REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2015-04374

NATIONAL GAS COMPANY OF TRINIDAD & TOBAGO

Claimant

AND

SUPER INDUSTRIAL SERVICES

First Defendant

RAINFOREST RESORTS LIMITED

Second Defendant

BEFORE THE HONOURABLE MADAME JUSTICE JOAN CHARLES

Appearances:

For the Claimant:	Mr. Jason Mootoo led by Ms. Deborah Peake S.C. instructed by Ms. Savitri Sookraj
For the First Defendant:	Mr. N. Bisnath instructed by Mrs. Lydia Mendonça
For the Second Defendant:	Mr. Navindra Ramnanan led by Mr. Ramesh Lawrence Maharaj S.C. instructed by Ms. Odylyan Pierre
Date of Delivery:	20th February 2020

JUDGMENT

AGREED FACTS

[1] The Claimant ("NGC") is a limited liability company duly incorporated under the Companies Ordinance Ch. 31 No 1 and continued under the Companies Act Chap 81:01 having its registered office at Orinoco Drive, Point Lisas Industrial Estate, Point Lisas, Couva. Since incorporation, the entire issued share capital of NGC has been and continues to be held by Corporation Sole.

[2] The First Defendant, Super Industrial Services ("SIS") is a privately held limited liability company incorporated under the Companies Ordinance Ch 31 No 1 and continued under the Companies Act Chap 81.01 having its registered office at 25 Rivulet Road, Brechin Castle, Couva It is a general contracting company offering a range of services which include the supply of material, building construction, plant construction, civil, mechanical engineering and asphalt paving works.

[3] The Second Defendant, Rain Forest Resorts Limited ('RFRL"), is a privately held limited liability company incorporated under the Companies Act Chap 81.01 having its registered office at 11 Trial Street, Chaguanas.

[4] By Deed of Mortgage ostensibly dated 5th March 2015 registered as No. DE2015 02701816 DOOI on the 5th November, 2015 ("the First Mortgage") and made between SIS of the One Part and RFRL of the Other Part, SIS mortgaged to RFRL its leasehold interest in ALL AND SNGULAR that piece or parcel of land together with the building thereon and the appurtenances thereto belonging situate in the Ward of Couva in the Island of Trinidad comprising 12.1412 HECTARES and bounded on the North by lands of Caroni (1975) Limited on the South by lands of Caroni (1975) Limited on the East by Waterloo Road on the West by lands of Point Lisas Industrial Estate Development Company Limited delineated and shown coloured pink on the plan marked "A' annexed to Deed of Lease dated 26th November 2001 registered as No.

DE2002 0000 4240D001 and made between Caroni (1975) Limited of the One Part and SIS of the Other Part, to secure repayment to RFRL of the sum of TT$173 million allegedly loaned to SIS by RFRL.

[5] By Deed of Mortgage ostensibly dated 5th March 2015 registered as No. DE2015 02701795 DOOI on the 5th November 2015 ("the Second Mortgage") and made between SIS of the One Part and RFRL of the Other Part, SIS mortgaged to RFRL its freehold interest in ALL AND SINGULAR that certain piece or parcel of land situate in the Ward of Montserrat in the Island of Trinidad being portion of "Esperanza Estate" comprising ZERO POINT TWO TWO TWO ONE of a Hectare (0.2221 ha) delineated shown uncoloured and designated as ZERO POINT TWO TWO TWO ONE HECTARES on the plan marked "P' annexed to Deed registered as No.25087 of 1999 but upon recent survey found to comprise TWO TWO TWO ONE POINT THREE SQUARE METRES (2212.3 sq.m) and bounded on the North upon San Coco Road on the South partly upon an Access Road and partly upon lands formerly of Mamora Bay Limited by now of Winfield Aleong and Others on the East partly upon San Coco Road and partly upon Esperanza Estate and on the West partly upon San Coco Road partly upon an Access Road and partly upon lands formerly of Mamora Bay Limited now lands of Winfield Aleong and which said piece or parcel of land is delineated and coloured pink on the plan marked "X" to Deed dated the 28th day of October 2002 and registered as No. DE2004 00350539 DOOI, to secure repayment to RFRL of $2 million allegedly loaned to SIS by RFRL.

[6] By Deed of Mortgage ostensibly dated 5th March 2015 registered as 02766359 DOOI on the 13th November 2015 ("the Third Mortgage between SIS of the One Part and RFRL of the Other Part, SIS mortgaged a RFRL leasehold interest in ALL AND SNGULAR that piece or parcel of land in the Ward of Couva in the Island of Trinidad comprising One Point Zero Nine Nine Four Hectares (1.0994 Ha) be

the same more or less and bounded on the North partly by North Sea Drive and partly by lands owned by the Lessor and leased to Industrial Gases Limited on the South partly by lands owned by the Lessor and leased to Trinidad and Tobago Electricity Commission and partly by lands owned by the Lessor and leased to Phoenix Park Gas Processors Limited on the East by lands owned by Lessor and leased to Industrial Gases Limited and partly by a River Reserve and on the West partly by North Sea Drive and partly by Rio Grande Drive and which piece or parcel of land is delineated and shown coloured pink and marked 1.0994ha on the plan marked 'B' and annexed to Deed of Lease dated the 25th day of April 2008 registered No. DE2008 0110 6715 and made between Point Lisas Industrial Port Development Corporation Limited of the One Part and SIS of the Other Part, to secure repayment to RFR.L of the sum of TT $27 million allegedly loaned to SIS by RFRL.

[7] By Deed of Mortgage ostensibly dated 5th March 2015 registered as No. DE2015 02763612 DOOI on the 13th November 2015 ("the Fourth Mortgage") and made between SIS of the One Part and RFRL of the Other Part, SIS' mortgaged to RFRL its leasehold interest in ALL AND SNGULAR those two pieces or parcels of land situate in the Ward of Couva in the Island of Trinidad together comprising One Point Seven Zero Three Six Hectares (1.7036 Ha) be the same more or less The First Thereof comprising One Point Zero One Six Zero Hectares (1.0160 ha) bounded on the North partly by lands owned by the Lessor and leased to Alescon Readymix Limited and partly by the Southern Main Road on the South by Drain approximately 10.0m wide on the East by the Southern Main Road and on the West by, (Abandoned) Trinidad Government Railway Reserved and The Second Thereof comprising Zero Point Six Eight Seven Six Hectares (0.6876 Ha) and bounded on the North partly by Drain 10.0metres wide and partly by the Southern Main Road on the South by Drain approximately 10.0m wide on the East by the Southern Main Road and on the West by (Abandoned) Trinidad Government Railway Reserved and which two pieces or

parcels of land are delineated and shown coloured pink and marked (1) 1.0160ha and (2) 0.6876ha respectively on the plan marked "B" and annexed to Deed of Lease dated the 25th day of April 2008 registered as No. DE2008 0110 6836 and made between Point Lisas Industrial Port Development Corporation Limited of the One Part and SIS of the Other Part, to secure repayment to RFRL of the sum of TTS28 million allegedly loaned to SIS by RFRL.

[8] By Deed of Debenture ostensibly dated 12th November 2015 registered as No. 02815387 DOOI on the 26th November 2015 ("the Debenture") and made between SIS of the One Part and RFRL of the Other Part, SIS charged its undertaking goodwill motor vehicles and property and assets and rights whatsoever and wheresoever present and future including SIS uncalled capital and book debts for the time being the terms and conditions contained in the Debenture, to secure repayment to RFRL the sum of TT$IOO million allegedly loaned to SIS by RFRL.

[9] Notwithstanding the terms of the First Mortgage, Second Mortgage, Third Mortgage, Fourth Mortgage and Debenture, no monies were advanced to SIS by RFRL thereunder.

[10] The Court has a power to set aside sham transactions.

B: <u>Facts As Agreed Between the Claimant and the First Defendant only</u>

[11] By a contract in writing dated 10th March 2014 made between NGC and SIS (“the Contract”) SIS agreed to carry out the works as described therein (“the Works”) at or for the price of US$162,055,319 ("the Contract Price") on the terms and conditions set out in the Contract. The Contract was based on the FDIC Conditions of Contract for Plant and Design–Build 1st edition 1999 ("General Conditions") and comprised such conditions together with particular conditions of contract ("Particular Conditions") letter of acceptance from NGC to SIS

dated 6th March 2014 ("the Letter of Acceptance"), letter dated 5th March 2014 from NGC to SIS ("the Negotiated Terms Letter"), letter dated 21st February 2014 from NGC to SIS, Letter of Tender dated 10th December 2013 from SIS to NGC, Addenda Nos. 1-15, Employer's Requirements (Request For Proposal) Post Bid Clarifications Nos. 1 to 7 issued by NGC, Completed Schedules and the Contractor's (SIS) Proposal.

[12] The Works required SIS to, inter alia, design and build a Water Recycling Plant (WRP) at Beetham, together with associated pipelines and water storage facilities during the course of an 18 month period. The contractual commencement date for the Works was 22nd April 2014 and the Works were contractually required to be completed by SIS on or before 22nd October 2015; NGC issued a Notice of Termination of the Contract dated 20th November 2015 and served same upon SIS on the said date. The Notice provided SIS with 14 days' notice of NGC's intention to terminate the Contract with such termination to take effect on 4th December 2015 and was premised, in the first instance, on the grounds set out in sub-clauses 15.2(a) and (b) of the General Conditions and, in the alternative, on the grounds set out in sub-clause 15.2 (c) of the General Conditions.

[13] The Notice of Termination stated that as at the date thereof:

(a) SIS had advised the management of NGC that it had underbid for the Works and was unable to continue the Works without a review of the Contract Price and the Project schedule;

(b) SIS had commenced the withdrawal of construction resources, manpower, and equipment from the project sites and was providing only security and protection services for the Works;

(c) In breach of its contractual obligations SIS had permitted the performance bond in the sum of US$8,102,765.94 and insurances due under the Contract to expire and refused to renew same notwithstanding requests from NGC for it to do so by letters dated 9th November 2015 and 13th November 2015;

(d) SIS's conduct amounted to the clearest possible demonstration that it had abandoned the Works, or alternatively, did not intend to continue performance of its obligations under the Contract.

[14] In or around May 2014, shortly after the commencement date for the Works, NGC paid to SIS a Mobilisation advance of US$32,411,063.75 ("the Mobilisation Payment") being 20% of the Contract Price. The Mobilisation Payment was effected in accordance with the agreed position of the parties as set out at item 2 of the Negotiated Terms Letter which contemplated repayment of the Mobilisation Payment by SIS by way of deductions made against monies due to it under future Interim Payment Certificates Nos. 9, 10, 11, 12 and 21 (to be issued in accordance with the provisions of 14.6 of the General Conditions) with such deductions to be made in the following respective percentages of the Contract Price: 2.5%, 2.5%. 2.5%, 2.5% and 10%.

[15] The aforesaid deductions against the Mobilisation Payment were not in fact made owing to a subsequent agreement struck between SIS and NGC by way of letter dated 19th February 2015 from SIS to NGC and letter dated 23td February 2015 from NGC to SIS, whereby repayment of the Mobilisation Payment to NGC was postponed and agreed to be deducted in the aforementioned percentages from Interim Payment Certificates Nos. 15, 16, 17, 18 and 21 to be issued under the Contract.

[16] As at termination, only certificates Nos. 1 to 14 had been issued under the Contract and NGC had paid to SIS the aggregate sum of

US$121,745,119.82 (inclusive of the Mobilisation Payment) in connection with the Contract (being approximately 75% of the Contract Price) but the Mobilisation Payment still remained due to NGC.

