REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal S-334 of 2016
CV 2006-01349

BETWEEN

VSN INVESTMENTS LIMITED

AND

SEASONS LIMITED (IN RECEIVERSHIP)

Civil Appeal S- 335/2016
CV 2012-04599

BETWEEN

DAI TECH LIMITED, DEV DEBIDEEN, DEBBY DEBIDEEN

AND

MARAJ GOLD LIMITED, SEASONS LIMITED (IN RECEIVERSHIP)

Civil Appeal S-336/2016
CV 2006-01349

BETWEEN

SEASONS LIMITED (IN RECEIVERSHIP)

AND

VSN INVESTMENTS LIMITED

Panel:

A. Mendonça J.A.

N. Bereaux J.A.

G. Lucky J.A.

DATE OF DELIVERY: 26th May, 2021

Appearances:

Mr. F. Hosein S.C. and Mr R. Dass instructed by Mr A. Maraj for Dai Tech Limited, Dev Debideen, Debby Debideen and VSN Investments Limited.

Mr. T. Bharath instructed by Mr A. Le Blanc for Maraj Gold Limited and Seasons Limited (In Receivership).

I have read the judgement of Lucky JA and I agree.

_____

Allan Mendonça

Justice of Appeal

I too agree.

_____

Nolan Bereaux

Justice of Appeal

JUDGEMENT

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Delivered by Gillian Lucky, J.A.

FACTUAL BACKGROUND

1. The appeals in this matter originate from the deterioration of a business and personal relationship between Mr. Om Parkash Maraj (hereinafter referred to as "Maraj") and Mr. Dev Debideen (hereinafter referred to as "Debideen").

2. In 1996, Maraj and Debideen established an air-conditioning business, which they incorporated into a company called 'Seasons Limited' (hereinafter referred to as "Seasons"). Both Maraj and Debideen were directors of Seasons.

3. At the time of the incorporation of Seasons, Maraj was a director of Maraj Gold Limited (hereinafter referred to as "Maraj Gold") while Debideen was the owner of VSN Investments Limited (hereinafter referred to as "VSN") and a director of Dai Tech Limited (hereinafter referred to as "Dai Tech"). Debideen's wife, Debby Debideen was also a director of both VSN and Dai Tech.

4. After the incorporation of Seasons, Maraj and Debideen agreed that Debideen would manage the daily operations of Seasons, while Maraj would be responsible for the injection of capital into the business.

5. Maraj claimed that there was a mutual understanding that the funds advanced to Seasons were loans by his company Maraj Gold and that the sums advanced carried interest at the prevailing bank rate. Debideen claimed that he was unaware firstly, that the funds belonged to Maraj Gold and secondly, that the funds constituted a loan to be repaid with interest. Debideen claimed that the funds were provided by Maraj as Maraj's personal investment in Seasons.

6. In 1998, it was agreed by Maraj and Debideen that Seasons would expand its business to include real estate. In November 1998, both Maraj and Debideen incorporated another company called Signature Properties Limited. Properties identified by Debideen were purchased in the name of Seasons, using funds provided by Maraj. Debideen maintained that the funds injected by Maraj represented Maraj's personal injection and were not a loan from Maraj Gold.

7. Three High Court Actions were commenced by various parties. These three actions were referred to by the judge as – "**The Debenture Claim**", "**The Trespass Claim**" and "**The Guarantee Claim**".

8. The Trespass Claim was not appealed, therefore, that matter is not relevant to these proceedings.

9. The three appeals in this matter relate to the Debenture Claim and the Guarantee Claim. The appeals were not consolidated but have been heard together because of the interrelation of the issues raised and the evidence relied upon.

THE DEBENTURE CLAIM

Background

10. According to Debideen, sometime in 1998, he was made aware that the funds injected into Seasons were loans from Maraj Gold. A deed of debenture, registered as No. 7420 of 1998 was issued by Seasons as the borrower, in favour of Maraj Gold as the lender. Debideen claimed that he was coerced into signing the document and had no opportunity to consider it properly.

11. On 4th July 2001, Maraj presented a promissory note for execution by Debideen, in the latter's capacity as a director of Seasons. The promissory note stated 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. Debideen claimed that he had no choice but to sign the document.

12. In April, 2002, by virtue of sales arranged by Debideen, Seasons sold to Dai-Tech (owned by the Debideens), stock in trade and goods for the price of One Million and Forty-One Thousand, One Hundred and Eighteen Dollars and Twenty Cents ($ 1,041,118.20).

13. Since there was a charge on the assets of Seasons, Maraj Gold, in its capacity as debenture holder, wrote to Seasons on 1st May 2002 demanding payment of $8,113,997.69, then due and owing under the debenture. On 2nd May 2002 Maraj Gold appointed Mr. Victor Herde as receiver and manager of Seasons (then in Receivership) after Seasons defaulted in its repayment obligations.

14. The debenture claim was initiated in the High Court by Maraj Gold and Seasons (In Receivership) against Dai Tech and the Debideens. In that claim, Maraj Gold and Seasons (In Receivership) sought declaratory relief that all the assets of Seasons, including the stock in trade and goods sold to Dai Tech, were subject to the debenture.

