

IN THE COURT OF APPEAL OF BELIZE, A D 2023
CIVIL APPEAL No 12 of 2021

YOLANDA GOMEZ

APPELLANT

v

LA INMACULADA CREDIT UNION
REGISTRAR OF CREDIT UNIONS

1ST RESPONDENT
2ND RESPONDENT

Consolidated with

CIVIL APPEAL No 13 of 2021

YOLANDA GOMEZ

APPELLANT

v

LA INMACULADA CREDIT UNION

RESPONDENT

BEFORE

The Hon Madame Justice Woodstock-Riley	-	Justice of Appeal
The Hon Mr. Justice Foster	-	Justice of Appeal
The Hon Mr. Justice Bulkan	-	Justice of Appeal

Mr. Anthony Sylvestre for the appellant.

Mr. Fred Lumor, KC and Ashanti Arthurs-Martin for the 1st respondent.

Mr. Darrell Bradley for the 2nd respondent.

Date of hearing: 15 June 2022

Date of Promulgation: 7 July 2023

JUDGMENT

FOSTER, JA

Introduction

[1] The appellant, Ms. Yolanda Gomez, has appealed the order of Justice Michelle Arana made on 20th May 2021, which arose out of two consolidated matters intitule as claim numbers 538 of 2015 and 723 of 2015. Ms. Gomez contends that the learned judge erred in ordering, that:

- i. She was lawfully placed on administrative leave by the first respondent, La Inmaculada Credit Union (“LICU”).
- ii. The second respondent, the Registrar of Credit Unions did not have any duty to perform under section 36 of the Credit Unions Act, Cap 314 in the circumstances of this case.
- iii. There was no statutory duty imposed upon the Registrar of Credit Unions to intervene on her behalf when she was placed on administrative leave and subsequently terminated from her employment by the LICU.
- iv. She is liable for each and every allegation made by the LICU against her and was therefore lawfully dismissed and not entitled to any damages.
- v. She must pay the sum of \$436,906.34 to the LICU for loss suffered by them.
- vi. She must pay to the LICU and the Registrar of Credit Unions costs to be agreed or assessed.

[2] I propose to address the background in order to provide the requisite context to the appeals.

Background

[3] The relevant background facts can be briefly stated. Ms. Gomez was employed at the LICU for twenty-four (24) years, from 1991 to 2015. At the time of her termination, she was the General Manager.

[4] In or about March 2015, concerns were raised by a member of the LICU’s Credit Committee as to the manner in which loans were being disbursed under Ms. Gomez’s management, particularly to senior staff members and family and friends of Ms. Gomez. Those issues were raised with Ms. Gomez in a Board of Director’s meeting held on 26th March 2015. Although Ms. Gomez did not reply to the concerns raised in the meeting, she provided a written response in a letter addressed to the LICU’s President, Ms. Ena Martinez, on the next day.

[5] Following several joint meetings held between the LICU’s Board of Directors (“Board”) and the Credit Committee in April 2015 to discuss the alleged mismanagement of the LICU under Ms. Gomez’s leadership, a special Board meeting was convened on 15th April

2015 where several issues were again brought to Ms. Gomez's attention. Ms. Gomez failed to provide any specific response to the matters raised.

[6] The Board subsequently met with the LICU's compliance officer, who provided information and documents that revealed many irregularities alleged at the LICU and repeated violations of the LICU's policies by Ms. Gomez through her disbursement of loans to family members and friends. The LICU's Board presented its concerns to the Central Bank which conducted an on-site audit of the credit union. The Central Bank provided a report on the audit to the LICU in November 2015, which highlighted many irregularities in the procedures at the LICU.

[7] On or about 29th April 2015, the Board placed Ms. Gomez on administrative leave pending an investigation into her alleged mismanagement and the irregularities at the LICU.

[8] In or about June 2015, Cedric Flowers, Certified Public Accountant, was retained by the LICU to conduct a special investigation into the credit union. Mr. Flowers spent many weeks at the LICU reviewing files and reports. He then met with the Board to present his preliminary findings, which supported the matters disclosed by the compliance officer. In addition to Ms. Gomez's violation of the LICU's policies by disbursing loans to family and friends, Mr. Flowers presented documentary proof which supported his findings that Ms. Gomez had abused the LICU's credit card, had written off loans and interest for close family and friends without Board approval and without disclosing her relationship, had abused her power when she obtained a loan from an employee, had provided an altered cash position to the chairperson of the Supervisory Committee, failed to report cash shortages and had instructed the falsification of members' files. It is to be noted that the final report produced by Mr. Flowers is dated 21st October 2015.

[9] Following from Mr. Flowers' preliminary findings, on 20th July 2015 Ms. Gomez was invited to a meeting at the LICU on 23rd July 2015 to answer the queries which had arisen as a result of the ongoing audit. Ms. Gomez's attorneys replied on 21st July 2015 requesting copies of reports and audits. On the same day, a response was sent to Ms. Gomez's attorneys advising that the investigation was ongoing and so no report had been received. However, it was necessary for Ms. Gomez, as General Manager of the LICU, to present herself and assist with the on-going investigations. On 22nd July 2015, the LICU was notified by Ms. Gomez's attorneys that she would not attend the meeting without first knowing what she would be

questioned about and requested copies of documents. Ms. Gomez failed to attend the meeting on 23rd July 2015 and therefore failed to provide any input into the ongoing investigation.

[10] By letter dated 24th July 2015,¹ the Board dismissed Ms. Gomez with immediate effect. In the dismissal letter, the Board stated that it had lost all trust and confidence in Ms. Gomez's management and listed the following grounds upon which she was dismissed:

- i. Instructed the write-off of principal and interest amounts for close family, friends and selected staff members without the Board's approval;
- ii. Orchestrated the processing of a loan for her personal gain by abusing her power to influence an employee, Raul Cocom. She then signed as the approving authority to the loan obtained under deceit. This infraction is further compounded by the breaching of the Conflict of Interest Policy by not declaring her private interest and gain from the loan;
- iii. Failed to inform the Board of existing cash shortages;
- iv. Provided an altered cash position report to the Chairperson of the Supervisory committee in relation to the Belmopan cash count conducted on 28th March 2015;
- v. Instructed the falsification of contact reports which were inserted into members' files; and
- vi. Continuously abused the institution's credit cards for her personal use.

The letter stated that the above actions constituted gross misconduct and are contrary to the very mission and purpose of the LICU. It further stated that, "given that you are being summarily dismissed, you are not entitled to any benefits".

[11] Ms. Gomez initiated a claim against the LICU and the Registrar of Credit Unions (claim no. 538 of 2015) for wrongful dismissal and for breach of statutory duty owed under section 36 of the Credit Union Act. Ms. Gomez sought relief from the LICU in the form of a declaration that the LICU wrongfully dismissed her on 24th July, 2015; damages for wrongful dismissal and damages for injury to reputation and feelings caused by the manner she was suspended and dismissed by the LICU. As against the Registrar of Credit Unions, Ms. Gomez sought a

¹ Vol.4 , Record of appeal at p. 821.

declaration that the Registrar of Credit Unions breached his statutory duty to her mandated by section 36 of the Credit Unions Act and damages for breach of statutory duty owed to her by the Registrar of Credit Unions. I shall refer to this claim as the “wrongful dismissal claim”.

[12] Subsequently, the LICU brought a claim against Ms. Gomez (claim no. 723 of 2015) seeking the repayment of the sum of \$436,906.34 that Ms. Gomez “embezzled” from the LICU between 31st March, 2012 and 31st March, 2015 or in the alternative, damages in the sum of \$436,906.34 for loss sustained by the LICU through the gross mismanagement and falsification of the accounts of the LICU by Ms. Gomez and also through violations of the LICU’s by-laws, policies, and the provisions of the Credit Unions Act, resulting in unauthorized write off of interests, loans and the unauthorized advances of loan facilities to family members and friends of Ms. Gomez. For ease of reference, I shall refer to this claim as the “recovery of monies claim”.

[13] The two claims were consolidated and heard over a two (2) year period commencing 13th February 2017 and ending on 27th February 2019. The learned judge, in a detailed written judgment dated 11th March 2021 consisting of some 487 pages, dismissed the wrongful dismissal claim and found in favour of the respondents on the recovery of monies claimed. By order dated 20th May 2021, she ruled, that:

- i. “Yolanda Gomez was lawfully placed on administrative leave by the first respondent, La Inmaculada Credit Union.
- ii. The Registrar of Credit Unions did not have any duty to perform under section 36 of the Credit Unions Act, Cap 314 in the circumstances of this case.
- iii. There was no statutory duty imposed upon the Registrar of Credit Unions to intervene on Yolanda Gomez’s behalf when she was placed on administrative leave and when she was terminated from her employment by La Inmaculada Credit Union.
- iv. Yolanda Gomez is liable for each and every allegation made by La Inmaculada Credit Union against her and was therefore lawfully dismissed and not entitled to any damages.
- v. Yolanda Gomez shall pay the sum of \$436,906.34 to La Inmaculada Credit Union for loss suffered by them.

- vi. Yolanda Gomez shall pay to the La Inmaculada Credit Union and the Registrar of Credit Unions costs to be agreed or assessed.”

[14] It is against the above orders of the learned judge that Ms. Gomez’s appeal stems.

