IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF GUYANA

CCJ Application No GYCV2021/002
GY Civil Appeal No 171 of 2018

BETWEEN

TRUST COMPANY (GUYANA) LIMITED **APPELLANT**
(a company incorporated under the Companies Act, No. 29 of 1991 of the Laws of Guyana whose registered office is located at Lot 11 Lamaha Street, Georgetown, Guyana)

AND

GUYANA SECURITIES COUNCIL **RESPONDENT**
(a body corporate created under section 4 of the Securities Industry Act)

Before the Honourable: **Mr Justice A Saunders, PCCJ**
Mr Justice J Wit, JCCJ
Mme Justice M Rajnauth-Lee, JCCJ
Mr Justice A Burgess, JCCJ
Mr Justice P Jamadar, JCCJ

Appearances

Mr Timothy M Jonas SC and Mr Teni Housty for the Appellant

Mr C A Nigel Hughes and Mr Stephen Roberts for the Respondent

Statute – Statutory Interpretation – Meaning of 'public company' – Whether appellant a public company under provisions of the Act– Securities Industry Act Cap 73:04, s 3(2)(f)(ii).

Company – Securities – Whether appellant required to register with Securities Council as a reporting issuer – Securities Industry Act Cap 73:04, s 56(1).

SUMMARY

The Guyana Securities Council ("the GSC") is a body corporate created under the Securities Industry Act ("the Act") responsible for regulating the securities market and maintaining

surveillance over the securities market in Guyana. The Trust Company (Guyana) Limited ("Trust Company") was incorporated as a private company.

Section 3(2)(f) of the Act includes within the definition of a "public company" a company "that is the issuer of a security that is beneficially owned by more than fifty persons." Further, by s 56(1), from the date of commencement of Part V of the Act "all public companies shall become reporting issuers and shall, within ninety days from that date, file with the Council a registration statement in the prescribed form."

On 5 March 2010, the GSC wrote to Trust Company informing it that, as it had more than fifty shareholders, it was a public company and was required to register as a reporting issuer. Trust Company admitted that in 2009 there were sixty shareholders registered in the company's books, but it refused to register.

Trust Company filed an action before the High Court of Guyana seeking declaratory relief that shareholding in excess of fifty persons did not per se render a company a public company under the provisions of the Act, that it was a private and not a public company, and that it was under no obligation to register with the GSC. The trial judge found that Trust Company was a public company, as it had in excess of fifty shareholders and was under an obligation to register with the GSC. Trust Company appealed. The Court of Appeal dismissed the appeal and affirmed the trial judge's decision.

The main issue raised in this appeal was whether Trust Company is a reporting issuer under the Act. The determination of this issue involved the consideration of two questions of statutory interpretation: (1) whether Trust Company is a public company within the provisions of the Act; and (2) if the answer to the first question is in the affirmative, whether Trust Company is caught by s 56(1) of the Act and is compelled to register with the GSC as a reporting issuer.

Trust Company admitted that shares are a form of security. It argued, however, that a company can only be designated a public company if it issues a single share, which is then owned by more than fifty persons, and as it had not issued such a share that it was a private company. Trust Company urged the Court to perform a contextual interpretation of the Act and emphasized that the trigger for the regulatory scheme of the Act was the relevant transaction captured by the

statutory scheme, and not the mere number of shareholders. Trust Company also argued for the first time that s 56(1) was a transitional provision and the requirement to register only applied to public companies which existed on the commencement date of Part V, that is the 22 July 2002.

The GSC argued that Trust Company's transactional approach ignored the express wording of the Act. The Act contemplates that beneficial ownership of a security by a group in excess of fifty persons carries the consequence of altering the characterization of a company from private to public. The GSC agreed that in interpreting the term "public company", the Court should consider the context of the Act, but denied that the protection offered by the Act was limited to transactions only. The GSC argued that classification of a company as a private company involved two separate and distinct methods - one focused on whether the company offers securities for sale to the public and the other treats with the company's internal arrangement for the acquisition and sale of securities, noting in relation to the second limb that such forms of security cannot be beneficially owned by more than fifty persons.

On the first issue, whether Trust Company was a public company under the Act, the Court, in a judgment authored by Rajnauth-Lee JCCJ, was of the view that the legislature utilised two mechanisms for defining a public company. The first mechanism considers the company's direct dealings with the public, irrespective of the size of the public uptake; this is found in s 3(2)(f)(i). This mechanism however only captures the company's dealings with the public as it concerns shares and debentures. The second mechanism takes a broad brush "numbers game" approach to satisfy the test whether the company is a public company. It looks only at the number of persons who are beneficial owners of a "security" issued by the company, and that mechanism is to be found in s 3(2)(f)(ii). This mechanism seeks to capture dealings which extend beyond transactions involving shares and debentures, and uses as its threshold, the number of persons holding ownership in the securities.

The Court considered that the reference in s 3(2)(f)(ii) to a "security" must naturally and ordinarily include the plural "securities". Pursuant to s 6(1)(b) of the Interpretation and Clauses Act of Guyana, the singular includes the plural unless the context otherwise requires. The term "security" has been defined at s 3(2)(t)(ii) and includes any "share". The plain meaning rule was applicable here. When therefore s 3(2)(f)(ii) is juxtaposed with s 3(2)(t)(ii), a company that is the issuer of "shares" that are beneficially owned by more than fifty persons, is a public company under the

Act. The Court of Appeal correctly observed that it would be alarming if a company in Guyana could hide behind the use of the singular term "security" in s 3(2)(f)(ii) to avoid its designation as a public company. Such an approach would shatter the legislative policy which has, as its ultimate goal, the protection of persons who risk their capital and investment and who would otherwise be subject to the whims and fancies of the unscrupulous.

