THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO. CV 2015 - 03992

Between

RBC ROYAL BANK (TRINIDAD & TOBAGO) LIMITED

Claimant

And

ACE RECYCLING LIMITED

CARIBBEAN BATTERY RECYCLING LIMITED

SLARTEK SERVICES LIMITED

RDAC LIMITED

ALDWYN CLARKE

KEVIN CLARKE

TRICIA CLARKE-DE FREITAS

Defendants

BEFORE THE HONOURABLE MR. JUSTICE A. DES VIGNES

Appearances:

Mr. Jonathan Walker instructed by Mr. David Hamel-Smith for the Claimant
Mr. John Z. Heath instructed by Mr. Lee Merry for the Defendants

DECISION

THE APPLICATION FOR SUMMARY JUDGMENT

1. By Notice of Application filed on 19th May, 2016 the Claimant applied for summary judgment against the Defendants on its entire claim together with interest, pursuant to **Part 15 of the**

Civil Proceedings Rules (1998) as amended (hereinafter called "the CPR"). The Claimant also seeks orders pursuant to **Parts 67.5 and 67.11 of the CPR** respectively that the costs of the action and of the application be paid by the Defendants.

2. The Claimant's application for summary judgment was based on the grounds that the Defendants have no realistic prospect of success on their defence to the claim and there was no reason why the disposal of the claim should await trial. The Claimant's application was supported by the affidavit of Mr. Darryl White, Managing Director of the Claimant. The Claimant also indicated in its application that it intended to rely on the Statement of Case and the Defences filed in the matter.

3. The Defendant did not file any affidavit in opposition to the application for summary judgment.

4. In support of its application for summary judgment, the Claimant submitted that:[1]

    a. The Defendants' Defences in this matter are based on: (i) the assertion that "depriving" is not a basis for a cause of action or a cause of action on which the Claimant is entitled to rely; (ii) the assertion that there was never any intention to permanently deprive the Claimant of any monies; (iii) the assertion that the Claimant made the decision to provide the facility which allowed the Corporate Defendants to artificially inflate their accounts and accordingly knowingly undertook the risk; and (iv) a denial of personal liability by the Directors. These limbs of defence do not have any realistic prospect of success; and

    b. There is no genuine factual dispute over any of the facts relevant to the key issues and as such, the matter ought to be disposed of without a trial.

5. In opposition to the application for summary judgment, the Defendant submitted that:[2]

    a. There are serious issues of fact and law which ought to be decided by allowing the trial process to proceed so that issues raised on the pleadings can be addressed by the Court;

    b. There are no circumstances that exist that make it unjust for this matter to proceed to trial;

[1] Claimant's Written Submissions filed 8th July, 2016.
[2] Defendant's Written Submissions filed 20th September, 2016.

c. The Claimant cannot satisfy the Court that all of the elements of the claims of theft and unjust enrichment have been proved against the Defendants;

d. The affidavit evidence of Mr. White, led in support of the Claimant's application contains, in the first instance, no evidence that can assist in the determination of this application and secondly, it includes new facts which have not been pleaded.

LAW, ANALYSIS AND FINDINGS

6. In considering the application for summary judgement, I must consider whether the Defence of the First, Second Third and Fourth Defendants (hereinafter collectively called "the Corporate Defendants") and the Defence of the Fifth, Sixth and Seventh Defendants (hereinafter called "the Directors") disclose a Defence with a realistic prospect of success.

7. **Part 15 of the CPR** sets out the procedure by which the Court may decide a claim or part of a claim without a trial. According to **Part 15.2(a)** thereof, the grounds upon which the court may give summary judgment to a Claimant are as follows:

"15.2 The court may give summary judgment on the whole or part of a claim or on a particular issue if it considers that:

(a) on an application by the claimant, the defendant has no realistic prospect of success on his defence to the claim, part of claim or issue…"

8. In respect of the general principles to be considered by the Court in determining an application for summary judgment, Mendonca J.A. in **APUA Funding Limited & Another v. RBTT Trust Limited**[3] applied the dicta set out by Lewinson J. in the case of Federal Republic of Nigeria v Santolina Investment Corporation and Ors. [2007] EWHC 437. The said principles relied therein are as follows:

"19. …(i) The court must consider whether the defendant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 1 ALLER 91, [2000] PIQR p. 51;

[3]Civ. App. No. 94 of 2010 at para. 19 – Delivered 6th November, 2015.

