**IN THE SUPREME COURT OF BELIZE, A. D. 2015**

**CONSOLIDATED CLAIMS**

**CLAIM NO. 538 OF 2015**

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| **BETWEEN** | **(YOLANDA GOMEZ** | **CLAIMANT** |
| | **(** | |
| | **(AND** | |
| | **(** | |
| | **(LA INMACULADA CREDIT UNION** | **FIRST DEFENDANT** |
| | **(REGISTRAR OF CREDIT UNIONS** | **SECOND DEFENDANT** |

**AND**

**CLAIM NO. 723 OF 2015**

| | | |
|---|---|---|
| **BETWEEN** | **(LA INMACULADA CREDIT UNION** | **CLAIMANT** |
| | **(** | |
| | **(AND** | |
| | **(** | |
| | **(YOLANDA GOMEZ** | **DEFENDANT** |

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***BEFORE THE HONOURABLE MADAM JUSTICE MICHELLE ARANA***

**Mr. Eamon Courtenay, SC, along with Ms. Stacey Castillo of Courtenay Coye LLP for Yolanda Gomez**

**Mr. Fred Lumor, SC, and Mrs. Ashanti Martin for La Inmaculada Credit Union**

**Barrow & Co. LLP for the Registrar of Credit Unions**

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## R U L I N G

1. The trial in this matter is a Consolidated Trial where the Claimant in Claim 538 of 2015 Yolanda Gomez seeks damages against the Defendant La Inmaculada Credit Union (LICU) for unfair dismissal, while in Claim 723 of 2015 La Inmaculada Credit Union the Claimant seeks ??? against Mrs. Yolanda Gomez the Defendant. The court adjourned the trial in order to determine the issue of the admissibility of several documents which LICU is seeking to put into evidence against Mrs. Yolanda Gomez. This is a Ruling based on written submissions received from the parties on several objections raised by Mr. Courtenay, SC, on behalf of Mrs. Gomez on the basis that these documents run afoul of the rule against hearsay and are therefore inadmissible. The objections are raised in relation to:

   a) Several annexes to the witness statements of Marina Gongora, Lucia Gonzalez, Ena Martinez, Cedric Flowers, Jamid Teul, Yolly Trejo and Yadeli Urbina witnesses for La Inmaculada Credit Union (LICU); and
   b) One annex to the witness statement of Glenford Ysaguirre the 2nd Defendant in Claim No. 548 of 2015.

The Court now outlines the submissions made on behalf of each party and gives its Ruling.

**Submissions on behalf of Yolanda Gomez contesting the Admissibility of Documents**

2. Mr. Courtenay, SC, on behalf of Yolanda Gomez contends that the documents which the La Inmaculada Credit Union seeks to put into evidence are inadmissible and fall into three categories:

Documentary Hearsay, Failure to Comply with the Evidence Act and Electronic Evidence Act and Bank Account Statements.

**Category A - Documentary Hearsay**

Addressing the issue of documentary hearsay, Learned Counsel says that section 82 of the Evidence Act Cap 95 of the Laws of Belize makes provision for proof of certain statements by documents if certain conditions are satisfied:

> *"82 (1) In any civil proceedings where direct oral evidence of a fact would be inadmissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied -*
>
> *(a) If the maker of the statement either:-*

*(i) had personal knowledge of the matters dealt with by the statement; or*

*(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have personal knowledge of those matters; and*

*b) If the maker of the statement is called as a witness in the proceedings:*

*Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is outside Belize and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success."*

3. Mr. Courtenay, SC, submits that there has been no evidence provided to establish that the makers of the documents falling under Category A are unable to attend as witnesses by reason of death, being unfit by reason of bodily or mental condition, absence from the jurisdiction, or that efforts to secure that person's attendance have failed. It would therefore have been

necessary for the maker of these documents to be called as a witness in these proceedings for the documents to be admissible. He further contends that Section 82(2) provides that evidence may be admissible if undue delay or expense would be caused if the maker of the document is available but is not called as a witness and if the original document is not produced and a copy thereof is produced instead. No evidence has been produced to show that undue delay or expense would have resulted from calling the makers of the documents which fall under this category. In addition, the copies of the documents produced have not been certified as true copies.

Section 82(4) reads as follows:

> *"For the purposes of this section, a statement in a document shall not be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialed by him or otherwise recognized by him in writing as one for the accuracy of which he is responsible."*

Mr. Courtenay, SC, contends that documents falling within this category have been exhibited to witness statements of persons who are not the makers of those documents; the makers of the documents have not been

called as witnesses therefore these documents should not be allowed into evidence.

