

RC
G.H. Silva

Judgment
59,1964

No. 43 of 1963.

In the Privy Council

On Appeal from
The British Caribbean Court of Appeal

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

BETWEEN BRITISH GUIANA CREDIT CORPORA-
TION, a body corporate, incorporated by
Ordinance, No. 13 of 1954 whose Office is
situate at Lots 20 and 21 Water Street, George-
town, Demerara (Defendants) *Appellants*

78734

10

AND

CLEMENT HUGH DA SILVA (Plaintiff) ... *Respondent.*

Case for the Respondent

RECORD.

1. This is an appeal from the judgment of the British Caribbean Court of Appeal dated 19th July 1963 (Jackson J., Luckhoo and Dale Jj.A.) whereby the Respondent's appeal from the judgment of the Supreme Court of British Guiana (Fraser J.) dated 19th March 1962 dismissing the suit of the Plaintiff (now the Respondent) and ordering him to pay one half of the Defendants' (now the Appellants) costs was allowed and judgment entered for the Respondent for damages of \$30,460 with costs both in the Supreme Court and the British Caribbean Court of Appeal.

pp. 105-132.

pp. 75-97.

2. The Appellants are a body corporate having perpetual succession incorporated by Ordinance Number 13 of 1954 of the Colony of British Guiana and consist of one official member and such number of other members not being less than seven as the Governor of the Colony may from time to time determine. Such members are appointed by the Governor of the Colony, who is bound to appoint a Chairman and Deputy Chairman of the Appellants from the unofficial members. The Respondent at all material times until January 1961 was employed and acted as Deputy Financial Secretary of the Colony. He then went on vacation leave until 30 January 1962, when he retired from the said post.

p. 47,
ll. 26-28.

pp. 3-9.

3. The Plaintiff (now the Respondent) by his Statement of Claim alleged that the Defendants (now the Appellants) had by advertisement announced the vacancy of the post of General Manager of the Appellants and invited applications to fill the vacancy, that by a letter dated 24th August 1960 he had applied for appointment to this post, that by a letter dated 26th September 1960 signed by the Secretary of the Appellants he had been informed that he had been selected for the post, and that by a letter dated 3rd October 1960 he had informed them of his acceptance of this appointment. He claimed against the Appellants in the suit (*inter alia*) damages for repudiation of the contract thereby created to employ him as General Manager. The Appellants by their Defence denied that there was any consensus *ad idem* between them and the Respondent and contended that the Respondent by the said letter dated 3rd October 1960 had refused to accept the terms and conditions of employment on which they had offered to employ him as General Manager and had submitted a counter-offer which they had not accepted. They further alleged by paragraph 19 of their Defence that the purported selection of the Respondent as their General Manager was invalid and bad at law because :—

pp. 10-14.

(A) The advertisements for the said appointment were inserted in the newspapers in August 1960 without the prior approval of the Governor in Council of the Colony ;

(B) The Secretary of the Appellants was not legally entitled to write the said letter dated 26th September 1960 to the Respondent ;

(C) The Respondent's alleged appointment was *ultra vires* the provisions of the said Ordinance Number 13 of 1954.

pp. 15-18.

In addition the Appellants made no admission as to the alleged special damage. By his Reply the Respondent joined issue with the Appellants on their Defence and by paragraph 5 thereof alleged the Appellants were estopped from contending that the Respondent was not validly appointed as General Manager of the Appellants.

4. The questions for determination in this appeal are whether a binding contract was made between the Respondent and the Appellants for the Appellants to employ the Respondent as a General Manager and the measure of damage recoverable by the Respondent for repudiation by the Appellants of such contract, if made.

p. 36,
ll. 23-33.

5. In the month of August 1960 the Appellants inserted a notice in a daily newspaper of the Colony announcing the vacancy of the post of General Manager of the Appellants and that particulars of the post could

be obtained on application and invited applications to fill the vacancy. The Respondent obtained from the Appellants a copy of the particulars, which contained the terms and conditions of employment in the said post. By a letter dated 24th August 1960 addressed to the Chairman of the Appellants the Respondent wrote: " In response to your advertisement in the Press I hereby apply for appointment as General Manager ". On 22nd September 1960 at a properly constituted meeting of the members of the Appellants (hereinafter called " the Board of the Appellants ") at which the Respondent was not present (he being the official member)

10 twenty-six applications for the post which had been received were considered. The said applications were reduced by elimination to three and upon a ballot being held the Respondent received five votes, a Mr. Persaud two votes and the other candidate, Mr. G. E. Luck, no votes. The Respondent was then chosen for the post and it was decided by the Board of the Appellants that the Respondent and the Government be notified of his appointment and all unsuccessful candidates be notified that the position had been filled. On 26th September 1960 the Chairman of the Appellants approved and one Kranenburg as Secretary of the Appellants signed a letter dated 26th September 1960 which stated that the Respon-

20 dent had been selected for the post of General Manager on the terms and conditions which had been advertised, and that the said Kranenburg would be glad to be informed as soon as possible how soon the Respondent would be able to take up the appointment. This letter was handed to the Respondent by the said Kranenburg, who asked him how soon he could assume duty, and the Respondent said that he would be able to do so around the middle of December 1960, to which the said Kranenburg replied that this would be all right.

6. The Respondent replied to the said Kranenburg as Secretary of the Appellants by a letter dated 3rd October 1960 and enclosed a draft of a service agreement between him and the Appellants. In the letter he wrote : " I thank you for your letter of 26th September informing me of my selection for appointment as General Manager. I enclose draft agreement of service which I shall enter in with the Corporation. I accept the appointment."

