

**TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**H.C.A. Cv. 2085 OF 2001**

**BETWEEN**

**CABFLOOR ENTERPRISES LTD.**

**PLAINTIFF**

**AND**

**TRINIDAD & TOBAGO FOREST PRODUCTS LTD. (TANTEAK)**

**DEFENDANT**

**Before The Honourable Mr. Justice Stollmeyer**

**Appearances:**

**Mr. J. Mootoo for the Plaintiff**

**Mr. P. Deonarine for the Defendant**

**JUDGMENT**

The application before me is the Plaintiff's summons for summary judgment under the provision of Order 14 of the Rules of the Supreme Court, 1975.

By writ of summons filed at 25<sup>th</sup> July 2001 the Plaintiff makes several claims against the Defendant, all of which are set out in the statement of claim endorsed on the writ. The facts pleaded in the statement of claim are verified by the affidavit of Reynold Logan filed 21<sup>st</sup> August 2001 on behalf of the Plaintiff. The affidavit in opposition of Suzette Liverpool-Bailey filed 13<sup>th</sup> November 2001 on behalf of the Defendant denies none of the matters so pleaded and verified, nor does it put forward any evidence which casts doubt on the accuracy of the alleged terms of the contract, or of the amounts claimed by the Plaintiff, or of the alleged breach of contract. It does, however, set out to raise the issue of the validity of the contract upon which the Plaintiff bases its, or one of its, claims. In the event, the facts so pleaded and verified are admitted and are briefly as follows.

By agreement made between the parties in or about March 2000, which agreement was partly orally, partly written and partly by conduct, the Plaintiff was to cut and extract teak logs and poles from the "1963 Morne Diablo Teak Plantation" owned by the Forestry Department of the government of Trinidad and Tobago, and managed by the Defendant, and deliver those logs and poles to the Defendant's lumber yards at Carlsen Field and/or Brick Field. The Defendant was to pay the Plaintiff for these services, saw the logs and poles, and then sell the resulting "mill run sawn lumber" to the Plaintiffs at agreed prices for use in the Plaintiff's business. This agreement was for the period 27<sup>th</sup> March 2000 to 28<sup>th</sup> August 2000. There is no denial that the parties each performed fully their duties and obligations under this first contract.

In or about December 2000 the parties entered into a second contract under which work to be carried out by the Plaintiffs and Defendants respectively were the same in nature as in the first contract, and on the same terms as to the prices to be paid by the parties as had been agreed in the first contract.

This contract was varied in or about March 2001 by oral agreement arrived at by Mr. Reynold Logan on behalf of the Plaintiff and Mr. Michael King on behalf of the Defendant, so as to allow the Defendants to retain for its own use such quantities of mill run sawn lumber as the Plaintiff might agree from time to time.

In pursuance of this contract, the Plaintiff says that it delivered some 13,133.33 cubic feet of teak logs to the Defendant's lumber yard at Carlsen Field between January 2001 and April 2001. Under the terms of this second contract, the Defendant was to pay to the Plaintiff \$5.00 per 1.27 cubic feet for felling, bucking and extracting logs; a further \$3.00 per 1.27 cubic feet for loading and transporting the logs for delivery to the Defendant's Carlsen Field facility; and \$0.70 per linear foot for poles delivered to the Defendant's facilities at Carlsen Field and/or Brick Field. These were the same prices as had been agreed in the first contract.

Further, the Plaintiff was to pay to the Defendant \$4.50 per board foot for the mill run sawn lumber sold to the Plaintiff and \$0.70 per linear foot in respect of logs which it purchased.

As a consequence of the amendment in March 2001 the Defendant was to pay \$3.05 per board foot for the mill run sawn lumber, and \$0.70 per linear foot for poles, which the Defendant retained under the terms of the amended contract. I will refer to the contract as amended as "the second contract".

Under the provisions of the second contract, it was agreed by the parties that the Defendant would retain a total of 4,272.8 cubic feet (41,883.17 board feet) of mill run sawn lumber and 9,975 linear feet of poles. As a consequence of this, an amount of \$155,125.99 became due to the Plaintiff by the Defendant.

The Defendant, however, has only paid to the Plaintiff \$111,274.32 for the cutting, extracting and transportation of 13,333.33 cubic feet of logs to Carlsen Field thus leaving a balance of \$9,339.47 due by the Defendant to the Plaintiff.

The Plaintiff further alleges that the Defendant has failed/refused to saw any part of the 8,860.53 cubic feet of logs (being the quantity left after the Defendant retained the 4,272.8 cubic feet of mill run sawn lumber referred to above) and/or to sell same to the Plaintiff despite the Plaintiff's requests that this be done.

The Plaintiff pleads an alternative cause of action at paragraph 14 of the statement of claim. It is a claim founded on an account stated in the amount of \$164,465.46 set out in writing and contained in an I.O.U. dated 10<sup>th</sup> July 2001.

The affidavit of Ms. Liverpool-Bailey is confined to putting forward two possible defences. The first is that there was no legal relationship between the parties in relation to the second contract; the second is that there was no knowledge, much less approval, by the Defendant's Board of Directors of the contract with the Plaintiff, and that there was no authority given to anyone to enter into the second contract with the Plaintiff.