**Category B - Failure to Comply with the Evidence Act and Electronic Evidence Act**

4. Mr. Courtenay, SC, also contends that snapshots of records from the Emortelle System have been annexed to witness statements, and that these snapshots are electronic records under the Electronics Evidence Act. He cites section 5 to 7 of the Electronic Evidence Act which set out the requirements to tender electronic evidence, including obligations to prove authenticity and integrity of the record:

> *"5. The person seeking to introduce an electronic record in any legal proceeding has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic record is what the person claims it to be.*
>
> *6. (1) In any legal proceeding, subject to subsection (2) of this section, where the best evidence rule is applicable in respect of electronic record, the rule is satisfied on proof of the integrity of the electronic record system in or by which the data was recorded or stored.*
>
> *(2) In any legal proceeding, where an electronic record in the form of a printout has been manifestly or consistently acted on, relied upon, or used as the record of the information recorded or stored*

*on the printout, the printout is the record for the purpose of the best evidence rule.*

*(7) In the absence of evidence to the contrary, the integrity of the electronic records system in which an electronic record is recorded or stored is presumed in any legal proceeding:*

*(a) where evidence is adduced that supports a finding that at all material times the computer system or other similar device was operating properly, or if not, that in any respect in which it was not operating properly or out of operation, the integrity of the record was not affected by such circumstances, and there are no other reasonable grounds to doubt the integrity of the record;*

*(b) where it is established that the electronic record was recorded or stored by a party to the proceedings who is adverse in interest to the party seeking to tender it; or*

*(c) Where it is established that the electronic record was recorded or stored in the usual and ordinary course of business by a person who is not a party to the proceedings and who did not record or store it under the control of the party seeking to introduce the record."*

Learned Counsel for Mrs. Gomez submits that no such evidence has been produced by the witnesses to comply with these provisions. He further argues that section 83 of the Evidence Act requires that particular

information be given in relation to the computer from which the evidence was produced, and that a certificate be provided certifying certain matters:

> *"83(1) In any civil proceedings, a statement contained in a document produced by a computer is admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if it is shown –*
>
> *(a) that the document containing the statement was produced by the computer during a period over which the computer was used regularly to store and process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by any person;*
>
> *(b) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;*
>
> *(c) that throughout the material part of that period the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and*
>
> *(d) that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities.*

*(2) In any civil proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate :-*

*(a) identifying the document containing the statement and describing the manner in which it was produced; and*

*(b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer; and*

*(c) dealing with any of the matters to which the conditions mentioned in subsection (1) relate, and purporting to be signed by a person occupying a responsible position with relation to the operation of the relevant device or the management of activities(whichever is appropriate),*

*Shall be evidence of any matter stated therein; and for the purpose of this subsection it is sufficient for a matter to be stated therein; and for the purpose of this subsection it is sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.*

*(3) For the purposes of this section:-*

*(a) information is taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or( with or without human intervention by means of any appropriate equipment; and*

*(b) information is taken to be supplied to a computer where, in the course of activities carried on by any individual or body, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities; and*

*(c) a document is taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment."*

Mr. Courtenay, SC, states that once again the respective witnesses have failed to comply with these provisions.

**Category C - Bank Account Statements**

5. Mr. Courtenay, SC, cites section 6 of the Evidence Act Cap 95 of the Laws of Belize as follows:

*"6. The court may permit any party to a civil cause or matter to use his books of account, kept in the course of his business, as evidence in support of his claim or defence, if they appear to have been kept in the course of business with so remarkable degree of regularity as to be satisfactory to the court."*

He argues that the bank account statements are printed records containing handwritten numbers, symbols and words and therefore have not been kept with "*a reasonable degree of regularity*" as required by the statute. He

makes the further point that these account statements constitute secondary evidence and the copies have not been certified as true copies as required by the common law. Halsbury's Laws of England 5th Ed. Civil Procedure (Volume 11) 2015 [936] reads as follows:

> *"Secondary evidence of the contents of private documents is inadmissible if primary evidence is available. Before secondary evidence is tendered it is, therefore, usually necessary to account for the absence of the original, and for this purpose proof that primary evidence is not available may be required."*

6. Mr. Courtenay, SC, also relies on the dicta from ***Miron (T/A Belican Supply Depot) v Melendez and Chi*** in a claim against the defendants for monies unlawfully misappropriated; Hafiz Bertram J (as she then was) held as follows:

> *"58. The Bank Statements of Belize Bank cannot be relied on as evidence of fact as the Bank that prepared the Statement was not called to give evidence. The claimant in cross-examination said that the Bank statements were prepared by the Bank and he cannot say what the contents of the bank statement represent because he did not prepare them."*

It is submitted by Learned Counsel for Mrs. Yolanda Gomez that the situation in the case at bar is similar in that no representative of the Bank is

called to give evidence therefore the statement of accounts cannot be relied on as evidence of fact. He also objects to a number of documents attached as exhibits to the witness statement of Marina Gongora on the basis that they fall within Category A described above in that they constitute documentary hearsay or they fail to comply with the requirements of the Evidence Act or the Electronic Evidence Act as set out in Category B. The documents attached are not Ms. Gongora's documents and have simply been attached to support her Witness Statement without regard for the basic rules of evidence. SM Construction Ltd is again relied upon on the inadmissibility of documentary hearsay. The submissions are repeated in regard to the documents attached to the witness statements of Lucia Gonzales and Ena Martinez, and the contention is that both sets of documents are subsumed under Category A as they constitute documentary hearsay.

