THE REPUBLIC OF TRINIDAD & TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV. 2016-04265

Between

TRINIDAD & TOBAGO NATIONAL

PETROLEUM MARKETING COMPANY LIMITED

Claimant

And

LINCOLN & ASSOCIATES LTD.

First Defendant

DOOKS DYNAMICS INC.

(FORMERLY TRADING AS DOOKS DYNAMICS)

Second Defendant

LINCOLN DOOKHRAN

Third Defendant

Before the Honourable Mr Justice Ronnie Boodoosingh

Appearances:

Mr Kelvin Ramkissoon and Mr Nizam Saladeen for the Claimant

Mr Navindra Ramnanan and Mr Shivanand Ramnanan for the Defendant

Date: 29 January 2020

JUDGMENT

BACKGROUND

1. This is a claim for monies due and owing with respect to verbal and written contractual arrangements among the parties. The claimant, Trinidad and Tobago National Petroleum Marketing Company Limited (TTNP), claims that the second defendant, Dooks Dynamics Ltd. (DDL), failed to pay for goods delivered to it by TTNP. The first defendant, Lincoln & Associates Ltd (LAL), had a company to company guarantee with DDL. The third defendant, Mr Lincoln Dookhran, (Mr Dookhran), is a Director of LAL and DDL. All three defendants dispute that any monies are owed to TTNP and counterclaims that TTNP breached the arrangement.

2. By letter dated 2nd August 2012, TTNP made an arrangement with the LAL and Mr Dookhran to distribute TTNP's products in Guyana to the Guyana Sugar Corporation (GUYSUCO), a company based in Guyana. A condition of the arrangement was that LAL and Mr Dookhran would incorporate a company in Guyana to conduct the distribution. On 11th October 2012, Mr Dookhran, through his attorney-at-law, incorporated DDL.

3. TTNP pleaded, that in or about October 2012, DDL commenced purchasing products from TTNP in Trinidad and Tobago for distribution in Guyana. During the period November 2012 to April 2013, DDL ordered and TTNP supplied products to DDL. A term of the contract provided for 60 days credit on all of purchases from TTNP. In the event that DDL failed to liquidate the invoiced amount within the requisite period, DDL incurred a "finance charge" of 1% each month on the said sum, later uplifted to 2%. Because DDL did not liquidate certain sums in the period June 2013 to October 2016, TTNP applied the finance charges.

4. TTNP also pleaded that DDL failed to make full and timely payments. On 4th December 2012, Mr John Gormandy, General Manager Lubricants at TTNP, made a decision to suspend TTNP's supply of products to DDL. TTNP subsequently engaged the services of a company it previously dealt with, Industrial Supply of Guyana Inc. (ISG), to distribute in Guyana. By various email correspondence sent from Mr Gormandy and Mr Rudy Ramcharan, Industrial Lubricants Sales Representative of TTNP, to Mr Dookhran and Mr Hardeo Dookharan, brother of Mr Dookhran and Company Secretary at DDL, TTNP reminded them of the monies due and owing.

5. On 25th March 2013, a meeting between TTNP and the Mr Dookhran was held to discuss payment. TTNP pleaded that at the meeting, LAL and Mr Dookhran agreed that they would expedite the payments of the outstanding balances and in return TTNP would resume supply of products.

6. The business relationship between the TTNP and DDL continued after this meeting but fell apart once again as no further payments were made by DDL. On 14th May 2013, TTNP suspended the supply of products to DDL. Further correspondence was sent reminding Mr Dookhran and Mr Dookharan of the outstanding balance.

7. At another meeting on 28th August 2013 between TTNP and DDL, TTNP alleged that Mr Dookhran acknowledged that DDL owed TTNP outstanding monies.

8. All three defendants pleaded that a contractual arrangement was initially made between TTNP and LAL to distribute TTNP's products to GUYSUCO. However, upon the incorporation of DDL, the arrangement for distribution was between TTNP and DDL, and the only obligation of LAL was guarantor of DDL.

9. DDL admits that it purchased products from TTNP commencing October 2012 which were supplied between November 2012 to April 2013.

10. All three defendants further pleaded that there never was a finance charge included in the contractual arrangement between TTNP and DDL. If such a charge was implemented, this was done unilaterally by TTNP and was not part of the pre-existing contract.