(ii) A "realistic" defence is one that carries some degree of conviction. This means that it is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ. 472 at 8.

(iii) In reaching its conclusion the court must not conduct a "mini trial": Swain v Hillman;

(iv) This does not mean that the court must take at face value and without analysis everything that a defendant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED&F Man Liquid Products v Patel at 10;

(v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No. 5) [2001] EWCA Viv. 550 [2001] Lloyd's Rep PN 526;

(vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd. v Bolton Pharmaceuticals Pharmaceutical Co. 100 Ltd. [2007] FSR 63;

(vii)Although there is no longer an absolute bar on obtaining summary judgment when fraud is alleged, the fact that a claim is based on fraud is a relevant factor. The risk of the finding of dishonesty may itself provide a compelling reason for allowing a case to proceed to trial, even where the case looks strong on the papers: Wrexham Association Football Club Ltd. v Crucial Move Ltd. [2006] EWCA Civ. 237 at 57." [emphasis mine].

9. In **APUA** (supra)[4] Mendonca JA. went on to state as follows:

"20. In Easyair Ltd. (t/a Openair) v Opal Telecom Ltd. [2009] EWHC 339 (Ch) Lewison, J. in relation to an application by a defendant to strike out a claim added the following

[4] Ibid at paras. 20-21.

consideration (at para 15) which I think is equally relevant to an application by a claimant for summary judgment:

> *"On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and the parties have had an adequate opportunity to address this in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that it is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it will be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction..."*

21. It is evident from the above that the summary judgment application is not meant to dispense with the need for trial where there are issues which should be investigated at trial, but as Lord Woolf MR noted in Swain v Hillman (at 94):

> *"It is important that a judge in appropriate cases should make use of the powers contained in Part 24 (the English equivalent to our Part 15). In doing so he or she gives effect to the overriding objectives contained in part 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is the claimant's interests to know as soon possible that is the position. Likewise, if a claim is bound to succeed, a claimant should know that as soon as possible."*

10. At paragraphs 5 and 15 respectively of the Statement of Case the Claimant alleges that "*the Defendants conspired to defraud or otherwise steal from RBC the sum of $22,564,306.55 through the implementation of a circular 'kiting' scheme." and "the Defendants defrauded, stole or otherwise deprived RBC of the sum of $21, 339,211.69 and RBC has suffered damage in that amount. Alternatively the Defendants have been unjustly enriched to the face value of the dishonoured cheques at the expense and to the detriment of RBC."* Both the Corporate Defendants and the Directors deny these allegations in their respective Defences.

11. On an examination of the Claimant's pleadings in this matter, the causes of action that the Defendants have been called upon to answer are fraud and conspiracy to defraud and/or theft and stealing and/or unjust enrichment. I propose to examine the submissions of the parties with respect to these causes of action seriatim. In the first instance, the issue to be determined is whether the Defences of the Defendants discloses a realistic prospect of success to the claim of fraud and conspiracy to defraud.

Fraud and conspiracy to defraud

12. In response to the allegations of fraud and conspiracy to defraud, the Corporate Defendants contend as follows at paragraphs 2 to 4 and 10-11 of their Defence:

    a. The issue of conspiracy could not arise as the cheque kiting scheme would not be possible without the knowledge and/or consent of the Claimant;

    b. There was never any intention to permanently deprive the Claimant of any monies and it was always its intention to repay the Claimant;

    c. The Claimant, through its own unilateral decision, provided the Corporate Defendants with a facility whereby its accounts with the Claimant could be artificially inflated;

    d. It was obvious to the Claimant that the Corporate Defendants did not have the assets to honour the payments being made on their accounts on a daily basis;

    e. The Claimant was aware that the accounts of the Corporate Defendants were artificially inflated and the Claimant actively participated in creating the inflated balance by allowing cheques to be drawn on same. Accordingly, the Claimant knowingly took a risk that the clearing of deposited cheques without hold could result in those cheques being negotiated and allowed the account to be overdrawn; and

    f. Depriving the Claimant is not the basis for a cause of action or one on which the Claimant can rely.