**Documents annexed to Cedric Flowers' Witness Statement**

7. Mr. Courtenay SC submits that the Report on Special Investigation at La Inmaculada Credit Union Ltd ("the Report") is not in compliance with Part 32 of the Supreme Court (Civil Procedure) Rules ("the CPR") and contains hearsay evidence.

The main objections to the admissibility of the Report are as follows:

a. The report must be addressed to the court (32.12);
b. The report must give details of any literature or other material which the expert has used in making the report ( 32.12(1)(a);
c. The report must say who carried out any test or experiment which the expert has used for the report and accompanying details of qualifications(32.13(1)(b) & (c );
d. The report must confirm certain statements at the end (32.13(2) including the following:
    i. The expert understands his duty to the court as set out in Rules 32.3 and 32.4;
    ii. He has complied with that duty;
    iii. The report includes all matters within the expert's knowledge and area of expertise relevant to the issue on which the expert evidence is given; and
    iv. The expert has given details in the report of any matters which to his knowledge might affect the validity of the report.

e. The report must have the following attachments (32.13(3):

    i. all written instructions given to the expert;

    ii. any supplemental instructions given to the expert since the original instructions were given; and

    iii. a note of any oral instructions given to the expert and the expert must certify that no other instructions than those

disclosed have been received by him or her from the party instructing the expert, the party's legal practitioner or any other person acting on behalf of the party.

In support of his objections, Mr. Courtenay, SC, relies on the dicta of Barrow JA (as he then was) in ***Josephine Gabriel and Co Ltd. v. Dominica Brewery and Beverages Ltd (Dominica)*** Civil Appeal No. 10 of 2004 where His Lordship opined thus:

> "*[7] The over-arching importance that the rules place on the duty of the expert to assist the court and not to seek to procure a favourable outcome for the party who instructed him appears in rule 32.14, which specifies certain things that must be contained in an expert witness' report. The relevant portions are rules 32.14 (2) and (3) which state: …*
>
> [*8] The reports for both experts did not contain a statement that the expert understood her or his duty to the court or that he or she had complied with that duty. There was no indication that either expert had included in her or his reports all matters within her or his knowledge and area of expertise relevant to the issue. The instructions given to the experts were not disclosed.*
>
> *[9] The breaches of the rules that were committed in the presentation of the expert evidence were egregious. The parties were lucky to escape the consequences of such breaches. It would have been entirely appropriate, because it would have been proportionate to the*

*scale of the violations, for the judge to refuse to receive the evidence of both expert witnesses. The administration of justice cannot countenance the conduct of litigation in such flagrant violations of rules specifically designed to protect the courts against the danger of deception by apparently credible expertise that conceals its true intent of promoting the interests of its purchaser."*

8. Mr. Courtenay, SC, submits that the rules mentioned in paragraph 7 of this judgment are the equivalent of Rule 32.13 of Belize's CPR. He also cites the Caribbean Civil Court Practice as follows:

> *"The expert evidence presented to the court must be, and should be seen to be the independent product of the expert uninfluenced as to form or content by the demands of litigation. An expert witness must provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within the witness' expertise."*

The argument is that the Report results in manifest prejudice to Mrs. Gomez, as the failure by LICU to comply with the requirements of Part 32 effectively deprives Mrs. Gomez of the opportunity to put written questions to Mr. Flowers with respect to the report and receive written responses. In addition, the tendering of the Report would be a breach of natural justice due to Mrs. Gomez as this was an investigation which Mrs. Gomez was not allowed to participate in, by reason of a refusal of LICU

and Cedric Flowers to allow her to review documentation before being interviewed for the investigation. Mr. Courtenay, SC, also argues that the Report contains findings based on interviews with persons who are not witnesses in the trial, and as such, would continue hearsay, and would therefore be inadmissible. He cites Morrison JA in ***Blue Sky Belize Ltd v. Belize Aquaculture Ltd.*** Civil Appeal No. 8 of 2012.

