IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF THE CO-OPERATIVE REPUBLIC OF GUYANA

CCJ Appeal No CV 2 of 2010
GY Civil Appeal No 61 of 2005

BETWEEN

1. **ASHMIDPHRAQUE DAVID SHEERMOHAMED**
2. **ASLIM SHEERMOHAMMED, deceased (through Kathleen Sheermohamed the executrix of his estate)**

APPELLANTS

AND

S.A. NABI AND SONS LIMITED **RESPONDENT**

Before the Right Honourable **Mr Justice de la Bastide, President**
And the Honourables **Mr Justice Nelson**
Mr Justice Bernard
Mr Justice Hayton
Mr Justice Anderson

Appearances

Mr Christopher Roy Parker, QC for the Appellants
Sir Fenton Ramsahoye, SC and Mr Sanjeev Datadin for the Respondent

JUDGMENT
of
The Right Honourable Mr Justice de la Bastide, President
and the Honourable Justices Nelson, Bernard, Hayton and Anderson
Delivered by
The Right Honourable Mr Justice de la Bastide
on the 23rd day of May, 2011

[1] The *dramatis personae* in this appeal are the two original appellants (whom I shall refer to respectively as "Ashmid" and "Aslim" and jointly as "the appellants"), Ashmid being the son of Aslim (who is now deceased), and two brothers of Aslim, namely, Shir Amineen Nabi ("Amin") and Azeez Sheermohammed ("Azeez") also now deceased. The respondent, S.A. Nabi and Sons Limited ("the Company") is a family company engaged in the construction business. It was incorporated in Guyana in 1965. The three brothers, Aslim, Amin and Azeez, between them owned the great majority of shares in the Company and for some time comprised the Board of Directors of the Company.

The Notice of Motion

[2] The proceedings out of which this appeal arises, were launched by a notice of motion dated the 21st October, 2004, in which the Company was named as the applicant. The action was brought against four respondents with Ashmid and Aslim being named as the third and fourth respondents respectively. The first two respondents were respectively the Attorney-General and the Registrar of Joint Stock Companies, but they took no part in the proceedings and are not parties to this appeal.

[3] The notice of motion was in fact an application under s 137(1) of the Companies Act, 1991 Cap. 89:01 ("the Act") although there is no mention of this section in the notice of motion itself or in the affidavit in support. The section is mentioned, however, in the heading of the affidavit by which an *ex parte* application was made for an interlocutory injunction. This section provides as follows:

> "A company or a shareholder or director thereof may apply to the court to determine any controversy with respect to an election or appointment of a director or auditor of the company."

The purpose of the substantive application was to challenge the appointment of Ashmid as a director of the Company. The relief claimed consisted of an 'order' (a declaration really) that Ashmid was not 'lawfully appointed' a director of the Company and a number of consequential orders including an injunction restraining Ashmid from acting as a director and a declaration that certain resolutions passed by Aslim and Ashmid as

directors were null and void and of no effect. The resolutions that were targeted included those by which shares held by Amin and Azeez were subjected to a lien and then forfeited and subsequently sold to Aslim.

[4] The basis of the challenge of Ashmid's appointment was that it was made by two directors, Aslim and Amin, at a meeting held on the 10th September, 2004 to which a third director, namely Azeez was not invited. It was contended that the two directors who attended that meeting did not constitute a quorum and did not have the power to appoint what was alleged to be a fourth director. The controversial meeting was convened by Aslim for the express purpose of increasing the number of directors from two to three and thus satisfying the requirement contained in article 80 of the Company's articles that there be a minimum of three directors – all of this on the premise that Azeez was not a director at the material time. That was a premise which in September 2004, appears to have been accepted by all three brothers.

[5] At the meeting Amin proposed Azeez (presumably with Azeez's consent) to be the third director while Aslim proposed Ashmid. Aslim by means of a casting vote which he claimed as chairman resolved the deadlock in Ashmid's favour.

[6] It was crucial to the case for the applicant that Azeez was a director at the time of the meeting on the 10th September, 2004. If he was a director, then the admitted failure to invite him to the meeting alone would have nullified any business transacted at it. It was alleged that in any event there was no quorum at that meeting. These were the applicant's principal arguments although Aslim's right to a casting vote was also challenged. As a result, the central factual issue in this case was whether Azeez, who both sides agreed had been a director up to 1994, was still a director on the 10th September, 2004.

Judgment of Persaud J

[7] In the High Court Persaud J had to decide this issue largely on the basis of the documents which were introduced into evidence as annexures to the affidavits sworn respectively by

Amin in support of the application and by Aslim in opposition to it. One of the unsatisfactory aspects of this case is that it was starved of evidence. In their affidavits both deponents simply made contradictory averments that Azeez was or was not still a director in September 2004. Aslim produced no evidence of how Azeez's directorship was terminated. On the other hand, Amin offered no explanation of why he (and apparently Azeez as well) had accepted that Azeez was no longer a director or why he changed his mind about that. Moreover, for some reason, which it is difficult to fathom, the attorneys on both sides agreed that there should be no cross-examination. This had the effect, whether intended or not, of depriving the judge of any chance of discovering the answers to these crucial questions.

[8] The trial judge, Persaud J, considered the documentary evidence in the case. He paid particular attention to those documents which were signed by Amin who was the Secretary of the Company as well as a director. These included annual returns to the Registrar of Companies for the years 1995, 1996 and 1997 which reported that the Company had only two directors, Aslim and Amin. The Judge also referred to evidence that Amin had brought to Aslim's attention that the Company was in non-compliance with its articles since there were only two directors in place and the minimum number of directors required by the articles was three. This position was maintained by Amin in a letter written to Aslim dated the 30th September, 2004. The judge also took into account annual returns for the years 2002 and 2003 in which Azeez was shown as a director, but he found that there were aspects of these returns which rendered them unreliable. In the end, he held that on the evidence it had been established that Azeez was not a director in September, 2004. He also found that Aslim and Amin were entitled to fill the gap by appointing a third director and that Aslim was chairman and entitled to a casting vote. Accordingly, he gave judgment in favour of the appellants (respondents to the notice of motion) but made no order as to costs.

