REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P221 of 2019

Claim No. CV 2014-02872

Between

3 G TECHNOLOGIES LIMITED

First Appellant

DONALD SEECHARAN

Second Appellant

FARIZA SHAAMA SEECHARAN

Third Appellant

And

RUDRANAND MAHARAJ

First Respondent

ATTORNEY GENERAL OF TRINIDAD & TOBAGO

Second Respondent

PANEL: **A. Mendonça J.A.**

J. Jones J.A.

Date of Delivery: October 15, 2019

APPEARANCES:

Mr. R. Nelson SC, Mr. R. Seecharan and Mr. D Seecharan for the Appellants

Mrs. D. Peake SC, Mr. K. Garcia and Ms. M. Ferdinand for the First Respondent

Mr. D. Allahar for the Second Respondent

REASONS

Delivered by A. Mendonça J.A. and J. Jones J.A.

1. On October 10th, 2019 we dismissed this appeal and indicated then that we will provide written reasons for so doing. This we now do.

2. The First Appellant, 3 G Technologies Limited (3 G), is a limited liability company of which the Second and Third Appellants, Donald Seecharan and Fariza Seecharan (hereinafter together referred to as 'the Seecharans'), are directors and sole shareholders.

3. In 2005, 3 G borrowed the sum of $15,494,902.00 from Scotiabank Trinidad and Tobago Limited (Scotiabank). This sum was borrowed for the purpose of constructing a building on lands at Nos. 112-114 Duke Street, Port-of-Spain owned by the Seecharans. The building was duly constructed.

4. Repayment of the loan was secured, inter alia, by an all assets debenture given by 3 G to Scotiabank, a guarantee in favour of Scotiabank by the Seecharans and a collateral deed of mortgage over the property at Nos. 112-114 Duke Street.

5. In 2010, the Government of Trinidad and Tobago entered into an arrangement with 3 G for the rental of certain portions of the Duke Street property for use by the Department of Court Administration of the Judiciary of Trinidad and Tobago (the Judiciary). Shortly thereafter, the Judiciary occupied portions of the Duke Street property paying a monthly rent and a portion of electricity charges incurred in respect of the Duke Street property.

6. By deed of appointment dated November 14, 2013 and made between Scotiabank and the First Respondent, Rudranand Maharaj (hereinafter referred to as 'the Receiver'), the Receiver was appointed the receiver and manager of the property of 3 G by Scotiabank acting under its powers in the debenture.

7. By Notice dated November 14, 2013 the Receiver gave notice to the Registrar of Companies of his appointment pursuant to section 297 of the Companies Act Chapter 81:01. Notice of his appointment was also given to the Judiciary.

8. By a deed of appointment dated November 15, 2013 Scotiabank appointed the Receiver as the receiver of income of the Duke Street property under the collateral deed of mortgage. On November 25, 2013 the tenants of the Duke Street property, including the Judiciary, were given notice of the appointment of the Receiver as receiver of the income of the property.

9. By an undated letter received by the Judiciary on November 29, 2013, 3 G indicated its objection to the appointment of the Receiver and stated that it did not accept the "purported appointment" of any receiver and claimed that his appointment was invalid in law. 3 G further stated that there was no proper ground for the appointment of a receiver and referred to the receiver as a trespasser. It called upon the Judiciary to continue to pay the rental income of the Duke Street property to 3 G notwithstanding the appointment of the Receiver.

10. By a further letter dated January 3, 2014 3 G again wrote to the Judiciary indicating that it had been informed that "our rental income" had been paid to the "trespasser"- referring to the Receiver – and stating that the Judiciary's payment of rent to the "invalid receiver/trespasser does not mean that" the Judiciary would "no longer owe the rent to" 3 G, it would. In response, the Judiciary by letter dated January 8, 2014 stated that it was advised by the Property and Real Estate Services Division (PRESD), the State agency responsible for all matters concerning government rentals, that all rents payable by the Judiciary in respect of the Duke Street property were to be paid to the Receiver.

11. Following a threat by 3 G to commence legal proceedings to challenge the appointment of the Receiver, the Judiciary was advised by PRESD that the

rents should not be paid either to the Receiver or 3g but be paid into an escrow account.

12. On July 23, 2014 the Receiver wrote complaining of the continued practice by the Judiciary of depositing the rent for the Duke Street property into an escrow account. The Receiver indicated in that letter that he had received a letter from Trinidad &Tobago Electricity Commission (T&TEC) calling for settlement of a judgment in the sum of $732,033.50 and other liabilities in the amount of $218,196.05. The Receiver stated:

> "The Receiver does not have the cash available to settle this debt. The continued treatment by the Judiciary of depositing rental amounts into an escrow account continue to frustrate this receivership and we are of the opinion that this treatment is incorrect.
>
> In this regard, we appeal to you to release the rental amounts being held in the escrow account, failing which, the Receiver will not be able to liquidate the debt to T&TEC. As a result, as advised by T&TEC, the supply of electricity to the said building will be discontinued on the 31st July 2014. This action, will indeed interrupt the operations of the Judiciary."