15. In their defence, Dai Tech and the Debideens claimed that they were coerced into the execution of both the deed of debenture and the promissory note. In essence, the defence was one of undue influence.

Decision of the Trial Judge

16. The judge determined that the central issue was whether Dai Tech and the Debideens were liable under the debenture executed in favour of Maraj Gold. A sub-issue raised was whether the relief sought by Maraj Gold was barred by illegality since, if the funds were in fact loaned to Seasons by Maraj Gold, in the latter's capacity as a moneylender, there had to be compliance with the provisions of the Moneylenders Act.

17. The judge was of the view that the submissions of Dai Tech and the Debideens departed from the original defence of coercion. The submissions instead focussed on the illegality of the transaction (which was not specifically pleaded), resulting in the unenforceability of the debenture.

18. The judge found that there was no evidence that Maraj Gold was in the business of moneylending for the year when the debenture was signed nor was there evidence that Maraj Gold was in the business of moneylending during the period 1996 to 1998, when the funds were advanced to Seasons.

19. The judge further found that Dai Tech and the Debideens failed to prove the defence of illegality, therefore Maraj Gold and Seasons were entitled to the declaratory relief sought.

Appeal of Debenture Claim

20. By Notice of Appeal **CA S335/2016**, Dai Tech Limited and the Debideens (hereinafter together referred to as "Dai Tech") appealed from the decision in relation to the Debenture claim.

Submissions on Debenture Claim

Submissions of Dai Tech

21. The debenture claim was instituted under the **Rules of the Supreme Court** 1975 (RSC). The matter was converted from the RSC to the Civil Proceedings Rules 1998 (CPR). Dai Tech submitted, that because the action was converted from the RSC to the CPR, it meant that the latter rules applied to the entirety of the claim, that is, from the time of its filing to its conclusion. Dai Tech relied on the cases **Assoon v Petrotrin** CV 2006-01194 and **Trinidad Express and Ors v Conrad Aleong** CA 122 of 2009 to support its position on the converted matter being subject to the CPR.

22. Dai Tech submitted that unlike the position under O. 18 r. 8 of the RSC, there was no need to specifically plead any fact showing illegality under the CPR. In this regard, Dai Tech submitted, that illegality arose '*ex facie*' by virtue of the evidence in the trial. Dai Tech relied on **Halsbury's Laws of England, Volume 22 (2012)**, at paragraph 426 which states:-

> *"426 Establishment of Illegality*
>
> *Where a contract on the face of it is illegal the court will take notice of that fact and refuse to enforce the contract even though the vitiating factor has not been*

pleaded, and even though the defendant does not wish to raise the objection….."

23. Dai Tech argued that once there is evidence to establish illegality, a Court is bound to take notice of that matter, even if illegality is not pleaded or the transaction is not '*ex facie*' illegal. Dai Tech further relied on the text **Illegal Transactions**,(1998) (LLP) by Dr Nelson Enongchong. Page 20, paragraph 1- 5 which states:-

> *"Where the evidence which emerges at trial shows conclusively that there is illegality, the court will allow the issue to be raised since no further evidence by the other party could show that the transaction is legal. Where the illegality does not appear in the pleading, the court may raise it of its own motion if "the evidence adduced by the plaintiff proves the illegality". For, as the Privy Council pointed out in Chettiar v Chettiar, once evidence is disclosed which proves the illegality, the courts are "bound to take notice of it ... though not pleaded".*

24. Dai Tech submitted that the debenture purported to secure an illegal debt and was unenforceable because it was in breach of sections 11, 12 and 14 of the **Moneylenders Act**, Chapter 84:04 (hereinafter referred to as "the Act"). Sections 11, 12 and 14 of the Act state:-

> *"**11**(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

***12**. (1) 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.

(2)…….
(3)…….
(4)…….

***14**. Any contract made after the commencement of this Act for the loan of money by a moneylender licensed under this Act shall be illegal in so far as it provides directly or indirectly for the payment of interest in advance whether by deduction of any amount from the principal sum borrowed or otherwise or for the payment of compound interest or for the rate or amount of interest being increased by reason of any default in the payment of sums due under the contract and any such moneylender contravening this section is liable to the penalties prescribed by section 13."*

25. Dai Tech relied on the case of **Sookdeo and Anor v Lum Young and Anor** CV.2010-03195, in which Justice Rampersad applied the case of **La Chapelle v Moses** C.A.PCC.31/195. In **La Chapelle**, the Court of Appeal stated that section 11 of the Act requires two (2) documents, firstly a note/memorandum of the contract for the repayment of the money lent and secondly the security, if any, given by the borrower or his agent in respect of such contract.

26. Dai Tech also submitted that the interest applied by Maraj Gold was far in excess of the statutory limitation prescribed in section 12 and further, the compound interest charged was in breach of section 14 of the Act.

