*Privy Council Appeal No.* 43 *of* 1963

**British Guiana Credit Corporation** – – – – – *Appellant*

*v.*

**Clement Hugh Da Silva** – – – – – – – *Respondent*

FROM

## THE BRITISH CARIBBEAN COURT OF APPEAL

## JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 16TH DECEMBER 1964

*Present at the Hearing:*
LORD HODSON.
LORD GUEST.
LORD DONOVAN.
[*Delivered by* LORD DONOVAN]

Their Lordships will refer to the appellant as the defendant Corporation and to the respondent as the plaintiff, these being their respective capacities in the Court of first instance.

In 1960 the plaintiff was a Deputy Financial Secretary of the Colony of British Guiana. The defendant Corporation was incorporated by The British Guiana Credit Corporation Ordinance 1954 (hereinafter called "the ordinance") to promote the economic development of the Colony. In 1960 a vacancy occurred in the post of General Manager of the defendant Corporation and applications to fill the vacancy were invited by advertisement. In accordance with the terms of the advertisement the plaintiff applied for the terms and conditions of the post and these were sent to him. He sent in his application, and was later informed by letter that he had been selected for the appointment and was asked how soon he could take it up. Before he could do so the Corporation changed its mind and, without any formal notification to the plaintiff, appointed someone else. The present litigation ensued, the plaintiff claiming damages for breach of contract. In the Supreme Court of British Guiana he failed. In the British Caribbean Court of Appeal he succeeded and was awarded damages to the extent of $30,460. The defendant Corporation now appeals to the Board.

The following questions arise:

1. Was a contract of service concluded between the parties?
2. If so, is it unenforceable through lack of proper form?
3. Is any such contract, if not unenforceable through lack of proper form, nevertheless *ultra vires* the Corporation?
4. Have the damages been assessed on the proper principles?

In the Supreme Court of British Guiana Fraser J. held that a contract of service had been concluded but that it was unenforceable both for lack of proper form and because it was in any event *ultra vires* the defendant Corporation. In the Caribbean Court of Appeal it was held unanimously by the President, Sir Donald Jackson, Luckhoo and Date JJ. that a contract of service had been concluded; and that the defendant Corporation's contentions that such contract was unenforceable for lack of proper form, and that it was in any event *ultra vires* both failed.

The facts leading up to the present controversy are these. In August 1960 the defendant Corporation by advertisement invited applications for the post of its General Manager; and pursuant to the terms of that advertisement

supplied the plaintiff, at his request, with a circular (Exhibit B) setting out the terms and conditions attached to the post. The following are relevant extracts from that circular.

> "The Corporation wishes to consider applications by suitably qualified persons for appointment as General Manager."
>
> . . .
>
> 4. The General Manager is the chief executive officer of the Corporation appointed under section 6 of the Ordinance. He is responsible to the Corporation for the day-to-day management of its business in accordance with the provisions of the Ordinance and its administrative directions. He has the duty of advising the Corporation in its functions.
>
> 5. The post carries a salary of BWI $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 BWI $2,500). . . .
>
> 6. 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. . . .
>
> . . .
>
> 8. The applicant should give full particulars of his qualifications, training and experience.
>
> 9. Applications should be addressed in plain sealed envelopes marked "Confidential—Application for appointment as General Manager" to the Chairman the British Guiana Credit Corporation . . . to reach him not later than Thursday, 15th September 1960."

Twenty-six applications in all were received by the defendant Corporation, and these were considered at a duly constituted meeting held on the 22nd September 1960. The plaintiff as Deputy Financial Secretary was an official member of the Corporation, but he withdrew from the meeting when the matter of selecting a new General Manager was reached. All the applications were carefully considered and all but three eliminated. The three persons remaining on this "short list" were the plaintiff, a Mr. I. Persaud, and a Mr. G. E. Luck. In the voting upon these three the plaintiff received five votes, Mr. Persaud two, and Mr. Luck none.

The Secretary of the defendant Corporation was then instructed by the Chairman of the meeting to write to the plaintiff informing him that he was selected for the appointment. The Chairman also instructed the Secretary to inform the Financial Secretary of the Colony (the plaintiff's official superior) of the plaintiff's selection. In the afternoon of the same day the Chairman orally informed the plaintiff that his application had been successful.

The following is an extract from the minutes of this meeting of the defendant Corporation:

> "*Appointment of a General Manager vice 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 notified that the position has been filled."