13. Following that letter and as the threatened proceedings challenging the Receiver's appointment had not been initiated, the Judiciary was advised to release the rent held in escrow and pay same to the Receiver.

14. On August 14, 2014 the Appellants commenced these proceedings in which they challenge the appointment of the Receiver and seek declarations including (a) that the appointments of the Receiver under the debenture and as receiver of income under the collateral deed of mortgage are illegal, null and void and are of no effect, and (b) the acceptance by the Receiver of the appointments and all his acts are illegal, null and void and are acts of trespass.

15. In view of the competing claims to the rent by the Receiver and 3G and the commencement of these proceedings challenging the Receiver's appointment, the Judiciary again withheld payment of the rent and paid it into an interest-bearing escrow account and continue to do so.

16. On September 30, 2015 the Attorney General filed the application that has given rise to this appeal for the court's directions as to the payment by the Judiciary of the rents for the Duke Street property. By that application the Attorney General sought the following relief:

> "(a) An order pursuant to CPR 19(5)(2)(b) adding the Attorney General of Trinidad and Tobago ("the Applicant") as an Interested Party/Defendant to these proceedings for the purposes of making applications under sections 296(c) of the Companies Act, Chap. 81:01 ("the CA") and/or under CPR 17.1(c)(vi) and/or CPR 17.1(j);
>
> (b) Consequent upon the order made at paragraph (a) above, an order that pursuant to CPR 17.2(2)(c) the Applicant be permitted to apply for interim relief before entering an appearance, and that the Applicant not be required to enter an appearance;
>
> (c) An order pursuant to Section 296(c) of the CA directing the Applicant to pay all arrears of rent and charges and all future rents and charges in relation to the premises located at Nos. 112-114 Duke Street, Port of Spain, at present occupied by the Judiciary, to such person and/or account as this Honourable Court may direct, until the determination of this action or until further order;
>
> (d) Further and/or in the alternative an order pursuant to CPR 17.1(c)(vi) directing the payment of all arrears of rent and all future rents and charges in relation to the premises located at Nos. 112-114 Duke Street, Port of Spain, at present occupied by the Judiciary, in such manner as this Honourable Court may direct, until the hearing and determination of this action or until further order;
>
> (e) Further and/or in the alternative an order pursuant to CPR 17.1(j) directing the payment of all arrears of rent and charges and all future rents and charges in relation to the premises

located at Nos. 112-114 Duke Street, Port of Spain, at present occupied by the Judiciary, to be paid into court or otherwise secured in such manner as this Honourable Court may direct, until the hearing and determination of this action or until further order; and

(f) That there be no order as to costs."

17. **Section 296(c)** of the **Companies Act Chapter 81:01** and **Rules 17.1(1)(c)(vi)** and **17.1(1)(j)** of the Civil Proceedings Rules (CPR) referred to above are as follows:

> **"296.** Upon an application by a receiver or receiver-manager of a company, whether appointed by the Court or under an instrument, or upon an application by any interested person, the Court may make any order it thinks fit, including—
>
> (c) an order declaring the rights of persons before the Court or otherwise, or directing any person to do, or abstain from doing, anything

> **Orders for interim remedies**
> **17.1 (1)** The court may grant interim remedies including—
>
> (c) an order –
>
> (vi) for the payment of income from a relevant property until a claim is decided
>
> (j) an order for a specified fund to be paid into court or otherwise secured where there is a dispute over a party's right to the fund"

18. The application came on for hearing before R. Mohammed J. He first dealt with the issue of joining the Attorney General as an interested party and granted that order. There has been no appeal in relation to that order.

19. In relation to whom the rent and charges (i.e. the electricity charges) should be paid by the Judiciary, being the core issues raised by the application, the

Appellants contended before the Judge that the rents should be paid to 3 G. The full text of the order sought by the Appellants before the Judge was as follows:

> "1) The arrears of rent withheld by the CEA be paid as it was being paid before in the name of the First Claimant account payee only, with an undertaking by the First Claimant to deposit the said rental cheques into its account at Scotiabank for payment of the arrears of monthly instalments as per an amortization schedule adjusted for interest at the prevailing rate for fully secured facilities retroactive to the review date of the said loan facility between the First Claimant and Scotiabank to go towards the redeeming of the First Claimant's loan and into the future with further lump sums payments to principal as maybe agreed between the First Claimant and Scotiabank to bring an earlier end with the redemption of the said loan as stated or review date of the said loan facility between the First Claimant and Scotiabank to go towards the redeeming of the First Claimant's loan and into the future with further lump sums payments to principal as maybe agreed between the First Claimant and Scotiabank to bring an earlier end with the redemption of the said loan as stated or as may be agreed. Liberty to apply if there is no agreement on the payment of further lump sums to be paid to principal to bring an earlier end to the payment of the First Claimant's loan.
>
> 2) In respect of the payment of utilities the agreement was that the CEA pay its arrears of utility charges directly to the utility provider and in respect of those charges the CEA do continue to pay those charges directly."