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7. As a result of receiving the said letter dated 26th September 1960 the Respondent by a minute of 16th October 1960 made application to be seconded to the post of General Manager of the Appellants or for the permission of the Government of British Guiana to retire from the public service and agreed to allow a Dr. Diephuis, to whom he had let his house

40 for a short period, to remain in the house until Dr. Diephuis left the country.

p. 137,
Exhibit B.p. 137,
Exhibit C.pp. 19-24,
l. 14.pp. 155, 156,
Exhibit D.p. 62,
ll. 10-30.p. 157,
Exhibit E.

p. 38, l. 1.

pp. 157, 161,
Exhibit F.p. 40,
ll. 21-26.p. 41,
l. 39.
p. 42, l. 5.

p. 58,
ll. 21-35.

8. The period for which the members of the Appellants, apart from the Chairman but including the official member, had been appointed by the Governor expired on 25th September 1960 and all these members, who had been members for many years, then became eligible for re-appointment. The Respondent, who was the official member, was re-appointed, but only one of the other members was re-appointed and seven new members were appointed by the Governor of the Colony.

p. 162
l. 20.
p. 163, l. 5.

p. 163,
Exhibit G.1.
paragraph 8.

p. 161,
Exhibit K.

9. At a meeting of the new Board of the Appellants on 27th October 1960 at which all members were present after the withdrawal of the Respondent, the Chairman read the said letter dated 3rd October 1960 and also a letter to him dated 18th October 1960 from the Financial Secretary of the Colony. The last mentioned letter stated that the question of filling the vacant position of General Manager of the Appellants had been considered by the Governor in Council and asked the members of the Appellants to re-examine the recommendation made (though in fact it is submitted an appointment and not a recommendation had been made) for filling the post of General Manager of the Appellants, as the Government was anxious that the best person available be obtained for the post. The letter suggested that if the members were not satisfied that any of the persons who had so far applied were suitable, the vacancy should be advertised in a wider field. It was decided by the Board of the Appellants that the matter raised by this letter should be considered at a special meeting.

p. 27,
ll. 16-30.
p. 165,
Exhibit G.2,
paragraphs 9
and 10.

10. The said vacancy was never re-advertised and on 11th November 1960 at a meeting of the Board of the Appellants consisting of the Chairman and the seven new members (the Respondent having withdrawn from the meeting) it was unanimously agreed that the said Mr. G. E. Luck was suitable for the post of General Manager and that he should be appointed. It was decided by the Board of the Appellants, however, not to offer the said Mr. G. E. Luck the appointment until the Governor in Council had been informed of the decision and approved the selection. The said G. E. Luck was the Acting Permanent Secretary of the Ministry of Trade and Industry of the Colony, of which the Minister was one Dr. Jagan.

p. 39,
ll. 20-25.

p. 39,
ll. 1-8.
pp. 164, 165,
Exhibit G.2.

p. 52,
ll. 40-47.

p. 171,
ll. 15-28.

11. By virtue of being a member of the Board of the Appellants the Respondent was sent by the Appellants and received in November 1960 a copy of the Minutes of the said meeting held on 11th November 1960 and became aware for the first time of the decision of the Board of the Appellants reached at this meeting. As a result of receiving this information the Respondent consulted solicitors and by a letter to the Appellants dated 7th December 1960 the Respondent's solicitors stated that it was

the Respondent's claim that he was the duly appointed General Manager of the Appellants and that he was ready and willing to take over the responsibilities of this position within a reasonably short time. The letter stated that if any attempt was made to revoke or cancel the said appointment the Respondent would have no alternative but to issue a writ, but in spite of this statement no reply to this letter was ever received. At a meeting on 9th December 1960 of the Board of the Appellants from which the Respondent was absent the Chairman informed the members that he had received from the Acting Permanent Secretary of the Ministry of Trade and Industry a copy of a statement regarding the appointment of Mr. G. E. Luck as General Manager of the Appellants, which would be released to the Press by Dr. Jagan, the Minister of Trade and Industry on 10th December 1960. On 11th December 1960 a photograph appeared in a newspaper of Dr. Jagan shaking hands with Mr. G. E. Luck with comments indicating that he was congratulating Mr. G. E. Luck on his appointment. On 13th December 1960 a writ was issued by the Respondent against the Appellants commencing this suit.

12. On 15th December 1960 the said Mr. G. E. Luck presented himself at the General Manager's office of the Appellants and there told the said Kranenburg that he had come to assume duty as General Manager and had already reported in writing to the Chairman that he had assumed duty. The said Kranenburg thereupon reported this matter to the Chairman. On 16th December 1960 a meeting of the Board of the Appellants was held at which the members refused to hear legal advice about the Respondent's claims. They then invited the said Mr. G. E. Luck into the meeting and at the request of the Board of the Appellants he prepared a letter appointing him General Manager. The said Kranenburg was then authorised by the Board of the Appellants to sign the letter, which he did under protest on the grounds that he had previously signed a letter appointing the Respondent to this office.

13. The said suit brought by the Respondent against the Appellants was heard by the Honourable Mr. Justice Fraser in the Supreme Court of British Guiana. The Appellants by their Defence had pleaded that the said Kranenburg was not legally entitled to write the letter dated 26th September 1960 and the learned Judge in his judgment construed this to mean that he had no authority to sign it, or alternatively that the purported offer of the Appellants by the said letter was not in accordance with Ordinance Number 13 of 1954 of the said Colony as amended by Section 2 of Ordinance Number 13 of 1955. Although this point was not taken in the course of the trial on behalf of the Appellants and although Counsel of the Respondent was given no opportunity of being heard on the point, the learned Judge by his judgment held that the said Kranenburg had not been authorised to sign the said letter in accordance with the

p. 173,
Exhibit G.4.

p. 121,
ll. 16-20.
p. 39,
ll. 15-20.

p. 123.

p. 63,
ll. 10-22.

p. 63,
l. 27.
p. 64, l. 27.

p. 13,
l. 43.
p. 14, l. 2.
p. 82, l. 45.
p. 83, l. 15.

p. 115,
ll. 17-24.

p. 82,
l. 45.
p. 87, l. 20.