The letter to the plaintiff was dated the 26th September, 1960, and was in these terms:

" Dear Sir,

With reference to your letter of 24th August 1960, applying for the vacant post of General Manager of this Corporation, 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.

Yours faithfully,
L. E. Kranenburg
Secretary "

This letter was handed to the plaintiff personally by Mr. Kranenburg. The plaintiff told Mr. Kranenburg that he could assume his duties as General Manager about the middle of December.

A week later the plaintiff was speaking to Mr. Kranenburg on the telephone, and the latter asked him how soon he could commence his duties as General Manager. The plaintiff replied that he was waiting on the Financial Secretary (meaning for the latter to take a decision on the matter) and that in the meantime Mr. Kranenburg might prepare the usual agreement of service. Mr. Kranenburg replied that he did not have the agreement of service of the previous General Manager, and he asked the plaintiff to get out one of the standard Crown Agents and Colonial Office forms of agreement for Mr. Kranenburg's use as a draft.

The plaintiff then wrote a letter dated the 3rd October 1960, to Mr. Kranenburg in the following terms:

" Dear Sir,

*Appointment as General Manager.*

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.

I am reporting the position to the Government with a view to release as early as possible. Meanwhile I would ask that no official announcement be made by the Corporation.

Yours sincerely,
C. H. Da Silva."

It is necessary to quote certain of the clauses in the draft agreement forwarded with this letter.

" 2. The salary of the office is at the rate of eleven thousand two hundred and eighty dollars ($11,280) a year fixed.

3. This Agreement is subject to the conditions set forth in the Schedule hereto annexed, and the Schedule shall be read and construed as a part of the Agreement.

. . .

*SCHEDULE*

1. The engagement of the person engaged is for a period of six years resident service . . .

. . .

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' 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 to the Corporation three months' notice in writing or on paying to the Corporation one month's salary. . . . ".

The succeeding events were as follows. New members of the defendant Corporation were appointed towards the end of October 1960 replacing almost in their entirety those persons who were members at the time of the plaintiff's selection as aforesaid. The plaintiff, however, remained as the Official Member.

At a meeting of the defendant Corporation thus newly composed held on the 27th October 1960, the Chairman read the plaintiff's letter of the 3rd October 1960, accepting the defendant Corporation's offer to him of the post of General Manager. He also read a letter dated the 18th October 1960, from the Financial Secretary intimating that it was the wish of the Governor-in-Council that the Board (i.e. the defendant Corporation) re-examine the recommendation made for filling the post of General Manager.

The meeting decided to consider this matter at a special meeting to be called for the purpose.

This special meeting was held on the 11th November 1960, and the minutes of the proceedings relating to this matter read as follows:

"9. At this stage of the proceedings Mr. Da Silva was granted permission to leave. The Assistant Secretary also withdrew.

10. *Appointment of a General Manager:* The matter was considered in terms of the Financial Secretary's letter . . .

The qualifications, training and experience of all the candidates were reviewed exhaustively by the Board who unanimously agreed that Mr. G. E. Luck, Permanent Secretary, Ministry of Natural Resources, British Guiana, was suitable for the post and should be appointed.

It was decided, however, not to offer Mr. Luck the appointment until the Governor in Council had been informed of the decision and had approved the selection."

Mr. Luck at this time was the Acting Permanent Secretary of Trade and Industry. The Minister of Trade and Industry was at this time Dr. Jagan. Mr. Luck was the candidate who had received no votes when the Corporation previously considered its "short list". The Corporation never formally withdrew its letter to the plaintiff, dated 26th September 1960, nor did it write to him telling him that another person had been appointed; nor did it explain to him the circumstances in which this had been done.

Mr. Luck was eventually told of his appointment on the 16th December 1960.

The plaintiff's claim for damages for breach of contract was heard by Fraser J. in the Supreme Court of British Guiana in February and March 1962, and judgment was delivered on the 19th March 1962. The learned Judge found that a contract of service between the parties was formed on the 3rd October 1960, when the plaintiff wrote his letter of that date above set out. He rejected the defendant Corporation's contention that that letter, together with its enclosure, constituted a counter offer. On the other hand he accepted the defendant Corporation's argument that the contract was unenforceable for lack of proper form and was in any event *ultra vires* the Corporation. These contentions will be explained presently. In the result the plaintiff's action was dismissed and he was ordered to pay one-half of the defendant Corporation's costs.

