COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION
2019/CLE/GEN/001161

BETWEEN

SCOTIABANK (BAHAMAS) LIMITED

Plaintiff

AND

RAMIRO EUDUARDO DEL AMO

AND

DEL AMO BAHAMA INVESTMENT LIMITED

Defendants

Before: The Honourable Madam Justice Simone Fitzcharles

Appearances: Mr. John Minns for the Plaintiff

Mr. Colin Jupp for the Defendant

Judgment Date: 30 November 2023

RULING

FITZCHARLES J:

1. This is an application by Summons filed on 24 November 2022 by the first defendant, Ramiro Eduardo Del Amo ("**Mr. Del Amo**"), to have the Originating Summons filed on 29 July 2016 by Scotiabank (Bahamas) Limited ("**Scotiabank**") set aside and/or dismissed on the following grounds:

"1. That an irregularity has occurred due to the misjoinder and/or non-joinder of the proper party to these proceedings pursuant to Order 2 of the Rules of the Supreme Court and/or the inherent jurisdiction of the Court.

2. Further and/or alternatively, that the claims in the Originating Summons are now statute barred pursuant to sections 32 (1), 23 (5), 38 (1) and 38 (5) of the Limitation Act and/or the inherent jurisdiction of the Court.

3. Further and/or alternatively, that irregularities have occurred due to the Plaintiff's failure to comply with Order 3 Rule 5 of the Rules of the Supreme Court."

Background

2. In May 2008 the plaintiff agreed to lend the sum of US$470,600.00 to Mr Del Amo. The loan was secured and memorialized in the following documents:

   (1) An Indenture of Mortgage between Ramiro Eduardo Del Amo (as borrower) , Del Amo Ltd. (as mortgagor) and Scotiabank (as mortgagee) dated 20 May 2008 ("**Mortgage**"). Under the terms of the Mortgage, Del Amo Ltd agreed to mortgage to Scotiabank:

   > **"ALL THAT Unit 4-901, in the Condominium known as "Residences at Atlantis" situate on Paradise Island one of the islands of the Commonwealth of The Bahamas ("Property")."**

   The Mortgage, which cited Mr Del Amo as the principal of Del Amo Bahama Investment Ltd, is recorded in Volume 10564 at pages 157 to 179 in the Registry of Records in the City of Nassau on the island of New Providence in the Commonwealth of The Bahamas.

   (2) A Guarantee by Del Amo Bahama Investment Ltd ("Del Amo Ltd") to Scotiabank executed on 14 May 2008, by which the guarantor agreed to repay on demand all debts and liabilities present or future owed by Mr Del Amo to Scotiabank.

   (3) A Promissory Note dated 7 July 2008 by which Mr Del Amo promised to repay to Scotiabank the loan which Scotiabank granted to Mr Del Amo in the amount of US$470,600.00 ("**Promissory Note**").

3. By letter dated 29 January 2015, Scotiabank, through its attorneys, Messrs. Graham Thompson, demanded payment from Mr. Del Amo of US$642,588.72. This sum was comprised of:

   (i) US$470,600.00 being the principal balance,

(ii) of US$165,680.00 in interest outstanding,

(iii) US$1,602.12 as to fees, and

(iv) US$4,706.00 as to penalties.

Subsequently, by letter dated 03 February 2015, Scotiabank (through Graham Thompson) demanded repayment from Del Amo Ltd of the same outstanding sum. The Defendants have allegedly failed to pay the outstanding principal and interest as demanded by Scotiabank. To date, the total amount due and unpaid as at 02 May 2016 is $694,971.16.

4. By way of Originating Summons filed 29 July 2016, Scotiabank brought an action for breach of contract against the Defendants for the Defendants' alleged failure to repay funds as outlined under the terms of the Mortgage and the Promissory Note.

5. On 22 September 2016, Scotiabank made an application for leave to serve the Originating Summons and accompanying affidavit on Mr. Del Amo outside of the jurisdiction. By court order dated 10 November 2016, such leave was granted by the Registrar of the Supreme Court.

6. Thereafter, on 08 April 2021, Scotiabank filed a Notice of Intention to Proceed with the action. The Notice of Intention to Proceed stated that Scotiabank intended to proceed with the action at the expiration of one (1) calendar months' notice from 08 April 2021.

7. An Affidavit of Service was filed by Jose Garcell on 02 August 2022 evidencing that Mr. Del Amo was served with the Notice of Intention to Proceed on 09 June 2021 at 1:40pm in Coral Gables, Florida, United States of America.

