

**JAMAICA**

**IN THE COURT OF APPEAL**

**BEFORE: THE HON MR JUSTICE BROOKS P  
THE HON MISS JUSTICE STRAW JA  
THE HON MRS JUSTICE FOSTER-PUSEY JA**

**SUPREME COURT CIVIL APPEAL NO 33/2005**

|                |  |                                  |
|----------------|--|----------------------------------|
| <b>BETWEEN</b> | <b>FIRST TRADE INTERNATIONAL BANK<br/>&amp; TRUST LIMITED (in Liquidation)</b> | <b>APPELLANT</b>                 |
| <b>AND</b>     | <b>EXECUTIVE MOTORS LIMITED</b>  | <b>1<sup>ST</sup> RESPONDENT</b> |
| <b>AND</b>     | <b>KEY MOTORS LIMITED</b>  | <b>2<sup>ND</sup> RESPONDENT</b> |

**Dr Lloyd Barnett, Keith Bishop and Andrew Graham instructed by Bishop & Partners for the appellant**

**Ransford Braham QC and Ms Carol Davis for the respondents**

**14, 15, 16, 17 December 2020 and 30 July 2021**

**BROOKS P**

[1] I have read, in draft, the judgment of Straw JA. I agree with her reasoning and conclusion. There is nothing further that I wish to add.

## **STRAW JA**

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|  |   |
|--|---|
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## **Introduction**

[2] There are certain areas in which antiquity is ideal, but in others, it is not. This case has resided in the court system for too long, due in part to matters beyond all parties' and this court's control. This appeal was previously heard in May and June of 2015, but no judgment had been issued. It is for this reason, that this matter is now being considered by this panel as presently constituted.

[3] This is an appeal by First Trade International Bank & Trust Limited (in Liquidation) (hereinafter referred to as 'FTIB' or 'the Bank') against the decision of M McIntosh J ('the learned judge'), delivered on 7 February 2005. This appeal arises from the learned judge's decision in respect of a consolidated claim brought by FTIB against Executive Motors Limited ('Executive') and Key Motors Limited ('Key') (collectively called 'the respondents'). FTIB sought to recover from Executive and Key, the respective sums of US\$89,876.69 and US\$233,075.37 which it claims, it loaned the respondents pursuant to letters of credit ('L/C').

[4] The respondents each filed separate counterclaims against FTIB, claiming monies paid over by them on L/C's which they alleged that FTIB did not transfer in accordance with the L/C's nor repay to them.

### **The learned judge's order**

[5] On 7 February 2005, the learned judge made the following orders in the matter:

#### **"JUDGMENT**

Judgment for the Defendants on the Claim.

Judgment for the Defendant, Key Motors on the Counter Claim in the sum of US\$309,320.00 from 1<sup>st</sup> August 1995 with interest at 33% per annum and judgment for the defendant, Executive Motors on the counterclaim in the sum of US\$130,995.13 with interest at 33% from 14<sup>th</sup> June 1995 [.]

Costs to the Defendant to be agreed or taxed."

### **Background**

[6] FTIB was a bank located in Nassau, Bahamas, but its license permitted it to conduct business with banks and other entities outside the Bahamas. The nature of its business arrangement, relevant to this matter, was that it provided L/C's, valued at 50% of goods ordered by its customers from suppliers. The Bank's customers included the respondents. The respondents are companies located in Jamaica and at the time the litigation arose, were engaged in importing motor vehicles and spare parts from Korean companies, from which they had manufacturers' distributorships ('the suppliers'), which would later be sold locally.

[7] It was customary that financial institutions, such as FTIB, would intervene in negotiations between buyers and sellers to ensure payment of shipments made by overseas suppliers. As such, FTIB acted as an intermediary for the respondents and was responsible to open the L/C's which the respondents applied for. By virtue of this arrangement, the respondents would advance 50% of the value of their shipments to FTIB. FTIB, in turn, would lend the respondents the remaining 50% of the value of

shipments, which they were to repay, to FTIB, within 120 days, at an interest of US prime +1%. FTIB would thereafter advance the full payments to the suppliers' banks ('the beneficiary banks').

[8] Once the L/C was established (by virtue of a document titled - Agreement for Letter of Credit and Security Agreement, the format for all the relevant L/C's), FTIB would transmit a telex to the suppliers through the beneficiary's bank. Upon receipt of the L/C's by the suppliers, the documents relevant to the shipping would be sent to FTIB upon shipment. These documents included a bill of lading, packing list, and insurance cover. When FTIB received these documents, it would compare them with the L/C's to ensure that the requirements were met and to verify that all the documents were received. If there were no discrepancies, FTIB would normally transfer the amount for the shipment to an intermediary bank for the ultimate credit to the beneficiary bank. In order to transfer funds to the beneficiary banks, FTIB would instruct its bank, First Union National Bank of Jacksonville ('First Union') to transfer the sums, less any applicable charges, to the beneficiary bank. FTIB would receive from its bank, evidence, in the form of a transmittal Federal Reserve Wire Network ('Fedwire'), that the transfer was completed. Simultaneously, FTIB would book a 120-day loan (from the date of the bill of lading) for 50% of the value of the shipment, in keeping with its agreement with the respondents as well as send the shipping documents to the respondents, so they could collect the items in the shipment. Copies of the various agreements for the L/C's were exhibited in an agreed bundle of documents.

[9] This arrangement continued until sometime in 1995, when FTIB experienced liquidity issues. Consequently, FTIB was unable to advance its 50% portion relevant to the L/C's and the respondents had to fully finance the endeavour. The president of the bank, Mr Glenn Varvla, as well as the general manager, Mr Manuel Valera, were terminated when the difficulties arose and Mr Pierre Loubeau ('Mr Loubeau') was appointed as the general manager. FTIB later went into liquidation.

### **FTIB's position**

[10] FTIB's claim, is, simply for recovery of money. The Bank asserts that the respondents did not repay the entire loan amount on certain L/C's, with some amounts, inclusive of principal and interest, still outstanding.

[11] FTIB claims that Executive owes it the following:

| <b>Related L/C or Overdraft</b> | <b>Principal Outstanding<br/>(US\$)</b> | <b>Interest accrued to 28 February 1997<br/>(US\$)</b> |
|---------------------------------|---|--|
| 2088                            | \$51,807.50                             | \$8,136.72   |
| Overdraft                       | \$27,984.50                             | \$1,947.97   |
|                                 | <b>\$79,792.00</b>                      | <b>\$10,084.69</b>                                     |

[12] FTIB therefore claims, up to 28 February 1997, the sum of US\$89,876.69, which includes principal and interest.

[13] Additionally, FTIB asserts that Key owes it the following sums:

| <b>Related L/C</b> | <b>Principal Outstanding<br/>(US\$)</b> | <b>Interest accrued to 28 February 1997<br/>(US\$)</b> |
|--------------------|---|--|
| 2108               | \$69,690.89                             | \$9,282.44   |
| 2108               | \$90,537.97                             | \$14,668.04  |

|      |                     |                    |
|------|---------------------|--------------------|
| 1869 | \$15,162.36         | \$2,631.89         |
| 2288 | \$27,026.91         | \$4,074.87         |
|      | <b>\$202,418.13</b> | <b>\$30,657.24</b> |

[14] FTIB therefore claims against Key the sum of US\$233,075.37, which includes principal and interest.

[15] FTIB's witness, Mr Loubeau (see witness statement dated 15 September 2003 at paragraph 23), indicated that all the L/C's were handled by Continental Processors, an affiliate of FTIB, located in Miami, Florida; that the files were processed and kept at that location; further, that to the best of his knowledge, the records/files for the respondents were properly filed and stored.

[16] Mr Anthony Kikivarakis ('Mr Kikivarakis'), a partner at Deloitte & Touche, Bahamas, who was appointed as one of the liquidators for FTIB, admitted that a letter, dated 21 February 1996, was sent to Executive indicating that FTIB owed it US\$96,220.75 (that is US\$95,059.66 plus interest of US\$1,161.09). However, he later resiled from that position, stating that the letter was sent before the completion of the reconciliation process. FTIB claimed that after the process was completed, the accounting records revealed that FTIB paid certain sums to the beneficiary banks that had not been previously reflected. Accordingly, FTIB claimed that Executive owed FTIB the sum of \$89,876.69 and the respondents owed the collective sum of US\$322,952.06, as set out above.

[17] FTIB asserted, that while it was unable to pay certain sums outlined in the L/C's due to liquidity issues, it informed the respondents of this fact and indicated that they had to make the direct payments to the beneficiary's bank. Additionally, FTIB



contended that the respondents did not suffer any losses, as they received the items in the shipment.

### **Executive's and Key's position**

[18] The respondents, through their director Ms Sandra Lyn Shue ('Ms Lyn Shue'), admitted the process involved in the payment of shipments relevant to the L/C's but denied being indebted to FTIB. Reference was made to the said letter dated 21 February 1996, sent by Mr Kikivarakis, stating that FTIB owed Executive the sum of US\$96,220.75.

[19] The respondents also counterclaimed against FTIB, for the sums it paid to the Bank, by virtue of the L/C's which FTIB did not satisfy in accordance with the said L/C's. They alleged that they sent FTIB, their 50% value of certain L/C's, which were never returned to them, nor forwarded to the beneficiary banks, due to FTIB's liquidity issues. They contended that despite paying the 50% sums to FTIB, they had to make full payment to the beneficiary banks for shipments they ordered from suppliers. Executive counterclaimed against FTIB for the sum of US\$131,215.13 and Key counterclaimed for the sum of US\$309,670.00, with interest at a commercial rate or at such rate as the court determined. In the alternative, they contended that if they owed FTIB any sums, it should be settled by way of a set off of their claim against FTIB.

[20] Executive claimed the outstanding sums from FTIB, pursuant to the following L/C's:

| <b>L/C</b>  | <b>Outstanding Sum<br/>(US\$)</b> |
|-------------|-----------------------------------|
| <b>2747</b> | \$10,286.13                       |

|             |             |
|-------------|-------------|
| <b>2307</b> | \$68,606.00 |
| <b>2748</b> | \$52,103.00 |

Executive had also claimed the sum of US\$220.00 for storage fees at the wharf for goods which were not cleared because of non-payment by FTIB. This amount of \$220.00, when added to the total of the outstanding amounts on the L/C's - \$130,995.13, came to the amount of \$131,215.13 claimed by Executive (the learned judge made no order in relation to the sum of \$220.00 in her award of \$130,995.13).

[21] Key claimed against FTIB, pursuant to the following alleged unpaid L/C's:

| <b>L/C</b>  | <b>Outstanding sums<br/>(US\$)</b> |
|-------------|------------------------------------|
| <b>2288</b> | \$214,836.00                       |
| <b>2753</b> | \$94,384.00                        |

[22] They asserted that FTIB's failure to satisfy the L/C's resulted in them suffering loss and damage and that they incurred expenses.

### **The grounds of appeal**

[23] FTIB's grounds of appeal contained in the notice of appeal (filed 18 March 2005) are as follows:

"a. That the learned trial judge erred in holding that the Defendants are entitled to the sum outlined in their Counterclaim;

b. The learned trial Judge erred in awarding interest of 33% on a United States Dollar transactions which provides that the payments to the Defendants would attract interest of 4%;

c. The learned Judge erred in holding that the Claimant failed to prove its case; and

d. The evidence of the Respondents does not support the findings of the learned Judge.”

### **Preliminary issue**

[24] At the outset of the submissions on behalf of the respondents, Queen’s Counsel, Mr Ransford Braham, raised a preliminary issue which pertained to the scope of the appeal and, in particular, the notice of appeal filed by FTIB. It was submitted that there was no challenge in relation to the learned judge’s findings on the claim, namely her order which read:

“Judgment for the Defendants on the Claim.”

[25] In support of this, Mr Braham referred to court to rule 1.10 of the Court of Appeal Rules (‘CAR’) which, under the heading “Contents of Notice of Appeal”, provides:

“Subject to rule 4.2, in the notice of appeal the appellant must give details of –

(a) The decision or part of the decision which is being appealed identifying so far as practicable –

(i) any finding of fact; and

(ii) any finding of law,

which the appellant seeks to challenge;

(b) the grounds of the appeal;”

[26] Queen’s Counsel contended that rule 1.10 was not complied with, insofar as there was no attempt to set out the findings of facts and issues of law that were being challenged. Further, it was submitted that FTIB’s notice of appeal was embarrassing to

the respondents and, in the circumstances, the appeal should be limited to the counterclaim, since that was the part of the learned judge's judgment that was being challenged, together with the rate of interest.

#### The appellant's response to the preliminary issue

[27] Learned counsel, Dr Lloyd Barnett (who did not appear in the first hearing of the appeal) conceded that there were some deficiencies in the notice of appeal. He submitted that the problem arose from the orders of the learned judge, as set out in the reasons for judgment. Further, the notice of appeal was formulated before the said reasons had become available and as such, it was quite understandable that the details of the decision, including the findings being appealed, could not have been given at that time.

[28] Dr Barnett also submitted that when the respondent's filed their submissions in January 2015, in relation to the first hearing of this appeal which took place in 2015, no preliminary point of this kind was taken. Against that background, he contended that it would be manifestly unfair for the respondents to take this preliminary point, at this stage (that is, at the re-hearing of the appeal).

#### Ruling on preliminary issue

[29] The grounds of appeal do lack the details required as to the specific challenges to the findings of the learned judge. There would have been no impediment to FTIB seeking to amend the grounds of appeal, in order to conform to rule 1.10 of the CAR (see rule 1.12 of the CAR.) As such, counsel for FTIB is without any rational excuse for the deficiencies at this time. However, in treating with this matter, I considered that the parties had already completed the hearing of this appeal in 2015 and due to no fault of their own, the judgment was not delivered.

[30] I also took into account the fact that the issues identified by the submissions of FTIB, relevant to the grounds of appeal, are essentially, focused on the evaluation of documentary evidence (in particular the Fedwires) by the learned judge. Further, as

learned counsel for FTIB, Dr Lloyd Barnett submitted, the conflict between the evidence of the witnesses for the parties relate to their interpretation of the accounting records. While the learned judge, therefore, did some assessment in relation to the creditworthiness of the witnesses, this was essentially, limited to their testimony concerning the documentary evidence. I considered also, the broad-brushed complaint relevant to ground c, that the learned judge erred in holding that FTIB had failed to prove its case.

[31] The grounds of appeal can, therefore, be considered within the context of the treatment by the learned judge of the documentary evidence presented in proof of the claim and counterclaim, which are for the most part, factually intertwined. Given all of the above, I would allow the full ventilation of the appeal.