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— requirements of Section 13 of Ordinance Number 13 of 1954 as amended as aforesaid because he had not been authorised to sign this letter either specially or generally by a Resolution of the Appellants. As the letter was also not under seal, the learned Judge held that it was not binding upon the Appellants. It was submitted further on behalf of the Appellants that neither the Repellant nor the Respondent had any intention to create a Contract by the correspondence herebefore mentioned but this submission was rejected by the learned Judge. He also held that if the letter dated 26th September 1960 contained an offer binding on the Appellants, the letter dated 3rd October 1960 was an acceptance of the offer and not a rejection and counter-offer. He further found that the approval of the Governor in Council to the assignment of a salary of \$11,280 per annum to the post of General Manager of the Appellants had not been obtained before the Appellants purported to contract to employ the Repellant as aforesaid. As this was a salary in excess of \$4,800 per annum he held that the Appellants had acted *ultra vires* in purporting to make this Contract in that they had not complied with the requirements of Section 6 (1) of Ordinance Number 13 of 1954. It was objected on behalf of the Respondent that the Appellants were not entitled to contend that the prior approval of the Governor in Council as aforesaid had not been obtained, as this allegation had not been pleaded in the Defence and by virtue of Rule 14 of Order 17 of the Rules of the Supreme Court the allegation that this condition precedent had been satisfied must be implied in the Statement of Claim, but this objection was overruled by the learned Judge. The learned Judge, consequent upon his findings, gave judgment for the Appellants. He further held that as a member of the Appellants the Respondent was in part responsible for their said defaults, and accordingly he ordered the Respondent to pay half the Appellants' costs of the suit, although he said that apart from this circumstance he would have made no order for costs in favour of the Appellants because of their behaviour.

14. The Respondent appealed to the then Federal Supreme Court. The relevant grounds of appeal were as follows :—

(A) That the learned Judge erred in finding that there was a lack of mutuality between the parties on the ground that no enforceable offer or acceptance was made by the Appellants because the letter dated 26th September 1960 was not executed by them in the manner required by Section 7 or Section 13 of Ordinance Number 13 of 1954 as amended;

(B) That the learned Judge erred in finding that the said appointment of the Respondent was *ultra vires* the Appellants on the ground that the Governor in Council had never approved the salary of

\$11,280 per annum which the Appellants assigned to the post of General Manager in their advertisement :

(c) That on the admissions on the pleadings and on the evidence the learned Judge was bound in law to find that there was an enforceable contract between the Appellants and the Respondent and that the Appellants were in breach thereof.

- 15.** The Respondent's appeal was heard by the British Caribbean Court of Appeal. It was submitted on behalf of the Respondent that upon a true construction of Sections 14 and 15 of Ordinance Number 13 of 1954 the Appellants were a corporation incorporated for trading purposes and that therefore the Appellants were empowered to enter into a contract to employ a General Manager which was not under seal and accordingly that the said letter dated 26th September 1960 was an enforceable offer or acceptance, but the Court declined to rule upon this submission. The Court held, however, that the Honourable Mr. Justice Fraser misdirected himself in holding that the letter dated 26th September 1960 was not binding on the Appellants because it was not executed in accordance with the requirements of Section 7 or Section 13 of Ordinance Number 13 of 1954 as amended. The Court said : " It is my opinion that the Corporation resolutely determined that appellant had been selected for the appointment, and that it was with the unanimous approval of the members of the Corporation at that meeting that the Secretary was charged with the duty of conveying the news to the appellant ; this he did. This is in compliance with the statute. I have dealt with this on the assumption that the letter had to be signed in accordance with the terms of section 13 to be effective. On the other hand I am not convinced that the statute could be interpreted to mean that a letter by the Secretary under prior direction at a meeting of the Corporation conveying information of a result of a ballot or intimation that someone was selected for appointment or any other such information, should be under seal or would require a resolution strictly formal. Such a letter would not in my view fall within the ambit of section 7 or 13. If it did, then as stated above the requirements of the statute have been satisfied." The Court also held that the said letter dated 3rd October 1960 was an unqualified acceptance of an offer contained in the said letter dated 26th September 1960 and was not a counter-offer, and that oral evidence was admissible on this issue. It further held that the learned Judge misdirected himself in holding that the approval of the Governor in Council to the assignment of a salary in excess of \$4,800 per annum to the post of General Manager of the Appellants had not been given before the post was advertised and found as a fact that such approval of a salary of \$11,280 per annum had been given before the post was advertised. The Court held, therefore, that the contract to employ the Respondent as General Manager was not *ultra vires* the
- p. 106, l. 29.
p. 107.
- p. 107, l. 2.
p. 109, l. 48.
- p. 109,
ll. 28-48.
- p. 110.
- p. 115, l. 10.
p. 115,
ll. 2-5.
- p. 112,
ll. 16-22.
- p. 115, l. 11.
p. 128, l. 17.
- p. 128,
ll. 14-17.