8. On 28 October 2022, the Affidavit of Gabriel K. Brown was filed evidencing that Del Amo Ltd was struck off the Register of International Business Companies since 01 January 2012. Knowledge of this came to Scotiabank's attention by way of letter dated 14 February 2015 from Mrs. Sarah Lobosky of Harry B. Sands, Lobosky and Company.

9. Scotiabank filed a Notice of Appointment to hear the Originating Summons on 07 November 2022. Mr. Del Amo then filed an unconditional Memorandum of Appearance and Notice of Appearance in the action on 17 November 2022. Shortly thereafter, on 24 November 2022, Mr. Del Amo filed the present application before this Court.

Issue

10. The issue that the Court must determine is whether or not the Originating Summons ought to be set aside and/or dismissed on the following grounds:

(1) that the plaintiff has misjoined or failed to join a proper party pursuant to Order 2 rule (2) of the Rules of the Supreme Court, 1978 ("**RSC**"); and/or

(2) that this action is statute barred pursuant to sections 32(1) (5), 28 (1) and (5) of the Limitation Act and/or the inherent jurisdiction and/or;

that Scotiabank has taken irregular steps due to its failure to comply with Order 3 rule 5 of the RSC.

Evidence

Mr. Del Amo's Evidence

11. On 24 September 2022, Mr. Del Amo filed the Affidavit of Latoya Garland ("**Garland Affidavit**") which exhibits the unfiled Affidavit of Ramiro Eduardo Del Amo dated 22 November 2022 ("the Del Amo Affidavit").

12. In the Del Amo Affidavit, Mr. Del Amo states inter alia that:

(1) the named defendants in the action are stated to be Ramiro Euduardo Del Amo and Del Amo Bahama Investment Limited;

(2) nowhere in the proceedings is Mr. Del Amo listed as a defendant nor has he been added or substituted as a defendant;

(3) his name is and always has been Ramiro ***Eduardo*** Del Amo (he exhibits the biographical pages of his passport to the affidavit);

(4) he confirms that he has never been known as Ramiro Euduardo Del Amo (the named first defendant in this action);

(5) a review of the Originating Summons filed herein confirms that Scotiabank has commenced these proceedings under "similar circumstances". It is unclear what is meant by "similar circumstances"; and

(6) the Notice of Intention to Proceed confirms that Scotiabank has continuously persisted with these proceedings for years notwithstanding the above information.

Scotiabank's Evidence

13. Scotiabank filed the Affidavit of Gregory Stuart ("**Stuart Affidavit**") on 29 July 2016, which provides that:

(1) Scotiabank agreed to loan Mr. Del Amo funds in the amount of US$470,600 on 07 July 2008;

(2) the agreement was condensed into the Mortgage;

(3) Scotiabank demanded payment of the outstanding principal, interest and penalties fees by letters dated 29 January 2015 and 03 February 2015 respectively;

(4) to date, the defendants have failed to pay the outstanding principal and interest; and

(5) due to the defendants' default and failure to satisfy the Mortgage, Scotiabank desires to exercise its powers under the Mortgage.

14. Scotiabank further filed the Affidavit of Gabriel K. Brown on 28 October 2022. In it, Mr Brown explained that Del Amo Ltd had been struck off the record since 01 January 2012. The status of Del Amo Ltd as struck off since 01 Janaury 2012 was confirmed in an exhibited letter from Sarah Lobosky of Harry B. Sands, Lobosky and Company (the registered office of Del Amo Ltd) to Leif Farquharson of Graham Thompson (Counsel for Scotiabank) dated 04 February 2015 and in an exhibited form from the Companies Registry.

15. Scotiabank filed a Supplemental Affidavit of Gregory Stuart ("**Second Stuart Affidavit**") on 25 November 2022. It provides and exhibits a loan history summary of the Del Amo account as at 18 November 2022. Essentially, it evidences the amount of funds unpaid by the defendants and the payment history of the loan.

Mr. Del Amo's Submissions

Misjoinder, Limitation and Amendment

16. Counsel for Mr. Del Amo submits that there has been a clear misjoinder and/or non-joinder due to the fact that "Ramiro Eduardo Del Amo", a borrower of Scotiabank, has not been listed as a defendant in these proceedings nor has he ever been added or substituted as a defendant in these proceedings.

17. Counsel relies on **A Treatise on the Rules for the Selection of Parties to an Action by AV Dicey Esq. ("Dicey")**, at pages 528-529 in which the learned author states:

> **"A mis-joinder of defendants is, unless amended, fatal..."**

18. Counsel states that the position was liberalized by the advent of **Order 15 rule 6 (2) of the RSC**, which provides:

> **"(2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application —**

(a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;

(b) order any of the following persons to be added as a party, namely —

(i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or

(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter, but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorised."

