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Judgments
59, 1964

IN THE PRIVY COUNCIL

No. 43 of 1963

O N A P P E A L

FROM THE BRITISH CARIBBEAN COURT OF
APPEAL

B E T W E E N

BRITISH GUIANA CREDIT CORPORATION
a body corporate, incorporated by
Ordinance No. 13 of 1954, whose
office is situate at Lots 20 and
21 Water Street, Georgetown, Demerara
(Defendants)

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Appellants

- and -

CLEMENT HUGH DA SILVA (Plaintiff)

Respondent

C A S E FOR THE APPELLANTS

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
23 JUN 1965
25 RUSSELL SQUARE
LONDON, W.C.1.

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Record

20 1. This is an appeal from a judgment and
order, dated the 19th July, 1963 of the
British Caribbean Court of Appeal (Jackson,
P., Luckhoo and Date, JJ.A.) allowing the
appeal of the Plaintiff - Respondent from
a judgment and order, dated the 19th March
1962, of the Supreme Court of British
Guiana (Fraser, J.) by which the Plaintiff
- Respondent's action against the
Defendants- Appellants was dismissed. By
the said judgment and Order of the British
Caribbean Court of Appeal judgment was
30 entered for the Plaintiff-Appellant-
Respondent in the sum of \$30,460.00.

pp.105-132

pp.75-97

2. The Defendants-Appellants (hereinafter
referred to as "the Corporation") are a
statutory corporation created by the
British Guiana Credit Corporation
Ordinance, c.13. of 1954 as amended by the
British Guiana Credit Corporation
(Amendment) Ordinance c.13 of 1955, of the
Laws of British Guiana. The Plaintiff -

p.4 1.29
p.10 1.9
p.31 1.15
p.75 1.27

p.2 1.23

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Respondent (hereinafter referred to as "The Respondent") claimed to have been appointed by the Corporation under a contract of service as the Corporation's General Manager and claimed further that the Corporation had broken this contract of service. He asked for a declaration that he was the Corporation's duly appointed General Manager, alternatively for damages, and for an injunction restraining the Corporation from appointing anyone else to the post.

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3. The Corporation asserted that there never had been any concluded agreement between themselves and the Respondent, alternatively, that if there had been an agreement, it had been repudiated by the Respondent. They said further that if there had been an apparent agreement which had not been repudiated, it was ineffective by reason of want of form in the manner of execution by the Corporation and because such an agreement was ultra vires the Corporation in any event. Further, if there had been a valid and enforceable agreement which was not repudiated, and if they had broken this agreement, then the Respondent had failed to mitigate his loss thereunder.

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4. A series of interrogatories were administered by the Respondent to a Mr. Moore, who had been the Corporation's Chairman at the time of the alleged appointment but who, at the time the interrogatories were answered, was no longer the Chairman or a member of the Corporation. The learned trial judge admitted the answers notwithstanding the objection of the Corporation.

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5. An agreed statement of facts and documents was put before the trial Court. The Statement embraced the following facts:

a) The Corporation had advertised the post of General Manager in the local

press in August 1960. The Respondent had asked for particulars and had been provided with a copy of the terms and conditions attaching to the post. These provided, inter alia, for:

- i) an annual salary of \$11,280.00; a free partly furnished house; and leave facilities;
 - 10 ii) leave passages up to a maximum of \$2,500;
 - iii) a motor car allowance;
 - iv) a duration of appointment which would: "normally be for three years in the first instance".
- b) The Respondent submitted a formal application to the Corporation's Chairman on the 24th August 1960.
- 20 c) At a properly constituted meeting of the Corporation's Board held on the 22nd September 1960 all the applications received by the Corporation were considered and the Respondent was selected for the post. The Board decided that the Respondent was to be notified of his appointment and that all unsuccessful applicants were to be told the vacancy had been filled;
- 30 d) By a letter dated the 26th September 1960 the Corporation's Secretary informed the Respondent that he was selected for appointment on the terms and conditions advertised and requested to be informed as early as possible how soon he would be able to take up the appointment.
- 40 e) At a properly constituted meeting of the Corporation's Board held on the 27th October 1960 a letter from the Respondent to the Corporation dated the 3rd October 1960 was read and noted and the minutes of the Board Meeting of the 22nd September 1960 were read by

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the Corporation's Secretary and confirmed by the Chairman;

f) On the 7th December 1960 the Respondent's Solicitors wrote to the Corporation claiming the Plaintiff to have been duly appointed as General Manager, stating that he was ready and willing to take up the appointment within a reasonably short time, and, that he was treating himself as duly appointed General Manager. No reply was received to this letter.