11. DDL pleaded that the total sum they paid to TTNP was a total of $603,046.61 in contrast to the $572,007.38 as pleaded by TTNP. These payments were made in a timely manner.

12. The defendants pleaded the suspension of supplying goods by TTNP was in breach of the contractual obligations. The amount outstanding was not close to the credit limit agreed by the parties. DDL argued that this credit limit was initially in the sum of three million TT dollars and was uplifted to six million TT dollars. After the first set of invoices were supplied by TTNP on 28th and 29th November 2012, TTNP suspended the supply of goods five days later. The withholding of the supply was in clear breach of the contractual arrangement and forced DDL to make certain choices. Furthermore, TTNP arranged with the company it formerly dealt with, ISG, to supply the goods to GUYSUCO which was in breach of the agreement that DDL had with GUYSUCO to be sole supplier of TTNP's products.

13. Through Mr Dookhran, DDL admitted that there was an outstanding balance only because it wanted to receive products to supply GUYSUCO. DDL was therefore under economic duress by TTNP to agree to the debts.

COUNTERCLAIM

14. DDL counterclaimed it had not reached its credit limit of six million dollars nor had the required 60 days elapsed as provided for in the agreement. Therefore, the first suspension on 4th December 2012 was in violation of the contract. The suspension

caused losses to DDL's business as it could not supply GUYSUCO with products during the period 4th December 2012 to 18th December 2012. A further breach of the contract was made on 14th May 2013 when the second suspension occurred as DDL had not yet reached its credit limit of six million dollars. Even though a payment of USD $150,000.00 was made by DDL to TTNP, TTNP failed to resume the supply of products to DDL.

15. DDL pleaded that this was an attempt by TTNP to interfere with its business given that TTNP quickly resumed supply of products through ISG to GUYSUCO. Additionally, DDL was compelled to enter into the payment arrangement with TTNP to avoid the unpleasant consequences put forward by TTNP. But it did not end there. There was also a conspiracy by TTNP and its former distributor ISG to supply GUYSUCO with products once the suspensions came into effect.

EVIDENCE

16. The claimant had four witnesses: Mr John Gormandy; Mr Rudy Ramcharan; Mr Junior Barnett, Information and Communications Technology Manager; and Mrs Joy Simmons-Elias, Credit Supervisor. The defendants had three witnesses: Mr Lincoln Dookhran; Mr Hardeo Dookharan; and Mr Kavin Adams, Operations Manager at DDL.

Mr John Gormandy

17. Mr Gormandy stated in his witness statement that on 26th May 2012, a meeting was held between Mr Dookhran and himself to discuss distribution of TTNP's products. The next day he was shown a warehouse by Mr Dookhran in which the products would be stored.

18. At paragraph 16, he stated that the purchase of TTNP's products were formalized by letter dated 2nd August 2012.

19. A security bond was put into place whereby Bankers Insurance became the guarantors of LAL. Since this arrangement was between the Bankers Insurance and LAL, a company to company guarantee was also put in place between LAL as guarantor to DDL.

20. At paragraphs 28 to 30, a client account was created which was overseen by Mr Ramcharan. Mr Gormandy stated that he had the discretion to provide 30 days credit limit in addition to the standard credit limit of 30 days for a total of 60 days but there was never a monetary credit limit in place.

21. From paragraph 31 to 40, he stated DDL became the supplier of TTNP's product to GUYSUCO. On 4th October 2012, DDL was supplied with TTNP's products amounting to USD 275,497.21. On 4th December 2012, Mr Ramcharan informed him that the products had not been paid for. He informed Mr Ramcharan to suspend the supply of products to DDL. Mr Ramcharan informed

DDL that the supply of products will be suspended and DDL replied that they were making arrangements to pay.

22. At paragraph 42 and 48, he stated in order to avoid a crisis in Guyana, TTNP supplied products to GUYSUCO through ISG. On 18th March 2013, an email was sent to DDL. DDL acknowledged the debt owed and proposed a payment plan. The plan was rejected by TTNP.

23. At a meeting on 25th March 2013 with Mr Dookhran and Mr Gormandy, Mr Dookhran acknowledged the debt owed. At a subsequent meeting on 23 August 2013 between TTNP and Mr Dookhran, Mr Dookhran once again acknowledged that DDL owed the sum of money. At paragraph 66, he stated that further to the amount owed, there were finance charges due. This is supported by documentary evidence in the form of an email acknowledgement.