[17] Clause 15.4 of the General Conditions provides, inter alia, that NGC may after the Termination Notice has taken effect, inter alia:

(a) proceed in accordance with Sub-Clause 2.5 of the Contract which sets out procedural code for NGC making any claims for payment against SIS under any clause in the General Conditions or otherwise in connection with the Contract;
(b) withhold further payments to SIS until the costs of design, execution, completion and remedying of any defects, damages for delay in completion (if any), and all other costs incurred by NGC, have been established, and/or;
(c) recover from SIS, any losses and damages incurred by NGC and any extra costs of completing the Works after allowing for any sum due to SIS under Sub-Clause 15.3, and after recovering any such losses, damages and extra costs, NGC shall pay any balance to SIS.

[18] NGC served four notices dated 23rd December 2015 on SIS (with copies thereof provided to the Engineer) in respect of NGC's entitlement to payment under clause 15.4 of the General Conditions for losses and damages incurred by it and any extra costs of completing the Works as a consequence of termination of the Contract. Each of the four Notices were referable to clause 2.5 of the Contract and are in respect of the matters set out hereunder:

Basis of Entitlement	Amount
Refund of Overpayments made to SIS	US$25,761,918.33 or TT$166,164,373.23
Loss and damage incurred by NGC in respect of one-time costs for logistics and material movement consequent on termination	TT$3,000,000.00
Loss and damage incurred by NGC in respect of ongoing monthly costs at the rate of TT1,239,348.00 per month from the date of termination until such time as a is awarded to a new contractor for completion of the Works	TT$14,872,176.00 TT$1,239,348.00 x (being x 12 months)
Loss and damage and/or extra costs incurred by NGC in completing the Works	The quantum of this claim is in the process of being computed and will not be fully known until such time as the Works are being completed by a new contractor.

[19] By four (4) letters dated 24th December 2015, SIS notified NGC that it disputed liability for payment to NGC in respect of each of the claims set out in NGC's said clause 2.5 Notices and further advised, that pursuant to Clause 20.2 of the General Conditions as amended, it was giving notice that disputes existed between it and NGC in respect of the said claims and accordingly called upon NGC to nominate its representative to settle the disputes or otherwise initiate proceedings for resolving the disputes in accordance with the said clause 20.2.

[20] Clauses 20.2 and 20.3 of the Particular Conditions provide, inter alia:

(a) that disputes between the parties as to the construction of the Contract or as to any matter or thing of whatsoever nature arising

under or in connection with the Contract, including any claim in tort, under statute or for restitution based on unjust enrichment or for rectification or frustration shall, in the first instance, be addressed by nominated representatives for parties meeting within 10 days of service of a dispute notice by one party upon the other;

(b) that in the event the dispute is not resolved within 30 days of the first meeting of representatives for the parties, both parties may agree to refer the dispute to mediation or either party may refer the dispute to arbitration; and

(c) in the event that the dispute is referred to arbitration, clause 20.5 of the Particular Conditions shall apply.

[21] In accordance with the provisions of Clause 20.3 of the Particular Conditions, representatives for both NGC and SIS met but the parties were unable to resolve the aforesaid disputes.

[22] Clause 20.5 of the Particular Conditions provides, inter alia:

(a) that any Dispute between the parties arising out of or relating to or in connection with the Contract, including any question regarding its existence, validity or termination, will be referred to and finally resolved by arbitration in accordance with the UNCITRAL Arbitration Rules;

(b) either party may refer to arbitration all or any part of a Dispute by written notice to the other stating the Dispute to be resolved and the nature of the Dispute and the parties shall, where applicable, rely on the provisions of the Arbitration Act Chap 5:01 of the Laws of Trinidad and Tobago or any statutory variation, modification or re-enactment thereof for the time being in force;

(c) the arbitral tribunal will consist of 1 arbitrator to be agreed upon between the parties;

(d) if no agreement is reached within 30 days after receipt by a party of such a proposal from the other, the arbitrator shall be appointed by the Dispute Resolution Centre of the Trinidad and Tobago Chamber of Industry and Commerce; and

(e) that the parties agree that no dispute or difference under the Contract will be referred to the courts for resolution except where necessary to preserve the subject matter of the action by way of injunctive or declaratory proceedings.

[23] On the 23rd December 2015, NGC obtained an ex parte interim freezing injunction in these proceedings over the assets and property of SIS up to a limit of TT$180 million. The following day, namely, 24th December 2015, Preconco Limited ("Preconco"), a Barbadian company and the joint venture partner of SIS filed CV2015-04375 ("the Preconco Action") in the High Court of Justice of Trinidad and Tobago against SIS, claiming payment of the sum of TT$168,521,377.20 (inclusive of VAT). The Claim Form and Statement of Case filed in relation to the Preconco Action have annexed thereto what purports to be a Tax Invoice issued by Preconco in support of the monies claimed by it but NGC says that the following material irregularities exist in the issue of the said Tax Invoice:

(a) the VAT registration number "20092922" stated on the said Tax Invoice is a Barbadian VAT registration number and not a Trinidad and Tobago VAT registration number;

(b) the supply of goods and services by a Barbadian company to a company in Trinidad and Tobago does not attract VAT in Barbados

and a Barbadian company cannot charge VAT in Trinidad and Tobago unless it is registered for VAT in Trinidad and Tobago;

(c) the rate of VAT applied to the said Tax Invoice is 15% being the Trinidad and Tobago VAT rate (resulting in a claim for VAT from SIS of $21,981,049.20) and not the Barbados VAT rate of 17.5%; and

(d) an instruction to "make all cheques payable to: Prestressed Structures Limited" is inserted at the foot of the said Tax Invoice.

[24] The Claim Form in the Preconco Action was served on SIS on 24th December 2015 and SIS failed to enter an appearance thereto within the required timeframe. On 5th January 2015, a Request was filed by Preconco For Entry of Judgment in Default of Appearance against SIS for the sum of TT$168,884,745.07. As at the date that NGC filed its Statement of Case in this action, no Defence had been filed by SIS to the Preconco Action.

Facts As Agreed between the Claimant and RFRL only

[25] In late November 2015, NGC commissioned a search at the Companies Registry in relation to RFRL and SIS which disclosed, inter alia, the following facts and matters:

(a) RFRL was incorporated on 7th December 2000;

(b) at all material times, the registered office of RFRL was 11 Trial Street, Chaguanas;

(c) the directors of RFRL are Winston Siriram of 11 Trial Chaguanas and Razeena Ahamad of 470 St. Croix Road, Princes Town;

(d) the entire issued share capital of RFRL is 100,000 shares which have all been held by Winston Siriram since at least the year 2001;

(e) the annual returns of RFRL are up to date and have always stated that the amount of indebtedness in respect of the Company of all mortgages and charges of the kind which are required to be registered with the Registrar under the Companies Act is nil; and

(f) on the Company file, relative to SIS Statements of Charge were filed in respect of:

i the First Mortgage and Second Mortgage on the 5th November 2015;
ii the Third Mortgage and Fourth Mortgage on the 13 th November 2015; and
iii the Debenture on the 26th November 2015.

[26] The said search at the Companies Registry was updated shortly thereafter and revealed the following additional informant:

(a) on 1st December 2015, RFRL filed a document in the Companies Registry purporting to be a Special Resolution of RFRL ostensibly dated 4th February 2015 by which the shareholder of RFRL (Winston Siriram) resolved that the maximum number of shares in RFRL be increased from 100,000 shares to 500,000,000 shares;

(b) on 1st December 2015, RFRL filed a document in the Companies Registry purporting to be Articles of Amendment ostensibly dated 4th February 2015 which showed that item 4 of the Articles of the Company were amended to read as follows: THE MAXIMUM NUMBER OF SHARES COMPANY IS AUTHORISED TO ISSUE IS

FIVE HUNDRED MILLION (500,000,000) ORDINARY SHARES"; and

(c) on 8th December 2015, RFRL filed a document in the Companies Registry purporting to be RFRL's Annual Return for the year 2015 in which it is recorded that 500,000,000 shares in RFRL were issued and that such shares are owned by Winston Siriram.

THE CLAIM

[27] By its Statement of Case filed herein on 25 January 2016 NGC claims the following relief against SIS and RFRL:

(a) declarations that the following five (5) deeds made by SIS in favour of RFRL were made to delay, hinder and/or defraud NGC:

i. Deed of Mortgage dated 5 March 2015 registered as No. DE2015 02701816 D001 on 4 November 2015 ("**the First Mortgage**") in respect of SIS's leasehold interest in 12.1412 Hectares of land in the Ward of Couva;

ii. Deed of Mortgage dated 5 March 2015 registered as No. DE2015 02701795 D001 on 4 November 2015 ("**the Second Mortgage**") in respect of SIS's freehold interest in a parcel of land situate in the Ward of Montserrat being portion of "Esperanza Estate" comprising 0.221 of a Hectare;

iii. Deed of Mortgage dated 5 March 2015 registered as No. DE2015 02766359 D001 on 12 November 2015 ("**the Third Mortgage**") in respect of SIS's leasehold interest in a parcel of land situate in the Ward of Couva comprising 1.0994 of a Hectare;

iv. Deed of Mortgage dated 5 March 2015 registered as No. DE2015 02763612 D001 on 12 November 2015 ("**the Fourth Mortgage**") in respect of SIS's leasehold interest in two pieces or parcels of land situate in the Ward of Couva together comprising 1.7036 Hectares;

v. Deed of Debenture dated 12 November 2015 registered as No. DE2015 02815387 D001 on the 18 November 2015 ("**the Debenture**") whereby SIS granted a charge in favour of RFRL over its undertaking goodwill motor vehicles and property and assets and rights whatsoever and wheresoever both present and future;

(b) an order that the First Mortgage, Second Mortgage, Third Mortgage, Fourth Mortgage (collectively "**the Mortgages**") and the Debenture each be set aside pursuant to section 78(1) of the Conveyancing and Law of Property Act ("**the Act**");

(c) alternatively, a declaration that the Mortgages and Debenture each constitute sham transactions and an order setting them aside;

(d) an order directing the Registrar General to expunge the Mortgages and the Debenture from the Index of Deeds kept pursuant to section 4 of the Registrar General Act, Chap. 19:03;

(e) an order directing the Registrar of Companies to expunge from the Companies Registry all Statements of Charge filed in respect of the Mortgages and the Debenture;

(f) a freezing injunction as against SIS restraining it from disposing, dealing with or diminishing the value of any of its assets in Trinidad and Tobago up to the value of TT$180 million until the hearing and

determination of certain arbitration proceedings between NGC and SIS ("**the Arbitration Proceedings**");

(g) an injunction as against RFRL restraining it from in any way dealing with or disposing of the property and assets of SIS charged or mortgaged to it under the Mortgages and the Debenture;

(h) such further and/or other relief as to the court may seem just; and

(i) costs.

[28] On 10th June 2016, the injunctions referred to at sub-paragraphs 2 (f) and (g) above were granted by this court in favour of NGC pending the hearing and determination of the Arbitration Proceedings. The appeal of SIS against that judgment was withdrawn and RFRL has taken no steps to prosecute its appeal against the judgment.

[29] The trial of the instant claim is confined to a consideration of whether NGC is entitled to the relief set out at sub paragraphs (a) to (e) above and costs. In the circumstances the issues which fall for determination by this court are therefore:

(a) whether the Mortgages and the Debenture can be set aside at the instance of NGC under section 78 of the Act; and

(b) whether the Mortgages and Debenture constitute sham transactions which are liable to be set aside by NGC under the common law.

The Summary of the First Defendant's Defence

[30] By its defence, the First Defendant pleads that its traditional financiers declined to continue financing the First Defendant due to its political affiliation and the adverse publicity following the award of the Contract. As a consequence, the First Defendant had to make alternative financing arrangements. After being unsuccessful in securing financing through the local banking sector, the First Defendant was left with no alternative but to seek financing elsewhere. The First Defendant duly advised the Claimant of the problems with respect to financing. The Mortgages and Debenture were executed as part of the First Defendant's attempt to secure financing in the expectation that it would have continued to have the benefit of the Contract.