Judgment of Court of Appeal

[9] In the judgment of the Court of Appeal the case took a different turn. For the Court of Appeal it was crucial that the applicant was not Amin but the Company and therefore the Court of Appeal held that the "out-of-court assertions" of Amin to the effect that Azeez had ceased to be, and was not at the material time, a director of the Company, could not be used as evidence of the truth of that which was asserted but only as prior inconsistent statements that could be used to undermine Amin's credibility. All the evidence therefore that Amin had up to the end of September, 2004, demonstrated both in writing and by his conduct that he firmly believed that Azeez was no longer a director of the Company, was held to have no positive probative value whatever. The Court of Appeal stressed that the appellants (respondents in the Court of Appeal) had provided no evidence that anything had occurred which would have resulted in the termination of Azeez's directorship pursuant either to article 95 of the Company's articles or to section 69 of the Act. The Court held that in those circumstances the appellants had failed to discharge the evidential burden that lay on them to rebut the presumption that Azeez who had admittedly been a director from the inception of the Company until 1994, had continued in that office up to 2004. Accordingly the Court of Appeal allowed the appeal, set aside the declaration made by Persaud J affirming the lawfulness of Ashmid's appointment and granted the applicant most of the relief which was sought including an order for costs against the appellants though limited to the sum of $100,000.00.

Principal issue of fact

[10] As already mentioned (in [6] above), the principal issue of fact in this case was whether Azeez was a director of the Company in September, 2004. If he was, then he ought to have been invited to attend the directors' meeting of the 10th September, 2004 and it would not have been competent for a fourth director to be appointed by two directors (or by any number of directors for that matter).

[11] In order to succeed in this appeal, the appellants must satisfy us that the judge's finding that Azeez was not a director in September, 2004, was supported by the evidence and that the Court of Appeal was wrong to hold that it was not.

Amin's out-of-court assertions

[12] A factor that weighed very heavily with the Court of Appeal in reaching its conclusion was the restriction it placed on the use that could be made by the appellants of Amin's "out-of-court assertions" (see [9] above). The appellants' answer on this point was that while accepting that out-of-court statements by persons who are not parties, can properly be used only to undermine their credibility, it was wrong to treat Amin as a non-party as there was an understanding or agreement, shared by the parties and the trial judge, that having regard to the patent lack of authority for bringing this action in the Company's name, the action would be allowed to proceed on the footing that Amin, and not the Company, was the applicant. It was suggested that this course was chosen in order to avoid the additional cost that would be incurred and the delay that would result if this action was dismissed and Amin was required to file a fresh action in his own name, as he was entitled to do under section 137(1) of the Act (see [3] above).

[13] The problem with this contention is that not only was there no order made adding or substituting Amin as applicant, but nowhere in the proceedings is there any record of any such understanding or agreement. There are nevertheless several compelling indications to be found in the affidavits and in the orders and judgment of the trial judge, that there must have been some such understanding or agreement. Before examining this material, however, it is necessary first to consider the premise on which the appellants' argument rests, namely, that there was an obvious lack of due authority to bring this action in the Company's name.

Authority to sue in Company's name

[14] It was not in dispute that it was Amin who gave instructions to the attorneys to file the application in the Company's name and who thereafter instructed the attorneys and paid

their fees. Amin swore three affidavits in this matter. Two of them were sworn on the 21st October, 2004, the day on which the notice of motion was filed. One of these (to which I shall refer as "Amin's first affidavit") was sworn in support of the notice of motion. The other (to which we shall refer as "Amin's second affidavit") was in support of an *ex parte* application for an interim order restraining Ashmid from acting as a director of the Company. The third affidavit was sworn by Amin on the 11th November, 2004, and was in support of an application by summons for an interlocutory order to prevent the holding of a directors' meeting to which Ashmid had been invited and which was to be held at a time when Amin would not be in Guyana.

[15] At the time when the notice of motion was filed there was a dispute as to who were the directors of the Company and therefore it would have been problematical for anyone to prove that he had been authorised to sue in the Company's name by a majority of the directors. In any case, there was no suggestion in any of Amin's affidavits that any meeting, either of directors or of shareholders, had been held at which a resolution had been passed authorising him to bring these proceedings in the Company's name.

[16] In fact, nowhere in these affidavits is there even a bald assertion that Amin had obtained such authorisation. The closest he comes to it is in paragraph 2 of Amin's first affidavit in which he alleges that he has been authorised "by a majority of the shareholders and the board of directors" to swear the affidavit. But the issue is not whether he was authorised to swear an affidavit but whether he was authorised to launch the action in the Company's name. Be that as it may, in paragraph 2 of Aslim's affidavit in opposition sworn on the 22nd November, 2004, the applicant was put to proof of paragraphs 1 and 2 of Amin's first affidavit. Nothing further was ever offered by Amin by way of proof of his authority either to swear his first affidavit or to sue in the Company's name. One notes that in Amin's third affidavit at paragraph 2, he claims to be authorised to swear that affidavit "by the majority of shareholders" – there is no mention of directors. It is perhaps also significant that in his third affidavit Amin states in paragraph 3 as follows: "that I swear this affidavit in my capacity as Secretary of the Company and as a

shareholder." He seems to be relying on his status as Secretary and as a shareholder to justify his swearing the affidavit rather than on authorization by anyone.

[17] Finally, on the question of authorisation, reference is made to paragraph 27 of Amin's first affidavit which reads in part as follows: "This affidavit is drawn upon the instruction of the Applicant by Sanjeev J Datadin, attorney-at-law whom I authorise …". Again it is significant that while Amin accepts responsibility for having authorised Mr. Datadin, attorney-at-law for the applicant "to do all things on behalf of the Applicant", there is no mention of Amin himself having been authorised by anyone to give that authorisation to Mr. Datadin.