> "[*57] Putting these cases on one side, therefore, the authorities appear to support two-complementary-propositions on the issue of the admissibility of expert opinion evidence based on hearsay. The first is that, where the opinion of an expert is based on the existence or non-existence of some fact,, which is basic to the question on which he is asked to express his opinion, that fact must be proved independently by admissible evidence, either given by the expert himself if it is within his own knowledge, or by some other witness."*

The submission is that for Cedric Flowers' Report to be admissible, persons he interviewed which the report was based on, should have been called as witnesses in order for the report to be admissible. As this was not done, the Report would be inadmissible.

9. Mr. Courtenay, SC, objects to documents attached to Jamid Teyul's statement (Tab 1) on the basis that they are documentary hearsay in that

Mr. Teyul did not make or sign the loan documents or the promissory note. He also objects to the documents in Tab 2 of Mr Teyul's statement as failing to comply with the requirements of Evidence Act and Electronic Evidence Act.

The objection against the documents attached to Yolly Trejo's witness statement in Tab 2 is that they fall under Category C.

In relation to Yadeli Urbina's witness statement, Tabs 4, 5, 6 and 11 do not comply with the Evidence Act or the Electronic Evidence Act, while Tabs 7, 8, 9, 10, 11, 12, 13, 14. 15, 16 and 17 constitute documentary hearsay. Tab 18 are bank account statements which are subsumed under Category C as in ***Miron (T/A Belican Supply Depot)*.**

Tab 1 attached to Glenford Ysaguirre witness statement is challenged as documentary hearsay as Mr. Ysaguirre is not the maker of the Report.

Finally in relation to affidavits filed by Jamid Teyul, Yaneli Urbina and Marina Gongora on September 25th, 2017, the objection is that LICU is attempting to tender evidence by way of affidavit at the midpoint of trial to cure defects in its evidence. LICU has not referred to any rule which would allow them to do this. There is no such rule. LICU is seeking to do this after

Mrs. Gomez has closed her case and she therefore has no opportunity to respond to this unlawful ambush. Pursuant to Part 27.8 (3) of the Supreme Court Civil Procedure Rules:

> *"A party seeking to vary any other date in the timetable without the agreement of the other parties must apply to the court, and the general rule is that the party must do so before that date."*

The court should therefore find that the documents be ruled inadmissible for reasons stated above.

**Submissions on behalf of La Inmaculada Credit Union (LICU) in response to Objections raised on the Admissibility of Documents**

10. Mr. Fred Lumor, SC, responds to the objections raised by Mr. Courtenay, SC, as follows:

The objections have been placed in two broad categories:

a) Documentary hearsay
b) Failure to comply with the Evidence Act and the Electronic Evidence Act

Learned Counsel for LICU submits that it is LICU's position that the documents which have been annexed and which have been objected to as documentary hearsay are documents which form a part of the records of

LICU and are on LICU's files. He cites section 88(1) of the Credit Unions Act which provides that:

> *"A copy of any entry in a book of a registered credit union kept in the course of business shall, if certified in such manner as may be prescribed by rules, be received in evidence in any legal proceedings, civil or criminal, as prima facie evidence of the existence of such entry and shall be admitted as evidence of the matters, transactions and accounts therein recorded in every case where, and to the same extent as the original entry itself is admissible."*

There are no rules under the Credit Unions Act which specify how the records of the credit union may be certified. Nevertheless, the purpose and intent of section 88(1) is to enable the court to receive evidence from the books of a registered credit union.

Learned Counsel for LICU also relies on Section 12 of the Evidence Act which states that:

> *"A copy of any entry in a banker's book is admissible as prima facie evidence of the entry, and of the matter, transaction or account therein recorded:*
>
> *Provided that no copy shall be received in evidence unless it is first proved that the book in which the entry was made was, at the time of*

*making that entry, one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank, which proof may be given, either orally or by affidavit, by a partner or officer of the bank, and that the copy has been examined with the original entry and is correct, which proof must be given by some person who has examined the copy with the original entry, and may be give neither orally or by affidavit."*

The submission is that the objection raised to these documents is premature in that it is raised before LICU's evidence has been tendered. Once the Court accepts that the same criteria laid down for banks should be applied to a credit union, then any record from the credit union sought to be tendered as evidence can be certified by an oral certificate from LICU's officer. Section16 of the Evidence Act reads as follows:

*"The court may permit any party to a civil cause or matter to use his books of account, kept in the course of his business, as evidence in support of his claim or defence, if they appear to have been kept in the course of business with so reasonable a degree of regularity as to be satisfactory to the court."*

Mr. Lumor, SC, submits that the affidavit of Maria Gongora, Jamid Teyul and Yadeli Urbina certify that the documents produced in their witness statements are true copies of documents on LICU's files.

