THE REPUBLIC OF TRINIDAD AND TOBAGO:

IN THE HIGH COURT OF JUSTICE

[1] Claim No. H.C.A. 1561 of 2002 CV 2012-04599

BETWEEN

MARAJ GOLD LIMITED
SEASONS LIMITED (IN RECEIVERSHIP)

Claimants

AND
DAI TECH LIMITED
DEV DEBIDEEN
DEBBY DEBIDEEN

Defendants

[2] Claim No.: HCA 907 of 2003 CV 2012-4598

BETWEEN

VSN INVESTMENTS LIMITED

Claimant

AND

SEASONS LIMITED
(IN RECEIVERSHIP)

Defendant

[3] Claim No. CV 2006-01349

BETWEEN

VSN INVESTMENTS LIMITED

Claimant

AND

SEASONS LIMITED
(IN RECEIVERSHIP)

Defendant

Before the Honourable Madam Justice Eleanor Joye Donaldson-Honeywell

Appearances:
Mr. Jagdeo Singh, Mr. Terrence Bharath and Mr. Andre Le Blanc Attorneys at Law for Maraj Gold Limited and Seasons Limited [In Receivership]

Mr. Fyard Hosein SC, Mr Rishi Dass and Mr A. Maraj Attorneys at Law for Dai Tech Limited, Dev Debideen, Debbie Debideen and VSN Investments Limited.

Dated the 26th day of September, 2016

Judgment

I. Introduction

1. The genesis of this consolidated case involving three separate matters was the business endeavours entered into between two individuals, Mr. Om Parkash Maraj and Mr. Dev Debideen some thirty years ago. In 1996 these business endeavours commenced with the establishment of an air-conditioning business which the two men incorporated into a company called Seasons Limited. Seasons Limited is the litigant in common in all three of the consolidated matters and the underlying issues to be determined herein relate to the breakdown of business relations concerning this Company.
2. At the time of incorporation both men were engaged in other business endeavours. Om Maraj is a Director of the company, Maraj Gold Limited ("Maraj Gold"), which together with Seasons Limited is the Claimant in one of the consolidated matters. He is also a Director of Seasons Limited ("Seasons") which is now in receivership. Maraj Gold is engaged in the business of sale of precious metals and stones and is also involved in moneylending.
3. Dev Debideen was, at the time he started the business with Om Maraj, the owner of two other businesses, namely Cool Aire Limited and VSN Investments Limited ("VSN") which is a company that Dev Debideen used to own properties including his home in Fairways, Maraval. Dev Debideen is currently also a Director of Dai Tech Limited ("Dai Tech"). The latter two companies are litigants herein and Debby

Debideen, Dev's wife, is a co-director of both companies. Dev Debideen and Om Maraj arranged for rental of property at 246 Eastern Main Road, Barataria, owned by VSN as the location for operations of Seasons.

4. The business Dev Debideen and Om Maraj entered into, to sell air conditioning units, later branched out to the purchase and sale of real estate. From the business transactions between them and their companies, several disputes arose. These resulted in the filing of certain high court actions, of which three remain herein to be decided:
   i. Claim No. CV 2012-04599; formerly HCA No. 1561 of 2002 between Maraj Gold and Seasons as Claimants and Dai Tech, Dev Debideen and Debby Debideen as Defendants ("the Debenture Claim");
   ii. Claim No. CV 2012-04598 formerly HCA No. 907 of 2003 between VSN as Claimant and Seasons as Defendant ("the Trespass Claim"); and
   iii. Claim No. CV 2006-01349 between VSN as Claimant and Seasons as Defendant ("the Guarantee Claim").

II. Factual Background

5. These claims arose out of the failed Seasons business involving Om Maraj and Dev Debideen. In or around 1996 they decided to open an air conditioning business together. Both men claim it was the other who made the suggestion to start the business. In any event, the company Seasons was incorporated for the purpose of carrying on this business. Its registered address was the VSN owned premises at 246 Eastern Main Road, Barataria.
6. The arrangement agreed upon was that Dev Debideen would manage the day to day operations and administration of Seasons, having prior experience in that line of business and Om Maraj would play a less immersive, management role. His company Maraj Gold injected capital into the project.
7. These capital injections were initially for the purchase of equipment and accessories for the business. Om Maraj claims that there was a mutual understanding that these loans by Maraj Gold carried interest at the prevailing bank rate. The evidence of Dev Debideen, however, suggests that he was unaware that the monies came from Maraj Gold and that they constituted a loan which was to be repaid with interest. He claims

to have been of the view that the money came from Om Maraj as his personal investment in Seasons.

8. Some three years later, around 1998, it was agreed that Seasons would also carry on the business of real estate and that properties identified by Dev Debideen would be purchased in the name of Seasons using monies provided by Om Maraj. According to Dev Debideen he was still of the view that the monies came personally from Om Maraj. However, in actuality the money Om Maraj arranged to be injected into Seasons came from his other business, Maraj Gold.
9. In January 1998 Seasons purchased a parcel of land for the sum of Two Hundred and Fifty Thousand Dollars ($250,000.00) on the Churchill Roosevelt Highway, Aranguez from monies advanced by Maraj Gold.
10. Sometime in 1998 Dev Debideen was made aware that the monies injected into Seasons were in fact loans from Maraj Gold. A Deed of Debenture registered as Deed No. 7420 of 1998 on 15th April, 1998 was issued by Seasons as Borrower in favour of Maraj Gold as Lender for the consideration therein and to secure the payment of all monies and the discharge of all obligations and liabilities including lawfully incurred expenses and charges due from and incurred by Seasons to Maraj Gold. Dev Debideen claims that he was coerced into signing this document and had no real opportunity to consider it properly.
11. Another source of funds for Seasons Ltd was an overdraft facility with a limit of Two Million Dollars ($2,000,000.00) established at Scotiabank on or about November 19, 1998. The facility was secured by the dwelling house where Dev Debideen lives in Fairways, a property owned by VSN. The Deed of Mortgage was executed with Seasons Limited as "the Borrower" and VSN as the Mortgagor. Seasons and VSN covenanted jointly and severally with the Mortgagee, Scotiabank to repay all monies outstanding on demand. According to Dev Debideen the purpose of the overdraft was to run the day to day operations of Seasons since Om Maraj said he had no more money to invest in Seasons. Om Maraj disputes that the monies from the overdraft were used for Seasons operations. He contends in his witness statement that the monies were used to settle debts due by Dev Debideen personally. In the pleadings however there is a

mere non-admission at paragraph 3 of Seasons Ltd.'s defence as to the advances of money to Seasons from the facility.

12. In November, 1998 Om Maraj and Dev Debideen incorporated another company called Signature Properties Limited ("Signature") and a property comprising 0.4054 hectares was purchased in Signature's name.
13. In December 1998 two more properties situate at Churchill Roosevelt Highway, Aranguez were purchased by Seasons for One Million, Two Hundred Thousand Dollars ($1,200,000.00) and Nine Hundred and Fifty-Eight Thousand and Fifty-Four Dollars ($958,054.00). In June, 2000 Seasons purchased a parcel comprising 0.3678 hectares for the sum of Two Hundred and Fifty Thousand Dollars ($250,000.00).
14. Om Maraj claims that he had caused to be made a ledger of all the monies Maraj Gold had advanced. He annexed this ledger to his witness statement. Dev Debideen on the other hand alleges that from the end of 2000 and the beginning of 2001 he began to distrust Om Maraj, believing that he was acting in his own interests and that of his other companies rather than in the interests of Seasons.
15. On 4 July, 2001, Om Maraj presented a promissory note for execution by Dev Debideen stating that Seasons was indebted to Maraj Gold in the sum of Seven Million, One Hundred and Ninety-five Thousand, Seven Hundred and Seventeen Dollars and Five Cents ($7,195,717.05) together with interest thereon at the rate of 15% per annum from July 10, 2001 until demand. Dev Debideen claims he felt he had no choice but to sign the document put before him.
16. Om Maraj had serious concerns about mismanagement of Seasons Limited. He claims that Seasons made a profit in its first year and operated at a loss ever since. It is the evidence of Dev Debideen, however, that the company made profits but that it all went to the payment of the interest on the loans from Maraj Gold.
17. Business relations deteriorated between Dev Debideen and Om Maraj. They then commenced discussions to end the business shared between them and their companies. With the assistance of Mr. Dave Rampersad, the Accountant for Seasons Limited, they agreed to meet and mediate their differences. To this end the parties held meetings on 21 August, 2001, 6 October, 2001, 11 January, 2002, 13 February, 2002, 4 March, 2002 and 6 March, 2002.