19. It is argued for Mr Del Amo that although there has been a liberalization of the position, all necessary parties, and no others, must be named in proceedings when they are commenced. Each party must (i) be correctly named and (ii) leave to add a defendant will not be granted after the expiry of any limitation period. Counsel relies on **Lucy v W.T. Henleys Telegraph Works Co. Ltd [1970] 1 Q.B. 393** ("**Lucy**") for those propositions.

20. Mr. Del Amo submits that there has been an obvious misjoinder and/or non-joinder on the part of Scotiabank and that a cursory review of the documents filed on Scotiabank's behalf undeniably confirms this. The first named defendant in this action is listed as "Ramiro **Euduardo** Del Amo" on the Originating Summons and throughout several filed documents, but his name is "Ramiro <u>**Eduardo**</u> Del Amo". [Emphasis added].

21. Mr. Del Amo asserts that the correct name of the borrower is seen on the Guarantee (as evidenced in the Stuart Affidavit). The correct spelling of the borrower's middle name can also be found on the backing sheet of the Indenture of Mortgage.

22. It is further argued that although the mis-joinder or nonjoinder can be remedied by an amendment, this would defeat a limitation defence. Counsel relies upon section **32 (1) and 32 (5) of the Limitation Act, 1995** ("**LA**") which provides:

"32. (1) No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on property, whether real or personal, or to recover the proceeds of the sale of land, after the expiry of twelve years from the date when the right to receive the money accrued....

(5) No action to recover arrears of interest payable in respect of any sum of money secured by a mortgage or other charge or payable in respect of the proceeds of the sale of land, or to recover damages in respect of such

arrears shall be brought after the expiry of six years from the date on which the interest became due:

Provided that —

(a) where a prior mortgagee or other encumbrancer has been in possession of the property charged, and an action is brought within one year of the discontinuance of such possession by the subsequent encumbrancer, that encumbrancer may recover by that action all the arrears of interest which fell due during the period of possession by the prior encumbrances or damages in respect thereof, notwithstanding that the period exceeded six years;

(b) where the property subject to the mortgage or charge comprises any future interest or life insurance policy and it is a term of the mortgage or charge that arrears of interest shall be treated as part of the principal sum of money secured by the mortgage or charge, interest shall not be deemed to become due before the right to receive the principal sum of money has accrued or is deemed to have accrued."

23. Additionally, **section 38(1) and (5) of the LA** state:

> **"38. (1) Where there has accrued any right of action (including a foreclosure action) to recover land or any right of a mortgagee of personal property to bring a foreclosure action in respect of the property, and —**
>
> **(a) the person in possession of the land or personal property, acknowledges the title of the person to whom the right of action has accrued; or**
>
> **(b) in the case of a foreclosure or other action by a mortgagee, the person in possession as aforesaid or any person liable for the mortgage debt makes any payment in respect thereof, whether of principal or interest, the right shall be deemed to have accrued on and not before the date of the acknowledgement or payment.**
>
> **(5) Subject to the proviso to subsection (4), a current period of limitation may be repeatedly extended under this section by further acknowledgements or payments, but a right of action, once barred by this Act, shall not be revived by any subsequent acknowledgement or payment."**

24. Mr. Del Amo contends that the effect of these Limitation Act provisions was clearly explained by Hepburn J in **Imperial Life Assurance Co. of Canada v Kemp [2004] BHS J. No 463**, where the learned judge opined:

> **"Therefore, the relevant limitation periods in respect of the instant claims are to be determined in accordance with section s 32(1) and 32(5) and 38(1) and 38 (5) of the Limitation Act. In the result, the relevant limitation period in respect of Imperial Life's claim for principal was 12 years from 29 January, 1992 and in the case of its claim for interest the limitation period was 6 years from 29 January 1992. Imperial Life's claims would have been barred on 29 January 2004 (in the case of the claim for principal) and 29 January 1998 (in the case of the claim for interest), unless any person in possession of the property or any person liable for the mortgage debt made any payment in respect thereof to Imperial Life before the claim became statute barred."**

25. Counsel submits that both the Originating Summons and the accompanying affidavit (being the Affidavit of Gregory Stuart) both confirm that the Mortgage was taken out on 20 May 2008. It was averred that no payments were ever made with respect to the principal sum owing. However, in a Supplemental Affidavit sworn by Mr Stuart for Scotiabank, a Loan History Summary showed payments made on the outstanding loan. Mr Del Amo submitted that this payment history ought to be ignored by the Court as it did not appear to belong to Scotiabank. However, he did not seek to cross-examine the affiant and there was no material before the Court to sufficiently ground this submission. Without more, the Court therefore accepts the evidence as set forth by the affiant for Scotiabank.