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p.35 1.8

The agreed statement also covered the following documents:

g) An advertisement in the "Daily Chronicle" of the 6th August 1960 referred to in (a) above, and admitted as exhibit A.

p.137

h) The particulars provided by the Corporation referred to in (a) above, and admitted as exhibit B. These included the following as Condition No. 6:

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p.138 1.29

"The appointment is non-pensionable and will normally be for three years in the first instance, but the duration of the initial contract is subject to variation to meet individual circumstances..."

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j) The formal application of the Respondent dated the 24th August 1960 referred to in (b) above and admitted as exhibit C.

p.155

k) Minutes of the Board meeting of the 22nd September 1960 referred to in (c) above and admitted as exhibit D.

p.157

l) Letter from the Corporation's Secretary to the Respondent dated the 26th September 1960 referred to in d) above and admitted as exhibit E.

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The letter stated:

- 10 "I am pleased to inform you that at a meeting of the Corporation held on Thursday 22nd September 1960, you were selected for the appointment on the terms and conditions as advertised; and I shall be glad to be informed as early as possible, how soon you would be able to take up the appointment." p.157 11.20-26
- m) Letter from the Respondent to the Corporation dated the 3rd October 1960 referred to in (e) above and admitted as exhibit F. This letter stated inter alia: p.157
- 20 "I enclose a draft agreement of service which I shall enter in with the Corporation. I accept the appointment." p.158 1.5
- n) Minutes of Board meetings held on the 27th October, 11th November, 18th November, and 9th December 1960, admitted as exhibits G.1.2.3 and 4. pp.162-174
- 30 o) Letter from the Respondent's Solicitors dated the 7th December 1960 referred to in (f) above and admitted as exhibit H. This letter included the following: p.168
- "It was not until late in November when he received a copy of the Minutes of the meeting held on the 11th November 1960, that for the first time he became aware of efforts to replace him by another person for the post of General Manager." p.171 1.10
- 40 6. In replying to the interrogatories Mr. Moore gave, inter alia, the following answers. There had been twenty six applicants for the post and all were placed before the Board at their meeting of the 22nd September 1960. Among the applications p.20 11.9-40

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p.21 1.1-17 was one from the secretary of the Corporation, who retired from the room when the appointment was being considered. By elimination the candidates were reduced to three and then a final selection was made by ballot, upon which the Respondent obtained five votes, a Mr. Persaud two votes, and a Mr. Luck no votes. The Board acquiesced in the selection of the Respondent. The Secretary later prepared minutes of the meeting but they contained no reference to the selection of a General Manager. He (Mr. Moore) drafted a paragraph on the matter, for inclusion in the minutes, but these minutes were not circulated to members of the Board because their term of office had expired. The minutes confirmed at the Board meeting of the 27th October were a true and accurate record of the meeting of the 22nd September. He told both the Respondent and the Financial Secretary of the Colony on the 22nd September that the Board had selected the Respondent and he (Mr. Moore) instructed the secretary of the Corporation to write to the Respondent informing him (the Respondent) that he had been selected. He (Mr. Moore) approved the secretary's letter of the 26th September before it was issued. The Board meeting of the 27th October was the next Board meeting after that of the 22nd September. At the later meeting only he and a Mr. Biragie were present of those who attended the earlier meeting. The minutes of the earlier meeting were read by the Secretary and signed and confirmed by him (Mr. Moore) as Chairman, and without objection. At this later meeting the Respondent's letter of the 3rd October was read. So also was a letter dated the 18th October from the Financial Secretary stating that it was the wish of the Governor-in-Council that the Board re-examine the matter of the appointment. The draft agreement enclosed with the Respondent's letter of the 3rd October was not considered by the Board. No directions were given to the Board as to who they should appoint. At the meeting of the