The plaintiff's appeal was heard in the Caribbean Court of Appeal in July 1963. The Court upheld the decision of Fraser J. that a contract was concluded on the 3rd October 1960. It rejected, however, the defendant Corporation's contention that the contract was unenforceable for lack of proper form and also its further contention that in any event it was *ultra vires*. The Court accordingly reversed the judgment of Fraser J. and gave judgment for the plaintiff in the sum of $30,460 calculated as will hereafter appear.

Their Lordships agree with both Courts that a contract of service was formed between the plaintiff and the defendant Corporation; but they take the view that it was formed at an earlier date than the 3rd October 1960. Where negotiations are in progress between parties intending to enter into a contract the whole of those negotiations must be looked at to determine when, if at all, the contract comes into being. See *Hussey v. Horne-Payne* 4 A.C. 311. Once the contract comes into being, however, subsequent negotiations by either party seeking, for example, to obtain better terms will not affect the existence of the previously concluded contract. c.f. *Bellamy v. Debenham* 45 Ch.D. 481.

In the present case the Corporation by its advertisement together with the particulars supplied to the plaintiff invited offers for the post of its General Manager on terms and conditions which it specified. By his letter dated the 24th August 1960, the plaintiff made such an offer. At its meeting held on the 22nd September 1960, the defendant Corporation accepted that offer, and instructed its Secretary to notify the plaintiff that he had been chosen for the appointment. The Secretary communicated this acceptance to the plaintiff by the letter of the 26th September 1960. In the view of their Lordships the contract was concluded on this day.

It is objected on behalf of the defendant Corporation that all that the Corporation did at this stage was to " choose " or " select " the plaintiff and that this was the first step only in the conclusion of a formal contract with him which would be the next stage. This argument is too artificial for acceptance. The Corporation clearly had no such situation in mind at the time. As appears above, the Chairman of the Corporation on the same day, namely the 22nd September 1960, told the plaintiff orally that his application (which was an application " for the appointment as General Manager ") was successful. All the unsuccessful applicants were notified " that the position had been filled "; and the plaintiff was asked by the Secretary of the defendant Corporation how soon he could take up " the appointment ".

Next it was suggested that no contract was formed on the 26th September 1960, because essential terms had not been agreed. Thus the date of commencing the duties had not been agreed nor had the period for which the appointment would run. Either of these omissions, it is suggested, would prevent the formation of the contract.

Their Lordships have no hesitation in rejecting the first of these contentions. As regards the date of commencing service, it is commonplace that such a matter is often left to be arranged between the parties to a service contract according to their mutual convenience after they have agreed upon their bargain. This omission does not preclude the formation of the contract, for the law will imply that the duties must be begun within a reasonable time. What is a reasonable time will naturally depend upon the circumstances.

Nor in their Lordships' opinion can it be asserted as a universal proposition that the omission to state when the contract is to come to an end will involve the consequence that there is no contract at all. There must be many contracts of service where no date for determination is expressly agreed but where the law will imply that the contract may be brought to an end by a reasonable period of notice. This would not normally apply, of course, to cases where the contract is for life or for some other period which though specified cannot be precisely determined in advance. It is not, however, necessary to pursue this matter because in the present case the question of duration is dealt with in the contract itself. Thus clause 6 of the defendant Corporation's offer said that the appointment " 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 ". The fair meaning of these words is, in their Lordships' opinion, simply that the first period of service will in the ordinary course be for three years but that the Corporation would be willing to adjust the period if the particular appointee's circumstances called for such an adjustment. It is to be observed that the Corporation itself declared that what would be subject to variation in this way would be " the initial contract "; in other words envisaging adjustment after the

contract had come into being. The alternative reading is that the period of appointment was left so completely uncertain that there could not be any *consensus ad idem*. Their Lordships do not accept this as a true construction of the Corporation's offer.

On the footing that the contract was concluded on the 26th September 1960, it becomes unnecessary to consider the problem which exercised the Courts below as to whether the plaintiff's letter of the 3rd October was a counter offer. The Corporation's letter of the 26th September was itself an acceptance of the plaintiff's offer of the 24th August 1960.

Their Lordships next turn to the defendant Corporation's technical defences.

Section 7 (3) of the Ordinance provides as follows:

> " 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."

Section 13 of the Ordinance as amended in 1955 reads:

> " 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."

It is now said that if the Corporation's letter of the 26th September 1960, were an acceptance of the plaintiff's offer to serve it as General Manager, then that letter was not in the form prescribed by either of the foregoing provisions and is accordingly ineffective to bind the Corporation. This contention was upheld by Fraser J., but rejected by the Caribbean Court of Appeal.