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p. 122, l. 37.
p. 123, l. 42.p. 127,
ll. 37-47.
p. 115,
ll. 17-21.p. 123, l. 18.
p. 131, l. 37.p. 130,
ll. 25-34.p. 130,
ll. 17-24.p. 131,
ll. 21-31.p. 131,
ll. 21-20.

Appellants. It held that an allegation that such prior approval had been obtained was not of the essence of the Respondent's cause of action and that accordingly such an allegation was to be implied in the Statement of Claim by virtue of Order 17 Rule 14 of the Rules of the Supreme Court. It ruled that although the Defence contained no allegation that such prior approval had not been given and the point was not raised by the Appellants' Counsel at the trial until his final address it was right for the Appellants to have leave to contend that no such approval as aforesaid had been given. On the issue of damage the Court rejected the submissions of the Appellants that :—

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(A) The Respondent should have mitigated his damage by withdrawing his request to be released from his service as Deputy Financial Secretary ;

(B) The Respondent would not have been able to undertake his duties as General Manager ;

(C) The sum received by the Respondent by way of pay during his accumulated leave should be deducted from any damages which would otherwise have been awarded.

The Court held that damages should be assessed by reference to the value of the salary and partly furnished quarters which the Respondent would have received over a period of two years together with the value of the leave passages he had lost and assessed damages at \$30,460. It calculated the damages as follows :

(A) Salary at \$11,280 per annum— \$22,560.

(B) In lieu of partly furnished quarters at \$2,700 per annum— \$5,400.

(C) The equivalent of leave passages— \$2,500.
Total— \$30,460.

Accordingly the Court reversed the judgment of the Honourable Mr. Justice Fraser and ordered that judgment be entered for the Respondent in the sum of \$30,460 with costs in the said Court and in the Court below.

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16. The Respondent submits that the said letter dated 24th August 1960 was an offer by him to accept the post of General Manager of the Appellants on the terms and conditions contained in the Particulars supplied to him and that this offer was accepted by the Appellants by a letter dated 26th September 1960 so as to create a contract. If this

submission is not correct, the Respondent submits that, as held by the British Caribbean Court of Appeal, the said letter dated 26th September 1960 contained an offer by the Appellants, which was accepted so as to create a contract by the said letter dated 3rd October 1960. Upon these submissions the following issues arise :—

(A) Was the said letter dated 26th September 1960 signed in such manner and circumstances that apart from any question of its execution being *ultra vires* the Appellants it was binding on them?

10 (B) Was the said letter dated 26th September 1960 *ultra vires* the Appellants ?

(C) Was the said letter dated 26th September 1960 either an offer or an acceptance of an offer contained in the said letter dated 24th August 1960 ?

(D) If the said letter dated 26th September 1960 was an offer, was the said letter dated 3rd October 1960 an acceptance of it or was it a rejection of it and a counter-offer ?

17. The Sections of Ordinance Number 13 of 1954 relevant to issue (A) mentioned in paragraph 16 hereof and evidence relating to this issue are set out below :—

20 The relevant Sections of the said Ordinance are Section 7, Section 13 as amended by Section 2 of Ordinance No. 13 of 1955, Sections 14, 15 and 47, which are as follows :

“ 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.

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

(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.”

“ 13. Any transport, mortgage, lease, assignment, transfer, agreement, or other document required 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.”

“ 14. (1) It shall be the duty of the Corporation to promote the economic development of the Colony and with that object to provide financial credits where necessary and desirable 10 and to stimulate and facilitate private investment in the Colony by local and external capital.

(2) The Corporation shall in pursuance of the discharge of its duties provide credits for agriculture, industry, rural and urban housing, and utilities both of a public and private nature and other undertakings of a like nature.

(3) Without prejudice to the generality of the provisions of subsection (2) of this section, the functions of the Corporation in the discharge of its duties shall be to—

(A) take over from time to time any credit activities of 20 the Government including outstanding loans to private enterprises but excluding advances of salaries to public officers and advances to local authorities constituted under the provisions of the Local Government Ordinance, 1945 ;

(B) provide agricultural and industrial credits to Co-operative Societies registered under the Co-operative Societies Ordinance, 1948 ;

(C) provide credits for land settlement schemes ;

(D) provide such credits as are necessary for agricultural and industrial undertakings other than those engaged in the 30 manufacture of sugar ;

(E) make loans to individuals, and make loans to, and purchase shares or debentures of, companies engaged in new or existing industries ;

(F) promote the introduction of private external capital for investment in agriculture, industry and mining ;

(G) promote useful innovations in agriculture and industry ;

(H) provide credits for private or mixed private and public investment in rural and urban housing.

(4) The Corporation shall have power for the purpose of the discharge of its duties—

10 (A) to carry on all activities the carrying on whereof appears to the Corporation to be requisite, advantageous or convenient for or in connection with the discharge of its said duties, including the processing and marketing of products and research activities ;

20 (B) to promote the carrying on of any such activities by other bodies or persons, and for that purpose to establish or expand, or promote the establishment or expansion of, other bodies to carry on any such activities either under the control or partial control of the Corporation or independently, and to give assistance to such bodies or to other bodies or persons appearing to the Corporation to have facilities for the carrying on of any such activities including financial assistance by the taking up of share or loan capital, or by loan or otherwise”

30 “ 15. The Corporation shall have power to do any thing and to enter into any transaction (whether or not involving expenditure, borrowing, granting of loans or investment of money in accordance with the provisions of this Ordinance in that behalf, the requisition of any property or rights, or, subject to the provisions of section 19 of this Ordinance, the disposal of any property or rights) which in its opinion is calculated to facilitate the proper discharge of its functions or is incidental or conducive thereto.”