### **Issues arising from the grounds of appeal**

[32] In relation to the grounds of appeal and counter notice of appeal, three issues have been identified which require the consideration of this court, in order to bring this matter to a resolution. The issues are set out below:

Issue 1 - Based on the evidence of the system established between the parties in relation to the L/C's and the documentary evidence admitted, did the learned judge err in ruling that FTIB had not established that the respondents owed money on the L/C's? (grounds c and d)

Issue 2 - Based on the evidence of the system established between the parties in relation to the L/C's and the documentary evidence admitted, did the learned judge err in concluding that the respondents had established that monies were owed to them on the L/C's by FTIB? (ground a)

Issue 3 - Did the learned judge err in awarding the interest that she did on the judgment debt? (ground b)

Issue 3 will be dealt with first. Thereafter, issues 1 and 2 will be considered together as the factual circumstances, as well as the documentation relied on by the parties are intertwined and interconnected.

### **Discrepancies in figures referred to by the parties**

[33] It is necessary to make a general statement, at the very outset, in relation to the sums of monies set out in the various documents. The case at bar pertains to allegations of monies owed, which are all denominated in United States Dollars ('USD'), as such, all references to figures pertain to USD, unless otherwise stated. In a number of instances, the figures referred to by the parties are at variance with the figures contained in documents which have been presented to the court. An explanation has been provided that fees, interest and other bank charges were not accounted for in some instances and that this resulted in discrepancies. Further, the parties on both sides indicated that they were unable to locate some supporting documents. Based on this recognition, precision is simply not possible and it will not be the aim of this court to reconcile figures which the parties, themselves, were unable to, or made no attempt to reconcile.

### **Issue 3 - Did the learned judge err in awarding the interest that she did on the judgement debt? (Ground b)**

[34] It is expedient to dispense with this issue first, as Mr Braham has conceded that the learned judge erred in the rate of interest that was awarded. Both he and Dr Barnett agreed, during oral submissions, that since the liabilities are denominated in United States Dollars ('USD'), the applicable rate of interest is 9%. Queen's Counsel referred this court to a related matter involving FTIB and Crown Motors (referenced at paragraph [9] of **Crown Motors Limited et al v First Trade International Bank & Trust Limited**<sup>1</sup>, where the court awarded interest at 9%). He also relied on section 3 of the Law Reform (Miscellaneous Provisions) Act as well as **British Caribbean**

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<sup>1</sup>[2016] JMCA Civ 6

**Insurance Company Limited v Delbert Perrier** (1996) 33 JLR 119; (1996) 52 WIR 342.

[35] In the face of such a concession, FTIB should succeed on this ground of appeal. For completeness, it is worth noting that the Judicature (Supreme Court) (Rate of Interest on Judgment Debts) Order, 2006 prescribes 3% per annum in the case of judgment debts denominated in foreign currency. This is distinct from the interest rate of 33% imposed by the learned judge, which was an exercise of her discretion, pursuant to section 3 of the Law Reform (Miscellaneous Provisions) Act. This section makes no distinction between awards denominated in Jamaican dollars and those denominated in foreign currencies. Dr Barnett's submission that the appropriate rate is 9%, is strictly applicable to the circumstances of this case.

**Issue 1 - Based on the evidence of the system established between the parties in relation to the L/C's and the documentary evidence admitted, did the learned judge err in ruling that FTIB had not established that the respondents owed money on the L/C's? (Grounds c and d)**

**Issue 2 - Based on the evidence of the system established between the parties in relation to the L/C's and the documentary evidence admitted, did the learned judge err in concluding that the respondents had established that monies were owed to them on the L/C's by FTIB? (Ground a)**

#### FTIB's submissions

[36] Dr Barnett took no issue with the principles pertaining to the review of factual findings of the learned judge by this court, as stated in the authorities such as **Thomas v Thomas et al**<sup>2</sup>. However, he submitted the learned judge had no advantage over this court in the case at bar, as her findings were not dependent on her opportunity to observe the witnesses and assess their credibility.

[37] He challenged, in particular, the findings of the learned judge, as to how the Fedwires came into existence. Further, he submitted that the learned judge erred in failing to admit them as evidence of proof of payment made to the beneficiary banks by

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<sup>2</sup> [1947] AC 484

FTIB. He was critical of her finding that the documents submitted by FTIB, did not establish that money had been paid over to the beneficiaries, as she concluded that the Fedwires were inadequate as proof of payment. He contended that the Fedwires were not adduced to prove the actual payment of money, that is, the physical movement of the funds but that they represent that accounts have been debited and credited and the print outs were evidence of this. He contended that Fedwires were used internationally to settle final payment, which was acknowledged by Ms Lyn Shue, the respondents' witness. He stated that they were admitted as business documents, demonstrating the business dealings of the parties, as indicated by Mr Kikivarakis and Mr Loubeau. This, he asserted, is permissible, pursuant to section 31F of the Evidence Act. He advanced that once the documents were admitted, the information contained therein would be evidence of the facts stated.

[38] Counsel contended that the question of proof of payment, is whether the Fedwire can be relied upon, in the context of the system outlined and the overall evidence. Further, he submitted that since the documents were transmitted electronically, the print out of the document would be coming from the original sources, so the modern approach would be to permit admission of computer generated documents. Counsel referred the court to **R v Jones and R v Sullivan**<sup>3</sup>; **Savings and Investment Bank v Gasco**<sup>4</sup>; **Knight v David**<sup>5</sup>.

[39] Dr Barnett conceded that during the trial process, at the time the Fedwire documents were being admitted into evidence, pursuant to the Evidence Act, counsel, Mr Bishop, who appeared for FTIB below, stated that the Fedwires were not being relied on to prove payment. However, Mr Bishop had also submitted before the learned judge, that while the Fedwires would not be relied on by themselves, they would form part of a chain and be connected to other evidence, in order to prove the relevant payments by FTIB. Dr Barnett submitted, therefore, that the Fedwire constituted part

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<sup>3</sup> [1978] 1 WLR 195

<sup>4</sup> [1984] 1 All ER 296

<sup>5</sup> [1971] 3 All ER 1066



of the evidentiary material which established that goods were paid for, or monies were credited to suppliers. He referred the court to Sarna, Letters of Credit: The Law and Current Practice (2<sup>nd</sup> ed) Chap 1; Farlex Financial Dictionary-Definition for Fedwire and The Fedwire Funds Service - Revised July 2014 for an understanding of the system.

[40] Dr Barnett contended that the dispute between the parties arose due to the issues surrounding the reconciliation process of the bank records. He referred to the witness statement of Mr Loubeau and highlighted the description of the process in relation to the L/C's. Learned counsel also referred to Mr Kikivarakis' witness statement and remarked that as one of the liquidators of FTIB, he was a witness who had no interest to serve. It was contended that the letter stating that FTIB owed Executive the sum of \$96,220.75 was dispatched before the reconciliation process was completed. He stated that when the process was completed, Executive's account was in overdraft, that is, Executive owed FTIB the sum of \$27,984.50.

[41] Dr Barnett referred the court to paragraph 3 of the agreement establishing the L/C (referred to at paragraph [8], above), where it was agreed that FTIB would have the discretion to charge any available funds from the respondents to any amounts payable by them under the agreement that became due and payable. He contended that the application of paragraph 3 would have to be taken into consideration, when the evidence of the reconciliation of the bank records fell to be considered. The wording of paragraph 3 is set out:

"3. In event of any US Currency draft(s) being drawn by the undersigned on you whereby to refinance any obligation(s) set forth in '1' AND '2' hereof and such draft(s) being accepted by you (at your option), the undersigned will pay you on demand, but in any event no later than ONE (1) business day prior to its maturity, the amount of each such acceptance. It is understood that each amount which may become due and payable to you under this agreement may, in your discretion and if not otherwise paid, be charged by you to any available funds then held by you for the account of the undersigned. The provisions of this agreement applicable to drafts or acceptances drawn under or relative to or covered by the Credit or applicable to documents or property

relative to the Credit or applicable to the proceeds of such documents or property, shall also be applicable to any drafts accepted by you pursuant to this paragraph and any documents property or proceeds relative thereto.”

[42] Dr Barnett also submitted that the oral and documentary evidence made it clear that all the monies FTIB loaned to the respondents were not repaid. He referred the court, in his written submissions, to the witness statements and oral evidence of Mr Kikivarakis and Mr Loubeau (see volume 12, pages 1 to 26, 22 to 66 and 89 to 95, respectively). He stated that this evidence sets out the course of business dealings between the parties. Also, that the banking officers processing the documents would have had personal knowledge of the transactions which they processed in the course of their occupation; and as such, the statutory conditions for admissibility of all the documents were satisfied. Accordingly, he argued that pursuant to the L/C's, a penalty of US prime rate +1% continues to accrue on the unpaid sum.

[43] It is counsel's submission that there was overwhelming evidence in support of the transmission of the amounts in question to the beneficiary banks. In all situations where there is reliance on Fedwires or any other document to indicate payment, there was corroborative evidence of the Fedwire settlement, such as the banking and shipping documents, the reconciled accounts and the expert evidence of FTIB's witnesses; and that there was no evidence of issues of dishonesty or credibility of these witnesses.

[44] Relating specifically to the counterclaim, counsel conceded that FTIB's failure to pay its 50% portion of the L/C to the beneficiary banks, on behalf of the respondents, may constitute a breach of contract. He also acknowledged that FTIB's failure to pay those agreed sums, resulted in the respondents having to satisfy the full invoice amounts, which, in any event, was their duty, that is, to pay for items they ordered and received. Counsel, however, stated that this failure did not result in any indebtedness of FTIB to the respondents. He asserted that the respondents, as prospective borrowers, cannot sue FTIB to recover loans which were not advanced or because they had to seek

alternative funding. He also denied that the respondents paid 50% of the value of shipments to FTIB, then had to independently pay the beneficiary banks the full value of the shipments. He contended further that the respondents' statement of case did not aver that this is what took place.

[45] Counsel argued that when FTIB was unable to make its portion of the payment, it negotiated with the suppliers to ship the goods, based on the payment of 50%, with the understanding that the remaining 50% would be paid within a stipulated time frame, to which the suppliers agreed. He contended that the fact that the suppliers shipped the goods, indicated that FTIB in fact paid the beneficiary banks the sums advanced to it by the respondents. Accordingly, he submitted, there was no loss to the respondents.

#### The respondents' submissions

[46] Mr Braham submitted that the learned judge's decision should not be disturbed. He stated that there were several witnesses who gave evidence concerning their views, as to the nature and import of the numerous documents that were put before the trial court. Queen's Counsel submitted that it is well established that the appellate court ought not to disturb the findings of fact by a trial judge unless the trial judge was plainly wrong. He referred the court to the following authorities, which state the applicable principles governing the approach of this court, in treating with the decision of the learned judge, pertaining to her findings of facts: **Thomas v Thomas**<sup>6</sup>, **Beacon Insurance Company Limited v Maharaj Bookstore Limited**<sup>7</sup>, **In re B (A Child) (Care Proceedings: Threshold Criteria)**<sup>8</sup>, **Housen v Nikolaisen**<sup>9</sup>, **Biogen Inc v Medeva plc**<sup>10</sup>, **National Water Commission v VRL Operators Limited et al**<sup>11</sup>, and

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<sup>6</sup> [1947] AC 484

<sup>7</sup> [2014] UKPC 21

<sup>8</sup> [2013] 1 WLR 1911

<sup>9</sup> [2002] 2 SCR 235

<sup>10</sup> [1997] RPC 1

<sup>11</sup> [2016] JMCA Civ 19

**D & LH Services Limited et al v the Attorney General and the Commissioner of the Jamaica Fire Brigade.**<sup>12</sup>

[47] Mr Braham acknowledged that the learned judge did find that the Fedwires were not sufficient as proof of payment of funds allegedly paid by FTIB, on behalf of the respondents. He submitted, however, that the learned judge did not just make this finding, but went on to evaluate the evidence relating to the authenticity of the Fedwires. He contended that the issue of whether the Fedwires were genuine and could be relied upon, would be a finding which the learned judge was entitled to make, notwithstanding that these documents were admitted under the Evidence Act.

[48] In that regard, Mr Braham reiterated the concession made by Dr Barnett, that counsel for FTIB below (Mr Bishop) indicated that he was not relying on the Fedwires as proof of payment by FTIB to the beneficiary banks. In support of the appropriateness of this concession, Queen's Counsel also referred to the evidence of Mr Loubeau (see witness statement dated 15 September 2003 at paragraph 22) that FTIB required confirmation from its bank First Union, that actual debits were made to its account and that there was no such authentic evidence produced in court during the trial.

[49] Queen's Counsel submitted that the learned judge did not err in rejecting the Fedwire documents as authentic. She found that there was no evidence as to how the print outs came into existence and there was no evidence to support or authenticate them. He referred the court to page 5 of her judgment in that regard. Further, the court was asked to note that Mr Loubeau gave evidence of the system used when payment was to be made to beneficiary banks on behalf of the respondents. Mr Loubeau indicated that he would first give approval for a debit to be done from FTIB's account held with First Union. Evidence of this approval would be shown by an initial in the logbook (which was not placed before the learned judge). The wire would then be sent to First Union, requesting it to make the payment (these wires were not placed before

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<sup>12</sup> [2015] JMCA Civ 65

the learned judge). Finally, in the account between FTIB and First Union, there would be debits and credits which would indicate that payments were made from the First Union account (this account was not placed before the learned judge).

[50] It was also submitted that it was questionable what the Fedwires that were admitted into evidence and relied upon by FTIB, represented. In particular, Queen's Counsel referred to copy of a Fedwire disclosed by Ms Lyn Shue (see **Annex 1(b)**), in the amount of \$171,301.12 which had a heading "Welcome to First Union National Bank of Jacksonville" and the words "No credit wires for this account at this time". Queen's Counsel stated that this was to be compared to a copy of a similar document relied on by FTIB, containing the same information, but which did not bear the heading "Welcome to First Union..." or the words "No credit wires at this time" (see **Annex 1(a)**).

[51] Mr Braham referred to the evidence of Mr Loubeau, that the Fedwires came from a machine or a computer on pages containing several Fedwires, and that FTIB's staff would cut them up, before placing them on the relevant files. Further, under cross-examination, Mr Loubeau was asked to compare a Fedwire document disclosed by FTIB to one disclosed by Ms Lyn Shue; and when asked in cross-examination about the differences between both, he explained that the top and bottom of the particular Fedwire produced by FTIB had been cut off (see **Annex 1**).