The Receiver submitted that the rent and charges be paid to him. The Attorney General on the other hand adopted a position of neutrality.

20. The Judge ordered that the Judiciary pay all arrears of the rent and charges and all future rents and charges in relation to the Duke Street property to the Receiver until the determination of these proceedings or until further order.

21. The Appellants now appeal. They contend for various reasons, to which I will refer to below, that the Judge erred in making the order that he did. The order that they now seek is however different to the one sought before the

Judge. They say that this Court should order that the rents continue to be paid by the Judiciary into the interest-bearing escrow account.

22. The Judge noted in his judgment that there was no dispute that the Court has the jurisdiction to make the orders sought by the Attorney General either under Section 296(c) of the Companies Act or Rules 17.1(1)(c)(vi) and 17.1(1)(j) of the CPR. In the written submissions before this court the Appellants seem to raise as issues whether the court could have made the orders under Rule 17.1(1)(c)(vi) or 17.1(1)(j). In relation to 17.1(1)(c)(vi)it is the submission that the application needed to have been made either by the Appellants or the Receiver, or in other words persons entitled to final orders at the conclusion of the matter. The application was however made by the Attorney General who is not entitled to any final relief. In relation to Rule 17.1(1)(j) it was submitted that this rule refers to the securing of a fund or payment into court but the order made by the Judge does neither.

23. These do not appear as grounds in Notice of Appeal and should not be entertained. In any event, they are in my view either lacking in merit or are inconsequential. The submission in relation to Rule 17.1(1)(c)(vi) has no merit as there is nothing in that rule that requires the application to be made by persons who may be entitled to a final order at the end of the proceedings. As regards Rule 17.1(1)(j), even if the Appellants are correct, it is of no moment as the Court as Rule 17.1(1)(c)(vi) or Section 296(c) of the Companies Act permit the Court to make the order that it did.

24. Mr. Nelson SC for the Appellants in contending that the Judge was wrong to order that the monies be paid to the Receiver, advanced the following submissions:

    (i) The Judge failed to understand that where the appointment of the Receiver is challenged, the Receiver needs to establish the validity of his appointment. The Receiver failed to do so and therefore he

cannot be regarded as validly appointed and entitled to take possession of the company's property under the debenture. If the rental income is the property of 3 G, the Receiver, therefore, would have no entitlement to receive it.

(ii) The Duke Street property is not an asset of 3 G but of the Seecharans. It therefore was not part of the assets charged by the debenture and the Receiver could not have been appointed in respect of it under the debenture. He therefore has no claim to be the receiver of the rental income in respect of the property under the debenture.

(iii) Under Section 288(3)(b) of the Companies Act Chapter 81:01 a debenture holder may appoint a receiver only if more than half of the total debt is owing. That is not the case here.

(iv) As to the collateral deed of mortgage, the power to appoint the Receiver as the receiver of income of the mortgaged property arises where the mortgage monies become due and payable. The First Respondent's case is that the moneys became due when it demanded payment of same under the covenant to pay. The collateral deed of mortgage, however, does not contain a covenant to pay on the part of the Seecharans and therefore the mortgage monies could not become due and payable under the collateral deed of mortgage. Consequently there was no power to appoint a receiver of income of the property under the collateral deed of mortgage.

(v) The collateral deed of mortgage, being a second mortgage, did not vest the legal estate in the Duke Street property in Scotiabank so as to enable the statutory power of sale and the concomitant power to appoint a receiver to arise.

(vi) The Judge erred when he failed to hold that the balance of convenience lay in permitting the rent to continue to be paid in an interest-bearing escrow account.

25. As to the first submission, Mr. Nelson argued that as the appointment of the Receiver was challenged it was not enough for the Receiver, as was done in this case, to waive his instrument of appointment and the debenture but had to go further to show at least on a strong prima facie basis, that an occasion has arisen under the debenture for the appointment of a receiver. If he fails to do so, he is to be treated as invalidly appointed and has no basis to claim any property of the company under the debenture.

26. In support of that submission Mr. Nelson referred to the case of **Kasofsky v Kreegers [1937] 4 All ER 374.** In that case an execution creditor seized the goods of a company pursuant to a judgment obtained in favour of the creditor against the company. The goods were claimed by a receiver appointed under a debenture. The debenture was granted by the company to secure the sum of £600 said to be advanced by the debenture holder to the company and was granted four days after the writ in the action was issued. According to the terms of the debenture, the first payment on account of the company's debt became due on April 22, 1937. The debenture holder could take no step to enforce the security for non-payment before that date. The receiver was however appointed on March 8, 1937. The only evidence before the court was the debenture and the appointment of the receiver. The court held that it was for the receiver to prove the happening of one of the events specified in the debenture that gave rise to the appointment of a receiver and that the maxim *omnia rite esse acta presumuntur* has no application to such a case. The receiver had failed to prove the occurrence of any event that gave rise to a power that he be appointed and accordingly his claim to the goods failed.