27. Based on the Act and the cases of **Sookdeo** and **La Chapelle**, Dai Tech contended that:-
    a) There was no written memorandum or note setting out the essential terms;
    b) No signed memorandum was executed prior to the loan ;
    c) Interest was charged in excess of the statutory limits of the Act; and

d) Compound interest had been charged in breach of the Act.

The submission was that the matters listed in (a) to (d) above, whether taken individually, collectively or in any combination amounted to a breach of the requirements of sections 11, 12 and 14 of the Act.

28. Dai Tech argued that the judge erred when she determined that there was no evidence of Maraj Gold carrying on the business of moneylending during the year when the debenture was signed. According to Dai Tech, at all material times, Maraj Gold, carried on the business of a moneylender because Maraj Gold stated this in the first paragraph of its statement of case.

29. According to Dai Tech, it was not a fact in issue that Maraj Gold was a moneylender. Dai Tech challenged the finding of the trial judge that there was uncertainty as to Maraj Gold's status as a moneylender during the period that the funds were advanced from Maraj Gold to Seasons.

30. Further, Dai Tech submitted that the declaratory relief granted by the Court was manifestly flawed because the trial judge accepted the submission of Maraj Gold that, because the relief sought under the debenture did not seek repayment but merely to prevent the disposal of assets that the claim could nevertheless proceed. Dai Tech argued that the orders were not justified having regard to the following:-

    a. The length of time which had ensued since initiation of the claim;
    b. The fact that the stock which was alleged to be in the possession of the Appellant was stock in trade and/or other current assets which were consumables and about which no evidence had been led to suggest that same was likely to be still in existence.
    c. The evidence that a subsequent business was operating at the premises at 246 Eastern Main Road and had done so for some 16 years as at the date of the judgment;
    d. The evidence of the Respondents that the subject stock in trade and other assets had in any event already been sold as at the date of the trial;

Submissions of Maraj Gold

31. Maraj Gold argued that it would be unfair to permit Dai Tech to rely on the defence of illegality, in circumstances in which Maraj Gold was not given the opportunity to rebut the allegations. Maraj Gold submitted that the matter commenced by the filing of a Writ of Summons in 2002 under the RSC and at the time of filing the statement of claim, Dai Tech was bound to observe those rules as they relate to the defence of illegality.

32. O. 18 r. 8 states inter alia, that any fact showing illegality must be specifically pleaded. Dai Tech did not comply with this provision.

33. Maraj Gold further relied on the case of **Lipton v Powell** [1920] 2 KB 51 in which the court permitted a moneylender to recover against a defendant whose defence of illegality failed because it was not pleaded. McCardie J at page 61 ruled as follows:-

> *"In the High Court if a defendant who is sued by a moneylender desires to rely upon the defence that he is not registered, he is bound to observe the requirements of the Rules of the Supreme Court, Order xix r. 15* (the UK equivalent) *which requires the defendant to raise by his pleading facts showing illegality either by statute or common law. In the present case the defendants did not plead the Money-Lenders Act and therefore prima facie they were not entitled to set up any plea of the Act save by the express order of the Court permitting them.."*

34. Maraj Gold agreed with the excerpt from the text by Dr Enonchong relied upon by Dai Tech but submitted that there was no evidence to show that Maraj Gold acted illegally when the sums were advanced to Seasons.

35. Further, Maraj Gold relied on an excerpt from **Chitty on Contracts, 33rd Edition (2018),** paragraph 16 -247 which states:

> *"Where a contract is ex facie illegal, the court will not enforce it, whether the illegality is pleaded or not; there is no "general principle that the claimant must either plead, give evidence of or rely on his own illegality." ….*

Secondly, where the contract is not ex facie illegal, evidence of extraneous circumstances tending to show that it has an illegal object should not be admitted unless the circumstances relied on are pleaded.

Thirdly, where unpleaded facts, which, taken by themselves, show an illegal object, have been put in evidence (because, perhaps, no objection was raised or because they were adduced for some other purpose), the court should not act on them unless it is satisfied that the whole of the relevant circumstances are before it"

But fourthly, where the court is satisfied that all the relevant facts are before it and it can clearly see from them that the contract had an illegal object, it may not enforce the contract, whether the facts were pleaded or not."

36. Maraj Gold submitted that Dai Tech did not fulfil the requirements as stated in the extract above to satisfy a finding of illegality by the judge. This was based on its submission that the relevant evidence to prove illegality was not before the Court.

37. Maraj Gold submitted that Dai Tech needed to prove that Maraj Gold carried on the business of moneylending during the years 1996 to 1998, (the period during which the funds were advanced to Seasons) and it was only in doing so that Dai Tech could then go on to claim the illegality of the manner in which the funds were advanced.

38. Maraj Gold submitted that in order to reverse the judge's finding of fact, it must be shown that the judge was plainly wrong in her finding that there was insufficient evidence that Maraj Gold was a moneylender at the time the funds were advanced to Seasons.

39. Maraj Gold submitted that the RSC and not the CPR applied to this case. RSC O. 18, r. 13 states that any allegation of fact made by a party in its pleading is deemed to be admitted by the opposite party unless it is denied or not admitted by that party in its pleading.