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| | Board on the 11th November they decided to | <u>Record</u> |
| | appoint Mr. Luck to the post of General | p.27 1.35 |
| | Manager. This decision was communicated | |
| | to Mr. Luck on the 16th December 1960. | p.28 11.8-16 |
| | The Corporation never gave notice to the | |
| | Respondent that he was no longer appointed | |
| | General Manager and they never withdrew, | |
| 10 | revoked or amended the Secretary's letter | |
| | to the Respondent of the 26th September. | |
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| | 7. Evidence was given by the Respondent as | |
| | follows. Until the 14th January 1961 he | p.36 1.8 |
| | was Deputy Financial Secretary of the | |
| | Colony and, by reason of this office, he | p.36 1.33 |
| | was at all material times an official | |
| | member of the Corporation's Board. He had | |
| | participated in the discussion of the | |
| | Board when it was decided to advertise, had | |
| 20 | helped to draft the particulars of the | |
| | appointment, and had taken part in | |
| | arranging for the post to be advertised. | |
| | He was present when the Board considered | |
| | and accepted the draft particulars on the | |
| | 29th July 1960. At that time he had not | |
| | resolved to apply although he thought of | |
| | himself as a probable candidate. He did | |
| | not disclose to the Board that he thought | |
| | himself a probable candidate. He knew of | |
| | the provisions of Section 10 of the | |
| 30 | Ordinance. He applied for the post on the | |
| | 24th August 1960. He received notice of | |
| | the meeting of the 22nd September but he | |
| | did not attend the meeting. He received | |
| | minutes of this meeting. On the 26th | |
| | September he received the letter from the | |
| | Secretary of the Corporation. It was handed | |
| | him by the Secretary who orally enquired | |
| | how soon he could assume duty. He replied | |
| 40 | that he could assume duty around the middle | |
| | of December after the budget. About a week | |
| | later the Secretary asked again, on the | |
| | telephone, when he could assume duty. He | |
| | then asked the Secretary to prepare the | |
| | usual agreement of service but was told the | |
| | Secretary did not have the service agreement | |
| | for the previous General Manager. The | |
| | Secretary asked him to get a standard Crown | |
| | Agents form for use as a draft. This he did | |
| | and after attempting to modify it he sent | |
| 50 | it to the Secretary with his letter of the | |

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| p.38 1.36 | 3rd October 1960. He had had no other communications from the Corporation about his appointment but he continued to receive minutes of meetings. He attended the meeting of the 27th October but withdrew while the item dealing with the appointment of a General Manager was being discussed and he had never seen the letter written by the Financial Secretary to the Board on the 18th October. He attended the meeting of the 11th November but was allowed to leave when the item dealing with the appointment of a General Manager was being discussed. He received a copy of the minutes of this meeting towards the latter part of November. He attended the meeting of the 18th November, in the minutes of which meeting there was a reference to the post of General Manager. He did not attend the meeting of the 9th December 1960. | 10 |
| p.39 1.2 | | |
| p.39 1.11 | | 20 |
| p.40 1.16 | 8. On the 16th November, 1960, as a result of the Secretary's letter to him of the 26th September, he addressed a minute to the Financial Secretary enclosing the Secretary's letter and asking either for secondment or that he be allowed to retire from Government service. He could have resigned but he understood that, although the Government could refuse him permission to retire at 50, permission was likely to be only a formality and he thought he could retire voluntarily at the age of 50. His intention was not to resign but to be permitted to retire. He was at that time 49 years of age, although according to Government records he was 48 and he had himself assumed he was 48, but he had some 10 or 11 months leave due to him. Had it not been for the appointment he would not have contemplated retiring at 50. He had, earlier, advised the head of his department that he had applied for the post. He received no answer to the minute of the 16th November and on the 8th December he wrote a formal letter repeating his application to retire. This letter was addressed to the Public Service | 30 40 |

Commission and was admitted as exhibit S.1. By it he asked for 10 months and 25 days vacation leave to commence from the 19th January 1961; for permission to retire at the expiration of this leave; and, for permission to accept paid employment during his leave. He received a letter dated the 12th January 1961 (exhibit S.2.) granting his leave and granting permission to retire at the termination thereof. He received a letter dated 2nd March 1961 (exhibit Q) declining permission to engage in pre-retirement employment and giving as a reason the absence of a statement from him as to the specific employment contemplated. On the 9th March 1961 (exhibit R) he stated in a letter that he proposed to engage in part-time secretarial duties and by letter dated the 24th March 1961 (Exhibit P) he was granted permission to take employment during his leave. He heard in December 1960 that someone else had been appointed General Manager but he did not consider whether he ought to withdraw his application to retire. If he had not retired he could have remained in Government service until he was 55.

