[2017] JMCC COMM 17

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2013CD00077

BETWEEN	**THE BANK OF NOVA SCOTIA JAMAICA LIMITED**	**CLAIMANT**
AND	**SOVEREIGN RESOURCES (UK) LTD.**	**1ST DEFENDANT**
AND	**DEAN WILLIAMS**	**2ND DEFENDANT**

IN OPEN COURT

Mr Emile Leiba and Ms Hyacinth Lightbourne instructed by DunnCox, Attorneys-at-Law for the Claimant

Mr Keith Bishop and Mr Andrew Graham instructed by Bishop and Partners, Attorneys-at-Law for the Defendants

Heard:19th, 20th and 28th June 2017

Evidence - Whether requirements in respect of computer generated documents applies equally to information derived from a computer contained in a witness statement which stands as evidence in chief - Evidence Act sections 31E and 31G

LAING, J

[1] The Claimant claims against the Defendants to recover a total sum of ten million seven hundred and twenty three thousand, nine hundred and eight dollars and thirty seven cents ($10,723,908.37) it asserted is owing in respect of three demand loan facilities and a credit card facility extended to the 1st Defendant.

[2] The Claimant averred in paragraph 12 of its Amended Particulars of Claim that the 2nd Defendant is liable by virtue of an Instrument of Guarantee dated the 15th

July 2011, pursuant to which he guaranteed payment to the Bank of the following:

> *"...all debts, liabilities, present and future, direct or in direct, absolute or contingent, matured or not, at any time owing by the 1st Defendant to the Bank or remaining unpaid to the Bank by the 1st Defendant, whether arising from dealings between the Bank and 1st Defendant or from other dealings or proceedings by which the Bank may be or become in any manner whatever a creditor of the 1st Defendant , and wherever incurred , and whether incurred by the 1st Defendant alone or with another or others and whether as principal or surety, including all interest, commissions, legal and other costs, charges and expenses."*

The Defence

[3] The 2nd Defendant in the Defendants' joint Defence admitted signing the said Instrument of Guarantee but said it was signed without any legal advice given to him or first obtained. He complained that the Claimant's agent did not even afford him the opportunity to read the document as it was presented to him with other documents for his immediate signature.

[4] The Defence did not join issue with most of the facts pleaded in the Amended Particulars of Claim, but a number of issues were raised by virtue of which the claim was contested and/or the Claimant put to proof. In respect of the Credit Card Agreement the Defendants asserted that it was a term of the agreement for the Claimant to provide the 1st Defendant with regular monthly statements and the Claimant failed to do so. It was also asserted that payments made by the 1st Defendant were never reflected in the Claimant's calculation.

[5] As it relates to the demand loans, it was pleaded in the Defence that the Defendants were never provided with a copy of the documentation in respect of the demand loans and accordingly they were never fully aware of the said loans. The Defendants also contended that certain promissory notes on which the Claimant sought to rely made no specific reference to the Defendants jointly or severally nor was it specified as to whether the obligation was on the 1st

Defendant only (paragraph 5 of the defence reads promissory "note" but I have treated the expression of the singular form to be a typographical error).

[6] The Civil Procedure Rules, 2002 ("CPR") rule 8.9 (1) requires a claimant to include in the claim form or particulars of claim "*a statement of all the facts on which the claimant relies*". Rules 10.5 (1), (2) and (3) provide as follows:

> *10.5 (1) The defence must set out all the facts on which the defendant relies to dispute the claim.*
>
> *(2) such statement must be as short as practicable.*
>
> *(3) In the defence the defendant must say –*
>
> > *(a) which (if any) of the allegations in the claim form or particulars of claim are admitted;*
> >
> > *(b) which (if any) are denied; and*
> >
> > *(c) which (if any) are neither admitted nor denied, because the defendant does not know whether they are true, but which the defendant wishes the claimant to prove..."*

[7] The Defendants in their Defence stated that the sums claimed by the Claimant did not reflect and account for the payments made by them. The Defendants also asserted that the Claimant is not entitled to the principal amount claimed or any interest thereon. As a consequence of the admissions made on the Defence, the main fact in issue which the Claimant was required to prove at trial, (but not the only one), was the pleading by which the Claimant asserted the quantum of the debt that was due and owing to it by the Defendants.