The Court therefore concluded that, having regard to the entire context of the Act and the main objectives of the Act as expressed by the Long Title, which include the regulation of the securities industry and the protection of the investing public, Parliament did not intend to exclude the plural "securities" or "shares" when the term "public company" was construed in s 3(2)(f)(ii). The suggestion that a company can only be designated a public company under the terms of s 3(2)(f)(ii) if it issues a single security or share, which is then owned by more than fifty persons, is a strained construction, which runs counter to the purpose of the legislation, and must be rejected.

The Court then came to the second issue, whether Trust Company is caught by s 56(1) of the Act and obliged to file a statement with the GSC as a reporting issuer. Since it involved a matter of pure law, and was inextricably bound up with the issues of statutory interpretation already before the Court, the Court allowed to be argued the submission of Trust Company that s 56(1) is a transitional provision even though this was a new point taken. However, the Court was not convinced by the submission.

The Court decided that the plain language of s 56(1) is that all public companies are deemed to be reporting issuers from the date of the commencement of Part V, that is, from 22 July 2002. The Court noted that s 56(1) does not say "as at the commencement of the Part", but "from the commencement of the Part". The Court did not think that the ninety days' prescription for the filing of the registration statement found in s 56(1) could trump the clear intention of the legislature that all public companies became reporting issuers from the commencement of Part V. Whether, therefore, the public company existed at the time the legislation came into effect or after the legislation came into effect, a public company is deemed to be a reporting issuer from 22 July 2002. This is the only common sense and logical interpretation of s 56(1).

The Court also observed that the interpretation suggested by the Trust Company would be contrary to the policy, clear purpose and entire scheme of the Act. The policy of the Act is reflected in the wide definition of "public company" set out in s 3(2)(f). In addition, this definition sought to go

beyond the definition of "public company" contained in the Companies Act of Guyana. Having determined that the definition of "public company" should be enlarged in order to provide the widest possible protection to the investing public, the Court posed the question: Why would Parliament abandon its policy by the use of a transitional provision in s 56(1), and make s 56(1) applicable only to those public companies which existed as at 22 July 2002. The Court decided that this would produce an absurd result which was unlikely to have been intended by the legislature in Guyana.

Further, the Court was of the view that to interpret s 56(1) as a transitional provision would have a consequence which was illogical and irrational. It would mean that Parliament intended, that s 56(6) which lays out the statutory procedure whereby a public company is no longer saddled with the obligations of a reporting issuer, would only apply to those "public companies" which existed on the commencement date. The Court did not agree that Parliament would have intended such a narrow application of s 56(6). There is nothing in the entire scheme of the legislation to suggest that this was the intention of the legislature.

In addition, the Court considered an important principle of statutory interpretation, especially in the context of Commonwealth Caribbean jurisdictions. Legislation must be interpretated purposively to give effect to the fundamental rights and values, and constitutional principles, contained in Commonwealth Caribbean Constitutions. The Court held the view that s 56(1) must be interpreted in such a way as to reflect the fundamental rights of non-discrimination and equality before the law of all public companies within the scheme of the Act. In other words, an interpretation which captures all public companies within the meaning of s 3(2)(f) (whether in existence as at 22 July 2002 or subsequently), treats all public companies in a non-discriminatory manner and equally, and is to be preferred. An interpretation which only targets public companies in existence as at 22 July 2002 does not treat all public companies equally, and will not be favoured. In the same vein, an interpretation which only targets public companies in existence as at 22 July 2002, would cause those public companies to bear statutory obligations (with serious consequences for breach) which would not be borne by public companies which came into existence after 22 July 2002. Such an interpretation must be rejected.

The Court did not consider that the ambiguity in s 56(1), as to the stipulation of the period of time that is to be given to a public company/reporting issuer to file a registration statement with the

GSC, can be a sufficient basis to exempt Trust Company from its obligation to register. The Court was of the view that this was an appropriate case to eliminate the ambiguity by interpreting the subsection to read, 'from the date of commencement of this Part, all public companies shall become reporting issuers, and shall, within ninety days of so becoming, file with the Council a registration statement in the prescribed form.'

Accordingly, a company which becomes a public company after 22 July 2002 must register as a reporting issuer within ninety days from the date on which it became a public company.

The appeal was therefore dismissed.

Cases referred to:

Brosseau v Alberta Securities Commission [1989] 1 SCR 301; *Byron v Eastern Caribbean Amalgamated Bank (Antigua and Barbuda)* [2019] UKPC 16, [2019] All ER (D) 63 (May); *Chung v AIC Battery and Automotive Services Ltd (In receivership)* [2013] CCJ 2 (AJ), (2013) 82 WIR 357 (GY); *Guyana Sugar Corporation Inc v Dhanessar* [2015] CCJ 4 (AJ) (GY); *Ontario Securities Commission v Tiffin* 2018 ONSC 3047, 142 OR (3d) 223; *Ontario Securities Commission v Tiffin* 2020 ONCA 217, 150 OR (3d) 714; *Persaud v Nizamudin* [2020] CCJ 4 (AJ) (GY); *Pezim v British Columbia (Superintendent of Brokers)* [1994] 2 SCR 557; *Public Service Appeal Board v Maraj* [2010] UKPC 29, (2010) 78 WIR 461 (TT); *The Queen v Flowers* [2020] CCJ 16 (AJ) (BZ), [2020] 5 LRC 628; *Shillingford v Andrew* [2020] CCJ 2 (AJ) (DM); *Trust Co (Guyana) Ltd v Guyana Securities Council* (Guyana HC, 8 October 2018); *Trust Co (Guyana) Ltd v Guyana Securities Council* (Guyana CA, 27 August 2020).