26. Mr Del Amo further asserts that the law with respect to adding defendants after the expiration of any limitation period was explained in the case of **Mabro v Eagle Star and British Dominions Insurance Co Ltd [1932] 1 KB 485** ("**Mabro**"). At page 487 of the judgment, Scrutton LJ opined:

> **"In my experience the Court has always refused to allow a party or a cause of action to be added where, if it were allowed, the defence of the Statute of Limitations would be defeated. The Court has never treated it as just to deprive a defendant of a legal defence."**

27. This principle was confirmed in the ***Lucy*** decision where the Court stated:

> **"...leave would not be granted where the effect would be to prevent the Defendant from relying on the Statute of Limitations. The same principle applies in relation to joinder of a defendant. Whereas here a direct action against a proposed defendant can be defeated by a plea of limitation, the plaintiff cannot escape the consequence by seeking to join the proposed defendant as a party in pre-existing proceedings...It is, I think, desirable to consider whether there is anything in recent changes of the Rules of the Supreme Court which might enable this court to do that which it could not have done in past years. I see nothing in the present RSC Order 15 r. 6 which alters the position as stated in Mabro's case."**

28. Mr Del Amo therefore argues that, based on the foregoing, amending the error to correctly name the borrower would defeat the limitation defence and thus is prohibited. He accepts that an amendment would be permitted if it were just in all the circumstances to do so.

29. Mr. Del Amo's Counsel quotes **Order 20 rule 5 of the RSC** which reads:

> **"5. (1) Subject to Order 15, rules 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.**
>
> **(2) Where an application to the Court for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may**

nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.

(3) An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.

(4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under paragraph (2) if the capacity in which, if the amendment is made, the party will sue is one in which at the date of issue of the writ of the making of the counterclaim, as the case may be, he might have sued

(5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment."

30. Counsel submits that, by virtue of **Order 20 rule 6 of the RSC**, the above rule is applicable to originating summonses as well.

31. Counsel further contends that it would be manifestly unjust to allow an amendment of the Originating Summons after the expiration of the applicable limitation periods as explained above because: *"the necessity for this amendment to correct the name of the first named Defendant was abundantly apparent many months ago and yet not asked for"*. Counsel submits that, in such circumstances, the Court would not allow an amendment after the expiration of the limitation period and relies on **Hipgrave v Case 28 Ch. D 365** to buttress this submission.

<u>Irregularities</u>

32. With respect to the irregularities, Counsel submits that Scotiabank failed to comply with Order 3 rule 5 of the RSC which necessitates not less than one month's notice being given to every other party in this action where a year or more has elapsed since the last proceedings.

33. **Order 3 rule 5 of the RSC** states:

"5. Where a year or more has elapsed since the last proceeding in a cause or matter, the party who desires to proceed must give to every other party not less than one month's notice of his intention to proceed. A summons on which no order was made is not a proceeding for the purpose of this rule."

34. Mr. Del Amo's counsel contends that there have been significant irregularities because:

a. The Originating Summons was filed on 29 July 2016 along with the Gregory Stuart Affidavit. An Order filed 16 November 2016 ("**Service Order**") gave leave to serve the Originating Summons and the Stuart Affidavit out of the jurisdiction. Then, according to the Affidavit of Service filed on 09 January 2019, the Originating Summons, Gregory Stuart Affidavit and the Service Order were purportedly served on Ramiro Eduardo Del Amo on 02 February 2017. Nowhere in the Affidavit of Service is there a service sheet confirming such service, nor does it state that the second named Defendant was ever served with any of the documents in this matter. A Notice of Intention to Proceed was filed on 08 April 2021. However, there is no evidence before the Court that this notice was served in any manner on either of the named defendants which is required pursuant to Order 3 rule 5 of the RSC.

b. A Notice of Appointment to Hear the Originating Summons was filed on 07 November, 2022. A Notice of Appointment to hear an application is not a Notice of Intention to Proceed under Order 3 rule 5 of the RSC and even if, it was considered such, that would not answer the issue that over a year had passed since the last Notice was filed and yet one month's notice of the appointment for the hearing was not given. In fact, as the hearing date was fixed for 18 November 2022 and Ramiro Del Amo was only served on 16 November 2022, only two days' notice was given. It is submitted that this is a gross irregularity on the part of Scotiabank and should not be countenanced by the Court as it flies in the face of the rule of law.

c. Counsel submits that, it is impossible for the requirement that every other party be given notice as required under Order 3 rule 5 of the RSC because Del Amo Ltd has been dissolved by operation of law and notice cannot be given to or received by a dissolved company. According to Charles J (as she then was) in **In the Matter of the Reinstatement of Soothsayer Limited No 134659 an International Business Company et al 2017/CLE/gen/00684**, the Court may, after considering the circumstances under which an IBC was dissolved, restore a company once it is satisfied that such dissolution was perpetrated by fraud. In the instant case, there is no evidence of fraud, thus, Counsel submits, the Court has no jurisdiction to restore Del Amo Ltd.