18. At the meeting held on or about 21 August, 2001, the parties agreed to sell Seasons Limited's lands at Aranguez (including the parcel vested in Signature) for a sum not less than Fourteen Million Dollars ($14,000,000.00), such sum to be used to settle all liabilities to Maraj Gold and repay all outstanding monies to the bank. Any remaining balance was to be divided equally between Mr. Debideen and Mr. Maraj as the only two shareholders. They further agreed that subsequent to the sale of the lands, the shares of Seasons Limited would be valued and that Mr. Om Maraj would make an offer for sale of Mr. Om Maraj's shareholding to Mr. Debideen. If Mr. Debideen was not interested in the purchase of Mr. Om Maraj's shares, then Mr. Om Maraj would purchase Mr. Dev Debideen's shareholding. The parties failed however to carry through this arrangement.
19. Eventually, at the final mediation meeting on March 6, 2002 they decided to abandon the previous arrangement. Instead Om Maraj and Dev Debideen then came to the following verbal agreement setting out how Seasons would be dealt with:
    a. The inventories, receivables and bank overdraft would be liquidated;
    b. The inventories would be transferred via a sale invoice to a new company to be incorporated and owned by Mr. Debideen;
    c. All new purchases and sales of air-conditioning equipment and any new business would be engaged in by the new company;
    d. Mr. Om Maraj and Mr. Debideen would use best efforts to sell all real estate owned by Seasons by July, 2002
    e. Dev Debideen would purchase Om Maraj's shares in Seasons for Five Hundred Thousand Dollars ($500,000.00); and
    f. **A shareholders' agreement incorporating these items would be drawn up during the course of the following week**. [Emphasis Added]
20. No shareholders' agreement was submitted to Om Maraj by Dev Debideen or otherwise prepared and signed off on by the parties.
21. According to Om Maraj reminders were sent to Mr. Dev Debideen's Attorney, Nazimudeen Mohammed, that a Draft Agreement was to be forwarded by him for Om Maraj's lawyer's consideration. No Shareholders Agreement Draft was sent and Om Maraj advised through his Attorney, by letter dated April 4, 2002, that he was no longer

interested in pursuing the March 6, 2002 proposal. Receipt of this letter was acknowledged.

22. However, on 31 April, 2002, by sale arranged by Dev Debideen, Seasons Limited sold to Dai-Tech Limited stock and goods for the sums of Sixteen Thousand, Two Hundred and Twelve Dollars and Twenty-Four Cents ($16,212.24); One Hundred and Fifty-Eight Thousand, Eight Hundred and Forty-Five Dollars and Twenty-Nine Cents ($158,845.29) and Eight Hundred and Sixty-Six Thousand and Sixty Dollars and Seventy-Five Cents ($866,060.75), totalling One Million and Forty-One Thousand, One Hundred and Eighteen Dollars and Twenty Cents ($ 1,041,118.20). In purported execution of the verbal agreement made on March 6, 2002 VSN had on April 30, 2002 issued to Seasons a Notice to Quit the premises where its operations were carried out.
23. Two months after the final mediation meeting Maraj Gold wrote as Debenture Holder on 1 May, 2002, to Seasons Limited (in Receivership) demanding payment of the sum of Eight Million, One Hundred and Thirteen Thousand, Nine Hundred and Ninety-Seven Dollars and Sixty-Nine Cents ($8,113,997.69) due and owing under the Debenture.
24. On 3 May, 2002, Mr. Victor Herde was appointed Receiver and Manager of Seasons. A few weeks thereafter on May 24, 2002 a demand was made of him that Seasons Ltd repay Scotiabank certain advances made under the overdraft facility in which Seasons was the borrower and VSN provided the security. Seasons did not pay the sum demanded by Scotiabank. Accordingly, on July 19, 2002 VSN in furtherance of its joint obligation under the mortgage paid the outstanding sum of Two Million, five Hundred and Forty-Five Thousand, Five Hundred and Twenty-Two Dollars and Fifty-Nine Cents ($2,545,522.59) to Scotiabank. Of this amount VSN claims Seasons was liable for One Million, Nine Hundred and Thirty-Four Thousand, One Hundred and Fifty Dollars and Thirty Cents ($1,934,150.30) since the rest was money used to the benefit of VSN.

III. Issues

25. The issues in the present cases are as follows:

i. In Claim No. CV 2012-04599 the central issue is whether Dai-Tech and the Debideens are liable under the debenture executed in favour of Maraj Gold. The legal submissions of Dai-Tech and the Debideens have raised as a sub-issue whether the relief sought by Maraj Gold is barred by illegality. A further issue raised on the pleadings and evidence is whether the relief sought is otiose having been taken over by events including the repayment of some monies by Seasons and the sale of properties owned by Seasons.

ii. In Claim No. CV 2012-04598 the issues are whether VSN is entitled to possession of the premises at 246 Eastern Main Road, Barataria, Trinidad and if so whether Seasons is liable in trespass to VSN for allegedly remaining in possession.;

iii. In Claim No. CV 2006-01349 the main issue is whether Seasons is required to pay to VSN the sum of One Million, Nine Hundred and Thirty-Four Thousand, One Hundred and Fifty Dollars and Thirty Cents ($1,934,150.30) being monies paid by VSN on behalf of Seasons. The pleadings and submissions of the Claimant VSN raise sub-considerations including:

a. Whether the Defendant, Seasons, was unjustly enriched by the payment of the mortgage debt by VSN since according to VSN the Company enjoyed the benefit of the repayment of the monies;
b. Whether VSN's role in the transaction was as a guarantor; and
c. If so whether by law Seasons as borrower was required to indemnify VSN for the amount paid.

IV. Evidence

26. In accordance with case management directions, the Evidence-in-Chief of the parties was filed in the form of Witness Statements. The two main protagonists, Om Maraj and Dev Debideen, both filed Witness Statements. In addition a Witness Statement was filed by Om Maraj's son, Rajiv Maraj, who had taken over from Mr. Herde as the Receiver and Manager of Seasons (in receivership). Another son of Om Maraj also

filed a Witness Statement. This was by Harish Maraj who gave evidence as Managing Director of Maraj Gold.

27. Relevant extracts of the evidence given by the witnesses under-cross examination are usefully set out at paras 7.20 to 7.21 and 6.36 to 6.38 of submissions filed by Counsel for Maraj Gold on June 27, 2016and paras 2.5 to 2.6 of their reply submissions filed on July 18, 2016 as follows:

> ***<u>Cross-Examination of Dev Debideen:</u>***
>
> "*7.20 As set out at paragraph 7.9 above, Dev's evidence is that on 4th July 2001 Om without any warning demanded that Dev sign a promissory note stating that Seasons was indebted to Maraj Gold in the sum of $7,195,717.05. This sum was supposed to include interest. Om came up with figures setting interest. At this point Dev felt he had no choice but to sign any document he put in front of me. Indeed, Om acted like that was the case and never consulted or even asked Dev whether he was comfortable with the arrangements in these documents or even gave Dev copies beforehand to get advice. In cross examination, Dev's position again changed when again presented with an inconsistent statement he made in his affidavit dated 21st June 2002 as follows:-*
>
> *Q. Okay. So before we—sorry, I missed one thing before I go on to that part. You said that you were also forced to sign a promissory note. You remember that?*
>
> *A. Uh-huh.*
>
> *Q. That's another document that you say you were forced to sign. That was—you were forced to sign that, you say, on the 4th of July, 2001, huh? Yes, Sir?*
>
> *A. Yes.*
>
> *Q. You say you were forced to sign that. Okay. Now, when you were—the promissory note was presented to you, why didn't you refuse to sign it?*
>
> *A. I ask myself that all the time.*
>
> *Q. Was that for friendship too?*
>
> *A. Yes.*
>
> *Q. Another friendship gesture?*
>
> *A. And trust.*
>
> *Q. Very good friend. So you signed a promissory note—*
>
> *A. And that was—I think that one was signed in the office.*
>
> *Q. That one you get correct. Yes, so, you signed the promissory note out of friendship for the purposes of friendship. So, you never knew, when you signed the promissory note, whether the amount stated on the promissory note was correct or not?*
>
> *A. It was all based on trust, eh.*