13. In response to the allegations of fraud and conspiracy to defraud the Directors contend as follows at paragraph 2 of their Defence:

a. The Fifth Defendant and Sixth Defendant had no involvement in the financial affairs of the Corporate Defendants. This was left entirely in the hands of the Seventh Defendant;

b. Although the Sixth Defendant was a co-signatory of the cheques issued by the Corporate Defendants, he pre-signed cheques as and when directed to do so by the Seventh Defendant; and

c. The actions complained of by the Claimant was committed by the Corporate Defendants alone and at all material times the Directors were acting in their corporate capacity and thus they cannot be held personally liable. The Corporate Defendants were not being used as a device or sham to conceal the wrongdoing.

14. Notwithstanding the aforementioned denials of the Corporate Defendants[5] and the Directors,[6] they all admitted that:

a. Between the 7th and 12th August, 2015, 47 cheques totalling $22,564,306.55 were presented to the Claimant for payment;

b. These cheques were signed by the Sixth and Seventh Defendant and were deposited at or about the same time on 7th August 2017 for and on behalf of the respective Defendants in whose favour they were made;

c. At the time when the cheques were made out and/or presented for payment, none of the accounts upon which they were drawn had sufficient funds to cover any of the cheques. As a consequence, the 47 cheques were returned to the Claimant by the drawer banks by reason of there being insufficient funds in the accounts upon which they were drawn to honour the payments;

d. At all material times, the Corporate Defendants knew at the time the cheques were issued and when they were presented for payment that there were insufficient funds in their accounts to cover the said cheques and did in fact present these cheques to the Claimant's Diego Martin branch for payment;

[5] Defence of the Corporate Defendants filed on 5th February, 2016 at paras. 5, 6, 8 and 12
[6] Defence of the Directors filed on 5th February, 2016 at paras. 5, 6, 8 and 12

e. The depositing of the cheques resulted in a false positive balance in the Corporate Defendants' accounts, as the Corporate Defendants well knew;

f. Upon the deposits being made into the Corporate Defendants' accounts, the Corporate Defendants immediately transferred via Automatic Clearing House Transfer procedure a total of $22,564,306.55 to other accounts maintained by the First Defendant at Intercommercial Bank and First Citizens Bank; and

g. On or about 13th August, 2015, the Fifth Defendant met with Mr. Darryl White and admitted that the Defendants had written the cheques and did not have the funds to cover these payments. The Fifth Defendant also explained that the monies were used to pay certain third parties who had loaned the Defendants monies at rates in excess of 30% per annum.

15. Having considered the pleadings and the submissions on this application as well as the relevant authorities, I am of the opinion that the Claimant is entitled to succeed on its application for summary judgment as the Defences of the Corporate Defendants and the Directors to the claim of fraud and conspiracy to defraud do not have a realistic prospect of success. My reasons are outlined hereunder.

16. On their own admissions, 47 cheques were made out by the Corporate Defendants, signed by the Sixth and Seventh Defendants, when the Corporate Defendants were aware that there were insufficient funds in their accounts to cover the cheques. Nonetheless, the Corporate Defendants presented the cheques for deposit into the accounts of the pertinent payees. As a consequence of the deposit of the cheques, a false positive balance in the accounts of the Corporate Defendants resulted, as the Corporate Defendants well knew. The Corporate Defendants then proceeded immediately to transfer via Automatic Clearing House transfer procedure $22,564,306.55 to other accounts maintained by the First Defendant at Intercommercial Bank and First Citizens Bank. The monies were then used to pay third parties who had loaned the Defendants monies at rates in excess of 30% per annum.

17. In my opinion, these admissions are in direct conflict with any denial of liability in respect of the claim of fraud and conspiracy to defraud the Claimant.

18. By way of written submissions, Counsel for the Defendants submitted that the Court should be slow to grant summary judgment in cases where findings of dishonestly were to be made. Counsel relied on **Apua** (supra) and distinguished **Wrexam Association Football Club Ltd v Crucialmove Ltd** [2006] EWCA Civ 237 which was relied on by Counsel for the Claimant, in this regard. The learning is clear that in such cases greater caution must be exercised before granting such an application. However, in this case, there have been admissions by the Defendants of conduct which on its face are fraudulent in nature and therefore dishonesty is apparent on the facts as pleaded.

