

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2014-02872

BETWEEN

3 G TECHNOLOGIES LIMITED

DONALD SEECHARAN

FARIZA SHAAMA SEECHARAN

Claimants

AND

RUDRANAND MAHARAJ

Defendant

Before The Honourable Mr. Justice Robin N. Mohammed

Date of Delivery: Tuesday 15 October 2019

Appearances:

Mr Rolston Nelson S.C. and Mr Odai N.S. Ramischand instructed by Mr Riaz P. Seecharan for the Claimants

Mr Alvin Fitzpatrick S.C. and Mr. Kerwyn Garcia instructed by Ms Marcelle A. Ferdinand for the Defendant

RULING ON NOTICE OF APPLICATION FOR PERMISSION TO FILE REPLY

I. Background

[1] This decision is concerned solely with the Claimants' Application filed on 13 November 2015 for permission to file a Reply and the Defendant's objections to the draft Reply attached to the said application. This Court has delivered at least two written decisions earlier in this matter and as such, a detailed summary of the background facts becomes unnecessary.

[2] The material issue in contention between the parties revolves around the circumstances in which Mr Rudranand Maharaj was appointed Receiver by the mortgagee, ScotiaBank Limited, of the income of the First Claimant - a Company whose offices are contained in a building constructed on the property situate at 112 - 114 Duke Street, Port of Spain. The First Claimant's building is currently rented out to the Judiciary of Trinidad and Tobago and earns a monthly rental income in the sum of approximately \$202,000.00¹.

[3] In 2005, the First Claimant took out a loan with ScotiaBank Limited in the sum of \$15,494,902.00 over a 14-year term with the Second and Third Claimants, its Directors, as Sureties. This loan was taken out for the purpose of constructing the said building on the property and carried a monthly instalment of \$178,319.38.

Their Claim is essentially that in November 2013, the Second and Third Claimants were informed that Mr Rudranand Maharaj was appointed as Receiver of the First Claimant on the basis that the First Claimant was in arrears of its monthly payments under the loan. The Claimants vigorously contest this decision to appoint a Receiver and allege that it is illegal, in bad faith, and done with ulterior motives.

By their Amended Claim, additional allegations of statutory breaches were levied against the Defendant asserting, inter alia, he is not a licenced trustee/receiver under the **Bankruptcy and Insolvency Act, Chap 9:70 (the Act)** and therefore, that his appointment is invalid. Thus, in summary, the Claimants claimed several declarations to the effect that the appointment of the Receiver is null and void and that all rents and/or monies collected

¹ See particulars of Losses and Prospective Losses at para 16 of the Amended Claim at (2)

by Mr Rudranand Maharaj in his capacity as Receiver be paid to the Claimants with interest. Additionally, declarations were sought to the effect that the Defendant lacks the requisite licence and therefore, cannot act as a Receiver of the First Claimant.

[4] In response, the Defendant pleaded that after reading the relevant documents provided by the mortgagee—ScotiaBank Limited, he satisfied himself that the mortgagee indeed had the power to appoint him as Receiver of the income of the First Claimant. Further, that upon the happening of one or more of the events that lead to such appointment, ScotiaBank Limited made a formal demand for payment of the debt. In those circumstances, having confirmed that the relevant documents were valid, the Defendant maintains that he acted in good faith and as a reasonably prudent person would in the discharge of his duties as Receiver. Further, his case is that he followed protocol and issued a notice of his appointment on the 14 November 2013 under the powers contained in a debenture issued by the First Claimant in favour of the mortgagee.

In response to the allegations of his purported breach of various statutory provisions, the Defendant relied on the judgment of this Court given on the 25 June 2015, which stated that the provisions of the Act did not apply to make his appointment illegal.

[5] After the Defence was filed, the Claimants filed the Application herein seeking permission to file a Reply to the Defence. The reasoning for the Application are as follows:

- i. The Defence raises matters which were not and/or should not have been dealt with in the Statement of Case which the Claimants seek to address in their Reply;
- ii. The Defence raises matters which require a reply so that issues between the parties can be defined;
- iii. The Defence has misconstrued and/or misstated the Claimants' cause of action;
- iv. The Reply serves to further the overriding objective in dealing with cases justly;
- v. The Reply seeks to assist the Honourable Court in actively managing the case effectively pursuant to its power of Case Management under **Part 26 of the Civil Proceedings Rules 1998 ("the CPR")**;

- vi. There is continuing prejudice which is severe and cumulative in nature to the Claimants caused by the Defendant which to date has gone unabated.

[6] The Defendant filed his submissions on his objections to the Reply on 30 August 2017. The Claimants, however, did not file any response.