“ 47. No act done or proceeding taken under this Ordinance shall be questioned on the ground—

(A) of the existence of any vacancy in the membership of, or any defect in the constitution of, the Corporation ; or

(B) of the contravention by a member of the Corporation of the provisions of section 10 of this Ordinance ; or

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(c) of any omission, defect or irregularity not affecting the merits of the case.”

Evidence of the said Kranenburg (verbatim) :

Examination in Chief :

pp. 62,
ll. 4-20.

“ On 22.9.60, a meeting was held in connection with the appointment. The minutes Exhibit “ D ” are correct. When I returned to the meeting the Chairman informed me that Mr. Da Silva had been selected for the appointment. This was done in the presence of the whole Board. In the presence of the whole Board I was instructed to inform 10 Mr. Da Silva accordingly and all applicants that the appointment had been filled. No member of the Board objected to these instructions. I carried out these instructions. I see Exhibit “ E ” dated 26.9.60. I signed this letter. I wrote it. I showed it to the Chairman before I despatched it. I carried the letter and I handed it to Mr. Da Silva on 26.9.60.”

Extract from Minutes duly confirmed of the said meeting held on 22nd September 1960 :

pp. 56,
ll. 13-29.

“ 3. (iii) *Appointment of a General Manager vice* 20
Mr. W. G. Carmichael : As the Secretary was one of the applicants for the position, he withdrew from the meeting while this item was being considered.

All applications which had been received as a result of the advertisement published locally and in the West Indies were then carefully considered, and Mr. Clement H. Da Silva, now Deputy Financial Secretary and Official Member of the Board, was chosen for the appointment. It was decided that Mr. Da Silva be notified and Government be advised of the appointment ; all the unsuccessful applicants to be 30 notified that the position has been filled.”

18. It is submitted by the Respondent upon the issue mentioned in paragraph 16 (A) hereof :—

(A) That the Appellants are a trading corporation, that the appointment of a General Manager was necessary for its trading activities and that accordingly the said letter dated 26th September 1960 having been signed by the said Kranenburg with the authority of the Board was binding on the Appellants ;

(B) That the said Kranenburg was specially authorised to sign the said letter dated 26th September 1960 by Resolution of the Appellants within the meaning of section 13 of the said Ordinance or alternatively if, in the events that have happened the said Kranenburg was not so authorised, the failure to pass a Resolution was an omission, irregularity or defect within the meaning of Section 47 (3) of the said Ordinance and accordingly did not invalidate the authority of the said Kranenburg to sign the said letter ;

10 (c) That the Appellants should not have been permitted to contend that the said letter dated 26th September 1960 was not signed by the said Kranenburg with the authority of the Appellants or that the purported offer thereon was not made in accordance with the said Ordinance because such matters were not pleaded in their Defence or raised at the trial and were matters adverted to for the first time in the judgment of the Honourable Mr. Justice Fraser and if these matters had been raised at the proper time the Respondent might have been able to adduce further relevant evidence thereon ;

20 (d) That the said letter dated 26th September 1960 signified a decision of the Appellants and by virtue of Section 7 (3) of the said Ordinance the said letter could have been signed so as to bind the Appellants by the Chairman and the said Kranenburg as Secretary, and as the Chairman approved the said letter the omission of the signature of the Chairman was an omission within the meaning of Section 47 (3) of the said Ordinance and accordingly the said letter took effect as if validly executed ;

(E) That the said letter dated 26th September 1960 was binding upon the Appellants and the decision to this effect of the British Caribbean Court of Appeal should be upheld.

30 **19.** The provisions of Ordinance Number 13 of 1954 and the facts and evidence relative to the issue mentioned in paragraph 16 (B) hereof are set out below :—

The relevant Section of the said Ordinance is Section 6, which is as follows :

“ 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 deem necessary for the proper carrying out of the provisions of this Ordinance :

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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.

(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 . . .”

Facts accepted by the British Caribbean Court of Appeal : 10

p. 116,
ll. 32-40.

That both the Financial Secretary and the Chief Secretary were members of the Governor in Council.

Evidence of the Respondent (verbatim) :

p. 39,
ll. 35-37.

“ I knew as a member of the Board that the salary of the post of General Manager of the Appellants was \$11,280 per annum fixed.”

p. 45,
ll. 8-12.

“ From 22.5.57 to the 6.8.60 I know that the Governor in Council did not reconsider the salary of the post of General Manager. So far as I know there was no reconsideration up to the date of the writ on 13.12.1960.” 20

p. 58,
ll. 3-6.

“ I was aware that the sum of \$11,280 was arrived at by adding \$10,560 Carmichael’s salary or the salary of the post plus \$720, the gratuity of the post.”

p. 58,
ll. 35-40.

The salary \$11,280 was approved by the Governor in Council in two parts. The first part \$10,560 by letter Exhibit “ O ” dated 22.5.57 and \$720 approved by the Governor in Council originally in 1954 as gratuity. It was the gratuity and salary which were combined.”

p. 60,
ll. 37-41.

“ I do not know whether approval had ever been given for the amalgamation of the salary of \$10,560—£2,200 per annum— 30 with the gratuity of £37.10s. per quarter by the Governor in Council.

p. 60,
ll. 44-47.

“ I now say that it was discussed by the Board and it understood that the sum of \$11,280 represented an amalgamation of a salary of \$10,560 per annum and a gratuity of £37 10s. per quarter.”

“ I would say that suggestions in draft were made by the Financial Secretary. I saw a draft submitted to the Corporation. I saw the draft before it was submitted to the Corporation. I am referring to Exhibit ‘ B ’.”

p. 45,
ll. 30-35.