The circumstances surrounding the coming into, the varying, and the performance of the second contract are therefore of some importance.

The Defendant does not deny the validity of the first contract of March 2000, nor does Ms. Liverpool-Bailey in her affidavit deny that either or both Mr. King or Mr. Chung had the authority to enter into contracts of this nature on behalf of the Defendant. Rather, she sets out that the existence of the second contract was not known to the Board of Directors, or of its Tenders Sub-Committee, and while her affidavit refers to revised tendering procedures and to a meeting of this sub-committee where a decision was taken against recommending an award of six contracts, there is nothing in her affidavit or the exhibits thereto, including extracts of certain meetings of the Tenders Sub-Committee and the Board of Directors, to suggest that the contract with the Plaintiff was invalid or to be terminated.

Mr. Reynold Logan's affidavit in reply puts forward certain evidence as to the issues of the Plaintiff's knowledge of the Defendant's internal procedures, and the authority of Messrs King and Chung to enter into contracts on behalf of the Defendant against the Defendant.

It is in these circumstances that the Plaintiffs claims:

- (a) the amount \$9,339.47;
- (b) the amount of \$155,125.99;
- (c) alternatively, the amount of \$164,465.46 upon an account stated;
- (d) damages for breach of contract;
- (e) interest of the rate of 12% per annum until payment or as such rate and for such period as the Court thinks just;
- (f) costs; and
- (g) further or other relief.

The Defendant entered an appearance to the action on 2<sup>nd</sup> August 2001 and the Plaintiff then issued a summons on 21<sup>st</sup> August 2001 under the provisions of Order 14 of the Rules of the Supreme Court seeking the following reliefs:

- (a) final judgment in the sum of \$164,465.46 in respect of an account stated in writing dated 10<sup>th</sup> July 2001;
- (b) interlocutory judgment for damages of breach of contract of the second agreement, as amended in or about March 2001;
- (c) interest thereon at the rate of 12% per annum until payment or at such rate and for such period as the Court thinks just; and
- (d) the costs of the application and the costs of the action.

The application is supported by an affidavit of Reynold Logan on behalf of the Plaintiff filed 21<sup>st</sup> August 2001. There is an affidavit in opposition filed 13<sup>th</sup> November 2001 sworn by Suzette Liverpool-Bailey. Finally, there is the affidavit of Reynold Logan filed 23<sup>rd</sup> November 2001 in reply to the affidavit in opposition.

At the outset of the hearing of the application, Mr. Deonarine raised a preliminary objection on behalf of the Defendant and thereafter, my having overruled the objection, raised two issues as to the substantive application: first, that it is not a fit and proper case for Order 14; and, second, that there are various triable issues.

### The Preliminary Objection

In essence, the preliminary objection is that the specially endorsed writ in this matter is not "good and complete within itself", and that this is a valid objection to be taken on the hearing of an Order 14 application.

The objection can be expanded in the following manner: if a claim is made by a specially endorsed writ of summons, then you cannot therein claim unliquidated damages, as has been done in writ in this action. Nor can you claim interest unless it is "linked" to the cause of action i.e. the contract or a statute, and that has not been done in the instant case. He further submitted that Order 6 Rule 2 may not set out what is meant by a specially endorsed writ, but it differentiates between a specially endorsed writ and a generally endorsed writ. In particular, he draws my attention to Order 6 Rule 2 (b) which requires that where a claim is made is for a debt or liquidated demand only, then the writ must be indorsed with, inter alia, a statement of the amount claimed in respect of the debt.

In support of his submissions, Mr. Deonarine referred me to the following authorities: 1. *Gurney v. Small* [1891] 2QB 584; *Sheba Gold Mining Co. Ltd. v. Trubshawe* [1892] 1QB 674; *The Gold Ores Reduction Co. Ltd. v. Parr* [1892] 2 QB 14; Goldrein & Wilkinson on "*Commercial Litigation: Pre-emptive Remedies*", 3<sup>rd</sup> Ed. at page 336; *Supreme Court Practice 1993* 14/1/4.

Mr. Mootoo's submissions are that *Gurney v. Small*, upon which Mr. Deonarine places heavy reliance (as Mr. Deonarine himself expressed it), and the other decisions referred to by Mr. Deonarine were all based upon the then Orders and Rules of the Supreme Court and that they have come to be changed over the years. In this context he referred me to *Atkin's Encyclopedia of Court Forms* Vol. 29 (1983) Re-issue at page 183 paragraph 2. Mr. Mootoo's further submission is that apart from the scope of Order 14 proceedings having widened considerably and now includes applications for final judgment which were not permissible under the English 1875 Rules which were in force at the time of e.g. *Gurney v. Small*, it is perfectly permissible, although not the practice, to include claims for both a debt or liquidated demand, as well as claims for unliquidated demands or unliquidated damages, in a statement of claim endorsed on a writ. In practice this is referred to as a specially endorsed writ.