[18] On a review therefore of the affidavits filed by the applicant, one is driven to conclude that there was no evidence whatever that Amin was authorised either by the directors or the shareholders of the Company to bring this action in its name and that the absence of such authority was manifest.

[19] In these circumstances the question arises whether the trial judge could have struck out the action as improperly brought in the Company's name, even in the absence of any application for such an order on the part of the appellants (respondents to the notice of motion). The established practice is that where it is intended to challenge as unauthorised the bringing of an action in a company's name, an interlocutory application to stay the action should be made in advance of the trial. This is to facilitate the trial of the issue whether the bringing of the action was properly authorised by the company. See *Richmond v. Branson & Sons*[1] and *John Shaw & Sons (Salford) Ltd. v Shaw.*[2] In this case, for the reasons already given, this issue was not a live one. Notwithstanding the normal practice, it has been recognized that where the lack of authorisation does not emerge from the resolution of a disputed issue of fact but is obvious, it is open to the court at any stage to strike out the action. See dictum of Roche L.J. in *Shaw* (above) at p.147: "If want of capacity or authority to sue plainly appears at any stage the Court may

[1] [1914] 1 Ch. 968 at 974
[2] [1935] 2 KB 113

then strike out the action". See also *Daimler Company Ltd. v. Continental Tyre & Rubber Company Ltd*.[3] This was an option which in our view, was clearly available to Persaud J on the state of the evidence presented to him.

The alleged understanding or agreement to substitute Amin as applicant

[20] The question then arises, why did the judge not adopt that course? How come the appellants did not apply for dismissal of the action on the ground that the action was brought in the Company's name without authority? The answer which the appellants suggest is that it was understood and agreed by all concerned that the application would proceed as though it had been made by Amin even though this was not reflected in any order made by the learned trial judge.

[21] It is time now to examine the affidavits and the orders and judgment of Persaud J to see what light they shed on the existence of the alleged understanding or agreement. A notable feature of the affidavit in opposition sworn by Aslim, and of the judgment of Persaud J, is that they are both laced with references to Amin as "the Applicant". In Aslim's affidavit I have counted eleven places in which Aslim refers to Amin as the applicant. On the other hand, when Aslim wishes to refer to the Company, he uses those very words "the Company". In the judgment of Persaud J there are no fewer than fourteen places in which the term "the Applicant" is used when the learned judge is clearly intending to refer to Amin and not the Company.

[22] It is interesting to see how the Court of Appeal in its judgment dealt with these references. The court first notes that Aslim in his affidavit refers to Amin as the applicant "when it is clear the Applicant was [the Company], and not [Amin] the director". The judgment then continues "It does appear that the trial judge fell into the same error since he also in his judgment refers to [Amin] as the Applicant". So the Court of Appeal regarded both Aslim and the judge as having fallen into the same error,

[3] [1916] 2 AC 307 at 331

presumably through inadvertence. With great respect to the Court of Appeal, it does seem to me intrinsically improbable that these repeated references would have been made by the judge and the attorney who drafted Aslim's affidavit, because they had forgotten or had not noticed that as the title of the action showed, the applicant was the Company. One or two references to Amin as the applicant might have been explained away as slips of the pen, but not when they occur in such profusion. The matter becomes even clearer when one looks at the two orders made by the learned trial judge and the affidavits sworn by Amin himself.

[23] The first order which Persaud J made was the grant of an interlocutory injunction restraining Ashmid from acting as a director of the Company. This order was made on the 22nd October, 2004. This was the application which was supported by Amin's second affidavit. The judge for his part understood that this application was one made by Amin. In fact, in the preamble to his interim order Persaud J treats the substantive notice of motion as an application made by Amin. The interim order reads in part as follows:

> "Upon reading Application by way of Notice of Motion on the part of SHIR AMINEEN NABI Secretary to the Applicant's Company preferred unto this Court and (sic) on the 21st day of October, 2004 … AND UPON HEARING Attorney-at-Law for the Applicant and the Applicant undertaking to abide by any Order the Judge may make as to damages…"

This order makes it clear that as far as the Judge was concerned, Amin was the applicant both on the substantive notice of motion and on the interlocutory application. In any case Persaud J would hardly have granted an interlocutory injunction to a person who was not (in his view) a party to the action.

[24] The judge's identification of Amin as the applicant is repeated in the preamble to the final order which he made on 6th June, 2005. This reads in part as follows:

> "Upon reading the Application by way of Notice of Motion <u>on the part of SHIR AMINEEN NABI</u>, Secretary to the Applicant's company preferred unto this Court on the 21st day of October, 2004 …" (emphasis added)

The expression "the Applicant's company" is difficult to interpret but the statement as to who made the application is not.

[25] Even more compelling than what the judge had to say about who was the applicant, is what came from Amin himself on that topic. Reading his affidavits it is clear that while he began by treating the Company (not altogether convincingly) as the applicant, by the time he swore his third affidavit he had really taken over that role completely. Amin's first affidavit contains several references to "the applicant company" but the mask appears to be slipping when in paragraph 26 he says: "I pray this Honourable Court will grant the orders …". The mask has come off entirely when in paragraph 7 of his second affidavit he swears: "that I hereby apply to this Honourable Court under section 137 of the Companies Act … for the following Order …". It is not surprising that when Persaud J made the interim order sought, he identified Amin as the applicant (see [23] above).

[26] Amin's third affidavit sworn on the 11th November, 2004, proclaims even more clearly his assumption of the role of applicant. Thus in paragraph 18 he swears:

> "This affidavit is drawn upon my instructions as the applicant by Sanjeev J Datadin, Attorney-at-Law whom I authorize to do all things in my behalf in this matter and my address for service is at the chambers of my Attorney…". (emphasis added)

[27] The Court of Appeal did not deal with, or attempt to explain, these passages from Amin's affidavits. Can it be sensibly suggested that Amin and his attorney had also fallen into the same error as the judge and Aslim by mistakenly treating Amin as the applicant? We think not. Admittedly, it is quite extraordinary that the case should have proceeded on the basis that Amin had been substituted for the Company as the applicant without an order being made, or an agreement being recorded, to that effect. It would however, be even more extraordinary for Amin's and Aslim's affidavits to have been drafted and sworn, and Persaud J's orders and judgment to have been framed and phrased, in the way in which they were, unless there was a common understanding or agreement that Amin had been substituted for the Company as the applicant. It is quite impossible to explain the actions of all concerned save on the hypothesis that there was such a common understanding or agreement. Accordingly, we hold that on a balance of probabilities there was such a common understanding or agreement.