9. He considered himself appointed General Manager as soon as he received the letter of the 26th September and in his letter of the 3rd October he said he accepted the appointment in order to confirm the agreement concluded by the letter of the 26th September. He enclosed a draft agreement to assist the Secretary who had asked for a draft Crown Agent's standard form and he was not laying down any conditions of his employment. He could only sign the agreement if the Corporation agreed to it. It was not necessary for him to have an agreement before assuming duty: the agreement was a formality. He interpreted the wording of Condition 6 of the particulars of the appointment to mean that he could ask questions or make suggestions as to his terms of service. He had suggested six years dividend into two tours of three years

p.42 l.14

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each: this seemed to fit with the minimum three years for which the particulars provided and still allowed at the end of that period for a further three years if the Corporation wanted him and he wanted them. His insertion of two tours was merely a suggestion, he was satisfied to accept three years. After he retired in January 1961 he had endeavoured to obtain suitable employment but he had not obtained any employment. His period of leave ended on the 22nd January 1962. He claimed special damages of \$57,990 and general damages of \$42,010. The special damages were made up as to \$33,840, being the General Manager's annual salary of \$11,280 for three years together with loss of free house valued at \$8,100 and leave passages of \$2,500. He had seen an Executive Council decision and a letter sent by the Financial Secretary to the previous General Manager informing him that the annual salary for the post was \$11,280. This was made up of salary \$10,560 and gratuity \$720.

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10. The draft agreement modified by the Respondent and submitted with his letter of the 3rd October carried a schedule of terms containing, inter alia, the following:

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1(1) The engagement of the person engaged is for a period of six years resident service comprising two tours of three years each commencing from the date of assumption of duty which term may be extended as provided for in Clause 8.

3. A free, partly-furnished house will be provided or an allowance in lieu.

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5(1) The Corporation may at any time determine the engagement of the person engaged on giving him twelve months' notice in writing or on paying him six months' salary.

(2) The person engaged may, at any time after the expiration of three months from the commencement of any residential service, determine his engagement on giving the Corporation three months' notice in writing or on paying to the Corporation one months' salary.

10 (3) If the person engaged terminates his engagement otherwise than in accordance with this agreement he shall be liable to pay the Corporation as liquidated damages three months salary.

11. Evidence for the Respondent was given by Mr. Kranenburg, the Secretary of the Corporation. He had delivered the letter of the 26th September to the Respondent, had asked when he could assume duty and had been told about the middle of December. About a week later the Respondent had telephoned and asked for a service agreement to be prepared. He had told the Respondent to get a copy of the Crown Agents' form and put up a rough draft of the terms of his appointment for his (the Secretary's) consideration. Neither he nor the Board ever considered the draft submitted by the Respondent. A letter from the Financial Secretary requested the Board to reconsider the appointment: the Board considered the letter and as a result of the request considered the applications again. When the Board decided to appoint Mr. Luck he was directed to ask the approval of the Governor-in-Council to this appointment. (The letter from the Financial Secretary was exhibit K dated the 18th October 1960. It was addressed to the Chairman of the Board and said:

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p.61
p.62 1.18

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"With reference to the Secretary's letter of 26th September and our subsequent conversation on the subject of filling the vacant post of General Manager of the Corporation. I am directed to inform you that the matter was considered by the Governor-in-Council.

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I am to ask the Board of the Corporation to re-examine the recommendation made as the Government is anxious that the best person available be obtained for the post...").

As Secretary of the Corporation he considered the Respondent definitely appointed. He was aware of Section 7(3) of the Ordinance No.13 of 1954 but he would not know whether a service agreement should be signed in the manner set out in that Section, although he remembered a service contract so signed. He was aware that the Governor-in-Council had to approve a salary above \$4,800 per annum but he did not know whether the Board ever asked for approval of the Salary of \$11,280. The Corporation did not consider whether Section 6(1) of the Ordinance No.13 of 1954 applied to the appointment.

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12. Evidence for the Corporation was given by Mr. Jaisar Girdhar, the acting chief accountant. The salary of the previous General Manager had been £2,200 (\$10,560) per annum which sum had been approved by the Governor-in-Council in May 1957 to be paid with effect from the 29th January 1957 (exhibit 0). The previous General Manager received in addition, a gratuity of £37.10.0. (\$180) payable for every completed quarter year of service. There had been no communication from the Government on the matter of salary after May 1957.

13. The British Guiana Credit Corporation Ordinance c.13. of 1954 provides, inter alia, as follows:

s.6(1) The Corporation shall appoint and employ at such remuneration and on such terms and conditions as they think fit a General Manager, a Secretary and such other officers and such servants as they may deem necessary for the proper carrying out

of the provisions of this Ordinance.

Provided that no salary in excess of the rate of four thousand eight hundred dollars per annum shall be assigned to any post under this subsection without the prior approval of the Governor-in-Council.

10 (2) No provision shall be made for the payment of any pensions, gratuities or other like benefits to the General Manager, the Secretary, other officers, servants or to other persons by reference to their service without the prior approval of the Governor in Council.