27. Goddard J in his judgment in **Kasofsky v Kreegers (supra) at page 377** stated:

> "There would be very good reason for saying that the whole of this debenture was really a sham. I am content with this. When the matter came before the master, it was perfectly clear that a point in issue in the case was whether the receiver has been validly appointed, and whether anything had arisen to justify the debenture holder in appointing areceiver. If one of the events which justified the appointment of a receiver had happened, then, the appointment of the receiver crystallised the debenture holder's charge upon the assets, and gave the receiver a right to take possession. But, if nothing had happened to give the debenture holder a right to appoint a receiver, the fact that she wrote on a piece of paper that she had appointed a receiver does not crystallise her charge, nor does it give a right to the receiver to take possession of the goods. The only evidence given at the trial was that Mr Kreeger put in a debenture, and then an accountant's clerk was called, and he produced the appointment of his principal, Mr Phillips, as receiver. Not a word of evidence was given to show that there was anything to justify the appointment of Mr Phillips as receiver…This appointment purports to show merely that Mrs Rosenberg appointed Mr Phillips as receiver. It does not even purport to show that any fact had arisen to justify the appointment, even if it would be enough to show it if the document merely recited it. There was no evidence at all upon which the master could hold that Phillips had been properly appointed a receiver, and that he had thereby got a good title to the possession of the goods. It is one thing to write out a paper saying that one has appointed a receiver. Unless circumstances have arisen to entitle one to make the appointment, and something has happened to crystallise the charge, that will not effect anything...."

Hibbery J in his concurring judgment stated at page 378:

> "I agree, and will add only this, because I entirely agree with what has been said. The claimant had to establish a title which ousted that of the execution creditor to the goods which the sheriff had seized. The claimant said that his title was derived from a debenture and the action of the debenture holder, who, under the powers which had been given by the debenture, had

> appointed a receiver. In these circumstances, it was necessary, in establishing the claimant's asserted title, that the claimant should show that his appointment was an appointment which could lawfully be made in the exercise of the powers given by the debenture. In effect, all the claimant did to discharge that burden of proof was to produce the debenture, and to produce a written document which purported to be an appointment of himself as receiver for the debenture holder. I ought to refer to the terms and conditions of the debenture. If one considers those terms and conditions, it becomes perfectly apparent that, unless the conditions precedent to the appointment of the receiver were fulfilled at the time of the appointment, the receiver for the debenture holder was not even *prima facie* validly appointed, unless, as Mr Weitzman said, one could rely on the maxim *omnia rite esseactapraesumuntur*. I add these words only because I want to say that the maxim has not, and never had, any application to a case where there is a person in the position of the debenture holder, and the right to appoint a receiver is made conditional upon certain express terms in that document. There is no presumption which will discharge him from proving that, if the appointment is made, the steps necessary to make a void appointment have been taken. In my view, this appeal ought to be allowed, and I concur in the form of order which Goddard J, proposes."

28. Of course the facts in the **Kasofsky** case are very different form the facts here. But the principle for what it stands is clear and that is where the appointment of a receiver is challenged, the receiver cannot rely on that Latin maxim but the onus is on him to show at least prima facie that one of the events that gives rise to the power to appoint a receiver has arisen.

29. In this case, clauses 2 and 12 of the debenture are relevant to the appointment of a receiver. Under clause 2 the moneys and liabilities secured by the debenture and the security thereby created shall become due and enforceable upon the occurrence of any of the events referred to in that clause. Included among the events at 2 (a) is that the moneys and liabilities secured by the debenture and the security thereby created shall become

immediately due upon demand in writing. Under clause 12 Scotiabank has the power to appoint any person a receiver or receiver and manager of all or any of the property charged by the debenture at any time after Scotiabank shall have demanded payment of the moneys secured by the debenture. The Judge noted from a perusal of the pleadings in this claim, that it is pleaded that demands were made by Scotiabank and its agents for payment of the monies secured by the debenture. These demands were said to have been made by letters dated May 13, 2011, April 24, 2013 and November 4, 2013. The Judge noted that the Appellant admitted receiving the last two mentioned letters.

30. As appears from the Judge's judgment, the Appellants contended that the letters of demand they received were not proper demands for the reasons appearing in the judgment. The Judge considered the submissions in that regard and came to the finding that the letter of November 4, 2013 "counts as a validly issued demand letter". That finding has not been challenged in this appeal. In the circumstances it seems to us that the Receiver has established that demand was made for the moneys secured by the debenture thereby giving rise to the exercise of the power to appoint a receiver.