An examination of Order 6 Rule 2 of the *Rules of the Supreme Court 1975* shows that Rule 2 (1) (a) requires that a writ must be endorsed prior to issue with either a statement of claim or a concise statement of the nature of the claim made, or the relief or remedy required in the action. Rule 2 (1) (b) requires certain details to be set out in the statement of claim where the claim is for a debt

or liquidated demand only. Rule 2 (1) (c) requires the writ to be endorsed with a statement as to whether the plaintiff's right to possession is subject to any statutory restrictions, where the claim made is one for possession of land.

There is nothing in Order 6 Rule 2 or, in any of the other Orders or Rules of the Supreme Court to which my attention has been drawn, that either prohibits the making of mixed claims, e.g. for both liquidated demands and unliquidated damages, in a statement of claim indorsed on a writ, nor any requirement that these mixed claims must be set out in a statement of claim which is a document separate from the writ of summons itself.

On enquiry from the Court as to where such a prohibition or requirement might be found, Mr. Deonarine referred to the decision in *Gurney v. Small* which, he submitted, was a decision which went not only to proceedings under Order 14 but also to the issue of whether mixed claims can properly be the subject matter of a specially indorsed writ. He referred me particularly to the passage in the judgment of Wills J. at page 586 which reads "*...in the present case it is perfectly clear that the writ to which the defendant originally appeared was not so specially indorsed; to hold otherwise would be to deprive the expression 'seeks **only** to recover' in that rule of all its significance .... The operation of Order XIV, r. 1, is confined, therefore, to the case of a defendant appearing to a writ of summons specially indorsed with a liquidated demand under Order III r. 6, and nothing else. Where that is the case, leave may be given to enter judgment 'for the amount so indorsed' – an expression which shews, if further arguments were necessary, that the order is only intended to apply to writs previously, specially indorsed under Order III r. 6*".

At the time when *Gurney v. Small* was decided, Order 14 Rule 1 (a) provided as follows:

*"Where the defendant appears to a writ of summons specially indorsed under Order III, Rule 6, the plaintiff may on affidavit made .....*"

At that time, the then existing Order III made a similar provision (as do now our existing rules) for indorsement, and, particularly, indorsement in instances where a plaintiff sought only to recover a debt or liquidated demand. Order III, Rule 1 required an indorsement of claim on every writ prior to issue. Rule 2 provided that it was not essential to set out the precise ground of the complaint or the precise remedy or relief which was being sought. This would be the equivalent of what is now referred to as the generally indorsed writ.

Order III Rule 6 at that time provided that "*In all actions where the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising*

..." on a contract or in certain other circumstances, then "... *the writ of summons may at the option of the plaintiff be especially indorsed with a statement of his claim, or of the remedy or relief to which he claims to be entitled*". This might be regarded as the equivalent of the present day specially indorsed writ and of our Order 6 Rule (2) (1) (b), but with one very vital distinction: the latter makes no mention of, and imposes no requirement, as to the circumstances in which interest on the claim can also be indorsed. In other words, a claim for interest is not now confined to the limited circumstances formerly found in Order III Rule 6.

What is of importance is that under neither rule is there any prohibition against the mixing of claims in a writ of summons, nor is there any requirement that mixed claims must be the subject of a separate statement of claim i.e. that a writ based on mixed claims must be one which is generally indorsed with a separate statement of claim. It may be the practice, certainly, to do so, but it is not a requirement of the Rules.

The *Supreme Court Practice 1993* at 14/1/4 sets out that the statement of claim is to be complete and good in itself, and that no defect or omission can be corrected or supplemented by the plaintiff's affidavit in support. Mr. Deonarine was at pains to point out to me this passage, and also that if the defect is one of substance, then the application for summary judgment is to be dismissed. This passage also goes on to say that, on the other hand, a defect in the statement of claim may be remedied or corrected by amendment under the provisions of Order 20, and that it is not necessary thereafter to issue a fresh summons under Order 14 or make a fresh affidavit, save as may be made necessary by the amendment.

The first of these passages is supported by the decision in *Gold Ores Reduction Co*, the second by the decision in *Sheba Gold Mining Co*. and the last by the decision in *Gurney v. Small*.

A reading of the judgment of Wills J. in *Gurney v. Small* shows that it dealt with an application under Order 14 where the indorsement on the writ had been amended after the issue of the Order 14 summons. This was done by way of deleting an unliquidated demand which had been included initially in the writ. It was held that in those circumstances there was no jurisdiction to make an order giving the plaintiff leave to enter final judgment (see the Headnote at page 584). At page 587, Wills J. says "*In the present case the plaintiff, at the time when he took out this summons, had no right to take it out, for there was then no specially indorsed writ under Order III, r. 6, and the defendant had therefore not appeared to a specially indorsed under that rule. And this original defect is not cured by the subsequent amendment of the indorsement;...*".

It is clear that under the Rules then in existence the defendant had to appear to a writ of summons which was specially indorsed under Order III Rule 6, and in that in *Gurney v. Small* it was "perfectly clear" that the writ was not specially indorsed. Great emphasis needs to be placed on the word "only" which relates to a plaintiff's claim for a debt or liquidated demand. At the time of *Gurney v. Small* being decided, no other application could be made under Order 14. See *Annual Practice 1925* at page 154 under "Preliminary Requirements" and at page 155 under "Indorsement on the writ".