The Appeal

[15] Ms. Gomez filed two notices of appeal which together lists eighteen grounds of appeal with many having sub-grounds, and some of the grounds overlapping with others. The appeals were consolidated and heard together. However, for convenience only, I will refer to civil appeal no.12 of 2021 as “the wrongful dismissal appeal” and civil appeal no.13 of 2021 as the “recovery of monies appeal”.

[16] The notice of appeal in the wrongful dismissal appeal contains six main grounds upon which Ms. Gomez seeks to impugn the judge’s decision. These grounds can be conveniently crystalized into the following issues:

- i. Did the LICU have the authority to place Ms. Gomez on administrative leave and to subsequently dismiss her?
- ii. Did Ms. Gomez have the opportunity to respond to the allegations made against her particularly after the completion of the Flowers investigation?
- iii. Does section 36(4) of the Credit Unions Act impose a statutory duty on the Registrar of Credit Unions to intervene on an employee’s behalf either when that employee was placed on administrative leave or was dismissed from employment?
- iv. Was Ms. Gomez wrongfully dismissed?
- v. Was Ms. Gomez entitled to damages?

[17] In the recovery of monies appeal, Ms. Gomez’s amended notice of appeal dated 7th February 2021, lists twelve grounds of appeal, from which I have distilled the main issue of whether the learned judge erred in concluding that Ms. Gomez is liable to pay to the LICU the sum of \$436,906.34 for loss suffered by the LICU.

[18] I propose to deal with the issues arising in the wrongful dismissal appeal first. Issues 1 and 2 are intertwined and may be conveniently dealt with together. I will then consider the

remaining issues arising in the wrongful dismissal appeal in turn. Thereafter, I shall address the issues arising in the recovery of monies appeal.

Issues 1 and 2 – Authority to place on administrative leave

[19] The thrust of Ms. Gomez’s argument is that the learned judge erred and/or misdirected herself in holding that she was lawfully placed on administrative leave by the LICU. Counsel for Ms. Gomez, Mr. Anthony Sylvestre, submitted two bases on which, he says that the learned judge’s finding was erroneous. First, he submitted that the learned judge failed to properly take into account that the Credit Union Act, the Credit Union By-Laws and the LICU Employees Employment Package does not empower the Board of the LICU to place an officer or employee on administrative leave.

[20] Second, Mr. Sylvestre submitted that learned judge failed to consider the unfairness in not affording Ms. Gomez any notice or opportunity to know the case against her and respond. He argued that it was only at the meeting of the Board on 15th April 2015, that Ms. Gomez was provided with concerns raised by the Credit Committee. She was not given prior notice of what she was required to respond to at the Board meeting and was therefore unable to provide satisfactory answers to the Board’s questions.

[21] In response, counsel for the LICU, Mr. Fred Lumor, SC submitted that as the employer, LICU retained the statutory and managerial power and right to discipline and terminate its employees. He argued that as a statutory corporation, the LICU’s powers are not limited to those expressly enumerated in the **Credit Unions Act**. He argued that the LICU is a credit union, a body corporate which has the ability to do all things necessary for the purpose of its by-laws. Further, he submitted that by Article VII (10) of the LICU’s By-laws, the Board is given “general direction and control of the affairs” of the credit union, including authority “to take all measures to provide for the management of the affairs of the society”. Accordingly, Lumor, SC argued that the LICU could take any and all measures in relation to the management of the LICU, including the hiring, firing and discipline of the General Manager, whether by placing her on administrative leave or otherwise. He contended that the LICU enjoys the same broad powers of management and residual power to discipline its employees as any corporate entity.

[22] Mr. Lumor, SC asserted that aside from the broad powers of management conferred by the **Credit Unions Act**, the LICU was given statutory authority to hire the credit union's management, pursuant to *section 30(1) of the Credit Unions Act*. He argued that as no contrary intention appears in the Credit Unions Act, the LICU's express statutory power to hire a manager must necessarily include the power to dismiss or suspend that manager. He said that the LICU at all times had statutory authority to dismiss or suspend Ms Gomez, such powers being residual and without reference to *section 36 of the Credit Unions Act*.

[23] On the breach of natural justice point, the argument led by Mr. Lumor, SC was that there is no common law right to natural justice in a claim for wrongful dismissal. He acknowledged that a right to natural justice can be incorporated into an employee's employment contract by the establishment of a disciplinary process. However, he said that the employment package which incorporated elements of natural justice had been revoked and that Ms. Gomez was notified of this revocation by letter dated 28th April 2015. He submitted that since the Board had revoked the employment package, it no longer formed part of Mrs. Gomez's employment contract when she was terminated on 24th July 2015 and she could therefore be summarily terminated, without any regard to the principles of natural justice.

[24] Mr. Lumor, SC submitted that even if the package was not revoked, Ms. Gomez had been lawfully terminated in accordance with the terms of the employment package. He further submitted that the LICU is not obliged to carry out an investigation and to follow the disciplinary procedures for every instance of misconduct. He referred the Court to the Employment Package which states that disciplinary action "*may be applied by the Credit Union*" for the circumstances outlined, thereby making it discretionary for the LICU to determine whether or not to initiate disciplinary procedures. He contended that under the LICU's employment package, the Board could dismiss an employee without completing an investigation if it involved misuse of monies. Mr. Lumor, SC said that in any event the LICU could not complete its investigation as Ms. Gomez refused to participate in the investigation by failing to make herself available to answer any questions.

[25] Mr. Lumor, SC contended that the LICU did afford Ms. Gomez all opportunity to make representations in her defense, but she failed to avail herself of the opportunity. He submitted that Ms. Gomez was made fully aware of the concerns of the Board which had been raised with her in at least two (2) prior meetings and was given an opportunity to present herself at a

meeting with the Board on 23rd July 2015, but chose not to attend. He maintained that Ms. Gomez made a conscious decision not to participate in the investigation, notwithstanding that she was on paid administrative leave, in receipt of her full salary, and was still employed as the General Manager of the LICU. He said that Ms. Gomez's complaint that there was no final report prior to her dismissal is therefore untenable. Her reluctance to participate in the investigation and her insistence on being provided with the investigative report before making herself available to be questioned was therefore misconceived. Ms. Gomez was on administrative leave and, as an employee of the LICU, had an obligation to present herself when she was re-called back from leave. He said that her failure to do so is an act of insubordination.

[26] Mr. Lumor SC, therefore submitted that the dismissal was not wrongful as there was no breach of any procedure, nor was there a violation of a right to natural justice. He submitted that in any event, the allegations are so grave and overwhelming that Ms. Gomez's summary dismissal is justified.

Discussion

[27] Before proceeding with the analysis in this case, it is helpful to set out the relevant provisions of the **Credit Unions Act**,² which deal with the management and administration of credit unions in Belize. The relevant sections for the purpose of this discussion are sections 11, 27(1) and 30(1).

[28] Section 11 renders a credit union a body corporate with the power to hold property, to enter into contracts, to borrow monies, to institute and defend suits and other legal proceedings and to do all things necessary for the purpose of its by-laws.

[29] Section 27(1) provides that every credit union shall be managed by a Board of Directors of at least five (5) members and no more than nine (9).

[30] Section 30(1) empowers the Board to designate the employee positions in the credit union, hire suitable persons with the skills and competence necessary for the prudent

² Chapter 314, Laws of Belize.

management of the credit union, and delegate adequate powers to them to manage the business and affairs of the credit union.

[31] The provisions of the **Credit Unions Act** must be read in conjunction with the LICU's by-laws. Article VII (10) of the LICU's by-laws clothes the Board with the wide powers of general direction and control of the affairs of the credit union. The Board is entitled to take all measures to provide for the management of the affairs of the Credit Union provided that such is consistent with the by-laws, the Law and Regulation.

[32] Having closely examined the relevant provisions of the **Credit Unions Act** and the LICU's by-laws, I can discern no ambiguity in the provisions. It is clear from the scheme of the Act that the Credit Union is imbued with the powers of a body corporate. The Board is responsible for the general management of the credit union. To my mind, the general management would necessarily include the recruitment of the staff needed to carry on the business of the Credit Union.

[33] Indeed, in interpreting *section 30(1) of the Credit Unions Act*, the Court must pay due regard to the relevant aspects of the **Interpretation Act of Belize**³ which by virtue of section 2(1) applies to all enactments in Belize. *Section 31(4) of the Interpretation Act*, provides that:

“Where an Act confers powers upon any person or authority to make appointments to any office or place, the power shall, unless the contrary intention appears, be construed as including the power to remove or suspend any person appointed and to appoint another person temporarily in the place of any person so removed or suspended in place of any sick or absent holder of such office or place.”

[34] There being no contrary intention expressed in the Credit Unions Act, I agree with Mr. Lumor, SC that implicit in the power to hire employees is the power to dismiss or suspend employees. I am therefore fortified in my view that the LICU has the power through statute and its by-laws to appoint and dismiss employees including Ms. Gomez. I am not persuaded by Mr. Sylvestre's argument that the **Credit Unions Act**, the LICU's By-laws and the LICU's employment package do not empower the Board of the LICU to place Ms. Gomez on administrative leave. The decision to place Ms. Gomez on administrative leave with full pay

³ Chapter 1, Laws of Belize.

pending the investigation into the allegations of gross misconduct and the decision to subsequently dismiss her remained with the Board of the Credit Union.