**Documentary Hearsay**

11. In response to the objection raised that the documents constitute documentary hearsay and offend Section 82 of the Evidence Act, Mr. Lumor, SC, counters that objection by saying that in the instant case, the documents objected to are all documents which form part of the continuous record of LICU. All the Annexes attached to the witness statements of Marina Gongora, Ena Martinez, Jamid Teyul, Yadeli Urbina and Lucia Gonzalez (documents to which Mrs. Gomez has objected to) do not constitute documentary hearsay because LICU is a party to the documents. Each officer who signed a contact report, a promissory note or a loan application, did so as an officer of LICU, on behalf of LICU, and consequently, LICU is able to rely on and produce those documents in these proceedings.

12. Mr. Lumor, SC, further argues that if the Court determines that each officer is required to personally attend to produce each document, there would be no end to the matter. The proviso to Section 82 enables the court to accept the document where the maker is not called as a witness because he/she is dead, unfit by bodily or mental condition, is outside Belize, if it is not reasonably practicable to secure his/her attendance, or if the person

cannot be found. He submits that LICU can therefore adduce evidence as to these matters through amplification of evidence when the witnesses are on the witness stand, and thereby satisfy the requirements of Section 82 of the Evidence Act. Learned Counsel further submits that pursuant to Section 82(2) the Court has a residual discretion to permit a document to be admitted into evidence, notwithstanding that the maker is available but is not called as a witness, where the judge is satisfied *"that undue delay or expense would otherwise be caused."*

Mr. Lumor, SC, cites ***Francis Petrus Vingehoedt v. Stanford International Bank Ltd. (In Liquidation)*** Civil Appeal No. ANUHCVAP2014/0030 (Antigua and Barbuda) where Pereira CJ cited the dicta of Kingsmill Moore J which provides a helpful explanation of hearsay evidence:

> *"In view of some of the arguments addressed to the Court, it is necessary to emphasize that there is no general rule of evidence to the effect that a witness may not testify as to words spoken by a person who is not produced as a witness. There is a general rule, subject to many exceptions, that evidence of the speaking of such words is* ***inadmissible to prove the truth of the facts*** *which they assert; the reasons being that the truth of the words cannot be tested by cross-examination and has not the sanctity of an oath. This is the rule known as the rule against hearsay…Evidence may properly be*

*given of words uttered by persons who are not called as witnesses… where the utterance of the words may itself be a relevant fact, quite apart from the truth or falsity of anything asserted by the words spoken. To prove by the evidence of a witness who heard the words, that they were spoken, is direct evidence, and in no way encroaches on the general rule against hearsay."*

Pereira CJ also stated:

*"The learned trial judge most carefully reminded himself that there is a distinction (and I agree) to be drawn between a statement as evidence of the proof of what a person said, on the one hand, and a statement as evidence of proof of that what was said was true, on the other."*

Learned Counsel submits that if the Court considers that the documents which have been objected to by Mrs. Gomez constitute hearsay and are inadmissible, alternatively the documents will not be tendered as proof of the truth of the written statements but rather as evidence of the fact that the statements had been made and form a part of LICU's records.

**Electronic Evidence Act/Evidence Act**

13. Mrs. Gomez has objected to documents obtained from LICU Emortelle System on the ground that reliance on the printouts would violate the

Electronic Evidence Act and the Evidence Act. Mr. Lumor, SC, cites Section 83 of the Evidence Act as amended through Act No. 18 of 1998:

> *"83.-(1) In any civil proceedings, a statement contained in a document produced by a computer is admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if it is shown –*
>
> > *(a) that the document containing the statement was produced by the computer during a period over which the computer was used regularly to store and process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by any person;*
> >
> > *(b) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;*
> >
> > *(c) that throughout the material part of that period the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and*

*(d) that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities.*

*(2) In any civil proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate:-*

*(a) identifying the document containing the statement and describing the manner in which it was produced; and*

*(b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer; and*

*(c) dealing with any of the matters to which the conditions mentioned in subsection (1) relate, and purporting to be signed by a person occupying a responsible position with relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated therein; and for the purpose of this subsection it is sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it*".

Section 7 of the Electronic Evidence Act provides that:

> *"In the absence of evidence to the contrary, the integrity of the electronic records system in which an electronic record is recorded or stored is presumed in any legal proceeding:*
>
> > *(a) where evidence is adduced that supports a finding that at all material times the computer system or other similar device was operating properly, or if not, that in any respect in which it was not operating properly or out of operation, the integrity of the record was not affected by such circumstances, and there are no other reasonable grounds to doubt the integrity of the record;*
> >
> > *(b) where it is established that the electronic record was recorded or stored by a party to the proceedings who is adverse in interest to the party seeking to introduce it; or*
> >
> > *(c) where it is established that the electronic record was recorded or stored in the usual and ordinary course of business by a person who is not a party to the proceedings and who did not record or store it under the control of the party seeking to introduce the record*."