31. In the affidavit of Donald Seecharan filed on January 18, 2016 he states that the appointment of the Receiver was fraudulently made as there was no interest owing to Scotiabank. The relevance of that is not apparent on the face of the debenture in view of clauses 2 and 12 which provide, as I have mentioned above, that the security created by the debenture becomes enforceable and gives Scotiabank the power to appoint a receiver when the monies secured by the debenture shall have been demanded. There is no mention in the debenture that interest must be due. It may be that the Appellants are contending that there may have been a collateral agreement or underlying arrangement that Scotiabank would not make a demand unless

there was a default in the payment of interest. That was not advanced at all on this application and in any event there is however no evidence to that effect on this application. In the circumstances it seems to us that the Receiver has established, at least on a prima facie basis, the validity of his appointment. The Receiver was therefore in a position to receive the rents of the property if it be the property of the company. This brings us to the second submission made by Mr. Nelson that the Duke Street property is not the property of 3 G and was not charged by the debenture.

32. In relation to that submission it is true that the debenture charged only all of the property of the company and that the power to appoint the Receiver is the power to appoint the Receiver in respect of the property charged by the debenture. It is also true that the Duke Street property is not the property of the company. It is owned by the Seecharans and therefore is not charged by the debenture. But it was accepted by Mr. Nelson that if the rent from the Duke Street property, as opposed to the property itself,is the property of 3 G, then it is charged by the debenture and the Receiver has the authority to receive the rental income and give a proper receipt and discharge for same. Mr. Nelson's argument, however, was that the rent too is not the property of 3 G but of the Seecharans. Although the rent, prior to the appointment of the Receiver, was paid to 3 G by the Judiciary, he argued that 3G was simply a collecting agent, collecting the rent on behalf of the Seecharans.

33. It was accepted by the parties that A may not be the owner of premises but if he were to lease the premises, especially with the concurrence of the owner, he is the landlord and entitled to the rents under the lease. There is overwhelming evidence, to which we will refer below, that 3 G was the landlord of the premises and collected rent on its own behalf and not as agent for the Seecharans. There can be no dispute that was done with the concurrence of the Seecharans.

34. The evidence to which we refer is the following:

(i) The affidavit of Michelle Austin filed on behalf of the Judiciary which at paragraph four refers to the arrangement between the Government and 3 G for the rental of the Duke Street property. This paragraph was admitted by Donald Seecharan in his affidavit filed January 18, 2016;

(ii) 3 G's undated letter (circa November 29, 2013) in which reference is made to rent due to 3 G in respect of the Duke Street property and the request by the Receiver to claim "the company's rent";

(iii) 3 G's letter of January 3, 2014 which refers to "our rental income" and says to the Judiciary that notwithstanding payment of the rent to the Receiver that the Judiciary remains liable to 3 G for the rent;

(iv) The letter of January 13, 2014 from 3 G to the Judiciary in which 3 G states "it is an injustice to pay our rent to a trespasser and not to your landlord"; and

(v) The copies of the numerous cheques in the Record of Appeal made payable to 3 G for the Judiciary's rent in respect of the Duke Street property.

There are also complaints made in the Appellants' pleadings in these proceedings that the Receiver has collected the income of 3 G (referring to the rents of the Duke St property) but not paid it to Scotiabank.

On the other hand, there is no evidence that says 3 G was merely an agent collecting the rent on behalf of the Seecharans.

35. In the circumstances we are unable to accept the submission that the rent is not the property of 3 G. On the evidence in this application, it clearly is and is therefore charged by the debenture.

36. The third submission refers to **Section 288(3)(b)** of the **Companies Act**. This provision is as follows:

> "(3) At any time after a class of debenture holders becomes entitled to realise their security interest, a receiver of any assets subject to such security interest or in favour of the class of debenture holders or the trustee of the covering trust deed or any other person may be appointed –
>
> > (b) by the holders of debentures in respect of which there is owing more than half of the total amount owing in respect of all the debentures of the same class"

This third submission in essence is that Section 288(3)(b) prohibits the appointment of a receiver. It was argued that although the demand for payment by Scotiabank was for a sum in excess of half of the loan, it has not been established by the Receiver that more than half of the debt was owing at the time of his appointment. Accordingly it has not been shown by the Receiver that his appointment is valid.

37. So far as is relevant to that submission, there are two things that are implicit in Section 288(3)(b) and these are:

    (i) Debentures may belong to different classes; and

    (ii) The section deals with the case where debenture holders in a class of debentures become entitled to realise their security.

38. Section 283 of the Companies Act provides the criteria for placing debentures into different classes. By that section, debentures belong to different classes depending on whether there are different rights attached to the debenture in respect of the matters mentioned in that section such as, inter alia, different rights as to the rates of interest or the dates for payment of interest, or that they do not all rank equally for payment. In view of the section it seems to us that before one can speak of classes of debentures,

there must exist more than one debenture and those debentures must have differences between them as contemplated by section 283. In this case, there is only one debenture in favour of Scotiabank and on a fair reading of section 283, it does not appear that a single debenture can constitute a class of debentures for the purpose of section 288(3)(b). We are therefore not persuaded that the section is at all applicable and has any relevance to this appeal.