[52] The court was referred to the evidence of Mr Loubeau as to what the words "No credit wires for this account at this time" meant. Mr Braham submitted that it showed no money was paid. He stated that Mr Loubeau indicated in his evidence (see volume 2, page 224), "...it means that the bank had not received any credits, any monies to its account the previous day to that specific account". He contended that the significance of this is supportive of the learned judge's view of the lack of provenance of the Fedwires relied on by FTIB.

[53] For all these reasons, Queen's Counsel submitted, the learned judge was entitled to determine whether the documents were authentic and reliable and that this was not an attack on the Fedwire system. He argued that it was within the learned judge's discretion to determine what weight to give to any of the documents. In making this assessment, he contended that the learned judge had to determine which documents were authentic and reliable. Counsel relied on paragraph [27] of **Desmond Robinson and the Attorney General v Brenton Henry and anor** [2014] JMCA Civ 17.

[54] Mr Braham also contended that the learned judge was not impressed with the reliability of the bank records produced by FTIB; and that was exacerbated in light of the financial difficulties existing at the Bank at the time, which necessitated it going into liquidation. He referred, in particular, to the review of the learned judge of the evidence of Ms Cheryl Simms ('Ms Simms'), an insolvency manager at the firm Deloitte & Touche, and her reference to a bank statement relevant to Key (described as CS 1/1 exhibited to her witness statement dated 27 November 2003). He stated that Ms Simms admitted that there were errors and the learned judge stated, in her judgment, that she could not rely on the bank records.

[55] The court was asked to compare the spread sheet, encompassing a report on all the relevant L/C's that was presented to this court, with the analysis of the L/C's, that was placed before the learned judge. He submitted that the spread sheet document did not support the particulars of claim of FTIB.

[56] Mr Braham argued that the learned judge was entitled to arrive at her findings, after careful consideration of the evidence presented by all parties. The respondents, he submitted, provided cogent evidence to support their counterclaims. He submitted that FTIB did not present authentic evidence to prove the alleged loans were owed by the respondents. He disagreed with Dr Barnett, that the fact that the goods were shipped, indicated that FTIB advanced the monies to the beneficiary bank. Mr Braham contended that the evidence of Mr Loubeau, as well as Ms Lyn Shue, confirmed that the items

would be shipped prior to any payment of funds to FTIB. Reference was made to paragraphs 18 and 19 of Mr Loubeau's witness statement (filed 19 September 2003) where he stated:

"18. The terms under which Hyundai would process the order were set out in the [letter of credit], and documents would be sent to FTIB upon shipment. These documents would include a bill of lading, packing list, and insurance cover amongst others. When FTIB received the documents it compared every single document with the [letter of credit] to ensure that the requirements were met and ascertained that all the documents were received.

19. If there were no discrepancies, FTIB would, under normal business conditions, transfer the amount of the shipment to the intermediary bank for ultimate credit to the beneficiary."

[57] In relation to the counterclaim, Queen's Counsel contended that FTIB breached the agreement, when it failed to make the payments advanced to it by the respondents, to the beneficiary banks. He submitted that the respondents were seeking a return of the payments they made to FTIB, in furtherance of the agreement. He argued that Ms Lyn Shue, in her witness statement, explained that the respondents paid FTIB monies, pursuant to certain L/C's, but FTIB failed to make the payments. He also argued that the respondents had to pay for the full value of the shipments to keep the distributorship. He noted that the cheques supporting the payments made by the respondents were before the learned judge.

[58] In particular, Queen's Counsel highlighted, as an example, the discrepancies in the evidence as it related to Key's L/C 2288 and the learned judge's assessment in relation to the figure of \$171,461.12, that FTIB asserted was paid to the beneficiary bank on Key's behalf.

[59] Mr Braham recounted the findings of the learned judge, to include that:

- a. the respondents advanced their 50% portion of the L/C's to FTIB;

- b. FTIB did not pay the monies to the beneficiary banks; and
- c. the monies paid by the respondents were to be refunded.

[60] He added that the learned judge's findings were further supported by the letter sent to the respondents by FTIB's liquidators that FTIB owed Executive money.

[61] He asserted that in the instant case, there was sufficient evidence that FTIB owed the respondents the sum set out in their counterclaims. Therefore, it cannot be said that the learned judge was plainly wrong. Further, Mr Braham highlighted that Mr Loubeau testified that there was mismanagement of funds which resulted in the termination of FTIB's previous manager, Mr Valero. Accordingly, he submitted that based on the evidence, the learned judge was correct to find that FTIB did not prove its case and her findings should not be disturbed by this court.

[62] In conclusion, Mr Braham submitted that, if this court were to find in favour of the respondents, the sums due to FTIB in the judgment of **Crown Motors Limited, Key Motors Limited and Executive Motors Limited v First Trade International Bank & Trust Limited (In Liquidation)**<sup>13</sup> are to be set off against any sums found due in this appeal, as per the orders of this court (Brooks, Straw, Foster-Pusey JJA) made with the consent of the parties on 5 November 2020.

### **Basis on which the appellate court will intervene in treating with findings of facts**

[63] In **D & LH Services Limited**, McDonald-Bishop JA (Ag) (as she then was) reviewed a number of the relevant authorities, in relation to the basis on which the appellate court would interfere with the finding of facts of a trial court (many of which were referred to by the Privy Council in **Beacon Insurance Company Limited**). In her characteristically thorough manner, she set out the applicable principles as follows:

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<sup>13</sup> [2016] JMCA Civ 6



"[31] In a relatively recent case on appeal from Trinidad and Tobago, [**Beacon Insurance Company Limited**], the Judicial Committee of the Privy Council was to again lend its voice to the issue as to the approach an appellate court should take in dealing with appeals from a trial judge's findings of fact. Under the heading 'The role of an appeal court', their Lordships undertook an extensive review of the numerous authorities that have treated with the question, including most importantly, the oft-cited **Thomas v Thomas** [1947] AC 484. The principles from those cases cited by their Lordships have been applied time and time again by this court and are, by now, so well-known to the extent that they are fast becoming trite.

[32] Be that as it may, it is nevertheless necessary to simply indicate that the principles enunciated by their Lordships in **Beacon Insurance Company Limited v Maharaj**, as extracted from the various authorities cited by them, have provided the necessary guidelines within which the decision of the learned trial judge and the grounds of appeal have been considered. Their Lordships, after distilling the applicable principles from those cases, stated, at paragraph 12:

'...It has often been said that the appeal court must be satisfied that the judge at first instance has gone 'plainly wrong'...This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts...Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions. Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence...'

[33] The dictum of Lord Neuberger, in **re B (A Child)** [2013] 1 WLR 1911, cited by their Lordships in **Beacon Insurance Company Limited v Maharaj**, is also worthy of particular note within this context. In that case, his Lordship opined, at paragraph 53:

‘This is traditionally and rightly explained by reference to good sense, namely that the trial judge has the benefit of assessing the witnesses and actually hearing and considering their evidence as it emerges. Consequently, where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where that conclusion was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it. This can also be justified on grounds of policy (parties should put forward their best case on the facts at trial and not regard the potential to appeal as a second chance), cost (appeals can be expensive), delay (appeals on fact often take a long time to get on), and practicality (in many cases, it is very hard to ascertain the facts with confidence, so a second, different, opinion is no more likely to be right than the first).’”

[64] While the main issues in the appeal surround the learned judge’s assessment of documentary evidence, FTIB has the same burden which McDonald-Bishop JA (Ag) identified in respect of the appellants in **D & LH Services Limited**. This is to persuade the court that the findings of fact of the learned judge, on which she has based her decision to grant judgment in favour of the respondents, are such as to warrant the interference of this court. If it is apparent that the learned judge erred sufficiently in her evaluation of this evidence, then this court would be entitled to intervene in the conclusions reached by her.

### **Did the respondents properly plead their case?**

[65] In relation to the pleadings as set out in the counterclaim, I find that there is no merit in Dr Barnett’s submissions, that the respondents did not aver that the sums being claimed, were sums that had been paid over by them as their advance on the L/C’s. This is depicted by the particulars of the relevant L/Cs, (with the outstanding amounts claimed) set out in their pleadings (as set out in paragraphs [20] and [21] above). Additionally, the circumstances relevant to the amounts allegedly owed, is further particularised in the witness statements of Ms Lyn Shue.

## The Fedwires

[66] The Fedwires were an important component of FTIB's claim. It relied, essentially, on the bank records and those Fedwires to prove that the respondents had outstanding loans, based on the L/C's that had been established. There were 12 copies of Fedwires admitted into evidence through FTIB's witness, as well as one copy Fedwire disclosed by Ms Lyn Shue, who had obtained it through her legal representatives from First Union. For ease of reference, these are set out, below with the corresponding L/C noted:

| <b>Date</b>   | <b>Amount<br/>(US\$)</b>                        | <b>Relevant<br/>L/C</b> | <b>Relevant claim</b>             | <b>Volume<br/>Reference</b> |
|---------------|---|-------------------------|-----------------------------------|-----------------------------|
| 15 March 1995 | \$48,289.45                                     | <b>1869</b>             | FTIB's claim against Key          | Volume 13<br>page 51        |
| 24 March 1995 | \$27,384.52                                     | <b>1869</b>             | FTIB's claim against Key          | Volume 13<br>page 52        |
| 13 April 1995 | \$113,582.19                                    | <b>1869</b>             | FTIB's claim against Key          | Volume 13<br>page 34        |
| 9 May 1995    | \$87,054.00*<br><i>(*Figure is<br/>unclear)</i> | <b>2088</b>             | FTIB's claim against<br>Executive | Volume 13<br>page 35        |
| 9 May 1995    | \$23,082.99                                     | <b>2108</b>             | FTIB's claim against Key          | Volume 13<br>page 36        |

|                |  |             |   |  |
|----------------|--|-------------|---|--|
| 9 May 1995     | \$30,239.72                                  | <b>1869</b> | FTIB's claim against Key  | Volume 13<br>page 50   |
| 20 May 1995    | \$181,000.75                                 | <b>2108</b> | FTIB's claim against Key  | Volume 13<br>page 53   |
| 13 June 1995   | \$201,807.01                                 | <b>2108</b> | FTIB's claim against Key  | Volume 13<br>page 33   |
| 13 July 1995   | \$103,505.00*<br><i>(*Figure is unclear)</i> | <b>2088</b> | FTIB's claim against Executive                                  | Volume 13<br>page 32   |
| 2 August 1995  | \$53,943.83                                  | <b>2288</b> | FTIB's claim against Key<br><br>Key's counterclaim against FTIB | Volume 13<br>page 57   |
| 6 October 1995 | \$171,301.12                                 | <b>2288</b> | FTIB's claim against Key<br><br>Key's counterclaim against FTIB | (There were two copies of this Fedwire)<br><br>Volume 6<br>page 67<br>(provided by FTIB) |

|                 |             |             |  |  |
|-----------------|-------------|-------------|--|--|
|                 |             |             |  | Volume 6<br>page 66<br>(provided<br>by Key)<br><br>See<br><b>ANNEX 1</b> |
| 26 October 1995 | \$52,105.00 | <b>2748</b> | Executive's counterclaim<br>against FTIB | Volume 13<br>page 31   |

[67] These Fedwires were copies and all were presented in a similar condition (with the heading and footing, apparently missing or cut off, save for the Fedwire produced by Ms Lyn Shue). Mr Loubeau gave an explanation for the condition of the Fedwires. He gave evidence that these Fedwires were received on pages through the computer and they were cut individually to place them in their respective files. He agreed that the top of these Fedwires with the words "Welcome to First Union..." were cut off. It is noted also, as submitted by Mr Braham, that the two copies of the Fedwires dated 6 October 1995, relevant to L/C 2288 (which included the one produced by Ms Lyn Shue) appear to be copies of the same document, as they bear the same date, time and amount of money. However, the words "Welcome to First Union..." as well as the words "No credit wires at this time..." are missing from the copy provided by FTIB (see **Annex 1**).

[68] The learned judge made no findings in relation to the facts that the words "[n]o credit wires at this time..." were missing from the Fedwire document produced by FTIB. However, she made critical findings of facts in relation to the Fedwires, generally and specifically.

[69] In her general comments, she stated as follows (at page 5):

"First Trade in support of its claim has produced and introduced into evidence print outs [sic] of Fed Wires.

There is no evidence before the court as to how these print outs, came into existence, there is no evidence to support or authenticate them and no confirmation of payment, as a result the Court ruled that these printouts do not provide proof of payment of the amounts set out therein. Loans by [FTIB] can only be proven if [FTIB] provides evidence that it made a payment to the beneficiary bank, in the absence of such proof [FTIB] would not be able to satisfy the Court that it made any loan to the [respondents]."

And further (at pages 10 and 11):

"Secondly Mr. Loubeau in his witness statement states that First Trade maintained its main operating account at First Union Bank at Miami, Florida. When effecting payment to the beneficiary First Trade would request from First Union that it debit its account and transfer the funds minus any applicable charges to the intermediary bank in Korea for final payment to the beneficiary. First Trade would always request and receive from First Union evidence (copy of transmitted fed wire) that transfer was effected.

The document would begin 'Welcome to First Union.' The only document which begins in this manner is that which was submitted by Miss Lvn Shue. This document was not received by First Trade from First Union in confirmation of payment it is a document exhibited to Miss Lyn Hue's [sic] witness statement as one obtained from first [sic] Union by Messers McKenney Bancroft and Hughes, Attorneys-at-Law for the [respondents] and is not a confirmation that money was actually paid with respect to L/C 2288 but was merely a repetition of the request made by First Trade.

Confirmation that an amount was paid by 'fed wire' should properly confirm a fed wire Reserve or from First Union Bank by means of a bank statement with regard to First Trade's account at First Union or by a letter from First Union confirming that the amount was deducted from First Trade's account. In any event a copy document in these circumstances cannot be regarded as sufficient confirmation of payment.

Mr. Loubeau's evidence that they received from First Union a document headed 'Welcome to First Union' but the top was cut off in [sic] not credible."

[70] Dr Barnett has complained that the learned judge did not understand correctly or appreciate what the Fedwires represented. It is important, therefore, to have an understanding of the Fedwire system.

[71] I have distilled a summary from the document provided by Dr Barnett - THE FEDWIRE FUNDS SERVICE, ASSESSMENT OF COMPLIANCE WITH THE CORE PRINCIPLES FOR SYSTEMATICALLY IMPORTANT PAYMENT SYSTEM (Revised July 2014), which speaks to the basic principles underpinning Fedwire funds service. This is summarised below.

