IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF GUYANA

CCJ Appeal No. CV014 of 2013
GY Appeal No. 39 of 2010

BETWEEN

FEIZAL MOHAMED AMIN,
trading under the name, style and firm
of AMIN LUMBER ENTERPRISE **Appellant**

AND

GUYANA OIL COMPANY LIMITED,
a company incorporated in Guyana under
the Companies Act Chapter 89:01 and
continued under the Companies Act 1991
with its registered office situate at Lot 166
Waterloo Street, Georgetown **Respondent**

Before The Right Honourable and the Honourables

Mr Justice Byron, President
Mr Justice Saunders
Mr Justice Wit
Mr Justice Hayton
Mr Justice Anderson

Appearances

Mr Rajendra Poonai and Mr K A Juman-Yassin for the Appellant

Mr Hari Ramkarran SC and Mr Kamal Ramkarran for the Respondent

JUDGMENT
of
The President and Justices Saunders, Wit, Hayton and Anderson
Delivered by
The Honourable Mr Justice Saunders

on the 8th day of May 2014

The parties and their respective contentions

[1] The Respondent, Guyana Oil Company Limited ('Guyoil'), used to supply Mr Amin, a gas station owner, with petroleum and petroleum products. What was once a congenial business relationship took a turn for the worse when there emerged a dispute over payment. On 12 December 2005 Guyoil initiated legal proceedings against Mr Amin by way of a specially indorsed writ. Guyoil claimed $101,280,423.00 allegedly owed to it for petroleum products supplied between 7 September and 28 September 2005. The action was supported by an affidavit verifying the claim and a statement that there was no defence to the claim.

[2] Mr Amin responded with an affidavit of defence dated 15 September 2006 in which he denied Guyoil's allegations. He disputed the debt and stated that all amounts owing to Guyoil had been liquidated and paid. He indicated that his lawyers had perused the invoices that supposedly supported the debt and he noted that none of these invoices had been acknowledged or signed by him; that the amounts claimed had apparently been mixed up with other accounts; that there were irregularities at the Accounts Section of Guyoil and that payments that were made by him were not taken into consideration.

[3] Guyoil replied with an affidavit filed on 26 October 2006. The thrust of this reply was that the defence was a sham because Mr Amin had previously sent to Guyoil a letter dated 14 October 2005 (the 'admission letter') in which Mr Amin actually admitted owing Guyoil, as at that date, the sum of $97,609,000.00. The letter, signed by Mr Amin himself, was exhibited to the affidavit. The letter's last paragraph clearly stated, "[I]t will take me some time to collect on the money I owe you but I promise will pay. An outstanding balance due to the sum of $97,609,000.00."

[4] Faced with this damning admission Mr Amin filed an affidavit of rejoinder in which he attempted to explain away his acknowledgment of indebtedness. He stated that the admission letter was written as a result of economic coercion; that

he was informed by Guyoil that in order to continue receiving supplies from them he had to confess *some* indebtedness to them but that any such admission did not preclude subsequent adjustments being made by Guyoil. Mr Amin also filed a defence on 2 February 2009 that incorporated all the points that were made in his affidavits save that it made no reference to the admission letter.

The first instance trial

[5] The dispute proceeded to trial on the merits. Ms Roslyn Franklyn, the Credit Controller of Guyoil, testified that Mr Amin was given credit for goods supplied between 1st and 20th September 2005 but that no credit was given after that date. A credit application form signed by Mr Amin was tendered in evidence. The approved credit limit on the form was $25 million. Ms Franklyn also exhibited a bundle of some 72 invoices and receipts to establish the debt on which Guyoil was suing. She also gave evidence of Guyoil's receipt of the admission letter. She said that the original could not be found but she produced a copy which was marked for identification. She denied that "any force of persuasion" was placed on Mr Amin to elicit the letter.

[6] If the judge's handwritten note of the evidence recorded is accurate (and there has been no suggestion that it was not) none of the cross-examination of Guyoil's witnesses was directed towards the authenticity of the content of the admission letter. Further, and significantly, there was no evidence coming from Mr Amin's side that disputed or otherwise touched on the admission letter. Mr Amin himself neglected to give evidence although he was present in court throughout the trial. He produced only one witness at the trial and that witness's evidence was directed towards Guyoil's sloppy record keeping. In sum, the evidence and the cross-examination of both the plaintiff's and the defendant's witnesses were concerned with the authenticity and regularity of the bundles of invoices, supply and delivery orders, bills, vouchers, receipts and other accounting documents produced by Guyoil; whether Mr Amin or any of his employees had signed them; the poor record-keeping of Guyoil and whether in all the circumstances it could fairly be

said that the debt claimed had been established by the evidence adduced by Guyoil.

[7] Mr Amin's written closing submissions did refer to the admission letter. In those submissions his counsel stated:

> "A letter purportedly written by the defendant to the plaintiff was tendered as Exhibit D for identification after an objection was taken as to its admissibility and was never formally tendered. Thus the contents of the letter cannot be used as evidence against the defendant. It is important to note that Ms Frankyn said in her evidence that after the letter was received there was (sic) several meetings held in order to reconcile the account. The simple fact is that the defendant did not accept the statement of account from the plaintiff."