40. The above provision meant that Dai Tech should have specifically admitted the first paragraph of the statement of claim in which it was pleaded that Maraj Gold carried on the business of, inter alia, moneylending. Dai Tech's failure to admit that pleaded fact meant that it was a fact in issue, which Dai Tech had to prove. Dai Tech did not fulfil its onus on this issue.

41. Further, Maraj Gold submitted, that even if the assets of Seasons were no longer available, that did not render the effect and impact of the Order of the judge otiose or unjustified. Maraj Gold submitted that although the assets may no longer be physically available, the judge correctly ordered that Dai Tech should provide the value of the assets instead.

Law, Analysis and Reasoning

42. The issue of the applicable Rules for the defence of illegality was canvassed by both parties. Dai Tech submitted that the CPR applied to the entire claim, that is, from the time of its filing to its conclusion, based on the fact that the claim had been converted from the RSC. On the other hand, Maraj Gold contended that the conversion of the claim to the CPR did not have retroactive effect to the time when the matter was initially filed. With respect to the defence of illegality, Dai Tech relied on the provisions of the CPR, while Maraj Gold relied on the provisions of the RSC.

43. The statement of case in this matter was filed under the RSC on 2nd June, 2003. Part 80.3 of the CPR states:

> ***"Old proceedings***
>
> ***80.3*** *(1) Subject to subparagraph (2), these Rules shall also apply to proceedings begun before the commencement date—*
>
> *(a) upon a request being made to have a matter set down for trial; or*
>
> *(b) if a judge or master so orders, and the court office issues a notice to the parties requiring them to attend a case management conference or pre-trial review.*
>
> *(2) These Rules shall not apply to any proceedings which stands abated under Order 3 rule 6 of the 1975 Rules unless leave to proceed has been granted under that rule.*

(3) Save as provided in (1) above, the 1975 Rules shall continue to apply to proceedings commenced before the commencement date".

44. On 7th November 2012, pursuant to **Rule 80.3(1)(b)** above, the court office issued a notice, requesting the attendance of the parties for a case management conference. This notice marked the conversion of the claim from being subject to the RSC to the CPR.

45. The issue of the retroactive application of the CPR was determined by the Court of Appeal in the case of **Caroni (1975) Limited v Ayoub Khan** CA No 167 of 2012. The Court decided that the CPR rules were not retroactive in operation on the conversion of the claim from being subject to the RSC to the CPR.

46. In the instant appeal, based on the decision in **Caroni**, the applicable rules would have been timestamped according to the chronology of the matter. This meant that the Orders and Rules of the RSC would have applied to the claim and all the matters that arose therein, including the defence of illegality, from the time of its filing in 2002 until the time of its conversion to the CPR in 2012.

47. With respect to the defence of illegality, O. 18 r. 8 of the RSC states:-

" Matters which must be specifically pleaded

(1) ***A party must in any pleading subsequent to a statement of claim plead specifically any matter****, for example, performance, release, any relevant statute of limitation, fraud or* ***any fact showing illegality****-*

(a) ***which he alleges makes any claim or defence of the opposite party not maintainable; or***

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading."

48. Based on the RSC rule quoted above, Dai Tech should have specifically pleaded the defence of illegality. However, according to case law, the failure to plead the defence of illegality is not automatically fatal. In the case of **First National Credit Union Co – operative Society Limited v Trinidad and Tobago Housing Development Corporation and Doc Homes** CA No. 11 of 2011, it is stated at paragraph 77:-

> *"**Where on the claimant's claim it appears that it is illegal, the court should refuse to entertain it whether illegality is pleaded or not**. However the court must act fairly and should only deal with an alleged illegality which is not pleaded where to do so does not cause unfairness to the parties (**see North-Western Salt Company Limited v The Electrolytic Alkali Company Limited** [1914] AC 461)."*

49. In **North-Western Salt Company Limited v The Electrolytic Alkali Company Limited** [1914] AC 461 at Page 469, Viscount Haldane L.C. further explained the position as follows:-

> *"My Lords, it is no doubt true that where on the plaintiff's case it appears to the Court that the claim is illegal, and that it would be contrary to public policy to entertain it, the Court may and ought to refuse to do so. But this must only be when either the agreement sued on is on the face of it illegal, or where, if facts relating to such an agreement are relied on, the plaintiff's case has been completely presented. If the point has not been raised on the pleadings so as to warn the plaintiff to produce evidence which he may be able to bring forward rebutting any presumption of illegality which might be based on some isolated fact, then the Court ought not to take a course which may easily lead to a miscarriage of justice. On the other hand, if the action really rests on a contract which on the face of it ought not to be enforced, then, as I have already said, the Court ought to dismiss the claim, irrespective of whether the pleadings of the defendant raise the question of illegality."*

50. Based on the case law cited in paragraphs 48 and 49 above, the issue is not so much whether illegality was pleaded (which in this case it was not) but rather, whether there were sufficient facts for the judge to consider, and ultimately make a finding on the defence of illegality.