[35] I now turn to the natural justice point. It is the law that an employer may terminate the services of an employee without notice or a hearing if the misconduct by the employee is sufficiently serious and gross that the employer can take the position that summary dismissal is justified without a hearing. This rule has been codified in *section 43 of the Labour Act of Belize* which is in the following terms:

- 1) *“An employer is entitled to dismiss summarily without notice or without payment of any severance or redundancy allowance or terminal benefit, any worker who commits an act of gross misconduct.*
- 2) *The gross misconduct referred to in subsection (1) of this section, is restricted to that conduct which is directly related to the employment relationship and has a detrimental effect on the business and is based on the operational requirements of the enterprise of such a nature that it would be unreasonable to require the employer to continue the employment relationship.”*

[36] The Eastern Caribbean Court of Appeal considered the issue of summary dismissal in the case of *Leonart Matthias v Antigua Commercial Bank*.⁴ In this case, the appellant, was employed by the respondent and worked continuously with the Bank for 22 years until when he was summarily dismissed for gross misconduct. At paragraph 40 Webster JA observed that:

“In the circumstances, I find that there was no procedural unfairness in the way that the Bank dismissed Mr. Matthias. In my view, the nature of the allegations and evidence against Mr. Matthias were sufficiently serious that the Bank acted reasonably, as found by the Industrial Court, in dismissing him on 4th February 2010 without a further opportunity to present his case. If I am wrong, and the dismissal was procedurally unfair, I will deal with the alternative situation of the reasonableness of the dismissal on the assumption that Mr. Matthias was not given the opportunity to present his defense. In doing so, I repeat that this is an alternative way of looking at the case because I have already found that

⁴ ANULTPAP2017/0002.

Mr. Matthias was given an opportunity to present his case and it was properly rejected by the Bank, and the circumstances were such that the Bank acted reasonably in summarily dismissing him.”

[37] A similar point was made in in the House of Lords decision of *Polkey v A.E. Dayton Services Ltd*,⁵ where Lord Mackay stated that:

“If the employer could reasonably have concluded in the light of the circumstances known to him at the time of dismissal that consultation or warning would be utterly useless he might well act reasonably even if he did not observe the provisions of the code. Failure to observe the requirement of the code relating to consultation or warning will not necessarily render a dismissal unfair. Whether in any particular case it did so is a matter for the industrial tribunal to consider in the light of the circumstances known to the employer at the time he dismissed the employee.”

[38] The term “gross misconduct” is defined in *section 2 of the Labour Act⁶ of Belize* as “misconduct that is such that the employer cannot reasonably be expected to take any course other than to terminate the employment of the worker”. In *Chitty on Contracts⁷* the learned authors explained the nature of “misconduct” stating that:

‘the general rule is that if the employee does anything which is incompatible with the due or faithful discharge of his duty to the employer, he may be dismissed without notice; the employee’s conduct need not be dishonest, since it is sufficient if it is “conduct of such a grave and weighty character as to amount to a breach of the confidential relationship between employer and employee.

Similarly, the learned authors of *Halsbury’s Laws of England* opined that:

“Misconduct inconsistent with an employee’s proper discharge of the duties for which he was engaged is good cause for his dismissal, but there is no fixed rule

⁵ [1988] AC 344.

⁶ Chapter 297, Laws of Belize.

⁷ Para 40-184, 32nd Edn, Volume 2, Sweet & Maxwell.

of law defining the degree of misconduct which will justify dismissal...An employee may also be summarily dismissed...if his conduct is insulting and insubordinate to such a degree as to be incompatible with the continuance of the relation of employer and employee.”⁸

[39] Misconduct is dealt with in **section 41 of the Labour Act** which provides that:

(1) Notwithstanding the foregoing provisions of this Part, an employer may dismiss the worker or the worker may abandon service of the employer, without giving notice and without any liability to make payment as provided in sections 37 to 40 or section 183 of this Act, if there is good and sufficient cause for such dismissal or abandonment of service,

Provided that an employer may not set up as a good and sufficient cause that the worker at the time of the dismissal was a member of a trade union.

(2) For the purpose of subsection (1) of this section, good and sufficient cause for dismissal without giving notice shall include dismissal,

- a) when an employee is guilty of misconduct, whether in the course of his duties or not, inconsistent with the fulfilment of the express or implied conditions of his contract of employment;*
- b) for willful disobedience to lawful orders given by the employer;*
- c) for lack of skill which the worker expressly or by implication warrants himself to possess;*
- d) for habitual or substantial neglect of his duties;*

for absence from work without permission of the employer or without other reasonable excuse”.

[40] Ms. Gomez’s dismissal letter indicated that she was being summarily dismissed and listed the reasons for her dismissal. The letter stated that the LICU had lost trust and confidence in her management and that her actions constituted gross misconduct and were contrary to the very mission and purpose of the institution. The learned judge found that there was an

⁸ 3rd Edition, Vol. 25, p. 487 at para 938.

abundance of evidence as to misconduct which grounded the termination.⁹ She found that Ms. Gomez flouted the regulations governing LICU with impunity – For example, by giving out several loans to her friends and family members without first disclosing the nature of her relationship to these individuals to the Board as required by the Conflict of interest Policy; waiving interest on loans when there was no interest waiver policy at the LICU, and giving out massive loans to members who were incapable of providing collateral to secure these loans.¹⁰ She found that any one of those violations would justify LICU terminating Ms. Gomez summarily and the cumulative effect of these violations coupled with others cited amounted to gross misconduct on her part.¹¹

[41] On my view of the record, the evidence against Ms. Gomez which the learned judge accepted as truthful was damning and overwhelming. No doubt, the conduct of Ms. Gomez, as general manager of a financial institution, was of such a grave and weighty character as to amount to a breach of the confidential relationship between employer and employee. In the circumstances, the alleged misconduct was of such a nature that the LICU would have acted reasonably in summarily dismissing Ms. Gomez in accordance with *section 43 of the Labour Act*. In any event, in my view, LICU could have good and sufficient cause to terminate Ms. Gomez pursuant to *section 42 of the Labour Act*. Under both sections, termination is allowed without notice.

[42] Assuming for the sake of argument that Ms. Gomez was not summarily dismissed, the question which arises is whether Ms. Gomez was terminated in accordance with her employment package. The employment package, which was revoked by letter dated 28th April 2015, contained a disciplinary procedure which stated that:

“Whenever practical disciplinary procedures should:

- (h) *Ensure that, except for **gross misconduct**, no employee is dismissed for a first breach of discipline*
- (i) *Ensure that disciplinary action is not taken until the case has been fully investigated, **except in cases where the misuse of monies is concerned.**”*

⁹ Page 461 of the judgment.

¹⁰ Page 46 of the judgment.

¹¹ Page 463 of the judgment.

[43] This case concerned gross misconduct by the misuse of monies. As found in the court below, I have considered that Ms. Gomez was indeed given an opportunity to respond to the allegations during the investigation. She failed to participate in the process adopted by the LICU. She was given the opportunity to be heard and cannot now claim that she did not have the opportunity to be heard, to respond to the allegations against her or that she did not know of the allegations. The LICU clearly communicated to Ms. Gomez what those allegations were during meetings convened on 26th March 2015 and 15th April 2015.

[44] In the circumstances, I find the LICU had the authority to place Ms. Gomez on administrative leave. I can identify no breach of natural justice and no error upon which the learned judge's decision can be assailed.

Issue 3 – Interpretation and application of section 36(4) of the Credit Unions Act

[45] Mr. Sylvester submitted that *section 36 of the Credit Unions Act* became engaged when the Supervisory Committee and the President of the LICU contacted the Registrar of Credit Unions regarding the “suspension” of Ms. Gomez and matters relating to “mismanagement in the affairs of the Credit Union.” He argued that after being informed of possible misappropriation of a credit union's property, the Registrar of Credit Unions had a statutory duty to ensure compliance with the procedure outlined in section 36.

[46] Mr. Sylvester submitted that pursuant to section 36 of the Credit Unions Act, the Registrar of Credit Unions is *empowered* to suspend an employee for alleged misappropriation or misdirection and the power to dismiss an employee for these reasons lies with the membership of the relevant credit union in a special general meeting. He argued that this is the procedure that ought to have been employed. He stated that the Registrar of Credit Unions was aware of the investigation being conducted by the LICU relating to the alleged misappropriation by Ms. Gomez and did not intervene. He complained that in this respect the Registrar of Credit Unions allowed the LICU to assume his powers.

[47] It was Mr. Sylvestre's submission therefore that *section 36 of the Credit Unions Act* provided the procedural safeguards for Ms. Gomez. The statutory duty owed by the Registrar of Credit Unions to Ms. Gomez was to ensure that all the protections guaranteed under the Act were afforded to her and that she would be treated fairly. He contended that the Registrar of Credit Unions breached his statutory duty by failing to consider the question of the

suspension of Ms. Gomez; failing to intervene in the LICU's unlawful suspension of Ms. Gomez; failing to prevent the LICU's Board from suspending Ms. Gomez based on an inconclusive report and failing to give Ms. Gomez a reasonable opportunity to exculpate herself. He told the court that the breach of the Registrar of Credit Union's statutory duty led to Ms. Gomez being terminated unlawfully by the LICU. He went on to state that Ms. Gomez lost the protection afforded to her by section 36 of the Act and consequently suffered damage. He further submitted that Ms. Gomez is entitled to damages based on the breach afforded by the Act.