35. In the circumstances Mr Del Amo requests that the Court set aside and/or dismiss the Originating Summons.

<u>Scotiabank's Submissions</u>

36. Scotiabank's Counsel submits that the limitation period does not apply. He quotes **section 5 of the LA** and highlights that an action upon an instrument under seal shall not be brought after the expiry of twelve years from the date the cause of action accrued.

37. Counsel submits that the guarantee and the Mortgage were documents under seal, thus the Defendants' obligations thereunder attracted a 12-year limitation period.

38. Further, Counsel contends that, in agreeing to Part 3 of the Promissory Note, the Defendants agreed to the following:

> **"I will make these payments every month beginning on the First Principal and Interest Payment Due Date as described in Section 4 of this Note. I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date, and if the payment includes both principal and interest, it will be applied interest before Principal. If, on July 1 2038, I still owe any amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date"."**

39. Counsel submits that, on the basis of the terms of the Promissory Note, Mr. Del Amo has a continuing monthly obligation to pay monthly installments. The defendants are in breach of the terms of their agreements with Scotiabank and are liable in accordance with the consequences set out therein.

40. Scotiabank further contends that section 38(1)(b) of the LA operates to renew the limitation period from the date of last payment. In this regard, Counsel asserts that while there was no system of consistent payment, it is readily apparent from the Loan History Summary that sporadic payments on the loan were made by the defendants within the six years prior to the action being commenced. Hence, no issue of limitation arises.

41. Counsel then cites **section 167(3) of the International Business Companies Act. 2000** ("**IBC Act**") which provides:

> **"(3) The fact that the name of a company is struck off the Register does not prevent —**
>
> > **(a) that company from incurring liabilities;**
> >
> > **(b) any creditor from making a claim against that company through to judgment or execution; or**
> >
> > **(c) the appointment by the court of an official liquidator for that company under section 168."**

42. Counsel concludes by submitting that the plaintiff is entitled to pursue the claim against the named defendants. He also sought to move the Court on a

Summons filed by Scotiabank to amend the misspelling of the middle name of Mr Del Amo from 'Euduardo' to 'Eduardo'.

Discussion and Analysis

Misjoinder/Non-Joinder

43. Mr. Del Amo's Counsel submits that the Originating Summons and Stuart Affidavit ought to be set aside/dismissed as against him because he is not a named defendant in the action. His counsel asserts that the extra "u" in the spelling of his middle name "Eduardo" is fatal to the action as "no such person exists." I do not agree with this submission.

44. In **Bennet Holdings Ltd v Schooner Bay Ventures Ltd2016/CLE/gen/000845** ("**Bennet Holdings**") Charles J (as she then was) had to determine whether a party in the proceedings was a proper party to the action. After considering relevant authorities, the learned judge made the following pronouncements:

> ***"Mrs. Lockhart-Charles relied on the Privy Council case of Metaxides and Silver Point v Swart and others [2015] UKPC 32 but Mrs. Pearce-Hanna attempted to distinguish it from the present case. In my opinion, the reasoning is apposite to the present case. Essentially, the Board held that, where a party represented by its conduct that it accepted a certain state of affairs to be the case, it would not be heard to adopt a contrary position. At [23], Lord Toulson, in delivering the Judgment of the Board, stated:***
>
> ***"It would have been obvious to anybody reading the originating summons, the amended originating summons, the ex parte injunction and supporting affidavit that Mr. Metaxides was seeking to proceed against the body which was responsible for the operation of the property. That party was SPCA. There was a misnomer on the originating summons as first issued, and the amended version showed a degree of confusion or uncertainty as to the correct name, but such defects were inconsequential because SPCA recognised itself as the defendant both by entering an unconditional appearance and by its subsequent conduct. It thereby waived any irregularity regarding the form of title used in the proceedings (or the absence of formal leave to file the amended originating summons). Having submitted to the court's jurisdiction and entered into a consent order, SPCA could not be heard to deny that it was a party to the proceedings and bound by the order, nor has it sought to do so."***
>
> ***74 In my opinion, DSB is a proper party to these proceedings. It is a fact that no business licence has the name "Destination Schooner Bay Limited" by itself but the 2013 and 2015 licences have Mr. Malcolm and his wife's names trading as Destination Schooner Bay Limited. A similar position obtains under the VAT Act. To my mind, this is sufficient for the reasons already expressed.***
>
> ***75 Although not exactly on point, a somewhat similar issue arose in the case of Soldier Crab Limited t/a Sandy Toes v Aqua Tours Limited***