39. The fourth submission relates to the collateral deed of mortgage (to which we will hereafter refer to as 'the collateral deed'). The collateral deed is made between the Seecharans and Scotiabank. It is explicitly expressed to be a collateral deed and is said to be supplemental to the debenture. By the collateral deed, the Seecharans mortgaged the Duke Street property to Scotiabank as further security for the repayment to the bank and discharge of all monies and liabilities secured by the debenture. The argument of Mr. Nelson is that the collateral deed does not contain a covenant on the part of the Seecharans to pay Scotiabank. He accepts that the debenture contains a covenant to pay by the Seecharans but he submits that the collateral deed is separate and apart from the debenture. The power to appoint the Receiver of the income in this case is said to have arisen because of the demand for payment and the failure to make payment. But, Mr. Nelson argues, as the collateral deed does not contain a covenant to pay, the power to appoint a receiver cannot arise under the collateral deed.

40. For this submission to really advance the Appellants' case it seems that it has been made on the basis that the first three submissions, or any one of them, in relation to the appointment of the Receiver under the debenture would be accepted by the Court. In other words this submission is predicated on a determination that the appointment of the Receiver under the debenture is invalid. In view of our conclusions with respect to those submissions, it is not

strictly necessary that we consider this submission. However, we will do so in the event that we wrong in the conclusions to which we have reached above.

41. Section 39 of the Conveyancing and Law of Property Act (CALPA), gives to the mortgagee certain powers included among them are the power of sale and the power to appoint a receiver of the income of the mortgaged property where the money has become due (See Section 39(1)(c)). Under Section 47(1) of CALPA a mortgagee may not appoint a receiver under until he has become entitled to exercise the power of sale conferred by the CALPA.

42. The CALPA contains provisions regulating the exercise of the power of sale and the power to appoint a receiver but these may be extended or varied by the mortgage deed. The collateral deed contains an express provision applying the power to appoint a receiver and the power of sale to the collateral deed but without the restrictions contained in the CALPA. The provision in the collateral deed which is at clause 4(e) is as follows:

> "(e) That the Statutory Power of Sale and of appointing a receiver and all ancillary powers conferred on mortgages by the Conveyancing and Law of Property Act Ch. 27 No. 12 shall apply to this security but without the restrictions therein contained as to giving notice or otherwise and so that for the purpose of a sale of the said Premises hereby mortgaged or any part thereof under such statutory power (or otherwise for the purpose of calling in the principal moneys hereby secured) the whole of the moneys for the time being owing on this security shall notwithstanding anything herein contained be deemed to become due and payable immediately on default being made in the observance or performance of any covenant or agreement herein expressly or impliedly contained and on the part of the Sureties to be observed and performed."

43. Essential to Mr. Nelson's argument is his contention that the collateral deed is to be treated as separate and apart from the debenture, and indeed if read as an independent document, it does not contain an express covenant to pay

on behalf of the Seecharans. We however cannot agree that the collateral deed is to be read as a deed separate and apart from the debenture.

44. As we mentioned, the collateral deed is expressed to be read as a collateral deed i.e collateral to the debenture and provides additional security for the monies secured by the debenture. At recital (4) it is there stated that that it was agreed between the parties that the payment to Scotiabank and the discharge of all monies and liabilities secured by the debenture should be further secured by a mortgage of the Duke Street property as collateral security. The debenture at recital B refers to the collateral deed and there says that 3G and the Seecharans have agreed to secure the payment of 3G's liabilities in the manner appearing in the debenture and by the collateral deed to be executed immediately after the denture.

45. The collateral deed is also expressed to be supplemental to the debenture. In that regard section **14(1)** of the **CALPA** provides as follows:

> "14. (1) A Deed expressed to be supplemental to a previous deed, or directed to be read as an annex thereto, shall, as far as may be, be read and have effect as if the Deed so expressed or directed were made by way of endorsement on the previous Deed, or contained a full recital thereof."

By that provision the collateral deed is to be read and have effect as if it contained a full recital of the debenture or were made by way of endorsement on the debenture.

46. In all the circumstances it is unrealistic to regard the debenture and the collateral deed as isolated from each other. The collateral deed and debenture are interdependent and must be read together.

47. When they are read together, the words in clause 4(e) of the collateral deed that for the purpose of a sale of the mortgaged premises under the statutory

power of sale or otherwise for the purpose of calling in the moneys secured by the collateral deed, the monies thereby secured shall be deemed to "become due and payable immediately on default being made in the observance and performance of any covenant or agreement expressly or impliedly contained and on the part of the sureties (i.e the Seecharans) to be observed and performed" must be understood to include a reference to the covenant on the part of the Seecharans in the debenture that they will as and when the moneys thereby secured become payable pay to Scotiabank and discharge all moneys and liabilities due to Scotiabank by 3G. It is not disputed that the monies become due on the happening of certain events which include a demand for payment. The effect is therefore clear that the power of sale and the concomitant power to appoint a receiver under the collateral deed arise on demand for payment. As we have mentioned above, the Judge has found that a demand has been made. This is of course subject to the Appellants' possible position that Scotiabank may not have been in a position to make a demand because of a collateral agreement or underlying transaction, which the Appellants must establish. In the circumstances, in our judgment, at least on a prima facie basis, the Receiver was properly appointed under the collateral deed as well.