The present Order 14, however, permits an application to be made in an action where a statement of claim has been served and an appearance entered "*.....on the ground that there is no defence to a claim included in the writ, or to a particular part of such a claim or part except as to the amount of any damages claimed...*". Applications for summary judgment under the provisions of this Order can be made in every action by writ save in Admiralty, Probate or actions including a claim for libel, slander, malicious prosecution, false imprisonment, seduction, breach of promise of marriage or a claim based on an allegation of fraud. See *Order 14 Rule 1. (2) (a) and (b)*, and *Supreme Court Practice 1993* at 14/1/1.

It is therefore now possible to apply for final judgment under Order 14 where a writ has been issued claiming relief in any action, other than those set out above, and also where the claims are mixed, with no restriction on the interest which may also be claimed. The Court has a discretion to award interest provided the claim for interest has been specifically pleaded, whether pursuant to the provisions of the Supreme Court of Judicature Act or otherwise. See "*Commercial Litigation: Pre-emptive Remedies*" at page 394. It is no longer a summary process confined purely to specially indorsed writs claiming recovery of a debt or liquidated demand in money, with or without interest arising in certain circumstances.

For those reasons the Defendant's preliminary objection fails.

#### *Not a Fit and Proper Case for Order 14*

The core of this submission is that there are circumstances which require close investigation by the Court, thus necessitating a trial. As Mr. Deonarine came to say, "I want to cross examine Reynold Logan on these oral contracts".

Mr. Deonarine's submission was that the first contract was only a contract for the cutting, extracting and transportation of logs i.e. a logging contract, as evidenced in the written agreement

of 23<sup>rd</sup> March 2000, and that this is therefore all which could ultimately form the second contract, and nothing more.

This submission is based on Mr. Logan saying in his affidavit of 23<sup>rd</sup> November 2001 that there had been previously a written agreement of February 2000 (which although bearing a typewritten date of 14<sup>th</sup> February 2000 was signed on 29<sup>th</sup> February 2000, but that is not material) for the sale of mill run sawn lumber by the Defendant to the Plaintiff, but that this agreement in February 2000 had been "superceded" by the first contract which makes no mention of the sale of this product to the Plaintiff.

Mr. Deonarine further submitted that this has two effects. First, it raises a question as to the terms of the first contract because the document of 23<sup>rd</sup> March 2000 does not set out its full terms and there are thus circumstances requiring close investigation which can only be carried out at a trial. He referred me to the *Supreme Court Practice 1993* at 14/3-4/9.

Further, Mr. Deonarine submitted that Reynold Logan's affidavit in reply of 23<sup>rd</sup> November 2001 contradicted the existence of a logging contract, as pleaded at paragraph 3 of the statement of claim, when he introduces this agreement of February 2000 for the sale of mill run sawn lumber. Again, he put forward that there were circumstances warranting close investigation.

Second, submitted Mr. Deonarine there is a consequential "knock-on" effect of all this which taints the second contract in the same manner: there is only the letter of 12<sup>th</sup> December 2000 which refers to logging operations and nothing more, consequently, the only contract which the Plaintiff can show as having come into existence is one restricted to logging operations and nothing more.

With respect, I am not persuaded that this is so.

First, Reynold Logan's affidavit of 23<sup>rd</sup> November 2001 is in reply to Suzette Liverpool-Bailey's affidavit of 13<sup>th</sup> November 2001 and obviously seeks to deal with the issues raised there, not with verifying the matters pleaded in the statement of claim. Reynold Logan had already verified the matters set out in the statement of claim in his affidavit of 21<sup>st</sup> August 2001.

Second, the statement of claim sets out that both the first contract and the second contract were partly oral, partly written and partly by conduct. There is no denial of any discussions having taken place between Messrs. Reynold Logan and Barry Logan on behalf of the Plaintiff on the one hand, and Messrs. Michael King and Maurice Chung on behalf of the Defendant on the other hand.

Consequently, the fact that the documents of 23<sup>rd</sup> March 2000 and 12<sup>th</sup> December 2000 do not set out all of the terms of the contracts is to me very understandable and very clear. The purpose behind Mr. Reynold Logan deposing as he does in his affidavit of 23<sup>rd</sup> November 2001 is to deal with the issues of his knowledge, whether actual or constructive, of the Defendant's internal procedures and the authority of Messrs King and Chung to enter into contracts on behalf of the Defendant. Mr. Logan set out to do so by showing that Mr. King, at least, had previously entered into contracts in writing on behalf of the Defendant.

This submission therefore fails.

### Triable Issues

Mr. Deonarine eventually came to agree that the issue raised by the Defendant in Ms. Liverpool Bailey's affidavit of 13<sup>th</sup> November 2001 is whether Messrs. King and/or Chung had authority to enter into the second contract on behalf of the Defendant.