[48] The essence of Mr. Lumor, SC's response was that section 36 sets out a statutory regime for the investigation and imposition of a penalty for the misappropriation or misdirection of funds, securities or other property of the credit union, by the Board, the Credit Committee or a member of either body or any officer or employee engaged by the Board. It is regulatory in nature. The statutory power conferred on the Registrar of Credit Unions does not create a cause of action, exercisable by an officer of a credit union. Nothing in the Credit Union Act indicates that an officer of a credit union may recover damages against the Registrar of Credit Unions for violation of any rights set out at section 36 of the Act. Mr. Lumor, SC submitted that section 36 was not intended for the protection of officers of the credit union, but rather, to afford the Registrar of Credit Unions a right to take action against an officer who is guilty of misappropriation or misdirection. Its sole purpose is to protect the public or credit unions, not its officers. Accordingly, he argued that a private law cause of action "*sounding in damages*" is inconsistent with the purpose and intent of section 36 of the CU Act. As such, he says that, there has been no breach of statutory duty by the Registrar of Credit Unions.

[49] Further, Mr. Lumor, SC argued that as section 36 does not confer any statutory duty on the Registrar of Credit Unions, the learned judge did not err in holding that the Registrar of the Credit Unions did not fail in his statutory duty to intervene on Ms. Gomez's behalf either when she was placed on administrative leave or when she was dismissed from her employment by the LICU. He argued that the Registrar of Credit Unions was not required to authorize Ms. Gomez's suspension in this case nor was he required to authorize her dismissal. Further, the Registrar was not required to intervene in the disciplinary action taken by the LICU against Ms. Gomez.

[50] Alternatively, Mr. Lumor, SC argued that the LICU says that Ms. Gomez by her misconduct made it impossible for her to continue to perform her duties as General Manager of the LICU. She repudiated her contract of employment which the LICU accepted.

[51] The crux of the Registrar of Credit Union's submissions is that section 36 is a discretionary authority, using the term "may", that does not create any statutory duty on the part of the Registrar and that the LICU could have properly, and did, take disciplinary action against Ms. Gomez, including her dismissal.

Discussion

[52] This appeal brings into sharp focus the operation and application of *section 36(4) of the Credit Unions Act*. Therefore, it is necessary to set out section 36 which provides:

- “(1) *When the Supervisory Committee is of the opinion that the funds, securities, or other property of the credit union have been misappropriated or misdirected, or in the event that the by-laws, the Rules or this Act have been contravened by the Board, the Credit Committee or a member of either body or any officer or employee engaged by the Board, the Supervisory Committee shall forthwith inform the Registrar in writing.*
- (2) *In the event of a misappropriation or suspected misappropriation or misdirection or suspected misdirection, the Supervisory Committee shall, in consultation with the Board, appoint an auditor or special examiner to investigate the situation at the expense of the credit union.*
- (3) *In the event that the auditor or special examiner appointed pursuant to subsection (2) of this section, concludes that misappropriation or misdirection has occurred, he or she shall submit his report to the Registrar, the Board of Directors, the Supervisory Committee and the Credit Committee.*
- (4) *Where, on receipt of the report of the auditor or special examiner, the Registrar is satisfied that there is sufficient evidence of misappropriation or misdirection on the part of any director, or a*

member of the credit union, or any officer or employee engaged by the Board, he or she may after consultation with the Supervisory Committee and after giving the person concerned a reasonable opportunity to exculpate him or herself, suspend such person from the exercise of his or her functions, and shall request the Board to summon a special general meeting of the members, and where the Board fails to do so, he or she shall hold the meeting within fourteen (14) days of the date of suspension.

- (5) *The Registrar shall report to the special general meeting all the circumstances of any misappropriation of mis-direction and the reasons for any suspension under subsection (4) of this section.*
- (6) *The member of the credit union may by resolution and after due deliberation, dismiss from office or reinstate any person suspended under subsection (4) of this section.”*

[53] I agree with Mr. Lumor, SC and Mr. Bradley that section 36(4) does not create any statutory duty on the Registrar to intervene on behalf of Ms. Gomez. It vests in the Registrar a discretionary power to suspend employees of a credit union in the event of misappropriation or suspected misappropriation or misdirection or suspected misdirection. A discretionary power cannot be the basis for establishing a statutory duty.

[54] Section 36(4) is regulatory in nature. It simply confers on the regulator, being the Registrar of Credit Unions, the statutory authority to intervene in matters of the internal management of the regulated entity, if he so chooses. This discretionary statutory power is quintessentially a matter included in legislation dealing with regulated entities, particularly banking, financial and insurance entities, to protect members including depositors and the public from acts of misappropriation and corruption carried on by its employees. Such provisions exist so that an institution with a rogue management does not remain under the control of that management to the detriment of depositors and the financial markets so long as those persons retained the support of the Board, senior leadership, or unsuspecting shareholders or members.

[55] Nothing in these provisions is meant to derogate from the authority already conferred on any employer by ordinary employment law to discipline its own staff for acts of misconduct. They are not mandatory. To the contrary, these “Section 36” type provisions are always written in discretionary terms to provide latitude to the regulator to act, when appropriate, in the interest of persons dealing with the financial institution and in the public interest.

[56] Mr. Sylvestre’s interpretation of section 36(4) is therefore in my view, incorrect, and if I were to accept such an interpretation, then as Mr. Lumor, SC and Mr. Bradley have correctly argued, this would yield an impossibility that Parliament could have never intended. It would mean that an employer would not be able to discipline its employee who is accused of misappropriation and that only the Registrar would be so authorized. In my view, it could have never been the intention of Parliament that the Registrar of Credit Unions would have the sole power to discipline employees of all Credit Unions and to usurp the powers of the board or management of Credit Unions of Belize to discipline, sanction and dismiss its own employees, as such an intention would have been absurd.

[57] Moreover, Mr. Sylvester’s arguments fail to take into account the *Labour Act* which was specifically intended to legislate employer and employee relations including termination by an employer of an employee. In this regard, I find that the following provisions of the Labour Act are instructive:

- a. Section 41 of the Labour Act empowers an employer to terminate an employee’s contract of employment for good and sufficient cause.
- b. Section 42 of the Act outlines the reasons which do not constitute good and sufficient cause to dismiss an employee, none of which apply to the case at bar.
- c. Section 43 of the Act empowers any employer to summarily dismiss an employee for gross misconduct.

[58] I emphasise that the purpose of Section 36(4) was to grant the Registrar the discretionary regulatory power to intervene in instances of suspected or actual misappropriation or misdirection. I fail to see how section 36(4) could be interpreted as empowering the Registrar the sole authority to settle every employment dispute within all Credit Unions in Belize where there have been allegations of misappropriation. To make a finding that as a result of Section 36(4) and to the exclusion of the Labour Act and an

employee's contract of employment, that the Registrar had the exclusive power to discipline and dismiss Ms. Gomez and that the LICU had no authority to do so would go against fundamental employment principles.

[59] The effect of *section 36(4) of the Credit Unions Act* was to provide the Registrar with a discretionary power to regulate the Credit Unions of Belize where there were allegations of misappropriation by an employee. It was never intended or could never have been intended that this provision would govern employment relations with respect to the Registrar having the power to terminate an employee of the Credit Union. This could not have been the intention of the Act as there is other legislation, primarily, the **Labour Act**, which regulates employment relations in Belize. Accordingly, in my judgment, the learned judge correctly interpreted Section 36(4) when she concluded that the Registrar did not have a statutory duty to intervene into the investigations concerning Ms. Gomez's allegations of misappropriation. The Registrar has a right but not an obligation to do so.

[60] I therefore find that in relation to *section 36(4) of the Credit Unions Act*, there is no statutory duty conferred upon the Registrar to intervene in investigations of Ms. Gomez's misappropriation and accordingly, there was no breach of statutory duty.

Issue 5- Was Ms. Gomez wrongfully dismissed.

[61] On this issue, Mr. Sylvestre complained that the learned judge erred and/or misdirected herself in deciding that Ms. Gomez was not wrongfully dismissed as General Manager of the LICU on 24th July 2015. The essence of his argument was that the learned judge failed to properly take into account the evidence of three witnesses. First, in relation to the witness Hector Sabido, Loans Monitoring Officer, he complained that the judge failed to properly take into account his evidence that the LICU aggressively encouraged the making of false accusations against Ms. Gomez on numerous occasions and thereby failed to draw the adverse inference that the LICU's case against Ms. Gomez was weak or unfounded and lacked merit.

[62] In relation to the witness, Ena Martinez, Mr. Sylvestre also complains that the learned judge failed to properly take into account her admission that the Board came to the conclusion to dismiss Ms. Gomez before giving her an opportunity to be heard and before completing their investigation and admitting no documentation was provided to Ms. Gomez as requested because the reports "were not finish yet...were not complete".

[63] Further, he stated that the learned judge failed to properly take into account that the Registrar of Credit Unions did not invite Ms. Gomez to a meeting to give her an opportunity to respond to the contents of the Flowers Report even though he accepted there were extremely damning statements in the Report against Ms. Gomez.

[64] In a nutshell, Mr. Lumor, S.C's submission in response was simply that the judge properly took into account the evidence of the witnesses. He reminded this Court of the principles governing appellate intervention with respect to the review of findings of fact, the evaluations of those facts and the inferences drawn from them by a trial judge.

