

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2015-03274

**IN THE MATTER OF THE PROPERTY COMPROMISED IN THE COLLATERAL
MORTGAGE DEED OF MORTGAGE DATED 5TH DAY OF DECEMBER, 2005
AND REGISTERED AS DEED NO DE200503226989D001 MADE BETWEEN
DONALD GORDON SEECHARAN ALSO CALLED DONALD SEECHARAN AND
FARIZA SHAAMA SEECHARAN OF THE ONE PART AND SCOTIABANK
TRINIDAD AND TOBAGO LIMITED OF THE OTHER PART**

BETWEEN

SCOTIABANK TRINIDAD AND TOBAGO LIMITED

Claimant

AND

DONALD GORDON SEECHARAN

(Also called DONALD SEECHARAN)

FARIZA SHAAMA SEECHARAN

Defendants/Ancillary Claimants

AND

SCOTIABANK TRINIDAD AND TOBAGO LIMITED

First Ancillary Defendant

RACHEL LAQUIS

Second Ancillary Defendant

AVALON SMITH

(Wrongly sued as AVALAON SMITH)

Third Ancillary Defendant

ROMNEY THOMAS

Fourth Ancillary Defendant

Before the Honourable Mr. Justice Robin N. Mohammed

Date of Delivery: Tuesday 19 October 2021

Appearances:

Mr. Alvin Fitzpatrick S.C. and Mr. Kerwyn Garcia instructed by Ms. Andrea Orie for the Claimant/First Ancillary Defendant and the Second, Third and Fourth Ancillary Defendants

Mr. Rolston Nelson S.C. and Mr. Donald Seecharan instructed by Mr. Riaz P. Seecharan for the Defendants/Ancillary Claimants

**DECISION ON SECOND, THIRD AND FOURTH ANCILLARY DEFENDANTS’
NOTICE OF APPLICATION**

I. Introduction and Factual Background

[1] This decision deals with the Notice of Application filed on 5 October 2017 by the Second, Third and Fourth Ancillary Defendants seeking an order pursuant to **Part 19.2(4) of the Civil Proceedings Rules 1998** (“the CPR”) that these Ancillary Defendants cease to be parties to the Ancillary Claim on the ground that it is not desirable for them to be parties to the proceedings.

[2] In these proceedings, the Defendants/Ancillary Claimants are Directors of 3G Technologies limited, a company whose offices are situate at 112–114 Duke Street, Port of Spain (“3G and/or the property”). On the 25 October 2005, the Defendants/Ancillary Claimants, along with their company, took out a loan credit facility in the sum of \$17,000,000.00 with interest to provide financing for the construction of the seven storey building on the property. The loan agreement was signed with the Claimant/First Ancillary Defendant, Scotiabank Trinidad and Tobago Limited (“Scotiabank Limited”), as the mortgagee and came with a monthly instalment of \$175,843.94 over a 14-year period. Two forms of security were given for repayment of this loan: (i) a Debenture over 3G’s fixed and floating assets; and (ii) a collateral mortgage over the property supplemental to the Debenture.

Most importantly, it was an agreed term between the parties that on the occurrence of either (i) the Defendants/Ancillary Claimants’ and/or 3G’s failure to pay the interest, principal, fees or commissions or (ii) a breach by 3G of any term or condition of the loan agreement, would amount to an event of default.

A further credit facility was taken out by the Defendants/Ancillary Claimants with Scotiabank Limited and thus, the Debenture was upstamped from \$17,000,000.00 to \$18,922,000.00.

[3] Scotiabank Limited claimed, however, that as at 2 October 2015 when the Fixed Date Claim was filed, while the further credit facilities have been repaid, the mortgage loan has not been repaid. In particular, Scotiabank Limited averred that the Defendants/Ancillary Claimants have failed to repay several monthly instalments. In the circumstances, after the application of interest and various late fee charges, the Fixed Date Claim sought, inter alia, the outstanding debt of **\$19,592,328.07**. Scotiabank Limited also sought delivery by the Defendants/Ancillary Claimants of possession of the property.

