

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2011-03772

BETWEEN

NANDA RAMHIT

Claimant

AND

VITCO TT LIMITED

Defendant/Ancillary Claimant

INDARNIL BHAGWANDEEN

Defendant to the Counterclaim/
Ancillary Defendant

Before The Hon. Madam Justice C. Gobin

Appearances:

Mr. P. Deonarine instructed by Ms. J. Narine for the Claimant

Mr. Dowlat instructed by Mr. S. Kadem for the Defendant

Ms. N. Alfonso instructed by Mr. R. Dass for the Defendant
to the counterclaim

JUDGMENT

1. Mr. Nanda Ramhit, a businessman, filed this action against the defendant company VITCO, for repayment of a loan in the sum of \$1,500,000.00 together with interest. It is not in dispute that he wrote a personal cheque dated 23rd September 2009 payable to the defendant in that sum. It is not seriously disputed that it was a loan and that it has not been repaid. VITCO, through its manager Kavindra Balgobin denied that there was a loan to the company.

2. The company accepted that a cheque in the sum of \$1,500,000.00 was drawn in its favour, but claimed that the loan was actually made to Indarnil Bhagwandeem

(Bobby), a director of the defendant under an arrangement with the claimant, who is his cousin, and that Bobby was the beneficiary of the proceeds of the loan which was only passed through VITCO for Bobby's accommodation. The defendant claimed in those circumstances that it was Bobby, who was liable to the claimant for the repayment of the loan. The defendant filed an ancillary claim against him.

3. On the facts in issue I had to determine to whom did Mr. Ramhit lend these monies and whether the defendant company or the ancillary defendant was liable for the repayment. My understanding, throughout, was that in addition, it was open to me, to find that neither was liable and if the pleadings and evidence supported it, that a third party who had not been sued, ought properly to have been named a defendant. This was one outcome which might have followed from a finding that the claimant failed to establish on a balance of probabilities, that VITCO was liable.

4. Both counsel for the claimant and for the ancillary defendant (Bobby) sought to persuade me that such a course was not open to me. They contended that I was limited on the pleadings, especially the defence, to either reject the defendant's statements of case, that it, VITCO, was not the borrower, or to find that the ancillary defendant was in fact the borrower. They said that in the absence of a positive case by the defendant that a third party, was in fact the borrower, this issue was not open for consideration.

5. The first question I had to decide then, was whether I was allowed to find that the loan may have been made to someone other than the defendant and ancillary

considered to be deficiencies in the claimant's statement of case which pleaded an oral agreement between Mr. Kavindra Balgobin, the Managing Director of VITCO and the claimant, pursuant to which the claimant agreed to lend the defendant money. The claimant did not specifically state that Mr. Balgobin was acting for and on behalf of the company. The claimant did not state in the statement of case that the defendant was the alter ego of Mr. Balgobin. I found that this ought to have been expressly pleaded if that was the claimant's case. By contrast, the ancillary defendant, in support of its case, claimed specifically that the company was established as a vehicle to conduct Mr. Balgobin's business, suggesting it was his alter ego.

6. Two letters were annexed to the claimant's statement of case which indicated that Mr. Ramhit had made pre-action demands for payment from Mr. Balgobin personally and which explained the reason for his having made the cheque payable to VITCO. The letters reminded that these things were done at Mr. Balgobin's request for "convenience and appearances". When the claimant's pleading was read together with these annexures it compounded the matter.

7. That it was an issue, would also have become more apparent from the ruling I made on the 27th September 2012, when I granted the defendant's application to strike out the claimant's case. Although this ruling was subsequently reversed by the Court of Appeal, my understanding from a perusal of the transcript of the proceedings is that the Court found that the decision to strike out was premature and that the state of the pleadings notwithstanding, that the matter ought to have been allowed to proceed to trial

pleadings notwithstanding, that the matter ought to have been allowed to proceed to trial because there were inferences to be drawn from the statement of case and from the correspondence that did not solely support the conclusion to which I had come.