Decision on this application was held in abeyance for a considerable amount of time on the basis that parties were attempting to resolve this and other related matters amicably without a trial. The Court having been informed by the parties that all settlement negotiations having broken down, and upon considering the pleadings and the written submissions of the Defendant, the Court now gives its decision on the Claimants' application for permission to file a reply.

II. Law

[7] **Part 10.10 of the CPR** states the following:

- “(1) A claimant may not file or serve a reply to a defence without –*
- (a) the permission of the court; or*
 - (b) if it is to be filed before a case management conference, the consent of the defendant.*
- (2) The court may only give permission at a case management conference.”*

[8] The principles to be applied when determining an application for permission to file a reply are oft quoted and familiar. In **Zuckerman on Civil Procedure, Principles of Practice, Third Edition** at paragraphs 7.31 and 7.32, the following was outlined:

*“7.31 In many cases the exchange of particulars of claim and of defence should be sufficient to identify the disputed issues so that no further exchange will be needed for this purpose. But in some a reply to the defence may prove necessary as where **the defendant has gone beyond a denial of the claimant's grounds for the claim and has alleged new facts** in support of his defence. In an action for breach of contract a defendant may, for example, admit the breach and the damage but raise the defence of frustration. The*

reply provides the claimant with an opportunity for addressing such a defence.

7.32 A reply must not be used for **repeating allegations in the particulars of claim or for bolstering them by challenging the defendant's denials**. It should only be used for dealing with matters which could not have been addressed in the particulars of claim.....”

[9] Mendonça JA in **First Citizen's Bank Limited v Shepboys Limited**², essentially states that a reply can only be filed in response to new matters raised in the defence, which were not and should not have been dealt with in the statement of case. Thus, a Reply must neither be a restatement of the Claim nor a defence to a defence.

[10] Pemberton J (as she then was) reiterated the point by citing learning from **Blackstone's Civil Practice 2001** in her decision of **Mayfair Knitting Mills Limited v Mc Farlane's Design Studios Limited**³ as follows:

*“...a reply may respond to any matters raised in the defence which were not and which should not have been dealt with in the particulars of claim and exists solely for the purpose of dealing disjunctively with matters which could not properly have been dealt with in the particulars of claim, but which require a response once they have been raised in the defence...Once, however, a defence has been raised which requires a response so that the issues between the parties can be defined, a reply becomes necessary for the purpose of setting out the claimant's case on that point. **The reply is, however, neither an opportunity to restate the claim, nor is it, nor should it be drafted as, a defence to a defence.**”*

[11] It follows that a reply to a defence is only appropriate in instances where something was raised in the defence which requires a response to clarify or define the issues between the

² Civ App P231 of 2011

³ CV2007–002865

parties. The reply, however, is not a medium to allow a claimant to make further averments or responses to the case put forth by the defendant. A reply should deal with “**new**” matters that are raised by the defence. It is not to be used as an opportunity to recap assertions already expressed in the statement of case nor should it be used, as stated in Blackstone, as a “**defence to a defence**”.

III. Analysis

- [12] **Paragraph 1 of the draft reply** is stated as being a **general** reply to the defence; to the denials, statements and allegations made therein. This Court is of the view that the generality of this statement is not permissible as it violates the essential reason for a reply. The Claimants ought to have specified to which paragraphs they were responding so that the Court would be better able to determine whether the paragraphs in the defence warrant a reply.

Accordingly, paragraph 1 of the draft reply ought to be struck out.

- [13] **Paragraph 2 of the draft reply** is in response to paragraphs 2(a) and 2(b) of the Defence where the Defendant averred that he is a stranger to the allegations made in the Amended Statement of Case relating to Scotiabank, its employees, servants or agents and that the allegations made cannot be answered by him. The Court is of the view that this is a new issue to which the Claimants are permitted to reply as this was not considered in the Amended Statement of Case.

Accordingly, paragraph 2 of the draft reply is permissible.

- [14] **Paragraph 3 of the draft reply** is stated as being in response to paragraphs 2(a) to (f) of the defence. The Court is of the opinion that the only new issue raised in paragraph 2 of the defence was the assertion that the Defendant cannot answer the allegations made against Scotiabank or its employees, servants or agents. Accordingly, the Court is of the opinion that **only** paragraph 2(b) of the defence warrants a reply.

However, the Court finds that parts of paragraph 3 of the Reply amount to a restatement of the Amended Statement of Case. Sub-paragraphs (i), (ii), (iii), (iv), (v), (vi), (x), (xi), (xii), (xiii) and (xiv) of paragraph 3 of the Reply are in response to the Defendant's assertion regarding Scotiabank and are therefore permissible. However, sub-paragraphs (vii), (viii), (ix), (xv), (xvi), (xvii), (xviii) and (xix) of paragraph 3 of the draft reply amount to a restatement of the Amended Statement of Case.