[2013/CLE/gen/013100] — Judgment delivered on 22 December 2016 - Charles J. BahamasJudiciary website for 2016. In that case, a written contract was entered into by two parties which were named in the contract as "Aquatours Ltd" and "Sandy Toes Ltd" whereby Aquatours agreed to provide boat transportation services. The first contract was performed in its entirety. A subsequent written contract was entered into by the same parties. It was not fully performed and the Plaintiff commenced proceedings against the Defendant. The Defendant alleged that the subsequent contract was a nullity because it contracted with a non-existent company and further, that the Plaintiff had not acted in accordance with certain provisions of the Companies Act and the Business Licence Act. The Court held that a company, like a natural person, has characteristics other than its name by which it can be identified. Such characteristics include its trading name, type of business, place of business and agents/directors. It was further held that the Defendant knew that it was contracting with a company which operated using the name "Sandy Toes", had a tourist excursion business on Rose Island and that Iola Knowles acted as its agent. These characteristics were identical to that of the Plaintiff. The Court also held that the Plaintiff was a party to the contract and the use of the name Sandy Toes Ltd rather than its corporate name, Soldier Crab Limited or its trading name, Sandy Toes, was a misnomer (emphasis added)."

45. In the English Court of Appeal decision of **Davies v Elsby Brothers Ltd [1961] 1 WLR 170 ("Davies")** Pearce LJ opined:

> ***"In English law as a general principle the question is not what the writer of the document intended or meant but what a reasonable man reading the document would understand it to mean; and that, I think, is the test which ought to be applied as a general rule in cases of misnomer -which may embrace a number of other situations apart from misnomer on a writ, for example mistake as to identity in the making of a contract. I think that the test must be: How would a reasonable person receiving the document take it? If, in all the circumstances of the case and looking at the document as a whole, he would say to himself: "Of course it must mean me, but they have got my name wrong", then there is a case of mere misnomer. If, on the other hand, he would say: "I cannot tell from the document itself whether they mean me or not and I shall have to make enquiries", then it seems to me that one is getting beyond the realm of misnomer.***
>
> ***One of the factors which must operate on the mind of the recipient of a document, and which operates in this case, is whether there is or is not another entity to whom the description on the writ might refer (emphasis added)."***

46. I consider the test as provided in the ***Davies*** case: how would a reasonable person receiving the document take it? Can there be another individual to whom the description on the Originating Summons might be referring?

47. Based on the evidence before me, on 17 November 2022, Mr. Del Amo filed an unconditional appearance in these proceedings. This suggests to me that he was fully aware that the Originating Summons must be referring to him and no other person. In fact, in Mr. Del Amo's Memorandum of Appearance and Notice of

Appearance, he had entered an appearance and notified Scotiabank that he had done so for "Ramiro **Euduardo** Del Amo" [emphasis added]. Furthermore, upon a cursory review of the Mortgage, there appears to be a typographical error where Mr. Del Amo's name has the additional "u" as well. This can be found in the second paragraph of the Mortgage itself – which Mr. Del Amo signed. There is no evidence before me confirming he ever challenged this typographical error in the Mortgage. In addition, it is only the additional "u" which is incorrect in the spelling of Mr. Del Amo's name. This is evidenced by the biographical pages in his passport exhibited to the Del Amo Affidavit.

48. I find that the additional "u" does not create any real ambiguity or confusion as to who is being named in the action. Applying the reasoning of Charles J in ***Bennet Holdings*** and the ***Metaxides*** decision, the additional "u" is simply a misnomer or typographical error that can quickly and easily be remedied. There is no confusion as to who was meant to be sued. This is clearly borne out by the conduct of both parties.

49. Accordingly, I will not set aside or dismiss the Originating Summons or Stuart Affidavit on an inconsequential error. In my view, the correction of a misnomer in this case does not signify or necessitate the addition of a new party or cause of action. The Court is also, in the result, minded to grant the application of Scotiabank to correct this obvious misnomer by deleting the extra vowel 'u' from the relevant pleadings.