8. In the course of the hearing of the procedural appeal the learned Chief Justice said:

We do not agree that the statement of case discloses no cause of action against the defendant and to the extent that the judge could and did refer to the annexed documents it is our view that it is no more clear on a perusal of those documents that this could only have been a claim in a personal action against Mr. Balgobin.

9. It was never suggested to or by the Court of Appeal that this was not an issue. Indeed the transcript of the proceedings is replete with comments which appeared to confirm that the Court of Appeal accepted that it was.

10. In the course of the trial, objection was taken once more to the references in cross-examination of the claimant by counsel for the defendant, to the correspondence and suggestions that the claimant had been demanding repayment from Mr. Balgobin as opposed to the defendant company. I indicated then that it was relevant to the credibility of the claimant's case even in the absence of a positive allegation by the defendant.

11. I have since upon rereading the papers, been reminded that in its statement of issues the defendant expressly identified it as an issue. (see defendant's statement filed)

- (2) whether the claimant made the loan to the defendant, to the ancillary or to Kavindra Balgobin.

This statement of issues was filed after the determination of the procedural appeal. Neither the claimant nor the ancillary defendant objected to it being identified as an issue. In the circumstances I am satisfied that this was an issue which was open for consideration.

12. The claim and the ancillary claim were tried together for convenience. It was accepted however, that the need to decide the ancillary claim would only arise if the claimant succeeded against the defendant.

13. Having considered the pleadings once more together with the evidence of Mr. Ramhit, Mr. Balgobin for the defendant and Mr. Bhagwandeem, insofar as the latter's evidence was relevant to the claimant's case, I find that the claimant failed to establish that the defendant was the borrower of the moneys lent.

14. Returning to the statement of case the claimant pleaded (para. 2) that the defendant was a corporate entity with Mr. Kavindra Balgobin, its Managing Director. It stated (para. 3) that by an oral agreement made between the claimant and Mr. Balgobin, the claimant agreed to lend the defendant the sum of \$1,500,000.00. As I said before, I found it significant that the claimant did not state that Mr. Balgobin was acting for and on behalf of the defendant. There was no allegation for example that the defendant was Mr. Balgobin's alter ego.

15. Mr. Ramhit's evidence confirmed that at all times he understood that the defendant was a separate entity to Mr. Balgobin. Mr. Ramhit is himself a director of three family run businesses. One of the companies MRCL has been in the business of constructing residential and commercial properties for sale for over thirty-four years, since 1981. Following his father's death in 2003 that company has been run primarily by himself and his brothers Roopchand Ramhit and Premchand Ramhit. In the circumstances I have concluded that based on his own experience he is aware that a managing director is not the company.

16. In his witness statement (para 9) Mr. Ramhit said that Mr. Balgobin announced in the presence of persons including himself, his brothers Mr. Bhagwandeem, Raja (the other person who was subsequently appointed a director of the defendant), that he (Kavindra) Raja and Bobby were going to form a company to bring in electrical cables and that Kavindra, Bobby and Raja were going to be directors. Again, he would have known that a company was being formed for a specific purpose, by three persons including the ancillary defendant Bobby. There is no evidence that Bobby corrected him and indicated it was Kavindra's company or alter ego, or a vehicle for the conduct of Kavindra's business.

17. He went on to say (at para. 14) that Kavindra asked whether he would loan \$1,500,000.00 to the company for the said purchases. I rejected this evidence. This was an important fact which had it been intended to be relied upon, ought to have been

pleaded. But more significantly it is inconsistent with the contents of the pre-action letters which were written by and on behalf of the claimant in which the claimant was reminding Mr. Balgobin that the monies were only paid to the company “for convenience and appearances”.

18. Against this background I also rejected the statement which appeared at para (19) of Mr. Ramhit’s witness statement that:

“Based on the representations and assurances made by Kavindra, on behalf of VITCO, I agreed to loan the money”.

19. I viewed them both as having been made in an attempt to fill what I considered to be significant gaps in the pleadings. In my assessment these attempts further compounded the inconsistency with the contents of the letters and led me to reject Mr. Ramhit’s credibility in this regard.