[8] Guyoil's written closing submissions focused heavily on the admission letter. Counsel contended that since the letter was contained in the Affidavit in Reply it was an admissible document under s 90(1) and (2) of the Evidence Act Cap 5:03 and indeed, its contents were never disputed by Mr Amin. In reply to these submissions, Mr Amin's counsel reiterated that the admission letter was tendered only for identification purposes and that the judge could not properly take cognisance of it.

[9] There were really two broad issues for determination by the trial judge. The first was the weight, if any, to give to the contents of the admission letter. The trial judge took the view that since it had merely been marked for identification he could not consider the truth of its contents. According to the judge, an opportunity was given to Guyoil to consider re-opening its case "to formally tender the said letter according to law". Since Guyoil had not availed itself of this opportunity, the judge stated, the letter was therefore of no evidential value.

[10] Having completely closed his mind to the impact and consequence of the admission letter, the judge then turned to consider the quality of the evidence adduced by Guyoil in support of its claim. In this regard, Guyoil's witnesses did not impress the judge who found what he referred to as fatal flaws in the oral and documentary evidence. The purchase orders and invoices were not signed by Mr Amin; there was no evidence that they were signed by any employee of Mr Amin's; there was no evidence that the vehicles receiving the product were owned or controlled by Mr Amin and there was evidence that several invoices had been tampered with. The judge concluded, "[T]here was absolutely no explanation forthcoming in relation to these material irregularities. As a result of this I could not find that the statement of accounts reflected any semblance of accuracy or reliability…The plaintiff's evidence lacked accuracy and credibility." In the circumstances the judge found for Mr Amin and dismissed the claim with costs. Guyoil appealed the judgment of the trial judge.

The judgment of the Court of Appeal

[11] The judgment of the Court of Appeal made little attempt to evaluate the soundness of the trial judge's assessment on the merits and, in particular, the trial judge's rejection of the evidence adduced at trial by Guyoil to substantiate its debt. The judgment focused on whether the judge was right to have given leave to defend. The Court of Appeal appeared to have taken the view that, given Mr Amin's protestations of having already paid all amounts owing to Guyoil, even before a trial was embarked upon, Mr Amin's challenge, on affidavit, to the accuracy and integrity of Guyoil's accounts should have peremptorily been disregarded by the trial judge. That challenge constituted "a mere general denial" as Mr Amin had not condescended to indicate what he had paid to Guyoil and when he had paid the same. The Court of Appeal, for example, took a dim view of paragraph 10 of Mr Amin's affidavit of defence, in which he stated that, "I will contend that based on the invoices supplied by the Plaintiff that I am not indebted to them in any sum". As far as the Court of Appeal was concerned, the challenge to Guyoil's record keeping was "a pointless contention by way of defence, it

manifested an attempt in desperation to set up a defence, when there seemingly was none".

[12] As to the admission letter, the Court of Appeal regarded the explanation given by Mr Amin for having written the same as another example of an incredible concoction on his part. The court considered that in all the circumstances, and especially in light of the admission letter, Mr Amin's defence was a sham and as such he had exhibited no reasonable grounds of defence. A plethora of cases was cited in support of this finding by the Court of Appeal including *Ward v Plumbley,*[1] *Sheppards and Co. v Wilkinson and Jarvis,*[2] *Barclays Bank v Rahaman,*[3] *Jacobs v Booths Distillery Co.,*[4] *Banque De Paris Et Des Pays-Bas (Suisse) J.A. v Costa De Naray and Christopher John Walters,*[5] *National Westminster Bank v Daniel,*[6] and *Anglo-Italian Bank v Wells.*[7] Having looked at these cases, the court exercised its powers under s 7(1)(a) of the Court of Appeal Act, Cap. 3:01 to set aside the trial judgment on the ground that Mr Amin had not demonstrated an ability to advance a plausible ground of defence. Judgment was given to Guyoil in the full sum of $101,280,423.00 together with interest at the rate of six per cent from the 13th December 2005 and continuing. Mr Amin appeals to this Court.

Discussion

[13] The first point that must clearly be made is that this Court accepts entirely, in principle, the learning on leave to defend so eloquently set out by the Court of Appeal and referred to in the several cases cited by that court. In these Order 12 rule 2 cases, it is important that trial judges do not unnecessarily prolong litigation by embarking upon trials when, on the affidavits before them, there is neither a reasonable prospect of defending the claim or a *bona fide* defence raised to the

[1] *[1890] 6 TLR 198.*
[2] *[1889] 6 TLR 13.*
[3] *(1963) LRBG 279.*
[4] *(1901) 85 LT 262.*
[5] *(1983) Lloyd's Law Reports 21.*
[6] *(1993) 1 WLR 1453.*
[7] *[1878] 38 LT 197.*

claims of a plaintiff. This Court therefore commends to trial judges this aspect of the Court of Appeal's judgment.