[72] One of the uses of the Fedwire Funds Service is for time-critical payments, such as the settlement of commercial payments and financial market transactions, and for the funding of other systematically important financial market infrastructures. It is a real time gross settlement system owned and operated by the Reserve Banks, which enables participants to make final payments in central bank money. The Fedwire Funds Service consists of a set of computer applications that route and settle payment orders. In addition to settling payment orders, the FedWire Funds Service and related applications, review payment orders for syntax errors, query and update account balances, and **notify participants of related credits and debits to their accounts.**

Further an excerpt from the same document provides:

“Payment to the receiving participant over the Fedwire Funds service is **final and irrevocable when the amount of the payment order is credited to the receiving participant’s account or when the payment order is sent to the receiving participant, whichever is earlier.... An institution sending payment orders to a Reserve Bank is required to have sufficient funds, either in the form of account balances or overdraft capacity, or a payment order may be rejected.**”  
(Emphasis added)

Also, in the Farlex Financial dictionary:

"A highspeed electronic communications network...It is an electronic transmission. One can only look at a print out of the actual transmission. The transmission contains inter-bank codes that are changed continually, a reference number, the names of the sending and receiving banks, the transfer amount and the name and account number of the sending account holder and the receiving account holder. And that is all. The crediting and debiting of Federal Reserve accounts is understood. It is not a required part of the transmission. There are no instructions, no words at all that are not part of an account name or bank address. Unless you are on the sending or receiving end of Fedwire funds and want to verify the transmission for some reason, the print out is not very interesting."

[73] Based on the above explanation of the Fedwire system, the Bank is required to have sufficient funds, and payment is final and irrevocable, when the amount of the payment order is credited to the receiving participant's account or when the payment order is sent. The learned judge rejected the Fedwires as providing any proof of payment by FTIB. This raises the question, was this rejection justifiable based on the circumstances as they existed before her?

### **Evidence from the witnesses relevant to the Fedwires**

[74] Mr Kikivarakis, in his witness statement (filed 19 September 2003), spoke to reviewing documents supporting the negotiations under the L/C's. These included the miscellaneous telexes (between Continental Processors on behalf of FTIB and Key or Executive or the beneficiary or its intermediary bank) and the related Fedwire payment advices. He stated also (see witness statement filed 19 September 2003 at paragraph 15), "[t]o my knowledge, from the Fedwire advice Deloitte & Touche obtained details and in essence confirmation that the beneficiary intermediary bank had been paid amounts due under the particular L/C negotiation. This amount was deducted from the FTIB account at First Union Bank".

[75] The evidence of Ms Simms and Mr Loubeau is to the effect that from the Fedwire advice, Deloitte and Touche obtained details and in essence, confirmation, that the beneficiary's intermediary bank had been paid amounts due under particular L/C



negotiations. Ms Simms stated (see witness statement filed 19 September at paragraph 14) that the amount reflected on the Fedwire advice was deducted from FTIB's account at First Union Bank. Mr Loubeau explained (see witness statement filed 12 September 2003 at paragraph 22) that FTIB, when effecting payment to the beneficiary, would request from First Union, that it debit its account and transfer the funds minus any applicable bank charges to the intermediary bank in Korea for final payment to the beneficiary; that FTIB would always request and receive from First Union evidence (copy of transmittal wire) that transfer was effected. The witnesses seem to be relying totally on the Fedwire document, as demonstrating that payment was made.

[76] During a *voir dire* held to determine whether the Fedwires were to be allowed into evidence, Mr Loubeau, under cross-examination, had this to say about the Fedwire documents (see record of appeal, volume 2 at page 328):

"But this is the confirmation, those that went through First Union, the wire transfers, this is confirmation such as page 26, it has a sequence number, it has a time. The status is saying, 'transmitted all other basic information where it went to what account', everything is there which means it was indeed as it said at the top 'transmitted.' So that is the confirmation."

[77] Ms Lyn Shue's evidence (see notes of evidence in volume 4 at page 957) was partially supportive of the reliance that could be placed on the Fedwire, but it was qualified. She stated that the term Fedwire is used primarily in the USA and is associated with the Federal Reserve; that **authentic** Fedwires ought to involve the Federal Reserve, where the transmission of funds has been by virtue of the Fedwire Funds Service. She stated also that an **authentic** Fedwire, represents the movement of money from the Federal Reserve to a financial institution. However, she indicated that she was unable to verify if Fedwires produced by FTIB were authentic. She gave this explanation, "because today things happening that are appalling to all of us...that I would think that...it would only be the Fed themselves that would be able to authenticate them, unless a bank who is a party to the transaction would authenticate them".

[78] Ms Lyn Shue also stated that she has been involved in international business activities for many years and that in her experience, “where unauthenticated and unsigned documents are questioned, the proper procedure would be to obtain authenticated documents on the letter head of the issuing or receiving institution signed by authorised persons, and in the case of Banks...such documents should be under seal and notarized by a Notary Public” (see witness statement dated 14 April 2003 at paragraph 8).

[79] The evidence revealed that telexes would be sent from FTIB to First Union in relation to the amounts on the L/C’s and in return, FTIB would receive a copy of the related Fedwire payment advice from First Union. Therefore, the learned judge would not have been factually accurate in her assessment, that there was no evidence as to how these print outs came into existence.

[80] It does appear that an authentic Fedwire document would, *prima facie*, be evidence of an electronic transmission of funds to the receiving bank, as long as there is sufficiency of funds available to the account holder of the sending bank. However, I have placed emphasis of the word “authentic” as used by Ms Lyn Shue, as the learned judge was of the view that the documents relied on by FTIB were of questionable authenticity. Even if the learned judge erred in stating that there was no evidence as to how the Fedwires came into existence, can it be said that she was wrong in her assessment, that there was no evidence to support or authenticate the copy of the Fedwire documents/print outs and thus no confirmation of payment? The learned judge would have had these documents for her assessment as well as the competing pieces of evidence from Mr Kikivarakis, Ms Simms and Mr Loubeau on one hand and Ms Lyn Shue on the other hand.

### **The effect of the Fedwires being admitted into evidence**

[81] The Fedwire transmissions were admitted into evidence, pursuant to 31F of the Evidence Act. The relevant portions are set out below:

"31 F.- (1) A statement in a document shall be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible if in relation to -

(a) ...

(b) civil proceedings, the conditions specified in-

(i) subsection (2); and

(ii) subsection (4),

are satisfied.

(2) The conditions referred to in subsection (1) (a) and (b) (i) are that-

(a) the document was created or received by a person in the course of a trade, business, profession or other occupation or as the holder of an office, whether paid or unpaid;

(b) the information contained in the document was supplied (whether directly or indirectly) by a person, whether or not the maker of the statement who had or may reasonably be supposed to have had, personal knowledge of the matters dealt with in the statement;

(c) each person through whom the information was supplied received it in the course of a trade, business, profession or other occupation or as the holder of an office, whether paid or unpaid.

(3) ...

(3A) ...

(4) Subject to subsections (5) to (8), the condition referred to in subsection (1) (b) (ii) is that the party intending to tender the statement in evidence shall, at least twenty-one days before the hearing at which the statement is to be so tendered, notify every other party to the proceedings as to the statement and as to the person who made the statement."

[82] Morrison P (Ag) (as he then was), in **National Water Commission v VRL et al**<sup>14</sup>, summarized the effect of section 31F(2) which is relevant to business documents:

“[78] The conditions of admissibility of statements contained in a document under that section are, it will be recalled, that, firstly, the document must have been created or received by a person in the course of a trade, business, profession or other occupation or as the holder of an office, whether paid or unpaid; secondly, the information supplied in the document must have been supplied (whether directly or indirectly) by a person, whether or not the maker of the statement, who had or may reasonably be supposed to have had, personal knowledge of the matters dealt with in the statement; and thirdly, each person through whom the information was supplied must have received it in the course of a trade, business, profession or other occupation or as the holder of an office, whether paid or unpaid.”

[83] These business documents would normally have been admitted and become evidence of the facts stated therein (see 31F(1) of the Evidence Act; and **Desmond Robinson and the Attorney General v Brenton Henry and anor**). But whether the learned judge could be satisfied, on a balance of probability, that these documents were also authentic, so as to be sufficient to prove payment, that is, the electronic transmission of the funds, would have been left to her to determine, in accordance with the other pieces of evidence. In **Desmond Robinson and the Attorney General v Brenton Henry and anor**, Panton P, although dealing with a different section of the Evidence Act, made the following point at paragraph [27]:

“... The fact that the parties may have agreed to the admission of the report as an exhibit does not mean that the learned judge **was obliged to accept its contents, hook, line and sinker. It is the duty of a party producing evidence to show its authenticity and reliability...**”

(Emphasis supplied)

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<sup>14</sup> [2016] JMCA Civ 19

[84] The learned judge was clearly dissatisfied with the provenance and authenticity of the documents, although it could be argued that they had been admitted into evidence, pursuant to the Evidence Act.

[85] FTIB faces, however, two obstacles in challenging the assessment of the learned judge, as to the effect that the admissibility of these documents could have in the overall context of all the evidence. Firstly, the transcript reveals, as conceded by Dr Barnett, that the Fedwires were admitted into evidence following the *voir dire* by the learned judge for a limited purpose. In the face of concerns expressed by her (as to the purpose for which the documents were being tendered for admission), she was told by counsel, Mr Bishop, that FTIB would not be relying on those documents by themselves, to prove payment but in connection with the bank records. At the end of the hearing relevant to the admissibility of these documents, the learned judge made this ruling “....it is my view that they should be admitted by virtue of section 31F of the Evidence Amendment [sic] Act, not as proof of payment but of evidence the wire transmissions were sent.....That the documents attached to the Affidavits [sic] of Mr Loubeau and Mr Kikivarakis are admitted”.

[86] The second obstacle pertains to the learned judge’s scrutiny of the physical condition of the Fedwires. Her general complaints in relation to this issue is set out at paragraph [69] above. She complained, for example, that the heading of the Fedwires were missing the words “[w]elcome to First Union” and found the explanation for its absence to be not credible.

[87] Apart from the learned judge’s obvious dissatisfaction with the condition of these Fedwires, there was also other contradictory evidence, challenging payments that were supposedly made in relation to some of these L/C’s by virtue of the Fedwires. This will be examined subsequently in a consideration of the various L/C’s.

[88] Dr Barnett’s submission that the Fedwires were supported by documents, in particular shipping documents, would not assist in the value of the estimation of the

Fedwires. The evidence is clear, from the witnesses of all the parties, that the shipping documents were sent to FTIB after the L/C's were established, but before any payment is transmitted to the beneficiary bank. The learned judge made this finding specifically (at page 14):

"The cars were shipped and were received by the Defendants but one has to look at this, that is the context of the system of opening and paying Letters of Credit. The fact that the cars were shipped and the shipping documents given to First Trade does not provide proof of payments made by First Trade.

The evidence reveals the cars would have been shipped and the shipping documents given to First Trade before they made any payments on negotiating the Letters of Credit..."

[89] Further, the learned judge was also unimpressed with the accuracy of the bank records relied on by Ms Simms (reflected in appendix CS-1 of witness statement of Cheryl Simms dated 27 November 2003 - volume 11, page 141) in order to prove FTIB's claim. In relation to these, while assessing Key's counterclaim relevant to L/C 2288 and L/C 2753, she referred to payments, that Ms Simms testified were made by FTIB (at page 13 of her judgment):

"The payments which were made by First Trade can be confirmed by the Statement of Account, Miss Simms testified. However she admits that this statement contained errors. There is reason to believe it still contains errors as it is not complete. There is an alleged payment of Three Hundred and Forty Two Thousand, Three Hundred and Twenty Four Dollars and Thirty Seven Cents with respect to L/C 2288 and the words 'payment not effected' is written on the document in handwriting. In her analysis Miss Simms confirms that such a payment was not made.

With reference to L/C 2288 there is also another amount of Nine Hundred and Thirty Two Dollars and Thirty One Cents (US\$932.31), which must also be an error as L/C 2288, was not negotiated.

There is nothing to suggest that these amounts were credited back to Key's Accounts although Miss Simms in her affidavit states that the amount of Three Hundred and Forty Two Thousand, Three Hundred and Twenty Four Dollars and Seventy Two Cents

(\$US342,324.72) was credited back to Key [sic] Accounts. This is not reflected in the document.

This statement therefore cannot be accepted as proof of payment of any sum by First Trade as it obviously contains errors and in any event was generated by First Trade.”

[90] Bearing in mind, her assessment of the documentary evidence, in particular the Fedwires and bank records, I have found no basis to find that the learned judge erred in her conclusions concerning the weight she could attach to these documents. It seems to me that FTIB could have assisted its case by obtaining some documentation from First Union as to the debiting of its account relevant to the L/C's at the time the Fedwires were created. The amount of documentation would not have been unduly difficult to obtain as reliance was being placed only on 12 Fedwires. The learned judge's desire for supporting documentation, is all the more understandable, given the financial state of FTIB during the relevant period.

[91] However, before coming to any ultimate conclusion on the merits of these grounds (in relation to the appeal and counter appeal), it is important to examine the overall evidence presented by FTIB, as well as Executive and Key, that was before the learned judge, relevant to specific L/C's.

#### **L/C's in relation to Executive - 2088, 2307, 2747 and 2748**

[92] The evidence in relation to Executive is relevant to L/C's 2088, 2307, 2747 and 2748.

#### **L/C 2088**

[93] FTIB's claim against Executive is based on L/C 2088, as well as an outstanding overdraft. Ms Simms claimed that the principal amount outstanding on this L/C is the sum of \$51,807.50, plus an overdraft amount of \$27,984.50, the total being \$79,792.00. The corresponding interest on both sums being \$8,136.72 and \$1,947.97, respectively, amounting to \$10,084.69 with the total being \$89,876.69.

[94] Ms Simms states that L/C 2088 was established in February 1995 in the amount of \$170,694.00; that a partial negotiation of this L/C was in the amount of \$103,615.00. The Fedwire dated 13 July 1995 would be the relevant document. According to her, payment of this last amount was made on 13 July 1995 with 50% of this (\$51,807.50) being financed by FTIB at an interest rate of US prime +1% for 120 days. Executive also advanced its 50% in the amount of \$51,807.50. Mrs Simms states that this loan by FTIB remains unpaid by Executive (see analysis of L/C 2088 at **Annex 2**).

[95] In her witness statement (dated 19 September 2003) Ms Lyn Shue generally denied that Executive owed the amount of \$89,876.69 as claimed, and relied on the letter from FTIB's liquidators indicating that its records showed that the sums of \$96,220.75 was due to Executive. Although no reference was made by her to L/C 2088, it appears from the notes of evidence (see record of appeal, volume 4, page 1114) that she specifically denied that Executive owed FTIB the sum of \$54,841.48, which appears to be the said sum of \$51,807.50 plus interest.