Q. You never verified it?

A. No.

Q Could he be shown his affidavit, please M'Lady the same affidavit—

Q. Sir, page—I don't have a page—paragraph one seven. Sir. one seven, on 4th July, 2001?

Q. All right. Now read slowly so Her Ladyship could hear what you have written there.

A. "I have since checked the records which shows a debt of 7.178 million to the First Plaintiff."

Q. Thank you. Could you pass it back to Her Ladyship, please? So you verified the debt?

A. I guess at that time.

7.21 As set out at paragraph 7.12 above, Dev's evidence is that at a meeting held on 6th March 2002 all discussions were consolidated in an agreement made orally that the inventories, receivables and bank overdraft would be liquidated; the inventories would be transferred via a sale invoice to a new company to be incorporated and owned by Dev, all new purchases and sales of air-conditioning equipment and
any new business would be made by the new company; that best efforts would be made to sell all the real estate owned by Seasons by July 2002; that Dev would purchase Om's shares in Seasons for $500,000.00; and a shareholders agreement incorporating these items would be drawn up. In cross examination, Dev's position is that the equipment and assets of Seasons were transferred to Dai-Tech in the absence of this shareholders agreement, as the following extract from the cross examination illustrates:-

Q . Um, but let me understand this. Seasons—you and Mr. Maraj didn't sign a shareholders' agreement with respect to how you would dissolve this whole business?

A. Is it here?

Q. No it's not.

A. Well then maybe then it's not.

Q. If it's not there, it's not?

A. Then it's not—then okay

Q. Okay. Well it's not there. It's on no other document that we have.

A. Okay.

Q. So you're telling us that if it's not here you didn't enter into any shareholders' agreement with Mr. Maraj?

A. I can't remember.

……

Q . Okay. but it's not here; and if it was in your possession you would have attached it to your witness statement?

A. Yes, I would think so, yes.

……

Q . Okay. By what agreement or from Mr. Om Maraj or did you have the permission or Seasons, hold on, to transfer this equipment?

A. This was an agreement made before with Mr. Maraj.

Q. Yes. So you transferred this equipment?

A. Yes.

Q. Okay. And where did you get the 10 per cent uplift? You transferred it at cost plus 10.

A. This was the agreement that we had, verbally again, and I mean, I did it in writing.

Q. I know. But do you have any document which you attached to your witness statement to show minutes of a meeting where it was agreed or anything like that?

A. If it's not here then it's not.

……

Q . Did you all have a Board of Directors meeting agreeing to transfer this equipment?

A. Yeah, both of us.

Q. You held a Board of Directors meeting?

A. Both of us spoke together and if that is it, I mean, yeah.

Q. Sir, you could give me any idea when "both of us" spoke about this?

A. No. I can't remember.

……

Q . All right, did you ever pay to Seasons, and could you sh—if the answer is yes could you show me where?

A. No.

Q. Did you ever pay to Seasons—

A. No.

Q. —the cost of this equipment? Sorry, Sir?

A. No.

Q. No. Okay. Why? Why?

A. [No response]

……

Q . I'm putting it to you that's because it never happened and that's being untruthful because if it did happen you would have it in your witness statement and it's not there. Now, where did you come up—there's nothing in your witness statement anywhere about

the cost plus 10 per cent or the transfer. I've shown you all the correspondence where we say "talk done", so I'm putting it to you at the time when you took this equipment over into Dai-Tech's books, that equipment, which you took into Dai-Tech's books, was an unauthorized taken from Dai-Tech's part.

A. If that was so, I would not have put the correct prices and 10 per cent, I probably would use—

Q. All right, did you ever pay to Seasons, and could you sh—if the answer is yes could you show me where?

A. No.

……..

Q. Thank you. I'm also putting it to you that there's no written agreement anywhere with respect to any transfer of the assets from Seasons to Dai-Tech between yourself and Mr. Maraj acknowledged by yourself and Mr. Maraj.

A. I know we spoke.

Q. Well just say yes or no.

A. Well there is no document."

Cross-Examination of Maraj Gold Witnesses:

6.36 The following points were raised in the ***cross examination of Om*** *by Senior Counsel:-*

Q[1]. And you were the one who had access to money, isn't that so?

A. It's Maraj Gold who had access.

Q. Maraj Gold had access to money. But you, through Maraj Gold, would bring into the company moneys, isn't that so?

A. Yes.

Q. To purchase all the materials and what have you?

A. It was agreed that Maraj Gold will supply

……..

Q[2]. And you are the one who was to provide, by some means or the other, the moneys to expand his business and develop this company called Seasons Limited, isn't that so?

A. Yes.

……..

[1] Evidence Transcript Day 1 page 11 line 24

[2] Evidence Transcript Day 1 page 12 line 20

Q[3]. *Now, Mr. Debideen's instructions are that when this arrangement was made, the moneys that you were to provide to the company was really a capital injection rather than a loan. Is that so?*

A. *It was a loan.*

Q[4]. *Okay. So your position is that Maraj Gold was supposed to provide a loan. Is that your position?*

A. *Yes*

Q[5]. *Okay. And the position is that the interest rates that were chargeable is a matter entirely for Maraj Gold, isn't that so?*

A. *Yes.*

Q. *And therefore, the interest rates that were charged to Seasons from 1996 until 2015 were interest rates calculated on the basis of the debenture, isn't that so?*

A. *Yes.*

……..

Q[6]. *So notwithstanding the fact that Maraj Gold received 10 million 275, then 7 million 158, then 840, then $100,000, you say notwithstanding that, some $13 million is still outstanding?*

A. *Yes.*

Q. *Out of a loan portfolio of $13 million and notwithstanding a payment of almost $19,000, you say 13 is still outstanding?*

A. *Yes.*

……..

Q[7]. *In other words, we have to—you are asking us to accept the accounts that you have presented. Isn't that so?*

A. *Yes.*

Q. *And you're saying that those accounts show moneys were due—*

A. *Yes.*

Q. *—$8 million and therefore I could appoint a Receiver?*

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[3] Evidence Transcript Day 1 page 13 line 15

[4] Evidence Transcript Day 1 page 14 line 7

[5] Evidence Transcript Day 1 page 19 line 24

[6] Evidence Transcript Day 1 page 37 line 1

[7] Evidence Transcript Day 1 page 38 line 11

A. *Yes.*

……..

Q[8]*.* *Now, if time goes by and no payment is made on the amounts that were loaned by Maraj Gold to Seasons, the interest accumulates, doesn't it?*

A. *Yes.*

Q. *So therefore, the faster property is liquidated and sums are paid, it means that the amount of interest is reduced, it's not so much?*

A. *Yes.*

……..

Q[9]*.* *But you're aware that, when the receivership, during the course of the Receivership, that various sums were paid to Maraj Gold in satisfaction of what Maraj Gold said was a debt to it, isn't that so?*

A. *Yes, it was a debenture holder.*

Q. *Okay, all right.*

A. *First payment have to come to Maraj Gold*

……..

Q[10]*.* *Okay.*

"If any interest or any interest payable on arrears of interest capitalized under this present clause shall remain unpaid for 30 days after the day on which the same ought to be paid, then in every such case the interest so in arrears shall at the expiration of such 30 days be capitalized and considered as from the day on which the same ought to be paid as an addition to the principal moneys hereby secured and shall thenceforth bear interest to be computed from the day on which the same ought to have been paid and to be payable at the rate and on the days aforesaid and at the covenants and provisions…"—et cetera, et cetera.

So what you said, you capitalized the interest pursuant to that?