51. The judge did consider the matter of illegality as evidenced at paragraphs 39 and 45 of her decision which state:-

> *"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.*
>
> *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."*

52. The judge accepted that the defence of illegality arose on the evidence, and then proceeded, to determine whether the defence was proven. Having considered all the evidence before her, the judge found that the defence of illegality failed based on the insufficiency of evidence.

53. In **Beacon Insurance v Maharaj Bookstore** [2014] UKPC 21, the Privy Council gave guidance with respect to the approach that should be taken when an appellate court is reviewing the decision of a trial judge. Lord Hodge said at paragraph 12: -

> "*12. ….It has often been said that the appeal court must be satisfied that the judge at first instance has gone "plainly wrong". See, for example, Lord Macmillan in Thomas v Thomas at p 491 and Lord Hope of Craighead in Thomson v Kvaerner Govan Ltd 2004 SC (HL) 1, paras 16-19. This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts: Piggott Brothers & Co Ltd v Jackson [1992] ICR 85, Lord Donaldson at p 92. Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions. Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence: Choo Kok Beng v Choo Kok Hoe [1984] 2 MLJ 165, PC, Lord Roskill at pp 168-169."*

54. The test is that an appeal court must be satisfied that the trial judge has gone "*plainly wrong*" before there is any interference with the judge's findings.

55. To satisfy the defence of illegality with regard to the factual matrix of this claim, there had to be evidence to prove the following: -

    i. That Maraj Gold was a moneylender;
    ii. That at the time the funds were advanced to Seasons, Maraj Gold was in the business of moneylending; and
    iii. That the manner in which the funds were advanced was in breach of the provisions of the Act, more specifically, section 11.

56. In relation to the first issue, that is, the status of Maraj Gold as a moneylender, the judge found that this element of the defence was satisfied. The Judge stated at paragraphs 34 and 35 of the decision that:-

> *"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…."*

57. The second issue was whether Maraj Gold was in the business of moneylending at the time the funds were advanced to Seasons. The Judge stated at paragraph 35 of the decision that:-

> *"….. 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."*

58. Based on the extract above, the Judge found that the second element was not satisfied. Dai Tech submitted that the judge erred in this regard and argued that it was never a fact in issue whether Maraj Gold was in the business of moneylending at the time the sums were advanced. The first paragraph of Maraj Gold's statement of claim stated:-

> "*At all material times the First Named Plaintiff carried on the business of trade or sale and distribution of precious metals and stones and moneylenders.*"

59. In response to the first paragraph of Maraj Gold's statement of claim, paragraph 1 of the defence of Dai Tech stated:-

"Save that the first named Plaintiff is a company duly incorporated under the Laws of Trinidad and Tobago the Defendants make no admission to paragraph 1 of the Statement of Claim."

60. It has already been established that at the time of the filing of the statement of claim in 2003, the RSC applied. The overriding rule at the time of filing was RSC O. 18 r. 13 which states: -

"**Admissions of Denials**

13. (1) Subject to paragraph (4), any allegation of fact made by a party in his pleading is deemed to be admitted by the opposite party unless it is traversed by that party in his pleading or a joinder of issue under rule 14 operates as a denial of it.

(2) A traverse may be made either by a denial or by a statement of non-admission and either expressly or by necessary implication.

(3) Subject to paragraph (4), every allegation of fact made in a statement of claim or counterclaim which the party on whom it is served does not intend to admit must be specifically traversed by him in his defence or defence to counter-claim, as the case may be; and a general denial of such allegations, or a general statement of non-admission of them, is not a sufficient traverse of them.

(4) Any allegation that a party has suffered damage and any allegation as to the amount of damages is deemed to be traversed unless specifically admitted."

61. In **The Supreme Court Practice 1998**, Volume 1, Part 1, in relation to RSC O. 18. r. 13, the following is stated at page 303:-

*"**Effect of Rule***

..This rule enforces a cardinal principle of the system of pleadings, that every allegation of fact in a statement of claim or in a counterclaim must be traversed specifically, otherwise it is deemed to be admitted. It thus prescribes how the pleader should answer his opponents' pleading, by providing that the penalty

for not specifically traversing an allegation of fact is that it would be taken to be admitted, whether this was intended or not."

62. The only fact alleged in the first paragraph of Maraj Gold's statement of claim was that Maraj Gold was in the business of trade or sale and distribution of precious metals and stones and moneylenders. Dai Tech specifically stated that it made no admission to this fact. Dai Tech's statement of non-admission made Maraj Gold's status as a moneylender a fact in issue.

63. To determine whether Maraj Gold was in the business of moneylending at the time the funds were advanced, the judge had to consider the evidence. With no direct or circumstantial evidence before her on which to make as a finding of fact that Maraj Gold was in the business of moneylending between 1996-1998, the judge was left with no option but to dismiss the defence of illegality. The judge was therefore not "plainly wrong". In fact, her judgement shows a full and proper understanding of the defence of illegality as it related to the claim and a thorough analysis of the evidence required to prove the defence.

64. Although much time was spent by Dai Tech showing that section 11 of the Act was breached by Maraj Gold when the latter advanced the funds to Seasons, this third element of the defence, namely the statutory breaches, would only arise for consideration, if the first two elements of the defence had been satisfied.