Legislation referred to:

Antigua and Barbuda – Industrial Court Act Cap 214; **Barbados** – Securities Act, Rev Ed 1971, Cap 318A; **Canada** – Securities Act, RSA 1970, c 333; Securities Act, SA 1981, c S-6.1; Securities Act, SBC 1985, c 83; **Dominica** – Companies Act 1994; Securities Act 2001; **Guyana** – Companies Act, Rev Ed 1970, Cap 89:01; Companies Act, Rev Ed 2011, Cap 89:01; Constitution of the Co-operative Republic of Guyana, Rev Ed 2011, Cap. 1:01; Interpretation and General Clauses Act, Rev Ed 2011, Cap 2:01; Securities Industry (Conduct of Business) Regulations 1998; Securities Industry (Disclosure by Reporting Issuers) Regulations 2002; Securities Industry (Registration of Issuer and Securities) Regulations 2002; Securities Industry Act 1998 (Commencement) Order 2000; Securities Industry Act 1998 (Commencement) Order 2002; Securities Industry Act, Rev Ed 2011, Cap 73:04.

Other sources referred to:

Antoine R-M B, *Commonwealth Caribbean Law and Legal Systems* (2nd edn, Routledge-Cavendish 2008); Bailey D and Norbury L, *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edn, LexisNexis 2020); Johnston D L, *Canadian Securities Regulation* (Butterworths 1977).

JUDGMENT

of

The Honourable Mr Justice Saunders, President

and The Honourable Justices Wit, Rajnauth-Lee, Burgess and Jamadar, Judges

Delivered by

The Honourable Mme Justice Rajnauth-Lee

on the 30 day of July 2021

Introduction

[1] The Appellant is the Trust Company (Guyana) Limited ("Trust Company" or "Trust"). The Respondent is the Guyana Securities Council ("the GSC" or "the Council"). The main issue raised in this appeal is whether Trust Company is a reporting issuer under the Securities Industry Act ("the Securities Industry Act" or "the Act")[1]. The determination of this issue involves the consideration of two questions of statutory interpretation: (1) whether Trust Company is a public company within the provisions of the Act; and (2) if the answer to the first question is in the affirmative, whether Trust Company is caught by s 56(1) of the Act and is compelled to file a statement with the GSC as a reporting issuer. We answer both questions in the affirmative and therefore hold the view that Trust Company is a reporting issuer under the Act.

Background Facts

[2] The facts are undisputed. Trust Company was formerly Royal Bank Trust Company (Guyana) Limited, incorporated in British Guiana on 17 May 1966, and a wholly-owned subsidiary of the Royal Bank of Canada. Clause 5 of its Articles of Association stipulated that Trust Company was a private company and that the number of its members was not to exceed fifty[2]. Trust Company changed ownership and was continued under the provisions of the Companies Act[3] ("the Companies Act"). In its Annual Returns filed with the

[1] Cap 73:04.
[2] "…exclusive of persons who are in the employment of the Company and of persons who having been formerly in the employment of the Company, were, while in such employment, and have continued after the determination of such employment to be members of the Company" see cl 5 of Trust Company's Articles of Association.
[3] Cap 89:01.

Registrar of Companies for the year ending 31 December 2009, Trust Company's shareholders exceeded fifty.

[3] The GSC is a body corporate created under the Act with functions set out at s 5 of the Act. Among its functions, the GSC is responsible for the registration, authorisation and regulation of self-regulatory organisations, securities companies, securities intermediaries, brokers, dealers, traders, underwriters, issuers and investment advisers, and for the control and supervision of their activities with a view to maintaining proper standards of conduct and professionalism in the securities business. By s 6 of the Act, in the discharge of its functions, the GSC is empowered, *inter alia*, to take action against persons who are registered or are required to be registered under the Act for failing to comply with the Act.

[4] On 5 March 2010, the GSC wrote to Trust Company. The letter sets out in part:

> I refer to your letter dated the 3rd March, 2010 and I wish to state that Trust Company (Guyana) Limited is not a private company as you are alleging. Our records indicate that your company, since 2003, requested to be registered as a public issuer but at that date your company was not qualified to be so registered. However, according to the 2007 shareholders register which your company provided to the Council, your company had in excess of fifty shareholders which classifies it as a public company under the Securities Industry Act 1998. Consequently, you are hereby referred to section 56 (1 to 3) of the Securities Industry Act 1998 and you are hereby required to register as a reporting issuer within **three days of the date of this letter** failing which legal action would be taken against your company to enforce registration.
>
> The Council has also noted that you company has complied with section 58 of the Securities Industry Act 1998 as all reported issuers are required to so do but failed to register under section 56 of the said Act….

The High Court Proceedings and Judgment

[5] On 9 April 2010, Trust filed an action before the High Court of Guyana seeking *inter alia* declaratory relief that shareholding in excess of fifty persons did not per se render a company a public company under the provisions of the Act, that it was a private and not a public company under the Act, that the GSC had no jurisdiction in respect of private companies and that it was under no obligation to comply with the GSC's demands issued by letter of 5 March 2010.