[96] Although the learned judge stated that she had to determine whether FTIB had satisfied the court that there was a balance owed by Executive on loans relevant to L/C 2088, there is no specific consideration given by her in the judgment. She found (at page 15 of the judgment) generally, that all the documents relied on by FTIB, to show payments made (subsequent to the letter dated 21 February 1996 - referred to at paragraphs [16], [18], [40] and [60]), which form exhibits and consist of Fedwires, do not constitute proof of payments of the amounts stated in the said Fedwires. Since the learned judge cannot be faulted on her assessment of the Fedwires, I have no basis to interfere with her conclusion in this regard.

### **The overdraft**

[97] According to Mr Kikivarakis, the overdraft amount of \$27,984.50 was as a result of the following adjustment to the records:



- (i) \$120,661.00 comprising amount of \$52,105.00 on L/C 2748 (see analysis at **Annex 3**) and \$68,556.00 on L/C 2307 (see analysis at **Annex 6**) were paid to various Korean intermediary banks for the purpose of motor vehicles and spare parts.
- (ii) These sums were applied against the credit originally given to Executive of \$96,220.75. When the sums were adjusted along with net interest of \$3,544.25, the balance amounted to the above overdraft amount of \$27,984.50 (see reconciliation summary attached to spreadsheet at **Annex 4**).

He stated that Executive needed to repay this amount and that there were documents in support of this.

[98] Further, in his witness statement (filed on 19 March 2003), Mr Kikivarakis conceded that on L/C 2748, established in the amount of \$104,260.00, only the amount of \$52,130.00 advanced by Executive was sent to the beneficiary (that is, FTIB's portion remained unpaid) and this is also confirmed by the analysis relied on by FTIB (see **Annex 3**). It is to be noted however, that in this analysis, the figure attributed to what is unpaid by FTIB is \$20,572.26, rather than \$52,130.00. This appears to be an error, but is supportive of the learned judge's view that the documentation relied on by FTIB was unreliable. Mr Kikivarakis evidence was that the analysis (in relation to all the L/Cs) was prepared by the Deloitte & Touche team using FTIB's bank accounts, Key and Executive's current and loan accounts, and the L/Cs. It is based on this analysis that FTIB would have debited Executive's account in the amount of \$52,105.00, against the earlier credit of \$96,220.75, prior to the completion of the reconciliation process (see reconciliation summary attached to spreadsheet at **Annex 4**). The spreadsheet was created for this court's ease of reference but was not before the learned judge.

[99] Puzzlingly, FTIB is now contending based on this spreadsheet for L/C 2748, that Executive only paid \$24,145.50 instead of the amount of \$52,130.00 (see **Annex 5**) (it

is to be noted that there is at times, variation in the reporting of this figure, for example Executive pleaded \$52,103.00 in its counterclaim, FTIB, in its analysis used the figure of \$52,130.00, as did the learned judge and in the witness statement, Mr Kikivarakis referred to it as \$52,105.00). This amount of \$24,145.50 would represent a portion of the \$52,130.00, which FTIB is alleging it paid to the beneficiary. Therefore, based on the spreadsheet, it would appear that the amount of \$27,984.50 is owed by Executive on L/C 2748. The spreadsheet demonstrates a shift in the accounting, as it suggests that Executive did not pay the amount of \$52,130.00. In giving evidence before the learned judge, as was stated in the preceding paragraph, Mr Loubeau conceded that this amount (\$52,130.00) had been paid and this concession was also reflected in the analysis relied upon by FTIB at the trial (see **Annex 3**). It cannot be sustained, therefore, that the amount of \$52,130.00 ought to be debited from Executive's account as claimed by FTIB. The evidence relied on by FTIB is patently unreliable and it is clear that discrepancies existed. Again, the learned judge could not be faulted in her assessment of FTIB's claim, based on the entirety of the evidence presented and the documentation before her. The evidence relating to the amount of \$68,556.00 (which was also debited in the reconciliation summary – see **Annex 4**) relevant to L/C 2307 will be considered below.

### **Executive's counterclaim (L/C's 2747, 2748 and 2307)**

[100] The evidence relevant to Executive's counterclaim, involves L/C 2747 in the amount of \$10,286.13, L/C 2307 in the amount of \$68,606.00 and L/C 2748 in the amount of \$52,103.00 (this last sum has been referred to above in paragraphs [98] and [99] in relation to FTIB's claim for the overdraft).

[101] The learned judge treated with L/C's 2748 and 2307 at pages 15 and 16 of the reasons for judgment. There was no specific reference to L/C 2747. She examined FTIB's evidence in support of its contention that amounts were due from Executive. She considered the two sources, firstly the letter of 21 February 1996 from FTIB stating that "as per the Bank's records" \$96,220.76 was due from FTIB to Executive. Secondly, she

considered the evidence of Mr Kikivakaris and Ms Simms, that in their reconciliation process completed by their firm Deloitte & Touche, documentation had been located to support further payments by FTIB of \$120,661.00 and \$52,105.00 (plus a charge of \$25.00) – this amounted to \$52,130.00 on L/C 2748 and a further payment of \$68,556.00 on L/C 2307.

### **L/C 2307**

[102] The learned judge indicated (at page 16 of the judgment) that FTIB provided no document to support this payment of \$68,556.00 on L/C 2307. What followed was her findings in the following terms (on page 16):

“There is no evidence that First Trade made payment to a beneficiary bank pursuant to any L/C – [FTIB has] failed to provide any proof of payment of Sixty Eight Thousand, Five Hundred and Fifty Six Dollars (US\$68,556.00) on L/C 2307 and this claim against Executive Motors fails.”

[103] This claim, in relation to the amount of \$68,556.00 on L/C 2307, was part of the reconciliation process that led to the debiting of Executive’s account that resulted in the alleged overdraft in the amount of \$27,984.50. In respect of this L/C, Ms Lyn Shue denied that there would have been any amount owed by Executive.

[104] The full amount in relation to L/C 2307 was for \$137,212.00. Ms Lyn Shue stated that Executive advanced its 50%, which amounted to \$68,606.00, by virtue of two cheques. These two cheques were exhibited to her witness statement and were in the amounts of \$40,000.00 and \$28,606.00. Based on the analysis supplied by the FTIB’s witness Ms Simms (see **Annex 6**), it is agreed that Executive paid the amount \$68,556.00 and that FTIB failed to advance its 50% due to liquidity problems. What remains in dispute, is whether FTIB transferred the amount paid by Executive to the beneficiary’s bank. FTIB maintained that it did so by two payments (\$55,476.50 and \$13,079.50), those sums being half of the respective shipments under the L/C.

[105] However, Ms Lyn Shue has stated that there is no proof that FTIB paid over this money. She states that she had to pay the full amount (\$137,212.00) on this L/C to Cho Hung Bank, but has been unable to get confirmation of this alleged payment from her suppliers, based on the passage of time.

[106] There is, however, a telex from FTIB to Cho Hung Bank (dated 12 October 1995) informing them they could only pay 50% percent on the L/C. There is also a corresponding telex (dated 3 November 1995) from the said bank to FTIB advising that "we accept payment of the \$68,606.00". There is however no subsequent document to prove if and when these funds would have been sent by FTIB. In the circumstances, Executive has claimed that they are owed this money. The learned judge indicated (at page 16 of the judgment) that FTIB failed to provide proof of payment of these funds and in fact that there was no documentation to support this payment; and accordingly that FTIB's claim against Executive failed. It is to be assumed that it is on this basis she found for Executive on its counterclaim. Even if the learned judge had been satisfied with the authenticity of the Fedwires, in this instance, there was no Fedwire (authentic or otherwise) to support that this payment of \$68,556.00 had been made by FTIB. Accordingly, the learned judge's conclusion in relation to L/C 2307 cannot be faulted.

### **L/C 2747 and 2748**

[107] I have already referred to FTIB's evidence relevant to L/C 2748, which was set out at paragraphs [98] and [99]. Reference has also been made to the fact that FTIB conceded that Executive paid the amount \$52,130.00 towards the establishment of this L/C in the amount of \$104,260.00. Ms Lyn Shue contended that this L/C was never established, in spite of the fact that the amount of \$52,130.00 was paid by Executive (the pleadings refer to sums of \$104,206.00 and \$52,103.00, respectively). She explained that the amount of \$52,130.00 was taken from a cheque of \$60,945.86; also that another cheque of \$1,470.27 was advanced along with the cheque of \$60,945.86

and out of these two, the sum of \$10,286.13 was paid to establish another L/C (that is, L/C 2747).

[108] Further, Ms Lyn Shue stated that despite the above deposit, FTIB made no payment on L/C 2747, which was for \$20,572.26; that as a result, Executive had to make payment on the entire amount to one of its suppliers, Itochu Corp, directly. A letter from Itochu Corp (dated 7 July 1997) was put in evidence in confirmation of this, as well as a photocopy cheque in the full amount of \$20,572.26 to Itochu Corp (drawn by Key). Ms Lyn Shue stated that there was no recovery of the amount of \$10,286.13 from FTIB. The contents of the said letter from Itochu Corp (at paragraphs 2 to 4) are set out in full:

"2) Itochu Korea made a clean bank negotiation with all required documents at Chohung Bank, Korea. At the later stage, we were informed by Executive Motors that the shipping documents has not reached to them in time. At the same time, Chohung Bank, Korea informed us that the payment from the confirming bank was not settled for a long time.

3) Itochu has asked Chohung Bank and Executive Motors to check the position at First Trade Intl Bank and Trust Ltd. and was informed that it has been bankrupted without any information.

4) Finally, Executive Motors sent to Chohung Bank, Korea through Itochu Korea their check to settle the payment to be sent by First Trade Intl."

[109] The letter confirmed that, although the L/C was received, the beneficiary's bank informed Itochu that the payment from the confirming bank was not settled for a long time; and that Executive settled the full payment (by cheque) which was originally, to have been sent by FTIB.

[110] FTIB has conceded, through the evidence of Mr Kikivarakis, that this money was never sent. He stated that FTIB received Executive's payment of \$10,286.13, but did not indicate in his witness statement, whether that portion was paid over to the beneficiaries by FTIB. However, some clarity was to be found in his evidence given

under cross-examination. He stated specifically that the amount of \$10,286.13 was not paid to any beneficiary bank but was applied to Executive's overdrawn account (which Dr Barnett has submitted is permissible in accordance with paragraph 3 of agreement for L/C referred to at paragraph [41] above). The issue is whether there is any proof that the amount was properly applied to maturing loans. Obviously, this could only have been conclusively demonstrated through reliable bank records.

[111] There is no indication that the learned judge specifically considered this issue of the application of funds to maturing loans. However, what she would have had before her for consideration was (1) the undisputed fact that Executive would have paid the amount to establish this L/C, (2) that this amount was never sent to the beneficiary bank, and (3) bank records which she had found to be reliable. In that regard, it appears that the learned judge would have had a basis to conclude that Executive made out its case in relation to the \$10,286.13 owed by FTIB and was entitled to recover same.

[112] The issue in relation to L/C 2748, is whether there was proof that FTIB had paid over \$52,130.00 to the beneficiary or whether it should be refunded to Executive.

[113] FTIB asserted that the sum of \$52,130.00 was actually paid over and relied on two copies of telex messages from FTIB to Cho Hung Bank (dated 12 October 1995) and from Cho Hung Bank to FTIB (dated 3 November 1995). These telex messages are also referred to in paragraph [106] in a consideration of L/C 2307, but are also relevant to L/C 2748 as well. As stated previously, they referred to FTIB's requests for Cho Hung Bank to accept the 50% payment and Cho Hung Bank's acceptance. FTIB also relied on Fedwire dated 26 October 1995, in the amount of \$52,105.00, in proof of that payment. That Fedwire was in the same condition as the copies which the learned judge rejected as being inauthentic. The telex messages suggested that FTIB had an intention to pay over the stated sum, but cannot by themselves prove that the funds were actually transmitted.

[114] While the learned judge made reference to this Fedwire (relevant to L/C 2748) there was no specific analysis as it related to Executive's counterclaim. The learned judge merely stated (at page 16 of the judgment), in general terms, that "[t]here is no evidence that First Trade made payment to a beneficiary bank pursuant to any L/C" and, in her conclusion, she entered judgment for Executive on its counterclaim. It would appear therefore that she was satisfied on a balance of probabilities that the amount of \$52,105.00 should be repaid to Executive, since L/C 2748 was never established, as FTIB failed to advance its 50%.

[115] I have also made reference to the unreliability of FTIB's records at paragraph [99] in relation to this L/C and concluded that it is questionable whether reliance can be placed on FTIB's assertion that this sum of \$52,105.00 was actually paid over. Although FTIB never claimed this sum at the trial, it is evident that the spreadsheet demonstrates discrepancies in FTIB's assertions, as submitted by Mr Braham (see **Annex 5**). Again, this would be supportive of the learned judge's finding that the bank records contained errors and could not be relied on. It is difficult to conclude, therefore, that the learned judge erred in her overall assessment on this aspect of the counterclaim.

### **L/C's in relation to Key - 2108, 1869 and 2288**

#### L/C 2108

[116] This L/C was established in the total amount of \$415,845 (see **Annex 7**). Based on the evidence of Mr Kikivarakis, there were two payments based on L/C 2108. Firstly, in relation to an amount of \$201,832.01, FTIB would have paid \$100,916.00. Key also paid over its half in the same amount. FTIB alleged that, of the amount paid by them, \$69,690.89 was never repaid by Key. The interest on this figure is \$9,282.44. The second tranche on this L/C was \$181,075.75. FTIB stated that it paid its amount of \$90,537.97 and Key also advanced its 50% in the same amount (\$90,537.97). FTIB alleges that all these funds were paid to the beneficiary's bank but Key did not repay the amount advanced by FTIB. The interest on that figure is \$14,668.04. FTIB therefore

claimed the total amount of \$160,228.86 (\$69,690.89 + \$90,537.97) plus interest of \$23,950.48. This is supported by the analysis provided by Ms Simms (see **Annex 7**).

[117] On the other hand, the evidence of Ms Lyn Shue is that she sent several cheques to FTIB in relation to this L/C. She stated that this L/C was created on or about May 1995. She exhibited payments of five copy cheques by Key in the amounts of \$80,000.00, \$22,000.00, \$22,000.00, \$50,000.00 and \$30,000.00. She also said that based on statements sent by FTIB to Key, three further payments on this L/C were identified (these three figures appear not to be contested – see **Annex 8**). These were payments of (i) \$60,000.00 dated 6 June 1995; (ii) \$100,000.00 dated 6 June 1995 and (iii) \$55,000.00 dated 6 June 1995. In relation to the last three cheques, the corresponding FTIB bank statements in relation to Key, dated 31 May 1995 and 31 July 1995 were exhibited (see **Annex 9**). Based on her evidence, Key would therefore have paid a total of \$415,000, while total supplies invoiced were \$412,288.31 plus FTIB charges of \$1,162.00 (totalling \$413,450.93). It is her evidence therefore that the amount of \$1,549.07 is owed to Key, however this amount did not form part of Key's counterclaim against FTIB.