The Evidential Issues

[8] On the 26th May 2017, the Claimant filed a Notice of Intention to Tender into Evidence certain documents in accordance with section 31 F of the Evidence Act and part 29 of the CPR, with the reason given that the maker cannot be located. This was duly served on Counsel for the Defendants on or about the 29th May 2017 and it was met with a Notice of Objection and an Amended Notice of Objection, objecting to the tendering of the documents or statements made in

these documents and requiring the persons who made the statements in the several documents to be called as witnesses at the trial.

[9] Many of the documents in the Claimant's Notice of Intention to Tender were legal documents such as an Instrument of Guarantee, a Credit Card Agreement and Promissory Notes. As stated by the authors of **Cross on Evidence** 6th Edition at page 462:

> *"It is obvious that many legal documents have an operative effect, and hence cannot be regarded as asserting any state of fact. Thus contracts and wills generally fall outside the scope of the hearsay rule. In the case of related documents it is sometimes more difficult to draw the line".*

It was therefore rather odd that during the trial there was an issue raised as to whether some of these legal documents could potentially fall within the hearsay rule. However, even if any of the documents were not subject to the hearsay rule the Claimant would still have been required to comply with the best evidence rule. Lord Denning MR speaking of the rule in the English Court of Appeal case of **Garton v Hunter (Valuation Officer) 1969 1 All ER 451 at 453 E**, stated as follows:

> *"That old rule has gone by the board long ago. The only remaining instance of it that I know is that if an original document is available in one's hands one must produce it. One cannot give secondary evidence by producing a copy."*

[10] The Court was not required to make any rulings on the issue of hearsay in respect of the transactional documents because the Claimant was content to present its case as to quantum largely in reliance on the evidence of its sole witness Mr. Anthony Boyd. Mr Bishop insisted that he would not consent to the admission of copies of the Claimant's documents and required that the Claimant produce the originals or explain their absence. As Sykes, J recognized in **Ann Marie Sinclair and Jackson v Mason and Dunkley Claim No Cl1995/s-188** (delivered 5 August 2009), a party seeking to rely on the grounds listed in subsection 31E (4) of the Evidence Act must do so by evidence called at the trial. Mr Boyd, the Claimant's sole witness, in giving evidence did not proffer an

explanation as to the existence or non-existence of the originals nor did he give evidence in relation to the unavailability of any of the makers of the documents and accordingly there was no basis for admission of any of these documents. Although some documents were marked for identity, wisely, no application for admission was pursued.

[11] At the commencement of the trial the Court heard the Claimant's application for the Second Witness Statement of Mr Boyd to stand as (a part of) his evidence in chief. The grounds on which the application was made included, *inter alia*, that the statement disclosed the substance of the evidence which the Claimant was seeking to amplify and that a new matter had arisen namely the Defendants' refusal to agree the Claimant's document of the loan history statement. Despite the Defendants' objection, the Court granted the application in view of the limited scope of Mr Boyd's second witness statement which was mainly confined to details of the sum claimed and a limited explanation as to how the amounts were arrived at in respect of the various loan facilities.

[12] Mr Boyd is the senior manager in charge of commercial asset recoveries at the Claimant. His evidence in cross examination was that he was provided with the documents which form the foundation for this claim but was not present when these documents were "made" and is not in a position to say who is the "maker" of these documents. More importantly, he admitted that he did not personally do the interest calculations reflected in his second witness statement and in respect of which there is a claim. His evidence was that the interest calculations were generated automatically by the Banks' computer system. When asked if he checked the interest calculations to confirm that the rates which were supposed to have been used were in fact used, he indicated that he did not recall.