20. Mr. Ramhit traced the chronology of events which led to the decision to file the claim against Vitco only and not Mr. Balgobin. The first letter which his office Manager prepared based on his instructions were written to Mr. Balgobin. In addressing it, he noted his position as Managing Director of the defendant. In it the claimant recited all of the negotiations and dealings in relation to the loan. They involved Mr. Balgobin personally. Tellingly in my view it stated:

“you wholeheartedly agreed to this proposal and further requested that I make the cheque for the loan in the name of Vitco TT Limited, which I did”.

21. The second was a formal preaction letter which was written by attorneys on record and which was addressed to Mr. Balgobin. This one did not even refer to his position at the defendant company. It gave the clearest impression that Mr. Balgobin was the intended defendant and the actual borrower. It stated at paragraph (3).

The proposed defendant further requested for the sake of convenience and appearance that the said cheque should be made in the name of the Vitco TT Limited (hereinafter the "Company"). In consequence of the same the claimant drew a cheque on a Republic Bank Limited account for the sum of \$1,500,000.00 in favour of the Company, dated the 23rd day of September, 2009. A true copy of the cheque is hereto annexed at A.

22. The letter ended by calling for both Mr. Balgobin (the proposed defendant) and the company to repay the monies lent. That request by itself could not in my view affix liability in VITCO. The statement of case and these letters supported a finding that the transaction was a personal loan agreement with Mr. Balgobin, as opposed to VITCO, and that moneys were only paid to the defendant company's accounts for convenience.

23. In the light of the contents, the call for the defendant to repay the loan in the circumstances did not follow. While a claimant is not necessarily bound by the claims made in the preaction correspondence, the statements made in preaction letters and the circumstances in which it is alleged a cause of action arises, remain relevant to my assessment of the claimant's credibility, as does any previous inconsistent statement. Where a preaction letter written on instructions by Counsel is involved, I should expect greater consistency on material allegations.

24. It is convenient to note here that I have read the submissions of Counsel for the claimant as to how I should treat the words “for convenience and appearance”, where a deliberate choice was made by an attorney who was the writer of the pre-action letter, to use them. I regret to say I have not been persuaded that in the circumstances of this case, I can simply ignore the words, as counsel’s choice and not the litigants. Insofar as the submission sought to explain the reason for pursuing a claim against VITCO opposed to Mr. Balgobin, I reject the explanation. In earlier submissions on the striking out application and before the Court of Appeal counsel placed much reliance on the “cheque rule”. I do believe it was the misapprehension that the rule applied, that led to the decision to proceed against VITCO, only in the proceedings.

25. At the hearing of procedural appeal, Counsel indicated that the claimant was not relying on the cheque rule. Had the claimant then joined Mr. Balgobin personally in these proceedings or had he filed a fresh claim against him, this matter may have ended very differently. In closing submissions at the end of the trial, the submissions on the ‘cheque rule’ were not repeated.

26. In so far as Mr. Ramhit’s overall credibility is concerned I have found him to be generally a truthful witness save for the instances I identified above on which he attempted to fill the gaps left in the pleadings. Indeed his answers to the court following his cross-examination were not equivocal. The following exchange to my mind established clearly that this claimant lent the money to Mr. Balgobin personally:

The Court: **Now, you were shown the letter from the firm Girwar and Deonarine, sir, 9th June 2011 written by Ms. Tacklalsingh?**

The Court: Now, you were shown the letter from the firm Girwar and Deonarine, sir, 9th June 2011 written by Ms. Tacklalsingh?

Nanda Ramhit: Yes

The Court: All right. I want you to look at paragraph 3, small 3 at the top of page 2. Just read that paragraph for me; I want you to read it aloud for me.

Nanda Ramhit:
(reading) The proposed defendant further requested for the sake of convenience and appearance that the said cheque should be made in the name of VITCO TT Limited.

The Court: All right. What do you understand by that, for the sake of convenience and appearances? You obviously---- I take it you gave instructions to your lawyer for the -----this letter to be written, yes?