24. During cross examination, Mr Gormandy indicated that he was involved in the negotiations with DDL. He said that Mr Dookhran represented to him that he owned the warehouse where the products will be stored. However, this was a misrepresentation because the products were stored at the back of a residential house.

25. He stated that at the time of the arrangement he was satisfied that LAL had a warehouse in Parika, Guyana, to store products which was shown to him in 2012. When he visited in 2013, the

products were kept elsewhere. He made that visit because there were, inter alia, stock discrepancies.

26. Regarding the letter setting out the terms of the arrangement of 2nd August 2012 with LAL, he indicated that this letter along with other emails constitute the arrangement. He agreed that the finance charge should DDL exceed the 60-day credit limit was not included in the letter. However, the provision of the finance charge was included in the invoices. He indicated that the issue of the finance charge would have been raised by the account representatives before the first set of products were sent.

27. With respect to the performance bond, it did not represent a line of monetary credit but a form of security if there was default on payment.

28. He made the final decision for the suspension after deliberations with the Chief Officer. The first suspension was lifted on DDL on 28th December 2012. However the payment made was inadequate to allow further credit. The suspension was never a term in the contract but it was agreed verbally. He did not agree that the first suspension was not in line with the credit policy.

29. He agreed that the arrangements made was a sole distributorship of TTNP's products by DDL to GUYSUCO. However, ISG also supplied GUYSUCO but this did not undermine the relationship between GUYSUCO and DDL.

Mr Rudy Ramcharan

30. In the witness statement of Mr Ramcharan, he stated that around October 2012 DDL began ordering products from TTNP.

31. At paragraph 22 and 23, he stated that he personally directed and facilitated the delivery of products to DDL and he kept up to date with payments. Once the orders were fulfilled DDL was given a 60-day credit limit.

32. On 4th December 2012, he noticed that the payment for invoice dated 4th October 2012 remained unpaid, which he brought to the attention of Mr Gormandy who then advised him to suspend the supply of products to DDL. When payments were eventually made, the suspension was lifted.

33. However, the account became overdue again and by letter dated 14th March 2013 he asked DDL when would the outstanding balance be cleared. On 19th March 2013, DDL sent via email an acknowledgement of the amount owed and a proposed payment plan. This plan was rejected. This acknowledgement was an important bit of evidence.

34. At a meeting of 25th March 2013 between TTNP and Mr Dookhran, Mr Dookhran acknowledged that DDL owed the outstanding balance. Mr Dookhran paid the sum of USD 70,000.00 and the suspension was lifted. Goods were then ordered by DDL. However, after a month he noticed that no further payments were made and another suspension was then imposed.

35. At a meeting on 28th August 2013, between TTNP and Mr Dookhran, Mr Dookhran once again acknowledged the debt owed and a payment plan was agreed. He subsequently informed Mr Ramcharan and Mr Gormandy that GUYSUCO had not paid monies owed to DDL and they cannot honour their commitment to TTNP.

36. During cross examination, he stated he was never involved in negotiations or drafting the terms of the arrangement. He indicated that there was a concern from DDL with respect to stock from TTNP. He visited Guyana in 2013 to address the concern.

37. He indicated that if there is a query to an invoice TTNP cannot withhold products. However, he indicated that even though a claim was made for damaged products there was no proof by DDL supporting the claim and therefore an investigation was conducted.

38. He stated that DDL was not entitled to a six million-dollar credit limit but instead a 60-day credit limit.

39. At no point was ISG brought in to fulfil orders to GUYSUCO when DDL could not fulfil them. GUYSUCO was free to purchase from whomever they wished.

Mrs Joy Simmons-Elias

40. At paragraph 7 and 8 she stated that she was aware of Mr Gormandy's provision of the 60-day credit limit and that as part of the credit policy of TTNP, a finance charge is applied to all outstanding balances. She informed DDL by letter dated 16th July 2013 of the finance charges they were accruing.

41. During cross examination, she was able to speak to payment allocations. With respect to any penalties on a client account, any decision regarding this goes to the Credit Committee and a decision regarding the account was made in 2013. She indicated that the finance charges had nothing to do with the credit limit and DDL was informed that they were past due 60 days.