[6] During the High Court proceedings, Ms Deborah Williams, Company Secretary of Trust Company, deposed that in 2009 there were sixty shareholders registered in the books of the company. Eleven of those shareholders were past and present employees of Trust Company. She denied however that Trust Company ever distributed securities to the public or made any offer of shares or debentures to any group of fifty persons or more by way of advertisement or any other form of solicitation. She did not contend that these sixty shareholders were not the beneficial owners of the shares of Trust Company. In fact, the evidence is silent on this issue and this matter proceeded in the courts below and before us, on the basis that the sixty shareholders were the beneficial owners of the shares.

[7] On 8 October 2018, Barlow J dismissed Trust Company's claim and found that Trust was a public company since it had in excess of fifty shareholders. She observed that to accept the argument advanced by Trust Company would mean that a company that has not issued any form of security to the public, could, by private arrangements, have 10,000 shares beneficially owned by 10,000 persons. That company, however, would not be deemed a public company since the company would have treated with multiple shares and not a single share. The trial judge was of the view that that was not the intent and purport of the Act. She observed that the first part of s 3(2)(f) treated with companies that distributed or offered shares to the public, and the second part, where no mention was made of a public offer or distribution, all that was required was beneficial ownership by fifty or more persons in a security.[4]

The Judgment of the Court of Appeal

[8] Trust Company appealed to the Court of Appeal. On 27 August 2020, the Court of Appeal (Cummings-Edwards Chancellor (Ag), Gregory and Persaud JJA) dismissed the appeal. Delivering the judgment of the Court of Appeal, Persaud JA warned against an over legalistic application of canons of construction and interpretation which would defeat the true purport and intent of legislation. He expressed the view that the general scheme of a piece of legislation and the mischief that it sought to avoid must always be fully appreciated

[4] (Guyana HC, 8 October 2018).

and at the forefront of one's mind in embarking upon the process of statutory interpretation.[5]

[9] At paragraph 20, Persaud JA reasoned that:

> However, it would indeed be alarming to suggest that a company would be free to issue several securities each of which is beneficially owned by 50 persons and be in a position to call into aid the use of the singular term "a security" in section 3(F)(ii) of the Act, to avoid its designation as a public company and thus not be subjected to scrutiny. This would shatter the legislative policy and intent which has as its ultimate goal, the protection of persons who risk their capital and investment and whom would otherwise be subject to the whims and fancies of the unscrupulous. The intention of a company here is of no relevance and is simply not contemplated by the Act, however well intended or appreciative of the services rendered by past or present members of staff.

The Appeal to this Court

[10] Trust Company appealed the decision of the Court of Appeal. Before this Court, Trust Company relies on three grounds of appeal:

a. The Court of Appeal erred in its construction of the provisions of the Act and in particular its conclusion that shareholding in a company in excess of fifty shareholders per se renders that company a public company under s 3.

b. The Court of Appeal erred in its conclusion based on the erroneous construction that Trust Company is a public company by virtue of its shareholding in excess of fifty shareholders, notwithstanding that Trust has never distributed or made any offer of shares or debentures to the public and has never issued a security beneficially owned by more than fifty persons.

c. The Court of Appeal erred when it concluded that that by the letter dated 5 March 2010, the GSC had lawfully demanded that Trust Company register as a reporting issuer under the Act. The basis for the GSC's demand was that Trust Company was a public company, since it had in excess of fifty shareholders in 2009. This, it was contended by Trust, was not lawful and was in excess of the powers of the GSC.

[5] (Guyana CA, 27 August 2020).

[11] In addition, in their Reply Submissions filed with the Court on 19 March 2021, Trust Company raised a new point. For the first time, Trust Company submitted that s 56(1) of the Act was a temporal and transitional provision which was only intended to apply to public companies which existed at the commencement date of Part V, that is, 22 July 2002. Trust contended that after the ninety days prescribed in s 56(1), the section was spent, and there was, therefore, no statutory obligation on Trust to register as a public company pursuant to s 56(1). Accordingly, it was argued, Trust was not caught by s 56(1), even if Trust was a public company within the meaning of the Act. We will return to the issue whether Trust ought to be allowed to take this point at this late stage.

The Relevant Statutory Framework

[12] The important provisions of the Securities Industry Act are set out below. The Act is comparable to legislation which has been enacted in various jurisdictions with similar objectives.[6] "Securities Acts in general can be said to be aimed at regulating the market and protecting the general public."[7] The Securities Act "is regulatory in nature. In fact, it a part of a much larger framework which regulates the securities industry throughout Canada. Its primary goal is the protection of the investor but other goals include the capital market efficiency and ensuring public confidence in the system."[8] The Long Title of the Securities Industry Act of Guyana states that it is an Act to provide for the registration of securities brokers and dealers, certain self-regulatory organizations, and certain issuers of securities; and for the regulation of securities issuances, with the purpose of encouraging capital formation and the growth of efficient securities markets, while protecting purchasers of securities and promoting ethical behavior in the securities industry.

[13] Section 3(2)(f) of the Act defines "public company" as follows:

> (i) any of whose issued shares or debentures are or were part of a distribution, or an offer, to the public; or

[6] Securities Act, RSA 1970, c 333; Securities Act, SA 1981, c S-6.1; Securities Act, SBC 1985, c 83.
[7] *Brosseau v Alberta Securities Commission* [1989] 1 SCR 301, 314 (L'Heureux-Dube J).
[8] *Pezim v British Columbia (Superintendent of Brokers)* [1994] 2 SCR 557, 589 (Iacobucci, J) citing David L Johnston, *Canadian Securities Regulation* (Butterworths 1977) 1.