[28] This finding involves a rejection of the submission made by Sir Fenton Ramsahoye S.C. who appeared for the Company at the hearing of this appeal. He submitted that the failure of the appellants to apply for substitution of Amin as the applicant was a conscious decision taken by them to allow the matter to proceed with the Company as applicant in order to avoid delay and in the hope of achieving a favourable outcome (which they did achieve before the trial judge). This submission was not made in the written arguments submitted to us on behalf of the Company. Indeed, in the written argument (prepared by other counsel) the Company had seemed prepared to accept that there may have been some understanding or agreement with regard to Amin being substituted for the Company. As I have been at pains to demonstrate, the affidavits filed and the orders and the judgment of Persaud J. effectively rule out the interpretation proposed by Sir Fenton of what transpired in the High Court.

[29] The fact remains, however, that there is no record in the proceedings of any such understanding or agreement and no order was ever made substituting or adding Amin as applicant. The title of the action remained unchanged and Amin is not mentioned in it. A person cannot be added or substituted as a party without an order of the court. This matter is now before the third and final tier court for decision but up to now no such order has been made or been applied for. The two questions which arise are: do we in these circumstances have the power to make an order adding or substituting Amin as applicant, and if we do, ought we to make such an order at this late stage?

Do we have power to make an order substituting Amin as the applicant?

[30] The first question which must be answered, is whether Persaud J had power to make an order adding or substituting Amin as applicant. It is clear that he did have that power even in the absence of any application for such an order. This power is derived from Order 14.14 of the Rules of the High Court which provides as follows:

> "No action shall be defeated by reason of the mis-joinder or non-joinder of parties, and the Court may in every action deal with the matter in controversy as far as regards the rights and interests of the parties actually before it. The Court or a Judge may, at any stage of the proceedings, either upon or without the

> application of either party, and on such terms as may appear to the Court or Judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action, be added. No person shall be added as a plaintiff without his own consent in writing thereto." (emphasis added)

[31] This rule prohibits the joinder of a person as plaintiff 'without his own consent in writing'. In this case there was of course no document by which Amin in so many words consented to be substituted as the applicant, but his consent to be so joined is manifest from his third affidavit in which he actually describes himself as the applicant and has clearly adopted the role and status of applicant. In our view, Amin had sufficiently indicated 'his own consent in writing' so as to satisfy that precondition for the making of the order.

[32] The trial judge having failed to make an order for substitution, the Court of Appeal could have corrected that omission by exercising the power vested in it by section 7(1)(a) of the Court of Appeal Act "to … make any such order as the court from whose order the appeal is brought might have made, or to make any order which ought to have been made …".

[33] The discretion of the Court of Appeal in the exercise of this power is also not fettered by the failure of any party to invoke it, for section 7(2) of the Court of Appeal Act provides:

> "The powers of the Court of Appeal under the foregoing provisions of this section may be exercised notwithstanding that no notice of appeal or respondent's notice has been given in respect of any particular part of the decision of the court from whose order the appeal is brought or by any particular party to the proceedings in that court, or that any ground for allowing the appeal or for affirming or varying the decision of that court is not specified in such a notice; and the Court of Appeal may make any order, on such terms as the Court thinks just, to ensure the determination on the merits of the real question in controversy between the parties."

[34] The Court of Appeal therefore had power to make the order substituting Amin as applicant and the matter having come on further appeal to us, the same power is available to us pursuant to section 11(6) of the Caribbean Court of Justice Act which provides:

> "The Court shall, in relation to any appeal in any case, have all the jurisdictions and powers possessed in relation to that case by the Court of Appeal."

[35] We conclude therefore that this Court does have the power to make an order for the substitution of Amin for the Company as the applicant in these proceedings. But ought we to exercise our discretion in favour of making such an order at this the final stage of the proceedings?

[36] It would be highly unusual, possibly unprecedented, for an order to be made at this stage of the proceedings for the substitution of a party. Normally, such an order would not even be considered. But as already pointed out, the facts of this case are very special in that the party whom it is proposed to introduce by way of substitution has participated in all the proceedings to date as fully as if he were a party and behaved and was treated by the judge and the opposing parties in the court of first instance as though he was a party. Nonetheless, we do not think that we should make an order for substitution unless we are convinced that such an order is necessary in order to avoid serious injustice. The possibility of serious injustice in this case, however, would not arise if we were satisfied that the Court of Appeal was wrong to allow the appeal against Persaud J's judgment even on the footing that there was no substitution of parties. We will proceed therefore to address the issues raised by this appeal firstly on the basis that Amin is not a party and that the Company remains the applicant in the High Court, the appellant in the Court of Appeal and the respondent in this Court. If we are satisfied that on that basis the Court of Appeal's decision was wrong and the decision of Persaud J should be restored, that would be a critical consideration in deciding whether we should with retrospective effect substitute Amin for the Company as a party to these proceedings in this Court and the courts below.