65. The judge however did briefly address the third element, that is, whether the manner in which the funds were advanced was in breach of section 11 of the Act. The judge found that there was a breach of section 11 of the Act. At paragraph 41 of her decision the Judge stated:-

"There is in the present case no evidence of there being a separate note or memorandum that was signed before the loan was given."

66. The point is that for the purposes of this appeal, it is unnecessary to consider the third element of the defence of illegality in light of the failure to prove the second element. For the defence of illegality to be successful, all three elements had to be proven and that was not the case. For the purpose of this appeal, it is therefore unnecessary to determine the merit of the submissions as they relate to the alleged breaches of the Act, specifically section 11, because such determination would not impact on the failure to satisfy the second element of the defence.

67. However, the matter does not end there. According to Section 12(1) of the Act, the interest, which may be charged on loans by any person other than a moneylender, licensed under the Act, shall not exceed the rate of twenty-four per cent (24%) simple interest per annum.

68. The issue therefore is, what remedy exists in circumstances in which there has been an excessive interest rate charged by a person who is not a moneylender. Section 24, sub-sections (1) and (2) of the Act provide:-

> *"(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 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."

69. Section 24, sub-sections (1) and (2) were given judicial consideration in the case of **Fort Vue Ltd. v Young** [1988] LRC (Comm) 483 in which Warner JA stated the following at page 490:-

"Sub-sections (1) and (2) of section 24 clearly demonstrate that it was not the intention of the legislature that loans at rates of interest higher than that permitted under the Act should be unenforceable. Re-opening the transaction and taking an account between the lender and the person sued (the borrower) are inconsistent with the contract being void or unenforceable. The section speaks of relieving the person sued from payment of any sum in excess of that adjudged by the court to be due."

70. Based on the factual scenario and in accordance with Section 24, Maraj Gold was bound by the cap on interest. In other words, Maraj Gold was prevented from charging more than twenty-four percent (24%) on the principal sum loaned.

71. The remedy provided in Section 24 was considered by the trial judge at paragraph 42 of her decision where she stated:-

"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 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."

72. It is clear from the extract of the judgement above, that the judge carefully considered the application of the section 24 remedy but was unable to grant it because of the insufficient evidence before the Court. In those circumstances, this Court finds no fault with the Judge's refusal to reopen the transaction to provide relief to Dai Tech.

Conclusion

73. For the reasons set out above, the appeal on the debenture claim is dismissed and the decision of the trial judge is affirmed.

THE GUARANTEE CLAIM

Background

74. A Deed of Mortgage dated 19th November, 1998 was executed between Seasons as the "Borrower" of the First Part, VSN as the "Mortgagor" of the Second Part and Scotiabank of Trinidad and Tobago as the Mortgagee of the Third Part. The Deed of Mortgage, which was over the property of VSN, was made to secure an overdraft facility granted by the mortgagee.

75. When Scotiabank made a demand for repayment of the sum of Two Million and Ninety-Six Thousand, Seven Hundred and Twenty-Seven Dollars and Eighty-Seven Cents ($2,096,727.87) (hereinafter referred to as "the original debt"), VSN paid the entire original debt to Scotiabank and then sought repayment from Seasons.

76. Seasons refused to repay VSN the money which VSN paid on behalf of Seasons. VSN initiated the guarantee claim in the High Court against Seasons, on the basis of unjust enrichment.

77. The position of VSN, was that VSN acted as the guarantor for the overdraft facility and therefore, VSN was entitled to recover 100% of the money paid by VSN to Scotiabank on behalf of Seasons.

78. According to VSN, the purpose of the overdraft was to run the daily operations of Seasons, however, Seasons contended that the funds were used to settle the personal debts of Debideen.

79. VSN admitted that the sum of Six Hundred and Eleven Thousand, Three Hundred and Seventy-Two Dollars and Twenty-Nine Cents ($611,372.29), from the original debt, was used for the benefit of VSN. Therefore, VSN sought repayment from Seasons for the sum of One Million, Nine Hundred and Thirty-Four, One Hundred and Fifty Dollars and Thirty Cents ($1,934,150.30) (hereinafter referred to as "the reduced debt"). This reduced debt was the remaining sum VSN claimed was owed by Seasons, after the personal benefit of VSN was deducted from the original debt.

The decision of the trial judge

80. The judge determined that the main issue was whether Seasons was required to pay VSN the reduced debt. Sub-issues raised were (1) whether Seasons was unjustly enriched by the payment of the reduced debt by VSN; (2) whether VSN's role in the transaction was as a guarantor, and if so; (3) whether by law, Seasons as borrower was required to indemnify VSN for the reduced debt.

81. The judge determined that VSN failed to prove that it was a guarantor for the overdraft facility since the mortgage deed and the statement of case of VSN stated that VSN and Seasons were jointly and severally liable for repayment of the loan.

82. The judge found, that in light of the principles of unjust enrichment, both VSN and Seasons were liable to repay the reduced debt in equal parts, in the sum of Nine Hundred and Sixty Seven Thousand and Seventy Five Dollars and Fifteen Cents ($967,075.15).