[13] It was these critical admissions on which Mr Bishop grounded his submissions that the Claimant had not presented sufficient evidence to support the sum claimed. Mr Bishop sought support in the case of **National Water Commission v VRL Operators Limited and Others [2016] JMCA Civ 19** in which our Court

of Appeal reviewed sections 31E-31H of the Evidence Act. Counsel placed reliance on these provisions of the Evidence Act in particular section 31G which is reproduced as follows:

> *"31G- (1) Subject to the provisions of this section, in any proceedings, a statement in a document or other information produced by a computer shall not be admissible as evidence of any fact stated or comprised therein unless it is shown that –*
>
> > *(a) there are no reasonable grounds for believing that the statement is inaccurate because of improper use of the computer; and*
> >
> > *(b) at all material times the computer was operating properly, or if not, that any respect in which it was not operating properly or was out of operation was not such as to affect the production of the document or the accuracy of its contents.*
>
> *(2) Subject to subsection (3), in any proceedings where it is desired to have a statement or other information admitted in evidence in accordance with subsection (1) above, a certificate –*
>
> > *(a) dealing with any of the matters mentioned in subsection (1); and*
> >
> > *(b) purporting to be signed by a person occupying a responsible position in relation to the operation of the computer,*
>
> *shall give rise to a presumption, in the absence of evidence to the contrary, that the matters stated in the certificate are accurate, and for the purposes of this paragraph it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.*
>
> *(3) Where a party intends to rely on a certificate referred to in subsection (2), that party shall, at least thirty days before commencement of the trial, serve on the other party, (or, in the case of an accused, his attorney-at-law) written notice of such intention, together with a copy of the certificate.*
>
> *(4) Any person who in a certificate tendered which he knows to be false or does not believe to be true commits an offence and shall be liable –*
>
> > *(a) on conviction, on indictment in the Circuit Court to a fine or to imprisonment for a term not exceeding two years, or to both such fine and imprisonment; or*
> >
> > *(b) on summary conviction in a Resident Magistrate's Court to a fine not exceeding one million dollars or to imprisonment for a term not exceeding six months, or to both such fine and imprisonment;*

> *(5) Where the circumstances of the case are such that, on the application of either party the court considers that the prejudicial effect of enabling a party to benefit from the presumption under subsection (2) in relation to the matters stated in a certificate would outweigh the probative value of the certificate, the court may require the party who is seeking to rely on the statement in a document or other information produced by the computer, to prove the matters referred to in paragraphs (a) and (b) of subsection (1) by adducing evidence thereof.*
>
> *(6) Nothing is subsection (1) shall affect the admissibility of an admission or a confession by an accused.*
>
> *(7) In this section, 'computer' means any device or group of interconnected or related devices, one or more of which, pursuant to a program, performs automatic processing of data, and includes any data storage facility or electronic communications system directly connected to or operating in conjunction with such device or group of such interconnected or related devices."*

[14] The point was well made by Mr Bishop that up until the point when the admission was made by Mr Boyd in cross examination as to the source of the evidence contained in his second witness statement (relating to the various amounts being claimed and the interest payments), it could not have been known that the original source of this information was computer generated. This is so Counsel said, because presumably it may have been possible for this information to have been produced by the personal and exclusively human efforts of Mr Boyd exercising his mathematical acumen. As a consequence there was no earlier opportunity for the Defendants to challenge the admissibility of this evidence on the basis of non compliance with section 31G of the Evidence Act, in the same way that one would have done where there is a document which is obviously on its face, a computer generated document.

[15] Mr Leiba sought to distinguish the **National Water Commission v VRL** case on the basis that it concerned the determination of the issue of admissibility of evidence prior to the commencement of the trial whereas in the instant case the evidence of Mr Boyd in respect of which there was a challenge, was evidence which was already before the Court. Mr Leiba also sought to distinguish the

National Water Commission v VRL case on the basis that that decision was concerned with computer generated documents as compared with this case which concerns information derived from a computer system and the subsidiary issue as to whether that system falls within the definition of a computer system.