[118] Based on the cheques referred to by Ms Lyn Shue, Key would have basically paid the full amount of this L/C. Ms Simms, however, is disputing the amount paid, based on the bank records and the statement of account, which she said indicated that the sum of \$31,225.11 was repaid by Key, leaving a balance of \$69,690.89, in relation to the first tranche. In relation to the second tranche of \$90,537.97, FTIB alleged that this remained unpaid. Ms Simms relied, as proof of this, that there is no corresponding entry in the bank records, showing the total amount of the loan and no debit entry, so this demonstrated that the sum remained unpaid.



*How did the learned judge resolve the evidence in relation to this L/C?*

[119] The learned judge indicated (at page 7 of the judgment) that FTIB was relying on Fedwires to prove that it made the payments as indicated, on the two respective figures of \$100,916.00 and \$90,537.97. She stated, however, that they provided no proof of payment except for the unauthenticated Fedwires (see Fedwire table above at paragraph [66] with Fedwires dated 20 May 1995 and 13 June 1995); and that FTIB had not proved that the loan existed. It is not clear if she was referring to bank records or merely the Fedwires. The learned judge did make that finding, at page 8 of the judgment, that Ms Lyn Shue had accounted for the full amount of this L/C (\$415,000.00). It does appear that based on the documentation, Ms Lyn Shue's evidence was more credible in relation to this accounting.

[120] Further, in relation to this L/C, nothing turns on the Fedwires (authentic or otherwise), as Key is not claiming these monies were never paid over to the beneficiary bank, but that all the relevant sums were repaid by Key. The learned judge's critical assessment of the bank records has already been noted.

[121] Based on the evidence as reviewed above, there is no basis to challenge the learned judge's findings in this regard, as it would have been for FTIB to satisfy the court on a balance of probabilities, that monies were owed on this L/C.

#### L/C 1869

*What is the evidence that was before the learned judge in relation to L/C 1869?*

[122] The evidence from FTIB through its witness Mr Kikivarakis (see paragraph 18 of witness statement dated 18 September 2003) (as reflected in the analysis provided by FTIB – **see Annex 10**) is that this L/C was established 29 December 1994 in the amount of \$229,665.00. The dispute relates to a tranche of \$30,324.72. FTIB alleged that this full amount (plus bank charges) was paid to the beneficiary bank on 9 May 1995, but Key did not repay the amount of \$15,162.36 (representing the 50% advance

from FTIB). FTIB also claimed the interest of \$2,631.89 on this amount. On the totality of the L/C, FTIB alleges that Key only repaid \$212,299.64.

[123] On the other hand, Ms Lyn Shue's evidence was that the total on this L/C was actually \$218,000.00 (see paragraph 11 of witness statement dated 24 November 2003). However, a breakdown prepared on behalf of Key reflected 11 cheques (which were exhibited) with the total amount repaid being \$229,730.99 (with the final cheque of \$20,000.00 being drawn in relation to two L/C's - 1869 and 1952, of which only \$1,730.99 went to L/C 1869 - see **Annex 11**). Although there is a discrepancy between the two figures referred to by Ms Lyn Shue, her witness statement referred to this L/C being created on or about March 1995 but in the breakdown, the start date of 23 December 1994 basically accords with the evidence of Mr Kikivarakis (in relation to the actual amount of the L/C as set out in paragraph [122]).

*Was this issue resolved by the learned judge?*

[124] The learned judge stated that the only proof of payment by FTIB was the Fedwire, which she ruled was not sufficient proof. However, Key was not denying that the total amount of \$30,239.72 was paid to the beneficiary's bank. Key maintained that it repaid all. The learned judge would have had to be satisfied on the evidence, that the total amount was repaid. It would appear that the evidence before the learned judge supported Key's assertion that it owed nothing on this L/C, based on the 11 cheques exhibited and the list indicated in the breakdown (see **Annex 11**). There would be no basis to disturb the learned judge's findings in relation to this L/C.

#### L/C 2288

[125] With regard to L/C 2288, it is unique, in that both FTIB and Key alleged that monies are owed to them. It formed a part of FTIB's claim, as well as Key's counterclaim. The evidence revealed that it was created in the amount of \$432,880.00 (apparently, \$435,405.00, when FTIB's charges were added). The issue arose in relation to two tranches - firstly the sum of \$54,053.83. FTIB alleged that Key advanced

50% in the amount of \$27,026.92, and that FTIB financed \$27,026.91, but that Key failed to repay that amount. FTIB has alleged that a balance of \$27,026.91 was therefore due.

[126] In relation to the second tranche of \$342,022.19, FTIB alleged that Key paid its 50%, amounting to \$171,461.12 and that FTIB was unable to pay its half because of liquidity problems. The evidence between the parties differed as to what happened to the money paid by Key. FTIB claimed that this money was paid over to the beneficiary's bank and relied on a Fedwire, dated 6 October 1995, in the amount of \$171,301.12, in proof of the transmission of those funds.

[127] Ms Lyn Shue gave evidence that 10 cheques were paid by Key between 26 April to 18 August 1995, totalling \$214,835.82 (see **Annex 12**). The copy cheques were exhibited to her witness statement (dated 19 September 2003). She alleged that FTIB failed to make any payment on this L/C, as it was experiencing liquidity problems. In support of her contention, she exhibited a letter from Hyundai, dated 20 September 1995, relevant to the L/C, complaining about the "unpayment" for \$385,098.92. She also exhibited a cheque, dated 20 September 1995, in the amount of \$250,000.00 that Key had to pay directly to that supplier. A second letter from Hyundai, dated 13 October 1995, contained a promise to refund money to Key, if payments were received from FTIB. Further, Ms Lyn Shue stated that a second cheque of \$135,099.00 was paid to Hyundai bringing the total amount to \$385,099.00, as requested by Hyundai. She exhibited two further copy cheques and a letter from Hyundai in that regard.

[128] Key claimed, therefore, that the sum of \$171,461.12 (its half of the second amount of \$342,922.24) paid to FTIB, was never paid over to the beneficiary. Ms Lyn Shue also made reference to a second copy of that Fedwire, referred to earlier and highlighted the marked differences between the two (see **Annex 1**). This has been set out above in paragraph [50] above.

[129] Remaining consistent in her position, the learned judge found that the Fedwire for the amount of \$171,301.12 (see **Annex 1**) was not conclusive that FTIB's account had been debited of the amount. Her findings in that regard, as well as her findings in relation to the differences between the two copies of the Fedwire are stated thus (at pages 9 to 11 of the judgment):

"There is a major conflict in respect to the alleged payment of One Hundred and Seventy One Thousand, Four Hundred and Sixty One Dollars and Twelve Cents (US\$171,461.12). [FTIB has] sought to use the two documents attached to Miss Lyn Shue's affidavit as proof that First Trade paid this amount.

The difficulty with this is that these documents refer to a payment of One Hundred and Seventy One Thousand, Three Hundred and One Dollars and Twelve Cents (US\$171,301.12) and in Miss Simms analysis she refers to an amount of One Hundred and Seventy One Thousand, Four Hundred and Sixty One Dollars and Twelve Cents (US\$171,461.12) and no explanation has been offered for the difference in amounts.

...

Confirmation that an amount was paid by 'fed wire' should properly confirm a fed wire Reserve or from First Union Bank by means of a bank statement with regard to, First Trade's account at First Union or by a letter from First Union confirming that the amount was deducted from First Trade's account.

In any event a copy document in these circumstances cannot be regarded as sufficient confirmation of a payment.

Mr Loubeau's evidence that they received from First Union a document headed 'Welcome to First Union' but the top was cut off in [sic] not credible."

[130] The letter from Hyundai, specifically stating that funds were not received, would also bolster the learned judge's determination that the Fedwire could not be relied on, in spite of the submissions by Dr Barnett as to the purpose of Fedwires. It showed that up to 13 October 1995, Hyundai had not received this transmission for the amount in the Fedwire, dated 6 October 1995. One would have thought that in the circumstances,

FTIB, in putting forward its best case would have made efforts to obtain a statement of account from First Union, demonstrating that the sum of \$171,461.12 had been debited from its account. If it is that FTIB had paid that amount, then it should be attempting to recover those funds from Hyundai. Based on all the circumstances that were before the learned judge, it could not be maintained that she erred, in properly analysing the entirety of the evidence and finding against FTIB in the claim and finding for Key on the counterclaim in relation to L/C 2288.

### **Key's further counterclaim**

#### L/C 2753

[131] Key also counterclaimed on L/C 2753 for \$94,384.00. It was alleged that this L/C was established in or about July 1995 with the beneficiary being Hyundai. Key claimed that it paid to FTIB, three cheques in the amounts of \$25,000.00, \$30,000.00, and \$50,000.00 – with instructions that \$39,381.17 of the last cheque was to be applied to this L/C. Copies of these three cheques were exhibited (see witness statement dated 19 September 2003). It was alleged that these payments were paid pursuant to its half share of the L/C, totaling \$94,381.17; that FTIB made no payments to any beneficiaries from these amounts and the money has not been repaid (there appears to be a difference between the figure of \$94,384.00 as set out in the counterclaim and the amount of the three cheques totalling \$94,381.17).

[132] Mr Kikivarakis responded to Key's counterclaim in respect of this L/C by stating that it was not possible to match the amount claimed to any of the L/C references. Consequently, a request had been made for Key to supply documentary evidence to facilitate an investigation. He stated that this information was never received from Key.

[133] The learned judge rehearsed the evidence considered by her in relation to this L/C (at pages 12 and 13):

“Key Motors also counterclaims with regard to L/C 2753. Both [FTIB's] witnesses say this L/C was never identified at First Trade. Mrs [sic] Lyn Shue refers to three payments of Twenty Five

Thousand Dollars (US\$25,000.00), Thirty Thousand Dollars (US\$30,000.00) and Thirty Nine Thousand Three Hundred and Eighty One Dollars and Seventeen Cents (US\$39,381.17) from the cheque for Fifty Thousand Dollars US\$50,000.00 dated 1<sup>st</sup> August, 1995. The cheques with accompanying letters are exhibited by Miss Lyn Shue and Miss Simms in cross-examination admits that the cheques referred to were received. She admits receiving One Hundred and Five Thousand Dollars (US\$105,000.00). Ninety Four Thousand, Three Hundred and Eighty Four Dollars and Seventeen Cents (US\$94,384.17) of that amount was to be applied to L/C 2753 and in the light of [FTIB's] denial that that L/C was identified at First Trade it seems that no payments were made from the amount tendered...

[FTIB] admit they got the cheques which were sent with the letters and it seems reasonable to infer that they must have got the letters. The L/C was never in fact established so the money ought to be returned to Key Motors."

[134] She concluded (at page 13 of the judgment) that Key "has on a balance of probabilities proved its counterclaim...being Two Hundred and Fourteen Thousand, Eight Hundred and Thirty Six Dollars (\$214,836.00) on L/C 2288 and Ninety Four Thousand, Three Hundred and Eighty Four Dollars (\$94,384.00) on L/C 2753"

[135] Again, there appears to be no basis to challenge the findings and conclusion of the learned judge in relation to this L/C, relevant to Key's counterclaim.

## **Conclusion**

[136] Save for ground b, which pertains to the rate of interest, FTIB has failed to demonstrate that the learned judge erred in any material way in relation to her findings and conclusions on the claim and counterclaim. Grounds a, c and d are devoid of any merit and accordingly fail. I would therefore propose that the appeal be allowed in part, to vary the rate of interest awarded by the learned judge. The other orders of the learned judge on the claim and counterclaim should be affirmed.

## **Setting off of judgment relevant to Crown Motors**

[137] In the case of **Crown Motors Limited, Key Motors Limited and Executive Motors Limited v First Trade International Bank & Trust Limited (In Liquidation)**, this court made orders on 29 January 2016, including the following, that is now relevant to this appeal:

“iii. It is ordered that the monies currently held in account at Dehring Bunting & Golding Limited be transferred into the joint names of the attorneys-at-law for the Bank and the appellants or in the alternative be transferred into an account in the joint names of the attorneys-at-law for the Bank and the appellants at the Bank of Nova Scotia Jamaica Limited, Commercial Banking Center, within 14 days of the date of this order, until otherwise ordered.”

[138] Accordingly, there are sums being held in account at the Bank of Nova Scotia Jamaica Limited in FTIB’s favour.

[139] Prior to hearing of this appeal, on 5 November 2020, this court also made certain other relevant orders:

“1) ...

**2) By consent, the order of Morrison P made on 16 June 2020 in respect of the application to file counter-notice out of time is varied as follows:**

**At the end of the substantive appeal the court will be entitled to make consequential orders, including but not limited to an account of the true amount owed by Crown Motors to the appellant by virtue of the judgment [2016] JMCA Civ 6; in the event the appellant fails in its appeal the amount due to the appellant by Crown Motors may be set off against any amounts due to the respondents by the appellant, the disbursements of sums held in accounts for security for costs at the BNS, among other orders deemed necessary by the court.**

3) ... .”

[140] Accordingly, it is therefore proposed that the parties should be directed to do the necessary accounting exercise to give effect to the orders of this court.

### **Costs**

[141] In light of FTIB's only success being on a minor point, there should be no departure from the usual principle that costs should follow the event. FTIB should therefore pay the costs of the appeal.

### **FOSTER-PUSEY JA**

[142] I too have read in draft the judgment of Straw JA and agree with her reasoning and conclusion. I have nothing further to add.

### **BROOKS P**

### **ORDER**

- 1) The appeal is allowed in part.
- 2) The learned judge's orders made on 7 February 2005 in relation to the claim and counterclaim are affirmed, save for the rate of interest awarded therein, which is varied (by consent) from 33% to 9%.
- 3) The order of the learned judge as varied is to read as follows:

Judgment for the Defendant, Key Motors on the Counter Claim in the sum of US\$309,320.00 from 1<sup>st</sup> August 1995 with interest at 9% per annum until 7 February 2005 and judgment for the defendant, Executive Motors on the counterclaim in the sum of US\$130,995.13 with interest at 9% from 14<sup>th</sup> June 1995 until 7 February 2005.