What Ms. Liverpool Bailey says in relation to this issue is that the Cabinet of the Government of Trinidad and Tobago agreed to her appointment to the Board of Directors to the Defendant on July 18<sup>th</sup> 2000. She does not say when she assumed those duties, but does say that when she did so certain tender procedures were in place. Further, she says that on 2<sup>nd</sup> November 2000 the Defendant's then Chief Executive Officer, Alvin Seereeram, sought approval of the Board of Directors in relation to three tenders which had been invited, none of which concerned the Plaintiff. Queries were raised by the Board of Directors and it appointed a Tenders Sub-Committee. Ms. Liverpool Bailey was herself appointed to this sub-committee on 23<sup>rd</sup> January 2001.

The queries raised in relation to the tenders concerned pricing and selection of preferred bidders, and the sufficiency and accuracy of the recommendations made by management. The first mandate of the Tenders Sub-Committee was to review the existing procedures in relation to tenders received.

The Tenders Sub-Committee, at a meeting of 30<sup>th</sup> November 2000, which Ms. Liverpool Bailey would not have attended having only subsequently been appointed to that sub-committee, agreed that the procedures for selective tendering should be re-examined, and that an assessment would have to be made of any "field" (of teak, presumably) before it was contracted out. At that meeting two tenders were approved, neither of which related to the Plaintiff, and that that approval was rectified by the Board of Directors on 19<sup>th</sup> December 2000.

Ms. Liverpool Bailey further deposes that no approval was ever sought of the Board of Directors or the Tenders Sub-Committee, nor was the Board ever aware of any logging or other contract with the Plaintiff, and further, that the Board would not have sanctioned the second contract because first, it was not awarded in accordance with the then existing tendering procedures and, second, the prices quoted were unacceptable.

The Board of Directors also decided in January of 2001, after the Chief Executive Officer had reported that there were no logging contracts issued save for those set out in Ms. Liverpool-Bailey's affidavit, none of which had anything to do with the Plaintiff, that the existing form of logging contract should be reviewed by the Tenders Sub-Committee.

Nothing is said in her affidavit of 13<sup>th</sup> November 2001 as to whether a final form of logging contract has been agreed, nor whether any tender procedures have been laid down.

As to the Plaintiff's knowledge of the authority to enter into contracts by Messrs. King and Chung, Ms. Liverpool-Bailey says only that the Plaintiff well knew at all material times that the Defendant was a State Enterprise "...and ought to have known before any contracts could be entered into on behalf of the Defendant the Board would have to approve same. The Plaintiff had been dealing with the Defendant for a period of years and was familiar with the tendering and internal procedures of the Defendant".

Further, Ms. Liverpool Bailey deposes that

"The purported renewed contracts and its amendments appear to take the form of letters and conversations, which are not in keeping with the manner in which Tanteak awarded its contracts. If a Logging Contract is to be awarded by Tanteak, it would be submitted in writing for both parties to sign of which the Plaintiff well knew as was done in the previous contract. As such, the manner in which the Plaintiff has based its claim in relation to the contract would place the Plaintiff on enquiry that all was not in order. The Plaintiff by its Managing Director, Reynold Logan who worked as Sales Manager with the Defendant and knew the procedures".

"Based on the express policy of the Board and the knowledge of the Plaintiff in relation to the internal and tendering procedure of the Defendant Company, any purported act by any Agent of Tanteak would be null and void and of no effect".

Her affidavit therefore deals almost exclusively with the Defendant's internal procedures. It does not venture to say how these might be, or become, known to the Plaintiff or any one else.

There is nothing before me to indicate that the public, including the Plaintiff, knew that contracts of this nature could only be awarded as a consequence of a tendering procedure which was known to, or could reasonably have been known to, or could reasonably be expected to be known to, the public or the Plaintiff. There is nothing in her affidavit to indicate that this tender procedure was anything other than an internal procedure, nor to indicate that it was known by any other party. Similarly, the purchasing procedure set out in her exhibit "SLB3" is an internal procedure not shown to be known to the general public, and more particularly, not shown to be known by the Plaintiff.

In response to this Mr. Reynold Logan says that he worked as a Sales and Manufacturing Manager with the Defendant but resigned from that position in 1988, since which time the majority of management and staff employed by the Defendant, as well as its Directors, have changed. More significantly, he says "Neither the Plaintiff nor I have had any knowledge of the internal management procedures of the Defendant since 1988".

It is to be noted that none of the material put forward by Ms. Liverpool Bailey by way of exhibits to her affidavits relating to the internal procedures of the Defendant predates Mr. Logan's departure from his employment with the Defendant. He denies that while he worked with the Defendant contracts would have to be approved by its Board of Directors prior to being entered into, and goes further to say that during the time he was Sales Manager he was authorised to, and did, enter into contracts on behalf of the Defendant with a variety of parties for sawmilling and logging operations without any assessment of those contracts being made by the Board of Directors.