[31] The Mortgages and Debenture were prepared in escrow pending disbursement in the event that financing was eventually required. However, before the financing was finalized, the Claimant wrongfully terminated the Contract and there was no longer the need for financing. Accordingly, no funds were disbursed and there were and are no sums outstanding under the Mortgages and Debenture, with the effect that the Second Defendant has no rights under the various deeds.

The Summary of the Second Defendant's Defence

[32] The Second Defendant pleaded that:

(a) The Claimant's averments with respect to its contract with the First Defendant were matters between the Claimant and the First Defendant; the Second Defendant contended that in any event the Claimant is unable to prove the facts and matters therein. As a consequence, S.78(1) of the CLPA has no application to this Defendant since the Claimant is not a creditor of the First Defendant;

(b) The Second Defendant admitted the various deeds pleaded at paragraph 21 of the Statement of Case but denied that the Mortgages and Debenture were made with intent to defraud creditors of the First Defendant;

(c) The Second Defendant denied paragraph 24 of the Statement of Case and asserted that the Claimant was required to prove that it is in fact a creditor of the First Defendant failing which S.78(1) of the Act has no application to the impugned transactions;

(d) That the mortgages and debenture were executed bona fide and in good faith due to the First Defendant's need for financing from alternative sources as a result of its longstanding financing arrangements with its standing financier being withdrawn;

(e) That the impugned instruments were prepared in escrow pending disbursement in the event financing was eventually required. All the documentations were put in place and the Second Defendant was in the process of raising the financing required by the First Defendant. In anticipation of disbursement, the various deeds were registered and variations of the deeds were to be prepared and registered upon disbursement. Prior to the financing being finalized, the Claimant terminated the Contract and there was no longer need for financing;

(f) That on commencement of these proceedings, the Claimant was fully aware that the Defendants acknowledged that no funds on the mortgages and debenture were dispersed and there were no sums outstanding under the Mortgages and Debenture, with the effect that the Second Defendant had no rights under the various deeds. The Second Defendant indicated its willingness to release the mortgages and debenture to which the Claimant objected. This commitment to release the Mortgages and the Debenture is a commitment which

continued throughout the proceedings but was met with objections from the Claimant;

(g) That the Claimant has not been prejudiced by the registration of the Mortgages and Debenture for the reasons set out in paragraph (e) and (f) above.

[33] The broad issues which this Court must determine are whether, firstly, the mortgages and debenture can be set aside by the Claimant under Section 78 of the Act and secondly, whether the mortgages and debenture constitute sham transactions which are liable to be set aside by the Claimant under common law principles. In order to determine the factual issues in this case, I am guided by the principles outlined by Lord Ackner in the Privy Council decision of **Horace Reid v Dowling Charles and Percival Bain.**[1]

> *"... where the wrong impression can be gained by the most experienced of judges if he relies solely on the demeanour of witnesses, it is important for him to check that impression against contemporary documents, where they exist, against the pleaded case and against the inherent probability or improbability of the rival contentions, in the light in particular of facts and matters which are common ground or unchallenged, or disputed only as an afterthought or otherwise in a very unsatisfactory manner."*

ISSUES

a) *Whether the Claimant was a creditor of the First Defendant at the time of the execution of the Conveyances and Debenture;*
b) *Whether the First Defendant conveyed the properties described with the intention to defraud its creditors;*

[1] Privy Council Appeal No. 36 of 1987 page 6

c) *That as a result of the Conveyances, the Claimant suffered prejudice; and*

d) *Whether the mortgages and debenture amount to sham transactions.*

Issue (a) Was the Claimant a Creditor of the First Defendant at the time of the execution of the Conveyances and Debenture

Submissions of the First and Second Defendants

[34] Both Defendants submitted that the Claimant cannot succeed in its claim since it cannot establish that NGC was a creditor of the First Defendant at the time that the mortgages and debenture were executed. While the First Defendant admitted that at the time of termination of the contract, the mobilisation payment was still due to be paid by the First Defendant to the Claimant,[2] SIS had also pleaded that said termination was unlawful and that the issue of whether it was indebted to the Claimant was to be determined by arbitration. SIS also denied that NGC was a creditor of the SIS and averred that NGC may end up being indebted to it.[3]

[35] The Claimant's claim that it was a creditor of the First Defendant is based on the mobilization payment in the sum of US$ 32,411.063.75.[4] The mobilization payment was agreed to be repaid initially by way of deductions from Interim Payment Certificates ("IPC") Nos 9,10,11,12 and 21. By agreement between the parties by way of Letter dated the 19th February, 2015 from SIS to NGC and letter dated the 23rd February, 2015 from NGC to SIS, the repayment was postponed to be deducted from IPC Nos 15, 16, 17, 18 and 21[5].

[2] Paragraph 9 of First Defendant's Defence
[3] Paragraph 20 of First Defendant's Defence
[4] See paras 8, 10 and 24 (a) of the SOC
[5] See paras 8 and 9 of the SOC

[36] Paragraph 10 of the Statement of Case referred to the fact that at termination of the contract, only certificates Nos 1 to 14 had been issued and that the mobilization payment still remained due with which this defendants agreed. However, at paragraph 12 of its defence, SIS pleaded that the termination of the contract was unlawful and that whether it was liable to the Claimant was an issue to be determined by arbitration. SIS also denied that it was a creditor of the Claimant and that the Claimant may end up being indebted to SIS following the arbitration proceedings.

[37] Both Defendants submitted that the Claimant had no absolute right to the repayment of mobilization sums but instead such right to repayment was conditional upon the contract not being terminated prior to IPC No. 15 (and/or full repayment of the mobilization). Once the contract has been terminated, then a final account has to be taken[6] and it is this final account[7] which determines whether any of the parties are indebted to each other and to what extent.[8]

[38] The Defendants argued that upon termination of the Contract the balance due on the mobilization would become subsumed within the overall claim of the Employer (NGC)[9]. This claim is now subject to dispute and a counterclaim by SIS has been filed before the arbitrator. The arbitrator will ultimately decide whether NGC is indebted to SIS or vice versa. The Defendants argued further that NGC cannot sever the mobilization balance from its entire claim (which is now subject to dispute and a counterclaim) and contend that it is a creditor in respect of the mobilization balance only. It is for this reason that NGC being a creditor in respect of the mobilization payment is conditional upon no

[6] In accordance with Clause 15.3 of the FIDIC Plant and Design-Build 1st Edn 1999 see also para 21 of the Witness Statement of Danford Mapp

[7] The issue of the final account is in dispute with IPC's issued by DM also being disputed. The evidence shows substantial and unexplained variations in the amount being claimed by NGC and the sums appear to have been progressively inflated by Mr. Mapp in the first instance and the subsequently by Amec Foster Wheeler (see pages 10-28 of the transcript of proceedings 19-09-19-evidence of Danford Mapp)

[8] See page 28 Lines 1-47 Transcript of proceedings on the 19th September, 2019 (Evidence of Danford Mapp).

[9] See paras 22 and also 27(c) of the Witness Statement of Danford Mapp

termination taking place prior to the repayment of the mobilization payment by SIS.[10]

The Defendants submitted that the Claimant admitted, through the cross examination of their witnesses Maria Thorne and Danford Mapp, that the issue whether the mobilization payment was in fact due to the Claimant was a matter before the Arbitrator to be determined by the Arbitrator, which supported their contention that the Claimant was not a creditor of the First Defendant in respect of the Mobilization Payment.

[39] The Defendants contended that as at the date of the execution of the Deeds, NGC cannot claim to have been a creditor of SIS or to be a creditor in respect of the mobilization payment or at all, since all these issues are before the arbitrator and therefore this Honourable Court is without jurisdiction to make any determination of same. The Defendants argued that, by the terms of the FIDIC Contract, any dispute in respect of the Mobilization Payment is to be determined in accordance with the terms of the Contract, i.e. by the Arbitrator. They argued further that the Court does not have any jurisdiction to determine whether the First Defendant owes monies to the Claimant in respect of the Mobilization Payment; the Court cannot usurp the jurisdiction of the Arbitrator to make that determination because the parties have contracted for the Arbitrator to make that decision.

[40] The Defendants submitted that NGC has failed to prove a fundamental element of its claim in these proceedings i.e. that at the material time they were a creditor of SIS; on this basis alone the Claim must fail.

The Claimant's Submissions

[10] See also page 132 of the Transcript of proceedings 23-07-19 where Maria Thorne accepts that the mobilization payment is also in issue before the Arbitrator.

[41] The Claimant submitted that pursuant to the Contract, arbitration proceedings were commenced by NGC against SIS to recover monies due to NGC by SIS. Those proceedings are still at the interlocutory stage and no date has been fixed for the hearing of the arbitration.[11] In the arbitration, claims made by NGC against SIS, include claims for: (i) payment of the sum of TT$2,888,250.45 and the further sum of TT$1,254,859.38 and US$337,595.00 in respect of one-off costs incurred by NGC consequent upon termination of the Contract; (ii) payment of the sum of TT$5,581,785.57 and the further sum of TT$6,516,229.78 in respect of ongoing monthly costs incurred by NGC from 4 December 2015 to 31 December 2016; (iii) payment of the sum of US$61,536,297.82 being the amount which NGC overpaid SIS for work done by SIS under the Contract; and (iv) interest on all sums awarded.[12]

[42] The Claimant submitted that at all times since May 2014, SIS has been liable to NGC for repayment of the sum of US$32,411,063.75 ("**the Mobilization Payment**"), being the amount of a mobilization payment made to SIS by NGC in May 2014. The Mobilization Payment was advanced to SIS in accordance with an agreed position between NGC and SIS whereby SIS was to repay same by way of deductions made against monies due to it under future Interim Payment Certificates Nos. 9, 10, 11, 12 and 21 to be issued under the Contract. That agreement was overtaken by a subsequent agreement between the parties, contained in a letter dated 19 February 2015 from SIS to NGC and a letter dated 23 February 2015 from NGC to SIS, which postponed repayment of the Mobilization Payment to deductions made against future Interim Payment Certificates to be issued under the BWRP Contract, namely, certificate Nos.15, 16, 17, 18 and 21.[13]

[11] See para 5 of the Thorne Witness Statement at pg 1038 of Trial Bundle 2B.
[12] See para 6 of the Thorne Witness Statement at pg 1039 of Trial Bundle 2B.
[13] See para 9 of the Thorne Witness Statement at pg 1040 of Trial Bundle 2B; see also paras 9, 15 and 16 of the Mapp Witness Statement at pgs 362 and 364-365 of Trial Bundle 2A.

[43] At the date of termination of the Contract, the entire Mobilization Payment of US$32,411,063.75 remained due to NGC from SIS and has not been repaid;[14]

[44] NGC contended that the amount of the Mobilization Payment alone far exceeds any retention monies due to SIS under the Contract, whether one uses the amount of retention as determined by Mr. Mapp (the person NGC says replaced the previous Engineer under the Contract, namely, Mr. Sarjad) in Interim Payment Certificate No. 16 (Revised) where he assessed such retention as being US$19,147,490.84 or the amount of retention as determined by Mr. Nazim Sarjad[15] (the person who SIS contends by its pleadings was the only person who validly served as Engineer under the Contract) in Interim Payment Certificate No. 14 where he assessed it as being US$22,333,514.07. Additionally:

(i) The value of NGC's claim against SIS under the Contract in the arbitration is in excess of TT$436 million plus interest and costs;

(ii) The freezing injunction obtained against SIS in this action is in the sum of TT$180 million;

(iii) SIS has admitted that it is liable to NGC for repayment of the Mobilization Payment in the sum of US$32,411,063.75[16] - such sum having been advanced to SIS as a loan in May 2014 and never repaid.