[4] The Defendants/Ancillary Claimants filed their Defence and Counterclaim on 3 November 2015. The Defendants/Ancillary Claimants subsequently filed an Amended Defence and Counterclaim on 22 November 2019. In summary, the Defendants/Ancillary Claimants alleged that Scotiabank Limited fraudulently misappropriated the monies paid to it under the loan, and that its decision to appoint a Receiver was illegal. In essence, the Defendants/Ancillary Claimants denied the claims sought and also proceeded to file a Counterclaim with their Defence for several declarations and orders, which, inter alia, stated that certain decisions and actions of Scotiabank Limited were illegal and/or in contravention of various pieces of legislation along with orders for damages, an independent review of 3G's accounts and that Scotiabank Limited provide a proper statement of accounts.

[5] The Defendants also filed the Counterclaim/Ancillary Claim against three other persons not named in the Fixed Date Claim: Ms. Rachel Laquis - *Scotiabank Limited's Legal and Corporate Secretary*, Ms. Avalon Smith – *Scotiabank Limited's Senior Credit Solutions Manager, Commercial* and Mr. Romney Thomas – *attorney-at-law in the employ of Scotiabank Limited*, the Second, Third and Fourth Ancillary Defendants respectively.

[6] The Second, Third and Fourth Ancillary Defendants subsequently filed the Notice of Application on 5 October 2017 with an affidavit in support of Ms. Andrea Orie,

instructing attorney-at-law for the Ancillary Defendants. The Defendants/Ancillary Claimants filed their affidavit in opposition to the Application on 6 December 2019. The Second, Third and Fourth Ancillary Defendants filed their affidavit in reply on 31 July 2020. The Second, Third and Fourth Ancillary Defendants filed written submissions in support of their Application to cease to be parties on 13 August 2020. To date, the Defendants/Ancillary Claimants have not filed any submissions and/or reply submissions concerning this Application.

II. Issue

- [7] Having reviewed the Application, its attendant affidavit, the Defendants/Ancillary Claimants' affidavit in opposition and submissions filed by the Second, Third and Fourth Ancillary Defendants, the Court must now rule on the following issue only: **Should the Second, Third and Fourth Ancillary Defendants cease to be parties to the Defendants/Ancillary Claimants' Amended Defence and Counterclaim filed on 22 November 2019?**

III. Submissions and Analysis

- [8] **Part 19 of the CPR** deals generally with the addition or substitution of parties after proceedings have been commenced. **Part 19.2(4) of the CPR** provides for the removal of a party to the proceedings by Order of the Court. It states:

"19.2(4) The court may order any person to cease to be a party if it considers that it is not desirable for that person to be a party to the proceedings."

- [9] Counsel for the Ancillary Defendants submitted that the Second, Third and Fourth Ancillary Defendants should cease to be parties to the Counterclaim because -
- a. The Defendants/Ancillary Claimants have no or no realistic prospect of success on the Counterclaim against these Ancillary Defendants;
 - b. Consistent with their pattern of conduct and modus operandi throughout these proceedings, the Counterclaim has been instituted in order to delay and unduly complicate a simple mortgagee action which was filed by Scotiabank Limited

by Fixed Date Claim in 2015 and which should have been disposed of summarily and/or speedily a long time ago;

- c. The Counterclaim is misconceived, frivolous and vexatious and amounts to harassment of these Ancillary Defendants - two of whom are attorneys-at-law. Thus, the Counterclaim is intended to embarrass them in their profession which this Honourable Court should not condone;
- d. The Amended Defence and Counterclaim discloses no grounds for bringing claims against these Ancillary Defendants and it is not desirable for these Ancillary Defendants to be parties to these proceedings; and
- e. The authorities speak in one, consistent voice against the kind of tactical manoeuvring which Counterclaim represents, and are uniformly condemnatory of this kind of Counterclaim, in which individual employees and officers of corporations are sued for tactical advantage, when there is no or dubious merit to the claims against them.