83. Both Seasons and VSN appealed the decision made in the guarantee claim. The appeal by VSN is C**A S334/2016** and the appeal by Seasons is **CA S336/2016**.

84. The position of VSN was that it acted only as guarantor and the judge erred by finding that it was 50% liable. On the other hand, Seasons agreed with the decision of the judge that the debt was joint and several but disagreed with the 50% contribution allotted to Seasons.

Submissions by VSN

85. VSN submitted that the judge erred by finding that VSN and Seasons had joint and several liability. The position of VSN was that it acted only as guarantor in relation to the overdraft facility and, as such, VSN should have recovered 100% of the reduced debt.

86. VSN submitted that there was no evidence that Seasons did not benefit from the reduced debt. VSN submitted that generally, a party who wishes to neither admit nor deny a version of events pleaded by a claimant, must either put forward a different version or must state its reason for resisting the allegation. The absence of either option means that the allegation is being admitted. According to VSN, there was no denial in the defence of Seasons, that Seasons benefitted from the money amounting to the reduced debt.

87. VSN submitted that it could have provided evidence to show that payments were received by Seasons, if there was a denial in the pleadings. According to VSN, permitting the matter to be raised on appeal was unfair since VSN was deprived of the opportunity to lead evidence to support its claim.

88. VSN submitted that it had :-

    a) *an implied right to indemnification as the guarantee was admittedly given at the request of Seasons;*

b) *A subrogated right at common law and equity to reclaim the payments under the guarantee to avoid the unjust enrichment of Seasons in respect of the moneys paid on its behalf; and*

c) *A statutory right in any event under section 11 of the Mercantile Law Act "to stand in the place of the creditor" to recover the money paid under the guarantee.*

89. VSN submitted that the judge erred when she found that only 50% of the sum could be recovered.

Submissions of Seasons

90. Seasons submitted that the mortgage deed and statement of case of VSN referred to Seasons and VSN as being jointly and severally liable for repayment of the overdraft facility and therefore VSN was not a guarantor.

91. Seasons submitted that the judge erred when she did not find that there was a lack of evidence that Seasons was unjustly enriched, particularly where the uncontroverted evidence showed:-

(i) no record that any money from the overdraft facility passed through the accounts of Seasons or was used in the business of Seasons;

(ii) that VSN could not provide any documentation to prove that any money from the overdraft facility was used for the business of Seasons;

(iii) that any money from the overdraft facility was used by VSN for its own purpose; and

(iv) that the said mortgage dated 19th November 1998 was stamped to cover 1.3 million dollars and did not marry with the amount VSN claimed it repaid.

92. Seasons stated that the decision was plainly wrong since there was no evidence that Seasons retained any benefit from the reduced debt. Seasons averred that even if it was wrong on the law of contribution, the reduced debt claimed was not permissible because it was substantially more than the stamped sum of the mortgage.

93. Further, Seasons submitted that the judge was wrong to rely on **Section 11** of the **Mercantile Law Act,** Chapter 82:02 because it was not pleaded and Seasons was not afforded an opportunity to advance a defence to this claim

Law, Analysis and Reasoning

94. The testatum of the Deed of Mortgage which is the subject of this appeal, stated as follows:-

> "NOW THIS DEED WITNESSETH as follows:
>
> *1.In consideration of credit from time to time extended to the Borrower by the Bank at the request of the Borrower and Mortgagor the Borrower and the Mortgagor* ***hereby jointly and severally*** *covenant with the bank that they will on demand in writing from the Bank pay to the Bank all moneys and liabilities……..*
>
> *4.The Borrower and the Mortgagor* ***hereby further jointly and severally covenant with the*** *Bank that they will at all times during the continuance of the security, duly and punctually pay all monies due and owing under the Prior mortgage and will duly and punctually pay the rents rates taxes charges duties and assessments……" (emphasis mine)*

95. The resolution of the apportionment of repayment as it related to VSN and Seasons is based on firstly, whether VSN was a guarantor; and secondly, the effect of both parties signing as being liable "jointly and severally" to repay the sum loaned by the bank.

96. **Halsbury's Laws of England 2019**, Contract, Volume 22, under the rubric "Joint and Several Promises", at paragraph 435 states:-

> ***"435. Construction.***
>
> *The question whether a promise made by two or more persons is (1) several; or (2) joint; or (3) both joint and several, is one of construction, and depends upon the intention of the parties as expressed in the contract. Where several persons join in making a covenant, the rule is that the covenant is to be*

construed according to the ordinary meaning of the terms used by the parties, and it is not to be departed from on considerations of hardship or inconvenience. No particular words are necessary to constitute a covenant whether it is joint or several, or both joint and several. If two persons covenant generally for themselves without any words of severance, or promise that they or one of them will do a thing, a joint liability is created; and if the covenantor's liability is to be confined to his own acts words of severalty must be added. If, however, the terms of the covenant are ambiguous it is to be construed according to the interests of the parties; that is to say, if their interests are joint the covenant is to be construed as joint, and if their interests are several it is to be construed as imposing a several liability on each of the covenantors."