[37] We turn therefore to consider the Court of Appeal's judgment on that footing i.e. that Amin is not a party. The main reason why the Court of Appeal reversed Persaud J was

because in its view his finding that Azeez was not a director at the material time, was not supported by the evidence. The Court of Appeal reached this conclusion largely because it held that Amin's out-of-court assertions, being those of a non-party, could be used only for undermining Amin's credibility and not to prove that which was asserted. In coming to this conclusion the Court of Appeal in our view made two errors. Firstly, the evidence of Amin's assertions having been introduced and relied upon in the High Court without objection or limitation as to the purpose for which it was to be used, it would not have been open to the applicant to seek for the first time in the Court of Appeal to object to that evidence being used for any purpose which it could rationally serve. It was therefore impermissible for the Court of Appeal of its own motion to raise that issue and to impose a limitation on the effect which could be given to these assertions. Secondly, the Court of Appeal appears to have imposed this limitation on the use of all the out-of-court assertions made by Amin, evidence of which was adduced in the High Court, without regard to the fact that (a) some of these assertions were made by Amin to third parties on behalf of and with the authority of the applicant and so were binding on the applicant and (b) the evidence of some of these assertions was introduced by the applicant itself.

[38] With regard to the first of these errors, the rule in civil cases is that a party may choose not to object to the admissibility of evidence and if he fails to do so whether deliberately or through inadvertence, then he is considered to have waived his objection and cannot take it subsequently on appeal.

[39] This point has recently been made by Hayton J in delivering the judgment of this Court in *Guyana Bank for Trade and Industry v. Desiree Alleyne*[4] at [56] to [60] and the cases there cited. We would refer also to *Gilbert v Endean*[5]**,** *Tyne Improvement Commissioners v Armement Anniversois SA (The Brabo) No. 2*[6] and *Jones & Anor. v. Sutherland Shire Council.*[7] There is also the following instructive passage in McCormick, Law of

[4] [2011] CCJ 5 (AJ)
[5] (1878) LR 9 Ch D 259
[6] [1949] AC 326

[7] (1979) 40 LGRA 323, [1979] 2 NSWLR 206

Evidence (1954) at paragraph 54 which was quoted with approval by Asprey J.A. in *McLennan v Taylor*[8]:

> "A failure to make a sufficient objection to evidence which is incompetent waives … any ground of complaint of the admission of the evidence. But it has another effect, equally important. If the evidence is received without objection, it becomes part of the evidence in the case, and is usable as proof to the extent of whatever rational persuasive power it may have. The fact that it was inadmissible does not prevent its use as proof so far as it has probative value. Such incompetent evidence, unobjected to, … may support a verdict or finding … . If the evidence has no probative value, or insufficient probative value to sustain the proposition for which it is offered, the want of objection adds nothing to its worth and it will not support a finding. It is still irrelevant or insufficient."

[40] There is no suggestion that before Persaud J there was any question of limiting the use to which evidence of Amin's assertions could be put. The position would have been different if the evidence of these assertions had been admitted subject to the *caveat* that they were to be used only for the purpose of undermining Amin's credibility. But that was not the case. It clearly never occurred to anyone in the trial court to limit the use to which this evidence could be put.

[41] In the circumstances of this case in particular, it would be especially unfair to permit the matter to be raised for the first time on appeal. Had it been raised at the proper time, that is, before the trial judge, it is quite likely that steps would have been taken either to have the application properly constituted with Amin as the applicant or to have it dismissed. It is true that it has not been made a ground of appeal to this Court that it was wrong for the Court of Appeal to challenge the use made of Amin's out-of-court assertions by the trial judge, but then neither was the use of that evidence made a ground of appeal to the Court of Appeal. We think that it was wrong of the Court of Appeal to raise this issue on its own initiative and we hold that even if the Company is acknowledged to be the applicant, so that the assertions of Amin are those of a non-party, the evidence of those assertions should be given its full probative value and logical effect and not be treated as usable only for the purpose of attacking Amin's credibility.

[8] [1966] 2 NSWR 685 at 696-697

[42] The second error into which the Court of Appeal fell, was in part that it failed to recognise that some of the assertions made by Amin were fully admissible against the Company because they were made on behalf of the Company and with its authority. We are not referring here to assertions made by Amin to Aslim as one director to another, but rather to the annual returns which Amin signed and submitted on behalf of the Company and the banking documents which likewise he signed and issued to the Company's bankers on its behalf. Both categories of documents were signed by Amin in his official capacity as a director and Secretary of the Company. The annual returns submitted to the Registrar of Companies included a list of the directors in office during the year under report. The banking documents were required by the Company's bankers to be completed and signed on behalf of the Company as a condition of their providing banking services and facilities to the Company. These documents too provided information as to who were the directors of the Company from time to time. Since it is common ground that Amin was at all material times a director and the Secretary of the Company, it can be assumed in the absence of any evidence to the contrary that when he signed annual returns and banking documents, he did so with due authority from the Company.

[43] What then are the specific documents which because they fall into one or other of the two categories of documents identified above are fully admissible against the Company and assert either expressly or impliedly that Azeez had ceased to be a director. They are as follows:

(1) The annual returns for 1995, 1996 and 1997 which listed only two persons, Aslim and Amin, as directors. These returns were signed by Aslim and Amin. It is pertinent to note here that it was never suggested by anyone that Azeez was ever re-appointed a director after spending some time out of office. The applicant's case was that Azeez never ceased to be a director. That is contradicted by these returns.

(2) A printed form supplied by the Royal Bank of Scotland purporting to be an excerpt from the minutes of a meeting of the Company's board of directors held on the 17th April, 1997 and to record a resolution passed at that meeting authorising Aslim to sign on any account opened by the Company with that bank. This document was signed by Amin as Secretary and he certified *inter alia* 'that the specimen signatures overleaf are correct'. It appears that what was 'overleaf' were the names and specimen signatures of two persons identified as the directors – Aslim and Amin.

(3) A letter dated 22nd July, 1999 from Guyana Bank for Trade and Industry to the Secretary of the Company in which the bank lists the facilities that have been renewed for the Company and identifies the security provided by the Company. Among the securities listed is a joint and several guarantee by **"**the shareholders/directors of the company" who are identified as Aslim and Amin. Listed as a separate item of security is a guarantee by Azeez who is described simply as "shareholder". This letter was countersigned by both Aslim as Managing Director and Amin as Secretary. The clear implication is that Azeez was not a director in 1999.