Analysis

[16] It should be noted that section 31G in its current iteration was brought about by the Evidence (Amendment) Act 2015, which came into force on 11th August 2015. The 2015 Act also made amendments to sections 31D, 31E and 31F of the Evidence Act and subsequent references to these sections will be in relation to the Evidence Act. In the **National Water Commission v VRL** case, one of the issues on appeal was whether section 31G permitted an alternative route for the introduction in evidence of computer generated documents independently of either section 31E or 31F as they stood at the time when my learned brother Batts, J so found. At that time, sections 31D, 31E and 31F each had an opening phrase "Subject to section 31G". This phrase was deleted by the 2015 amendment. The Court of Appeal held that section 31G did not provide a self contained code for the admissibility of computer generated documents and that the deletion of this opening phrase did not affect that conclusion. Morrison JA in delivering the judgment of the Court expressed it in paragraph 75 as follows:

> *[75] Accordingly, the removal of the opening words "subject to section 31G" in sections 31E and 31F does nothing to affect the imperative obligation. Now contained in the new section 31G, on a party seeking to rely on " a statement in a document or other information produced by a computer" to satisfy the requirements of the new section 31G. Perhaps more importantly for present purposes, I think that my conclusion that, under the un-amended sections 31E, 31F and 31G, a computer generated document sought to be admitted under section 31G had first to be admissible under one or both of sections 31E and 31F, remains unaffected by the provisions of the amended sections 31E, 31F and 31G. All that the 2015 Act has done, as the memorandum of objects and reasons to which I have already referred suggests that it set out to do, is to simplify the requirements which need to be complied with before computer evidence may be deemed admissible. It has not, in my judgment, affected the prior requirement to satisfy the criteria for the*

admissibility of documentary hearsay evidence under the provisions of section 31E or 31F."

[17] The Court in **National Water Commission v VRL** considered the case of **Desmond Robinson and The Attorney General v Brenton Henry and Sarah (Butt) Henry [2014] JMCA Civ 17** which concerned a claim by the Henrys that the Appellants had wrongly detained a used and damaged 1.8 litre BMW motor car imported into Jamaica from England in respect of which they had paid all customs duties payable. The Appellants contended that there was a suspicion of fraud in the declarations in relation to the cubic capacity rating of the vehicle and accordingly more customs duties need to be paid by the Henrys. At the trial a Mr Anthony Naylor testified on behalf of the Appellants and gave evidence of information derived from a computer in England.

[18] In reviewing that case Morrison, P commented at paragraphs 56 and 57 as follows:

*[56] Finally on this point, I should mention the decision of this court in **Robinson & Attorney General v Henry & Henry**. The court was concerned in that case with what Panton P described as "computer generated information which had not been verified as required by law". In upholding the trial judge's refusal to admit this evidence under section 31G, Panton P, with whom the other members of the court agreed, said this:*

> *"[26].... In his witness statement, Mr Naylor clearly stated that he had no personal knowledge of the information that he was producing from the computer records of Black Horse Limited. He also said that if the computer was not operating correctly or was out of operation at any time, such default 'was not such to affect the accuracy of the information'. I am unable to understand how he could have made such a statement. Furthermore, under cross-examination, he confirmed that the figures and statement of accounts to which he had made reference were put in the computer by someone whose identity he does not know.*
>
> *[27] In the circumstance, I do not think that the learned judge can be faulted for applying section 31G to Mr Naylor's evidence. As regards the evidence of Mr Dalton- Brown, it is obvious that the learned judge was not convinced that the diagnostic report was authentic and reliable. 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 party producing evidence to show its authenticity and reliability. In any event, I am not surprised that the judge did not lay great store on Mr Dalton- Brown's evidence seeing that there were apparently important matters that he either did not notice or did not remember. He did not generate confidence."*
>
> *57. It appears from this passage that Panton P took it to be significant that the witness who produced the computer-generated records had no personal knowledge of the information contained in them. On this basis, it may be arguable, as Mr Williams and Mrs Kitson submitted, that the learned President's comments support the view that section 31G, standing by itself was insufficient to support the statement's admissibility. But, with respect, I cannot read this decision as providing definitive support for NWC's contention in this case. Rather, it seems to me, the generality of the learned President's language strongly suggests that, as Batts J explained, "..... the section 31 G application failed because the trial judge found the supporting evidence unreliable".*

[19] I wholly appreciate the conclusion of Morrison JA that the finding of Panton,P cannot be relied on to support the assertion that section 31G provides a separate and independent basis for the admissibility of hearsay documents. However it appears to me to be patently clear that Panton, P in finding that the learned judge cannot be faulted for applying section 31G to Mr Naylor's evidence, was confirming the applicability of the provisions of the Evidence Act dealing with computer generated evidence to oral evidence in Court which originated from a computer.