Discussion

[65] It is axiomatic that Ms. Gomez's appeal against the learned judge's decision that her dismissal was lawful is an appeal against the findings of fact by the learned judge. This is clear from the decision of *Henry v Mount Gay Distilleries Limited (Barbados)*¹² where Lord Browne-Wilkinson observed that a finding of summary dismissal was a question of fact and the appellate court should exercise caution when reviewing such a finding. He stated:

"The question whether misconduct is such as to justify summary dismissal is a question of fact and degree. As such, it is a matter for decision by the trial judge and not by the appellate courts: Clouston & Co. Limited v. Corry [1906] A.C. 122".

This passage was cited with approval by the Eastern Caribbean Court of Appeal in Ingrid Brantford-Hughes v Golden Years Home for the Elderly,¹³ and St. Kitts Marriott Resort v Deorah Stevens.¹⁴

[66] Indeed, it is a principle of law well settled by numerous judicial pronouncements that an appellate court is generally reluctant to interfere with the findings of fact by a lower court. This principle recognises the trial judge's unique position of being able to see and hear witnesses give their evidence and to assess their demeanor and credibility.¹⁵ If authority is needed for this well-established principle it can be found in the seminal judgment of Lord Thankerton in *Watt (or Thomas) v Thomas*, a decision that has been applied on many

¹² [1999] UKPC 39.

¹³ MNILTAP 2019/0002.

¹⁴ SKBMCVAP2016/0001.

¹⁵ Luella Mitchell v Maurice Jones SVGHCVAP2006/016.

occasions by this Court in *Rupert Ritchie et al v Raquel Rodriguez et al*;¹⁶ *Robert Panton and Knox Arnold v Eric Defour and Marqus Defour*,¹⁷ and *Oscar Selgado v Edward Broaster*¹⁸.

[67] In *Watt (or Thomas) v. Thomas*,¹⁹ the House of Lords held:

“ . . . When a question of fact has been tried by a judge without a jury and it is not suggested that he has misdirected himself in law, an appellate court in reviewing the record of the evidence should attach the greatest weight to his opinion, because he saw and heard the witnesses, and should not disturb his judgment unless it is plainly unsound. The appellate court is, however, free to reverse his conclusions if the grounds given by him therefor are unsatisfactory by reason of material inconsistencies or inaccuracies or if it appears unmistakably from the evidence that in reaching them he has not taken proper advantage of having seen and heard the witnesses or has failed to appreciate the weight and bearing of circumstances admitted or proved.”

[68] The principles which govern the review of findings of fact by an appellate court were also authoritatively stated by the Caribbean Court of Justice in *Campbell v Narine*²⁰ where the CCJ endorsed the oft-cited view of Lord Sumner in *SS Hontestroom (Owners) v SS Sagaporack (Owners)*²¹ that—

‘not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case ... If his estimate of the man forms any substantial part of the reasons for his judgment the trial judge’s conclusions of fact should be let alone.’

¹⁶ Belize Civil Appeal No. 12 of 2001.

¹⁷ Belize Civil Appeal No. 1 of 1990.

¹⁸ Belize Civil Appeal No. 11 of 2019.

¹⁹ [1947] A.C. 484.

²⁰ (2016) 88 WIR 319.

²¹ [1927] AC 37 at 47.

[69] Further, in the recent case of *Merlene Todd v Desiree Price*,²² the CCJ after referring to its earlier decisions in *Campbell v Narine*, *The Medical Council of Guyana v Sahadeo*,²³ *Ramdehol v Ramdehol*,²⁴ and *Thakur v Ori*,²⁵ restated the principles governing appellate intervention *with a trial judge's findings of fact*:

“An appellate court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that the trial judge was “plainly wrong” and should not interfere unless the inferences drawn by the trial judge were “plainly unreasonable”. The meaning of the “plainly” in this context was explained in Henderson at [62], where Lord Reed said:

There is a risk that it may be misunderstood. The adverb “plainly” does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

This Court stated that there will be “limited circumstances where an appellate court can interfere with findings of fact made by a trial judge who has had the advantage of seeing and hearing oral evidence.” We held that interference can only be justified if a factual conclusion is “one that no reasonable judge could have reached,” that is to say that “the making of a critical finding of fact which has no basis in the evidence or a demonstrable misunderstanding of relevant evidence or a demonstrable failure to consider relevant evidence.”

[70] Accordingly, for Ms. Gomez to succeed she must satisfy this Court that the judge erred in principle in considering the evidence, or because it unmistakably appears from the evidence that she has not taken proper advantage of having seen and heard the witnesses, or that her findings on the evidence were plainly wrong. It is not enough for Ms. Gomez to say

²² [2021] CCJ 2 (AJ).

²³ [2016] CCJ 14 (AJ).

²⁴ [2017] CCJ 14 (AJ) at [46].

²⁵ [2018] CCJ 16 (AJ).

that the judge came to the wrong conclusions or that this Court, reviewing the evidence, should come to different conclusions on the facts.

[71] With the foregoing principles in mind, I shall consider the criticisms made of the learned judge. The learned judge recounted the evidence of Mr. Sabido, his answers under examination in chief, cross examination and re-examination. She recounted the evidence he provided at pages 50 – 62 (Vol. 6 of the Bundle) when indicating whether there was a waiver of interest policy, the evidence surrounding \$134,000.00 which he admitted that he delivered to Ms. Gomez in an envelope and whether he was ever notified by Mr. Flowers to provide evidence of written instructions relating to waiving interest on the Emortelle System. Mr. Sabido's evidence showed that Ms. Gomez breached her position of trust in implementing a waiver of interest policy that had no support from the Board and that she instructed staff to perform tasks which made them unknowingly or deliberately involved in the acts she performed and complained of which gave rise to her dismissal.

[72] A close examination of the judgment of the learned judge reveals that Mr. Sylvestre's true contention is that the judge failed to regard Mr. Sabido's evidence favourably. Simply put, Mr. Sylvestre's argument was that the learned judge was wrong for not believing Mr. Sabido's evidence. In my view, this is not a sufficient basis for this Court to interfere with the judge's findings. The judge would have had the advantage of seeing and hearing Mr. Sabido, an advantage which this Court does not enjoy. Mr. Sylvestre has failed to put sufficient material to impeach the trial judge's finding of fact which appears to be based on the judge's assessment of the credibility of Mr. Sabido.

[73] Likewise, in relation to the evidence of Ms. Ena Martinez, the learned judge explained why she considered her to be a credible witness. This finding was open to the judge having seen and heard Ms. Martinez.

[74] In my judgment, the learned judge took cognizance of all the evidence. The learned judge made factual findings which were clearly open to her on the evidence and found that Ms. Gomez was not wrongfully dismissed. It cannot be said that there was no evidence to support those findings or that they were ones which no reasonable judge could have made or that the learned judge was plainly wrong, either in her factual findings or inferences drawn from the facts. Neither can it be said that the decision of the judge was unreasonable and

cannot be supported having regard to the evidence. Accordingly, the learned judge's decision cannot be impeached.

Issue 6 – Is Ms. Gomez entitled to damages for wrongful dismissal

[75] Having found that Ms. Gomez was not wrongfully dismissed, the issue of her entitlement to damages for wrongful dismissal accordingly falls away.

The recovery of monies appeal

[76] I now turn to the recovery of monies appeal. The only issue remaining to be considered is the broad one of whether the judge erred in holding that Ms. Gomez was liable to pay to the LICU the sum of \$436,906.34.00. Stripped of all of its appearance of complexity, in my view, this issue is one of fact and law and its resolution turns on the correctness of several factual findings of the learned judge as well as her conclusion on the admissibility of certain pieces of evidence tendered on behalf of the LICU.

No Cause of Action disclosed on pleadings

[77] Mr. Sylvestre, in his written and oral submissions, argued that paragraph 5(1) of the LICU's amended statement of claim did not disclose any specific and ascertainable cause of action. In paragraph 5(1), the LICU averred that the Ms. Gomez, between 31st March 2012 and 31st March 2015 embezzled funds and/or caused LICU loss in a total sum of \$436,906.34 through fraud, deception, falsification of accounts, concealment, false and dishonest statements, conflict of interest and acting contrary to the provisions of the **Credit Unions Act**, LICU's By- laws and Policies.

[78] Mr. Sylvestre further submitted that by the LICU's pleadings, they asserted that Ms. Gomez "embezzled" or caused loss conjunctively in a number of ways. He said that the loss was not particularized to have been caused disjunctively. Mr. Sylvestre told the Court that the significance of this, as was pointed out in Ms. Gomez's submissions in the court below, is that, acting in conflict of interest or in breach of the **Credit Unions Act** and the LICU's By-Laws and Policies, would not entitle the LICU to any damages as those would be contractual breaches which would not cause any loss to LICU.

[79] Mr. Sylvestre argued that, the only ascertainable civil cause of action (from that which is averred in paragraph 5) which could ground a claim for the quantifiable loss claimed, is fraud, the tort of deceit or breach of trust. None of those causes of actions were pleaded. Mr. Sylvestre submitted that on this basis alone LICU's claim as it relates to the ninety-five thousand five hundred eighty-six dollars and eighty-three cents (\$95,586.83) should fail and that the learned trial judge, erred in her finding in that respect.