As to the Plaintiff dealing with the Defendant, he says that the Plaintiff was never informed that the approval of the Board of Directors would have to be sought and obtained before the Defendant could enter into any contract, and that the Plaintiff entered into contracts with the Defendant without any reference to the latter's Directors or for Board approval. He gives two examples of these prior contracts. The first is by the letter of February 2000 which is signed by Mr. King. The other is the first contract, also signed by Mr. King. He deposes further that payments were made pursuant to both the first contract and the second contract, and that performance of the second contract by the Plaintiff continued up to March 2001, exhibiting copies of certain "Log Removal Permits" evidencing acceptance of logs by the Defendant.

Perhaps most significantly, he says that the Defendant relied upon the fact that it had previously entered into contracts with the Defendant, at the time when Mr. King acted on the Defendant's behalf in relation to the second contract the second contract.

There is nothing before me to contradict any of this, or to raise any issue in relation thereto. Further, and equally if not more important, it is not what the Defendant's Board of Directors might or did not know that is important: it is what the Plaintiff knew or could reasonably be expected to know in all the circumstances.

It is clear from what is before me that the first contract i.e. that of March 2000, came into existence as a consequence of discussions between Messrs Reynold Logan and Barry Logan on behalf of the Plaintiff, and Michael King and Maurice Chung on behalf of the Defendant. The terms of that first contract are set out, in part, in a letter written by the Defendant to the Plaintiff of 23<sup>rd</sup> March 2000 and signed by Barry Logan on behalf of the Plaintiff and Michael King on behalf of the Defendant.

Mr. King was then the Defendant's "Manager – Operations/Sales/Marketing" and signed this letter in that capacity. He had previously signed a letter written by the Defendant to the Plaintiff of 14<sup>th</sup> February 2001 in that capacity, and which letter set out the terms on which the Defendant was prepared to enter into a contract with the Plaintiff for the sale to the Plaintiff of "mill run sawn lumber".

Given the manner in which the first contract came into existence, its performance in full by both parties without question on the part of the Defendant as to its validity, I cannot see how the Defendant can now say that Mr. King, or Mr. Chung for that matter, had no authority to enter into that first contract with the Plaintiff. Indeed, the Defendant does not seek to do so, and from paragraph 11. of Ms. Liverpool-Bailey's affidavit its validity is accepted.

The Defendant's acceptance, tacit if not express, since no attempt is made to disavow it, of the validity of the first contract demonstrates an acceptance that Messrs. King and Chung did have the authority to so act, and the Plaintiff would be entitled to rely on this actual, if not ostensible, authority.

On the basis of the first contract having been entered into and performed without question, the Plaintiff then entered into the second contract in December 2000. The Plaintiff received a letter from the Defendant signed by its Production Manager, Maurice Chung, dated 12<sup>th</sup> December 2000 enquiring whether the Plaintiff would be "continuing logging operations" at the 1963 Morne

Diablo Teak Coupe in January 2001, saying that this information was needed to plan the Defendant's harvesting operations for the year 2001, and requesting a reply by 15<sup>th</sup> December. This letter is the part of the second contract which is in writing. The remaining terms and conditions are said to have been agreed orally or by conduct and the Defendant does not deny this.

Mr. Deonarine sought to distinguish between the component parts of this second contract (and the first) submitting that there was authority to enter into a written contract as to the cutting and extracting of the teak logs "in the field" and transporting them to the Defendant's facilities Carlsen Field and Brick Field, but that there was no authority delegated to either Mr. King or Mr. Chung to enter into any oral contract for the supply or sale or purchase of anything. He also submitted that Mr. Logan having deposed that the first contract "superceded" a written contract 14<sup>th</sup> February 2000, the latter could only be a component part of the former on the basis of it being agreed orally and, consequently, could not be a part of the first contract. That first contract, he submitted, was only a logging contract and nothing more than what was set out in the written agreement of 23<sup>rd</sup> March 2000. I need only add that the contract of 14<sup>th</sup> February 2000 is not disavowed by the Defendant and that it was signed by Mr. King on its behalf.

I find this distinction between the oral and written components of the contract difficult to understand, given the Defendant's acceptance of the first contract in its entirety, including those parts which were oral. It is artificial and I reject it. The Plaintiff pleads, and verifies, the first contract as a single contract and the Defendant does not in any way seek to deal with it in any different manner in Ms. Liverpool-Bailey's affidavit.

Thereafter, the Plaintiff continued, or resumed, its cutting, extracting and transportation functions. There is clear evidence of this from the Defendant's "Log Removal Permits", copies of which are exhibited as "RL4" to Mr. Logan's affidavit of 23<sup>rd</sup> November 2001. These permits were issued to the Plaintiff by the Defendant to cut teak trees. It is also clear that the Plaintiff performed these functions during the months of January, February and March 2001, with logs being accepted by the Defendant up to at least 9<sup>th</sup> March 2001. Further, some payments at least were made by the Defendant to the Plaintiff for the teak logs delivered to its facilities, and on the 10<sup>th</sup> July 2001 the Defendant's accountant, Bernadette Charles, wrote to the Plaintiff admitting, if not confirming, that the Defendant was entitled to the Plaintiff in an amount of \$164,465.46 as of that date. This letter is not disavowed nor denied.