- 4) The parties are directed to give effect to the orders of this court made on 5 November 2020, relevant to the setting off of the judgment in **Crown Motors Limited, Key Motors Limited and Executive Motors Limited v First Trade International Bank & Trust Limited (In Liquidation)** [2016] JMCA Civ 6 and in case of dispute to be referred to the Registrar of the Supreme Court.
- 5) By consent -
- a) The stay of execution of the order of Campbell J in respect of the sale of the premises at 8 Marescaux Road Kingston 5 shall abide the culmination of the set off process mention in order number 4 herein;
  - b) Order number 3 of the order of this court dated 29 January 2016 in respect of monies held in account shall remain in force pending the determination of the set off process mentioned in order number 4 herein; and
  - c) Monies are to be paid out to the party in credit on the determination of the set off process mentioned in order number 4 herein.
- 6) Costs of this appeal (excluding the costs of the first hearing of the appeal) and costs in the court below to the respondents to be agreed or taxed.

## **ANNEXES**

### **ANNEX 1 – Fedwire related to L/C 2288 (dated 6 October 1995)**

#### **(a) Copy provided by FTIB:**

FIRST UNION BANK

Time Entered: 10/06/95 15:46

Current Status: TRANSMITTED

Amount: \$ 171,301.12

Caller Name: CASSANDRA JOHNSON

Secondary Auth Name: SELWYN RICHARDSON

Funds Type: SAME

Wire Type: FEDWIRE

To: FIRST CHGO IN NYC

026009797

Wire Ref Number: 001414

Direction: OUTGOING

Time Transmitted: 10/06/95 15:16

Fedwire Text:

FST UNION JAX /ORG=FIRST TRADE INTL BANK AND TRUST ++;NASSAU, BAHAMAS,

FIRST CHGO IN NYC /CTR/BNF=HANIL BANK SEOUL KOREA/AC-15109515001

RFB=H40050412781325 OBI=RE:12288 REP DRAFT LESS OUR CHARGES \$110.00

BB1=UNDER

TELEX ADVICE TO THEM AT NO COST TO US W/T N4223 SEQ-951006003243

(b) Copy provided by Key:

WA >  
SEQ# >  
ACCT >  
DAY(S) >  
B TIME >  
MIN AMT > 171000.00  
MAX AMT > 172000.00  
Align/Return

WELCOME TO FIRST UNION NATIONAL BANK OF JACKSONVILLE

Remote Wire Activity Report  
Date: 10/06/95 Time: 10:23

Account Number: DD 002000000539411  
Account Title: FIRST TRADE INTL BANK AND TRUST ++

No Credit Wires for this account at this time.

Bank Wire

WA:BO>D  
First Union Seq. No.: 851006003243 - DEBIT  
Time Entered: 10/06/95 15:48  
Current Status: TRANSMITTED  
Amount: \$ 171,301.12  
Cdr Name: CASSANDRA JOHNSON  
Secondary Auth Name: SELWYN RICHARDSON  
Funds Type: SAME  
Wire type: FEDWIRE  
To: FIRST CHGO IN NYC  
026009787

Wire Ref Number: 001414  
Direction: OUTGOING

Time Transmitted: 10/06/95 16:15  
FedWire Text:

FST UNION JAX /ORG=FIRST TRADE INTL BANK AND TRUST ++;NA98AU, BAHAMA6  
RFB=H40050412781325 OBI=REF DRAFT LESS OUR CHARGES \$110.00  
BBI=UNDER  
TELEX ADVICE TO THEM AT NO COST TO US W/T N4223 SEQ-851006003243

Total debited: \$ 171,301.12

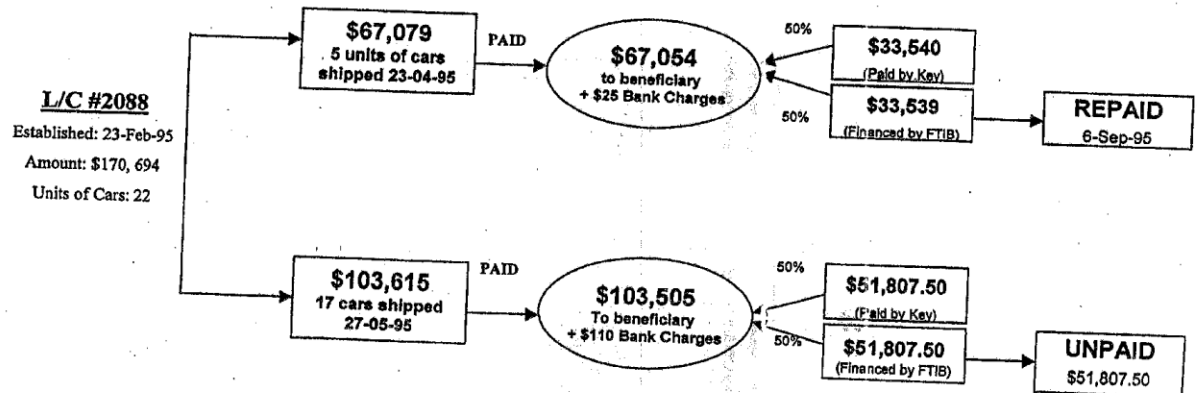
Account Number: DD 002000000539932  
Account Title: FIRST TRADE INTL BANK AND TRUST(VISA ACCT)

No Credit Wires for this account at this time.

## ANNEX 2 - Analysis of L/C 2088

### *Analysis of L/C 2088* *Executive Motors*

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**ANNEX 3 - Analysis of L/C 2748**

# ***Analysis of L/C 2747 & L/C 2748***

## ***Executive Motors***

---

**L/C #2747**

Established: 03-Jul-95

Amount: \$20,572

Units of Cars: 22

**UNPAID**

**\$20,572.26**

**L/C #2748**

Established: 03-Jul-95

Amount: \$104,260

Units of Cars: 13

**PAID**

**\$52,130**

**Less \$25 Bank Charges  
(Paid By Key)**

50%

50%  
UNPAID  
DUE TO  
LIQUIDITY  
PROBLEMS

**UNPAID**

**\$20,572.26**

## ANNEX 4 – Reconciliation Summary

### Reconciliation Summary

First Trade International Bank & Trust (Bahamas) Limited ("FTIB")

Executive Motors Limited ("Executive")

FTIB's claim against Executive for L.C. 2008 and Overdraft

| Letter of Credit<br>Number | Principal<br>Outstanding | Interest<br>Accrued to<br>28-Feb-97 | Total<br>As at<br>28-Feb-97 | Date<br>Transmitted | Time<br>Transmitted | Average<br>Prime Interest<br>Rate |
|----------------------------|--------------------------|-------------------------------------|-----------------------------|---------------------|---------------------|-----------------------------------|
| 2088                       | 51,807.50                | 8,136.72                            | 59,944.22                   | 07/13/95            | 17:04               | 8.75%                             |
| Overdraft                  | 27,984.50                | 1,947.97                            | 29,932.47                   | 10/26/95            | 14:08               | 8.75%                             |
|                            | <u>\$ 79,792.00</u>      | <u>\$ 10,084.69</u>                 | <u>\$ 89,876.69</u>         |                     |                     |                                   |

Reconciliation of the overdraft of USD27984.50 is listed below

|   |                       |          |       |       |
|---|-----------------------|----------|-------|-------|
| Balance owed to Executive prior to reconciliation                   | 95,059.66             |          |       |       |
| Interest on balance owed to Executive prior to reconciliation       | 1,161.09              |          |       |       |
| Payment of L.C. 2748  | (52,105.00)           | 10/26/95 | 14:08 | 8.75% |
| Payment of L.C. 2307  | (68,556.00)           |          |       |       |
| Reversal of net interest previously credited to Executive's account | (3,544.25)            |          |       |       |
|   | <u>\$ (27,984.50)</u> |          |       |       |

Note - The average prime interest rate was calculated using the prime interest rates for February, July and December 1995 located under the heading 1995 Prime Interest Rate "Prime Interest Rate History" and "Prime Interest Rate History - FedPrimeRate.com".

## ANNEX 5 - Spreadsheet for L/C 2748

First Trade International Bank & Trust (Bahamas) Limited ("FTIB")  
 Executive Motors Limited ("Executive")  
 Letter of Credit 2748 ("L.C. 2748") and Agreement for Letter of Credit - Ref: Vol. 6, pp. 106-110  
 Established 3 July 1995, in the amount of USD104,260, for thirteen (13) units of cars

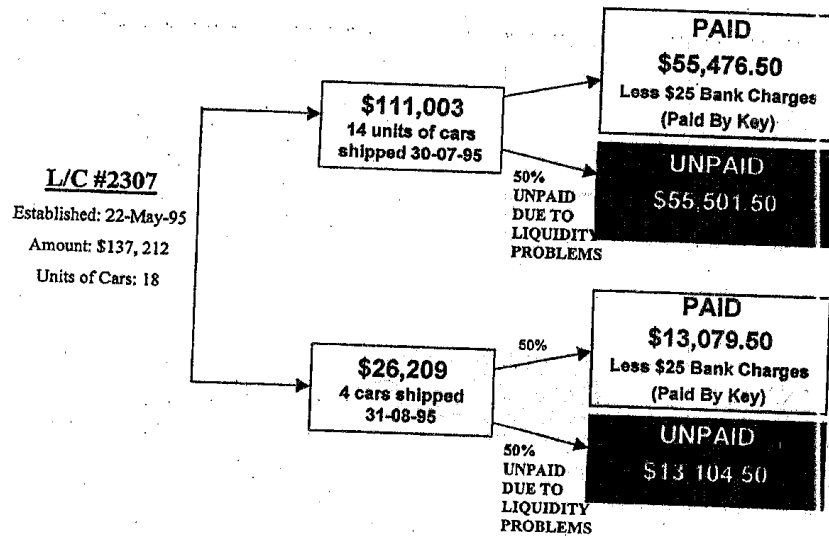
| Established 3 July 1995, in the amount of USD104,260.10 and then (25) times of this |                            |                             |                     |                            |                                    |                                   |                             |                             |                             |              |  |                  |                  |                             |          |
|---|----------------------------|-----------------------------|---------------------|----------------------------|------------------------------------|-----------------------------------|-----------------------------|-----------------------------|-----------------------------|--------------|--|------------------|------------------|-----------------------------|----------|
| Number of Vehicles  | Invoice date and Reference | Invoice Ref.                | Amount per Shipment | Amount paid to Beneficiary | Amount paid by FTIB to Beneficiary | Amount paid/repaid by Key to FTIB | Balance owed to FTIB by Key | Bill of Lading              | Bill of Exchange            | Packing List | Date of Wire transmission by FTI to Beneficiaries Bank | Date Transmitted | Time Transmitted | Average Prime Interest Rate | Comments |
|   |                            |                             |                     |                            |                                    |                                   |                             |                             |                             |              |  |                  |                  |                             |          |
| 13  | 3-Jul-95                   | L.C. 2748 See Vol 6, pp 112 | \$ 104,260.00       | \$ 52,130.00               | \$ 52,130.00                       | \$ 24,145.50                      | \$ 27,984.50                | L.C. 2748 See Vol 6, pp 111 | L.C. 2748 See Vol 6, pp 114 |              | L.C. 2748 See Vol 13, pp 31                            | 10/26/95         | 14:08            | 8.75%                       | a        |

Note - The average prime interest rate was calculated using the prime interest rates for February, July and December 1995 located under the heading 1995 Prime Interest Rate "Prime Interest Rate History" and "Prime Interest Rate History - FedPrimeRate.com".

a. The wire transfer amount was listed as USD52,130 and not USD52,105, which appears to relate to wire bank charges.  
 A copy of the telex message from Cho Hung Bank Seoul, dated Nov 3 1995, advising acceptance of USD52,130.00 is located on page 37 of Vol 13 for L.C. 2748.

## ANNEX 6 - Analysis of L/C 2307

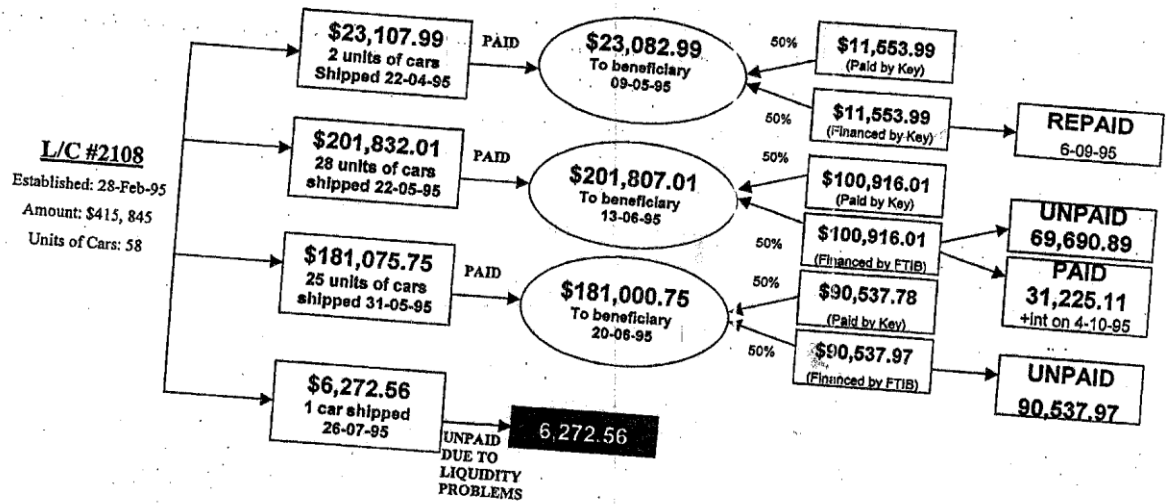
### *Analysis of L/C 2307* *Executive Motors*





## ANNEX 7 - Analysis of L/C 2108

### *Analysis of L/C 2108* *Key Motors*



# ANNEX 8 - Breakdown of payments on L/C 2108

"SLCA"

PRESENTED BY: KEY MOTORS LIMITE 31

## LETTER OF CREDIT #2108

**\$23,107.99**  
HMC Inv. # E504B19AB1-A-01  
Inv. Date: 09-May-95

**\$64.35**  
FTIB Charges

**\$201,832.01**  
HMC Inv. # E504B19AB1-A-01  
Inv. Date: 31-May-95

**\$570.58**  
FTIB Charges

**\$181,075.75**  
HMC Inv. # E504B19AB1-A-03  
Inv. Date: 06-Jun-95

**\$527.69**  
FTIB Charges

**\$6,272.56**  
HMC Inv. #  
Inv. Date: 26-Jul-95

| PAYMENTS BY KEY MOTORS TO FTIB |          |           |            |
|--------------------------------|----------|-----------|------------|
| Date                           | Bank     | Cheque #  | Amount     |
| 02-Mar-95                      | Citibank | 221403111 | 80,000.    |
| 03-Mar-95                      | MSB      | 108738    | 22,000.    |
| 21-Mar-95                      | MSB      | 117548    | 18,000.    |
| 23-Mar-95                      | MSB      | 117586    | 50,000.    |
| 21-Apr-95                      | MSB      | 117890    | 30,000.    |
| 06-Jun-95                      |          | *         | 60,000.    |
| 06-Jun-95                      |          | *         | 100,000.   |
| 06-Jun-95                      |          | *         | 55,000.    |
| TOTAL PAID BY KEY MOTORS       |          |           | \$415,000. |

\* Refer to First Trade Statements of Account dated 31-May-95 & 31-Jul-95 confirming payments received from Key Motors Ltd.