Their Lordships likewise reject it.

In the first place it is to be observed that neither of the enactments is mandatory in form. It is common ground that the letter in question did not need a seal. The effect of section 7(3) of the Ordinance is, therefore, to permit signatures under the hand of the Chairman, Deputy Chairman or General Manager and the Secretary. But the language does not automatically involve the consequence that any letter otherwise signed is a nullity. On this point their Lordships endorse the views of the Caribbean Court of Appeal. It is unnecessary, however, to pursue this topic for on the facts their Lordships like that Court are also of the opinion that there was sufficient compliance with Section 13. This again is permissive in form and is designed not to lay down essential requirements for authenticity but rather to simplifying its proof. The material facts are these.

The meeting of the defendant Corporation held on the 22nd September 1960, was duly convened and properly conducted. The minutes of that meeting show that the plaintiff was chosen for the appointment and that instructions were given that he should be so notified. In his evidence the Secretary of the defendant Corporation Mr. Kranenburg said that in the presence of the whole Board (which means the whole Corporation, there being no separate " Board ") he was instructed to inform the plaintiff that the plaintiff had been selected for the appointment.

In these circumstances their Lordships think that the Secretary was " specially authorised by resolution of the Corporation " within the meaning of Section 13 even though the defendant Corporation's resolve was not reduced to writing. In the circumstances it becomes unnecessary to consider whether even otherwise the letter of the 26th September 1960, would have been effective to bind the Corporation on the ground, for example, that it was a trading Corporation. [It may be useful here to recall that the defendant Corporation itself admitted in argument that ordinary day-to-day letters on trivial matters could properly be signed by the Secretary alone.] It is also unnecessary to consider the effect of section 47 of the Ordinance which

provides that no act done or proceeding taken under the Ordinance shall be questioned on the ground . . .

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

It is next argued that if there were a contract appointing the plaintiff as General Manager it was *ultra vires* the Corporation. The argument was rested on the words of section 6 of the Ordinance, and in particular the proviso thereto. The section is in the following terms:

" 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.

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."

Before the Board, Counsel for the defendant Corporation went the length of contending that even though a salary in excess of $4,800 might be assigned to the post of General Manager yet every subsequent appointment for that post at the same salary would need fresh approval by the Governor-in-Council, and here there was no such approval. The Caribbean Court of Appeal rejected that contention when advanced before them, and their Lordships do the same. The Corporation is under a duty to appoint the various officers under the provisions of section 6(1), and the section requires no approval to such appointment. In terms what is being considered in the proviso is a salary assigned to the post and not to each individual holder of it. This does not mean that if a salary of over $4,800 is once assigned to a post, the Corporation could appoint a further holder of it at a still higher salary without approval. But in their Lordships' view it does mean that the same salary once assigned to a post with a Governor-in-Council's approval can be paid to a subsequent incumbent without further such approval.

It is then argued that even so a higher salary than that approved by the Governor-in-Council was here agreed to be paid to the plaintiff. The Governor-in-Council had approved a salary of £2,200 per annum for the General Manager, i.e. $10,560, but the salary offered to the plaintiff was $11,280, and in doing this the Corporation exceeded its power.

The difference between the two sums is $720. This sum had been paid to the previous General Manager, a Mr. Carmichael, as a gratuity additional to his salary of $10,560 and had been approved as a gratuity by the Governor-in-Council. It differed from the salary in that it was paid by instalments of $180 for each completed three months of service. In the circular supplied to the plaintiff and other applicants setting out the terms and conditions of the post (Exhibit B) the defendant Corporation had combined these two amounts and stated that " the post carries a salary of $11,280 ". The defendant Corporation now argues that there was no proof that the Governor-in-Council had ever approved this merging of the salary and gratuity so that the whole became salary. The answer to the argument is that it was for the Corporation to prove the absence of such approval. The Corporation had raised the matter by way of defence and it was for them to establish it. All it did, however, was to call the Acting Chief Accountant, who in 1960 was a Grade A clerk, whose evidence was inconclusive and who admitted that others would be better acquainted with what happened in 1960 than he was. The matter does not rest there. The terms and conditions of the vacancy for which the plaintiff applied and in which the salary of $11,280 is specified was settled in the office of the Financial Secretary who apparently was a member of the Governor-in-Council. There was, therefore, some impetus towards the view that the Governor-in-Council knew of and sanctioned the salary of $11,280. But however this may be the defendant Corporation failed completely to establish the absence of approval which it alleged, and this is sufficient to dispose of the point.