A. *Yes.*

Q. *And you capitalized the interest in some cases for 30 days, after 30 days?*

A. *Yes.*

Q. *In some cases after 28 days?*

A. *Yes.*

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[8] Evidence Transcript Day 1 page 55 line 25

[9] Evidence Transcript Day 1 page 62 line 23

[10] Evidence Transcript Day 1 page 67 line 11

Q. *After 10 days?*

A. *Yes.*

Q. *After five days?*

A. *Yes.*

Q. *After one day?*

A. *Yes.*

Q. *And you then charged interest on that, right?*

A. *Yes.*

……..

Q[11]. *Mr. Maraj, I want to get it absolutely clear.*

A. *Yes.*

Q. *In some instances on the ledger, as the ledger shows—*

A. *Yes.*

Q. *—Maraj Gold calculated interest after five days?*

A. *Yes.*

Q. *After two days?*

A. *Yes.*

Q. *After 30 days?*

A. *Yes.*

Q. *After 20 days?*

A. *Yes.*

Q. *Not at all times after one month?*

A. *Because payment was paid—*

Q[12]. *And the faster you put these moneys into the accounts, the less money it is that Seasons is alleged to owe. Isn't that so? You reduce the amount owing?*

A. *Yes, when a payment came in I give credit, when payment was paid out, a debit.*

……..

Q[13]. *So what you did is you added interest—*

A. *Yes.*

Q. *—whenever it became due?*

A. *Yes.*

[11] Evidence Transcript Day 1 page 72 line 9

[12] Evidence Transcript Day 1 page 78 line 7

[13] Evidence Transcript Day 1 page 80 line 15

Q. And in some cases you added interest before it was—

A. Actually whenever a movement was there I add up the—

Q. You added the interest?

A. Yes.

Q. And then you charged interest—

A. The payment.

Q. And then you charged the—you continued to charge interest on whatever is the added amount?

A. Yes.

Q. Well, the debenture permits you to capitalize interest, doesn't it?

A. Yes.

Q. And this is what you did?

A. Yes.

"2.5 ……

Q. 1957. So is it 1957 you established Maraj Gold Limited?

A. It's our family business.

Q. Yes.

A. It was Maraj Brothers, not Maraj Gold.

Q. Maraj Brothers?

A. Yes. In the beginning.

Q. And which year was Maraj Gold established?

A. First it was Golden Gold Limited. I think then we changed that name.

Q. Yeah.

A. I can't remember that exactly.

Q. All right. Well, never mind. It's not significant. Now, this is a company that deals with buying and selling of jewellery, manufacturing of jewellery?

A. Yes.

Q. It also has a money lending—

A. Yes, money lending—

Q. It was a money lending business?

A. —pawn broking, yes. (Emphasis ours)

Q. *It's also a licensed moneylender?*

A. *Yes.*

Q. *Under the money lending Act?*

A. *Yes."*

6.37 *The following points were raised in the* ***Cross-Examination of Harish*** *by Senior Counsel:-*

Q[14]*.* *Okay. So the accounts in respect of the relationship between Maraj Gold and Seasons are accounts which were under the supervision of your father, Om Parkash Maraj, is that not so?*

A. *Yes.*

Q. *And you rely on them, do you not?*

A. *Yes.*

Q. *And he's the one who made the decisions regarding debits, credits, entries as the case may be?*

A. *Yes, he was keeping tab on this.*

Q. *I think I need to get a clearer answer. He's the one who made the decisions regarding debits and credits and entries into the ledger between—regarding the loan between Maraj Gold and Seasons, isn't that so?*

A. *Yes.*

Q. *And you depend on him entirely for that, isn't that so?*

A. *Yes.*

Q. *You can't say whether it was correct or not, can you?*

A. *Correct in which way?*

A. *You cannot say whether the contents of the ledger between 1996, when you were not here—*

A. *Uh-huh.*

Q. *—and 2015, are accurate or not, or 2012, are accurate or not, can you? [Pause] Can you, Mr. Maraj?*

A. *Yes.*

6.38 *The following points were raised in* ***Cross-Examination of Rajiv*** *by Senior Counsel:-*

[14] Evidence Transcript Day 1 page 87 line 16

Q[15]. *And in the end, as Receiver, you had to rely on the accounts that were prepared by your father, Mr. Om Parkash Maraj, isn't that so?*

A. *That would be correct, yes.*

Q. *That would be correct. So in the end you say that Seasons is now indebted to Maraj Gold for some 13 million and more dollars, isn't that so?*

A. *Yes.*

Q. *And there's very little documentation to support?*

A. *I wouldn't say very.*

Q. *Except the accounts?*

A. *Yes, from the ledger that was kept by Maraj Gold.*

Q. *So the ledger is what it is that you are—that you're relying on?*

A. *Well we couldn't get other—I could not get any accounts further from Mr. Herde, even when requested a second time.*

Q. *Okay.*

V. Law and Analysis

THE DEBENTURE CLAIM

28. By Writ of Summons filed on 7th May, 2002 and Statement of Claim filed on 2nd June, 2003, Maraj Gold Limited and Seasons Limited (In Receivership) claimed the following reliefs:

i. A Declaration that all the stocks, shares, bonds and securities; loan capital both present and future; revenues and claims both present and future; goodwill and all patents or patent applications, trademarks, trade names, registered designs and - copyrights, and all licences; and all machinery, equipment, office furniture, fixtures and fittings, chattels (including motor vehicle registration number PBG 56), all its undertaking, goodwill, assets, revenues and rights whatsoever and wheresoever both present and future, including its uncalled capital, stocks-in-trade, book debts and other debts of the second Plaintiff from time to time due or owing to the second Plaintiff arid all other assets are covered and/or charged by a Single Debenture ("the said Debenture") made or given by the second Plaintiff, Seasons Limited (now In

[15] Evidence Transcript Day 1 page 93 line 5

Receivership) under its Common Seal dated the 19th day of February, 1998 and registered on the 9th day of March, 1998 pursuant to Section 79 of the Companies Ordinance Ch.31 No.1 and also registered as a deed on the 15th day of April, 1998 as No. 7420 of 1998 in favour of the first Plaintiff, Maraj Gold Limited to secure, inter alia, all monies and liabilities together with interest, commissions, discounts and all other lawful charges and expenses on a full indemnity basis due from and incurred by the second Plaintiff to the first Plaintiff (default having been made by the second Plaintiff in the payment of the sum due, owing and payable thereunder) (demand having been made by letter dated 1st May, 2002 from the first Plaintiff to the second Plaintiff) (hereinafter, called "the said assets") which are or were in the Defendants' possession or in the possession of either or any one of them at 246 Eastern Main Road, Barataria, Trinidad or elsewhere or wheresoever, are the property of the second Plaintiff, subject to the said Debenture.

ii. Further or alternatively, a Declaration that the said Debenture constitutes. a charge on the said assets in priority to any and/or all purported claim or claims of the' Defendants or any one of them whether purportedly created by a document or documents or by any purported sale or agreement or otherwise purporting to be made between the second Plaintiff and the Defendants or any one of them.

iii. A Declaration that ALL AND SINGULAR that piece or parcel of land situate at Aranguez, San Juan in the Ward of St. Anns, Trinidad comprising point Four Four Six Four Hectares be the same more or less known as Field No. 15 Parcel No. 15A and more particularly described in the Second Schedule to the said Debenture; ALL AND SINGULAR that piece or parcel of land situate at the Churchill Roosevelt Highway San Juan in the Ward of St. Anns, Trinidad comprising point Six One Three Two Hectares and more particularly described in the Schedule to Deed dated 10th December, 1998 and registered as No. 2685 of 1999; and ALL AND SINGULAR that certain piece of land situate at the Churchill Roosevelt Highway, San Juan in the Ward of St. Anns comprising Point Eight Six Seven Two Hectares or Two Acres Zero Roods and Twenty-Three Perches and more particularly described in Deed dated 22nd December, 1998 and registered as No. 5066 of 1999 are covered and/or charged by the said Debenture.