97. Further, the **Law of Guarantees** by Andrews and Millet, 7th edition, at paragraph 4-011 states:-

*"**Joint and several liability***

*It will frequently be the case that the creditor requires more than one surety, for example when two directors of a company are required to guarantee the due fulfilment of its obligations to pay rent to the landlord and its office premises. When this occurs, the sureties may be jointly liable, severally liable or jointly and severally liable. Similarly, in contracts of indemnity, the surety may enter into a joint or joint and several liability with the principal or with another surety. In determining the type of liability undertaken by the parties to a particular contract, the rules of construction which are applied are of the same for contracts of suretyship as for contracts generally**.** No special formula is needed to create a joint or several liability. If two persons covenant for themselves, without any words of severance, that they or one of them shall do something, a joint obligation is created; therefore if it is intended to make the surety's obligation entirely independent from that of his co-obligators, clear and specific words of severance are required: White v Tyndall (1888) L.R. 13 App. Cas 263 at 269.."*

98. Applying the learning in the extracts in paragraphs 96 and 97 above, the status of VSN as a party to the Deed of Mortgage had to be determined based on the construction of the clauses as reflected in paragraph 94 above. The terms of the covenant in the Deed of Mortgage were unambiguous. There was no evidence to support any other position (such as an independent obligation by one party for repayment of the loan) than that as stated in the Deed of Mortgage. Therefore, the judge was right in her finding that VSN was not a guarantor but remained liable for the overdraft facility "jointly and severally" with Seasons.

99. The judge next had to determine the apportionment of the reduced debt. This determination involved a consideration of the principle of unjust enrichment.

100. **Goff and Jones, The Law of Unjust Enrichment** (9th edition) under the heading "Equal Apportionment" at paragraph 20-90, states:-

> *"20-90 Where there is no contract allocating responsibility between the parties, the courts apply a default rule that they are equally responsible for paying the third party. The Courts then ask whether they should depart from this rule, and make an unequal apportionment in accordance with one or more of the three rules discussed in the next three sections. It can happen that a court arrives back at equal apportionment after applying these further rules. But the point to note here is that a court will always apportion liability equally where none of these other rules applies, or if it possesses insufficient information to apply any of them clearly".*

101. The reference to the 'next three sections' in the extract from Goff and Jones, deals with (i) causative potency; (ii) moral blameworthiness; and (iii) retention of gains. While (i) and (ii) are inapplicable to the factual scenario in this claim, the third rule, namely retention of gains, which enables departure from the general principle of equal apportionment, was considered by the judge. This consideration is found at paragraphs 64 and 65 of her decision in which she stated:-

> *"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)."

102. **Goff and Jones, The Law of Unjust Enrichment** (9th edition) under the heading "Appealing from Apportionment Decisions" at paragraph 20-87 states:-

"20-87 Unlike the trial judge, an appellate court does not usually have the opportunity to see and hear the witnesses in a case. For this reason an apportionment decision by the trial judge is only altered in exceptional circumstances: where there has been a clear mistake of legal principle or fact. Hence, in most cases it is "not the point" that "some may not agree with [the trial judge's] emphasis on particular matters" or that "some may have come to a result other than [the trial judge's apportionment". Moreover…"it is insufficient for an

appellant to persuade an appeal court that……the trial judge's apportionment is different from that which the court of appeal would have decided", as an appeal court "is not entitled to interfere if the trial judge's apportionment was reasonably open". A trial judge should usually set out his reasons for an apportionment decision, but it seems that he need not do so if his assessment of the claimant and defendant's positions towards one another sufficiently appears from his assessment of his positions towards the third party."

103. In this claim, the judge had no evidence upon which to make a finding that Seasons benefitted from an unjust enrichment that would support a claim for Seasons to repay more than 50% of the reduced debt. Further, the judge was thorough in her explanation for her finding of the apportionment of 50% to be carried by each party. There was nothing to suggest that the judge was "plainly wrong" in her assessment, as she applied the law to the evidence in the matter. For any other apportionment to have been made, in the absence of evidence, the judge would have entered into the realm of speculation or made a finding that crossed into the zone of absurdity. In fact, the judge in paragraph 64 of her decision explained that "*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."*

104. Further, Seasons submitted that Section 11 of the Mercantile Act should not have been considered by the judge in her determination of the issue of the apportionment of the reduced debt. Section 11 of the Mercantile Act states:-

"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 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 co-debtor, 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.

105. The purpose of section 11 is to facilitate or enable the recovery by the co debtor (Seasons) from VSN of a just proportion of the monies paid. The principles enunciated in section 11 do not include any additional principle not already factored in the doctrine of unjust enrichment. Thus, with or without the consideration of section 11, the decision of the judge would have been the same.

Conclusion

106. For the reasons set out above, the two appeals on the Guarantee claim are dismissed and the decision of the judge is affirmed.

107. In summary therefore, the three appeals are dismissed and the Court will hear the parties on the issue of costs.

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Gilian Lucky

Justice of Appeal