“ The draft of the Particulars which I saw as sent by the Financial Secretary is identical with Exhibit ‘ B ’.”

p. 45,
ll. 36-38.

10 “ I remember on 4.8.60 I wrote a letter to the Chief Secretary enclosing copies of full particulars of the vacancy requesting that the advertisement be published in the newspapers in Jamaica, Trinidad and Barbados. The letter had as enclosure a copy of Exhibit ‘ B ’.”

p. 45,
l. 45.
p. 46, l. 4.

“ The vacancy notice was drafted by W. D’Andrade who was the Financial Secretary. He used files to draft the notice. On 27.7.60. I handed a copy of the draft notice to Mr. Muir on the request of the Financial Secretary.”

p. 59,
ll. 38-43.

20 “ I remember on 4.8.61 I wrote a letter to the Chief Secretary enclosing copies of full particulars of the vacancy requesting five advertisements be published in the newspapers for Jamaica, Trinidad and Barbados. The letter had as enclosure a copy of Exhibit ‘ B ’ being the full particulars and also a copy of the advertisement.”

p. 45, l. 45.
p. 46, l. 6.

Evidence of the said Kranenburg (verbatim) :

“ I presume that the sum of \$11,280 was made up of the salary of £2,200 per annum and the gratuity of £37 10s. per quarter . . . I do not know if the Board asked for the approval of the sum of \$11,280.”

p. 66, l. 39.
p. 67, l. 2.

Evidence of Jaisar Girdhar (verbatim) :

“ I am Acting Chief Accountant of the B.G. Credit Corporation.”

p. 67,
ll. 24-25.

30 “ There was no communication from the Government on the question of salary after Exhibit ‘ O ’ i.e. in May 1957.”

p. 68,
ll. 6-8.

“ In June and July 1960 I was a Grade A clerk. In 1960 the Accountant was R. Yerrakadoo. In 1960 Mr. Yansen was Chief Accountant. They would be better acquainted with what happened in 1960 than I would.”

p. 68,
ll. 11-17.

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Further facts relevant to the issue:

p. 24,
ll. 37-41.

On 22nd September 1960 the Chairman of the Board of the Appellants informed the Financial Secretary of the selection of the Respondent as General Manager.

p. 163, l. 40.
p. 164, l. 4.

On 27th October 1960 the members of the new Board of the Appellants asked to be furnished with particulars of the staff including pay and conditions of service. At a meeting of the said Board on 25th November 1960 a document showing particulars of staff and conditions of service was distributed to members present. It stated (*inter alia*) that the salary scale 10 of the General Manager was \$11,280 per annum fixed.

p. 168,
ll. 10-20.

The Appellants did not allege in their Defence or at all until the final address by their Counsel at the trial that the Governor in Council had not approved a salary of \$11,280 per annum for the post of General Manager of the Appellants and did not call the Financial Secretary or the Chairman of the Appellants or its Chief Accountant to give evidence to this effect.

pp. 10-14.

p. 115,
ll. 17-20.

20. It is submitted by the Respondent upon the issue mentioned in paragraph 16 (B) hereof :—

(A) That the finding of the British Caribbean Court of Appeal 20 that the Governor in Council had approved a salary of \$11,280 per annum for the post of General Manager of the Appellants before the post was advertised was right having regard to the conduct of the Financial Secretary and the other evidence in the case and should be upheld :

(B) That as the Appellants did not allege in their Defence or suggest until their Counsel's final speech that the approval of the Governor in Council of the said salary of \$11,280 per annum was not given before the contract to employ the Respondent was made, the Appellants should not be and should not have been allowed to rely 30 upon any defence based upon this allegation :

(C) That even if the said prior approval had not been given as aforesaid, the appointment of the Respondent as General Manager of the Appellants was not *ultra vires* the Appellants ;

(D) That in any event a salary of \$10,560 had been approved by the Governor in Council as aforesaid and payment thereof was an obligation of the Appellants enforceable by the Respondent :

(E) That the so-called gratuity was in fact part of the salary assigned to the said post and consequently a salary of \$11,280 per annum for the said post had been approved as aforesaid.

21. As regards the issue mentioned in paragraph 16 (c) hereof, the Respondent submits :—

10 (A) That the terms of the said letter dated 26th September 1960 and the circumstances herebefore mentioned in which it was written show that it was an offer to contract or alternatively the acceptance of an offer to contract contained in the said letter dated 24th August 1960 :

(B) That the Appellants, having failed to pursue in the British Caribbean Court of Appeal their submission before the Honourable Mr. Justice Fraser that the said letter dated 26th September 1960 was not written with any intention to create any legal relationship with the Respondent, should not be permitted to renew such submission :

(C) That the Appellants are estopped by their admissions and/or their defence from contending that the said letter was neither an offer nor an acceptance :

20 (D) That if the said letter dated 26th September 1960 was not an acceptance of an offer contained in the said letter dated 24th August 1960 the finding of the British Caribbean Court of Appeal that the said letter dated 26th September 1960 was an offer to enter into a contract should be upheld.

22. The facts and evidence relative to the issue mentioned in paragraph 16 (D) hereof are set out below :—

The Particulars of the terms of employment as General Manager supplied to the Respondent included the following terms :—

30 “ 5. The post carries a salary of B.W.I. \$11,280 (equivalent at the current rate of exchange to £2,350 sterling) per annum, a free partly furnished house and leave facilities in accordance with the Government’s General Orders and Regulations in force at the time (now five days’ leave for each completed month of resident service) accumulative to a maximum of six months with leave passages to a maximum of B.W.I. \$2,500.” p. 138,
ll. 11-33.