48. In relation to the fifth submission (which like the fourth submission only advances the Appellants' case if they establish that the Receiver has no authority under the debenture to receive the rents) it is correct that the collateral deed is a second mortgage and does not therefore vest the legal estate of the Duke Street property in the mortgagee. The argument was that as the collateral deed did not vest the legal estate in the mortgagee, the power of sale could not arise and consequently neither could the power to appoint a receiver which the mortgagee may do only when he has become entitled to exercise the power of sale.

49. That submission is however misconceived. What it amounts to is that a second mortgagee cannot exercise a power of sale. But that is plainly wrong. Section 39 of CALPA which identifies the power of sale as an incident to a mortgage made by deed, as is the collateral deed, makes no distinction between a first and second mortgage. A second mortgagee has all the remedies of a first mortgagee including the power of sale. He can affect a sale of the mortgaged property but subject to the first mortgage. If the prior mortgagee agrees to join in the conveyance and receive part of the purchase money in discharge of its mortgage, the second mortgagee can sell free from the first mortgage. Here it is worth noting in passing that the first mortgagee is Scotiatrust and Merchant Bank Trinidad and Tobago Limited so it is reasonable to infer that the chance the first mortgagee may agree to enter into such an arrangement is not remote. That notwithstanding, the fact that the collateral deed does not vest the legal title in the mortgagee is no obstacle to the power of sale arising nor does it present any obstacle to the power to appoint a receiver. It is here relevant to note that Section 47(8) of CALPA which deals with the application of monies received by a receiver provides at Section 47(8)(b) that he is to keep down the interest on all principal sums having priority to the mortgage under which he was appointed.

50. We come to the sixth and final submission which relates to the balance of convenience. As we mentioned, the Judge decided that the rents and the utility charges paid by the Judiciary should be paid to the Receiver. The Appellants' contention is that the Judge was plainly wrong in the exercise of his discretion to so order. They say that the balance of convenience lay in favour of the rental income and charges now in the interest-bearing escrow account remaining there and all future rents and charges being paid into that account pending the hearing and determination of the Appellants' claim.

51. In coming to his decision, the Judge considered whether it was more appropriate that the rental income and the charges remain and be paid into the interest-bearing escrow account or be paid to the Receiver. He noted that there was merit in the "suggestion" that the rental income and charges now standing in the interest-bearing escrow account remain there and all future rents and charges be paid into it, but there was also some "noteworthy criticism". He reasoned that if the money be left in the interest-bearing escrow account and future rents and charges are paid into it there would be no resources with which to pay the loan instalments and the "utility bill", or in other words the electricity charges. However if the monies were paid to the Receiver he could pay "all overheads" with respect to the property. The judge concluded:

> "Thus, it would better serve the interest of all parties if the monies are paid to the Receiver, who, in proper discharge of his contractual duties, can settle the outgoings and keep the property tenanted as an income-earning asset."

52. Mr. Nelson submitted that the Judge in the exercise of his discretion was plainly wrong, he made factual errors, took into account irrelevant considerations and failed to take into account relevant considerations.

53. In relation to the factual errors, it was pointed out that the Judge referred:

    (a) to the building on the Duke Street lands as 3 G's building whereas it is owned by the Seecharans; and

    (b) to the collateral deed of mortgage as securing the sum of $600,000.00 when it was in fact security for the loan granted by Scotiabank to 3 G in the sum of $15,494,902.00.

54. While these are inaccuracies, we fail to see that they provide any basis to say that the Judge was plainly wrong. The fact is that the Judge fully understood

the issue raised by the this application which was what should be done with the rents payable by the Judiciary in respect of the Duke Street property pending the determination of the Appellants' claim. He correctly regarded the rental income as the income of 3 G and understood that that was among the assets charged by the debenture to secure the loan to 3 G in respect of which the Receiver was appointed. In that light, if the Judge were mistaken as to the ownership of the building and the amount secured by the collateral deed that seem to us to be of no real significance to his determination as to whom or what account the rents should be paid.

55. In relation to the matters that the Judge erroneously took into account, Mr. Nelson focused on the Judge's reference to the payment of the electricity charges. These he said are required to be paid by the Judiciary directly to the provider. So by the Judge taking into consideration that monies should be paid to the Receiver to secure the payment of the electricity bill, the Judge took into account a consideration which was irrelevant as well as inaccurate.