[45] NGC contended that having regard to the foregoing at a minimum, NGC is a creditor in respect of the Mobilization Payment and/or a prospective creditor in respect of its arbitration claim against SIS for upwards of TT$436 million.

[14] See para 16 of the Mapp Witness Statement at pg 365 of Trial Bundle 2A; see also para 10 of the Thorne Witness Statement at pg 1041 of Trial Bundle 2B.
[15] Mr. Sarjad preceded Mr. Mapp as Engineer under the Contract and Interim Payment Certificate No. 14 was the last certificate issued by Mr. Sarjad - see paras 11 ,12, 14 and 17 of the Mapp Witness Statement at pgs 362 to 365 of Trial Bundle 2A.
[16] Paragraph 9 of the First Defendant's Defence

ANALYSIS

[46] The Defendants relied upon the case of **Royal Bank of Trinidad and Tobago v Ghany Safety Supplies and Tool Company Ltd and Mexicana Holdings Ltd**.[17] as support for their submission that the Claimant must be creditor of the Defendants at the time of the execution of the conveyances in order to have the conveyances set aside under Section 78(1) of the Act. I note that this judgment of Kangaloo J (as he then was) is in conflict with the learning contained in Halsbury's Laws of England[18] and the cases cited thereunder which state:

> "It is not, however necessary for the avoidance of a conveyance that the transferor should be in any way indebted at the time of the conveyance."

[47] Further in the Australian case of **Langdon v Gruber**[19] Austin J considering a similar provision to S. 78(1) of the Act, Section 37A of the New South Wales Conveyancing Amendment Act 1930 opined:[20]

> "The section does not literally require that the persons intended to be defrauded must all be creditors at the time of transfer. To impose that construction on the statutory language would be to remove from its scope a situation falling squarely within the within the legislative policy and the object of the section. It is enough, in other words, that the intention is to defraud a person whose claim is likely to mature into a debt in the immediate or foreseeable future."

[48] In the Court of Appeal decision of **Chan v Marcolongo; Chen v Lyn International Pty Ltd 2009**[21], the Court, in interpreting the meaning

[17] HCA No. 5249 of 1985
[18] Vol. 18 paragraph 367 4th Edition
[19] [2001] NSWSC 276
[20] Paragraph 58 to 60 of the judgment of Austin J
[21] NSWA 326

of the term 'creditor' under their S. 37 A of the **Conveyance Act 1919** (similar to our S. 78(1) of the Act) opined[22] that:

> "The word "creditors" in the section has been held on more than one occasion to mean present or future creditors, so that if a person fears that his or her activities may generate creditors and puts property out of the reach of such possible persons, the transfer of the property can be attacked under the section; see e.g. Mackay v Douglas (1872)[23]. In Barling v Bishopp(1980)[24], 17 days before an action in trespass was tried in which Bishopp was a defendant, he transferred his property to his daughter. Bishopp had no creditors at that stage, but Romilly MR had no difficulty at finding that the conveyance was in fraud of creditors saying:
>
> > *"It is obvious that the statute is not, in terms, restricted to existing creditors alone, but that it extends to future creditors also."*

[49] A review of the authorities, with the exception of **Royal Bank v Ghany supra**, support the view that the term 'creditors' used in S. 78(1) is not limited to existing creditors but includes future creditors. I therefore hold the view that the word 'creditor' is not rigidly confined to mean a person in whose favour a judgment debt/or any other debt has already been secured but includes future creditors as well as persons with pending claims against the Defendant as is the case here. I am of the view that the word 'creditor' must be construed in the context of the CLPA S. 78(1) and judicial decisions on this statutory provision. In the circumstances, where the authorities and the learning contained in Halsbury's Laws of England support an interpretation of the word 'creditor' to include future creditors and claimants with pending claims against a defendant(s), I respectively decline to follow the Royal Bank

[22] Paragraph 180
[23] LR 14 Eq 106
[24] 29 Beav 417; 54 ER 689

case on this point especially since no cases are cited in support of this conclusion by Kangaloo J.

[50] I therefore hold that NGC is a creditor of SIS for the purposes of S 78(1) of the Act by reason of the outstanding mobilization payment (which is agreed and admitted by the First Defendant) and pending arbitration proceedings against SIS.

ISSUE (b) Was there intent to defraud at the time of the execution of the Deeds

Submissions on behalf of the First Defendant

[51] The First Defendant contended that the Deeds and Debenture were executed for valuable consideration and were not voluntary. SIS contended that its arrangement with the Second Defendant – that the latter would arrange financing for the First Defendant constitutes valuable consideration.

[52] The First Defendant submitted that there being consideration for transfer under the mortgages and debenture, the Claimant must prove actual and expressed intent to defraud before these transactions could be set aside; both Defendants contended that the Claimant failed to do so. Relying on the case of re **Johnson, Golden v Gillam**[25], the Defendants argued that the existence of valuable consideration for the execution of the deeds shows that there may be purposes for the transactions other than the defeating/delaying of creditors.

[53] The First Defendant further argued that the Claimant also had to establish that the transactions were not done in good faith which the latter failed to do since the First Defendant has established that there was a legitimate purpose in the execution of the Deeds – to acquire third

[25] [1880 G. 22] – [1881] 20 Ch. D. 389 page 5(last para)/page 6(1st para)

party financing in order to ensure the continuity of the contract. The Defendant, therefore, submitted that even if the Court were to find that there was no consideration for the Conveyances and Debenture, the impugned transactions must be considered as though there had been consideration.

[54] Both Defendants noted that where there is valuable consideration for the impugned transfer then the burden is on the party seeking to set aside the transaction to prove actual and expressed intent.[26]

[55] With respect to the Claimant's contention that fraud and the intent to defraud can be inferred on the basis that the Deeds were voluntary conveyances because no consideration passed, the Defendants submitted that these conveyances cannot be regarded as voluntary conveyances by reason of the following:

a) The evidence of the First Defendant is that the Deeds were executed on the basis of an arrangement and/or agreement with the Second Defendant that the Second Defendant would secure financing for the First Defendant for the completion of the project - this arrangement constitutes valuable consideration.

b) The First Defendant argued that it has shown that there was a legitimate purpose in the execution of the Deeds i.e. to acquire third party financing in circumstances where this was desperately required to ensure continuity of the project. In the circumstances, the purpose of execution of the Deeds could not have been to delay, hinder or defraud the Claimant. SIS submitted that these transactions fail to be considered as they were in the category of conveyances for consideration even if the Court were to find that there was no consideration.

[26] See Royal Bank –v- Ghany Safety Supplies (Supra) Kangaloo J at pages 8 and 9 where the learned judge considers the effect of element (d); see also **re Johnson. Golden –v- Gillam** [1880 G. 22.] - (1881) 20 Ch.D. 389 page 5 (last para)/page 6 (1st para); See also Freeman v Pope - [1861-73] All ER Rep Ext 1774-Lord Justice Giffard @ page 8 para 2. See also Lloyd Bank –v- Marcan Shipping [1973] 1 WLR 1387 Russel LJ @1390H note also Cairns LJ at 1392

[56] SIS contended further that even if there was no valuable consideration, if the transaction was done in good faith then this element of the Act is not satisfied. Since the Claimant has not established that the impugned transactions were not done in good faith, proof of actual and/or express intent would be required and must be proved by the Claimant.

[57] SIS also argued that even if the court is of the view that the conveyance is without consideration, since the Claimant has not alleged that the First Defendant was insolvent at the time of execution of the Deeds or at all, and the transactions did not deplete the funds available for creditors, proof of actual intent to defraud is required by the Claimant.

[58] SIS submitted that, given that proof of actual and/or express intent to defraud is required to be proved by the Claimant, the Claimant's case is bound to fail since the Claimant's pleaded case is relying on an inference of fraud. Even if the Claimant can show that it does not have to prove actual fraud and it can ask the court to infer fraud, SIS argued that there can be no inference of intent to defraud on the facts and evidence of this case for the following reasons;

a) The First Defendant must have had the necessary intent as at the date of execution of the Deeds. All the Deeds (save and except the Debenture) was executed on the 5th March, 2015. At this time the contract was still in its embryonic stages. There is no evidence that at the date of execution there were any issues between the parties as it relates to the contract. None were pleaded and the Claimant's witness failed to identify any when asked in cross examination.[27]

b) It is inconceivable that a company such as the First Defendant would execute sham transactions with the intent to defraud the

[27] See pages 154 and 155 of the transcript of proceedings 23-07-19 (Evidence of Maria Thorne)

Claimant's 20% of the contract fee (assuming but not admitting that the Claimant was a creditor of the Defendant in respect of this sum) and risk or jeopardize the 80% of the contract sum particularly in circumstances when there were no issues in relation to the contract and that the 20% mobilization fee would have had to be applied to specialized equipment etc. necessary for the execution of the contract (under the supervision of the Engineer who was, at the material time, an employee of NGC).

c) Assuming but not admitting the mobilization payment constituted a debt, the **stated amount** secured by the mortgages could not have put recovery of the mobilization payment out of reach of the NGC. This is because under Clause 14.2 FIDIC General Conditions a Mobilization payment can only be made upon provision of security by the Contractor. This term has not been displaced by the Particular conditions and there is no evidence by NGC to suggest that this payment was not secured pursuant to the contract. The First Defendant could therefore not have depleted its assets to evade repayment of the said mobilization since, pursuant to the general conditions, same would have been secured.

d) None of the *badges of fraud*[28] outlined below are applicable to the facts of this case for the following reasons:

(i) The fact that the conveyance, comprised substantially the whole of the transferor's property, cannot support an intent to defraud since the First Defendant clearly required financing for a very substantial project (BWRP). The amounts stated on the Deeds are not inconsistent with the magnitude of financing that would be required by the First Defendant to complete the project; the court ought not to draw any conclusive inferences from this.

[28] Halsbury's Laws of England 4th Edition paragraph 366

(ii) The fact that the Deed contained a false recital - the First Defendant has given a reason for the recitals – that they were part of a transaction in which the First Defendant sought financing and on the basis of the arrangements between the First Defendant and the Second Defendant and the Deeds were executed acting on advice from Attorneys for the First Defendant.

(iii) Contemporaneous documents, namely the minutes of meetings held between NGC and SIS on the 19th October, 2015 and the 21st October, 2015[29] respectively, show that the First Defendant had indicated to NGC that they no longer had a credit facility from Scotiabank, that they were unable to further fund the project themselves and that they had financing arrangements in place once a way forward was agreed.

e) The evidence of Krishna Lalla was consistent with the contemporaneous documents; he also gave a full and detailed account of the circumstances which gave rise to the need for financing for the project and the reason why the arrangements with the Second Defendant were put in place to obtain the required financing.

Submissions of the Second Defendant

[59] RFRL submitted that the Claimant has not properly pleaded and or particularized the Defendants' alleged intent to defraud. The sub paragraphs of paragraph 24 of the Statement of Case do not plead any facts in support of the alleged fraudulent intent. The only paragraphs dealing with intent are paragraphs 24(b) and (c) but they do no more than baldly assert that the Mortgages and Debenture were executed with an intent to defraud and/or bad faith.

[29] Pages 287 and 99 respectively of Trial Bundle Other Documents Volume 1

[60] The Second Defendant argued that the issue is whether, on the basis of the primary facts pleaded in the Claimant's Statement of Case, an inference that the purpose of executing the mortgages and debenture was to put assets beyond the reach of the Claimant, or to otherwise prejudice the Claimant's interests, is more likely than one of innocence or negligence. This Defendant contended that the primary facts pleaded in the Claimant's Statement of Case do not support an inference that it is more likely than not that the Defendants acted with an intent to defraud the Claimant when executing the mortgages and debenture for the reasons cited below:

(i) It is common ground that no money passed between the Defendants in respect of the mortgages and debenture. As explained in the Defendants' defences, this is because the transactions were entered into on the basis of the deeds being held in escrow as the Second Defendant was raising finance for the First Defendant to finance construction of the water recycling plant.