[10] Counsel further submitted that the Amended Defence and Counterclaim disclose no grounds for bringing the claim against the Second, Third and Fourth Ancillary Defendants since the Defendants/Ancillary Claimants have not pleaded as follows:

- i. Facts supporting a finding that these Ancillary Defendants acted in furtherance of their own interests or improper purpose or that they acted in furtherance of any interest other than Scotiabank Limited;
- ii. Facts supporting fraud, deceit, dishonesty or lack of authority by these Ancillary Defendants;
- iii. Facts supporting actual tortious acts by these Ancillary Defendants which give rise to personal liabilities for which Scotiabank Limited may be vicariously liable but which on their own support a finding of liabilities against these Ancillary Defendants as individuals.

[11] Counsel contended that each and every one of the actions complained of as against these Ancillary Defendants were actions taken by them in furtherance of Scotiabank Limited's decision to exercise its contractual rights as against the Defendants/Ancillary Claimants. Further, the allegations of fraudulent behaviour which the Defendants/Ancillary Claimants make against these Ancillary Defendants are devoid of any facts which are capable of making out such claims. The allegations

against these Ancillary Defendants are without any particulars and without any relevant material facts to establish a reasonable cause of action in relation to the allegations. There is no pleading that use of Scotiabank Limited's corporate structure was a sham from the outset or was an afterthought to a deal which had gone sour or that these Ancillary Defendants' actions exhibit a separate identity or interest from that of Scotiabank Limited so as to make the act or conduct complained of their own or that these Ancillary Defendants acted negligently in relation to "customs of the trade" as to how Banks usually should act or that they acted beyond the course and scope of their employment at or retained by Scotiabank Limited or that they acted in furtherance of any interest other than that of Scotiabank Limited or that the Ancillary Defendants were acting other than in the normal course of their employment in the ordinary course of business.

[12] It was further submitted that the Fourth Ancillary Defendant, in particular, was at all material times acting no more than as a solicitor/instructing attorney and/or legal adviser to Scotiabank Limited. Therefore, the Fourth Ancillary Defendant is not liable to the Defendants/Ancillary Claimants for having so acted.

[13] Mr. Seecharan, in the affidavit in opposition to the Application filed on 6 December 2019, stated that the Second, Third and Fourth Ancillary Defendants have brought this Fixed Date Claim against the Defendants/Ancillary Claimants. However, this is incorrect. Scotiabank Limited is the only named Claimant in this Claim before the Court against the Defendants/Ancillary Claimants. The Second, Third and Fourth Ancillary Defendants are not parties to the Claim; they are, however, in the employ of Scotiabank Limited.

[14] Mr. Seecharan further stated that the Ancillary Defendants have to account for their actions acting on behalf of an artificial person, that is, Scotiabank Limited. However, it is trite law that a company is a legal entity that is separate and distinct from the individual members of the company: **Salomon v Salomon & Co Ltd**¹.

¹ [1897] AC 22

[15] Pursuant to **section 21(1) of the Companies Act, Chapter 81:01**, a company has its own legal personality with rights, powers, privileges and obligations of its own. A company is bestowed with legal capacity and its shareholders are not subject to liability. Accordingly, in a claim before the Court, which involves a company, it is not appropriate to name any of the shareholders or directors, unless such person is being sued in his/her personal capacity.