20 s.7(1) The seal of the Corporation shall be kept in the custody of the Chairman or the Deputy Chairman or the Secretary of the Corporation and may be affixed to instruments pursuant to a resolution of the Corporation in the presence of the Chairman or Deputy Chairman and the Secretary.

(2) The seal of the Corporation shall be authenticated by the signature of the Chairman, or Deputy Chairman and the Secretary.

30 (3) All documents, other than those required by law to be under seal made by, and all decisions of the Corporation may be signified under the hand of the Chairman or Deputy Chairman or General Manager and the Secretary.

s.9(1) Every member of the Corporation, every Manager, every Secretary, and every other officer of the Corporation -

40(b) shall not make use of any documents, matters or information which or knowledge of which he may obtain as a member, General Manager, Secretary or other officer of the Corporation, as the case may be, for the benefit of

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himself or any other person, or otherwise than for the purposes of his duties as a member, General Manager, Secretary or other officer of the Corporation -

and shall make and subscribe before a commissioner for oaths or Justice of the Peace a statutory declaration to such effect.

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(3) Where any member, the General Manager, Secretary or any other officer of the Corporation contravenes any of the provisions of Paragraph (a) or (b) of sub-section (1) of this Section, he shall be guilty of an offence, and shall, on summary conviction thereof, be liable to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months or to both such fine and imprisonment.

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s.10(1) Subject to the provisions of this Section, it shall be the duty of a member of the Corporation who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the Corporation, to declare the nature of his interest at a meeting of the Corporation.

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(2) In the case of such .. proposed contract the declaration required by this section to be made by a member of the Corporation shall be made at the meeting of the Corporation at which the question of entering into the contract is first taken into consideration

(3) For the purpose of this section, a general notice given to the other members of the Corporation by a member to the effect that he is also a member of a specified company or firm and is to be regarded as interested in any contract which may, after the

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date of the notice, be made by or with that company or firm, shall be deemed to be a sufficient declaration of interest in relation to any application or contract so made:

10 Provided that no such notice shall be of effect unless either it is given at a meeting of the Corporation or the member of the Corporation concerned takes reasonable steps to secure that it is brought up and read at the next meeting of the Corporation after it is given.

20 (4) No member of the Corporation shall sit or take part in proceedings or vote on the decision.... in respect of any contract or arrangement in which he is interested, whether directly or indirectly, and if he shall vote his vote shall not be counted nor shall he be counted in the quorum present at the meeting.

30 (5) Any member of the Corporation who fails to comply with any of the provisions of subsections (1), (2) and (3) of this section or who contravenes any of the provisions of subsection (4) of this Section shall be guilty of an offence, and shall, on summary conviction thereof, be liable to a fine not exceeding five hundred dollars or to imprisonment for a term not exceeding six months

40 s.13. Any transport, mortgage, lease, assignment, transfer agreement, or other document requiring to be executed by the Corporation or any cheque, bill of exchange or order for the payment of money requiring to be executed by the Corporation shall be deemed to be duly executed if signed by a person or persons specially or generally authorised by resolution of the Corporation so to sign.

s.54. The Governor in Council may, after

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consultation with the Chairman, give to the Corporation directions of a general character as to the policy to be followed in the exercise and performance of its functions in relation to matters appearing to him to concern the public interest, and the Corporation shall give effect to any such directions.

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14. The learned trial judge rejected the Respondent's claim for a declaration that he was the General Manager of the Corporation. He said:

p.76 1.4

"It seems that the claim for a declaration in the terms sought by the (Respondent) is intended to achieve the purpose of a decree of specific performance and I should say at once that the Court will not make a declaratory order in those circumstances."

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He then rejected the submission that the Respondent's acceptance was not final in that he made a counter offer to the Corporation and that in any event there was no intention between the parties to create legal relationships by the correspondence exchange. He accepted the Respondent's account of the circumstances of his sending the draft agreement and said:

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"But those circumstances have no relevance to the legal effect of the documents sent by the (Respondent) on 3rd October."