[44] Chief Justice Chang in delivering the judgment of the Court of Appeal said of Amin's out-of-court assertions that: "Since such assertions related to the membership of the Board of Directors and were made by one director to another director who was assuming the role of Chairman of the Board of Directors, they were assertions made to an 'insider' director and therefore were not binding on the Company". This description, however, does not fit the annual returns or the banking documents referred to above. The admissions which they contain were made to a third party and were fully and properly admissible against the Company. In an Australian case of *Trade Practices Commission v. TNT Management Property Limited*[9] it was held that statements made by the chairman and managing director of a holding company in a report to the Stock Exchange, were

[9] (1984) 56 ALR 627

admissible against a subsidiary of the holding company. The Court of Appeal was clearly wrong in failing to recognise that statements contained in the documents listed above were fully admissible against the Company and could properly be used as evidence of the truth of any assertions, express or implied, which they contained.

[45] The other category of assertions which the Court of Appeal failed to recognise as fully admissible against the applicant comprises those contained in documents which were put into evidence, by the applicant as part of its case. Having put them into evidence the applicant made them available for use by the other side for any purpose which they could rationally serve.

[46] One such document which was annexed to Amin's first affidavit, was a letter dated 30th September, 2004 written by Amin to Aslim. This letter concludes with the following statement: "Prior to September 10th 2004 the present-constituted board of directors is illegal or incapacitated with two directors in place". Surely, the applicant having put this letter in evidence cannot claim that the appellants should be limited in the use which they make of it. That letter shows that as late as 30th September, 2004, Amin who as a director and the Secretary of the Company was in arguably the best position to know who was or was not a director, was maintaining that he and Aslim were the only directors of the Company. That is fairly compelling evidence that Azeez was not at that time a director.

[47] Another document annexed to Amin's first affidavit was a letter dated 22nd October, 2003 from Aslim to Amin (see paragraph 10 of Amin's first affidavit). In that letter Aslim states that "Currently there are only two Directors", one less than the minimum prescribed by the Company's articles of association. He goes on to say that he is proposing Ashmid as a director to comply with the articles. He invites Amin to sign the attached copy of the letter and indicate by making the appropriate deletion, whether he approves or disapproves of the appointment of Ashmid. Amin has crossed out the word "approved" to indicate his disapproval of the proposed appointment of Ashmid and countersigned the letter as requested. By doing so, Amin was clearly accepting the premise on which he was asked to vote (in effect) for or against Ashmid i.e. that there

were only two directors in place at that time. Again, this document having been put in evidence by the applicant, the applicant can hardly object to it being used as evidence that Azeez was not a director in October, 2003 either.

[48] The question which now falls to be considered is how does the removal, complete or partial, of the limitation placed by the Court of Appeal on the use made of Amin's out-of-court assertions, impact on the Court of Appeal's conclusion that the appellants had failed to prove that Azeez had ceased to be a director. We have held that the Court of Appeal was not entitled to impose any restriction on the use made of those assertions given the failure of the applicant to propose any such limitation in the High Court and hence all the out-of-court admissions made by Amin that Azeez had ceased to be a director**,** can be given their full effect. These admissions include, in particular, the very striking admission which is implicit in Amin having attended the meeting of the 10th September, 2004 and proposed Azeez for appointment as the third director. We have also held in the alternative, that even if the Court of Appeal were entitled to apply to Amin's assertions the constraints usually imposed on the use made of the out-of-court's assertions of a non-party, no such restriction could be placed on the use made of those admissions by which the Company was bound having been made to third parties on its behalf and by its authority, or those which were the subject of evidence adduced by the Company itself. It does not matter on which of these bases one determines the central factual issue in the case. Both lead to the same conclusion i.e. that the judge's finding that Azeez was not a director in September 2004, was supported by the evidence and the Court of Appeal was wrong to hold that it was not. I shall proceed to explain why.

[49] Basically, the Court of Appeal's reasoning was that Azeez, having been a director since the foundation of the Company, it was incumbent on the appellants to prove that something had happened to terminate his directorship. The circumstances in which a director vacates office are listed in article 95 of the Company's articles and section 69 of the Act. Article 95 provides in part:

> "The office of any director … shall be vacated if the director:
>
> …

(d) by notice in writing resigns his office; or
(e) is removed from office."

Section 69 provides in part:

"A director of a company shall cease to hold office when –
(a) he dies or resigns;
(b) he is removed in accordance with section 71
…"

No evidence was adduced of any event having occurred which would have brought Azeez's directorship to an end. Accordingly, the appellants had failed to discharge the evidential burden on them.

[50] But what is the effect of removing all limitations, save those imposed by reason and relevance from the two categories of Amin's out-of-court assertions previously identified as fully admissible i.e. those binding on, and those proved in evidence by, the Company? They certainly constitute *prima facie* evidence that Azeez had ceased to be a director, even though they do not indicate how that had come about. We have suggested that as Secretary of the Company and a director, Amin was seemingly in the best position to know who the directors of the Company were at any given time. If he made, as he did, statements in important documents addressed to the Registrar of Companies and the Company's bankers indicating that Azeez was no longer a director that would provide credible and apparently reliable support for the judge's finding. There is of course the possibility that Amin might have been mistaken, possibly because he misinterpreted the law or wrongly applied it to the facts. Those assertions of Amin having been put into evidence, however, in some cases by the applicant itself, the evidential burden then shifted to the applicant to explain how if Azeez in fact remained on the Board, Amin came to make those repeated assertions to the contrary over such a protracted period. This the applicant did not do.

[51] The only positive evidence that the applicant adduced, apart from a bald assertion by Amin in his affidavit that Azeez continued to be a director after 1994, was the annual returns of the Company for the years 1998, 1999, 2000, 2002 and 2003, in which Azeez was listed as a director. There are aspects of these returns, however, which tend to discourage reliance

on them. For instance, in the returns for 1998, 1999 and 2000 there are six directors listed but Aslim is not one of them, although it was not in dispute that he remained a director throughout. The 2002 and 2003 returns list three directors - Azeez, Amin and Aslim. The Court of Appeal in its judgment says that the 2002 annual return was signed by "both the third named and fourth named Respondents", that is Ashmid and Aslim. But that is not correct. The 2002 return was in fact signed by Azeez and Amin. Moreover, from a handwritten date on the document it appears that the 2002 return was not prepared until the 6th July, 2004 and there is evidence that even after that date Amin was asserting that Azeez was not a director. So far as the 2003 return is concerned, that appears to have been prepared on the 26th October, 2004, that is after these proceedings were launched and accordingly, it has no evidential value whatever.