(ii) At the time that the mortgages were executed in March 2015, there were no claims made by the Claimant against the First Defendant. It should not be readily inferred, therefore, that the mortgages were executed so as to put the First Defendant's assets beyond the Claimant's reach. The fact that the debenture was executed in November 2015 does not undermine the force of this point, as the debenture was in effect a reinforcement of the mortgages for the purposes of providing security.

(iii) The Defendants have offered consistently to release the mortgages and debenture, so there has never been any prejudice suffered by the Claimant.

(iv) The law in respect of liability created by the mortgages and the debenture is that liability is subject to the equity of redemption. Since no money passed from the Second Defendant to or on behalf of the First Defendant, there was no liability under the mortgages and debenture. Consequently, the law did not permit the Second Defendant to dispose of the property. The First and Second Defendants agreed that no monies passed and agreed to have the releases done but the Claimant objected to that course of action.

[61] RFRL also submitted that the intent to defraud had to be shown at the time of the execution of the Deeds. The evidence of the Claimant's witness, Maria Thorne revealed that the mortgages and debenture were executed before the termination of the Contract on 20th November 2015. The Claimant, not having established its case against the First Defendant, could not also establish the cause of action against the Second Defendant.

[62] Accordingly, the Second Defendant contended that the Claimant failed to prove a necessary element of its claims, namely that the Defendants intended to defraud it by creating and registering the Deeds and Debenture.

[63] The Second Defendant argued that the contents of the mortgage and debenture cannot support an inference of fraud since under the mortgages and debenture, the borrower was entitled to redeem the mortgage at any time and the lender could not have clogged the equity of redemption. The contents of the mortgage show that notwithstanding the dates of redemption of the mortgages and the debenture, legally that there was always the right in equity to redeem the mortgages and debenture. There could have been no prejudice suffered by the Claimant because the Defendants made it clear that no monies passed under the

mortgages and debenture and they were prepared to release the mortgages and debenture.

Claimant's Submissions

[64] The Claimant submitted that, on the facts of this case, the Mortgages and the Debenture qualify as voluntary conveyances and the onus of disproving an intent to defraud rests squarely with SIS. The Claimant submitted further that the Mortgages and the Debenture all registered in November 2015, together comprise all of SIS's assets. Further, the Defendants have admitted that no money passed under these instruments, notwithstanding a statement in the operative part of each of the Mortgages that the loan proceeds have been "paid by the Lender to the Borrower on or before the execution of these presents (the receipt of which sum the Borrower hereby acknowledges)" and the Debenture, had been stamped to cover TT$100 million in accordance with the terms of clause 29 thereof. NGC submitted that SIS has not discharged the onus of disproving an intent to defraud either on the basis of the evidence or its pleading.

[65] The Claimant submitted that neither Defendant has adduced any documents to support the agreement between them for RFRL to provide financing for SIS. Further, that SIS has adduced no evidence, whether by way of witness statement, witness summary or indeed any documentation, to support its case that the withdrawal of financing from its bankers of thirty years led to it having to source alternative financing through RFRL. The Claimant submitted further that material inconsistencies in the Defendants' cases make it inherently improbable that there was ever any genuine loan transaction between SIS and RFRL. The failure to call witnesses who would have had a direct knowledge of the circumstances which led SIS to seek financing from RFRL and the circumstances under which the mortgages and debenture were executed further undermine the credibility of the defences and suggest that they

were fabricated.

[66] Further, the Claimant argued that the fact that the Mortgages and Debenture were registered in November 2015, at a time when it was clear that no financing could possibly be required from RFRL because of SIS's expressed unwillingness and/or inability to proceed with the project, demonstrates that the Mortgages and Debenture were designed to facilitate a dishonest intention on the part of SIS, namely, to create an impression that it was substantially indebted to RFRL and that all of its assets were charged in favour of RFRL as security for such indebtedness. This dishonest intention is evidenced by the expenditure of large sums of money (TT$1,320,000.00 in stamp duty and TT$92,380.00 in penalties) to secure the registration of the Mortgages and Debenture in an effort to create the illusion that RFRL had a security interest of $300 million over all of SIS's assets. Payment of these sums was a deliberate act undertaken by SIS and SIS has never offered any or any credible explanation as to why this was done.[30]

[67] The Claimant asserted that since 20th November 2015, SIS received notice of termination of the Contract. As at 4th December 2015, termination of the Contract had taken effect[31]. Notwithstanding this, SIS left the Mortgages and Debenture in place and there is no evidence whatsoever that they took any steps to have the instruments removed from the Registry or to have appropriate Releases prepared and registered. If the Mortgages and Debenture were genuinely connected with financing for the project and no longer required, any commercial enterprise would have taken immediate steps to have same released following termination of the Contract so as to facilitate free and unencumbered access to its assets. The Claimant contended that the inescapable inference to be drawn from SIS's failure to take any steps in that regard is that the instruments were truly sham documents designed

[30] See paragraph 67 of the prior decision of this Court dated 10 June 2016 in relation to NGC's application for a freezing injunction.
[31] See para 4 of the Thorne Witness Statement.

to give and maintain a false impression as to SIS's indebtedness and to put its assets beyond the reach of unsecured third party creditors. NGC argued that having regard to the facts above, the natural and probable consequence of the Mortgages and Debenture was to hinder, delay or defraud creditors.

[68] The Claimant contended further, that no credible reason has been advanced by SIS for executing the Mortgages and Debenture in favour of RFRL; accordingly the reasonable inference to be drawn is that they were made with an intention to defraud creditors in the context of section 78(1) of the Act.

[69] The Claimant also submitted that if this Court were to find that the Mortgages and the Debenture do not constitute voluntary conveyances, and the onus of proof of intent to defraud rests on NGC, in any event, on the analysis of the evidence, this onus has plainly been discharged on the basis of the evidence in this case. There is no evidence to support as argued for by the Defendants, that the mortgages and debenture were legitimate transactions for valid consideration; furthermore, contrary to RFRL's submission there are no contemporaneous documents to support the Defendants' cases. The documents disclosed by the Defendants cover the two month period from the 14th September 2015 to the 16th November 2015 and do not support their defence that the mortgages and debenture arose from a genuine commercial relationship between SIS and RFRL. These documents show that from September 2015, SIS did not intend to continue with the project and that funding would not therefore be required. In light of this, the registration of the mortgages and debenture in November 2015 can only have been done for an entirely dishonest purpose – to give the appearance that all of SIS's assets were encumbered to RFRL. The Claimant pointed out that the terms of the mortgages and debenture do not support the Defendants' contention that they were executed pursuant to a commercial transaction. Mr. Lalla, on behalf of the First Defendant,

testified under cross-examination that the arrangement between the First and Second Defendant was that the deeds and debenture would be signed and registered and then financing would be procured by RFRL and released to SIS when required. However, the recitals in the mortgages stated that the monies had been disbursed by RFRL and received by SIS; specific repayment dates for the receipt of these sums were also set in the mortgages. Since the mortgages and debenture are not in accordance with the arrangement between SIS and RFRL as testified to by Mr. Lalla, there is therefore no consideration for these instruments. The failure on the part of either or both defendants to plead that the mortgages and debenture did not contain the agreement between them lends support to the assertion that they were created with a dishonest intention and are purely voluntary since no consideration was advanced.

[70] The Claimant submitted in the round that once the Court rejects the Defendants' reason for entering into the mortgages and debenture, the only reasonable inference that can be drawn is that the instruments were entered into in order to defraud creditors. The Claimant argued that it is not necessary for SIS to have had any particular creditor in mind at the date of the execution of the instruments since it is not necessary for the avoidance of a conveyance that the transferor should, in any way, be indebted at the time of the conveyance.[32] NGC argued further that the intention to defraud is easily satisfied when one has regard to the fact that the mortgages and debenture charge all of the assets and property of SIS and the fact that no monies were advanced either at the time of their execution or at any time thereafter. The assets of SIS were encumbered by the mortgages for loans totaling two hundred and thirty million dollars even though no loans were ever granted. Pursuant to the debenture, all the property and assets of SIS were charged in favour of RFRL to secure advances to SIS up to one hundred million dollars and four hundred thousand dollars was paid by SIS to

[32] Para 367 of Vol 18 Halsbury's Laws of England

register said debenture when no such advances were ever made to it. The Claimant asserted that these facts supported its claim that there was an intention to defraud. Lastly, the Claimant submitted that for all the reasons advanced above the mortgages and debenture amount to sham transactions.

Issue (b) Analysis

[71] The main plank of the Defendant's defence to the Claimant's claim that the transactions were entered into with intent to defraud NGC was that the deeds were executed pursuant to an arrangement/agreement between the Defendants whereby the Second Defendant would secure financing for the First Defendant, the latter's bankers having withdrawn all facilities from the First Defendant. Both Defendants pleaded[33] that the deeds were prepared in escrow pending disbursement in the event that financing was required; further that the deeds were registered in anticipation of disbursing finances for the project. However, as noted by the Claimant, at the time of registration of the deeds (5th November 2015) SIS had already indicated to NGC that it would not continue with the project and had taken steps to support this stance:

i The letter dated 14th September 2015 by which SIS wrote to NGC stating, inter alia, that it was reasonably certain that steps would be taken by the State to stop or frustrate SIS in the successful execution of the project;
ii The letter dated 14th October 2015 by which SIS wrote to NGC stating, inter alia, that on 8th October 2015 it began the withdrawal of construction resources, manpower and equipment from the project site;
iii The letter dated 15th October 2015 by which SIS wrote to NGC stating, inter alia that it was unable to continue with the works under the current circumstances and current conditions of contract;

[33] Paragraph 8 of the Second Defendant's defence, paragraph 22 of the First

iv Minutes of a meeting held on 21st October 2015 between representatives of NGC and SIS, which record at item 2.1 thereof that SIS's Operations Manager, Darren Debideen, stated that "SIS underbid for the project at the tender stage and was unable to continue the Works without a review of the Contract price and the Project schedule;

v Minutes of a meeting held on 28th October 2015 between representatives for NGC and SIS which record at:

a) Item 2.1 that "SIS stated in light of their expressed inability to continue with the project, construction activity on the project had been stopped with the exception of backfilling, covering up of pressure testing areas and repairs to some areas on the pipeline Right of Way(ROW); and

b) At item 2.2 that "SIS responded that they have already indicated that they cannot meet the project obligations due to financial and security constraints. SIS cannot continue and, as such, they would not extend the bond and insurances.

[72] No explanation has been forthcoming from the Defendants as to why the deeds and debenture were registered after it was clear that the First Defendant had no intention of proceeding with the project. I also note that the registration of the deeds and debenture incurred stamp duty and penalties totaling $1,412,380.00 which was paid by SIS at a time when no monies had been advanced by RFRL to SIS. SIS was aware that no funding would be required for the project, because it had already signaled its intention to withdraw to NGC. It was clear to SIS and RFRL that no funding would be required at this stage, yet they proceeded with the registration of the deeds and debenture at significant expense to SIS.

[73] The recitals in the mortgage are inconsistent with the pleaded case of the Defendants and the testimony of Mr. Lalla for the First Defendant.

The Defendants pleaded that monies were to be disbursed only when the financing was secured, however the recitals state that TT$330 million was paid to SIS by RFRL.