19. The Defendants seek to rely on the defence that the Claimant was aware that their accounts were artificially inflated and had actively participated in creating this false positive balance by providing the facility whereby this could be done and allowing the cheques to be drawn thereon. It is on this basis that the Defendants contend that the Claimant knowingly undertook the risk that the accounts of the Corporate Defendants would be overdrawn.

20. I agree with the submissions of Counsel for the Claimant that this defence does not have a realistic prospect of success. In support of this submission Counsel relied on the Canadian authority of **Royal Bank of Canada v Hejna** [2013] ONSC 1719. Therein, similar facts to the case at bar existed in that the Claimant sought summary judgment against the Defendant on the basis of fraud by way of a cheque kiting scheme. The Court held that the Claimant met the onus of showing that there was no genuine issue requiring a trial as it was evident on the facts that the Defendant knowingly undertook conduct referred to as cheque kiting by inter-accounts deposits and withdrawals through a daily series of cheques:

"[87] The practice of cheque kiting was explained in Royal Bank of Canada v. Location Bristar Idealease Inc., 2012 QCCS 211 (CanLII) at paras. 7-10 as follows:

> *Essentially, the illegal practice of "cheque kiting" begins when a cheque is issued from a bank account whose balance is insufficient to cover it. To create confusion, money is recorded in more than one bank account at one moment in time. In most cases, the money is in transit or quite simply fictitious. The circulation of cheques between various accounts is jointly controlled. Here, the scheme was operated by the administrators of Bristar and JMB.*
>
> *Thus, cheques and registered funds are circulated from one bank to another and from one account to another, in a manner that maintains fictitious bank balances in some accounts while depositing the very same amounts in other accounts.*

> *Obviously, masterminds who undertake this type of fraud take advantage of the clearance periods that are inherent to cheque processing in the banking system.*
>
> *Cheques are circulated so quickly that an account at one banking institution is debited one day and credited the next. Over time, the false increase in bank balances varies from one bank to another, until one of the banks involved realizes that it is part of a kiting scheme and denounces the fraud ...*
>
> *[88] This is exactly what occurred in this case, although most of the transactions occurred between RBC accounts as described in the Chang and Dickson affidavits. The defendant does not deny that the cheques were deposited and withdrawn in this fashion, in order to produce cash flow. The evidence presented by RBC leads overwhelmingly to the conclusion that the defendant engaged in cheque kiting through the circular cheque-writing activity to which he admits"…*
>
> *[90] … In this case the allegations of fraud by way of cheque kiting have been pled with particularity and have been strictly proved…Quoting from Derry v. Peek, (1989), 14 A.C. 337 (H.L.), Master Funduk summarized the law by stating that to make out deceit, there must be proof of fraud, which is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it to be true or false."*[emphasis mine].

21. Counsel for the Defendant submitted that the decision in **Hejna** (supra) was entirely irrelevant as the test used therein for granting a summary judgment application was different to that in this jurisdiction. Counsel submitted that the decision therein was against the backdrop of the expanded powers of the Canadian Courts under the amended Rules which are not applicable here. Further Counsel also distinguished **Hejna** (supra) on the basis that in that case an employee of the Claimant specifically denied the allegation that the Claimant was aware of and actively participated in the artificial inflation of the accounts and the Defendant also provided no proof thereof.
22. In my opinion, in the instant case, as in **Hejna** (supra), the Claimant has set out with particularity the allegations of fraud by way of cheque kiting and the Defendants have admitted the facts as set out in paragraph 14 herein. As in **Hejna** (supra), the Defendants do not deny that the 47 cheques were deposited and withdrawn (via transfer through ACH). The Defendants also admit that the monies withdrawn were used to pay loans to third parties. On this evidence

it is apparent that the Defendants were in fact knowingly engaged in cheque kiting which is fraudulent as it represents a false representation made with knowledge thereof.[7]

23. In respect of the claim of conspiracy to defraud, I disagree with the submission of Counsel for the Defendant that the Claimant has failed to adduce evidence in support of this cause of action. According to **Halsbury's Laws of England**:[8]

> *"85. A person who agrees with one or more other persons by dishonesty either to deprive a person of something which is his or to which he would be or might be entitled or to injure some proprietary right of a person is guilty of conspiracy to defraud at common law. Causing economic loss or prejudice need not be the purpose of the parties, but a defendant must have foreseen that such loss or prejudice would or might result."* (emphasis mine).