[20] Applying the finding in **National Water Commission v VRL** that a computer generated document sought to be admitted under section 31G had to be first admissible under one or both of sections 31E and 31F, then in this case the evidence of Mr Boyd which was extracted from the computer would have to be viewed in the context of that test. Section 31F deals with the admissibility of business documents and in my view is clearly inapplicable to these proceedings since as I earlier indicated, in the way the case ultimately unfolded there was no issue as to the admissibility of the potentially relevant documents, because the Claimant did not pursue that option.

[21] Section 31E addresses the admissibility of first hand hearsay statements including oral statements and subsection 31E (1) provides that:

> *"In any civil proceedings, a statement made, whether orally or in a document or otherwise, by any person (whether called as a witness in those proceedings or not) shall subject to this section, be admissible as evidence of any facts stated therein of which direct oral evidence by him would be admissible. "*

Subsection 31E (2) provides the mechanism for the party intending to tender such statement into evidence to give notice at least 21 days before the hearing (subject to the Court's discretion to dispense with notice) and 31E (3) provides for the notified party to require the maker of the statement to be called as a witness. Section 31E (4) establishes the conditions which must be satisfied by the party intending to tender a statement who does not wish to call as a witness the person who made the statement. Subsection 31E (5) provides as follows:

> *(5) Where in any civil proceedings a statement which was made otherwise than in a document is admissible by virtue of this section, no evidence other than direct oral evidence by the person who made the statement or any person who heard or otherwise perceived it being made shall be admissible for the purpose of proving it.*

[22] It is uncontroverted that there was no evidence from Mr Boyd on behalf of the Claimant as required by section 31G that there are no reasonable grounds for believing that his statement is inaccurate because of improper use of the computer, or that at all material times the computer from which he derived the information was operating properly. He would of course have had to provide a factual basis for these assertions or would have faced the possibility of a response similar to that of Panton, P in **Robinson & the AG V Henry and Henry** (supra) that "*I am unable to understand how he could have made such a statement*". The Court also noted that no certificate was produced dealing with these matters.

[23] Having regard to the procedural requirements of section 31E, I accept the submission of Mr Leiba that there is a difference between an application to exclude computer generated information made before a trial such as was

considered in the ***National Water Commission v VRL*** case and the submissions made in this case in the closing address on behalf of the Defendants by Mr Bishop. Mr Bishop had submitted in his address that the Court ought to exclude (or alternatively to not attach much weight to) such information, after the original source of it is discovered to have been a computer.

[24] However, having regard to ***Robinson & the AG v Henry and Henry*** (supra) and sections 31E and 31G in particular I have reached the conclusion that the admission into evidence of the information contained in the Second Witness Statement of Mr Boyd, pursuant to the order of the Court that it stands (in conjunction with his first witness statement) as his evidence in chief, was not an admission into evidence pursuant to sections 31E and 31G of the Evidence Act. However this finding notwithstanding, I also find that sections 31E and 31G are applicable to his evidence by virtue of his admission that the original source of his information was a computer or a computer system. In my view section 31E clearly contemplates its applicability to first hand hearsay in civil proceedings. Although as a consequence of the methodology employed in the reception of Mr Boyd's evidence initially, that is to say, as original first hand evidence in chief, it is at least arguable that it may not now open for this Court to retroactively find that this portion of his evidence is inadmissible. The basis for this would be due to non compliance with section 31G as Mr Bishop has urged the Court to find (or for non compliance with 31E).

[25] I do not think it is necessary for me to do so and I will not venture to make a conclusive finding on the admissibility point as it relates to the evidence act because in light of ***Robinson & the AG v Henry and Henry*** it is beyond argument that the Court can find that the evidence of Mr Boyd is unreliable as a consequence of such non compliance also find that such evidence is insufficient to satisfy the Court on a balance of probabilities. I do so find, largely as a result of the fact that Mr Boyd's evidence does not provide any supporting basis on which the Court can conclude that the computer generated evidence is reliable. It is worth noting, *en passant*, that this is not a case of an expert witness in respect

of which different considerations may apply to the need for home to speak to the equipment on which he is relying as demonstrated in the case of **R v Golizadeh Official Transcripts (1990-1997, [1994] Lexis Citation 2277** which was commended to the Court**.**

[26] The Court has not been provided with even a basic explanation as to the methodology by which the figures are automatically generated, for example the frequency and the process by which the base lending rate is updated. As it relates to the Defendants' client account information, was this inputted by a particular agent or by any agent who handles a portion of the account from time to time? Was there for example a particular person at the Bank responsible for managing and verifying the accuracy of the inputs related to the Defendants' accounts?