(ii) that is the issuer of a security that is beneficially owned by more than fifty persons.

It is agreed between the parties that the provision relevant to this appeal is s 3(2)(f)(ii).

[14] Section 3(2)(t)(ii) is relevant to this appeal and defines the term "security" as follows:

> "security" means any document or record evidencing ownership or any interest in the capital or debt, property, profits, earning or royalties of any enterprise or proposed enterprise and, without limiting the generality of the foregoing, includes any—
>
> (ii) share, stock, unit, unit certificate, participation certificate or certificate of share or interest.

[15] Section 56, subsections (1) (2) and (6), are also relevant to this appeal. They fall under Part V – Registration of Issuers and Securities - and read as follows:

> 56.(1) From the date of commencement of this Part, all public companies shall become reporting issuers and shall, within ninety days from that date, file with the Council a registration statement in the prescribed form.
>
> (2) A person who proposes to issue securities to the public shall register with the Council as a reporting issuer and file a registration statement in the prescribed form.
>
> …
>
> (6) Where a reporting issuer ceases to be a public company, the Council may on its own motion or on application by the issuer or another interested person make an order declaring, subject to such conditions as it considers appropriate, that the issuer is no longer a reporting issuer.

[16] Lastly, s 58 of the Act contains further obligations of a reporting issuer. Subsections (1) and (2) are set out below:

> 58.(1) A reporting issuer shall, within four months after the end of its financial year –
>
> (a) file with the Council a copy of its annual report containing the information prescribed by the Council and any other information that is not of a type prohibited by regulations;

(b) send to each of its security holders such financial statements as the Council may prescribe.

(2) A reporting issuer shall file such other reports in such form as may be prescribed.

[17] Once a company is a reporting issuer under the Securities Industry Act, therefore, it is subject to the important provisions of the Securities Industry Act, which exist for the regulation of the securities industry and for the protection of the investing public. Such a company must register with the GSC, and must file certain information (public and timely disclosure) prescribed by the Act.[9] In addition, it is subject to the insider provisions of the Act[10].

First issue: Is Trust Company a Public Company Under the Act?

[18] Trust Company concedes that the term "security" within the definition set out in s 3(2)(t)(ii) includes a share but contends that the term "the issuer of a security that is beneficially owned by more than fifty persons" within s 3(2)(f)(ii) of the Act cannot be interpreted to mean multiple shares issued to multiple shareholders. Rather, Trust Company argues, it refers to a single security which must be owned by fifty or more persons.

[19] Trust Company further submits that the resolution of this issue turns on a question of pure law: Does a company automatically become a public company under s 3(2)(f) of the Act if its shareholding by any means whatsoever is held by more than fifty shareholders? Trust Company answers in the negative - a company becomes a public company only when its issued shares are part of an offer to the public, or if it issues a security (a share) which is beneficially owned by more than fifty persons.

[20] In addition, Trust Company urges that the Court ought to perform a guided and informed contextual interpretation of the entirety of the Act. The Act was enacted in order to address the lack of protection for the ordinary investing public entering into securities related transactions, when its securities were offered to the public. The purpose of the Act therefore

[9] Securities Industry (Disclosure by Reporting Issuers) Regulations 2002.
[10] Securities Industry (Conduct of Business) Regulations 1998.

was the protection of the public and the regulation of transactions involving securities. It was submitted, therefore, that the Court should interpret the relevant provisions of the Act in light of those factors: the protection of the public, and the transactional objectives of securities regulations. Trust Company also emphasised that the trigger for the regulatory scheme of the Act was the relevant transaction captured by the statutory scheme, and not the mere number of shareholders.

[21] On the other hand, the GSC submits that Trust Company's transactional approach ignores the express wording of the Act. The Act contemplates that there is an express intention that beneficial ownership of a security by in excess of fifty persons carries the consequence of altering the characterisation of a company from private to public.

[22] The GSC agrees that in interpreting the term "public company", the Court should consider the context of the Act, but denies that the protection offered by the Act was limited to transactions only. The classification of a company as a private company involved two separate and distinct methods - one treats with a company that offers securities for sale to the public and the other treats with a company that has its internal arrangement for the acquisition and sale of securities, noting in relation to the second limb that such forms of security cannot be beneficially owned by more than fifty persons, without falling within the realm of the Act.

[23] It is helpful to look at a bit of the history of Companies legislation in Guyana. The 1913 Companies Act of Guyana[11] came into effect on 30 August 1913 ("the 1913 Act"). The 1913 Act did not contain a definition of a public company. At s 129(1), however, it defined a private company as a company which by its articles (a) restricted the right to transfer its shares and (b) limited the numbers of its members (exclusive of (i) persons who were in the employment of the company and (ii) persons who, having been formerly in the employment of the company, and continued after the determination of that employment to be, members of the company) to fifty; and (c) prohibited any invitation to the public to subscribe for any shares or debentures of the company. Section 129(2) set out the procedure

[11] Rev Ed 1970, Cap 89:01.

by which a private company turned itself into a public company. It passed a special resolution and filed with the Registrar the statement in lieu of prospectus (which a public company would have had to file before allotting any of its shares or debentures), together with the statutory declaration which a public company would have had to file before commencing business.