In considering the intention of the parties a feature that he considered relevant was the reception given by the Board to the Respondents letter of the 3rd October. The draft agreement submitted by the Respondent was never considered by the Board because, after the Respondent's letter had been read, they had read to them the Financial Secretary's

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10 letter of the 18th October. The Respondent's letter made no impact on the Board either as an acceptance of an offer or as a conditional acceptance. The learned Judge continued by saying that he accepted the evidence of the Respondent that the revised terms included in the draft were not intended to be a counter-offer. He added:

"The whole web of the defence on this aspect arose ex post facto and had no factual bearing on the behaviour and intentions of the Board on 27th October or subsequently."

p.82 1.21

20 15. Fraser J. then considered the question as to whether there was want of form in the Secretary's letter of the 26th September. He drew attention to sections 7 and 13 of the 1954 Ordinance (the latter section as amended by section 2 of the 1955 Ordinance) and said:

30 "Having considered those two sections the position seems to be to be this: in order to bind the Corporation the letter of 26th September should bear the common seal in manner provided by Section 7 or should be signed by some person or persons specially or generally authorised by a resolution of the Corporation. There is nothing to indicate that Mr. L.E. Kranenburg as secretary was ever alone specially authorised to sign for the Corporation. On the contrary the copies of the two letters tendered by the Corporation show that the Secretary and the Chief Accountant were given special authority."

p.85 1.36

40 He concluded that there was a lack of mutuality between the parties on the sole ground that no enforceable offer or acceptance was made by the Corporation because the Secretary's letter was not executed in manner required by Section 7 or Section 13 of the Ordinance.

p.87 1.13

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p.87 1.21

16. Finally, and on the basis that he was wrong in holding there was want of form, he considered whether the contract was ultra vires the Corporation, and he referred to Section 6(1) of the Ordinance. He construed the proviso to the Section as a condition precedent to the exercise of the power therein conferred and said that it was not permissive but imperative. It prohibited the assignment of a salary until approval was given by the Governor-in-Council. There was no doubt that the Governor-in-Council had never approved the salary of \$11,280 which the Corporation assigned to the post. He continued:

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p.94 1.42

"It was urged that the approval of a gratuity of £37.10.0 (\$180) per completed quarter of service and the approval of a salary of £2,200 (\$10,460) per annum.....should be treated as an approval to pay a salary of \$11,280; or at least emoluments of \$11,280. To accept this proposition is to do violence to the plain words of the Ordinance in which a salary is dealt with in a provision to sub-section (1) and a gratuity is dealt with in subsection (2)."

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He went on to reject the Respondent's submission that because the Corporation had not pleaded failure to perform the condition precedent the performance of the condition must be implied. He therefore held the contract, "if it was made" to be ultra vires the Corporation and to be void and unenforceable, and he dismissed the Respondent's claim.

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17. Judgment in the British Caribbean Court of Appeal was given by Jackson P. with Luckhoo and Date JJ.A. concurring. On the issue as to want of form the learned President reached the conclusion that a letter conveying a decision of the Board on the matter of an appointment was not such a document as would come within the

10 ambit of Section 7 or Section 13 of the Ordinance. If it did come within the ambit of the sections then in his view the requirements of Section 13 had been complied with. The minutes of the Board meeting of the 22nd September 1960 disclosed that the Board had decided the Respondent was to be notified of the appointment and Mr. Kranenburg had testified that, in the presence of the whole Board, he had been instructed to inform the Respondent.

20 18. The learned President then expressed his conviction that the Respondent's letter of the 3rd October with its enclosed modified draft agreement was not a counter offer but was in effect an unqualified acceptance. He referred to the contents of the modified draft and the evidence of the Respondent and Mr. Kranenburg and said:

30 "The testimony of the (Respondent) and the Secretary of the Corporation discloses the reason for the draft which accompanied the (Respondent's) letter of the 3rd October, 1960 and that it was specially requested from him by the Secretary for use as a guide. It is manifest that it cannot sensibly be considered as containing a counter offer or as a document purporting to impose conditions alien to those in the advertisement.... An examination of Paragraph 1 of the Schedule shows that it is not repugnant to Paragraph 6 of the advertisement; for the latter states that the duration of the initial contract is subject to variation to meet individual circumstances..... The last complaint is about Paragraph 5 of the Schedule which refers to determination of engagement. It is not suggested that a termination of engagement clause is not required nor that such a term is not in the Crown Agent's model".

p.114 l.1

40 19. Dealing with the issue that the appointment was ultra vires the Corporation the learned President said the

p.115

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finding of the trial Judge that the Governor in Council had never approved the salary of \$11,280 could not be supported. As there was no averment by the Respondent, in his pleadings, that the statute had been complied with, and no allegation in the Corporation's pleadings that it had not been complied with, the burden was on the Corporation to establish approval had not been given. All they had done was call a grade A clerk, a junior officer at the material time. Although this witness had said that was no communication from Government on the question of salary after May 1957. "He had perforce to confess he could not speak with any certainty or authority and to admit that the persons more qualified by knowledge on that score would have been the Chief Accountant or the Accountant". On the contrary, there was evidence that, if specific approval of \$11,280 was essential, it had been given. The Financial Secretary, who was a member of the Governor-in-Council, had personally drawn up the draft advertisement, and inserted the figure of \$11,280 per annum. He (the Financial Secretary) had sent the copy of the advertisement with salary inserted to the Corporation, and:

"In essence that was the way the prior approval of the Governor-in-Council was signified".

