.

[24] Interestingly, Mr. Mohabir Singh, the Company's Managing Director, never queried the amounts of the commissions or the amounts collected from October 2001 to February 2004. He stated quite emphatically that whatever the commission was, the receiver was entitled to retain it out of money received by him.

[25] At [5] reference was made to the fact that the appointment of two Receivers of the Company's property contributed in some measure to the dispute which has arisen between the Company and Mr. Ramcharan. The case of *Gwembe Valley Development Co Ltd v Koshy (No. 2)*³ is a case where more than one receiver was appointed under one debenture held by two lenders to secure loans made by them. Rimer, J. held that the powers of receivers appointed successively under the debenture were exercisable severally, and that this need not be assumed to be a recipe for chaos; rather a power for receivers to act severally as well as jointly ought, in his view, to be regarded as providing a convenient regime under which the duties of the receivership can be divided between them.

[26] No evidence was led which indicated any arrangement between the two debenture holders as to the manner in which the duties of their receivers were to be carried out, but there seems to have been no conflict as they acted jointly in discharging their duties. They were entitled to be paid their commissions at the agreed rates out of all monies received on behalf of the Company.

³ [2000] 2 B.C.L.C. 705

Disposal of Appeal

[27] This Court concurs with the following findings of both the Hon. Chief Justice (ag.) and the Court of Appeal that:

- (i) Mr. Ramcharan's commission, having been fixed contractually between himself and the Bank, could have been varied by them without the consent of the Company or resort to a court for such an order;

- (ii) Mr. Ramcharan was entitled to full payment of his commission during the period when he operated as sole Receiver. Any payments of commission to Mr. Solomon after his appointment as Receiver were lawfully made out of all monies due to or collected on behalf of the Company, the two Receivers being paid proportionately according to their debentures.

[28] The Hon. Chief Justice (ag.) in his judgment calculated the amount of Mr. Ramcharan's commission based on the latter's evidence and that of Mr. Mohabir Singh, Managing Director of the Company, as to the gross amounts which were collected during the period of time that Mr. Ramcharan was in office. The learned Chief Justice (ag.) arrived at a figure of GUY\$11,680,541 instead of the sum of GUY\$11,700,000 which Mr. Ramcharan in fact received. This indicated an overpayment of GUY\$19,459 which he ordered to be repaid by Mr. Ramcharan along with interest at 4% per annum until payment. The Court of Appeal saw no reason to disturb this finding, and neither does this Court.

[29] For all the reasons discussed earlier this Court will dismiss the appeal, and award costs to the Respondents to be taxed certified fit for two Counsel unless agreed.

The Rt Hon Mr Justice Dennis Byron (President)

The Hon Mr Justice A Saunders

The Hon Mme Justice D Bernard

The Hon Mr Justice Wit

The Hon Mr Justice Anderson