Mr. Lumor, SC, submits that pursuant to Section 8 of the Electronic Evidence Act, proof of matters required by sections 6, 7 and 8 of the Act *"may be established by an affidavit given to the best of the deponent's*

*knowledge or belief"*. He further submits that the use of the word "*may*" instead of "*shall*" leaves the Court with a discretion to accept proof of those matters by oral testimony. To the extent that there is any inconsistency in the construction of the two Acts, the latter in time would prevail. LICU has filed affidavits dated September 25th, 2015 in which Yadeli Urbina, Marina Gongora and Jamid Teyul have certified documents annexed to their witness statements; the affidavits provide the certificate as required by the Evidence Act and the Electronic Evidence Act and therefore render the documents compliant with both statutes. The sole purpose of these affidavits is to authenticate the computer printouts and electronic evidence adduced by LICU's witnesses, and no new factual matter is introduced which is prejudicial to Mrs. Gomez. Learned Counsel for LICU argues further that there is no need for a computer technician to provide a certificate; he relies on ***R v. Shephard*** [1993] AC 380 where the principal question for determination was whether a party seeking to rely on computer evidence could discharge the burden cast on it to establish that at all material times the computer was operating properly without calling an expert. The House of Lords determined that:

*"Where a prosecutor wished to rely upon evidence set out in a document produced by a computer, it was necessary for affirmative evidence to be adduced as to the computer's reliability in accordance with the requirements of section 69 of the Act of 1984, by either calling of oral evidence or the tendering of a written certificate in accordance with the terms of paragraph 8 of Schedule 3 to the Act; that although the nature of the oral evidence required to discharge that burden would vary, depending upon the complexity of the computer and its operations, it would normally be possible for the evidence as to the computer's reliability to be given by a person who was familiar with it, in the sense of knowing what the computer was required to do, and who could say that it had been doing it properly, and that, accordingly, since the function of the computer connected to the till rolls had been limited to the provision of basic information, the store detective's evidence that there had been no malfunction by the tills or the computer on the relevant date was sufficient confirmation of the computer's reliability for the purposes of section 69, and the till roll had been properly admitted in evidence."*

Mr. Lumor, SC, submits that it follows from this that there is no need for a computer technician to provide the certificate, and that the employee of LICU who had responsibility for the computer from which the information is extracted is the appropriate person to provide the certificate.

14. It is also submitted on behalf of LICU that the extracts from the Emortelle System form a part of the credit union's books and records and so is admissible pursuant to section 88(1) of the Credit Unions Act.

In ***Barker v Wilson*** [1980] 1 WLR 884 Bridge LJ held at page 887 that:

> *"The Banker's Books Evidence Act 1879 was enacted with the practice of bankers in 1879 in mind. It must be construed in 1980 in relation to the practice of bankers as we now understand it. So construing the definition of "bankers' books" and the phrase "an entry in a banker's book," it seems to me that clearly both phrases are apt to include any form of permanent record kept by the bank of transactions relating to the bank's business, made by any of the methods which modern technology makes available, including, in particular, microfilm."*

In the instant case, it is submitted that an "*entry in the book of a registered credit union*" similarly is not limited to a book in the conventional sense, but must refer to any form of permanent record kept by the credit union of transaction relating to its business. LICU's records are not kept manually, but are kept electronically through the use of a software called the Emortelle System. The records from that system are therefore entries in LICU's books, and as such, those records constitute prima facie evidence of the existence of the matters, transactions and accounts therein recorded.

**Expert Evidence**

15. In response to the objections raised by Mrs. Gomez to the expert report of Cedric Flowers on the ground that the report does not comply with part 32 of the CPR, Mr. Lumor, SC, reviews the history of the application by LICU to appoint Mr. Flowers as an expert. By an application dated 29th February, 2016 LICU sought the following order:

> "T*hat permission be granted to the Applicant to call Cedric Flowers, Certified Public Accountant, as an expert witness, and that he be permitted to submit to the Court a special examination report of the accounts or financial statements of the Claimant/Applicant for the period March 2012 to March 2015."*

In the grounds it was expressly stated that:

> *"2. The proposed expert conducted a special examination of the financial affairs and books of the Claimant for the period 31st March 2012 to 31st March 2015 which is the subject matter of this claim.*
>
> *3. The expert prepared a report on the special examination dated 21st October 2015 which forms part of the Statement of Claim of the Claimant in this proceedings, and on which the Claimant intends to rely."*