On another view specific approval of \$11,280 was not necessary. The Ordinance required a salary in excess of \$4,800 per annum to be approved, and a salary in excess of this figure had been approved - the \$10,560 approved in 1957 -

"The statutory requirements had therefore been complied with; the salary is attached to the post and not the officer."

The defence of ultra vires therefore failed.

20. The learned President then turned to the question of damages. It had been

urged that the Respondent could have withdrawn his application to retire in order to mitigate damages. On this, the President said:

10 "Indeed the (Respondent)
 recognised his duty to mitigate damages
 and endeavoured to satisfy this
 requirement by seeking employment
 elsewhere. The die was already cast
 so far as his employment in the civil
 service was concerned for he had
 already taken the final step".

p.130 1.35

He continued:-

20 "The principal ground requiring
 active attention is what is a
 reasonable period within which the
 appellant would secure employment of a
 status not too distinctly removed from
 the one of which he was deprived or in
 short which a man in his position
 could find reasonable employment."

p.130 1.41

He then took a period of two years for
compensation purposes and awarded \$30,460
damages, being two years at \$11,280 per
annum plus \$5,400 in lieu of partly
furnished quarters at \$2,700 per annum and
\$2,500 for leave passages.

p.131 1.12

30 21. It is respectfully submitted that both
 Fraser J. and the British Caribbean Court
 of Appeal were wrong in rejecting the
 defence that the Respondent's letter of the
 3rd October was a counter offer and that
 there was no intention between the parties
 to create legal relationships. The
 Corporation's advertisement and
 particulars made it plain that the contract
 was not to be for an indefinite period
40 terminable only by reasonable notice on
 either side but was to be for a fixed
 period. The actual duration of the
 contract was a material term of it and
 remained to be negotiated between the
 parties. The Respondent was, by the
 particulars, invited to put forward his
 proposal as to duration and, by modifying

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and submitting the Crown Agent's draft, this is what he did. It is respectfully submitted that, regardless of what may or may not have been in the minds of Mr. Kranenburg the members of the Board and the Respondent at the time of interchange of letters, no enforceable agreement could come into existence until the Corporation had considered the Respondent's proposals, accepted them, and communicated their acceptance thereof to the Respondent. It is submitted that what transpired at the Board meetings after the 22nd September in connection with the appointment of Mr. Luck is irrelevant to this issue, save insofar as the Board's conduct revealed that they did not regard themselves as contractually bound to the Respondent. Moreover, it is submitted, this approach receives support from the action of the Corporation in causing the decision of the Board to be communicated to the Respondent by the informal means that were in fact used. It is respectfully submitted that, on the findings of the learned President that the duration of the initial contract was subject to variation to meet individual circumstances, and, impliedly, that a term providing for termination was required in the contract, the learned President ought to have held that there was no concluded agreement.

22. It is further submitted, respectfully, that Fraser J. was correct and the British Caribbean Court of Appeal were wrong on the issue of want of due form. No reasons were advanced for the view expressed by the learned President that a letter communicating a decision to appoint was not within the ambit of either section 7 or section 13 of the Ordinance. Indeed evidence was admitted which showed that, in the case of other contracts of service, the procedure contemplated by the Ordinance had been observed. It is submitted also that the events of the 22nd September 1960 when the Secretary was given oral instructions by the Chairman in

the presence of the Board, could not, on any proper view, be regarded as compliance with Section 7 of the Ordinance.

23. It is respectfully submitted that Fraser J. was correct and the British Caribbean Court of Appeal were wrong on the issue of ultra vires. It is submitted that it was wrong to hold, as the learned President held, that once a salary in excess of \$4,800 per annum had been approved by the Governor-in-Council then such approval remained good for any salary in excess of \$4,800. On a true interpretation of Section 6(1) of the Ordinance it is apparent that each and every variation of a salary in excess of \$4,800 fell to be separately approved by the Governor-in-Council. In this connection it is important to bear in mind that the Respondent was at all relevant dates an officer in the public service, and that section 14(5) of the Ordinance No. 13 of 1954 was in the circumstances applicable. This subsection provides as follows :-

"Where an officer in the public service etc. etc. as amended from time to time."