[80] In response, Mr. Lumor, SC submitted that at no point in Ms. Gomez's defence or witness statement is the issue of the claim not disclosing any cause of action pleaded or taken below. Further, in oral arguments, he stated that the averments in the statement of claim go to Ms. Gomez acting unlawfully, and although not specifically pleaded, 'unlawfully' meant contrary to *section 47(8) of the Credit Unions Act* which provides that: "anybody who knowingly approves or grants a loan in contradiction of this Act or the rules shall be liable to any losses resulting to this credit union in connection with that."

Discussion

[81] This is a short point. In my view, Mr. Lumor, SC rightfully emphasised that it was incumbent on counsel for Ms. Gomez to raise in the court below that there was no cause of action disclosed in paragraph 5 of the statement of claim. Having failed to do so, Mr. Sylvestre cannot properly advance these arguments before this Court. This is particularly improper when considering that counsel for Ms. Gomez could have applied to strike out the statement of claim pursuant to *Rule 26.3(1) (c) of the Civil Procedure Rules*. Instead of doing so, he proceeded to defend the claim by filing a defence and witness statements. Further, while I note that Ms. Gomez was represented by different counsel in the court below, it is also of relevance that Mr. Sylvestre did not raise this issue as a ground in his notice of appeal. Instead, he has sought to raise this issue, belatedly, by way of written and oral submissions before this Court.

[82] Putting aside the issue of the appropriateness of Mr. Sylvestre's contention, I will, for completeness consider whether there is "even a scintilla of a cause of action"²⁶ known to law disclosed in paragraph 5 of Ms. Gomez's statement of claim. Having perused the statement of claim in its entirety, I am of the view that although the statement of claim is inelegantly drafted, the claim passes the test of a "scintilla of a cause of action". Ms. Gomez acted without

²⁶ As expressed in the Canadian case of *Operation Dismantle Inc v R* [1986] LRC (Const) 421 which was cited in *Baldwin Spencer v The Attorney-General of Antigua and Barbuda et al* ANUHCVP1997/0020A.

any authority, unlawfully and in violation of the LICU's policy by tampering with the loan balances. Throughout the statement of claim, the LICU has pleaded that Ms. Gomez acted in breach of the mandate given to her by the Credit Union.

Admissibility of evidence

[83] The nub of Mr. Sylvestre's argument is that the learned judge erred in admitting inadmissible hearsay documentary evidence in the nature of:

- a) Annexes 2 & 8 of Ena Martinez's Witness Statement (Report of Grant Thornton & Central Bank Report);
- b) Annex 1 of Jamid Teyul's Witness Statement (Loan Documents & Disbursement Slip);
- c) Annex 2 of Yolly Trejo's Witness Statement (Contact Report);
- d) Annexes 9, 12, 13, 14, 15, 16, 17, 18 and 19 Yadelí Urbina's Witness Statement (Contact Report-9, Contact Report-12, Contact Report-13, Esther Rosado Loan Application-14, Loan Application & Promissory Note-15, Loan Application/Account Statement of Esther Rosado-16, Loan Application for Sandra Reyes-17, Credit Card Statements-18 and Credit Card Statements-19).

[84] Mr. Sylvestre submitted that objections based on inadmissibility were taken in the court below and while they were not upheld, the court ruled that the evidence would be conditionally admitted providing *section 82 of the Evidence Act*²⁷ was satisfied. He argued that section 82 was not satisfied. He said that at the trial none of these witnesses, amplified their evidence and explained the reason why the maker of the statement/document was not available. He submitted that the learned judge did not advert her mind to this issue and consequently, she erred in admitting into evidence inadmissible hearsay evidence. He further submitted that this, constituted a material irregularity in the trial as the learned trial judge's decision making would have been based on inadmissible hearsay evidence.

[85] Mr. Lumor, SC argued that the learned judge did not admit inadmissible evidence. He told this Court that the documents which have been annexed to the witness statements, and which have been objected to as documentary hearsay are documents which form part of the records of LICU and are on LICU's files. He pointed the Court to *section 88(1) of the Credit*

²⁷ Chapter 95, Laws of Belize.

Unions Act and contended that the purpose and intent of section 88(1) is to enable the court to receive evidence from the books of a registered credit union. He submitted that the LICU does not keep books, but rather keeps files as its records.

Discussion

[86] The rule against hearsay as a general principle has been described as follows:

“Assertions of persons other than the witness who is testifying are inadmissible as evidence of the truth of that which was asserted”²⁸

[87] In *SM Constructions Limited v Maheias United Concrete & Supplies Limited* the CCJ considered the hearsay rule in Belize and observed that:

“The Evidence Act, CAP 95 of the Laws of Belize, R.E. 2000 makes no provision as to hearsay evidence in civil proceedings.

[107] The only statutory exceptions to the rule against hearsay evidence are made with respect to criminal proceedings.

...

[109] ... the common law position is thus applicable and that the examination of *Myers v DPP*, provides a useful framework for application of the rule in the instant circumstances, with the result that unsworn written assertions or statements, whether contained in documents or otherwise, made by persons who did not testify before this court (who may or may not be alive) and which are being put forward as proof of the truth of those statements, constitutes hearsay evidence and is not admissible.

[88] Section 86(2) governs admissibility of documentary evidence as to facts in issue. It provides that:

- 1) *In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied-*
 - a. *if the maker of the statement either-*

²⁸ Cross on Evidence, pg 38. Claim No. 483 of 2013 (CCJ).

- i. *had personal knowledge of the matters dealt with by the statement;*
or
 - ii. *where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and*
- b. *if the maker of the statement is called as a witness in the proceedings: Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is outside Belize and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.*

[89] In my judgment, some of the annexes to which Mr. Sylvestre has referred do not constitute inadmissible hearsay evidence. For instance, the report of Grant Thornton & Central Bank Report (Annexes 2 & 8 of Ena Martinez's Witness Statement). The Report of Grant Thornton was tendered and admitted in the evidence of Giacomo Sanchez who is the maker of the document and the Central Bank Report was annexed to the witness statement of Glenford Ysaguirre who was the Registrar of Credit Unions when the report was prepared.

[90] Similarly annex 1 of Jamid Teyul's Witness Statement (Loan Documents & Disbursement Slip), the Disbursement Slip was signed by Mr. Teyul, as admitted by him at paragraph 9 of his Witness Statement, and so this document would be admissible and would confirm the grant and issuance of the loan to Ms. Olga Hernandez.

[91] Further, the documents which have been annexed to the witness statements, and which have been objected to as Documentary Hearsay are documents which form a part of the internal records of LICU and are on LICU's files. Any officer who signed the document did so on behalf of LICU, and so it is LICU (not the individual officer) who is a party to the document.

[92] Mr. Lumor, SC relied on *section 82(2) of the Evidence Act*, which gives the Court a residual discretion to permit a document to be admitted in evidence, notwithstanding that the maker is available but is not called as a witness, where the judge is satisfied “*that undue delay or expense would otherwise be caused*”. Section 82(2) provides:

(2) *In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case, it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence-*

a) *notwithstanding that the maker of the statement is available but is not called as a witness;*

b) *notwithstanding that the original document is not produced, if in lieu thereof, there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or as the court may approve, as the case may be.*

[93] In my view, the circumstances of this case justified the application of section 82(2) as it would be impossible, costly, and would have occasioned a delay of the trial to have each employee who signed a document attend court to tender the document into evidence. The documents were produced from proper custody of the LICU.

[94] Accordingly, the learned judge, in her ruling of 16th April 2018, did not err in admitting the annexes into evidence. She rightfully had regard to them in making her decision.

Findings of facts

[95] Mr. Sylvestre submitted that the learned judge erred and misdirected herself on the evidence by holding that:

1. the waiver of accrued interest on active loans were approved by Ms. Gomez for the years ending 31st, March 2213 in the sum of \$95,586.83.
2. Ms. Gomez acted dishonestly, unlawfully, and in violation of LICU's policies and by-laws when she approved the write- off of active loans for relatives and friends in the sum of \$55,984.32.
3. Ms. Gomez acted dishonestly and unlawfully by causing a credit to be made to the accounts of
 - a. her domestic helper, Olga Hernandez, and thereby reduced her loan balance by the sum of \$79,519.94.
 - b. her nephew, Roy Roberto Rosado, and thereby reduced his loan balance by the sum of \$45,693.28.
 - c. her sister, Sandra Reyes, and thereby reduced her loan balance by the sum of \$30,219.46.
4. Mrs. Gomez abused her office and acted in breach of trust by using LICU's credit card for personal purchases in the sum of \$67,309.74.
5. Ms. Gomez ordered the falsification of the account of Fiona Reyes/Armando Gomez and that she acted in conflict of interest and in violation of LICU's By-laws and policies by instructing the disbursement of unauthorised loan facilities to her husband, Armando Gomez, on the account that he held jointly with her niece, Fiona Reyes.
6. Ms. Gomez acted unlawfully in ordering the disbursement of \$27,000 to Armando Gomez, which was drawn on the account of her nephew Roy Roberto Rosado, through the dishonest manipulation of the said account.
7. Ms. Gomez is accountable to the LICU for the embezzlement of \$436,906.34 or is otherwise accountable for said loss to LICU.

Discussion

[96] The arguments raised by Mr. Sylvestre engage the legal principles governing appellate interference with factual findings of a judge which I have already set out above. It bears repeating that the circumstances meriting appellate interference with a judge's conclusion of primary facts are (i) where there was no evidence to support the conclusion; (ii) where the conclusion was based on a misunderstanding of the evidence; or (iii) the conclusion was one which no reasonable judge could have reached or is plainly wrong.