iv. An injunction to restrain the first Defendant whether by its directors, officers, auditors, proxies, nominees, servants, workmen or agents or any of them or otherwise howsoever and/or an injunction to restrain the second and third Defendants and each of them whether by themselves, their servants, workmen or agents or any of them or otherwise howsoever from doing the following acts or any of them that is to say:

a. Preventing the Plaintiffs or either of them, their officers, servants, workmen or agents from entering the said premises situate at 246 Eastern Main Road, Barataria, Trinidad aforesaid for the purpose of taking an inventory of the said assets stored, kept or detained thereat;

b. Destroying, defacing, tampering with, changing, altering, hiding, removing, transferring, mortgaging, pledging or selling or otherwise disposing of any or all the said assets which are either kept, stored or detained on the said premises situate at 246 Eastern Main Road, Barataria Trinidad or elsewhere by the Defendants or either of them or by any other person or persons on their behalf or on behalf of either or any one of them.

c. Detaining or taking possession or control of the said assets or any or all of the stocks-in-trade, property or other assets belonging or which had belonged to the second Plaintiff over which the first Plaintiff has a charge by virtue of the said Debenture and otherwise interfering with Victor Herde (or his successors, his servants or agents) as Receiver and Manager of the second Plaintiff;

d. Destroying, defacing, tampering with, changing, altering, hiding, removing, transferring, mortgaging, pledging or selling or otherwise disposing of motor vehicle registration number PBG 56 being a white Lexus Sports Utility Vehicle (SUV).

e. Removing from the jurisdiction or otherwise dealing with, disposing of, mortgaging, selling, assigning, charging or otherwise dealing with or diminishing the value any of their respective assets which are in Trinidad and Tobago whether in their respective own names or not and whether solely or jointly owned so as to reduce the value of their assets within the

jurisdiction below One Million, Nine Hundred Thousand Dollars ($1,900,000.00)

v. An Order for the Delivery up of the said assets or their value and damages (including exemplary or aggravated damages) consequent upon the wrongful interference with the same by their detention and damages for the wrongful conversion by the Defendants (or any one of them) of the same, being the property of the second Plaintiff, subject to the said Debenture.

vi. Further and/or alternatively, damages including exemplary or aggravated damages.

vii. Interest thereon pursuant to Section 25 of the Supreme Court of Judicature Chap. 4: 01 and/or pursuant to the equitable jurisdiction of the Court.

viii. Costs.

ix. Further or other relief.

29. The Defendants filed their Defence on 26th April, 2004 and Maraj Gold Limited and Seasons Limited (In Receivership) filed their Reply on 8th November, 2004. The Defence admits the existence and execution of the Debenture and puts the Claimants to strict proof of the monies allegedly owed to them. The Defence further alleges that the second Claimant demanded of the Defendant that he sign the promissory note without being given an opportunity for prior consultation.

30. In his witness statement Dev Debideen gave evidence in line with his pleadings by contending that he was forced to sign both the debenture and the promissory note, without having time for consideration of these documents. Regarding the debenture however, it was brought out under cross-examination that the document was in fact prepared by the Attorney-at-Law for Dev Debideen and was executed in his office. The contention put forward by Dev Debideen in relation to the promissory note is that it was signed on the basis of trust and friendship. However, on his own evidence the document was signed around the time that Debideen purportedly had feelings of mistrust in Om Maraj and began to suspect that he was operating only in the interest of his other companies.

31. In submissions filed by their Attorneys the focus of the Defendants in this Claim, shifted away from the allegation of coercion by Om Maraj in getting Dev Debideen to agree to sign. There was also a move away from the challenge to the accuracy of Om

Maraj's accounting processes used to quantify the debt owed by Seasons. Instead the focus shifted towards a new argument that enforcement of the Debenture was in fact barred due to illegality. The Defendants now submit that Maraj Gold was a moneylender at the time of the making of the debenture and was therefore subject to the **Moneylenders Act, Chap. 84:04** ("the Act").

32. Section 2 of the Act defines a *'moneylender'* as *"any person whose business is that of moneylending, or who advertises or announces himself or holds himself out in any way as carrying on that business, but does not include any person bona fide carrying on the business of banking or insurance or bona fide carrying on any business not having for its primary object the lending of money, in the course of which and for the purposes of which he lends money"*. The Act requires every moneylender to take out a licence every year and that every moneylender's contract be regulated by the provisions of the Act.
33. The Defendants claim that the current Debenture is illegal and unenforceable under the following sections of the Act:
    i. Section 11 which provides: *"(1) No contract for the repayment by a borrower of money lent to him or to any agent on his behalf by a moneylender licensed under this Act or for the payment by him of interest on money so lent and no security given by the borrower or by any such agent in respect of any such contract is enforceable, unless a note or memorandum in writing of the contract is made and signed personally by the borrower, and unless a copy of the note or memorandum is delivered or sent to the borrower within seven days of the making of the contract; and no such contract or security is enforceable if it is proved that the note or memorandum was not signed by the borrower before the money was lent or before the security was given, as the case may be.*

    (2) The note or memorandum shall contain all the terms of the contract, and in particular shall show the date on which the loan is made, the amount of the principal of the loan, and, either the interest charged on the loan expressed in terms of a rate per cent per annum, or the rate per cent per annum, represented by the interest charged as calculated in accordance with the Schedule."

    ii. Section 12(1) which provides: *"The interest which may be charged on loans by any person other than a moneylender licensed under this Act shall not exceed the rate*

of twenty-four per cent simple interest per annum, whether the interest is payable monthly or at any greater fixed period, and nothing herein contained shall authorise the charging of compound interest on such loans which would, in effect, amount to simple interest in excess of such rate per annum."

34. The Defendants rely on Om Maraj's evidence under cross-examination as proof of Maraj Gold carrying on business as a licensed moneylender under the Act.
35. This evidence does prove that Maraj Gold was known by its owner Om Maraj to be a moneylender under the Act. It is, however, unclear exactly when the business carried out this moneylending function and as submitted by Counsel for Maraj Gold, whether it operated as a moneylender at the time the debenture was signed. There is no documentary or verbal evidence of a moneylender's license having been taken out by Maraj Gold for the year when the debenture was signed. There is also no evidence of any other moneylending business carried on by Maraj Gold around that time.
36. The High Court in the case of **Gokool v Ibemerum**[16] took into consideration that there had been no evidence of other financial transactions conducted around the time of the disputed transaction to determine that the Plaintiff was not a moneylender. In that case, unlike the present, the Plaintiff had never held herself out to be such. In the current circumstances, there is still a lack of evidence of Maraj Gold's status at that time and as to whether the current transaction was one which would fall under Section 11 of the Act. However, even if Maraj Gold was not a licenced Money Lender at the time of the debenture, the provisions of Section 12(1) of the Moneylenders Act debarring the charging of excessive interest would apply.
37. In response to this new aspect of the case for the Defendants, the Claimants submit that the illegality submission must fail for the following reasons:
    i. That this submission was not pleaded, has taken them by surprise and they haven't been given an opportunity to answer this claim.
    ii. That Section 24 of the Act makes provision for situations where the interest exceeds the specified amount in the Act.

[16] CV1998-01142

iii. That their claim does not seek repayment of the money lent or to enforce a security but merely the protection and preservation of the property of Seasons.

Failure to Plead:

38. It is clear that illegality was never pleaded by the Defendants. The Defendants, citing **Halsbury's Laws of England**[17] claim that illegality is not required to be pleaded as the court cannot enforce an illegal contract. However, the Claimants dispute this in the circumstances of the present case. Citing **CPR 8.6(1)** and the decision in **Charmaine Bernard v Ramesh Seebalack [2010] UKPC 15**, they submit that illegality cannot be established conclusively and the submission, in the absence of any pleading and sufficient evidence, must fail.
39. There is, in fact, much uncertainty in the evidence as to Maraj Gold's status as a moneylender and whether the disputed transaction would fall under the provisions of Section 11 of the Act. In fact, even the 1998 text **"Illegal Transactions" by Dr. Nelson Enonchong** cited by the Defendants as to the proposition that illegality need not be proven, explicitly states that where illegality is revealed, the court must be satisfied that the whole of the circumstances relevant to the illegality are before it. The author at page 23 acknowledges that where the illegality does not appear on the face of the complaint it must be specifically pleaded since, *"as a matter of procedural fairness the other party needs to have due notice of the issue so that he may prepare himself with any evidence which may be necessary to answer the allegation of illegality."*

Section 24 of the Act Addresses Excessive Interest:

40. Section 24(1) & (2) of the Act provides as follows:

*"(1) Where proceedings are taken in any Court by any person for the recovery of any money lent, or the enforcement of any agreement or security made or taken in respect of money lent, and there is evidence which satisfies the Court that the interest charged in respect of the sum Actually lent exceeds the rates authorised by this Act, **the Court may re-open the transaction, and take an account between the lender and the person sued**, and may, notwithstanding any statement or settlement of account or any*

[17] Contract (Vol. 22 (2012)) [426]

*agreement purporting to close previous dealings and create a new obligation, re-open any account already taken between them**, and relieve the person sued from payment of any sum in excess of the sum adjudged by the Court to be due in respect of such principal and interest, and for such costs and charges as the Court may adjudge to be reasonable**, and, if any such excess has been paid or allowed in account by the debtor, may order the creditor to repay it; and may set aside, either wholly or in part, or revise, or alter, any security given or agreement made in respect of money lent, and if the lender has parted with the security may order him to indemnify the borrower or other person sued.*

*(2) **Any Court in which proceedings might be taken for the recovery of money lent** by any person shall have power to and **may, at the instance of the borrower or surety or other person liable, exercise the same powers as may be exercised under this section**, where proceedings are taken for the recovery of money lent, and the Court shall have power, notwithstanding any provision or agreement to the contrary, to entertain any application under this Act by the borrower or surety or other person liable, notwithstanding that the time for repayment of the loan, or any instalment thereof, may not have arrived."* [Emphasis added]

41. This provision makes it clear that where interest is charged in excess of that regulated by the Act the transaction is not necessarily unenforceable due to illegality. The court may still determine that the transaction can be enforced and in so doing can take an account and relieve the person sued from payment of the excessive interest charged. Interpreting this provision, the Court of Appeal in **Fort Vue Ltd. v Young**[18] (followed in **Wattley v Lopez CV2014-00845**), held that even if the interest charged was excessive this does not render the agreement unenforceable. It is clear from a proper interpretation of the Act that the Defendants have failed to prove illegality sufficient to render the Debenture unenforceable.
42. Further there has been no application by the Defendants for the taking of accounts as to the quantum of interest charged that may have exceeded the amount permitted under the Act. Although the accuracy and propriety of the accounting of Om Maraj is

[18] C.A./CIV.133/86

challenged, no pleading, evidence or submission is provided by the Defence as to what the correct quantum of outstanding debt should be. Accordingly, there is insufficient information before the Court based upon which, even without an application having been made, the Court could as part of the determination herein make a decision on the taking of accounts as to the true quantum of the debt.

Maraj Gold's Claim Does Not Seek Repayment:

43. The Defendants suggest that under Section 11 of the Act, the Claimants are barred from enforcing the debenture due to the absence of any note or memorandum in writing ***signed before the money was lent*** and ***containing all the terms*** of the contract, particularly ***the date of the loan*** and ***the principal sum***. The Court of Appeal in the case of **La Chapelle v Moses**[19] explained the interpretation of section 11 as follows:

"This means that to be enforceable the simplest moneylending transaction must take place in this wise:

(1) There must be a request by the borrower for a loan and a willingness by the lender to lend his money on terms acceptable to both; that is the contract;

(2) A note or memorandum of that contract must be signed by the borrower;

(3) That note or memorandum must be signed by the borrower before the money is lent; and

(4) A copy of the note or memorandum must be delivered or sent to the borrower within 7 days of the making of the contract…

It is submitted that where the security takes the form of a promissory note and a copy of it is given to the borrower there is as it were instantaneous compliance with the requirements of the section. This argument necessarily implies that the promissory note is itself the contract and that the copy is a note or memorandum of the contract. Assuming that to be so it follows that in signing the promissory note the borrower will be signing the note or memorandum at the same time as the security is given, for it is his signature that creates the security.

It is manifest therefore that there cannot in such case be an enforceable contract because the relevant part of the provisions of this subsection provides that the

[19] Volume XIII (1952-1953) Trin. L. R.,40

security shall not be enforceable if it is proved that the note or memorandum aforesaid was not signed by the borrower "before the security was given" …

The subsection therefore clearly contemplates 2 separate documents, the note or memorandum and the security. It is possible to conceive a case where the note or memorandum contains little more than an embodiment of what is to be stated in security, that is, where the security contains all the terms of the contract. Nonetheless it must be a separate document signed by the borrower before the security is given. For these reasons we are of the opinion that the appeal fails."

44. There is in the present case no evidence of there being a separate note or memorandum that was signed before the loan was given. Even if it can be said that the Defendants are correct in alleging that there was no separate memorandum evidencing agreement to a loan prior to execution of the debenture, the Claimants make a further submission in response that the reliefs they have claimed herein do not seek repayment of the loans secured by the debenture. The reliefs claimed in fact only to seek to prevent the Defendants from disposing of the assets of Seasons and interfering with the work of the receiver. Accordingly, the Claimants submit that the reliefs claimed are not barred under the Act.
45. In all the circumstances the submission of the Defendants that enforcement of the debenture is debarred for illegality to the extent that Maraj Gold's claims for relief herein must fail has not been supported on the evidence before the Court. It is my determination therefore that there is no merit to the submission that the Claim is debarred by illegality.
46. There was more merit however in the earlier focus of the Defence on challenging the accounting accuracy as to the quantum of debt outstanding and secured by the debenture. This point which was not pursued in closing submissions, as well as the concerns regarding interest charges in excess of rates permitted under the Money Lenders Act may still be advanced in the course of the receivership of Seasons.
47. Under Section 24 of the Act, an account can be taken by the Court to determine if there has been an excess of interest charged. By undertaking this exercise, only the goods and equipment that amount to the value that should have been charged under the Act would be preserved as property of Seasons (in liquidation). The prospect of proper

accounting for amounts owed by Seasons will not be prejudiced by grant of the relief sought herein.

48. Although the Defendants have failed to establish that the entire claim is barred for illegality their submission on the futility of some of the declaratory relief claimed herein is supported by the evidence. The submission, which remains uncontradicted by the Claimants, is that the third declaratory relief sought as to the parcels of land is no longer sustainable as all have since been sold. Additionally, other relief claimed namely damages and an injunction freezing the Defendants assets ["Mareva Injunction"] were not substantiated in any particulars, evidence or submissions.

THE TRESPASS CLAIM:

49. By Writ of Summons and Statement of Claim filed on 2nd April, 2003, VSN Investments Limited claimed against Seasons Limited (In Receivership) (a) possession of premises situate at 246 Eastern Main Road, Barataria, Trinidad; (b) mesne profits of Trinidad and Tobago Eight Thousand, Three Hundred and Nine Dollars (TT$8,309.00) plus VAT from 1st May, 2002; damages for trespass; costs; and further and other relief.
50. By its Defence filed on 8th May, 2003, Seasons Limited denies that it has failed to deliver up the said premises and claims that neither the company nor its Receiver has had access to the premises since May, 2002. Instead the premises have since April, 2002 been occupied by Dai-Tech Limited.
51. The Claimant submits that there was no admissible evidence given on this issue by the Defendant as Om Maraj did not have personal knowledge of the denial of access to the property. Rajiv Maraj as receiver did not give evidence on this point.
52. The Defendant responds by citing Rajiv Maraj's witness statement which states that the entire stock of Seasons was sold to Dai Tech and that the employees of Dai Tech occupied the premises and refused to cooperate with the former receiver, Mr Herde. Further, the Claimant's own witness statement suggests that Victor Herde as receiver of Seasons took into his custody the records and papers relating to Seasons by removing them from the rented premises.
53. On a view of all the relevant evidence, the Claimant has not proven that Seasons was still in occupation of the premises for the period claimed. There can be, therefore, no

order for damages for trespass or mesne profits as trespass has not been sufficiently proven. There is, however, no dispute by the Defendant that the Claimant is indeed entitled to possession of the premises and therefore an order for possession will be made to ensure that VSN's rights are secured.