Del Amo Ltd being Dissolved

50. Mr. Del Amo's counsel strenuously submitted that, as Del Amo Ltd has been dissolved, it cannot be pursued in the named action. As Scotiabank's counsel correctly points out, this is not the case. According to **section 167(3) of the IBC Act**:

> **"(3) The fact that the name of a company is struck off the Register does not prevent —**
>
> **(a) that company from incurring liabilities;**
>
> **(b) any creditor from making a claim against that company through to judgment or execution; or**
>
> **(c) the appointment by the court of an official liquidator for that company under section 168 (emphasis added)."**

51. The Court is of the view that Scotiabank may lawfully pursue its claim as against Del Amo Ltd. by virtue of section 167(3) of the IBC. The course taken will depend upon whether the company has been removed from the Register. If the assets are *bona vacantia* the plaintiff will have to involve the Treasurer. (See **Nathlee Whilmena Dorsett as the Personal Representative of the Estate of Alfred**

Wesley Ramsey & Anor. v Bernadette Turnquest BS 2022 SC 106 at para. 15-18 per Winder CJ.) This does not negate the fact that the Company, as the named Mortgagor in the Mortgage and a guarantor under the Guarantee, is subjected to certain liabilities should it fail to comply with the terms of the said Mortgage. What is affected by the Company's removal, if that is in fact the case, is dealing with the assets.

Statute of Limitation

52. Mr. Del Amo's Counsel heavily relies on sections 32 (1), 23 (5), 38 (1) and 38 (5) of the LA to advance the proposition that the action is statue barred. With respect to the principal sum under the Mortgage, I do not agree with his arguments. The Originating Summons was filed in time – that being well before the limitation period of 12 years. Further, the argument on limitation does not apply as there is no new cause of action nor new party being added post the expiry of the limitation period.

53. The same may not be said of the claim for the interest. **Section 32 (5) of the LA** states that an action for the interest in respect of any money secured by a loan must be brought within six (6) years from the date on which the interest became due. The mortgage was executed on 20 May 2008 and the Promissory Note at clause 3 states that payment was to commence on 01 August 2008; if no payment was ever made on the interest, the cause of action would have arisen on 01 September 2008 and would be statute barred on 01 September 2014. On the other hand, if payments were made post 1 August 2008, it is possible the claim came within the 6 year limitation. This will depend on the evidence to be dealt with on the substantive hearing of the Originating Summons. The Court will assess at that time how much, if any, of the interest payment is due and whether there is any evidence by which the proviso under section 32(5) of the LA may apply to the interest claim.

54. To be clear, the Court will not set aside or dismiss the Originating Summons as Scotiabank may still pursue Mr. Del Amo and Del Amo Ltd for the principal sum under the loan. The issue whether the interest is payable must abide the outcome of that hearing.

Irregularities and application of Order 2 and Order 3 rule 5 of the RSC

55. I turn to deal with the arguments for setting aside the proceedings on the basis that there have been irregularities. In considering this issue, I first wish to highlight **Order 2 rule 1 and 2 of the RSC**:

> **"1. (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by**

reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document judgment or order thereon

2. (1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity. (Emphasis added)."

56. Mr. Del Amo filed an unconditional Memorandum of Appearance and an unconditional Notice of Appearance on 17 November 2022. Subsequently, he filed a summons for this application (seeking to set aside the Originating Summons for inter alia irregularities) on 24 November 2022. The Affidavit of Service prepared by Jose Garcell and filed on 02 August 2022 evidenced that Mr. Del Amo was served with the Notice of Intention to Proceed on 09 June 2021.

57. I note that the Originating Summons was filed on 29 July 2016, leave to serve the Originating Summons and accompanying affidavit on Mr. Del Amo out of the jurisdiction was granted on 10 November 2016, with a subsequent Notice of Intention to Proceed filed on 08 April 2021 (and served on Mr. Del Amo on 09 June 2021, as evidenced in the Affidavit of Service prepared by Jose Garcell).

58. Furthermore, a Notice of Appointment to Hear the Originating Summons was filed by Scotiabank on 22 August 2022. However, there is no evidence confirming that it was ever served on Mr. Del Amo or Del Amo Ltd. As Mr. Del Amo's counsel points out, there was no renewal of the Notice of Intention to Proceed nor was a subsequent Notice of Intention to Proceed ever filed. Though there are irregularities in relation to the steps taken by Scotiabank in this matter, the filing of the unconditional Memorandum of Appearance and the unconditional Notice of Appearance, has a significant impact on the reliefs available to Mr. Del Amo.