[24] On 25 May 1995, the modern Companies Act came into effect. It sought to revise and amend the law relating to companies and to provide for related and consequential matters. It defined "public company" as a company any of whose issued shares or debentures are or were part of a distribution to the public within the meaning of s 531, or are intended for distribution to the public.[12] The Securities Industry Act came into effect on 13 December 2000, but several parts of the Act including Part V (under which s 56 falls) came into effect on 22 July 2002.[13]

[25] In Barbados, s 58 of the Securities Act[14] compels all public companies to become reporting issuers. Section 58 is similar to s 56(1) of the Securities Industry Act. Section 2 of the Barbados Act defines a public company as "a company any of whose issued securities are or were part of a distribution, or an offer, to the public". Accordingly, in Barbados, companies are not classified as public companies if they are issuers of a security that is beneficially owned by more than fifty persons. That provision has not been included in the Barbados Securities Act.

[26] Section 97 of the Securities Act of the Commonwealth of Dominica[15] makes public companies reporting issuers. The term public company is given the same meaning as in the Companies Act of the Commonwealth of Dominica.[16] Pursuant to s 543 of the Companies Act of the Commonwealth of Dominica, a public company "means a company any of whose shares or debentures are or were part of a distribution to the public". As in Barbados, companies in Dominica are not classified as public companies if they are issuers of a security that is beneficially owned by more than fifty persons.

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[12] Companies Act, Cap 89:01, s 2.
[13] Securities Industry Act 1998 (Commencement) Order 2000 and Securities Industry Act 1998 (Commencement) Order 2002.
[14] Cap 318A.
[15] Act 21 of 2001.
[16] Act 21 of 1994.

[27] We return to the first question before the Court, and that is, whether Trust Company is a public company under the Act. We note that the legislature utilises two mechanisms for defining a public company. The first mechanism considers the company's direct dealings with the public, irrespective of the size of the public uptake, and that is to be found in s 3(2)(f)(i). This mechanism however only captures the company's dealings with the public as it concerns shares and debentures. The second mechanism takes a broad brush "numbers game" approach to satisfy the test whether the company is a public company. It looks only at the number of persons who are beneficial owners of a "security" issued by the company, and that mechanism is to be found in s 3(2)(f)(ii). This mechanism seeks to capture dealings which extend beyond transactions involving shares and debentures, and uses as its threshold, the number of persons holding ownership in the securities.

[28] In addition, we are of the view that the reference in s 3(2)(f)(ii) to a "security" must naturally and ordinarily include the plural "securities" pursuant to s 6(1)(b) of the Interpretation and General Clauses Act of Guyana.[17] Simply put, the singular includes the plural, unless the context otherwise requires. The term "security" has been defined at s 3(2)(t)(ii) as meaning any document or record evidencing ownership or any interest in the capital or debt, property, profits, earning or royalties of any enterprise or proposed enterprise, and includes any "share". The plain meaning rule is applicable here.[18] When therefore s 3(2)(f)(ii) is juxtaposed with s 3(2)(t)(ii), a company that is the issuer of "shares" that are beneficially owned by more than fifty persons is a public company under the Act. We understand the Court of Appeal to be saying that it would be alarming if a company in Guyana could hide behind the use of the singular term "security" in s 3(2)(f)(ii) to avoid its designation as a public company.[19] We agree. The Court of Appeal has correctly observed that such an approach would shatter the legislative policy which has, as its ultimate goal, the protection of persons who risk their capital and investment and who would otherwise be subject to the whims and fancies of the unscrupulous.[20]

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[17] Cap 2:01.
[18] See *Chung v AIC Battery and Automotive Services Ltd (In receivership*) [2013] CCJ 2 (AJ), (2013) 82 WIR 357 (GY); *Persaud v Nizamudin* [2020] CCJ 4 (AJ) (GY) and *The Queen v Flowers* [2020] CCJ 16 (AJ) (BZ), [2020] 5 LRC 628.
[19] See *Trust Company* (n 5) at [20].
[20] ibid.

[29] The GSC has placed reliance on the Canadian case of *Ontario Securities Commission v Tiffin*[21] and the dictum of Harvison Young JA, which lends support to the conclusion arrived by the Court. The appellants had been charged by the Ontario Securities Commission for offences under the relevant securities legislation. The appeal involved a question of statutory interpretation of the term "security". The central issue concerned whether certain promissory notes were securities within the statutory scheme of the applicable securities legislation, Harvison Young JA noted that the principles of statutory interpretation were well established. The terms of the legislation were to be interpreted in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme and object of the legislation and the intention of the legislature. Accordingly, Harvison Young JA expressed the view that the definition of "security" adopted by the appeal judge was supported both by the plain text of the legislation and the logic of the regulatory scheme.

[30] We agree with the GSC that having regard to the entire context of the Act and the main objectives of the Securities Industry Act as expressed by the Long Title, which include the regulation of the securities industry and the protection of the investing public, Parliament did not intend to exclude the plural terms "securities" or "shares" when the term "public company" is construed in s 3(2)(f)(ii). The suggestion that a company can only be designated a public company under the terms of s 3(2)(f)(ii) if it issues a single security or share, which is then owned by more than fifty persons, is a strained construction, which runs counter to the purpose of the legislation, and must be rejected.