Accordingly, the amount of the emoluments payable to the Respondent was a matter requiring specific consideration by the Governor-in-Council. It is further submitted that there was clear evidence that the salary of \$11,280 had never been approved by the Governor-in-Council and that the Corporation had discharged the burden of proof upon them in this regard. The fact that the Financial Secretary, who was assumed by the Court of Appeal without evidence to be a member of the Governor-in-Council, had approved the advertisement was not evidence that the salary assigned thereto had been approved by the Governor-in-Council. On the other hand the evidence of Mr. Jaisar Girdhar was clear on the matter. He, it appears, had been in the accounts department of the

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Corporation throughout the material period and was in a position to know whether any approval of salary after May 1957 had been communicated to the Corporation, as it would inevitably have been if there had been approval. It is further submitted that the requirement in the proviso to Section 6(1) was one of which the Court was bound to take notice in any event, regardless of whether it had been pleaded by either party.

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24. It is submitted with respect that if, contrary to the Corporation's contentions, there had been a concluded contract which was broken by the Corporation, then the British Caribbean Court of Appeal were wrong in their approach to the matter of damages. It is respectfully submitted that the learned President erred in saying that the die was cast in respect of the Respondent's employment in the civil service. It was apparent from the letter written by the Respondent's Solicitors that he was aware late in November 1960 that the Board were making efforts to appoint another General Manager. Notwithstanding this information he wrote a formal letter on the 8th December 1960 repeating his earlier minute of the 16th November 1960, and asking for permission to retire, and he never sought to withdraw this letter. It is submitted that, in the premises, the Respondent failed to mitigate his loss. It is further submitted that, apart from the question of mitigating damages, the British Caribbean Court of Appeal failed to consider their own findings when dealing with the measure of damages. It is submitted that a necessary implication of the learned President's findings was that there had been imported into the contract of service the provisions put forward by the Respondent for termination of the contract. These permitted termination by the Corporation on payment of six months' salary. It is submitted therefore that this must be the maximum

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sum recoverable by the Respondent.

25. Further in relation to the assessment of damages the British Caribbean Court of Appeal failed to take account of the following factors in arriving at the amount of damages which was awarded to the Respondent :-

- 10 (a) that he continued to receive salary as an officer in the public service until January 1962; and
- (b) that the principle of British Transport Commission v. Gourley (1956) A.C.185 should have been applied and a reduction made in the gross amount in respect of tax which would have been deductible or payable by the Respondent in respect of any salary received from the Appellants.

20 26. The Corporation humbly submits that this appeal should be allowed with costs and the judgment of the Supreme Court of British Guiana restored, alternatively that the judgment of the British Caribbean Court of Appeal should be upheld subject to the reassessment of damages for the following among other

R E A S O N S

- 30 1. BECAUSE the communications between the parties indicated that they never moved beyond the stage of negotiating towards an agreement.
2. BECAUSE there was no true intention in the parties to create legal relationships.
3. BECAUSE the communication of the 22nd September, if it was intended to create legal relationships, lacked the form required by the Ordinance.
- 40 4. BECAUSE the alleged contract was ultra vires the Corporation in any event and thus void.

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5. BECAUSE the judgment of Fraser J. was right and ought to be affirmed.

A L T E R N A T I V E L Y

6. BECAUSE the Respondent failed to mitigate his damage although under a duty so to do.

7. BECAUSE the British Caribbean Court of Appeal erred in holding that the compensation period for the assessment of damages should be taken as being two years. 10

8. BECAUSE the British Caribbean Court of appeal failed to take account in assessing damages of the fact that the Respondent remained in receipt of salary as an officer of the public service until January 1962.

9. BECAUSE the British Caribbean Court of Appeal failed to apply the principle of British Transport Commission v. Gourley (1956) A.C. 185 in assessing damages. 20

MILNER HOLLAND

GERALD DAVIES

No. 43 of 1963

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE BRITISH CARIBBEAN COURT
OF APPEAL

B E T W E E N

BRITISH GUIANA CREDIT
CORPORATION a body corporate
incorporated by Ordinance No. 13
of 1954, whose office is situate
at Lots 20 and 21 Water Street,
Georgetown, Demerara
(Defendants)
Appellants

- and -

CLEMENT HUGH DA SILVA
(Plaintiff)
Respondent

CASE FOR THE APPELLANTS

CHARLES RUSSELL & CO.,
37, Norfolk Street,
STRAND, W.C.2.