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

Order 209 of the Government of the Colonies General Orders and Regulations in force in 1960 provided :

p. 114,
ll. 30-36.

“ A home allowance is an allowance granted to an officer who is entitled by virtue of the appointment he holds to free quarters but for whom quarters are not available.”

The draft agreement which was enclosed with the said letter 10 dated 3rd October 1960 contained a Schedule of Terms in which the following terms were included :

pp. 159-160.

“ 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 12.”

“ 3. A free partly furnished house will be provided or an allowance in lieu.”

“ 5. (1) The Corporation may at any time determine the engagement of the person engaged on giving him twelve months' 20 notice in writing or on paying him six months' salary.”

“ 5. (2) The person engaged may at any time after the expiration of three months after 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 month's salary.”

“ 5. (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' 30 salary.”

Evidence of the Respondent (verbatim) :

p. 37, l. 39,
p. 38, l. 7.

“ . . . I told the Secretary that I was waiting on the Financial Secretary and suggested to him that in the meanwhile he should prepare the usual agreement of service. The Secretary informed me that he did not have the agreement of service of the

previous General Manager and asked me to get out one of the Standard Crown Agents and Colonial Office forms of agreement for his use as a draft . . . I got one of the Crown Agents and Colonial Office forms and I attempted to modify it and sent it across to the Secretary for his use. Exhibit 'F' is dated 3.10.60. I was at that time treating myself as being appointed from the time I received the Corporation's letter."

"When in my letter I stated I was enclosing a draft agreement I was not laying down any condition of my employment." p. 42, ll. 24-27.

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"The draft agreement was a formality. In my draft agreement I made certain additions which were clauses in the Standard Crown Agents agreement of service which I had used as a draft at the invitation of the Secretary to help him. I have a copy of the Crown Agents form. I was satisfied with the terms and conditions advertised . . . I put two terms of three years. I interpreted the wording of the conditions to mean that I could ask questions or make suggestions as to my terms of service. My suggestion of six years divided into two tours of three years each seemed to me to fit in with this minimum three years and still allow at the end of that period for a further three years if the Corporation wanted me and I wanted them. My insertion of two tours was merely a suggestion. I was satisfied to accept three years . . . I would have taken up my duties as General Manager without signing any agreement. The formality of signing the agreement sometimes took place months after the officer assumed duty." p. 42, l. 34, p. 43, l. 18.

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"When I sent the letter of 3.10.60 I applied to Government to be seconded or to be permitted to retire at fifty." p. 47, ll. 33-36.

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"When I said that I would enter into agreement with the Corporation on the draft I meant that I would have entered into the terms of my draft or alternatively if the Corporation had amended the draft to comply with the terms of the advertisement I would have entered into such agreement as modified by the Corporation." p. 52, ll. 9-16.

"It is correct to say the Corporation's house was rented for one year to Captain Hayes expiring in August 1961 . . ." p. 56, ll. 25-27.

"In my draft agreement I mentioned that an allowance in lieu should be paid because I interpreted the vacancy notice which reads 'A free partly furnished house, and leave facilities p. 57, ll. 14-26.

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in accordance with the Government's General Orders and Regulations' to mean that the house would be available to the General Manager in accordance with the Government's General Orders, No. 209 of which provides the alternative either the house or an allowance in lieu. I thought that wording suggested that if the Corporation wanted to keep Captain Hayes in the house to give me an allowance instead."

Evidence of the said Kranenburg (verbatim) :

p. 62, l. 24.
p. 63, l. 6.

" When I gave Da Silva the letter Exhibit ' E ' I asked him how soon he thought he could assume duty. Da Silva said 10 around the middle of December when he was finished with the Budget . . . I think I said that would be all right. About one week later Da Silva telephoned me. In the course of the conversation he said that he hoped I would prepare the service agreement for his appointment early. My recollection is that I told him that I did not have a copy of the agreement signed by Carmichael but that I knew it was in the form used by the Crown Agents. I told him that he could get a copy of the form from the Colonial Secretariat. I asked him to get a copy and put up a rough draft of the terms of his appointment for 20 my consideration . . . I never considered the draft which Da Silva sent. The Board never considered the draft. As Secretary of the Corporation I considered the Plaintiff definitely appointed . . . The draft was never considered as a counter-offer. I was appointed Secretary on 11.12.56. In July 1959 I signed a service agreement. It was a considerable time after the appointment. It had retrospective effect."

p. 66,
ll. 31-35.

Agreed statement of facts and documents :

pp. 34-35.
p. 6,
ll. 29-39.
p. 5,
ll. 25-30.

The Appellants admitted that there was no reply to the said letter dated 7th December 1960 written by the Respondent's 30 solicitors, that the Respondent was selected for the said post of General Manager and that they decided that he should be notified of his said appointment and all the unsuccessful applicants should be notified that the vacancy had been filled.

23. It is submitted by the Respondent upon the issue mentioned in paragraph 16 (D) hereof :—

p. 112,
ll. 16-22.

(A) That the oral evidence herebefore mentioned is admissible on this issue as held by the British Caribbean Court of Appeal ;

(B) That the correct inferences to be drawn from the matters aforesaid are :

(i) that the finding of the Honourable Mr. Justice Fraser that the account given by the Respondent of the intention with which and the circumstances in which he wrote and dispatched the letter dated 3rd October 1960 was right and should be upheld, p. 79,
ll. 14-16,
pp. 82,
ll. 16-22.