59. In accordance with **Order 10 Rule 1 (3) and Rule 5 of the RSC**:

"10...(3) Where a writ is not duly served on a defendant but he enters an unconditional appearance in the action begun by the writ, the writ shall be deemed to have been duly served on him and to have been so served on the date on which he entered the appearance...

5. The foregoing rules of this Order (except rule 1(4)) shall apply in relation to an originating summons to which an appearance is required to be entered as they apply in relation to a writ, and rules 1 (1) and (2) shall, with any necessary modifications, apply in relation to an originating summons to which no appearance need be entered, a notice of an originating motion and a petition as they apply in relation to a writ."

60. The entry of a conditional appearance (with leave to do so under the RSC) would have allowed the defendants to attack the originating summons and proceedings on the basis of the existence of irregularities. However, a regular appearance was entered by Mr Del Amo. Therefore, he may not do so.

61. Relying on the inherent jurisdiction of the Court does not assist Mr. Del Amo either. The extent of the Court's inherent jurisdiction was explored in the Privy Council decision of **Texan Management Ltd and Others v Pacific Electric Wire & Cable Company Ltd** ("Texan"). There, at paragraph 57, the Court opined:

> **"But the modern tendency is to treat the inherent jurisdiction as inapplicable where it is inconsistent with the CPR, on the basis that it would be wrong to exercise the inherent jurisdiction to adopt a different approach and arrive at a different outcome from that which would result from an application of the rules: Raja v Van Hoogstraten (No 9) [2008] EWCA Civ 1444, [2009] 1 WLR 1143. That decision concerned the court's power under the inherent jurisdiction to set aside an order made without notice ex debito justitiae. It was held that although the inherent jurisdiction may supplement rules of court, it cannot be used to lay down procedure which is contrary to or inconsistent with them, and therefore where the subject matter of an application is governed by the CPR it should be dealt with in accordance with them and not by exercising the court's inherent jurisdiction."**

62. Although this references the CPR, for the purposes of this application (which are still governed by the RSC), ***Texan*** still provides helpful guidance on how the Court should proceed. With respect to the instant case and relying on the ***Texan*** decision, Mr. Del Amo cannot rely on the inherent jurisdiction of the Court where there are express rules (as provided in the RSC – Order 10 Rule 1 (3)) which dictate how the Court should handle such an application in the given circumstances.

63. More so, the filing of an unconditional Memorandum of Appearance and unconditional Notice of Appearance is deemed a fresh step in the proceedings. This was highlighted in the case of **Jeudi v Hanna et al BS 1995 SC 16** where Marques J (acting) had to address his mind to whether or not such unconditional filing would be considered a fresh step in the proceedings. There the Learned Judge opined:

> **"...it is a pre-requisite of RSC O.2, r.2 that a party making application to set aside for irregularity any proceeding or any document therein should do so before taking any fresh step after becoming aware of the irregularity. Here the record shows that the first named defendant entered an unconditional appearance to the Writ on the 15th December, 1994 and filed the Summons herein on 16th December 1994.**
>
> **The filing of such an appearance by the first defendant the plaintiff/appellant says constitutes a fresh step for the purposes of RSC O.2 r.2 and referred to paragraph 12/1/3 at page 97 of the 1976 White Book that reads:–**

"Where a defendant enters an ordinary appearance, without any condition or protest reserving his right to object to the irregularity of the Writ or service or the jurisdiction of the court, he is debarred from raising an objection afterwards

The effect therefore of an ordinary appearance [is] a waiver of irregularity, if any, as well as a submission to the jurisdiction of the court."

I adopt that statement and do hold that the unconditional appearance of the first defendant did constitute a fresh step precluding him from having the Writ set aside even though he made a timely application...". (Emphasis added).

64. Though the case discussed a writ, the legal principles are applicable to the instant case as Order 10 Rule 5 of the RSC states that the general rules governing the originating process (which discusses only writs) applied *mutatis mutandis* to an Originating Summons.

65. Relying on the aforementioned authorities, Mr. Del Amo took a fresh step in the proceedings by filing the unconditional Memorandum of Appearance and unconditional Notice of Appearance which had the effect of waiving the irregularities. He is thus, debarred from making an application to set aside the Originating Summons for irregularity.

66. In the circumstances, and for the foregoing reasons, the application of Mr. Del Amo to set aside the Originating Summons is dismissed. Further, I order:

   i. that the title of the action in the Originating Summons and all documents filed subsequent to this decision shall reflect the correct spelling of the name of the first defendant as "Ramiro Eduardo Del Amo."

   ii. that costs be awarded to the plaintiff to be taxed, if not agreed.

Dated 30 November 2023

Simone I Fitzcharles

Justice