24. In the Privy Council decision of **Wai Yu-Tsang v The Queen**,[9] the Court examined whether the actions of the defendant constituted a conspiracy to defraud. Therein, Lord Goff of Chieveley stated as follows:

> *"In the context of conspiracy to defraud, it is necessary to bear in mind that such a conspiracy is an agreement to practise a fraud on somebody (c.f. Welham v. Director of Public Prosecutions [1961] A.C. 103, 133, per Lord Denning)…*
>
> *The question whether particular facts reveal a conspiracy to defraud depends upon what the conspirators have dishonestly agreed to do, and in particular whether they have agreed to practise a fraud on somebody. For this purpose it is enough for example that, as in Reg. v. Allsop and in the present case, the conspirators have dishonestly agreed to bring about a state of affairs which they realise will or may deceive the victim into so acting, or failing to act, that he will suffer economic loss or his economic interests will be put at risk. It is however important in such a case, as the Court of Appeal stressed in Reg. v. Allsop, to distinguish a conspirator's intention (or immediate purpose) dishonestly to bring about such a state of affairs from his motive (or underlying purpose). The latter may be benign to the extent that he does not wish the victim or potential victim to suffer harm; but the*

[7] Derry v Peek (1889) 14 App Case. 337.
[8] Criminal Law, Volume 25 (2016) at para. 85
[9] [1992] 1 A.C. 269 at pp. 279 -280.

mere fact that it is benign will not of itself prevent the agreement from constituting a conspiracy to defraud."

25. At paragraphs 5 to 13 of the Statement of Case, the Claimant set out the particulars of the alleged fraud and conspiracy on the part of the Defendants. It is not in dispute that the Corporate Defendants were affiliated companies and that the Fifth Defendant was a director of all Corporate Defendants, the Sixth Defendant was a director of all save the Fourth and the Seventh Defendant was a director of the First and Third Defendant and the Secretary of all the Corporate Defendants. Further, it is not in dispute that the Sixth and Seventh Defendants were signatories for all the bank accounts held by the Corporate Defendants with the Claimant and were authorized to sign cheques issued. On the pleaded facts, which have been admitted by the Corporate Defendants, the Sixth and Seventh Defendants signed the 47 cheques which were deposited for an on behalf of the respective Corporate Defendant. At the material time (when the cheques were made out and/or presented for payment) all the Defendants admit that the Corporate Defendants knew that there were insufficient funds in all of the accounts on which they were drawn to cover them. In spite of this, they proceeded to deposit the 47 cheques into the respective accounts of the Corporate Defendants which resulted in a false positive balance on these accounts. Thereafter, the Corporate Defendants proceeded immediately to transfer the monies out of the accounts held with the Claimant to other external banks. In my opinion, these facts sufficiently prove the Claimant's case that the Defendants are liable for conspiracy to defraud. Further, the Fifth Defendant admitted that the Defendants (and not just the Corporate Defendants) wrote the 47 cheques and did not have the funds to cover these payments and that the monies were used to pay certain third parties who had loaned the Defendants monies. Accordingly, by virtue of the dishonest actions of the Defendants in deliberately generating and depositing 47 cheques which they knew could not be covered and with this knowledge transferring monies from these artificially inflated accounts, they brought about a state of affairs which they knew would or could deceive the Claimant and resulted in its economic loss or its economic interests being jeopardised.

26. The Directors seek to avoid liability on the grounds that the aforementioned actions were solely that of the Corporate Defendants and that their involvement was limited to performing acts as Directors of the Corporate Defendants and as such they are not and could not be held personally liable. The Directors also seek to rely on the defence that although the Sixth Defendant co-

signed the 47 cheques, he pre-signed cheques at the direction of the Seventh Defendant but the financial affairs of the Corporate Defendants were handled solely by the Seventh Defendant. It was also submitted that although the Fifth Defendant was a Director of the Corporate Defendants he was not involved in the financial affairs of the Corporate Defendants and that he was not a signatory to any of the 47 cheques.