[97] I shall consider each finding in turn.

Waiver of Interest

[98] Mr. Sylvester has challenged the learned judge's finding that Ms. Gomez had waived accrued interests on active loans totaling \$95,586.83 on the ground that the judge accepted that Ms. Gomez was "one of the persons responsible for the waiver of interest policy", and so was not the sole person responsible. He said that pursuant to the LICU's Employment Package, Ms. Gomez had the discretion to develop and implement rules and policies, and that she was therefore able to develop the interest waiver policy.

[99] The transcript of proceedings in the court below discloses that Ms. Gomez confirmed in cross-examination that the interest waiver was not approved by the Management Credit Committee.²⁹ Further, she confirmed that she was not authorized by the Board to implement the interest waiver policy,³⁰ and that the policy was not supported by the LICU's loan policy.³¹ Further, Mr. Sabido confirmed, in his cross examination, that all instructions for the waiver of interest were issued by the General Manager, Ms. Gomez.³²

[100] The learned judge accepted the evidence of the expert witness, Mr. Flowers, that this waiver of interest policy was formulated and developed by Ms. Gomez along with other management members.³³ The judge ultimately found that Ms. Gomez, as general manager, was responsible for the waiver of interest and that there was no residual discretion of the general manager to waive interest. She concluded that Ms. Gomez acted unlawfully and contrary to the LICU's regulations by doing so.³⁴

[101] Such findings were open to the learned judge based on the evidence. While the interest waiver policy may have been developed by other members of management, its implementation was sanctioned by Ms. Gomez whom as general manager was charged with the responsibility of overall management of the LICU. The judge was therefore correct in finding that Ms. Gomez acted unlawfully by implementing an unauthorized policy relating to interest, a matter which falls squarely within the purview of the Board. In order for this Court to interfere with

²⁹ Page 1219 of the Record of Appeal .

³⁰ Page 1221 of the Record of Appeal.

³¹ Page 1220 of the Record of Appeal.

³² Page 738 of the Record of Appeal.

³³ Page 470 of the judgment.

³⁴ Page 469 of the judgment.

this finding, Mr. Sylvester must demonstrate that the judge's conclusion is not supported by the evidence or that it is plainly wrong. In my view, Mr. Sylvestre has failed to do so and there is therefore no basis on which this Court could interfere with the judge's findings.

Approval to write off active loans for relatives and friends.

[102] Mr. Sylvestre submitted that the learned judge erred in failing to consider that the loan write offs were approved by LICU's board; and that there was no evidence of the falsification of the list containing the loan write offs.

[103] At pages 473-474 of the judgment the learned judge stated that:

"I accept as true the evidence of the President of the Board of Directors Mrs. Ena Martinez that the Board did not approve loan write-offs totaling \$55,984.33

...

She further testified that the Board members did not approve the write off of these loans as these members were known to be related to Mrs. Gomez. Mrs. Martinez said that Mrs. Gomez dishonestly presented one list to the Board for approval then issued instructions for the write off of loans for her close family members. I have to say given the context that Mrs. Gomez has been proven by the evidence in this case to have repeatedly violated LICU's policy and regulations for her personal benefit as well as the benefit of her family and friends, I find Mrs. Ena Martinez to be a witness of truth and I accept the evidence that the list approved by the Board was not the same list that Mrs. Gomez had given to them as being true on a balance of probabilities. I considered Mrs. Martinez's demeanor as she gave her evidence and it was quite clear that she had held Mrs. Gomez in very high esteem prior to the discovery of these irregularities; it was quite clear that Mrs. Martinez in her testimony expressed the reverence and trust the Board of Directors previously held for Mrs. Gomez as General Manager and the deep disappointment and shock she and the Board of Directors experienced when the extent of Mrs. Gomez's managerial misconduct were revealed was palpable.

...

I find on a balance of probabilities Mrs. Martinez was telling the truth when she said that the Board would never have approved write off- of loans for the list of Mrs. Gomez's family and friends."

[104] Based on the judgment of the learned judge, it seems to me that, she considered that the loan write offs were approved by the LICU's board. The learned judge rejected this evidence and preferred the evidence of Ms. Martinez. It was open to her to do so, particularly as no evidence of approval was provided. It is passing strange that no evidence was provided as the LICU would have had some written or official record of approval being granted for the writing off of loans. Similarly, any approval would have been discovered in the on-site audit which was conducted. I am therefore of the view that the learned judge did not err in the conclusion at which she arrived. Accordingly, there is no basis for this Court to interfere with this factual finding.

Causing a credit to be made to the accounts of family and friends

Olga Hernandez, Ms. Gomez's domestic helper

[105] Mr. Sylvestre argued that the learned judge did not consider the evidence of Mr. Hector Sabido that he was pressured by the agents of the LICU to agree to false accusations being made against Ms. Gomez and his evidence that the payment of the sum of \$79,519.94 has been made to the LICU. Further he argued that the learned judge did not consider the evidence of Mr. Cedric Flowers that the said money was placed in the vault by Melissa Leiva, Operations Manager. He complained that the judge did not consider the evidence of Ms. Gomez as to the reasons the large sum was handed to Melissa Leiva as opposed to the cashiers and why Ms. Leiva held possession of it.

[106] The learned judge recounted the evidence of Mr. Sabido in pages 49 to 61 of the judgment. She considered the payment made and the reason why the large sum was handed to the Operations Manager. At page 475 of the judgment, the learned judge found that the allegation against Ms. Gomez that she caused a credit to be made to the account of her domestic helper, Olga Hernandez to be substantiated by the evidence. The judge found that Ms. Gomez approved the loan to Ms. Hernandez without disclosing her interest. The judge stated that:

“It is incredible that Mrs. Gomez as General Manager would approve a loan of over \$79,000 to Mrs. Hernandez, fully knowing as her employer, that Mrs. Hernandez at the time of receiving this loan only had \$4164 in assets and \$52,887.55 in liabilities! The cogent, unchallenged evidence of the cashiers Lucia Gonzalez and Jeremias

Tun described in detail the fact that Mrs. ? was the person benefitting from this loan which had been disbursed to her domestic helper.

[107] The judge concluded that Ms. Gomez abused her position as general manager and in violation of the LICU policies and by-laws by not disclosing her interest in this loan which was ostensibly for Mr. Hernandez.

[108] In my view, it is an unfair criticism to say that the judge did not properly consider the evidence. The judge clearly did not accept the evidence of Mr. Sabido and Ms. Gomez. This, without more, is not a sufficient basis to overturn the findings of the judge. The judge considered the evidence and found that indeed Ms. Gomez acted dishonestly in reducing the loan balance of Olga Hernandez by the sum of \$79,519.94. Mr. Sylvester has failed to identify precisely the error allegedly committed by the learned judge. I can therefore find no basis for disturbing this finding.

Roy Roberto Rosado, Ms. Gomez's nephew and Sandra Reyes, Ms. Gomez's sister

[109] Mr. Sylvester contended that the learned judge failed to properly consider evidence that the sum of \$45,693.28 was paid and asserted that the learned judge regarded Ms. Gomez's conduct in a pejorative light. He submitted that the learned judge used her adverse findings in other areas in the case to make her determination. He argued that there was no consideration, for instance, of the evidence in the report of Mr. Flowers, that Melissa Leiva confirmed receipt of the money from Ms. Gomez and the money was placed in the vault. He said that such evidence cast doubts on the veracity and evidence of Lucia Gonzalez, which the learned judge preferred.

[110] At page 477 of the judgment, the judge accepted the evidence of Ms. Gonzalez that she was instructed by Mrs. Levia to process a payment of \$45,693.28 on the account of Mr. Rosado. She accepted her testimony that she did not receive any cash and she was instructed that the payment was already in the vault and that she was to simply add the paperwork.

[111] In relation to Mrs. Sandra Reyes, the judge accepted Ms. Gonzalez's evidence that she was instructed to process a payment of \$39,219.46 on her account and did not receive any cash. She was informed that the cash was in the vault.

[112] The learned judge was doubtful that any money was paid. She commented, that “... this is yet another example of the modus operandi existing at LICU at this time, where the rules were disregarded by Mrs. Gomez for her personal benefit and for the benefit of her family and friends.” She concluded that: “I accept Ms. Gonzalez’s evidence that she never received the cash for this payment, and I believe that this sum remains missing from the LICU to date”. The learned trial judge found that in every instance where Ms. Gomez alleged that she had refunded or returned monies, there was no evidence of repayment or refund of monies.

[113] In my view, Mr. Sylvestre, yet again seeks to mount a challenge based on the fact that the learned judge accepted the evidence of Lucia Gonzalez. Although there was evidence of monies supposedly in a black bag in the vault, none of the witnesses could confirm that cash was indeed in the bag. Further, the LICU’s bank statements which were produced in evidence do not show any large cash deposit during the period of the purported loan repayments.

[114] Accordingly, the learned judge was justified in her finding. Unless Mr. Sylvestre can show that the conclusion is plainly wrong, I am not minded to overturn this finding.

Breach of trust by using the LICU’s credit card for personal purchases.