Accordingly, sub-paragraphs (vii), (viii), (ix), (xv), (xvi), (xvii), (xviii) and (xix) of paragraph 3 of the draft reply ought to be struck out.

- [15] **Paragraph 4 of the draft reply** is not in response to any paragraphs of the defence. Nonetheless, the Court is of the opinion that the matters averred therein amount to a restatement of the Amended Statement of Case.

Accordingly, paragraph 4 of the draft reply ought to be struck out.

- [16] **Paragraph 5** is stated as being in response to paragraph 2(d) of the defence where the Defendant again averred to the circumstances under which Scotiabank had the power to appoint him as Receiver. The Court is of the view that there is no new issue raised in this part of the paragraph which warrants a reply. The Claimants in their reply at paragraph 5 sought to restate their Amended Statement of Case which is not permissible.

Accordingly, paragraph 5 of the draft reply ought to be struck.

- [17] **Paragraph 6** is stated as being in response to paragraph 3 of the defence where the Defendant averred that immediately following his appointment as Receiver of the First Claimant, he ensured that notice was given to the Registrar of Companies and that the Registrar entered his appointment in the register pursuant **section 265 of the Companies Act**. The Court is of the view this is not a new issue raised by the defence which warrants a reply.

Nevertheless, the Claimants in their reply averred that section 265 mandated Scotiabank to act in the registration of the appointment of the Receiver. They further averred that Carlene Seudat and Rachael Daniell falsely made a registration which is now the subject-matter of a criminal complaint filed in the First Magistrates' Court. The Court is of the opinion that this averment in the draft reply amounts to an introduction of new facts which ought to have been pleaded in the Amended Statement of Case.

Accordingly, paragraph 6 of the Reply ought to be struck out.

- [18] **Paragraph 7 of the draft reply** purports to respond to paragraph 4 of the defence where the Defendant averred that the facts pleaded in the Amended Statement of Case disclose no reasonable cause of action against him and/or is an abuse of process and should be struck out. The Court is of opinion that this is not a new issue raised by the defence which warrants a reply by the Claimants. This paragraph merely sought to restate the Amended Statement of Case as it relates to the alleged circumstances under which the Defendant was appointed as Receiver.

Accordingly, paragraph 7 of the draft reply ought to be struck out.

- [19] **Paragraph 8** is stated as being in response to paragraph 6 of the defence where the Defendant reiterated the nature of his appointment. This is not a new issue raised by the Defence which warrants a reply by the Claimants. This paragraph is a restatement of Amended Statement of Case as it relates to the non-acceptance of the Defendant as Receiver.

Accordingly, paragraph 8 of the draft reply ought to be struck out.

- [20] **Paragraph 9** is in response to paragraph 7 of the defence. The Defendant, in paragraph 7, again speaks to the nature of his appointment as Receiver and that such appointment was not invalid as a result of the First Claimant's alleged default in the observance or performances of covenants expressed and/or implied in the Deed of Debenture. The Court

is of the opinion that this is not a new issue raised by the Defence which warrants a reply. Again, the purported response seeks to restate the Amended Statement of Case on this issue, and is therefore not permissible.

Accordingly, paragraph 9 of the draft reply ought to be struck out.

- [21] **Paragraph 10** is in response to paragraph 9 of the defence where the Defendant averred that on a true construction of the terms of the Deed of Debenture and Deed of Collateral Mortgage, Scotiabank was not required to notify the Claimants that it intended to appoint a Receiver of the First Claimant. The Court is of the opinion that this is not a new issue raised by the defence which warrants a reply. The purported reply is simply restating facts averred in the Amended Statement of Case in relation to notice to be given by Scotiabank.

Accordingly, paragraph 10 of the draft reply ought to be struck out.

- [22] **Paragraph 11 of the draft reply** responds to paragraph 14 of the defence where the Defendant averred that the particulars of indebtedness set out in the letter dated 4 November 2013 from Messrs. Hobsons were accurate and not misleading; that Scotiabank had not failed to provide the Claimants with proper accounts over the years; and that there were monies outstanding and due to Scotiabank at the time the Defendant was appointed Receiver. The Court is of the view that paragraph 14 of the defence does not warrant a reply as it does not raise any new matters or issues.

Accordingly, paragraph 11 of the draft reply ought to be struck out.

- [23] **Paragraph 12** is in response to paragraph 15 of the defence where the Defendant averred that he requested and obtained from Scotiabank a statement of accounts in relation to the credit facility which showed that the Claimants have been repeatedly and consistently in arrears of payments. The Court is of the opinion that this is not a new issue raised by the defence which warrants a reply. In this paragraph of the draft reply the Claimants are

restating their Amended Statement of Case as it relates to Scotiabank's refusal to call in the Performance Bond which was assigned to them.