27. I do not agree with Counsel for the Defendants that the defences of the Directors raise serious issues to be tried. In the first instance, Counsel submitted that on the Defence, the Fifth and Sixth Defendants were unaware of the specific details surrounding the issuing of the 47 cheques. I reject this submission since, upon an examination of the Defence of the Directors, although the Fifth and Sixth Defendant pleaded that they had no involvement whatsoever in the financial affairs of the Corporate Defendants, they did not deny that they were aware of what transpired. Further, in their Defence (as summarized in paragraph 14 above), they admitted that the conduct complained of "*was committed by the corporate defendants alone. The directors were at all material times acting in their capacity as director or secretary respectively of the corporate defendants… at the material times the corporate defendants were aware that there were insufficient funds in their accounts to cover the said cheques and did in fact present those cheques to the claimant's Diego Martin branch*"[10]

28. In my opinion, the Directors cannot claim to be unaware by virtue of the Seventh Defendant being the Financial Manager and handling the financial affairs. This does not absolve them of the responsibility as a Director of the respective Corporate Defendants. Further, it is immaterial that the Seventh Defendant was charged with the responsibility for managing all financial affairs as all of the Directors admit that at all material times they would have been acting in their corporate capacity.

29. Counsel for the Defendants also submitted that, in the circumstances of this case, the corporate veil ought not to be lifted. In its Reply, Counsel for the Claimant submitted that in the circumstances of this case it was not necessary to pierce the veil as the alleged fraudulent actions were equally (jointly and personally) those of the Directors as they were of the Corporate Defendants.

[10] Defence of the Directors at para. 2(c) and 6

30. The House of Lords decision of **Standard Chartered Bank v Pakistan National Shipping Corp and others (No. 2)** [2002] UKHL 43 as cited by the Claimant, is instructive on this issue. Therein the Court held that a director of a company could not escape liability for deceit on the ground that his act was committed on behalf of the company. Lord Hoffman reasoned as follows:

> *"[20] My Lords, I come next to the question of whether Mr Mehra was liable for his deceit. To put the question in this way may seem tendentious but I do not think that it is unfair. Mr Mehra says, and the Court of Appeal accepted, that he committed no deceit because he made the representation on behalf of Oakprime and it was relied upon as a representation by Oakprime. That is true but seems to me irrelevant. Mr Mehra made a fraudulent misrepresentation intending SCB to rely upon it and SCB did rely upon it. The fact that by virtue of the law of agency his representation and the knowledge with which he made it would also be attributed to Oakprime would be of interest in an action against Oakprime. But that cannot detract from the fact that they were his representation and his knowledge. He was the only human being involved in making the representation to SCB (apart from administrative assistance like someone to type the letter and carry the papers round to the bank). It is true that SCB relied upon Mr Mehra's representation being attributable to Oakprime because it was the beneficiary under the credit. But they also relied upon it being Mr Mehra's representation, because otherwise there could have been no representation and no attribution.*
>
> *[21] The Court of Appeal appear to have based their conclusion upon the decision of your Lordships' House in Williams v Natural Life Health Foods Ltd [1998] 1 WLR 830. That was an action for damages for negligent misrepresentation. My noble and learned friend, Lord Steyn, pointed out that in such a case liability depended upon an assumption of responsibility by the defendant. As Lord Devlin said in Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465, 530, the basis of liability is analogous to contract. And just as an agent can contract on behalf of another without incurring personal liability, so an agent can assume responsibility on behalf of another for the purposes of the Hedley Byrne rule without assuming personal responsibility. Their Lordships decided that on the facts of the case, the agent had not assumed any personal responsibility.*

[22] This reasoning cannot in my opinion apply to liability for fraud. No one can escape liability for his fraud by saying: "I wish to make it clear that I am committing this fraud on behalf of someone else and I am not to be personally liable." Evans LJ [2000] 1 Lloyd's Rep 218, 230 framed the question as being "whether the director may be held liable for the company's tort". But Mr Mehra was not being sued for the company's tort. He was being sued for his own tort and all the elements of that tort were proved against him. Having put the question in the way he did, Evans LJ answered it by saying that the fact that Mr Mehra was a director did not in itself make him liable. That of course is true. He is liable not because he was a director but because he committed a fraud.