[52] We would make two other observations on these returns in which Azeez is listed as a director. One is that if the out-of-court assertions made by Amin which these documents contain are fully admissible in evidence at the instance of the applicant, then the same unrestricted use of the returns which do not list Azeez as a director, must be available to the appellants. Secondly, in determining what weight the returns which include Azeez as a director are given, one must bear in mind that the only witness to vouch the accuracy of these returns is Amin whose credibility has been gravely undermined by his prior inconsistent statements.

[53] If one is prepared to consider the possibility that Amin's belief that Azeez had ceased to be a director may have been mistaken, then one must also entertain the possibility that Amin was right for the wrong reasons. In this connection it is relevant to refer to another route by which a director may demit office. That is the route provided by section 68(1) of the Act. Section 68(1) limits the term for which a director may be appointed to five years subject to the possibility of reappointment. Section 68(7) permits provision to be made by the articles of association of a company for the automatic reappointment of a director at the expiration of five years subject to certain conditions. The articles of the Company do not contain any provision for automatic reappointment nor anything which is inconsistent with the limitation to five years of a director's tenure. If there had been

any such inconsistency, the Company's articles would have prevailed (see section 335(1) of the Act). It may well be therefore that quite independently of article 95 or section 69, Azeez may have vacated office pursuant to section 68 simply as a result of the effluxion of time. We do not wish, however, to make any firm finding about this or to base our decision on it as this aspect of the matter was not ventilated in the High Court and deserves a fuller argument than we have received.

[54] Without resort to section 68 therefore but for the reasons stated above, we hold that there was sufficient admissible evidence in the form of out-of-court assertions made by Amin to support the judge's finding that in September, 2004 Azeez was not a director even though the exact route by which he exited office was not established, the applicant having failed to discharge the evidential burden which shifted to it to explain away those assertions. It follows therefore that the lawfulness of the directors' meeting held on the 10th September, 2004 and of the appointment of Ashmid as a director which took place at that meeting, falls to be determined on the basis that at that time there were only two directors of the Company, namely, Aslim and Amin.

Was there a quorum?

[55] On that basis the next question to be answered is whether it was competent for Aslim and Amin to appoint a third director. The number of directors having been reduced to two, were the two remaining directors entitled to appoint a third director to bring the number of directors up to the prescribed minimum of three or was this something that could only be done by the shareholders in general meeting? The answer to this question provided by the Company's articles is different from that provided by the Act.

[56] Dealing first with the articles, the relevant portion of article 80 provides that: "The number of directors shall not be less than three nor more than seven". Article 102 provides that: "The quorum necessary for the transaction of the business of the Directors" if not fixed by the directors, "… shall (when the number of directors exceed two) be two". Article 83 provides as follows: "The Directors shall have power at any time and

from time to time to appoint any person as a Director to fill a vacancy (casual or otherwise)". Finally, article 103 provides as follows: "The continuing directors may act notwithstanding any vacancy in their body, but if and so long as their number is reduced below the number fixed by or pursuant to these articles as the quorum of Directors, the continuing Directors may act for the purpose of increasing the number of Directors to that number ...".

[57] Would Amin and Aslim have constituted a quorum pursuant to article 102? Only if the "number of directors" exceeded two. We understand the 'number of directors' to mean the number of directors actually holding office at the relevant time. So article 102 is not applicable here and Amin and Aslim did not constitute a quorum. But article 103 expressly empowered them as continuing directors to act for the purpose of bringing the number of directors up to that required to form a quorum. You need to have a minimum of three directors in place in order that two may constitute a quorum. Accordingly, with two remaining directors the number of directors had fallen below the number required to constitute a quorum and the appointment of a third director was necessary for that purpose. If one gives to article 103, as we think one should, a purposive rather than a literal interpretation, the article gives to the remaining directors the power to make such appointments of directors as are necessary in order to provide the Board with a quorum. In this case that involved the appointment of a third director. The directors are also given the power by article 83 to appoint any person as a director to fill a vacancy (casual or otherwise). Under the articles therefore it was within the competence of Aslim and Amin to appoint a third director.

[58] Turning now to the Act, s 73 deals with the filling of vacancies among the directors and by sub-section (1) empowers the directors to fill a vacancy on the board subject to two conditions. Firstly, this can only be done by a quorum of directors, and secondly, the vacancy to be filled must not be one resulting from *inter alia* a failure to elect the number or the minimum number of directors required by the articles of the company. If either of these conditions is not met, then according to s 73(2) the directors must call a special meeting of shareholders to fill the vacancy. Now whether Azeez ceased to be a director

because he was removed by the shareholders or he resigned or his term expired, the vacancy which that created was clearly neither recent in September 2004 nor casual and could have been filled by the election of a third director at any annual general meeting held after it occurred. Accordingly, the vacancy which Aslim and Amin set out to fill in September, 2004 was by that time at least, one resulting from a failure to elect the minimum number of directors required by the articles and therefore under section 73(2) could only be filled by the shareholders.