56. While there is some merit in that submission we do not believe that it is being entirely fair to the Judge. It seems to us that on a fair reading of the Judge's judgment, his decision to direct that the rents be paid to the Receiver was informed largely by two considerations. First, that the loan should be paid. It is not the Appellants' case that they have fully paid the loan. So they need to continue paying it. It is clear that loan payments are paid by the rental income. If that income remains in the interest-bearing escrow account the loan would not be paid. Second, the Duke Street property is an income-earning asset and it is everyone's best interest that it remains so. While the Judge did make much of the payment of the "utility bill" that was not his only focus. He referred also to "all the overheads of the property" which the Receiver could meet from the rents. It can hardly be disputed that the payment of overheads such as water rates and necessary repairs (for which the landlord may be responsible) may be equally necessary to maintain the

Duke Street property as an income-earning asset. The Receiver may pay such overheads and effect such repairs (See clause 12(e) of the debenture). In those circumstances, it does not appear to us that the attention given by the Judge to the payment of the electricity charges is sufficient to say that the Judge was plainly wrong to direct that the rents and charges should be paid to the Receiver rather than remain and be paid into the interest-bearing escrow account.

57. In relation to the considerations which the Appellants submit the Judge failed to take into account, reference was made by Mr. Nelson to paragraphs 51 and 56 of the Judge's judgment dated June 25, 2015 in relation to an earlier application made by the Appellants in these proceedings. In those paragraphs, the Judge acknowledges that there are issues to be determined at the trial of these proceedings relating to the validity of the Receiver's appointment and whether he has fraudulently converted monies by collecting rents by paying them into a receivership account and applying same in the manner referred to in the Receiver's defence filed in these proceedings.

58. It is however difficult to imagine that the Judge would not have had in mind his own decision given in these proceedings having referred to that previous judgment in his judgment in this application. However, it is clear to us that the position the Judge took is encapsulated at paragraph 27 of his judgment in this application where he said that "…until the validity of the Receiver's appointment in law is determined at trial, [the Receiver], prima facie, must be deemed to have been properly appointed as receiver" under the debenture and collateral deed. The Judge's conclusion on a prima facie basis that the Receiver was properly appointed stemmed from the fact that the Receiver had established on a prima facie basis that an event giving rise to his appointment had occurred, namely the demand for the payment of the

monies secured by the debenture. In our judgment, the Judge was entitled to take that position.

59. In view of the above, we are not satisfied that the Judge was plainly wrong to come to the decision that he did as to the payment of the rental income.

60. Even if we were of the view that the Judge erred by either taking into account irrelevant considerations or failing to take into account relevant ones and it was open to us to look at the matter afresh, in our judgment the best solution is to direct the rental income be paid to the Receiver as the Judge ordered.

61. As we have mentioned above, if the monies remain in the escrow account the loan would not be paid. That cannot be in anyone's best interest. It is also in everyone's interest that the Duke Street property be kept as an income earning asset which is best achieved by putting the Receiver in funds so to speak rather than leaving the monies now standing in the escrow account and having all future rents and charges be paid into it.

62. If it were established at the end of the day that the appointment of the Receiver is invalid or that he has fraudulently converted funds then the Appellants' complaints can be addressed by proper accounting of the funds paid to the Receiver and reconciling of the accounts. In that context it is appropriate to refer to **Section 296(e)** of the **Companies Act** which seems to be self-explanatory and is as follows:

> "296. Upon an application by a receiver or receiver-manager of a company, whether appointed by the Court or under an instrument, or upon an application by any interested person, the Court may make any order it thinks fit, including –
>
> (e) an order requiring the receiver or receiver manager, or a person by or on behalf of whom he is appointed –

> (i) to make good any default in connection with the receiver's or receiver-manager's custody or management of the property or business of the company;
>
> (ii) to relieve any such person from any default on such terms as the Court thinks fit; and
>
> (iii)To confirm any act of the receiver or receiver-manager"

63. Further, the Appellants have alleged no other prejudice they would incur by the payment of the rents and charges to the Receiver that cannot be rectified by a proper reconciling of the accounts and under section 296 (e) of the Companies Act.

64. For the above reasons we dismissed this appeal.

65. We also directed that there be a speedy trial of this claim. Mr. Nelson requested such an order and Mrs. Peake for the Receiver had no difficulty with it, although she stated that should be really a case management decision for the Judge. But of course this Court has can direct an early trial and given the circumstances in this matter, it is appropriate that we do so.

66. This claim was begun in 2014 and the defence was served in 2015. There is unlikely to be an adequate explanation why after a period of four years the trial of the claim has not occurred. Nor do we understand why after that passage of time that "there is little doubt that resolution by trial would not occur quickly" as the Judge seemed to think. Suffice it to say it is reasonable to have expected that the trial of the claim would have already occurred. It is obviously in the parties' best interest that the issues in the claim be finally resolved by a trial as soon as possible. In the circumstances we directed that the trial of this matter be fixed not later than the end of March 2020. The

intervening period should provide adequate time to deal with any procedural matters that may be outstanding.

67. In relation to costs Mr. Allahar for the Attorney General indicated that his instructions are not to seek an order as to costs. That was not however the Receiver's position. As a consequence we directed that Appellants file and serve submissions on costs within 14 days of these reasons becoming available and the Receiver file and serve submissions in reply within fourteen days thereafter.

68. Lastly on the application of the Appellants we granted a stay of the Judge's order for a period of 21 days from October 10th 2019.

Dated this 15th day of October, 2019

A. Mendonça J.A.

J. Jones J.A.