Nanda Ramhit: Yes, well, Kavindra is the one ask me to make the cheque out to VITCO.

The Court: Yes. So why do you say for convenience – well, you say that the loan is to VITCO, that's your case?

Nanda Ramhit: Yes

The Court: Well, if it's a loan to VITCO, how does appearance or convenience come about? If it's a loan to VITCO it is no questionof convenience or appearances to write it to VITCO?

Nanda Ramhit: Yes

The Court: Good. So what is --- why do you --- why did you give those instructions about appearance and covenience? Do you agree that when you want to make an appearance of something, it is not really the reality; it's an appearance, as opposed to what's the reality?

Nanda Ramhit: Yes

The Court: You understand that?

Nanda Ramhit: Yes

The Court: All right. And you understand that the sounding is --- you do something for convenience, it's because it's just a way of getting around something else, or you know, it might be just an easy way to get at something else, yes?

Nanda Ramhit: Yes

The Court: So you understand by that that it does give the impression that this is what – whoever this loan is for, it's only a matter of convenience and appearance. It's being drawn – it's been made out in VITCO's name, do you understand that?

Nanda Ramhit: Yes

The Court: So that would suggest to me that it's really not a loan to VITCO, it is for somebody else, whoever it is.

Nanda Ramhit: Well, the loan was for Kavindra Balgobin and he told me to make the cheque out to VITCO Limited.

The Court: All right. So the loan was for Kavindra?

Nanda Ramhit: Yes

The Court: But, you ---- he told you make the cheque out for VITCO?

Nanda Ramhit: Yes, he told me to make the cheque out to VITCO.

The Court: All right. And from the passages that Mr. Dowlath read out just now, that is what, even Bobby understood that the loan was for Kavindra for his new business venture?

Nanda Ramhit: Yes

The Court: And that new business venture was what, VITCO?

Nanda Ramhit: VITCO

The Court: So at the time when you handed Bobby the cheque, VITCO was already incorporated, was it?

Nanda Ramhit: Yes.

The Court: Good. So you are a businessman, the cheque could easily have been made out, for no appearance and no convenience, direct to VITCO?

Nanda Ramhit: Yes
The Court: But, according to Bobby, you told him the loan was to Kavindra?

Nanda Ramhit: Yes, the loan was to Kavindra.
The Court: All right. Anything of what I have asked?

Mr. Deonarine: No, please, My Lady.

The Court: I think there might have been one other thing. Yes, I just want to get clear --- the earlier letter you had sent, the personal letter you sent – did you do, did you write this letter yourself?

Nanda Ramhit: No, I got my --- Office Manager wrote it for me.
The Court: You got your Office Manager?
Nanda Ramhit: Yes
The Court: And you understood in that, that there is no mention of a loan to VITCO?
Nanda Ramhit: Yes, because I was addressing Kavindra himself, because I loaned the money to him.
The Court: You loaned the money to him.
Nanda Ramhit:through VITCO
The Court: All right
Yes, anything on that?
Mr. Deonarine: No, please, My Lady.
The Court: Step down. All right, Thank you, very much.

27. The evidence was entirely consistent with both preaction letters. While Mr. Balgobin was the managing director of VITCO at the material time, I find that the claimant intended to and did lend the money to Mr. Balgobin and he understood even up

to the trial stage that although the cheque had been made out to the defendant, his loan arrangement was with Mr. Balgobin. I have already indicated that I rejected Mr. Ramhit's belated evidence that Mr. Balgobin asked him to make the loan to the company.

28. I mentioned before that the claimant did not as did Mr. Bhagwandeem, allege that Mr. Balgobin was one and the same as the company its, alter ego. It is therefore not strictly speaking necessary for me to deal with this issue on Mr. Ramhit's case against VITCO. But since some evidence was led at the trial on the case for the ancillary defendant, and in the event that this issue is found to be relevant, I shall indicate my findings on it.