Finally, it is clear that at the Defendant's management level at least, there was knowledge and approval of the Plaintiff carrying out this work during this time. There are minutes of meetings on 6<sup>th</sup> March 2001 and 3<sup>rd</sup> April 2001 referring to logging work being done and completed by the

Plaintiff. The Defendant's Chief Executive Officer, Mr. A. Seereeram was at these meetings, as well as a wide range of the Defendant's supervisors.

There is therefore clear evidence that the Defendant, far from taking a position that there was no legal relationship between the parties, actually performed its obligations under the second contract, for some time at least. It may well be that the Defendant's Board of Directors came to be aware of this contract at some time and decided that it should be brought to an end, but that of itself does not make the contract invalid or unenforceable from its inception, nor does it detract in any way from the existence of any binding legal relationship between the parties.

Further, the second contract is said to have come into existence partly as a result of discussions between Reynold Logan and Barry Logan on behalf of the Plaintiff and Michael King and Maurice Chung on behalf of the Defendant; partly as a result of a letter dated 12<sup>th</sup> December 2000 written by the Defendant to the Plaintiff, a letter dated 14<sup>th</sup> December 2000 written by the Plaintiff to the Defendant, the Defendant's statement of account faxed to the Plaintiff on 25<sup>th</sup> May 2001, a letter from the Defendant to the Plaintiff of 10<sup>th</sup> July 2001 and a memorandum of 26<sup>th</sup> March 2001 from Michael King to Cherylene Kelly and David Lambert; partly by conduct, by virtue of the Defendant receiving the Plaintiff's letters and invoices for payment, and payment on account thereof without objection to the prices set out in those invoices; as well as partly by the course of dealings between the Plaintiff and Defendant.

There is no denial by the Defendant of the allegation as to discussions being held. Messrs King and Chung had negotiated the first contract and it was signed by Mr. King. Mr. King had a previously signed the contract of 14<sup>th</sup> February 2000 which dealt exclusively with the sale of a certain lumber products by the Defendant to the Plaintiff. Mr. Chung wrote to the Plaintiff on 12<sup>th</sup> December 2001 saying he had been instructed to do so. There had been no denial or disavowal by the Defendant of any of the terms of the first contract. Indeed, as I have said, the Defendant accepts its validity. It would therefore be only reasonable in my view for the Plaintiff to conclude that all of this was done on the instructions of whomsoever had the authority to authorise Messrs King and Chung that they could do all this, if indeed that was in fact necessary. The fact that the contract of February 2000 and the first contract had been performed by the Defendant without question would clearly place the Plaintiff in a position to assume that all the Defendant's internal procedures, whatever they may be, had been complied with, and on that basis could clearly rely on Messrs King and Chung having the authority to negotiate and enter into the second contract on behalf of its Defendant.

The question is therefore whether Messrs King or Chung had actual or only ostensible authority to so act on behalf of the Defendant.

Actual authority arises usually where there is an express delegation of authority to an agent by a principal. It is a legal and binding relationship between them of which a third party usually knows nothing, but if the latter enters into a contract with the agent, contractual rights are created as between the principal and the third party.

Apparent or ostensible authority is a legal relationship between the principal and a third party usually arising from a representation made by the principal to the third party. Where the representation is intended to be, and is in fact, acted upon by the third party, the representation is that the agent has the authority to contract on behalf of the principal. In these circumstances, it does not matter whether the agent was aware of the representation made to the third party, although he will usually know of it, and it does not matter whether the agent had actual authority to enter into the contract.

The most common form taken by the representation is as a consequence of conduct i.e. where the principal allows the agent to act in the management or conduct of the principal's business. If a board of directors of a company permits this, they represent to all persons doing business with the company that the agent has the authority to enter into contracts of a nature which a duly authorised agent is empowered to enter into in the normal course of business. The company is estopped from denying that the agent had that authority.

The third party, however, must satisfy four conditions so as to succeed on a claim against the principal:

1. a representation of the agent's authority must be made to the third party;
2. the representation must be made by someone who had "actual" authority to manage the principal's business, either generally or with respect to those matters relating to the contract in question;
3. the third party must be induced to enter into the contract i.e. must rely on, the representation;
4. there must be nothing in the memorandum and articles of a company which is a principal which deprives it of the authority to enter into a contract of the nature of that upon which the claim is based, nor deprive it of the authority to delegate to the agent the authority to enter into that contract.

See *Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd. & Anor.* [1964] 1AER 630 at pp 644C – 646C.

The extent to which an agent can now be found to have authority to bind a principal is demonstrated, for example, by the decision in *First Energy (U.K.) v. Hungarian International Bank Ltd.* [1993] 2LLR 194 where the agent had expressly told the third party he had no authority to approve large credit transactions or to sign a facility letter. No one on behalf of the defendant held him out as having this authority. Given the particular facts of that case, it was held (in the Court of Appeal) that the agent had apparent ostensible authority to write a particular letter on behalf of the defendant to the plaintiff, and that the letter had contractual effect. In any event, whether there is actual or ostensible authority, and whether the four conditions set out above have been satisfied by a plaintiff, will depend on the circumstances of each particular case.