[31] An analysis of the difference in the definition of the term "public company" used in the Securities Industry Act as compared to the Companies Act[22] is also helpful. As noted earlier, the Companies Act predates the Securities Industry Act.[23] Section 2 of the Companies Act, similar to the legislation in Dominica and Barbados, defines a public company as "a company any of whose shares or debentures are or were part of a distribution to the public". Section 3(2)(f)(ii) of the Act adds to that definition of the term "public

[21] 2020 ONCA 217, 150 OR (3d) 714. On appeal from the order of Charney J (Superior Court of Justice, May 15 2018), with reasons reported at 2018 ONSC 3047, 142 OR (3d) 223.
[22] Companies Act, Cap. 89:01.
[23] Act 29 of 1991 and Act 21 of 1998.

company" by including the reference to the fifty-person limitation, thus intending to embrace a definition of "public company" similar to that used in the 1913 Companies Act (but, interestingly, without excluding from that number, in contradistinction to the latter Act (see [23]), the persons who were in the employment of the company and those, who, having been formerly in the employment of the company, after the determination of that employment continued to be members of that company).

Second Issue: Is Trust Company Caught by s 56(1) of the Act and Obliged to File a Statement with the GSC as a Reporting Issuer?

[32] Having concluded that Trust Company is a public company under the Act, we now consider the second question: whether Trust Company is caught by s 56(1) of the Act and is therefore obliged to file a statement with the GSC as a reporting issuer.

[33] As mentioned earlier, Trust Company argued for the first time in its Reply Submissions that it was not caught by s 56(1) of the Act since s 56(1) was a temporal and transitional provision, which applied only to those public companies which existed at the commencement date of Part V, that is, on 22 July 2002. Trust contended that after the ninety days prescribed in s 56(1), the section was spent, that Trust was not a public company on 22 July 2002, and there was, therefore, no statutory obligation on Trust to register as a reporting issuer pursuant to s 56(1). Trust submitted that after the ninety days prescribed in s 56(1), only persons who proposed to issue securities to the public pursuant to s 56(2) were required to register with the GSC, and that Trust was also not caught by s 56(2).

[34] The Court regrets that such an important issue was only raised at this very late stage. Consequently, the preliminary issue which the Court will determine is whether Trust should be allowed to raise this new point.

[35] In the appeal of *Hilary Shillingford v Angel Peter Andrew and Gloria Burnette*[24], this Court examined whether a litigant should be allowed to raise a new point at a late stage of

[24] [2020] CCJ 2 (AJ) (DM).

proceedings. In *Shillingford*, the appellant had sought to raise a pleading point for the first time before this Court. The Court observed that an apex court was normally reluctant to allow a new point to be taken before it. The Court was of the view that the pleading point ought not to be allowed.

[36] It must be noted, however, that there are circumstances when an apex court will permit a new point to be taken. For example, in the case of *Byron v Eastern Caribbean Amalgamated Bank (Antigua and Barbuda)*, (referred to in *Hilary Shillingford*) the Privy Council allowed the fresh point to be taken having regard to the nature of the proceedings which emanated from the Industrial Court within the provisions of the Industrial Court Act[25]. These provisions allowed for flexibility in the hearing of disputes and provided that the court should act in accordance with equity, good conscience and the substantial merits of the case. Accordingly, *Byron* was an appropriate case to allow fresh points to be taken.

[37] The Court is of the view that Trust Company should be allowed to raise this fresh point. The contentions made by Trust Company as they relate to s 56(1) of the Act, are matters of pure law and statutory interpretation, and are inextricably bound up with the issue of the interpretation of a public company within the meaning of s 3(2)(f) of the Act.

[38] As noted earlier, s 56(1) of the Act provides that from the date of commencement of this Part [that is, from 22 July 2002], all public companies shall become reporting issuers and shall, within ninety days from that date, file with the GSC a registration statement in the prescribed form. The prescribed form is set out in the First Schedule of the Securities Industry (Registration of Issuer and Securities) Regulations made under ss 126(1) and 126(7) of the Securities Industry Act ('the Regulations').[26] A registration statement shall be accompanied by the documents set out in s 2(2) of the Regulations.

[39] Section 56(2) of the Act is also relevant to this appeal. Section 56 requires a person who proposes to issue securities to the public to register with the GSC as a reporting issuer and to file a registration statement in the prescribed form and within the prescribed time. The

[25] [2019] UKPC 16, [2019] All ER (D) 63 (May).
[26] The Securities Industry (Registration of Issuer and Securities) Regulations 2002.

prescribed form is the same as that to be filed when s 56(1) is invoked, and the same documents are to accompany the registration statement pursuant to s 2(2) of the Regulations referred to above.

[40] In addition, s 56(6) provides that where a reporting issuer ceases to be a public company, the GSC may on its own motion or on application by the issuer or another interested person make an order declaring, subject to such conditions as it considers appropriate, that the issuer is no longer a reporting issuer.

[41] Trust Company further argues that the ninety days stipulation in s 56(1) for the filing of the registration statement by the public company makes it clear that what is intended by the legislature is that only those companies in existence as at 22 July 2002, and who can therefore file their registration statement within those ninety days are captured by s 56(1) and are thereby reporting issuers.

[42] Although Trust's submissions on the second issue are interesting, we are not convinced. The plain language of s 56(1) is that all public companies are deemed to be reporting issuers from the date of the commencement of Part V, that is, from 22 July 2002. It is worth noting that s 56(1) does not say "as at the commencement of the Part", but "from the commencement of the Part". We do not think that the ninety days' prescription for the filing of the registration statement found in s 56(1) can trump the clear intention of the legislature that all public companies become reporting issuers from the commencement of Part V. Whether, therefore, the public company existed at the time the legislation came into effect or after the legislation came into effect, a public company is deemed to be a reporting issuer from 22 July 2002. This is the only common sense and logical interpretation of the s 56(1).