[14] A perusal of the cases cited above by the Court of Appeal will reveal, however, that in each of them the complaining party was challenging and the reviewing court was assessing an order made in interlocutory proceedings. In most of them the complaint was that summary judgment was granted when it ought not to have been, or an order, thought to be unreasonable, had been made by the trial judge as a condition for the defendant being able to proceed to trial on the merits, or else there was an appeal, before a trial on the merits had been held, against an order granting leave to defend. In no instance did any of these cases address a situation where a full trial had been held and a reasoned judgment given on the merits.

[15] What is therefore unique about the instant case is that there had already been a trial on the merits and, more importantly, the judge conducting that trial had actually given judgment *in favour of the defendant*. The judge had found that Guyoil, upon whom lay the burden of proof, had not established the debt. In these circumstances the decision on the merits (and the reasoning that supported that decision) could not be ignored by the Court of Appeal which concentrated itself more on what the judge could or should have done *before* the substantive trial was held. If indeed the defence to the action laid out in the affidavit was a sham; if the defence was entirely contrived; then this circumstance ought to have been plainly manifested in the judgment in favour of Mr Amin. The Court of Appeal should ideally have directed its attention to pointing to the flaws that emerged in the first instance judgment on the merits of the action and in particular the reasons why the trial judge found that Guyoil had not established the alleged debt. It is regrettable that the Court of Appeal elected, apparently of its own motion, to steer the focus of the appeal towards the issue of whether leave to defend should have been granted when section 6(5)(c) of the Court of Appeal Act clearly provides that no appeal shall lie from an order of a judge giving unconditional leave to defend an action. Save for its treatment of the admission letter, the Court of Appeal therefore

engaged itself largely in a theoretical, albeit interesting, discussion on the principles involved in granting leave to defend in lieu of directing its attention to the judge's findings on the merits.

[16] We do agree, however, with the views of the Court of Appeal on the admission letter. Specifically, we agree that, the letter having been exhibited as an annexure to Guyoil's affidavit in reply, the trial judge should have taken full cognisance of its contents given that those were never challenged by Mr Amin. *See*: *Guyana Bank for Trade and Industry v Alleyne*[8] and also *Sheermohammed and Another v S S Nabi and Sons Ltd*.[9] The letter was a statement adverse to the maker's interest and as such should have been received as evidence of its truth. We also agree that the explanation given by Mr Amin for writing the letter was not one that could be believed. The trial judge was wrong to refuse to factor its contents into his decision making.

The determination of the appeal

[17] How then should this appeal be determined by this Court? There are at least three relevant circumstances. Firstly, the case before the trial judge was fact intensive and the trial judge found that Guyoil had not proven its case. Secondly, in finding for Mr Amin, the trial judge neglected to consider a vital piece of evidence strongly indicative of Mr Amin's indebtedness to Guyoil in the sum of at least $97,609,000.00 of the $101,280,423.00 claimed. Thirdly, the Court of Appeal reversed the trial judge and gave judgment for the full sum not so much because of the judge's said neglect but on a premise that was then moot, namely, that the judge wrongly gave leave to defend.

[18] These three circumstances impel us to regard the judge's treatment of the admission letter as sufficiently serious to warrant judgment for Guyoil on the basis of that admission. If regard had been paid to the contents of that letter by the

[8] [2011] CCJ 5 (AJ), *(2011)* 77 WIR 303 [56] - [62].
[9] [2011] CCJ 7 (AJ), *(2011)* 78 WIR 364 [38] - [39].

judge, he would have found that Guyoil had established a debt at least in the sum of $97,609,000.00. That may in turn have coloured the judge's approach to the rest of the evidence.

[19] What then of the difference between the sum admitted in the letter and the full sum claimed? It is one thing to say that, in hindsight, the judge should not have given unconditional leave to defend. Such leave having been given, it is quite another thing to overrule the judge's findings of fact drawn after seeing and hearing the witnesses for Guyoil and examining almost 150 different exhibits. Apart from the reference to the admission letter, the Court of Appeal gave no reasons for reversing the trial judge's careful findings of fact in relation to Guyoil's inability to prove the debt claimed. Nor have we been persuaded, again leaving aside for the moment the letter and its implications, that those findings were wrong. This therefore requires us, in all the circumstances, to give judgment only in respect of the amount admitted in the letter since the Court of Appeal's basis for giving judgment in the full amount cannot be supported. We therefore allow the appeal in part.

[20] Before formally expressing the order of this Court we use this opportunity to endorse, unreservedly, the strong observations on the issue of delay made by the Chancellor in the penultimate paragraph of the judgment of the Court of Appeal. We trust that those observations are heeded fully by all trial judges in Guyana.

The order of the Court

[21] The appeal is allowed in part. The judgment of the court below is varied to the extent that there shall be judgment for Guyoil in the sum of $97,609,000.00 together with interest on that sum at the rate of six per cent per annum from the 13th December 2005 until payment. On the assumption that the Court of Appeal's costs award of $750,000.00 to Guyoil embraced both the trial and appellate hearings, Mr Amin will, in addition, pay 80% of the costs of this appeal to Guyoil.

The Rt Hon Mr Justice Sir D Byron (President)

The Hon Mr Justice A Saunders

The Hon Mr Justice J Wit

The Hon Mr Justice D. Hayton

The Hon Mr Justice W Anderson