Mr. Mootoo submitted that the Defendant's acceptance of the validity of the first contract must result in a finding that Messrs King and Chung therefore had actual authority to enter into the first contract in the manner they did i.e. partly in writing, partly orally and partly by conduct. Further, they therefore had the actual authority to enter into the second contract, again partly in writing, partly orally and partly by conduct.

While that submission may have had some initial attraction, I do not see that it falls within the accepted parameters of actual authority which requires there to be an express delegation of authority by the principal to the agent creating a legal and binding relationship between them. I have no primary evidence of that before me and I find it difficult to infer that from the evidence.

It does seem to me, however, that the four conditions which a plaintiff must satisfy to prove ostensible authority have in fact been met, even without Mr. Deonarine's submission that monies would only be paid by the Defendant to the Plaintiff if that payment had been approved by the Defendant's Board of Directors. I think that it can be properly inferred from Ms. Liverpool-Bailey's affidavit that the Board of Directors would have to approve, in some fashion, the payments to be made under a contract. That representation arises from, inter alia, the contract of February 2000; and then the first contract of March 2000 having been entered into on behalf of the Defendant by Mr. King; the first contract having come about at least partly as a consequence of discussions in which both Mr. King and Mr. Chung took part; and Mr. King signing the first contract on behalf of the Defendant. That contract, it will be recalled, was performed fully by the Defendant, which paid the monies due to the Plaintiffs thereunder, and which has not been denied by the Defendant to the present day.

Further, the second contract was entered into at least partly arising out of discussions in which both Mr. King and Mr. Chung took part; Mr. Chung signed the letter of 12<sup>th</sup> December 2000; the Plaintiff performed its obligations under the second contract, as did the Defendant up to at least March 2001, during which time the Defendant admittedly paid monies to the Plaintiff in accordance with the provisions of the second contract.

Given my conclusions that this second contract was clearly "whole" and included all the terms written, oral or by conduct, I then do not see how the Defendant can say now that the second contract is invalid. Indeed, the Defendant does not set out to reclaim any monies already paid under the second contract, and Mr. Deonarine made a concession from the Bar table, very candidly and very properly, that he had made known to Mr. Mootoo that the Defendant considered itself liable to pay the amount of \$9,339.47 which is a part of the amount claimed by the Plaintiff for the cutting, extracting and transportation of logs.

I have therefore come to the conclusion that the representation was made by way of conduct if in no other manner, and that the four conditions which a plaintiff is required to satisfy a court have been met. The second contract is therefore valid and enforceable.

In my view the Plaintiff has proved the claim clearly. I do not see that the Defendant has raised an issue or question which requires trial. It strikes me that the Defendant is saying that its Board of Directors knows nothing – but would like to know – of what might or actually took place in December 2000 and March 2001, but this desire is not a good enough reason to refuse the Plaintiff's application. See the *Lady Anne Tennant v. Associated Newspapers Group Ltd.* [1975] F.S.R. 298 at p. 303. The plaintiff's claim in breach of contract must succeed.

As to the claim founded on an account stated, an acknowledgement of a debt due is sometimes referred to as a "mere account stated" but is sufficient to allow a plaintiff to recover on a claim for an account stated. See *Knowles & Ors. v. Michel* 1881 13 East 249. Being a mere account stated, a defendant is in a position to re-open the whole question of any account on any ground, but the Defendant does not seek to do so here. The letter of 12<sup>th</sup> July 2001 is an unqualified, absolute, admission or acknowledgement of a debt which the Defendant has made to the Plaintiff. There is no denial by the Defendant of Bernadette Charles', the Defendant's accountant, authority to sign that letter see e.g. *Day v. William Hill (Ltd.)* [1949] 1AER 219; *Hughes v. Thorpe* (1839) 5M&W 656. If an account stated is alleged as a cause of action alternative to some other claim, the defence must deal expressly with that other claim and an affidavit in opposition to an application for summary judgment must set out sufficient facts and particulars to establish a prima facie defence to the claim. The Defendant here has not so much as set out to attempt this.

As to the claim for interest at the rate of 12% the Plaintiff does not plead the basis on which it is claimed. There is no evidence before me as to the date when it is to begin to run. In those circumstances this claim for interest prior to judgment fails. This, however, is not to fetter the discretion of a Court to award interest at the assessment of damages for breach of contract, if it be found appropriate to do so.

Consequently, the Plaintiff's claim on an account stated must succeed.

In the circumstances:

1. there will be final judgment for the Plaintiff against the Defendant in the sum of \$164,465.46 in respect of an account stated in writing dated 10<sup>th</sup> July 2001;
2. there will be interlocutory judgment for damages in breach of contract;
3. the damages for breach of contract are to be assessed by a Master;
4. the Defendant will pay to the Plaintiff the costs of the action, including the costs of this application, such costs certified fit for Advocate.
5. There will be leave to appeal.
6. There will be a stay of execution for 14 days on condition that the appeal is filed prior to 13<sup>th</sup> February 2002.

30<sup>th</sup> January 2002

C.V.H. Stollmeyer  
Judge