[27] The objective of the sections 31E- 31G is to ensure the accuracy and reliability of hearsay and computer generated information. If it were the case that the provisions only apply to a computer generated document itself and does not apply to the information derived from a computer or from such a computer generated document, then the provision could be easily circumvented by a litigant simply copying the information to his witness statement from a computer screen directly or from a computer printout. This would neuter and make a mockery of the provisions.

[28] Mr Leiba submitted in the alternative that once it was raised in cross examination that the evidence of Mr Boyd fell within the bounds of section 31G, the onus was on the party making that assertion to prove it. Counsel noted that section 31G (7) of the Evidence Act provides a very specific definition of a computer and it was not sufficient for a litigant, in this case the Defendants, to simply raise the spectre of a computer or computer system then in submissions assert that the relevant portion of the evidence of the witness was inadmissible. It was submitted that it was necessary for the cross examiner to suggest to the witness that the computer was one which fell fully within the definition set out in subsection 31G

(7). It was further submitted that in this case, such a suggestion not having been put to the witness it was not open to Counsel for the Defendants to challenge the admissibility of the witness' evidence in closing submissions.

[29] Whereas there is obviously a responsibility on a litigant to suggest its case generally, it is my view that the obligation is placed on the litigant who is intending to rely on the computer generated information or information derived from a computer to establish that it has satisfied the conditions as to admissibility and this obligation remains on that party throughout. It appears to me that once a litigant in cross examination extracts an admission that information was obtained from "a computer" or a computer system as occurred in this case then the Court is entitled to find that the "computer" is one which falls within the ambit of subsection 31G (7) if there is evidence to support such a finding. The party seeking to rely on information which it knows, or ought to know, is derived from a computer as defined by subsection 31G (7) cannot by failing to disclose this fact, gain an unfair advantage after its discovery by seeking to place the responsibility on the cross examiner to go further by having to suggest to the witness that the computer was one which fell fully within the definition as set out in subsection 31G (7).

[30] There may conceivably be cases where the party seeking to rely on the information is asserting that the instrument from which the information was obtained does not come within the ambit of a "computer" as defined by subsection 31G (7) but one would expect that these cases would be rare and there was no such assertion by the Claimant in this case.

[31] Although I have found that the evidence of Mr Boyd is unreliable for reasons associated with the Evidence Act, it would not make a difference had I not made those findings because in any event the claim could not succeed for other, albeit closely related and to some extent overlapping reasons. These have to do with the weight that could be attached to Mr Boyd's evidence (outside of the computer evidence reliability issue), arising from the non identification of all the interest

rates used in arriving at the final debt claimed. In considering whether the Claimant has satisfied the Court on a balance of probabilities that the debt claimed is in fact due and owing, the Court finds that this is a weakness in the Claimant's case. The evidence in chief of Mr Boyd as contained in his Second Witness Statement related to, *inter alia*, information as to principal balances and calculation of interest. There was also evidence as to payments that were applied to principal balances as a result of the sale of property which was being held as security by the Claimant. There was however no evidence before the Court as to the sale price of the property or of any costs, fees or other disbursements associated with the sale.

[32] Although the evidence of Mr Boyd is that the figures were generated automatically, as Mr Bishop submitted this was not beyond human calculation or a confirmatory check by Mr Boyd. This possibility of a confirmatory check is unaffected by and in fact is made more important by his evidence that the Bank's base rate fluctuates from time to time.