Mr Junior Barnett

42. At paragraph 4 of his witness statement, he indicated that he was in charge of TTNP's information and technology functions. He stated that the email correspondence between representatives of TTNP and representatives of the defendants conforms with the formats used by TTNP's computers which included the invoices and letters exhibited in the claim.

43. During cross-examination he testified that the emails shown to him were correct but he could not see the contents of the attachment in the email.

Mr Lincoln Dookhkran

44. At paragraph 8 of his witness statement, he stated that he was invited by Mr Gormandy on or about 26th May 2012 to meet with the Chief Executive Officer and Chairman of TTNP. He received a letter on 2nd August 2012 outlining the conditions for the distributorship in Guyana.

45. In August 2012 a meeting was held at the offices of GUYSUCO between Mr Gormandy, Mr Ramcharan, Mr Dookharan and himself. An oral agreement was reached between DDL and GUYSUCO for DDL to be the sole supplier to GUYSUCO. On 16th October 2012, TTNP appointed DDL as the sole distributor in Guyana.

46. He stated that initially, DDL was a sole proprietorship but at the demand of TTNP the business was incorporated. A guarantee was executed with Bankers Insurance and LAL. A company to company guarantee was also created from LAL to DDL. A credit line of three million dollars was also agreed with a term limit of 60 days. It was eventually increased to six million. However, the liability of DDL was always less than six million TTD.

47. He indicated that his only obligation for DDL was Director of the guarantor company for the liabilities of DDL.

48. At paragraphs 40, 47, 53 and 56, he claims that the suspension of 4th December 2012 of TTNP's products to DDL was unjustified as the payment made to products were paid long before they

were due. TTNP inflated the amount due and created disruptions in the supply of products. Two days later, TTNP engaged ISG to sell products to GUYSUCO. No finance charge was agreed between the DDL and TTNP.

49. At paragraph 59, he stated that because of the threats to withhold supplies of TTNP's products, he was forced to agree to the inflated invoices as presented by TTNP. This explanation did not seem to me to be an adequate one for agreeing to pay inflated invoices.

50. During cross examination, he admitted that DDL owes TTNP 117,000.00 USD. He did not agree that the amount owed is 862,000.00 USD as the figure was inflated.

51. Some products handed over from ISG to DDL were spoilt and TTNP credited DDL for those goods. He did not accept that monies on several invoices were yet to be paid and stated that Mr Ramcharan's calculations were wrong and they were paid. However, he could not produce receipts for payment of those invoices. His evidence was also devoid of supporting records and documentation to bolster these factual assertions.

52. He stated that it was not a term of the arrangement that there would be a finance charge and the letter of 2nd August 2012 did not embody the terms of the arrangement. However the performance bond was supposed to act as a credit facility.

53. The suspension was a way for TTNP to undermine the relationship between TTNP and DDL. Collusion between TTNP and ISG was evident as ISG was able to supply to GUYSUCO a few days after the suspension. TTNP was therefore responsible for DDL losing the distributorship and in doing so, caused DDL to suffer damage. He did not agree that the suspensions were justified. This witness also accepted certain aspects of the claim or was unable to explain matters in cross-examination. These have been detailed in the claimant's submissions.

Mr Hardeo Dookharan

54. At paragraph 6 of his witness statement, he stated that he was present at the handing over ceremony for the contract in August 2012. TTNP, GUYSUCO and representatives of DDL were present. The terms were not placed in writing but were agreed orally.

55. On 2nd October 2012, stocks held by ISG that belonged to TTNP were handed over to DDL. On 11th October 2012 a stock count was done which revealed that out of 384 drums, 190 were damaged. A joint stock count was completed on 7th January 2013. Reports were sent to Mr Gormandy outlining the concern but he never rectified the issue.

56. This had the effect of making it appear as though DDL were not fulfilling its obligations when it requested that it be credited for the corrections of the stock count. This led to a number of issues:

i. DDL's account was distorted and inflated from the inception of the contract;
ii. DDL was wrongfully penalized by TTNP;
iii. TTNP breached the sole distributorship arrangement between DDL and GUYSUCO by allowing ISG to supply GUYSUCO;
iv. In allowing ISG to supply to GUYSUCO it undermined DDL's ability to collect payments from GUYSUCO; and
v. DDL was therefore never paid on time by GUYSUCO.