[16] The Court, in its determination, considered the case of **Kay Aviation b.v. v Rofe**² where the Court observed that:

“The minimum level of material facts in a statement of claim founded on causes of action against an officer, director or employee of a corporation with whom the plaintiff has contracted is very high. The imposition of personal liability on an employee, officer or director of a company is the exception rather than the rule. To justify a departure from this rule a plaintiff must plead all the relevant material facts to establish there is a reasonable cause of action. In the absence of specifically pleaded material facts the action against the director, officer or employee of the corporation will be struck. See: Serel v. 371487 Ontario Ltd., [1996] O.J. No. 3988 (Gen. Div.). This is particularly so where the plaintiff is not a stranger to the defendant. In the case at bar, for example, the respondent has contracted with the corporation in which the appellant is sole director and officer and with full knowledge of the inherent limits to liability”

[17] In **Anil Maharaj (Trading as A. Maharaj Tyre Service) v. Rudy Roopnarine, Paula Kim Roopnarine and Refinery Industrial Fabricators Limited**³, the Claimant applied to the Court to lift the corporate veil of the Third Defendant company, thereby ascribing personal liability to the First and Second Defendants in a claim for monies due and owing. Rajkumar J (as he then was) applied the principles enunciated above and held that the Claimant had not pleaded fraud, deceit, fraudulent misrepresentation, or dishonesty, nor had he pleaded any other material facts specific

² PESCAD 7 (P.E.I C.A.)

³ CV2012-04524

to ascribing liability to the personal defendants. In the premises, the learned Judge found that the case as pleaded disclosed no grounds for lifting the corporate veil.

[18] The Court also considered the Canadian case of **Montreal Trust Company of Canada v ScotiaMcLeod Inc. (1995)**⁴ wherein the Court summarized the circumstances under which the corporate veil can be pierced to render directors or officers of a company liable as follows:

*“The decided cases in which employees and officers of companies have been found personally liable for actions ostensibly carried out under a corporate name are fact-specific. In the absence of findings of **fraud, deceit, dishonesty or want of authority** on the part of employees or officers, they are also rare. Those cases in which the corporate veil has been pierced usually involve transactions where the use of the corporate structure was a sham from the outset or was an afterthought to a deal which had gone sour. There is also a considerable body of case-law wherein injured parties to actions for breach of contract have attempted to extend liability to the principals of the company by pleading that the principals were privy to the tort of inducing breach of contract between the company and the plaintiff: see *Ontario Store Fixtures Inc. v. Mmmuffins Inc.* (1989), 70 O.R. (2d) 42 (H.C.J.), and the cases referred to therein. Additionally there have been attempts by injured parties to attach liability to the principals of failed businesses through insolvency litigation. In every case, however, the facts giving rise to personal liability were specifically pleaded. Absent allegations which fit within the categories described above, officers or employees of limited companies are protected from personal liability unless it can be shown that their actions are themselves tortious or exhibit a separate identity or interest from that of the company so as to make the act or conduct complained of their own.”*

⁴ (1995) 129 D.L.R. (4th) 711 at 720 (Ontario Court of Appeal)

[19] Consequently, in order to impose personal liability on the Second, Third and Fourth Ancillary Defendants, the Defendants/Ancillary Claimants are required to plead all the relevant material facts to establish that there is a reasonable cause of action against them, separate and distinct from any liability of Scotiabank Limited.

[20] In their Amended Defence and Counterclaim, the Defendants/Ancillary Claimants allege as follows:

- a. Scotiabank Limited, Ms Laquis, Ms. Smith and Mr. Thomas knew that by the October 2005 agreement, Scotiabank required 3G and the Defendants/Ancillary Claimants before it would allow any drawdown of the bridging loan, to enter into a performance bond for 10% of the construction contract sum as a security which was to be assigned absolutely to Scotiabank Limited;
- b. Scotiabank Limited, Ms Laquis, Ms. Smith and Mr. Thomas fraudulently purported not to know of the said performance bond and its absolute assignment to Scotiabank although they knew that by the October 2005 commitment and agreement that Scotiabank required the assignment of the performance bond as security before drawdown of the said facility;
- c. Mr. Thomas as a lawful agent made a demand by Pre-Action letter dated 10 April 2013 to the Defendants/Ancillary Claimants and the second dated 24 April 2013 upon 3G alleging that 3G was in breach of the following terms and conditions and the Defendants/Ancillary Claimants were sureties in the sum of \$15,049,201.05 which sum included interest and undetailed legal and professional fees knowing that the said claim was erroneous;
- d. Mr. Thomas has refused to disclose that a response was sent to him on 16 July 2013 by Mr. Riaz Seecharan;
- e. Scotiabank Limited, Ms Laquis, Ms. Smith and Mr. Thomas did not account for the performance bond;
- f. Mr. Thomas previously entered an appearance for the receiver in High Court Action CV2014-02874 in which proceeding, it was pleaded that the commitment letter dated 2 July 2007 by Scotiabank Limited stated that the provision of all security was met including the assignment of the said performance bond;
- g. The statement made by Scotiabank Limited and Mr. Thomas that they did not know of the performance bond and its assignment was fraudulent and made for

the purport of depriving 3G and the Defendants the benefit of the proceedings of the performance bond;

- h. By agreement dated 15 November 2013, Mr. Thomas, the lawful agent of Scotiabank Limited illegally and fraudulently prepared an agreement illegally appointing Rudranand Maharaj to be the receiver of the income of the property described in the schedule known and assessed as Nos. 112-114 Duke Street, Port of Spain;
- i. By the said agreement Mr. Thomas and Scotiabank Limited falsely stated that the Defendants/Ancillary Claimants were borrowers when they knew that 3G was the borrower and they were only the guarantors/sureties;
- j. Mr. Thomas and Scotiabank Limited made this false statement with the intention of illegally appointing the receiver although they knew that there was no default by the Defendants as sureties;
- k. The illegal appointment of receiver prepared by Mr. Thomas and executed by the officers of Scotiabank Limited namely Ms. Carlene Seudat and Ms. Christine Nunes was fraudulent;
- l. Mr. Thomas, Scotiabank Limited, Ms. Seudat and Ms. Nunes knew that the said appointment was not exercisable as the interest on the said commercial mortgage loan was not in arrear for upwards of two months after coming due and fraudulently made the said statement that interest was now in arrear for upwards of two months after becoming due;
- m. Mr. Thomas, Scotiabank Limited, Ms. Seudat and Ms. Nunes knew that 3G and the Ancillary Claimants on 1 December 2011, 9 January 2012, 16 February 2012 and 29 March 2012 had paid consistent monthly instalments of \$179,000.00 to the commercial mortgage loan;
- n. Mr. Thomas, Scotiabank Limited, Ms. Seudat and Ms. Nunes illegally and fraudulently appointed Rudranand Maharaj as receiver on 15 November 2013 pursuant to the Collateral Deed of Mortgage when there was no interest in arrear of upwards of two months after becoming due;
- o. Mr. Thomas, Scotiabank Limited, Ms. Seudat and Ms. Rachel Daniell illegally and fraudulently appointed a receiver of the assets of 3G in breach of the Companies Act;

- p. Mr. Thomas, Scotiabank Limited and its officers acted in breach of the Financial Institutions Act and the Central Bank directions and have acted maliciously against 3G and the Defendants/Ancillary Claimants;
- q. The malicious conduct which Scotiabank Limited, Ms Laquis, Ms. Smith and Mr. Thomas against 3G and the Ancillary Claimant has caused 3G's default, loss and damage to the Defendants/Ancillary Claimants with extreme prejudice and detriment;
- r. Mr Thomas, Scotiabank Limited, Ms. Laquis and Ms. Smith have fraudulently claimed for the sum of \$19,398,045.04 when they knew that since 16 February 2012 the principal outstanding was \$14,389,537.11 and that 3G and the Defendants/Ancillary Claimants have paid \$3,938,000.00 since then to Scotiabank Limited;
- s. Mr. Thomas, Scotiabank Limited and its officers have fraudulently claimed the sum of \$1,622,124.01 as interest on the outstanding loan when they know that the sum of \$12,228,042.45 has already been appropriated to the interest component of the said commercial mortgage loan;
- t. Mr. Thomas, Scotiabank Limited and its officers knew that there was no default interest owing at the time it fraudulently appointed the illegal receiver;
- u. Mr. Thomas, Scotiabank Limited, Ms. Laquis and Ms. Smith have filed for late fees in the sum of \$2,469,252.58 when they know that the said claim is false and fraudulent as no late fees were owing from October 2008; and
- v. Mr. Thomas, Scotiabank Limited and its officers know that since their fraudulent appointment of the illegal receiver in November 2013, the income of 3G which was paid to the 3G Technologies Limited account payee only has been received by Scotiabank Limited and fraudulently converted the cheques for its own use and/or to another account not the account payee of 3G Technologies Limited.