[74] I have also taken into account the fact that Mr. Lalla's evidence contradicted his pleaded case. At trial he testified, for the first time, that:

i. the mortgages did not contain the terms of what was agreed between himself and Mr. Siriram of RFRL[34] and
ii. the mortgages and debenture were not prepared in accordance with the instructions given to SIS's lawyers.[35]
iii. his evidence also contradicted his witness statement.[36] As a result of these inconsistencies on the central issue in this case, I formed the view that Mr. Lalla was neither reliable nor creditworthy. It is entirely unbelievable that Mr. Lalla and his lawyers would have failed to notice before the trial that the mortgages did not reflect Mr. Lalla's instruction and glaringly contradicted his case that these transactions were entered into on the basis that monies would only be disbursed as required and that the deeds were to be held in escrow.

[75] A review of the pleadings and evidence in this case has led me to conclude that the deeds and debenture were executed with intent to defraud NGC. The inconsistencies in the evidence of Mr. Lalla on a material issue – the reason why the deeds and debenture were created and registered served to undermine the main plank of the Defendant's defence – that those transactions were commercial in nature, made for a straightforward purpose – to provide financing for the First Defendant by the Second Defendant.

[34] Page 82 lines 19-23 of the Transcript of 19th September 2019
[35] Page 73 lines 9-23 of the Transcript 19th September 2019
[36] Paragraph 22 Witness Statement of K. Lalla filed on 22nd Feb 2016

[76] Mr. Lalla adduced no documentary evidence in support of his claim that his bankers of thirty years, Scotiabank, abruptly withdrew all credit facilities from SIS while the latter was in the middle of executing a billion dollar project. It is reasonable to expect that this communication must have been made in writing – in any event it should not have been difficult to adduce this evidence if it existed, either by way of a witness statement or witness summons. His evidence that he approached Republic Bank Limited and First Citizens' Bank for credit facilities, which was declined in April and August 2015 respectively[37], was also not supported by documents or any evidence from the banks in circumstances where SIS would be expected to call this evidence in order to support its contention that it approached RFRL to secure financing because he was declined by these banks. The failure to adduce any documentary evidence in support of this narrative is all the more startling when one considers that SIS was seeking financing for some three hundred million dollars (TT$ 300,000,000.00).

[77] The evidence of this witness that SIS sought financing from RFRL – a paper company was not creditworthy. There is no evidence before me either from RFRL or SIS as to the steps taken by Mr. Siriram to raise TT$ 300,000,000 dollars, or the capacity of RFRL to raise that sum of money. No documents evidencing the agreement between Mr. Lalla and Mr. Siriram of RFRL, or SIS and RFRL, was adduced in circumstances where such documentation is reasonably expected to exist – after all, the money to be loaned to SIS was significant; as well, SIS mortgaged most, if not all, of its properties and assets in order to purportedly secure this financing, thereby putting its not inconsiderable properties and assets at risk, especially in the circumstances where it had not received one cent as consideration for such conveyances and debenture. It is inconceivable and highly improbable that there would be no written record of the agreement between these Defendants.

[37] Paragraphs 6 and 8 of the witness statement of K. Lalla

[78] Although Mr. Siriram had filed a witness statement in these proceedings he did not attend at trial for cross-examination. No application was made for an adjournment in order to have him attend for cross-examination. Accordingly, no evidence was adduced before this court on behalf of the Second Defendant in support of its contention that the mortgages and debenture entered by RFRL and SIS were valid commercial transactions entered into in good faith with no intent to defraud NGC, a creditor. No evidence of the agreement/arrangement entered into by Mr. Lalla on behalf of SIS and Mr. Siriram on behalf of RFRL was adduced on behalf of the Second Defendant.

[79] In light of the fact that this Defendant had adduced no evidence either written or oral in support of its case, I drew an adverse inference against it – that in the circumstances where the Claimant had established a prima facie case against RFRL, its failure to put forward a witness(es) for cross-examination/adduce documentary evidence of the agreement/arrangement with Mr. Lalla of SIS was because if called, any such witness would not support its case and no documents existed or if they did they would not support RFRL's defence. This served to buttress my view that this Defendant, like SIS, created the mortgages and the debenture with intent to defraud creditors, including NGC, SIS's creditor[38].

[80] I also hold that the mortgages and debenture having been executed and registered at a time when SIS had no need of financing, having indicated its withdrawal from the contract, and no money having been advanced by RFRL despite the recitals in the mortgages to the contrary, that these were voluntary dispositions in respect of which there was no consideration.

[38] Ian Sieunarine v Docs Engineering Works (1992) Ltd, CV2000-2387

[81] In the circumstances, the burden of disproving fraud fell to the Defendants; I hold that the Defendants have failed to discharge this burden for all the reasons cited herein[39]. In **Lloyd's Bank v Marcan[40]** Pennycuick J, interpreting S. 172 of the Law of Property Act 1925 (UK) which is identical to S. 78(1) of the Act opined:

> "*Then comes the expression "with intent to defraud creditors." I think it is fairly clear that the word "defraud" in this subsection is designed to reproduce the expression "hinder, delay or defraud" in the Statute of Elizabeth, and is not intended to be confined to cases of fraud in the ordinary modern sense of that word, i.e. as involving actual deceit or dishonesty. It is quite inconceivable that if Parliament had intended to circumscribe the effect of the old provision it would not have done so in clear terms. The word "defraud" in the context of Section 172, and having regard to the history of its statutory predecessor, must, I think, carry the meaning of depriving creditors of timely recourse to property which would otherwise be applicable for their benefit. This result can plainly be achieved by transactions in many forms, i.e. not only an outright conveyance but also a lease, charge, contractual agreement or, no doubt, in other ways.*
>
> *The word "intent" denotes a state of mind. A man's intention is a question of fact. Actual intent may unquestionably be proved by direct evidence or may be inferred from surrounding circumstances. Intent may also be imputed on the basis that a man must be presumed to intend the natural consequences of his own act: see the judgment of Lord Hatherley L.C. and Giffard L.J. in Freeman v Pope(1870) 5 Ch. App. 538. I would mention that today this imputation might well be considered applicable where there has been a valuable consideration short of full consideration. I do*

[39] Halsbury's Laws of England 4th Edition Vol 18 para 365

[40] 1973 1WLR 339 Ch p 344 H

not, however, propose to pursue that point for this reason. In the present case there is evidence of actual intention. That, of course, is by no means always so in cases under this section. Where there is evidence of actual intention, in the nature of things there is very little room for imputing intention.

[82] From the facts of this case, there is evidence of a clear intention to defraud NGC by these Defendants. Even if the burden had been on the Claimant to satisfy this Court on a balance of probability that the Defendants entered into those transactions with intent to defraud SIS's creditors, I hold that NGC has satisfied that burden by proving that:

(i) the instruments contain false recitals as to monies being loaned to SIS by RFRL when no such sums were in fact loaned;
(ii) there was no consideration for the instruments as no loans were granted;
(iii) RFRL was a paper company with no assets and accordingly incapable of loaning monies to SIS;
(iv) the instruments, when taken together, purport to give security over all of the property and assets of SIS and provide RFRL with a right to sell all such property in the event of default of payment by SIS;
(v) the instruments were registered by SIS at a time when it was plain that it was not going to complete the project and no financing was necessary;[41] and
(vi) notwithstanding the matters at (v), SIS nonetheless proceeded to pay stamp duty and penalties in excess of $1.4 million to register the instruments.

[83] On the basis of the evidence, pleadings and documents filed in this case, I conclude that the mortgages and debenture were created and registered with intent to defraud SIS's creditors including the Claimant.

[41] See para 35 (e) of NGC's principal submissions.

Issue (c) Whether the Claimant has suffered any prejudice as a result of the Deeds

The Defendants' Submissions

[84] Both Defendants submitted that the Claimant has not shown that it has suffered any real prejudice by the creation of the mortgages and debenture since the Defendants have maintained from the outset that the monies intended to be loaned and secured under the deeds were never in fact loaned. As a result in law there is no encumbrance on the properties and SIS is entitled to call for the release of the deeds. RFRL submitted that SIS having pleaded that no funds were disbursed under the mortgage and no sums were therefore owed, the Second Defendant had no rights under the deeds.

[85] Relying on the case of **Atlantic Corporation[42],** the First Defendant submitted that even if the intent to defraud is established, the court cannot grant the declaration if there is no prejudice to the party seeking the declaration. Hayton J, considering S.149(1) of the Belize LPA[42] (similar to S.78(1) of the Act) opined *"Accordingly, we hold that NBLL's grant of the Legal Charge with intent to defraud Atlantic amounted to a "transfer of property" within S 149 of the LPA. DFC, however, will not be affected by this if not having notice of NBLL"s intent to defraud Atlantic and so having the protection of S 149(3). It is worth noting that "intent to defraud" suffices without there being any need for the "fraud" to be achieved. As we have held, however, where the fraud is not achieved, because NBLL's activities could not detract from the priority of Atlantic's Debenture over DFC's Legal Charge, Atlantic is not a "person thereby prejudiced" and thus is not able to invoke S 149…"*[43]

[42] CCJ Appeal No CV 7 of 2011

[43] At para 43. See also Para 52 where the Court issues final orders refusing the declaration under section 149

[86] The Defendants submitted, further, that the Claimant has not shown it suffered any prejudice as a result of the execution of the Mortgages and Debenture; even if those hurdles are crossed, the Claimant's claim would still fail because it cannot satisfy the element of proving prejudice. NGC must prove that it is a person "thereby prejudiced" to satisfy the elements of its claim.

[87] In her witness statement, Maria Thorne set out the prejudice purportedly suffered by the Claimant:[44]

i. The value of the Claimant's claim against the First Defendant under the Contract in the arbitration is in excess of TT$436 million plus interest and costs
ii. The freezing injunction is in the sum of TT$180 million
iii. All the assets and properties of SIS or their worth subject to the mortgages and debenture were encumbered and/or put beyond the Claimant's reach
iv. The Claimant, as a creditor of the First Defendant, is hindered from accessing the various assets and properties of SIS or their worth which are subject thereto in order to satisfy the First Defendant's payment obligation to it ; and/or
v. The Claimant, as a creditor of the First Defendant, is deprived of timely recourse to various assets and properties of the First Defendant which would otherwise be applicable for its benefit.

[88] The Defendants argued that the Claimant's assertion that it has suffered prejudice, based on the fact that it had to make a claim against the Defendant, cannot satisfy the requirement to prove prejudice. In response to the assertions of the Claimant, the Second Defendant submitted:

[44] Paragraph 33 of the Witness Statement of Maria Thorne

a) The arbitration proceedings are ongoing and there has been no determination in favour of the Claimant.
b) The Claimant, of its own accord, sought a freezing injunction in the sum of $180 million.
c) The assets of the First Defendant were not encumbered since no money passed.
d) The Claimant was not a creditor of the First Defendant and it has no determination from the arbitrator that the First Defendant has payment obligations to it, and as such the Claimant cannot claim it has been hindered.
e) The Claimant has not been deprived of timely recourse as the deeds could be released at any time.

[89] RFRL argued that, since no money passed and both the First and Second Defendants were always prepared to release the Mortgages, there could not be any prejudice suffered because of the Mortgages and Debenture. Further, at the time that the Mortgages were executed in March 2015, there were no claims made against the First Defendant by the Claimant and the Contract was in full force. Both the Mortgages and Debenture were registered in November 2015. The preparation of the debenture in respect of the Company was in effect a duplication of the Mortgages. There was no prejudice to the Claimant at the time the transactions were executed.