[115] Mr. Sylvestre highlighted that there were no written policies or guidelines for the usage or repayment of charges to the credit card. Consequently, it could not be said that Ms. Gomez abused her office. Further, he submitted that the findings relied upon in the report of Mr. Flowers constitute inadmissible hearsay.

[116] The learned judge relied on the finding of Mr. Flowers that LICU routinely made credit card payments for Ms. Gomez’s personal purchases and that there was no proof that she had reimbursed the LICU for the payments made on her behalf. The learned judge concluded that Ms. Gomez’s use of the LICU credit card for the purchases of personal items were not related to the business of the LICU and was an abuse of LICU’s credit card.

[117] I respectfully disagree with Mr. Sylvestre that this aspect of Mr. Flowers’ report would be inadmissible hearsay. Information obtained by Mr. Flowers through first-hand knowledge (as found in his Report) is admissible and can be acted upon. In any event, the learned judge referred to the evidence of Mrs. Yadeli Urbina at pages 157 – 158 of the judgment and at all material times had the documentary evidence referred to by Mr. Flowers in his expert report. Mr. Flowers’ finding in relation to the credit cards was not therefore inadmissible hearsay,

since the documentary evidence was provided to the court via the witness statement of Mrs. Urbina.

[118] While there is no established policy in place specific to the use of the LICU's credit card, Ms. Gomez had a duty not to abuse this privilege. The LICU credit card was to be used for the business of LICU and not for personal expenses of the general manager. The judge found that Ms. Gomez used the credit card for \$67,000 worth of personal expenses and that there is no evidence of repayment from Ms. Gomez. This was a finding which was open to the learned judge based on the evidence before her. Accordingly, this finding cannot be impugned.

Falsification of the accounts – Instructing the disbursement of unauthorized loan facilities to Ms. Gomez's husband, Armando Gomez, and niece, Fiona Reyes.

[119] Mr. Sylvestre submitted that the learned judge failed to consider the elements of falsification and ignored evidence confirming the legitimacy of the loan duly recorded in the Emortelle system and the promissory note being duly altered. He argued that the judge failed to consider that there was no evidence that Ms. Gomez made any false entries and was in possession of the documents or control of the system to falsify records. He further argued that the judge failed to consider that the loan is being paid by the account holder.

[120] Additionally, Mr. Sylvester contended that the judge failed to consider that Fiona Reyes provided due authority to Armando Gomez, as joint owner on the account, to facilitate and assist her as she lived abroad and that it was customary practice to assist members living abroad with disbursements. Further, he said that the judge failed to properly consider the evidence that the sum of \$26,100 was duly "approved by the Credit Committee on 22nd August 2012" and further that only loans above the ceiling of \$100,000 were required to be tabled to the Board of Directors or the Credit Committee. He submitted that all loans and additional loan requests under the \$100,000 ceiling were processed and disbursed immediately. The Credit Committee subsequently reviewed and endorsed those loans.

[121] Mr. Sylvestre's contentions can easily be resolved by reference to the learned judge's judgment. The learned judge relied on the evidence of Mr. Flowers which disclosed a series of transactions on the account of Fiona Reyes/Armanda Gomez. There was evidence that Ms.

Gomez facilitated multiple refinancing of a loan advanced to the joint account held by her husband and her niece. The judge noted at pages 482-483 of the judgment that:

“On 23rd May 2012, Mrs Gomez facilitated the refinancing of a loan of \$18,736 by advancing an additional sum of \$7,000 to the joint account held by these two people to whom she was closely related. A few days later on 19th June 2012, the loan was increased to \$28,736 by an additional advance of \$10,000 which was disbursed to Mrs. Gomez on the same day. This loan was again refinanced to \$54,836 by an additional sum of \$26,100 which was issued to Mr. Gomez between 9th and 14th August 2012. This sum was approved by the Credit Committee on 22nd August, 2012. After this, the loan application was further altered on the instructions of Mrs. Gomez to enter an additional \$14,000, increasing the loan balance to \$68,836. The additional \$14,000 was disbursed to Mr. Gomez between 23rd August and 5th September 2012. The promissory notes on file were altered in each instance to conform to the amounts of the unapproved loans and disbursements. On 10th April 2015, Mrs. Gomez removed her husband Armando Gomez as a joint holder of the account; at that time the loan balance stood at \$53,592.77.”

[122] The learned judge found that those transactions which are set out in the report of Mr. Flowers confirm violation of LICU’s conflict of interest policy and Code of Ethics. She found that they also confirmed that the account was falsified after the loan had been approved by the Credit Committee. Further, she observed that there were no loan applications to support these transactions, in breach of Article VI section 2 of LICU’s by-laws.

[123] In my view the evidence details the unlawful alterations to records of the LICU including promissory notes and loan applications. Further, although there is no direct evidence that Ms. Gomez personally effected the changes to the documents or in the Emortelle system, Ms. Gomez, in her evidence, confirmed that she gave the instructions for the loan write offs to be effected. Ms. Gomez never disclosed to the board that she had an interest in loan facilities which were advanced to the joint account held by her husband and her niece.

[124] In my view, the learned judge considered the evidence that was before her and arrived at the conclusion that Ms. Gomez was liable to pay the sum of \$53,592.77. Facilitation of transactions does not authorize the amendment to loan documents or the violation of LICU’ policies by the extension of further loan facilities without a formal application. Further, the

only evidence before the judge regarding repayment of this facility was the evidence of Ms. Gomez that she had been making payments by way of salary deductions. There is no other evidence that the loan has been repaid, or is still being paid to LICU.

[125] Having reviewed the learned judge's findings, I am satisfied that she did not misdirect himself on the evidence nor did she make a decision that was plainly and manifestly wrong or that a reasonable judge would not have made. As such, I do not have any proper basis for interfering with her conclusions.

Disbursement of \$27,000 to Armando Gomez, which was drawn on the account of Roy Roberto Rosado, through the dishonest manipulation of the said account.

[126] Mr. Sylvestre told this Court that the learned judge failed to properly consider the evidence confirming the legitimacy of this loan adjustment as the loan is duly recorded in the Emortelle system and the promissory note being duly altered. He said that she failed to consider evidence confirming the legitimacy of this loan adjustment as being duly authorized by Mr. Rosado to be made to Mr. Gomez, as Mr. Rosado was abroad. Further, Mr. Sylvestre argued that the judge failed to consider Ms. Gomez's evidence that it was customary practice to assist members living abroad with disbursements, and that monies have since been repaid.

[127] In this regard, the judge relied on the evidence set out in Mr. Flowers report which showed that the LICU granted a loan of \$13,000 to Roy Rosado, Ms. Gomez's nephew and that this sum was disbursed to Mrs. Gomez's husband. The evidence was that after his loan of \$13,000 was recorded an adjustment was made to the Emortelle system increasing the loan from \$13,000 to \$40,000. There was no loan application or approval to support the additional \$27,000. The evidence showed that the promissory note was altered by changing the word "thirteen" to "forty" and on that same day, the additional sum of \$27,000 was disbursed to Ms. Gomez's husband. This evidence led the learned judge find that Ms. Gomez not only authorized the loan disbursement but also instructed the falsification of her nephew's account.

[128] There was no evidence before the learned judge of repayment and so she cannot be criticized for failing to consider this issue. Further, there was no evidence to suggest that the adjustment was duly authorized.

[129] In the absence of a plain error, there is no basis upon which this court can overturn this finding. Ms. Gomez's actions were a clear violation of the LICU's by-laws and policies, of which she should, I would assume, have had knowledge.

Is Ms Gomez liable to repay or accountable to the LICU for the sum of \$436,906.34

[130] Mr. Sylvestre submitted that in the learned trial judge's decision, there is no analysis of what constitutes embezzlement and whether there was any evidence adduced to prove this. He submitted that given embezzlement is a conduct of dishonesty, as the authorities show, there would need to be cogent evidence to prove embezzlement.

[131] I note that the learned judge, at page 486 of the judgment, concluded that Ms. Gomez was liable to pay to the LICU the sum of \$436, 906.34 for loss sustained. The learned judge made no clear finding that Ms. Gomez was accountable to the LICU for the embezzlement of that sum. The pleadings adequately provided the basis for the learned judge to make the determination that Ms Gomez was liable to the LICU for its losses as a direct result of the mismanagement, falsification of accounts, breach of trust and violations of the by-laws/rules/regulations of the LICU all perpetrated by Ms. Gomez which amounts to dishonest conduct. As I stated above, throughout the pleadings, the LICU made allegations of dishonesty against Ms. Gomez in breach of the mandate given to her by LICU. The learned judge was therefore clearly right to find that Ms. Gomez acted dishonestly, and in violation of LICU's policies and by-laws. I have not discerned any basis tending to show that the learned judge may have committed some error in principle in her assessment of the evidence or that she failed to take into account relevant matters or took into account irrelevant matters or that there is a real prospect that her decision may be plainly wrong.

Conclusion

[132] In the circumstances, Ms. Gomez's consolidated appeals must fail. I would dismiss this appeal, with costs to the first and second respondent to be assessed, if not agreed, within 21 days of this judgment.

[133] I gratefully acknowledge the assistance of all counsel and apologize for the delay in the delivery of this judgment.

FOSTER, JA

WOODSTOCK-RILEY, JA

[134] I concur.

WOODSTOCK-RILEY, JA

BULKAN, JA

[135] I have read the judgment of my brother Justice Foster and fully concur with the Order proposed by him in para 132.

BULKAN, JA