[21] Having examined the contents of the Defendants/Ancillary Claimants' Amended Defence and Counterclaim filed on 22 November 2019, the Court is of the view that the Defendants/Ancillary Claimants have not pleaded any relevant material facts to establish that there is reasonable cause of action against the Second, Third and Fourth Ancillary Defendants. The Defendants/Ancillary Claimants, in the case at bar, have not pleaded nor given particulars of fraud, deceit, fraudulent misrepresentation or

dishonesty, nor have they pleaded any other material facts specific to ascribing personal liability to the Second, Third and Fourth Ancillary Defendants.

[22] Furthermore, the Second, Third and Fourth Ancillary Defendants are protected from personal liability unless it can be shown that the acts and/or conduct complained of are tortious or exhibit a separate identity or interest from that of Scotiabank Limited so as to make the actions and/or conduct their own. Again, the Defendants/Ancillary Claimants have not pleaded, nor given particulars of, these material facts in their Amended Defence and Counterclaim.

[23] Consequently, in the absence of such pleaded material facts against these officers and/or employees of Scotiabank Limited, the Court is of the opinion that it is not desirable for the Second, Third and Fourth Ancillary Defendants to be parties to the Counterclaim. In that regard, the Court agrees with Counsel for the Second, Third and Fourth Ancillary Defendants that they are not proper parties to the Defendants/Ancillary Claimants' Amended Defence and Counterclaim filed on 22 November 2019.

[24] Consequently, the Second, Third and Fourth Ancillary Defendants ought to cease to be parties to the Defendants/Ancillary Claimants' Amended Defence and Counterclaim filed on 22 November 2019.

[25] Nevertheless, if the Defendants/Ancillary Claimants wish to question the Second, Third and Fourth Ancillary Defendants on their actions and/or conduct concerning the loan agreement between Scotiabank Limited, 3G and the Defendants/Ancillary Claimants, they are permitted to file witness summonses along with witness summaries requesting that these persons attend trial to give evidence: **Parts 34.2 and 29.6 of the CPR** and **Universal Management Solutions Ltd v Ali and others**⁵.

⁵ CV2016-01032

VI. Disposition

[26] Accordingly, in light of the findings and analyses above, the order of the Court is as follows:

ORDER:

- 1. The Second, Third and Fourth Ancillary Defendants be and are hereby removed as parties to the Amended Defence and Counterclaim filed on 22 November 2019.**
- 2. The Defendants/Ancillary Claimants shall pay to the Second, Third and Fourth Ancillary Defendants the costs of the Application filed on 5 October 2017 to be assessed in accordance with Part 67.11 of the CPR 1998, in default of agreement.**
- 3. In the event that there is no agreement on the issue of costs, then the Second, Third and Fourth Ancillary Defendants to file and serve a Statement of Costs for assessment on or before 30 November 2021.**
- 4. Thereafter, the Defendants/Ancillary Claimants to file and serve Objections to the items on the Statement of Costs, if any or necessary, on or before 14 January 2022.**
- 5. Decision on quantification of costs to be given on a date to be notified.**

Robin N. Mohammed
Judge