THE GUARANTEE CLAIM:

54. By Writ of Summons and Statement of Claim filed on 23rd May, 2006, VSN Investments Limited claimed against Seasons Limited (In Receivership) (a) the sum of Trinidad and Tobago One Million, Nine Hundred and Thirty-Four Dollars, One Hundred and Fifty Dollars and Thirty Cents (TT$1,934,150.30) paid by the Claimant on behalf of the Defendant; (b) interest in the sum of Trinidad and Tobago Eight Hundred and Ninety Thousand, Eight Hundred and Seventy-Four Dollars and Eighty-Seven Cents (TT$890,874.87); (c) the sum of Trinidad and Tobago Seventy Dollars (TT$70.00) for Court fees; (d) the sum of Trinidad and Tobago One Thousand Dollars (TT$1,000.00) for attorney's fees; (e) costs; and (f) further and other relief.
55. By its Defence filed on 20th September, 2006, Seasons does not admit that Two Million, Ninety-Six Thousand, Seven Hundred and Twenty-Seven Dollars and Eighty-Seven Cents ($2,096,727.87) was advanced to Seasons by Scotiabank as alleged or that there was a demand made of Mr. Herde as Receiver for repayment of such a loan. In an earlier ruling[20] Madam Justice Jones who presided herein prior to her elevation to the Court of Appeal made a finding that this non-admission by Seasons amounted to a bare denial defence. Jones J opined,

> "[17] Part 10 of the CPR requires that where an allegation is not admitted in a defence a Defendant condescend to details. It is mandatory in its effect. It requires a defendant to admit or deny each allegation made in the statement of case. Where a defendant denies an allegation the defence must state the reason for doing so and, if proffering a different version of events, must state that version. The only exception to this mandatory requirement occurs where a defendant states it is unable to admit or deny

[20] VSN Investments Limited v Seasons Limited (Unreported, 29 April 2015)

an allegation because it does not know and therefore requires the claimant to prove.

……

[19] The Defendant's position therefore remains an incomplete and ineffectual denial of paragraphs 4 and 7 under the CPR. Further there is nothing in any of the other paragraphs of the defence that provides a different version of events or amounts to a denial of the allegations contained in paragraphs 4 and 7 of the statement of case. In accordance with the decision in **MI5 Investigations Limited v Centurion Protective Agency Limited** I am entitled therefore to treat the allegations in the statement of case as undisputed or the defence as containing no reasonable defence to that allegation.

[20] In these circumstances I agree with the Claimant's submission that, in the context of the applicable rules, there has been no denial of the allegations contained in the statement of case and in the circumstances no particulars are necessary. Put another way, given the defence filed, the particulars sought are not necessary for the purpose of managing the case and furthering the overriding objective."

56. Accordingly, it had previously been determined that the allegation of VSN with regard to an advance having been made to Seasons is uncontradicted by any pleading of the Defendant. Seasons further pleads in its Defence that if the said sum was repaid by VSN, this was done when Dev Debideen was shareholder and director of Seasons, VSN and Dai-Tech. At that time as well Debby Debideen was a shareholder and Director of the latter two companies. Accordingly, Seasons contends that any repayment of a Scotiabank advance by VSN was done in settlement of liabilities of VSN for assets of Seasons that were transferred to Dai-tech in 2002. Additionally, Seasons claims that One Hundred and Fifteen Thousand and Fifty Dollars and Seventy-One Cents ($115.050.71) of the amount advanced was incurred by Dev Debideen for his personal expenses. Neither particulars of this contention nor evidence thereof are provided.

57. In light of the submissions on both sides the Court is urged to find that the determination of this claim turns on whether VSN was a guarantor for the loan by Scotiabank or whether it was a principal debtor jointly and severally with the Defendant liable for the debt. VSN claims that it was the guarantor for the loan as the security was taken out on the home of its director Dev Debideen. According to Seasons, the legal implications of VSN being the guarantor are that VSN has:

    a. "*An implied right to indemnification as the guarantee was admittedly given at the request of the Defendant*
    b. *A subrogated right at common law and equity to reclaim the payments under the guarantee to avoid the unjust enrichment of the defendant in respect of the moneys paid on its behalf;*
    c. *A statutory right in any event under* ***section 11 of the Mercantile Law Act***[21] *"to stand in the place of the creditor" to recover the money paid under the guarantee.*

    In the premises, it cannot be denied that the claimant is entitled to relief as claimed against Seasons for the moneys which it advanced under the guarantee, "

58. However, Seasons submits that both companies were jointly and severally liable for the debt. This is borne out by VSN's own pleadings in its statement of case as well as in the Clause 1 of the mortgage deed itself.
59. The authority of **Tolley's Company Law Service**[22] cited by VSN in submissions addresses circumstances where there is a guarantor who has paid the debt of the debtor. This is not the case in this instance where the overdraft facility was taken out jointly and severally in the Claimant and Defendant's names.
60. There is, however, provision in the instant circumstances for contribution under the common law. **Halsbury's Laws of England**[23] defines Joint and Several Liability as follows:

[21] Chapter 82:02
[22] Borrowing and Debt Financing/ Guarantees [B5017]
[23] Contract (Vol.22 (2012) [640]

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

61. It continues at 647:

"Payment to one of a number of joint creditors discharges a debt owed to them jointly. Payment by one of joint, or joint and several, debtors discharges all, though it may give rise to a right of contribution among them."

62. In the chapter on Restitution[24], **Halsbury's** states, citing Goff and Jones on **The Law of Unjust Enrichment**[25] that in the discharge of debts a right to contribution may arise:

"A right to contribution arises whenever a person who owes with another a duty to a third party, and is liable with that other to a common demand, discharges more than his proportionate share of that duty. The essence of the right to a contribution lies in the liability to a common demand; and, ***where there is such a liability, the court will, subject to any contractual provision modifying or limiting any claim to a contribution, make an assessment of contribution****."* [Emphasis added]

63. The position at common law based on which VSN as a person jointly liable with Seasons for the debt can recover payment made on the debt is further reinforced as being provided for at **Section 11 of the Mercantile Law Act, Chapter 82:02**. This is so because the section does not govern only Guarantors but also persons similarly circumstanced as VSN as follows:

"11. ***Every person who****, being surety for the debt or duty of another, or* ***being liable with another for any debt*** *or duty,* ***pays the debt*** *or performs the duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty or other security which is held by the creditor in respect of the debt or duty, whether*

[24] Restitution (Vol. 88 (2012)) [480]

[25] (8th Edn, 2011) para 20-01

the judgment, specialty or other security is or is not deemed at law to have been satisfied by the payment of the debt or performance of the duty, and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, ***and, if need be, and upon a proper indemnity, to use the name of the creditor in any action or other proceeding at law or in equity, in order to obtain from the principal debtor****, or any co-surety, co-contractor or codebtor, as the case may be,* ***indemnification for the advances made*** *and loss sustained by the person who has so paid the debt or performed the duty, and the payment or performance so made by the surety shall not be pleadable in bar of any such action or other proceeding by him.* ***No*** *co-surety,* ***co-contractor or co-debtor shall be entitled to recover from any other*** *co-surety, co-contractor* ***or co-debtor, by the means mentioned above, more than the just proportion to which, as between those parties themselves, the last-mentioned person shall be justly liable****." [Emphasis added]*

64. Under the principles of Unjust Enrichment and in accordance with **Section 11 of the Mercantile Law Act** therefore, VSN may recover a just proportion of the money it repaid as fair contribution by the Defendant. This may be assessed in equal portions as a starting point as the parties shared equal liability for the facility. As aforementioned there is no pleading or evidence to substantiate that the money was not advanced to Seasons alone. Furthermore, there is no substantiated pleading or evidence that some of the money advanced was used personally for Dev Debideen. The allegation that the money repaid was intended by VSN as a repayment for assets sold to Dai-Tech defies logic as the two companies are separate persons in law and the basis on which such a transaction could have been envisaged is not particularised.
65. VSN has however admitted that part of the money Six Hundred and Eleven Thousand, Three Hundred and Seventy-Two Dollars and Twenty-Nine Cents ($611,372.29) was used for its benefit. There is no evidence that it was not for the benefit of Seasons that the remainder of the original Two Million and Ninety-Six Thousand, Seven Hundred and Twenty-Seven Dollars and Eighty-Seven Cents ($2,096,727.87) was advanced. Accordingly, it is my determination that the amount to be repaid by Seasons is half of the remaining quantum of One Million, Nine Hundred and Thirty-Four, One Hundred

and Fifty Dollars and Thirty Cents ($1,934,150.30) claimed by VSN which amounts to Nine Hundred and Sixty-Seven Thousand and Seventy-Five Dollars and Fifteen Cents ($967,075.15).