Accordingly, paragraph 12 of the draft reply ought to be struck out.

- [24] **Paragraph 13** is stated as being in response to paragraph 21 of the defence. The Court is of the opinion that the new issues raised in paragraph 21 of the defence was the judgment of the High Court delivered on 25 June 2015; the construction of **section 288 of the Companies Act**; the inapplicability of **section 41 of the Conveyancing and Law of Property Act** because of Clause 4(e) of the Deed of Collateral Mortgage; the averment that the Defendant is a stranger to the allegation that the Performance Bond was and has not been accounted for by Scotiabank and the application of the sums which he received as Receiver of the Duke Street property. Accordingly, the Court is of the opinion that **only** paragraphs 21(a), (b), (f) and (h) of the defence warrant a reply.

However, the Court finds that parts of paragraph 13 of the draft reply amount to a restatement of the Amended Statement of Case. Parts (a), (b), (f), (g), (h), and (i) thereof are in response to the new issues raised in the defence and are therefore permissible. However, sub-paragraphs (c), (d), and (e) of paragraph 13 thereof amount to a restatement of the Amended Statement of Case.

Accordingly, sub-paragraphs (c), (d) and (e) of paragraph 13 of the draft reply ought to be struck out.

- [25] **Paragraph 14 of the draft Reply** sought to respond to paragraph 23 of the defence where the Defendant denied that he accepted the appointment of Receiver of the First Claimant or as Receiver of the Duke Street property with ulterior motives or that such acceptance was in breach of the Companies Act and/or the Financial Institutions Act and/or Prudential Criteria and/or other applicable law and accounting practices. The Court finds that paragraph 23 of the defence does not warrant a reply by the Claimants as this is not a new issue raised.

Accordingly, paragraph 14 of the draft reply ought to be struck out.

- [26] **Paragraph 15** is in response to paragraph 33 of the defence. The Court is of the view that no new issue is raised in this paragraph which warrants a reply by the Claimants.

Accordingly, paragraph 15 of the draft reply ought to be struck out.

- [27] **Paragraph 16 (erroneously numbered as 15)** is in response to paragraphs 35 and 36 of the defence where the Defendant averred that from the spreadsheet, he was able to tell that there was unpaid interest at the time of his appointment as Receiver both under the Deed of Debenture and of the Duke Street property. He also denied that this appointment was invalid or illegal. The Court is of the view that this is not a new issue raised by the defence which warrants a reply by the Claimants.

Accordingly, paragraph 16 of the draft reply (erroneously numbered as 15) ought to be struck out.

- [28] **Paragraph 17 of the draft reply (erroneously numbered as 16)** responds to paragraph 39 of the defence where the Defendant averred that the matters relating to Scotiabank are embarrassing and should be struck out. The Court is of the opinion that this a new issue raised by the Defence which warrants a reply by the Claimants.

Accordingly, paragraph 17 of the draft reply (erroneously numbered as 16) is permitted.

- [29] **Paragraph 18 (erroneously numbered as 43)** is stated as being in response to paragraph 40 of the defence where the Defendant averred that the Claimants are not entitled to the reliefs claimed in the Amended Statement of Case. This is not a new issue raised by the defence which warrants a reply. The averment in paragraph 18 of the draft reply amounts to a restatement of the Statement of Case as it relates to the appointment of the Receiver being made in bad faith and for improper purposes.

Accordingly, paragraph 18 of the draft reply (erroneously numbered as 43) ought to be struck out.

IV. Disposition

[30] Having considered the pleadings, the draft reply and the submissions of the Defendant, the Court orders as follows:

ORDER:

- 1. Paragraphs 1, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16 (erroneously numbered as 15) and 18 (erroneously numbered as 43) of the draft Reply be and are hereby struck out.**
- 2. Sub-paragraphs (vii), (viii), (ix), (xv), (xvi), (xvii), (xviii) and (xix) of paragraph 3 of the draft Reply be and are hereby struck out.**
- 3. Sub-paragraphs (c), (d) and (e) of paragraph 13 of the draft Reply be and are hereby struck out.**
- 4. Permission is hereby granted to the Claimants to file and serve a Reply to the Defendant's Defence on or before 1 November 2019 in the terms set out in the draft Reply attached to Notice of Application filed on 13 November 2015 excluding the paragraphs or sub-paragraphs thereof struck out as ordered in clauses 1, 2 and 3 of this order.**
- 5. No orders as to costs on the Claimants' Application filed on 13 November 2015.**

Robin N. Mohammed

Judge