[90] The Second Defendant submitted that on 10th June 2016, this Court made an order to expunge the releases from the records of the Registrar General. On the 23rd November 2016, the Claim was automatically struck out pursuant to CPR Rule 27.3 (4) as confirmed by the Privy Council in its judgment.[45] The effect of the Privy Council judgment was that at the 4th April 2016 the Claim was struck out pursuant to Part 27.3 (4) and therefore the order made by the Court on 10th June 2016 in respect of the releases being expunged from the records of the

[45] National Gas Company of Trinidad and Tobago v SIS & anor JCPC [2018] UKPC 17 on 16th July 2018.
[46] See para 28 of the judgment where Giles JA agrees with the reasons of Allsop P on Ms. Marcolongo's appeal

Registrar General became null and void and of no effect having regard to the decision of then Privy Council. Further, the High Court did not set aside the releases when it restored the Claimant's claim, nor did it restore its order that the releases be expunged from the records of the Registrar General. Therefore by virtue of the order of the Court the releases stood as valid transactions.

Claimant's Submissions

[91] The Claimant submitted that in **Chen v Marcolongo; Chen v Lym International Pty Ltd** [2009] NSWCA 326, the Court of Appeal defined the meaning of the phrase "a person thereby prejudiced". Allsop P (the President of the Court), with whom Giles JA agreed[46], opined:

> *"On the question of the meaning of the phrase "any person thereby prejudiced", the evidence disclosed that Mrs. Marcolongo had a bona fide claim for unliquidated damages …… I do not think that s 37A requires the proof, by a trial within a trial that the claim will necessarily or even probably succeed. In advance of a hearing a party with a bona fide claim is prejudiced if a disposition of property by the defendant would leave the claimant without a likely adequate fund against which to proceed. This is consistent with the proposition that prospective creditors are included in the concept of creditors: Green v Schneller [2001] NSWSC 897; 189 ALR 464 at 468 [16]. The statute should be read liberally as one for the suppression of fraud."*

[92] It was further submitted that evidence adduced by the Claimant in the witness statement of Ms. Thorne was that, as a consequence of the Mortgages and the Debenture, NGC has suffered prejudice in that: [47]

i. the value of NGC's claim against SIS under the Contract in the arbitration is in excess of TT$436 million plus interest and costs;
ii. the freezing injunction obtained against SIS in this action is in the sum of TT$180 million;
iii. all the assets and properties of SIS, or their worth, which are

[47] See para 33 of the Thorne Witness Statement at pg. 1055 of Trial Bundle – Core Bundle Vol 2B.

subject to the Mortgages and the Debenture were encumbered and/or put beyond NGC's reach;

iv. NGC, as a creditor of SIS, is hindered from accessing the various assets and properties of SIS, or their worth, which are subject thereto in order to satisfy SIS's payment obligations to it; and/or

v. NGC, as a creditor of SIS, is deprived of timely recourse to various assets and properties of SIS which would otherwise be applicable for its benefit.

[93] NGC contended that SIS has admitted that it is liable to NGC for repayment of the Mobilization Payment in the sum of US$32,411,063.75 - such sum having been advanced to SIS as a loan in May 2014 and never repaid. In the circumstances, at a minimum, NGC is a creditor in respect of the Mobilization Payment and/or, like Ms. Marcolongo is a prospective creditor, in respect of its arbitration claim against SIS for upwards of TT$436 million.

[94] The Claimant submitted that the rational and probable consequence of the Mortgages and the Debenture was to delay, hinder or defraud creditors. Indeed, the fact that a mortgage, which represents a transaction in which the parties intended not to create the legal rights and obligations that they gave the appearance of creating, can be set aside under section 78 is not in doubt. In **Kang v Kwan & Ors**[47] Santow J acknowledged[48] that the plaintiff, who was affected by such a mortgage, was clearly a person "thereby prejudiced" under section 37A of the New South Wales Conveyancing Amendment Act and went on to hold, inter alia, that the mortgage before him should be set aside.

[95] In the premises, NGC is a person prejudiced by reason of the Mortgages and Debenture and qualifies as such for the purposes of section 78 of the Act.

[48] See paras 184, 189 and 193 of the judgment.

ANALYSIS – Issue (c)

[96] I have already determined that the mortgages and debenture were created and registered with the dishonest intention of defrauding SIS's creditors. These were entirely voluntary conveyances for no consideration, despite the fact that the recitals indicated that SIS received some $330 million dollars in exchange for the conveyance of most if not all of its properties to RFRL, a paper company. Having determined that NGC is a creditor of SIS, then the documents were clearly intended to give to third parties the appearance of creating between SIS and RFRL legal rights and obligations different from the actual rights and obligations (if any) which the parties intended to create.[49] Both SIS and RFRL have freely admitted that no monies were advanced to SIS from RFRL despite the contrary indication on the face of those documents. As noted above, the mortgages and debenture were registered at a time when SIS had already indicated that it was not proceeding with the contract and there was therefore no need for any financing. The only reasonable inference to be drawn from these facts, which I have drawn, is that these Defendants created these instruments to hinder creditors, including the Claimant, from accessing SIS's assets and properties in order to satisfy any Order or judgment obtained by NGC against SIS. As noted earlier, the First Defendant acknowledged that it was liable to refund to the Claimant the Mobilization Payment advanced to SIS at the commencement of the contract. The parties are now in arbitration with competing claims for payment. Although the Arbitration has not been determined, the Claimant is a creditor and stood to be prejudiced by the actions of the Defendants in transferring all SIS's property and assets to RFRL.

[97] The fact that the Defendants confessed that no monies were advanced and offered to release the mortgages and debenture, does not affect the fact that the Claimant was and is prejudiced by the actions of the

[49] Snook v London and West Riding Investment Ltd. 1967 Q 13 per Diplock L. J. p 802 D

Defendants.

[98] The Defendants argue that the mortgages and debenture have been released or discharged since the Order made by this Court on the 10th June 2016, that the Deed of Release, in respect of the mortgages and debenture were of no effect, was not reinstated; as a consequence the mortgages and debenture stand released and there are no mortgages and debenture to be set aside since a Court will not act in vain. The Defendants also contend that given their offer from the outset to release their instruments and the fact of their release, the Claimant has suffered no prejudice.

[99] On this head, I note that there was no appeal against that aspect of my Order of June 10th 2016 and neither the Court of Appeal nor the Privy Council dealt with this part of my Order. Further, I note, that by my ruling given on the 8th February 2019, I held that "where a claim struck out pursuant to CPR 27.3 is later restored, interlocutory orders given when the Claim previously subsisted are revived with it."[50] In the circumstances I hold that paragraph two of the Order made on the 10th June 2016 is valid and subsists.

[100] I agree with the Claimant's submission that even if the release is valid, an Order must be granted setting aside the mortgages and debenture, in light of my conclusion that they were dishonestly created.

[101] I, therefore, hold that the Claimant was prejudiced by the creation and registration of the deeds and debenture.

Issue (d) Sham Transactions

Submissions of the First Defendant

[50] Paragraph 56 of the Order of Justice Charles dated 8th Feb 2019

[102] The First Defendant submitted that none of the *badges of fraud*[51] are applicable, although the Claimant, in its opening speech, contended that the following are applicable:

i. *The conveyance comprised substantially the whole of the transferor's property.* SIS argued that this fact does not support an intent to defraud since the First Defendant clearly required financing for a very substantial project (BWRP). The amounts stated on the Deeds are not inconsistent with the magnitude of financing that would be required by the First Defendant to complete the project; the court ought not to draw any conclusive inferences from this.

ii. *The Deed contained a false recital.* The Claimant relied on the fact that the impugned Deeds purport that moneys passed under the mortgage when in fact none passed to buttress her argument that the Deeds and Debenture were created with fraudulent intent. This was explained as part of a transaction in which the First Defendant sought financing and on the basis of the arrangements between the First Defendant and the Second Defendant and the Deeds were executed acting on advice from Attorneys for the First Defendant. The First Defendant also asserted that:

a) Contemporaneous documents, namely the minutes of meetings held between NGC and SIS on the 19th October, 2015 and the 21st October, 2015[52] respectively, clearly show that the First Defendant had indicated to NGC that they no longer had a credit facility from Scotiabank, that they were unable to further fund the project themselves and that they had financing arrangements in place, once a way forward was agreed. This demonstrated consistency in the case of the

[51] Para 366 Halsbury's Laws of England 4th Ed Vol 18 para 366
[52] Pages 287 and 99 respectively of Trial Bundle Other Documents Volume 1

Defendants and the fact that NGC was at all material times aware of this situation.

b) The evidence of Krishna Lalla was consistent with the contemporaneous documents, namely the minutes of meetings referred to above; he also gave a full and detailed account of the circumstances which gave rise to the need for financing for the project and the reason why the arrangements with the Second Defendant were put in place to obtain the required financing.

Issue (d)

Submissions of the Second Defendant

[103] RFRL contended that the Mortgages and Debenture made in favour of the Second Defendant are capable of innocent meanings and cannot justify an inference of dishonesty. This Defendant submitted that fraud has not been pleaded in accordance with the requirements of the law since the primary facts and inferences to be drawn from them have not been pleaded (See case of Paragon Finance plc (formerly known as **National Home Loans Corp plc) v Hare 1999 LexisCitation 2456**) at page 6

> *"Mr Parker submitted that the plaintiffs' case concerning Ranga's knowledge is fully set out in the pleading, but in a case of this kind it is not sufficient for a plaintiff simply to include all the necessary allegations without pleading the inferences which he says are to be drawn from them. It is incumbent on him both to plead the primary facts on which he relies and to set out clearly how they give rise to the inference that the defendants were parties to a conspiracy. That, it seems to me, is what Carnwath J had in mind when he said that the plaintiffs had to make clear the logical connection between the facts pleaded and the substantive allegations. If that is not done, the defendant is placed in a*

difficulty because he is unable to identify clearly the nature of the case to which he must plead and which he must meet at trial."

[104] The Second Defendant argued that the contemporaneous documents set out in the Trial Bundle (Volume 1) support the Defendants' case. He relied upon:

(i) *Letter dated 14th September 2015 from the First Defendant to the Claimant page 77 Trial Bundle Vol 1*- In this letter the First Defendant confirmed that, at 14th September 2015, SIS raised the issue that since September 2013, senior government officers and Minister had made serious allegations about the project. The letter lists the conduct of said government officers in direct opposition to the contract, including calling for the project to be stopped, calling for probes into the contract and promising to go to Court to have the contract stopped. These allegations caused ScotiaBank to fear that steps may be taken to terminate the contract.

(ii) *Letter dated 5th October 2015 from the First Defendant to the Claimant – page 83 Trial Bundle Vol 1*- In this letter the First Defendant raises its concerns about the decision of the Claimant to appoint an Engineer which was not in conformance with the Contract, and the First Defendant requested that the parties meet on the matter to consider the implications of the changed circumstances.

(iii) *Letter dated 14th October 2015 from the First Defendant to the Claimant – page 93 Trial Bundle Vol 1* - the First Defendant explained the difficulties it was experiencing including firebombing of its equipment and threats which caused fear and panic among its employees, and that it had begun to withdraw resources and equipment.

(iv) *Letter dated 15th October 2015 from the First Defendant to the Claimant - page 95 Trial Bundle Vol 1*- the First Defendant

referred to the difficulties it was experiencing and wanted to meet with the Claimant to discuss the way forward.

[105] It was submitted that these contemporaneous letters show that despite various challenges the First Defendant was experiencing, the First Defendant was still interested in performing the Contract, which is evidence of its intention of honesty. These documents support the Defendants' contention that the First Defendant was prepared to carry out the Contract and therefore would have made arrangements to obtain the necessary credit facilities for the performance of the Contract.

(i) *Minutes of Meeting dated 19th October 2015* - page *287 Trial Bundle Vol 1*- The document provides the minutes of a meeting between officers of the Claimant, including Danford Mapp, and officers of the Defendant. The First Defendant's officers informed the Claimant that it had cost overruns of approximately $30 million and that Scotiabank had withdrawn the First Defendant's credit facility due to the Bank's discomfort with the project's risk. The First Defendant's officers also indicated at that meeting that although the First Defendant had been funding the works without this credit facility for some time that could no longer be sustained by the First Defendant.