VI. Conclusion

The Debenture Claim:

66. The Defendants in this claim have failed to provide a proper defence to the enforceability of the debenture and promissory note signed by Dev Debideen. Their submissions departed from their initial defence of coercion and focused on proving the illegality and unenforceability of the contract under the Moneylenders Act.
67. They have, however, failed to prove ex facie illegality as the Act makes specific provision for an account to be taken in cases where interest is charged in excess of that provided for in the Act. Further the submission that the contract is unenforceable due to the absence of the note or memorandum stating the particulars of the loan also does not stand in the face of the reliefs claimed by the Claimant. These reliefs do not seek repayment of any loan but merely protection of the assets of Seasons from being destroyed or distributed. Furthermore, even if the relief sought was repayment, all the relevant circumstances surrounding the alleged unenforceability may not be before the court due to the late submission by the Defendant and its departure from its pleaded case.
68. Therefore, Maraj Gold and Seasons must succeed in this Claim. They are entitled to the reliefs claimed save for the declaratory relief concerning lands that were sold, the damages claims and Mareva injunctive orders that were not pursued. The court has the power to order an account be taken as to any interest in excess of that permitted under the Money Lender's Act. There has been no counterclaim or application for such relief. However, in the determination of this matter parties will be afforded liberty to apply should the need arise.

The Trespass Claim:

69. The Claimant has failed to prove trespass sufficiently and on the weight of the evidence Seasons did not have possession of the premises. It is my finding that it was in fact controlled by Dai Tech. This is evident from the uncontradicted evidence of the receiver Rajiv Maraj that all the stocks of Seasons were removed and that the receiver was not allowed into the building.
70. Therefore, the order for damages for trespass cannot succeed. The order for possession will, however, be granted as there was no dispute by the Defendant that the Claimant was entitled to possession.

The Guarantee Claim:

71. The Claimant has failed to prove that it was a guarantor for the overdraft facility. The Mortgage deed and its own statement of case refer to the parties as being jointly and severally liable for repayment of the loan.
72. Therefore, the Claimant's submissions on guarantor's right to be repaid are not applicable. There is, still an appropriate remedy as initially claimed in VSN's Statement of Case at paragraph 11 under the principles of unjust enrichment for a contribution to be made by the Defendant towards the repayment of the loan. This is so because both Seasons and VSN were liable to repay when the demand was made by Scotiabank. The Claimant made the repayment in full which was paid more than a proportionate share of the whole loan. It is my finding that Seasons is liable to indemnify VSN for a proportionate amount valued at Nine Hundred and Sixty Seven Thousand and Seventy-Five Dollars and Fifteen Cents ($967,075.15) plus interest thereon at a commercial rate of 9%[26] from July 2002 to the date of Judgment.

[26] The Prime Lending Rate (Median) taken from Central Bank Data Centre search results for Commercial Banks as at August 2016.

VII. Decision:

RE: Claim No. H.C.A. 1561 of 2002 CV 2012-04599

73. Having considered the pleadings, evidence and submissions of parties on both sides it is HEREBY ADJUDGED AND DECLARED that:

i. All the stocks, shares, bonds and securities; loan capital both present and future; revenues and claims both present and future; goodwill and all patents or patent applications, trademarks, trade names, registered designs and - copyrights, and all licences; and all machinery, equipment, office furniture, fixtures and fittings, chattels (including motor vehicle registration number PBG 56), all its undertaking, goodwill, assets, revenues and rights whatsoever and wheresoever both present and future, including its uncalled capital, stocks-in-trade, book debts and other debts of the second Claimant from time to time due or owing to the second Claimant arid all other assets are covered and/or charged by a Single Debenture ("the said Debenture") made or given by the second Claimant, Seasons Limited (now In Receivership) under its Common Seal dated the 19th day of February, 1998 and registered on the 9th day of March, 1998 pursuant to Section 79 of the Companies Ordinance Ch.31 No.1 and also registered as a deed on the 15th day of April, 1998 as No. 7420 of 1998 in favour of the first Claimant, Maraj Gold Limited to secure, inter alia, all monies and liabilities together with interest, commissions, discounts and all other lawful charges and expenses on a full indemnity basis due from and incurred by the second Claimant to the first Claimant (default having been made by the second Claimant in the payment of the sum due, owing and payable thereunder) (demand having been made by letter dated 1st May, 2002 from the first Claimant to the second Claimant) (hereinafter, called "the said assets") which are or were in the Defendants' possession or in the possession of either or any one of them at 246 Eastern Main Road, Barataria, Trinidad or elsewhere or wheresoever, are the property of the second Claimant, subject to the said Debenture.

ii. The said Debenture constitutes. a charge on the said assets in priority to any and/or all purported claim or claims of the' Defendants or any one of them whether purportedly created by a document or documents or by any purported sale or

agreement or otherwise purporting to be made between the second Claimant and the Defendants or any one of them.

IT IS FURTHER ORDERED THAT:

iv. The first Defendant is restrained whether by its directors, officers, auditors, proxies, nominees, servants, workmen or agents or any of them or otherwise howsoever and the second and third Defendants and each of them whether by themselves, their servants, workmen or agents or any of them or otherwise howsoever are restrained from doing the following acts or any of them that is to say:

   a. preventing the Claimants or either of them, their officers, servants, workmen or agents from entering the said premises situate at 246 Eastern Main Road, Barataria, Trinidad aforesaid for the purpose of taking an inventory of the said assets stored, kept or detained thereat;

   b. destroying, defacing, tampering with, changing, altering, hiding, removing, transferring, mortgaging, pledging or selling or otherwise disposing of any or all the said assets which are either kept, stored or detained on the said premises situate at 246 Eastern Main Road, Barataria Trinidad or elsewhere by the Defendants or either of them or by any other person or persons on their behalf or on behalf of either or any one of them.

   c. detaining or taking possession or control of the said assets or any or all of the stocks-in-trade, property or other assets belonging or which had belonged to the second Claimant over which the first Claimant has a charge by virtue of the said Debenture and otherwise interfering with Rajiv Maraj (or his successors, his servants or agents) as Receiver and Manager of the second Claimant

   d. destroying, defacing, tampering with, changing, altering, hiding, removing, transferring, mortgaging, pledging or selling or otherwise disposing of motor vehicle registration number PBG 56 being a white Lexus Sports Utility Vehicle (SUV).

v. The Defendants are ordered to deliver up the said assets or their value being the property of the second Claimant, subject to the said Debenture.

vi. The Defendants are to pay to the Claimants the costs of the Claim to be assessed by the Master if not agreed.

vii. Liberty to apply.

RE: Claim No.: HCA 907 of 2003 CV 2012-4598:

74. Having considered the pleadings, evidence and submissions of both parties it is HEREBY ADJUDGED AND DECLARED that:

i. The Claimant is entitled to possession of the premises situate at 246 Eastern Main Road, Barataria.

ii. The Claims for Mesne Profits and damages are dismissed.

iii. No order as to costs.

RE: Claim No. CV 2006-01349

75. Having considered the pleadings, evidence and submissions of both parties it is HEREBY ORDERED that:

i. The Defendant is to pay to the Claimant the sum of Nine Hundred and Sixty-Seven Thousand and Seventy-Five Dollars and Fifteen Cents ($967,075.15) being monies paid by the Claimant on behalf of the Defendant plus interest thereon at a rate of 9% from July 19, 2002 to the date of Judgment

ii. The Defendant is to pay the Claimant prescribed costs quantified on the amount of the said sum of Nine Hundred and Sixty-Seven Thousand and Seventy-Five Dollars and Fifteen Cents ($967,075.15) plus the interest thereon.

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Eleanor Joye Donaldson Honeywell

Judge

September 26, 2016

Assisted by: Christie Borely

Attorney-at-Law

Judicial Research Counsel I