Their Lordships are in full agreement with the Caribbean Court of Appeal that the Corporation's technical defences fail.

As to damages, the plaintiff in his writ claimed the sum of $100,000 made up by adding to his alleged special damages, namely, the loss of benefits under the contract, a sum by way of general damages totalling $42,010, apparently as compensation for the " humiliation, embarrassment and loss of reputation " of which he complained in his statement of claim. Such general damages find no proper place in this claim. The plaintiff is entitled only to such damages as will compensate him for the loss suffered through the breach to the extent that such loss was reasonably foreseeable as liable to result.

As the Caribbean Court of Appeal held, he is not entitled to punitive damages. That Court awarded damages under three headings only, as follows:

| | |
|---|---|
| (*a*) Loss of salary .. .. .. .. .. | $22,560 |
| (*b*) Loss of the benefit of partly-furnished quarters.. | 5,400 |
| (*c*) Loss of the benefit of leave passages .. .. | 2,500 |
| Total.. .. .. .. .. .. | $30,460 |

There has been no cross-appeal by the plaintiff on the question of damages and their Lordships therefore have to deal with these three items only.

The above figures were computed on the basis that the proper period for which these benefits should be regarded as lost was two years.

Their Lordships are with respect unable to agree that this is the right period to be taken. The plaintiff was from the beginning of the contract always at the risk that the Corporation could have given him reasonable notice to terminate or pay him salary for that period in lieu. Indeed, had they recognised that a binding contract existed, this was the obvious way to terminate it when they decided to appoint Mr. Luck. Had the Corporation taken this course the plaintiff could have recovered no more than the salary plus other benefits under the contract for the period of the notice, or a payment down in lieu. This therefore, represents the measure of his loss (subject as to what is said hereafter as to leave pay). *Prima facie* a reasonable period of notice would have been six months. It is to be noticed that the plaintiff himself suggested in the document he submitted to the Corporation with his letter of the 3rd October 1960, that the Corporation could determine his contract on paying him six months' salary. Their Lordships will, however, leave the determination of the reasonable period for such a notice to the Caribbean Court of Appeal.

The loss of salary, furnished quarters and leave passages should be calculated for whatever period is so determined. From this total there should be deducted the appellant's leave pay for the like period unless the plaintiff satisfies the Caribbean Court of Appeal that he would have been entitled to keep such leave pay for his own benefit had he duly taken up the post as Deputy Manager of the Corporation. He gave certain evidence in the Court of trial suggesting that he would have been so entitled. Their Lordships appreciate the view on this matter expressed by the Caribbean Court of Appeal (that is, that the leave pay should be ignored), but the plaintiff is not entitled to make a profit out of the breach of contract but simply to be compensated for his loss, and his loss is the salary (plus the other two benefits) less what he received as leave pay for the corresponding period, unless he would have been entitled to keep that leave pay for himself in addition to his salary.

Another way of regarding the matter is to recall that it was the plaintiff's duty, as he admits, to take steps to mitigate his loss as from, at the latest, the date on which he issued his writ in the action, namely the 13th December 1960. This involves that he should then have sought leave to withdraw his application to retire from his Government post as Deputy Financial Secretary at the expiration of his leave—an application he had made only a few days before on the 8th December 1960. The emoluments of that post would, if the application had been granted, have reduced his loss. Inasmuch, however, as he received full pay (that is, his leave pay) right up to the 26th January 1962, this alternative way of looking at the case would *prima facie* yield the same

result. But there appears to be no evidence whether any application by the plaintiff to withdraw his application to retire would have succeeded, though presumably the probability is that it would. In the circumstances, however, their Lordships think it would be preferable to assess the damages on the basis first above indicated.

It is agreed that because of recent legislation in the Colony, no deduction for income tax falls to be made from the resulting sum.

For the reasons above stated their Lordships will humbly advise Her Majesty that the case should be sent back to the Caribbean Court of Appeal for the question of damages to be revised as indicated above; and that subject to this revision the appeal should be dismissed. The appellant must pay four-fifths of the respondent's costs before the Board.

(91211) Wt. 8069/11[illegible] 80 [illegible] Hw.

**In the Privy Council**

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BRITISH GUIANA CREDIT CORPORATION

*v.*

CLEMENT HUGH DA SILVA

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DELIVERED BY
LORD DONOVAN

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