Original Managers' Cheque records lost from files of Key Motors Ltd.

TOTAL Suppliers Inv. \$412,288.31  
TOTAL FTIB Charges 1,162.62  
GRAND TOTAL \$413,450.93  
Less: Total Paid by KML (415,000.00)  
AMOUNT DUE TO Key Motors ( 1,549.07)

# ANNEX 9 - Bank statements

F 4  
✓  
22

Page : 13

Closing Date : 05/31/95

Customer ID : 050415

County & Co. (Bahamas) Building  
West Bay Street  
P.O. Box 112245 • Nassau, Bahamas  
Tel: (242) 354-5151 • Fax: (242) 354-3877

M E N T

CORS LIMITED

..... : Main Office  
..... : US Dollar  
..... : MMD-Corporations-Foreign  
t number : 050415/472/01

125

| Value | Date     | Description       | Debit      | Credit     | Balance    |
|-------|----------|-------------------|------------|------------|------------|
| 95    |          | Balance Forward   |            |            | 276,649.77 |
| 95    | 05/04/95 |                   |            | 20,000.00  | 296,649.77 |
| 95    | 05/05/95 | REVERSING ENTRY   | 23,157.23  |            | 326,649.77 |
| 95    | 05/05/95 | Principal payment |            | 30,000.00  | 303,492.54 |
| 95    | 05/05/95 | 05041522300100201 | 366.66     |            | 303,125.88 |
| 95    | 05/05/95 | Interest payment  |            |            | 302,939.34 |
| 95    | 05/05/95 | 05041522300100201 | 186.54     |            | 289,234.58 |
| 95    | 05/05/95 | Interest payment  |            |            | 289,234.58 |
| 95    | 05/05/95 | 05041522300100201 | 13,704.76  |            | 266,126.59 |
| 95    | 05/05/95 | Interest payment  |            |            | 265,976.59 |
| 95    | 05/05/95 | 05041522300100202 | 23,107.99  |            | 289,084.58 |
| 95    | 05/09/95 | Negotiation       | 150.00     |            | 203,888.74 |
| 95    | 05/09/95 | Negotiation       |            | 23,107.99  | 203,600.75 |
| 95    | 05/09/95 | Loan Opening      |            |            | 246,198.67 |
| 95    | 05/09/95 | 05041522300100206 | 85,195.84  |            | 276,523.39 |
| 95    | 05/09/95 | E1952 NEGOTIATION | 287.99     |            | 253,415.40 |
| 95    | 05/09/95 | E1952 NEGOTIATION |            | 42,597.92  | 264,969.39 |
| 95    | 05/09/95 | Loan Opening      |            |            | 276,969.39 |
| 95    | 05/09/95 | 05041522300100207 |            | 30,324.72  | 269,415.39 |
| 95    | 05/09/95 | Loan Opening      |            |            | 269,263.39 |
| 95    | 05/09/95 | 05041522300100208 | 23,107.99  |            | 273,041.39 |
| 95    | 05/09/95 | Loan Cancellation |            | 11,553.99  | 333,041.39 |
| 95    | 05/09/95 | Loan Opening      |            |            | 433,041.39 |
| 95    | 05/09/95 | 05041522300100209 |            | 12,000.00  | 402,716.67 |
| 95    | 05/12/95 | Check deposit     | 7,556.00   |            | 417,879.03 |
| 95    | 05/19/95 | E1952 NEGOTIATION | 150.00     |            | 417,729.03 |
| 95    | 05/19/95 | E1952 NEGOTIATION |            | 3,778.00   | 417,729.03 |
| 95    | 05/19/95 | Loan Opening      |            |            | 417,729.03 |
| 95    | 05/19/95 | 05041522300100210 |            | 60,000.00  | 417,729.03 |
| 95    | 06/09/95 | Check deposit     |            | 100,000.00 | 417,729.03 |
| 95    | 06/13/95 | Check deposit     | 30,324.72  |            | 417,729.03 |
| 95    | 05/09/95 | Loan Cancellation |            | 15,162.36  | 417,729.03 |
| 95    | 05/09/95 | Loan Opening      |            |            | 417,729.03 |
| 95    | 05/09/95 | 05041522300100211 |            |            | 417,729.03 |
|       |          | Balance Forward   | 207,295.72 | 348,524.98 | 417,729.03 |

Statement page : 1

Unit First Trade International Bank & Trust, Ltd. at the above

First Trade International Bank & Trust, Ltd. at the above

# First Trade International Bank & Trust Ltd.

Courts & Co. (Bahamas) Building  
West Bay Street  
P.O. Box M3249 • Nassau, Bahamas  
Tel: (242) 355-5151 • Fax: (242) 355-3577

Page : 13  
Closing Date : 07/31/95  
Customer ID : 050415

## STATEMENT

### KEY MOTORS LIMITED

Branch ..... : Main Office  
Currency ..... : US Dollar  
Type ..... : MMD-Corporations-Foreign  
Account number : 050415/472/01

| Date     | Value             | Date | Description              | Debit      | Credit     | Balance    |
|----------|-------------------|------|--------------------------|------------|------------|------------|
| 07/01/95 |                   |      | Balance Forward          |            |            | 387,451.50 |
| 07/17/95 | 07/17/95          |      | R1869 NEGOTIATION OF     | 30,324.72  |            | 357,126.78 |
|          | 5/9/95            |      |                          |            |            |            |
| 07/17/95 | 07/17/95          |      | R1869 NEGOTIATION        | 150.00     |            | 356,976.78 |
|          | CHGS 5/9/95       |      |                          |            |            |            |
| 07/18/95 | 07/18/95          |      | Negotiation              | 342,922.24 |            | 14,054.54  |
| 07/18/95 | 07/18/95          |      | Negotiation              | 932.31     |            | 13,122.23  |
| 07/18/95 | 07/18/95          |      | Loan Opening             |            | 171,461.12 | 184,583.35 |
|          | 05041522300100215 |      |                          |            |            |            |
| 07/21/95 | 07/27/95          |      | Check deposit            |            | 55,000.00  | 239,583.35 |
| 07/31/95 | 07/31/95          |      | Negotiation              | 54,053.83  |            | 185,529.52 |
| 07/31/95 | 07/31/95          |      | Negotiation              | 210.13     |            | 185,319.39 |
| 07/31/95 | 07/31/95          |      | Loan Opening             |            | 27,026.91  | 212,346.30 |
|          | 05041522300100216 |      |                          |            |            |            |
| 07/31/95 | 07/31/95          |      | Interest posting         |            | 1,163.65   | 213,509.95 |
|          | 05041547200100201 |      |                          |            |            |            |
|          |                   |      | *** End of statement *** |            |            |            |

124

|                 |            |            |            |
|-----------------|------------|------------|------------|
| Balance Forward | 428,593.23 | 254,651.68 | 213,509.95 |
|-----------------|------------|------------|------------|

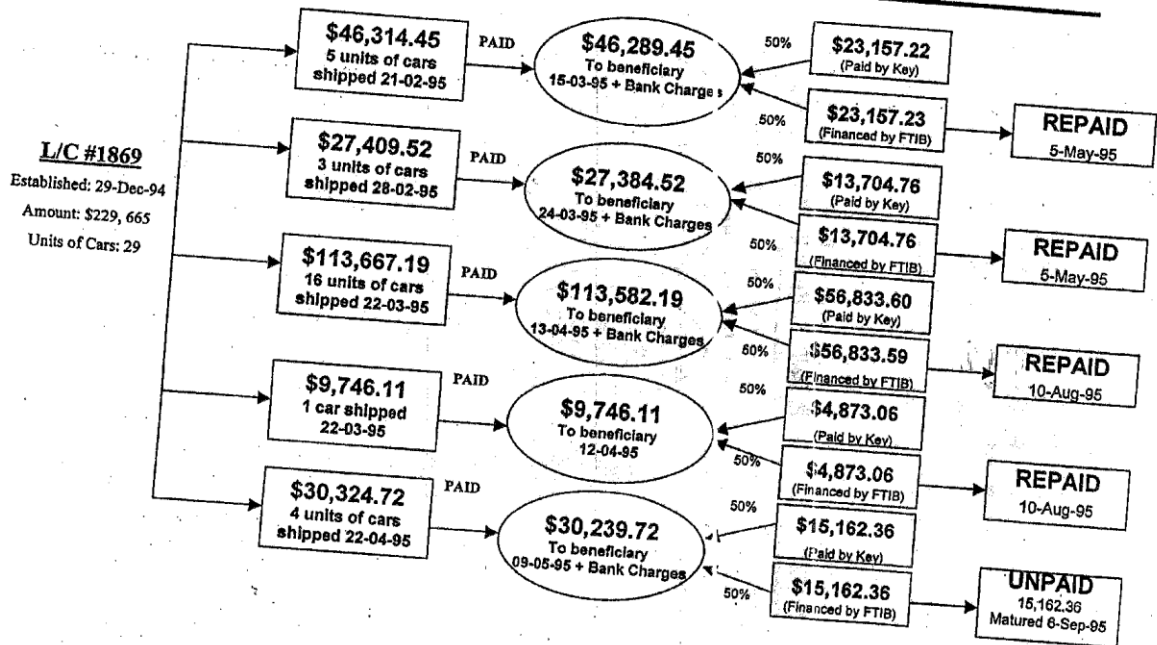
Statement page : 1

# ANNEX 10 - Analysis of L/C 1869

## Analysis of L/C 1869 Key Motors

### KEY

Negotiations not  
financed by FTIB due to  
liquidity problems

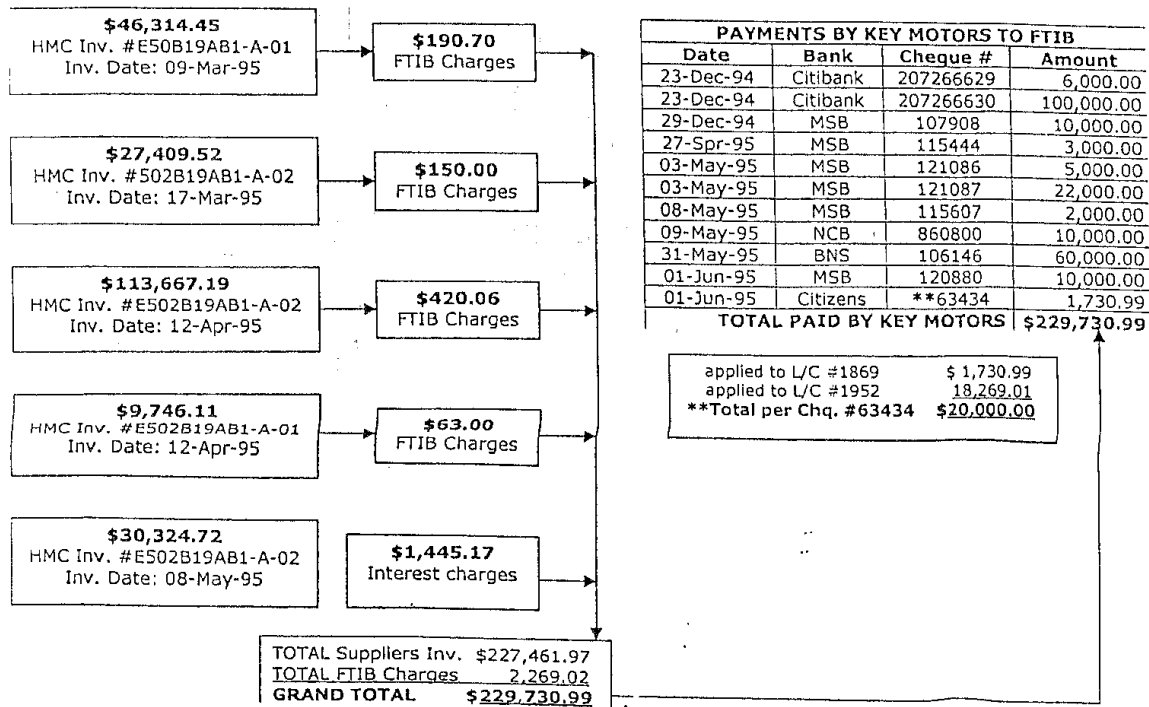


# ANNEX 11 - Breakdown of payments on L/C 1869

"SLSD"

PRESENTED BY: KEY MOTORS LIMITED

## LETTER OF CREDIT #1869



## ANNEX 12 - Breakdown of payments on L/C 2288

PRESENTED BY: KEY MOTORS LIMITED

### LETTER OF CREDIT #2288

**\$342,922.24**  
HMC Inv. #E505B19AB1-A-01  
Inv. Date: 24-Jun-95

**\$54,053.83**  
HMC Inv. #E505B19AB1-A-02  
Inv. Date: 05-Jul-95

**\$35,904.12**  
HMC Inv. #E505B19AB1-A-03  
Inv. Date: 26-Jul-95

#### PAYMENTS BY KEY MOTORS TO FTIB

| Date      | Bank     | Cheque # | Amount    |
|-----------|----------|----------|-----------|
| 26-Apr-95 | IVB      | 2601     | 20,000.00 |
| 20-Apr-95 | BNS      | 118454   | 12,835.82 |
| 03-May-95 | MSB      | 121087   | 22,000.00 |
| 13-Jun-95 | Citizens | 65545    | 8,000.00  |
| 13-Jun-95 | Eagle MB | 2777     | 12,000.00 |
| 13-Jun-95 | Eagle MB | 2775     | 10,000.00 |
| 13-Jun-95 | Citizens | 65546    | 5,000.00  |
| 19-Jun-95 | MSB      | 121166   | 35,000.00 |
| 28-Jun-95 | MSb      | 121277   | 40,000.00 |
| 18-Aug-95 | MSB      | 131078   | 50,000.00 |

**TOTAL PAID BY KEY MOTORS to FTIB and  
DUE FOR REFUND TO KEY MOTORS**

**\$214,835.82**