[23] Both Evans and Aldous LJJ treated the Williams case [1998] 1 WLR 830 as being based upon the separate legal personality of a company. Aldous LJ [2000] 1 Lloyd's Rep 218, 233 referred to Salomon v A Salomon & Co Ltd [1897] AC 22. But my noble and learned friend, Lord Steyn, made it clear [1998] 1 WLR 830, 835 that the decision had nothing to do with company law. It was an application of the law of principal and agent to the requirement of assumption of responsibility under the Hedley Byrne principle. Lord Steyn said it would have made no difference if Mr Williams's principal had been a natural person. So one may test the matter by asking whether, if Mr Mehra had been acting as manager for the owner of the business who lived in the south of France and had made a fraudulent representation within the scope of his employment, he could escape personal liability by saying that it must have been perfectly clear that he was not being fraudulent on his own behalf but exclusively on behalf of his employer.

[24] I would therefore allow the appeal against Mr Mehra…" [all emphases mine]

31. Further, the decision cited by the Defendants of **Rofe v Kay Aviation** [2001] PESCAD 7 is also instructive. Therein the Canadian Supreme Court of Appeal emphasized that "*the minimum level of material facts in a statement of claim founded on causes of action against an officer, director or employee of a corporation with whom the plaintiff has contracted is very high.*"[11] It is also stated that to impose personal liability on such persons (which is an exception rather than the general rule), the pleadings must contain all relevant material facts to establish the cause of action. In its Reply, Counsel for the Claimant highlighted that in **Rofe** (supra) the

[11] Rofe (supra) at para. 26

Court also stated at paragraph 20 that "*the directing minds of the corporate entity cannot be held liable for the actions of the corporation unless there is independent tortious conduct such as fraud, deceit, dishonesty or want of authority."*

32. I agree with the submissions of Counsel for the Claimant that the corporate veil need not be pierced for personal liability to be ascribed to the Directors as they independently engaged in fraud and conspiracy to defraud by virtue of their knowledge, conduct and involvement in artificial inflation of the respective accounts as well as the transfer of monies out of these accounts to third parties. In my opinion, the actions of the Directors were fraudulent, dishonest and deceitful and resulted in the Claimant being deprived of the monies that were overdrawn and admittedly used by the Defendants to pay loans they had incurred to third parties. In light of this, I am of the opinion that the Defendants have failed to disclose a defence with a realistic prospect of success to the claim based on fraud and conspiracy to defraud the Claimant. Therefore, the Claimant is entitled to succeed on its application for summary judgement based on this aspect of its claim.

Theft/Stealing and Unjust Enrichment

33. Having already determined that the Claimant is entitled to succeed on its application for summary judgment against the Defendants for fraud and conspiracy to defraud, I do not consider it necessary to examine in detail the alternative causes of action of theft/stealing and unjust enrichment.

INTEREST

34. **Part 8.5(3) of the CPR** provides that, *inter alia*, if a Claimant is seeking interest he must include details of the basis of entitlement, the rate and the period for which it is claimed. The Claimant has not included in his Claim Form or Statement of Case the details of the basis of entitlement or the rate of interest claimed. **Section 25 of the Supreme Court of Judicature Act, Chapter 4:01** confers upon the court a discretion to award interest at such rate as it thinks fit on the whole or any part of a debt. Accordingly, in the exercise of my discretion, I am of the opinion that the Claimant is entitled to an award of interest on the judgment sum at the rate of 5% per annum from 12th August, 2015 to the date of payment.

ORDER

35. In the premises, I hereby order that:

a. There be judgment for the Claimant against the Defendants for $20,865,691.79 together with interest thereon at the rate of 5% per annum from 12th August, 2015 to the date of payment;

b. The Defendants do pay to the Claimant the costs of this application pursuant to **Part 67.11 of the CPR**, to be assessed by the Registrar in default of agreement; and

c. The Defendants do pay to the Claimant the costs of this action pursuant to **Part 67.5 of the CPR**, to be assessed by the Registrar in default of agreement

Dated the 29th day of March, 2017

……..
André des Vignes
Judge