The grounds are substantiated by the affidavit of Ms. Yadeli Urbina which sets out the circumstances under which Mr. Flowers was hired by the Board

of LICU to conduct a special investigation into the financial affairs of LICU. In that affidavit, Ms. Urbina clearly states that the Claimant intends to rely on the report to establish its claim. It is submitted that it has always been LICU's position that the appointment of Cedric Flowers had been sought so that reliance could be placed on his report which had been prepared prior to the institution of the claim, and which had been annexed to the Claim Form. Consequently no orders were given by the Court, no date was set for filing the expert report and no provision made for questions to the expert. The Court by its order has authorized Cedric Flowers to be called as an expert and further authorization was provided for him to submit his report of the accounts or financial statements of the LICU for the period March 2012 to March 2015. Mr. Lumor, SC, submits that Mrs. Gomez has received a copy of Cedric Flowers report along with the claim, and if she considered that the report violated the CPR, objection should have been made to the application by LICU. No objection was made and the court proceeded to make the order appointing Mr. Flowers as an expert as prayed. Learned Counsel for LICU also distinguishes the facts in this case from the facts of those cases relied upon by Mrs. Gomez. In those cases, the failure of the expert to comply with rule 32 arose when the report was prepared after

appointment and after receiving instructions from the court. It is further submitted that the absence of a certificate required by rule 32.13(2) of the CPR can be cured by oral evidence from Cedric Flowers. He relies on ***Potomek Construction Ltd v. Zurich Securities Ltd*** [2004] 1 ALL ER (Comm) 672 where the court held that a similar defect in an expert report could be cured by oral evidence. What was important was that the court was satisfied that the expert understood his duty was to assist the court by providing an opinion and views independent of the party instructing him, and that he sought to fulfill that duty. It was further stated that the court had a discretion to grant leave to amend the report to bring it into compliance with the CPR. Mr. Lumor urges this court to adopt a similar approach to the report of Cedric Flowers in the case at bar.

16. Mrs. Gomez also objects to Mr. Flowers' report on the basis that opinions have been formed on the basis of hearsay. Learned Counsel for LICU submits that the information contained in the expert report is based on investigations undertaken by the expert, so that information consists of matters which are known to him as a result of his investigation. He cites Morrison JA in ***Bluesky Ltd v. Belize Aquaculture Ltd.*** where His Lordship relied on ***Phipson on Evidence*** 12th edn. Para 1207:

*"Where the opinion of experts if based on reports of facts, those facts, unless within the experts' own knowledge, must be proved independently. An expert's evidence is necessarily founded on his training and experience, both of which involve the acceptance of hearsay information. It is, however, permissible for him to give an opinion on the basis of such hearsay, provided that it relates to specific matters on which he does have personal knowledge, or of which admissible evidence will be given by another witness. He may not, however, give details of a particular transaction unless he himself has personal knowledge of it."*

Morrison JA added at paragraph 57:

*"Putting these cases on one side, therefore, the authorities appear to support two –complimentary-propositions on the issue of admissibility of expert opinion evidence based on hearsay. The first is that, where the opinion of an expert is based on the existence or non-existence of some fact which is basic to the question on which he is asked to express his opinion, that fact must be proved independently by admissible evidence, either given by the expert himself if it is within his own knowledge, or by some other witness. But secondly, once the primary facts on which the expert's opinion is based have been proved by such evidence, the expert may draw on the general body of knowledge in the particular area of expertise comprised in the work of others."*

The submission on behalf of LICU is that to the extent that the expert relied on any hearsay information, LICU has produced several witnesses in order to prove the primary allegations against Mrs. Gomez. If the evidence of LICU's witnesses is accepted, then, there can be no complaint that the expert's opinion is based on hearsay information, as the primary allegations would have been proved independently by admissible evidence. The instant case is therefore distinguishable from Blue Sky case. It is submitted that the objections by Mrs. Gomez should be dismissed and that LICU should be permitted to rely on its evidence in its entirety.

**Submissions on behalf of the Registrar of Credit Unions in response to Objections raised by Mrs. Gomez on the Admissibility of Glen Ysaguirre's Witness Statement**

17. Mrs. Liesje Barrow Chung on behalf of the Registrar of Credit Unions addressed the objection raised by Mrs. Gomez that the report annexed to the witness statement of Glenford Ysaguirre is documentary hearsay as Mr. Ysaguirre is not the maker of the report. In response to that objection, Mrs. Barrow Chung says that the report is not there as proof of the truth of the contents of the report, such as any of the allegations made against the Claimant, hence it does not fall under hearsay evidence. She cites the Privy

Council case of ***Subramanium v The Public Prosecutor*** [1956] WLR 965 where it was held that:

> *"Evidence of a statement made to a witness by a person who was not himself called as a witness was not hearsay evidence and was admissible when it was proposed to establish by the evidence, not the truth of the statement, but the fact that it was made."*

The submission is that this case enunciates the common law principle regarding what would be considered hearsay, a position which remains unchanged today.