57. At paragraph 22 he stated that a meeting was held on 25th March 2013, at the office of the Chief Executive Officer (CEO) of TTNP with representatives of TTNP and DDL. He stated that the Chairman of TTNP, Mr Neil Gosine, instructed Mr Gormandy and Mr Kenneth Mohammed, CEO of TTNP, to credit DDL in the amount of 200,000.00 USD pending the resolution of the overcharge and to lift the suspension. It was never carried out by Mr Gormandy. He also stated at that meeting, Mr Gormady stated that ISG was well stocked with products from TTNP. This was in breach of the sole distributorship agreement.

58. The issue of damaged stock was eventually rectified after Mr Goramndy visited the warehouse of DDL on 26th July 2013. Mr Gormandy ordered the disposal of the 190 drums. However, the charge of the damaged drums was never rectified by Mr Gormandy and TTNP made decisions based on incorrect information.

59. During cross examination, he stated he was not part of the arrangements made for distributorship of TTNP's product by DDL to GUYSUCO but he did attend the meeting.

60. He stated that products were sent by TTNP to DDL and had to be paid for. However, it was TTNP that owed DDL.

61. He stated that LAL did acknowledge the debt of DDL to TTNP in an attachment to an email dated 19th March 2013. But he disagreed that DDL continues to owe TTNP. He disagreed that TTNP did not engage in an economic conspiracy or that TTNP was justified in their decision to suspend.

62. He disagreed that the performance bond was not a credit facility, or that TTNP did not cause loss and damage to DDL, or that the finance charge was part of the arrangement.

Mr Kavin Adams

63. At paragraphs 2 and 3 of his witness statement, he stated that on 4th April 2013, he along with Mr Ramcharan and Mr Dookharan, counted the damaged stock totalling 190 drums which had to be dumped because of contamination. A further count was done again in 26th July 2013 with Mr Gormandy along with the previous three and the count was verified. Mr Gormandy instructed Mr Dookharan to dispose of the contaminated drums.

64. During cross-examination he said he was not aware of monies due and owing. He said he was present when the drums were being checked, he assisted with the check and had to dispose of the products.

DEFENDANT'S SUBMISSIONS

65. The defendants addressed several issues in their submissions. Substantively, whether the claimant breached the contract, whether there was economic duress or conspiracy by the claimant, and whether the court should pierce the corporate veil.

66. The claimant submitted that the contractual arrangement was between LAL and TTNP and not between DDL and TTNP. No law was submitted on this issue.

67. On whether the finance charges formed part of the contract, the defendants submitted that the interest charges do not form part of the contract. The case of ***Skillico Holdings Limited v Carrington Petroleum Service Limited CV2015 03308*** at ***paragraph 38*** stated: *"In Chitty on Contracts para 23 - 32 the authors state that: 'The parties to a contract may effect a variation of the contract by modifying or altering its terms by mutual agreement'."*

68. At ***paragraph 40*** of ***Skillico*** the court stated:

> *"The Halsbury's Laws of England on Variation-further considers: "A consensual variation is where the parties to a contract agree in a subsequent simple contract to vary its terms as between the parties to the original contract by way of a second contract... At common law, one party cannot unilaterally validly vary the terms of the contract..."*

69. Additionally, they also submitted that the credit policy which contained the finance charges was not part of the contract.

70. By withholding supplies it is the claimant that breached the contract. Since the contract was silent on what is the course of action if there was non-payment of the goods, the claimant was obligated to carry out its duties under the contract.

71. The defendants relied on the performance bond to indicate that it was the claimant that breached the contract by withholding supplies. The bond which was initially three million dollars and eventually raised to six million dollars were part of supplemental agreements to the primary contract. They submitted that at the time of the first suspension, LAL and DDL only owed the claimant approximately USD $275, 497.21. Should at any point LAL or DDL exceed the total of the bond, clause 1 and 6 of the performance bond agreement stated that a written request to the Guarantor to fulfil payment was included as a term of the contract. TTNP

did not use this mechanism to demand payment, but rather withheld supplies to DDL. The defendant submitted learning in the case of ***Edward Owen Engineering Ltd. v. Barclays Bank International Ltd. and Another [1978] Q.B. 159*** at page ***169*** where Lord Denning stated:

> *"A performance bond is a new creature so far as we are concerned. It has many similarities to a letter of credit, with which of course we are very familiar. It has been long established that when a letter of credit is issued and confirmed by a bank, the bank must pay it if the documents are in order and the terms of the credit are satisfied. Any dispute between buyer and seller must be settled between themselves. The bank must honour the credit."*

72. The defendants submitted further learning from ***Chitty on Contracts 31st edition, volume 2, paragraphs 44-009*** which stated:

> *"They are contractual undertakings, normally granted by banks, to pay or repay, a specified sum in the event of any default in performance by the principal debtor of some other contract with a third party, the creditor."*

73. With respect to the breach in not supplying goods, the defendants submitted learning from ***Halsbury's Laws of England Volume 91 (2012)*** at ***paragraph 69***:

"Thus, as a general rule in international sale contracts, such as FOB and CIF contracts, stipulations as to time, other than stipulations as to the time of payment, are of the essence of the contract. The reason for the general rule is obvious. An international sales contract is not always an isolated transaction but a link in a chain of transactions, and if A does not keep his contract with B, then B may not be able to keep his contract with C so that punctual performance may go to the whole consideration for the sale."

74. Therefore, by TTNP not supplying goods under the terms of the contract meant that they breached the obligations to LAL and DDL.

75. The defendants also submitted that the claimant committed economic duress towards the defendants. They submitted the case of ***Kolmar Group AG v Traxpo Enterprises PVT Ltd [2010] EWHC 113 (Comm)*** at ***paragraph 92*** which established the following principles:

"Economic pressure can amount to duress, provided it may be characterised as illegitimate and has constituted a 'but for' cause inducing the Claimant to enter into the relevant contract or to make a payment;

A threat to break a contract will generally be regarded as illegitimate, particularly where the Defendant must know that it would be in breach of contract if the threat were implemented;

It is relevant to consider whether the Claimant had a "real choice" or "realistic alternative" and could, if it had wished, equally well have resisted the pressure and, for example, pursued practical and effective legal redress. If there was no reasonable alternative, that may be very strong evidence in support of a conclusion that the victim of the duress was in fact influenced by the threat.

The presence, or absence, of protest, may be of some relevance when considering whether the threat had coercive effect. But, even the total absence of protest does not mean that the payment was voluntary."

76. The defendants submitted they were not in excess of the credit limit; however, TTNP withheld supplies forcing the defendants to admit the debts owed to the claimant.

77. Additionally, the defendants submitted that TTNP conspired against the defendants to remove the defendants as suppliers of GUYSUCO and replace them with ISG.

CLAIMANT'S SUBMISSIONS

78. In their closing submissions the claimant dealt with whether there was money due and owing, whether the finance charges applied, the effect of the company to company guarantee, the defendants' admission, whether there was a conspiracy and economic duress, piercing the corporate veil, and joint and several liability.

79. The claimant submitted that when Mr Dookhran was shown several invoices he did not produce evidence that they had been paid even though he stated that they had been paid. A few invoices he admitted had not been paid.

80. With respect to the finance charges, the claimant submitted that this was part of the agreement as it was part of the claimant's credit policy and was included on all invoices. At paragraph 17 of the submissions, this decision was implemented by the Credit Committee in 2013.

81. They submitted that the performance bond has been misconstrued by the defendants as a credit limit.

82. With respect to the admissions of the debt, the defendant made several promises to pay and a proposed payment plan was made on 19th March 2013. At a meeting on 25th March 2013, there was a further admission that the sum was owed. At another meeting

on 28th August 2013 further acknowledgment of the debt was made.

83. Consequently, the issues of economic duress, conspiracy and intimidation had not been proven.

84. ***Clerk and Lindsell on Torts (20th ed.) at paragraph 24-07*** state that: *"The tort of conspiracy to injure allows a claimant to succeed by reason of damage flowing from a combination alone, without proof of further illegality provided the Courts regard the object of the combination as illegitimate by reason of a predominant purpose to injure the Claimant."*

85. In the case of ***Thema Yakaena Williams v Trinidad and Tobago Gymnastic Federation CV 2016-02608*** Seepersad J referred to the ***Analysis of Economic Torts Second Edition*** by ***Hazel Carty*** and stated as follows:

> *"… the tort requires an agreement and concerted action causing intentional harm. The tort does not require unlawful means, it bases liability on malice and illegitimate purpose. Lawful means conspiracy should in fact apply only to most extreme cases of oppressive combination. This is because of the need to prove that the combination was motivated by an illegitimate purpose.*

The alleged conspirators must act with the intention to injure the Claimant. Where one only has an illegitimate motive, it would appear that there can be no liability."