[59] We do not agree with the view of the Court of Appeal that section 73(2) does not apply in this case. Firstly, as already mentioned, the subsection applies "if there is no quorum of directors or if there has been a failure to elect the minimum number of directors required by the Articles". As already mentioned, two directors can only form a quorum if there are at least three directors in place. That was not the case here. Secondly, even if the vacancy created by the cessation of Azeez's directorship was initially a casual one i.e. one which arose between annual general meetings, the opportunity to fill it would have existed at any subsequent annual general meeting and therefore, by September 2004 there would have been a failure to elect the minimum number of directors i.e. three, as required by the Company's articles. It is immaterial that there once was a sufficient number of directors to constitute a quorum and to satisfy the requirements of the articles with regard to the minimum number of directors. Accordingly, under section 73(2) it would have required a special meeting of the shareholders to fill the vacancy. By the same token it was not a vacancy that the directors could have filled under section 73(1) because it resulted "from a failure to elect the … minimum number of directors required by the Articles of the company". If section 73 was the governing provision, therefore, the appointment of Ashmid would have been invalid.

[60] Given the inconsistency between the articles and the Act, which is to prevail? The answer is provided by s 335(1) and (2) of the Act. These provide as follows:

> "335(1) Notwithstanding any other provision of this Act but subject to subsection (3) [of no relevance in this case], if any provision of a corporate instrument of a former-Act company lawfully in force immediately before the commencement of this Act is inconsistent with, repugnant to, or not in

compliance with this Act, that provision shall not be illegal or invalid only by reason of that inconsistency, repugnancy or non-compliance.

(2) Any act, matter or proceeding or thing done or taken by the former-Act company or any director, shareholder, member or officer of the company under a provision mentioned in subsection (1) shall not be illegal or invalid by reason only of the inconsistency, repugnancy or non-compliance mentioned in that subsection or by reason of being prohibited or not authorised by the law as it is after the commencement of this Act."

[61] The Company's articles qualify as "a corporate instrument of a former–Act company lawfully in force immediately before the commencement of this Act". Accordingly, the effect of section 335 is that articles 83 and 103 of the Company's articles prevail over section 73 of the Act and Aslim and Amin had the power to appoint a third director even though the vacancy arose because of a failure by the shareholders to elect a sufficient number of directors. For these reasons, we hold that Aslim and Amin did have the power to appoint a third director at their meeting on the 10th September, 2004.

The Casting Vote

[62] The only remaining question is whether Aslim was entitled to a casting vote when he and Amin were deadlocked on the 10th September, 2004 over the appointment of the third director. Article 101 gives the Chairman a second or casting vote in the event of an equality of votes at any meeting. There is no evidence that Amin raised any objection at the time to Aslim exercising a casting vote as chairman. In fact, Amin's first affidavit contains no clear denial that Aslim was the chairman, at least of that meeting. The main argument that was advanced for the applicant was that because Azeez was already a director and should have been invited to that meeting, the occasion for the exercise of a casting vote ought never to have arisen. In fact not only did Amin appear to have acquiesced in Aslim's assumption of the role of chairman but the trial judge found that Amin had represented to financial institutions that Aslim was the chairman of the Company. There has been no challenge of that finding. In fact the issue of the casting vote does not appear to have been raised in the Court of Appeal at all. There is no mention of it in the judgment of Chang CJ. There is no basis therefore for disturbing the

judge's finding that Aslim properly regarded himself as chairman of the September meeting and as such was entitled to a casting vote.

No Order For Substitution

[63] I turn back now to the question whether we should make an order for the substitution of Amin as applicant in place of the Company, having earlier held that we have the power to make such an order. We have in the preceding paragraphs in this judgment dealt with all the issues raised on this appeal on the footing that the Company and not Amin was and remains the applicant on the notice of motion, the appellant in the Court of Appeal and the respondent in this Court. On that footing we have come to the following conclusions:

(a) The Court of Appeal was not entitled to take the point that the out-of-court assertions of Amin, being the assertions of a non-party, could not be used as positive evidence of the truth of what was asserted.

(b) In any case, no such limitation could properly be imposed on (i) assertions made by Amin on behalf of and with the authority of the Company to third persons, or (ii) assertions evidence of which was introduced by the applicant.

(c) There was evidence to support Persaud J's finding that Azeez was not a director of the Company in September, 2004.

(d) Amin and Aslim were competent under the Company's articles to appoint a third director.

(e) Aslim as chairman of the meeting of the 10th September, 2004 was entitled to a second or casting vote in favour of appointing Ashmid a director.

(f) As a result of the above, Ashmid's appointment as a director was lawful and valid.

[64] The result of these findings is that we must allow this appeal even though no order is made for the substitution of Amin for the Company as applicant. The only difference that

such an order would make has to do with the matter of costs. It would render Amin liable to be ordered to pay the costs, not only of this appeal, but also of the proceedings in the courts below. This would undoubtedly be of advantage to the appellants, but it would not affect the substantial outcome of the appeal. Furthermore, the appellants must accept a large share of the responsibility (if not the whole of it) for the fact that no order for substitution was made. If, therefore, they are as a result unable to recover costs against Amin they have only themselves to blame for this. I have stated earlier in this judgment that we would only make an order for substitution if that was necessary to avoid serious injustice. It appears in the light of the findings that I have summarised above, that this is not the case and, accordingly, no order for substitution of parties will be made.

Estoppel

[65] We do not find it necessary to deal with the attempt by the appellants to invoke the doctrine of estoppel. Suffice it to say that if Amin, and not the Company, had been the applicant, the appellants might well have been able to claim that all the elements necessary to establish an estoppel by convention were present in this case. The effect of the estoppel would be to prevent Amin from alleging that Azeez was a director on September 10, 2004 or possibly even from challenging the lawfulness of the meeting held on that day. With the Company as applicant, however, the plea of estoppel becomes more problematical and I do not intend to add to an already lengthy judgment by exploring it.

Disposition

[66] For the reasons given we allow the appeal, quash the orders made by the Court of Appeal and restore the decision and order of Persaud J. We make no order as to costs either here or in the courts below.

/s/ M. de la Bastide
The Rt. Hon. Mr Justice Michael de la Bastide (President)

/s/ R. F. Nelson
The Hon. Mr Justice R. Nelson

/s/ D. P. Bernard
The Hon. Mr Justice D. Bernard

/s/ D. Hayton
The Hon. Mr Justice D. Hayton

/s/ Winston Anderson
The Hon. Mr Justice W. Anderson