Mrs. Barrow Chung submits on behalf of the Registrar of Credit Unions that the report attached to the statement of Mr. Ysaguirre is not used to prove any of the allegations made against the Claimant, or the content of the report. It is attached simply to show what exercise was undertaken by the 2nd Defendant under the Credit Unions Act section 60 which reads as follows:

> *"60. The Registrar shall have the power to appoint examiners to conduct an examination of the affairs of a credit union or the League as often as the Registrar shall deem it necessary."*

The section goes on to allow the Registrar to have these examiners prepare detailed reports that can be presented to the members of the credit union

that was examined. It is for these reasons that the report is attached to the witness statement of the Registrar of Credit Unions. Mrs. Barrow Chung therefore submits that it does not count as inadmissible evidence under the hearsay rule as it is not used to prove the truth of the content or any of the allegations made against Mrs. Gomez but merely used to show the functions or powers exercised by the office of the Registrar in this particular instance.

**Ruling**

18. I am grateful to all counsel for the parties for the extensive submissions which have been invaluable in assisting me in deciding this matter. I will start with the objection raised against the report attached to Mr. Ysaguirre's report that it is inadmissible as documentary hearsay. I agree with Mrs. Barrow Chung that the report does not violate that rule as it is tendered to show compliance by the Registrar of Credit Unions with the requirements of section 60 of the Credit Union Act and not to establish the truth of any allegation against Mrs. Gomez. The report is therefore ruled admissible. Having fully considered the arguments in support of and against the other objections regarding the admissibility of documents attached to the witness statements of Yadeli Urbina, Yolly Trejo, Ena Martinez, Lucia

Gonzalez, Marina Gongora and Jamid Teyul, I am of the respectful view that Mr. Lumor, SC, has successfully countered each objection raised by Mr. Courtenay, SC, as to the admissibility of these documents. I fully agree with Mr. Lumor, SC, that all the documents objected to by Mrs. Gomez as documentary hearsay will be admissible once the witness is allowed to amplify on the stand and explain the reason why the maker of the statement is not available (e.g. whether the witness is dead, body or mentally unfit, outside the jurisdiction) to tender the evidence directly. Once this is done, then requirements of Section 82 of the Evidence Act are satisfied, and the court can exercise its discretion not to require each and every witness to come to court where such a course of action will incur additional and unnecessary time and cost. In relation to the objection as to the admissibility of the Credit Union records annexed to the witness statements as not being in compliance with the Electronic Evidence Act and the Evidence Act, I once again agree with the submissions of Mr. Lumor, SC, that the affidavits filed by the witnesses provide the certificate required by these acts. In addition, I fully agree that even if the affidavits were not allowed, the witnesses could once again amplify their evidence while on the witness stand to give the certificate orally. There really must be a

practical common sense approach to the law. I would posit that these are records which are not completely alien to La Inmaculada Credit Union or to Mrs. Gomez. These witnesses (Yadeli Urbina, Lucia Gonzalez, Ena Martinez, Yolly Trejo, Marina Gongora and Jamid Teyul) are individuals who were employed by the credit union at the relevant time. It appears that these are printouts generated by these employees in the day to day functioning of the very organization of which Mrs. Gomez was the General Manager for several years. The Credit Unions Act section 88(1) clearly mandates that the records of the credit union regularly kept in the course of business shall be admissible, once duly certified. There is no need for a computer technician to testify as to the reliability of the computers when there is testimony from the people who used the computers every day. That objection is also overruled. Finally, in relation to the objection that Cedric Flowers' report is inadmissible due to non-compliance with the Civil Procedure Rules and due to the portions of documentary hearsay in the report, I once again agree with Mr. Lumor, SC, that the report was prepared by Mr. Flowers *before* the claim was instituted and *before* he was appointed as an expert. LICU clearly indicated that it was seeking permission to call Mr. Flowers as an expert, it obtained the permission of the court at case management and there was

no objection at that stage so the court duly appointed Mr. Flowers as an expert. LICU clearly indicated that it intended to rely on the report, and the report was duly served on Mrs. Gomez as a part of the claim. Mr. Flowers is a recognized expert in the field of Accounting in Belize, and having testified in these courts as an expert on countless occasions, I am certain that he is fully cognizant and mindful of his duty to impartially assist the court which overrides any obligation he has to his client. In relation to the portions of the report which may be hearsay, I also agree with Mr. Lumor SC's submission that the court retains a discretion to excise from the report any statement which the court determines to be hearsay. In these circumstances, I see no prejudice to Mrs. Gomez and I will allow the report of Mr. Flowers to be admitted into evidence. The objections are overruled and dismissed. Costs of this application awarded to the Respondents to be paid by the Applicants to be assessed or agreed.

***Dated this Monday, 16th day of April, 2018***

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**Michelle Arana**
**Supreme Court Judge**