[33] Mr Boyd's evidence is that in respect of the demand loan facility number 8000021 in the sum of eight million dollars ($8,000,000.00), the 1st Defendant agreed a rate of interest payable at a fixed rate of 14.75% per annum for 12 months from the date of the loan and thereafter interest would accrue at the Banks base lending rate plus 2%. He provided the present effective rate (presumably as at the date of his statement 18th May 2017 as 17.75% per annum). What the Court has therefore are 2 snapshots of the interest rate, one during the first 12 months and one as at May 2017 with no indication as to what the various positions were in between that period.

[34] In relation to the demand loan facility number 8000047 in the sum of one million seven hundred and twenty two thousand five hundred ninety nine dollars and thirty seven cents ($1,722,599.37), Mr Boyd's evidence is that the Claimant agreed to lend and the 1st Defendant agreed to the Bank's base lending rate plus 3.5%. He stated that the current rate is 15.75% and that interest is currently accruing at a rate of 19.25% but there is no evidence as to the effective rate at which interest accrued over the entire period for which interest is being claimed.

[35] As it relates to the demand loan facility number 8000022 in the sum of five million dollars ($5,000,000.00) Mr Boyd stated that the agreed rate of interest was 8.95% per annum and following the repayment of $5,000,000.00 from the proceeds of the sale of the property, there is now due and owing the sum of $2,165,168.98. Because there was a fixed interest rate in respect of this facility then one could conceivably check the sum claimed if one has a date from which the interest payments ran. However Mr Boyd speaks of irregular monthly payments which were made pursuant to direct debit from a deposit account between 2nd August 2011 and March 2012. There is no indication given of the total of these payments and accordingly it is unclear how the final figure stated to be due was arrived at.

[36] The Claimant claims a debt accrued on the credit card of three hundred and ninety four thousand three hundred and thirty dollars and eleven cents ($394,330.11) as at 12th May 2017 but there is no evidence provided as to the purchases which formed the basis for the application of interest at 42% per annum prior to the card being charged off as a result of this sum being converted to the status of a bad debt with the result that interest no longer accrues

[37] The fact that there were various interest rates applied over time makes it imperative that the calculations be demonstrated to the satisfaction of the Court, or demonstrable, especially in the context of this claim where a significant portion of the debt alleged is as a result of accrued interest. This is so because the Principal sums in respect of two of the facilities in the amounts of eight million

dollars ($8,000,000.00) and five million dollars ($5,000,000.00) respectively were liquidated by the application of the proceeds of sale of the real property which was held as security by the Claimant. There was also the application of $883,710.82 of the proceeds of sale to the loan facility number 8000047. Unfortunately the date or dates of the application of these sums in each case was not given in evidence.

[38] The Claimant has not demonstrated the accuracy of the figures which it has presented to the Court. The Court is being asked to accept the figures presented because a computer or computer system has churned them out and Mr Boyd is relying on them. Of paramount importance in the Court's assessment is the fact that Mr Boyd was not able to verify to the satisfaction of the Court that he checked the calculation of the figures and also the fact that the Court has not been provided with the source data including the base rate of interest as it fluctuated from time to time. As a consequence of these deficiencies the Court has been deprived of any opportunity to independently test the accuracy of the final figures claimed in respect of each facility.

Conclusion

[39] Whereas it appears that there may be a debt owing to the Claimant arising from, at the very least, accrued interest, having considered all the evidence in the round, I find that the Claimant has not satisfied the Court on a balance of probabilities that the quantum it has pleaded as being owed, is in fact owed. The Claimant has been put to proof in respect of this sum and has failed to prove its case in this regard. Having arrived at this conclusion it is unnecessary for me to address other issues which were raised during the trial including *inter alia*, whether the Promissory Notes and the Guarantee are enforceable against the 2nd Defendant, whether there was a legal obligation to provide the transactional documents and monthly statements to the Defendants or any of them, whether they were in fact provided and if not provided whether a failure to do so could provide a defence if the debt was proved. Though academic at this point, by way

of comment I should note that the 2nd Defendant was extremely uncooperative and deliberately evasive. He said he could not recall in response to most questions asked of him and I would not have been inclined to prefer his evidence on any issue of fact which might have been left to be decided.

[40] For the reasons stated above I find that the Claimant has to proved its case on a balance of probabilities and make the following orders:

1. Judgment in favour of the Defendants.

2. Costs of the claim to the Defendants to be taxed if not agreed.