10 (ii) that the provisions of paragraph 1 of the Schedule to the draft service agreement were merely a proposal made in the light of the statement in the Particulars that the duration of the initial contract was subject to variation,

(iii) that the provisions of paragraph 2 of the Schedule were merely the incorporation of a provision contained in General Order 209 of the Government's General Orders and Regulations which would have in all probability been applicable as the house in question had already been let by the Appellants,

20 (iv) that the provisions of paragraph 5 of the Schedule relating to the termination of the employment were normal in a Crown Agents and Colonial Office form of agreement and were merely advanced by way of suggestion and not by way of counter-offer,

(v) that the proposed draft agreement was put forward by the Respondent as and was understood by the Appellants to be a suggestion as to the form of the service agreement and not a counter-offer.

30 (vi) that if the said letter dated 26th September 1960 was not an acceptance of an offer contained in the said letter dated 24th August 1960, the decision of the British Caribbean Court of Appeal and the Honourable Mr. Justice Fraser that the said letter dated 3rd October 1960 was an unqualified acceptance of an offer contained in the said letter dated 26th September 1960 was right and should be upheld. p. 115,
ll. 2-5.
p. 82,
ll. 16-19.

24. Evidence on the issue of the measure of damage recoverable by the Respondent was as follows :—

Evidence of the Respondent (verbatim) :

“ On 16.10.60 I addressed a Minute to the Financial Secretary enclosing the Board's letter of appointment and asking p. 40,
ll. 22-26.

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either for a seconding under the law or asking that I be allowed to retire.”

p. 43,
ll. 27-29.

“ Since I retired in January 1961 I have not been employed anywhere. My vacation leave expired on 22nd January 1962.”

p. 44,
ll. 1-5.

“ I have lost salary of \$11,280 for three years—\$33,840. There is also loss of free house for the said period—\$8,100. I have lost my leave passages—\$2,500.”

p. 47,
ll. 33-42.

“ When I received (*sic.*) the letter of 3.10.60 I applied to Government to be seconded or to be permitted to retire at fifty . . . I knew that the Government would allow me to retire at fifty. I say I knew this because of the assurance given by the Government to the staff associations that voluntary retirement at fifty is a formality.” 10

p. 59,
ll. 4-8.
Exhibit T,
p. 136.

“ I have known of no case where an officer aged fifty had sought leave to retire and Government refused the request. Memorandum dated 7.11.45. tendered, admitted and marked ‘ T ’.”

p. 49,
ll. 21-23.

“ I knew all along that my birth date was 1911 . . . I was aware that the real date was 10th March 1911.”

25. The Respondent submits on the issue as to the measure of 20 damage recoverable :—

p. 130,
ll. 25-34.

(A) That the finding of the British Caribbean Court of Appeal that the Respondent was under no duty to mitigate his damage by withdrawing his application for permission to retire was right and should be upheld ;

(B) That the inference which should be drawn upon the evidence is that the Respondent would have been able to start work as General Manager of the Appellants about the middle of December 1960 or within a reasonable time from the date of his appointment but for the Appellants’ repudiation of his appointment ; 30

p. 130,
ll. 7-24.

(c) That the finding of the said Court that the Appellants having repudiated the said appointment were not entitled to contend that the Respondent would not have been able to discharge his duties as General Manager was right and should be upheld.

(D) That the finding of the said Court that the assessment of damages should be on the basis that the Respondent had lost the benefit of his salary and partly furnished free quarters for a period of two years and the benefit of his leave passages was right and should be upheld ;

p. 131,
ll. 12-20.

(E) That the finding of the said Court that no deduction should be made in estimating damages for any sum received by the Respondent in respect of his accumulated leave after 16th January 1961 was right and should be upheld ;

p. 131,
ll. 12-31.

10 (F) That the finding of the said Court that the Respondent suffered damage to the extent of \$30,460 was right and should be upheld.

26. The Respondent submits on the issue of costs that the Honourable Mr. Justice Fraser was wrong in holding that the Respondent should be treated as being in any way responsible for the omissions as aforesaid of the Appellants as he was not as aforesaid present on any of the occasions when his appointment was under consideration by the Board of the Appellants and that even if this appeal is allowed by reason of the conduct herebefore mentioned of the Appellants they should not be allowed any costs or alternatively any costs of the case in the Supreme Court of British Guiana.

p. 131,
ll. 21-36.

27. The Respondent respectfully submits that the order of the British Caribbean Court of Appeal dated 19th July 1963 was right and ought to be affirmed and that his appeal ought to be dismissed for the following among other

REASONS

30 (A) That the said letter dated 26th September 1960 contained either a purported acceptance of an offer to serve the Appellants as General Manager contained in the said letter dated 24th August 1960 or was a purported offer to employ the Respondent as General Manager of the Appellants ;

(B) That the said letter dated 26th September 1960 was binding upon the Appellants ;

(C) That the said letter dated 3rd October 1960 was either an acceptance of an offer contained in the said letter dated 26th September 1960 or a confirmation of a contract

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—

created by the said letter and the said letter dated 24th August 1960 ;

- (D) That such a contract was not *ultra vires* the Appellants ;
- (E) That as a result of the Appellants' repudiation of a contract to employ the Respondent as their General Manager the Respondent suffered damage to the extent of the amount of the judgment herein.

LEONARD LEWIS.

22.9.64

In the Privy Council

On Appeal from
The British Caribbean Court of Appeal

BETWEEN :

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 (Defend-
ants) *Appellants*

AND

CLEMENT HUGH DA SILVA (Plaintiff)
Respondent.

Case for the Respondent

GOODMAN, DERRICK & CO.,
30, Bouverie Street,
London, E.C.4.