86. The defendants however have not met this threshold by, for example, particularising malice or identifying the agreement or concerted action.

87. On piercing the corporate veil, the claimant submitted that since the defendants are evading their legal obligations, the corporate veil can be pierced.

88. In ***Prest v Petrodel Resources Ltd (2013) 2 AC 415***, Lord Sumption, at ***paragraph 35***, stated:

"I conclude that there is a limited principle in English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction when he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The Court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality. The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company

and its controller which will make it unnecessary to pierce the corporate veil."

89. They submitted that the defendants have failed to disclose material such as annual returns and share certificates for each company or statements of accounts. Mr Dookhran is the alter ego and principal directing mind of LAL and DDL. Also, Mr Dookhran interacted with the Claimant at all material times, negotiated payment terms, attended meetings, issued correspondence, collected documents, made queries and procured security instruments on behalf of the DDL.

90. Additionally, because of the company-to-company guarantee, liability ought to be joint and/or several amongst defendants and learning from ***Halsbury's Laws of England/Contract (Volume 22 (2019))*** states that:

"Any number of persons may join in making or accepting a promise; and a promise made by several persons may be: (1) joint; (2) several; or (3) joint and several

Joint liability arises where two or more persons jointly promise to do the same thing; for instance, B and C jointly promise to pay 2100 to A. In the case of a joint promise, there is only one obligation, namely a single payment of El 00. Each of B and C is liable for the performance of the whole promise but payment of EIOO by one discharges the other. Joint

liability is subject to a number of strict and technical rules of law which are discussed below.

Several liability arises where two or more persons make separate promises to another; for instance B and C each promise to pay 2100 to A In this case, the several promises by B and C are cumulative. Thus, A may recover a total ofE200, being 2100 from B and 2100 from C; and payment ofE100 by one of them does not discharge the other. There are, therefore, two separate contracts, one between A and B, and the other between A and C, and there is no privity between B and C,

Joint and several liability arises where two or more persons join in the same instrument in making a promise to the same person, and at the same time each of them individually makes the same promise to that same promisee; for instance B and C jointly promise to pay 2100 to A, but both B and C also separately promise A that EIOO will be paid to him by either B or C. Joint and several liability is similar to joint liability in that the co-promisors are not cumulatively liable, so that payment of E 100 by B to A discharges C; but it is free of most of the technical rules governing joint liability.

Where two or more persons are liable in contract or tort in respect of the same damage (whether jointly or otherwise), any person liable may obtain a contribution from any of those others."

91. I should note that both sides filed submissions in reply.

ANALYSIS AND CONCLUSIONS

92. The main issue is whether the products supplied by TTNP were paid for by DDL. There was no dispute that products were handed over from TTNP which were stored at ISG's warehouse to DDL. Once the items were received it was DDL's obligation to pay for the products. There was a dispute about the condition of all of the items. That dispute went on for some time.

93. I accepted that Mr Dookhran, one of DDL's director, admitted the debt was owed at the meetings of 25th March 2013 and 28th August 2013. He later indicated that DDL partially owed TTNP and much of the supposed debts were paid for. He was not able to provide any evidence of this. Mr Dookharan disputed that the debt was owed because the stock discrepancies were not rectified which led to discrepancies in accounting. But no evidence was put forward by him to support this contention. I did not accept this evidence.

94. On the other hand, I found that I could rely on the evidence of Mr Ramcharan, who provided a detailed listing of supplies sent and monies owed and paid for.

95. An issue was raised by the defendants about a claim for Invoice No. 1244432. This was for the sum of USD$275,497.21. This was for stock the claimant said it handed over to the defendant that was previously held in Guyana. This was not included in the

Statement of Case filed as part of the claim. The defendant stated in their Defence that as of 4 December 2012 the sum of USD $187,403.11 was what was due. The claimant referred to this invoice in its reply to this pleading. The claimant explained why there was no claim for this sum. The witness statement of Mr Ramcharan detailed the payments made.