[43] Further, we are of the view that the interpretation suggested by the Trust Company would be contrary to the policy, clear purpose and entire scheme of the Act. The policy of the Act is reflected in the wide definition of "public company" set out in s 3(2)(f), As has been mentioned earlier, this definition sought to go beyond the definition of "public company" contained in the Companies Act of Guyana. Having determined that the definition of

"public company" should be enlarged in order to provide the widest possible protection to the investing public, the question can be posed: Why would Parliament abandon its policy by the use of a transitional provision in s 56(1), and make s 56(1) applicable only to those public companies which existed as at 22 July 2002. We say that this would produce an absurd result which is unlikely to have been intended by the legislature in Guyana.[27]

[44] We say as well that to interpret s 56(1) as a transitional or temporal provision would also have a consequence which is illogical and irrational. It would mean that Parliament intended that s 56(6) which lays out the statutory procedure whereby a public company is no longer saddled with the obligations of a reporting issuer would only apply to those "public companies" which existed on the commencement date. We do not agree that Parliament would have intended such a narrow application of s 56(6). There is nothing in the entire scheme of the legislation to suggest that this was the intention of the legislature.

[45] In addition, an important principle of statutory interpretation, especially in the context of Commonwealth Caribbean jurisdictions, is that legislation must be interpretated purposively to give effect to the fundamental rights and values, and constitutional principles, contained in Commonwealth Caribbean Constitutions. (See also the Privy Council judgment of *Public Service Appeal Board v Omar Maraj*[28] upholding the judgment of the Court of Appeal of Trinidad and Tobago).

[46] In *Guyana Sugar Corporation Inc v Dhanessar*[29] Wit JCCJ agreed with the majority that the respondent's misconduct was such as to amount to good or sufficient cause for the termination of his employment, but disagreed on the interpretation of the relevant legislation. In our view, Wit JCCJ correctly set forth an important principle of statutory interpretation at [48]: '… Workers in Guyana have a fundamental right to be protected by the law. This means that legislation must be interpreted so as to effectuate the protection it is intended to offer.'

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[27] Diggory Bailey and Luke Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edn, LexisNexis 2020) at [13.1].
[28] [2010] UKPC 29, (2010) 78 WIR 461 (TT) at [25] - [29].
[29] [2015] CCJ 4 (AJ) (GY).

[47] Accordingly, we hold the view that s 56(1) must be interpreted in such a way as to reflect the fundamental rights of non-discrimination and equality before the law[30] of all public companies within the scheme of the Securities Industry Act. In other words, an interpretation which captures all public companies within the meaning of s 3(2)(f) (whether in existence at 22 July 2002 or subsequently), treats all public companies in a non-discriminatory manner and equally, and is to be preferred. An interpretation which only targets public companies in existence as at 22 July 2002 does not treat such public companies equally, and will not be favoured. In the same vein, an interpretation which only targets public companies in existence as at 22 July 2002, would cause those public companies to bear statutory obligations (with serious consequences for breach[31]) which would not be borne by public companies which came into existence after 22 July 2002. Such an interpretation must be rejected.

[48] As pointed out, reporting issuers have several statutory obligations under the Securities Industry Act. These obligations include registering as reporting issuers under s 56(1) and (2) of the Act.[32] In addition, under s 58, as reporting issuers, they must file annual reports and such other reports as may be prescribed and send to security holders such financial statements as the GSC may prescribe.

[49] For the reasons we have given, we do not consider that the ambiguity in s 56(1), as to the stipulation of the period of time that is to be given to a public company/reporting issuer to file a registration statement with the GSC, can be a sufficient basis to exempt Trust Company from its obligation to register. We are of the view that this is an appropriate case to eliminate the ambiguity by interpreting the subsection to read: [33]

> "From the date of commencement of this Part, all public companies shall become reporting issuers, and shall, within ninety days of so becoming, file with the Council a registration statement in the prescribed form."

Accordingly, a company which becomes a public company after 22 July 2002 must register as a reporting issuer within ninety days from the date on which it became a public company.

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[30] Constitution of the Co-operative Republic of Guyana, Cap 1:01, ss 149 and 149D.
[31] For example, see s 142(1) of the Act.
[32] See the definition of 'reporting issuer' in s 3 of the Act. See also reg 10 of 2002 (n 26).
[33] See Rose-Marie Belle Antoine, *Commonwealth Caribbean Law and Legal Systems* (2nd edn, Routledge-Cavendish 2008) at 256.

Disposition

[50] It is hereby ordered that:

(1) The appeal is dismissed.

(2) The orders of the Court of Appeal are affirmed.

(3) Section 56(1) of the Securities Industry Act is interpreted to read -

> "From the date of commencement of this Part, all public companies shall become reporting issuers, and shall, within ninety days of so becoming, file with the Council a registration statement in the prescribed form."

(4) The Appellant shall pay to the Respondent costs agreed in the sum of GY$150,000.00.

/s/ A Saunders

The Hon Mr Justice A Saunders

/s/ J Wit

The Hon Mr Justice J Wit

/s/ M Rajnauth-Lee

The Hon Mme Justice M Rajnauth-Lee

/s/ A Burgess

The Hon Mr Justice A Burgess

/s/ P Jamadar

The Hon Mr Justice P Jamadar