(ii) *Minutes of Meeting dated 21st October 2015 - at page 100 Trial Bundle Vol 1*- This document provides the minutes of a meeting between the Claimant's officers including Maria Thorne and the First Defendant's officers at which the First Defendant advised the Claimant that it could no longer fund the works especially with the withdrawal of its credit facility ScotiaBank and that the First Defendant had financiers who were willing to provide funding.

(iii) These documents are contemporaneous evidence supporting the Defendants' contention that the Claimant was aware that Scotiabank had withdrawn its credit facilities and that the First Defendant approached different financiers who were prepared to provide funding once NGC confirmed the Contract. The Claimant was aware, therefore, that the First Defendant had made arrangements to secure credit facilities for the future performance of the Contract. These documents also support the submission that there was no pretence by the First and Second Defendant in carrying out the transactions to secure funding.

(iv) *Newspaper articles dated 1st November 2015, 15th November 2015 and 16th November 2015 Trial Bundle Volume 1 pages 123 – 125* – These articles report adverse public comments made about the Contract as alleged by the First Defendant.

(v) These contemporaneous documents support the Defendants' case that there was bad publicity against the First Defendant in relation to the Contract and that Scotiabank and other banks were concerned about same to the extent that the First Defendant could not obtain funding from traditional bankers.

[106] RFRL contended that these contemporaneous documents support the Defendants' case that there was no dishonesty or pretence by the First and Second Defendants in the execution of the Mortgages and Debenture. These documents also support the credibility of Mr. Lalla in describing the reasons for and the circumstances in executing the Mortgages and Debenture for the purpose of obtaining funding after the withdrawal of the credit facility.

Issue (d)

Submissions of the Claimant

[107] Quite apart from its claim under the provisions of section 78 of the Act,

NGC also contended that it is entitled to have the Mortgages and the Debenture set aside on the basis that they amount to sham transactions.[53] It is well settled that the High Court has an inherent jurisdiction to do so: see **Emmet and Farrand on Title.**[54]

[108] The Claimant submitted that the mortgages and debenture amount to sham transactions since they were created with intent to delay, hinder, and/or defraud NGC. The Claimant relied on the facts and matters pleaded in this case, as well as the evidence adduced in support of its contention. The Claimant particularly relied on the matters outlined in paragraph 86 **supra** which it contended were badges of fraud rendering the transaction fraudulent and made with dishonest intent to give third parties and the court the appearance of creating legal rights and obligations which did not actually exist.

[109] The Claimant also submitted that, when considering whether a transaction is a sham, the court is not restricted to considering activities which took place before or at the time of the transaction: it is perfectly proper to consider how the parties subsequently acted.

Analysis of Issue (d)

[110] In **Snook v London and West Riding Investments Limited**[55] Lord Diplock opined:

> "As regards the contention of the plaintiff that the transactions C between himself, Auto Finance and the defendants were a " sham," it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the "sham" which are

[53] See para 25 of the Statement of Claim at pg 41 of Trial Bundle – Core Bundle Vol 1.
[54] (2007 ed.) at para 5.028.

[55] [1967] 2 QB 786 at 802

> intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities (see *Yorkshire Railway Wagon Co.* V. *Maclure*[15] and *Stoneleigh Finance Ltd.* v. *Phillips),*[1"] that for acts or documents to be a " sham," with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating."

Further, in **National Westminster Bank Plc v Jones** [2001] BCLC 98 at 111 C Neuberger J (as he then was), after reviewing the authorities in relation to sham transactions, stated:

> "In my judgment, the whole point of a sham provision or agreement is that the parties intend to give the impression that they are agreeing that which is stated in the provision or agreement, while in fact they have no intention of honouring with their respective obligations, or enjoying their respective rights' under the provision or agreement."

In light of my conclusion above, I have no difficulty in finding that the mortgages and debenture so created were sham transactions created to delay, hinder and/or defraud NGC, SIS's creditor from accessing SIS's properties and assets in order to satisfy any Order or judgment obtained by NGC against SIS.

As indicated above, I found that both Defendants clearly shared a common intention that the mortgages and debenture did not create the legal rights and obligations which they give the appearance of creating. Both Defendants have freely admitted this fact throughout these proceedings. The failure of the second Defendant to submit to cross-examination or adduce any documents to support its case that these were not sham transactions, undermined its assertions to the contrary. I have already determined that Mr. Lalla's testimony was neither creditworthy nor reliable and indeed strengthened the case against both

Defendants by reason of the inconsistencies contained therein, contradictions with the First Defendants' pleaded case and fresh evidence to explain the false recitals. I do not accept that the documents relied on by both Defendants support an honest/innocent reason for its creation of the deeds and debenture. In my view, they support the claim that they amount to badges of fraud.[56] In any event, Mr. Lalla's evidence was not supported by documents disclosed in this case.

CONCLUSION

[111] I therefore Order:

1. Judgment for the Claimant against the Defendants.

I grant the following Declarations:

A. As against SIS and RFRL:

i. a declaration that Deed of Mortgage dated 5th March 2015 registered as No. DE2015 02701816 D001 on the 4th November 2015 ("**the First Mortgage**") and made between SIS of the One Part and RFRL of the Other Part in respect of SIS's leasehold interest in ALL AND SINGULAR that piece or parcel of land together with the building thereon and the appurtenances thereto belonging situate in the Ward of Couva in the Island of Trinidad comprising 12.1412 HECTARES and bounded on the North by lands of Caroni (1975) Limited on the South by lands of Caroni (1975) Limited on the East by Waterloo Road on the West by lands of Point Lisas Industrial Estate Development Company Limited delineated and shown coloured pink on the plan marked "A" annexed to Deed of

[56] Badges of fraud – 1) false recitals in mortgages and debenture, no money advanced; 2) para 89

Lease dated 26th November 2001 registered as No. DE2002 0000 4240D001 and made between Caroni (1975) Limited of the One Part and SIS of the Other Part, was made by SIS to delay, hinder and/or defraud NGC;

ii. a declaration that Deed of Mortgage dated 5th March 2015 registered as No. DE2015 02701795 D001 on the 4th November 2015 ("**the Second Mortgage**") and made between SIS of the One Part and RFRL of the Other Part in respect of SIS's freehold interest in ALL AND SINGULAR that certain piece or parcel of land situate in the Ward of Montserrat in the Island of Trinidad being portion of "Esperanza Estate" comprising ZERO·POINT TWO TWO TWO ONE of a Hectare (0.2221 ha) delineated shown uncoloured and designated as ZERO POINT TWO TWO TWO ONE HECTARES on the plan marked "P" annexed to Deed registered as No.25087 of 1999 but upon recent survey found to comprise TWO TWO TWO ONE POINT THREE SQUARE METRES (2212.3 sq.m) and bounded on the North upon San Coco Road on the South partly upon an Access Road and partly upon lands formerly of Mamora Bay Limited by now of Winfield Aleong and Others on the East partly upon San Coco Road and partly upon Esperanza Estate and on the West partly upon San Coco Road partly upon an Access Road and partly upon lands formerly of Mamora Bay Limited now lands of Winfield Aleong and which said piece or parcel of land is delineated and coloured pink on the plan marked "X" to Deed dated the 28th day of October 2002 and registered as No. DE2004 00350539 D001, was made by SIS to delay, hinder and/or defraud NGC;

iii. a declaration that Deed of Mortgage dated 5th March 2015 registered as No. DE2015 02766359 D001 on the 12th November 2015 ("**the Third Mortgage**") and made between

SIS of the One Part and RFRL of the Other Part in respect of SIS's leasehold interest in ALL AND SINGULAR that piece or parcel of land situate in the Ward of Couva in the Island of Trinidad comprising One Point Zero Nine Nine Four Hectares (1.0994 Ha) be the same more or less and bounded on the North partly by North Sea Drive and partly by lands owned by the Lessor and leased to Industrial Gases Limited on the South partly by lands owned by the Lessor and leased to Trinidad and Tobago Electricity Commission and partly by lands owned by the Lessor and leased to Phoenix Park Gas Processors Limited on the East partly by lands owned by Lessor and leased to Industrial Gases Limited and partly by a River Reserve and on the West partly by North Sea Drive and partly by Rio Grande Drive and which piece or parcel of land is delineated and shown coloured pink and marked l.0994ha on the plan marked "B" and annexed to Deed of Lease dated the 25th day of April 2008 registered as No. DE2008 0110 6715 and made between Point Lisas Industrial Port Development Corporation Limited of the One Part and SIS of the Other Part, was made by SIS to delay, hinder and/or defraud NGC;

iv. a declaration that Deed of Mortgage dated 5th March 2015 registered as No. DE2015 02763612 D001 on the 12th November 2015 ("**the Fourth Mortgage**") and made between SIS of the One Part and RFRL of the Other Part in respect of SIS's leasehold interest in ALL AND SINGULAR those two pieces or parcels of land situate in the Ward of Couva in the Island of Trinidad together comprising One Point Seven Zero Three Six Hectares (1.7036 Ha) be the same more or less The First Thereof comprising One Point Zero One Six Zero Hectares (1.0160 ha) bounded on the North partly by lands owned by the Lessor and leased to Alescon Readymix Limited and partly

by the Southern Main Road on the South by Drain approximately 10.0m wide on the East by the Southern Main Road and on the West by (Abandoned) Trinidad Government Railway Reserved and The Second Thereof comprising Zero Point Six Eight Seven Six Hectares (0.6876 Ha) and bounded on the North partly by Drain 10.0metres wide and partly by the Southern Main Road on the South by Drain approximately 10.0m wide on the East by the Southern Main Road and on the West by (Abandoned) Trinidad Government Railway Reserve and which two pieces or parcels of land are delineated and shown coloured pink and marked (1) 1.0160ha and (2) 0.6876ha respectively on the plan marked "B" and annexed to Deed of Lease dated the 25th day of April 2008 registered as No. DE2008 0110 6836 and made between Point Lisas Industrial Port Development Corporation Limited of the One Part and SIS of the Other Part, was made by SIS to delay, hinder and/or defraud NGC;

v. a declaration that Deed of Debenture dated 12th November 2015 registered as No. DE2015 02815387 D001 on the 18th November 2015 ("**the Debenture**") and made between SIS of the One Part and RFRL of the Other Part whereby SIS charged its undertaking goodwill motor vehicles and property and assets and rights whatsoever and wheresoever both present and future including SIS' uncalled capital and book debts for the time being on the terms and conditions contained in the Debenture, was made by SIS to delay, hinder and/or defraud NGC.

I also grant the following Orders:

(i) an order that the First Mortgage, Second Mortgage, Third Mortgage, Fourth Mortgage and the Debenture each be set

aside pursuant to section 78(1) of the Conveyancing and Law of Property Act Chap 56:01;

(ii) a declaration that the mortgages and debenture each constitute sham transactions and are set aside;

(iii) an order directing the Registrar General to expunge the First Mortgage, Second Mortgage, Third Mortgage, Fourth Mortgage and Debenture from the Index of Deeds kept pursuant to section 4 of the Registrar General Act Chap 19:03;

(iv) an order directing the Registrar of Companies to expunge from the Companies Registry all Statements of Charge filed in respect of the First Mortgage, Second Mortgage, Third Mortgage, Fourth Mortgage and the Debenture;

The Defendant to pay to the Claimant budgeted costs in the sum of $622,108.33 plus VAT plus Disbursements of $17,039.25 pursuant to the Order of this Court dated 4th July 2019.

Joan Charles
Judge