96. What would take place is that as payments were made they were applied to the first in time invoices. So as those invoices were cleared there were additional supplies of products. This incurred additional sums being due. Thus what the claimant has claimed for are the additional sums which are due for products supplied. As the table put forward by Mr Ramcharan shows, Invoice 1244432 had been satisfied because payments were applied to it. Thus there was no claim for this invoice but it was important as evidence to explain how the payments were applied. In other words, the statement of case reflected that the claim was due for products supplied and not paid for from the latter part of November 2012. The statement of case set out the total payments made which would have included the application of payments to Invoice 1244432. It is to be noted that payments continued to be made long after the claimant stopped supplying products. The second defendant had acknowledged that monies were due even as payments continued to be made.

97. On the submissions regarding the performance bond, even if I were to accept DDL's version that the performance bond provided a credit limit, no evidence was provided that showed that the defendants highlighted this to TTNP so that the parties

could have rectified this issue. Instead the debt was admitted and DDL continued to receive the goods from TTNP. In my view, the existence of the performance bond is not material to the determination of this claim for monies due. The fact that there was a mechanism available to the claimant to seek payment does not erase the claimant's claim here or the right to advance it.

98. Further, even if the performance bond was not pursued this did not mean that the claimant applied economic pressure or engaged in acts to make out conspiracy or intimidation as alleged. The fact is that there were difficulties throughout the contract in respect of payment.

99. Regarding the finance charge, it was submitted by the claimant that the Credit Committee decided to institute a finance charge in 2013, months after the initial agreement. Even though Mr Gormandy stated that the finance charge was listed in the invoice, it was not part of the initial agreement. I found that this aspect of the claimant's case, therefore, could not be sustained. It was not contemplated at the time the contract was formed. Even though the defendants did not make specific objections to it when the invoices were generated, this does not mean that it formed part of the contract terms. The claim for finance charges in the sum of USD$100,322.62 is not allowed.

100. With respect to piercing the corporate veil, the claimant has not provided any sufficient justification on the evidence for such. The case law indicates that piercing the veil is used sparingly

where there is an attempt to avoid a legal obligation as the claimant rightly pointed out in the case of ***Prest v Petrodel Resources (supra)***. DDL was under no legal obligations at the time they were incorporated. As the defendants submitted, it was the claimant that encouraged the establishment of DDL to commence operations in Guyana. The courts power in relation to the piercing of the corporate veil is a significant departure from the fundamental tenets of company law and a clear and substantial case must be made out for the court to order that course. There was no evidence here of any deliberate attempt to hide or move assets. There was no evidence of any attempt to evade obligations by the third defendant engaging in a course of conduct to justify going behind the company structure.

101. Frankly, it was somewhat surprising that the claimant undertook this type of contractual obligations with the first and second defendants with the loose arrangements as described. There was no properly vetted contract document as such. There was a mix of letters and oral discussions. One might have expected a company like the claimant to have put more solid and definitive arrangements in place. Further, there had been several discussions and allowances made during the execution phase of the contract when payments were late or not forthcoming. But there were also admissions along the way of payments being due and attempts to reschedule them. These admissions gave credence to the claimant's case. The claimant has proved that monies were owed both by the evidence led of their witnesses and the admissions made on behalf of DDL.

102. The claimant has proved the entitlement to USD$731,624.09 based on the computation of the invoices crediting what was paid and other deductions made. There is judgment for the claimant for this sum against the first and second defendants. The claim against the third defendant is dismissed. Interest on this judgment sum at the rate of 2% per annum will run from 1 May 2013 to the date of judgment.

103. The first and /or second defendant will pay two-thirds of the prescribed costs of the claim to the claimant based on the judgment figure and interest calculated to judgment. This reduction is to take account of the dismissal of the claim against the third defendant. The counterclaim is dismissed. In respect of the counterclaim no specific figure was claimed. In submissions the defendants advanced that USD$6 million plus was payable in damages. This was in my view fantastical based on what was alleged and not proved by the second defendant. A more reasonable sum for fixing costs is much lower. I will accordingly use a figure of TT$500,000.00 as a basis for fixing costs for the counterclaim. The second defendant must pay prescribed costs of the claimant based on this sum. There is a stay of execution on the judgment of 28 days.

Ronnie Boodoosingh

Judge