29. While evidence was elicited (under his cross-examination by the defendant to the counter claim) that Mr. Balgobin was the incorporator of the defendant company and its sole shareholder, that was not sufficient in my view to cause me to lift the corporate veil and to find on the claimant's case that the defendant was in fact the agent or puppet of Mr. Balgobin.

30. As I noted above, Mr. Ramhit said that in July or August 2009 at a meeting at which Mr. Balgobin, Bobby, Raja (the other director of the defendant) and his brother Prem, Roopchand were present, that Kavindra said in everyones presence that he, Raja and Bobby were going to form a company to bring the electrical cables, fittings and fixtures. Kavindra also indicated that he, Raja and Bobby were going to be directors.

31. This is hardly consistent with the case that Mr. Balgobin was the company. Significantly, Bobby who went on to claim that the company which was a vehicle for Kavindra's business, said nothing to the contrary. I should state here that I found Bobby to be a most unimpressive witness.

32. In the light of my finding as to the claimants' claim, it is unnecessary for me to go into any analysis of Bobby's or indeed Mr. Balgobin's credibility. Neither impressed me, but I think it is necessary to indicate my findings on particular aspects of Bobby's evidence.

33. I completely rejected his explanation that he only became a director of VITCO to ensure that the rent for his premises was paid. This was a clear attempt to distance himself from the operations of the defendant company. He was a signatory to the defendant's accounts, even though he generally resided out of the country. He received a director's fee of \$10,000.00 a month. He decided to resign as a director when he became suspicious about funds being "siphoned" from Vitco's accounts into the account of some other company which was incorporated by his co-directors Mr. Raja and Mr. Balgobin. If the company were in fact Mr. Balgobin's puppet, one would think that Mr. Balgobin would be free to move funds to any other account of his. I find that contrary to his assertions, he was actively involved or at least that he intended to be. As it turned out the anticipated contracts never came.

34. I also reject entirely that there was an agreement for the sale of the John Street property to Mr. Balgobin or any company that he nominated. The preparation of a lease agreement by attorneys at a time when a lumpsum had already been paid under the alleged sale agreement, with no mention of the latter, simply does not support Bobby's case on this issue. Even the alleged terms are somewhat vague beginning with the absence of a purchase price.

35. Significantly too, Bobby in answer to the court gave evidence which confirmed that he well understood that the loan was not made to the defendant company but to Mr. Balgobin. He collected the cheque from the claimant, his cousin. He saw it was made to VITCO of which he was a director. As an active director he understood that VITCO had made no request for a loan from his cousin Mr. Ramhit. This exchange supports my finding that this is not a case for lifting the veil.

The Court: **Now, Mr. Ramhit is saying that the loan was to the Company, to VITCO. And that loan, that transaction was completed in October --- sorry September, 2009.**

Indarnil Bhagwandeem: **The loan was to Kavindra, but the cheque was made out to VITCO at Kavindra's request.**

The Court: **So as far as you are concerned, that loan has not --- is not the company's loan, is that your position?**

Indarnil Bhagwandeem: **That's right, yes.**

The Court: **Because as a Director, when you collected the cheque, you didn't say to Mr. Ramhit, VITCO hasn't – as far as I know, I am a Director, I don't know anything about any loan. You didn't say that?**

Indarnil Bhagwandeem: **That.....**

The Court: You didn't say when you collected the cheque made out in VITCO's name, I am a director of this company, I don't know anything about any loan to VITCO.

Indarnil Bhagwandeed: I told Nanda I didn't know he is lending Kavindra that money and it is made out to VITCO.

The Court: All right.

36. In the circumstances I hold that the claimant has failed to establish that it lent the sum of \$1.5 Million to the defendant herein. The case is dismissed with costs. While it is not necessary for me to proceed to deal with the ancilliary claim, Mr. Bhagwandeem did incur legal costs including up to trial. The ancilliary defendant is also entitled to his costs on the prescribed scale. I shall therefore order the claimant to pay the prescribed costs which would have been payable to the defendant, directly to the ancilliary defendant in satisfaction of the defendant's cost award.

Dated this 15th day of October, 2015.

CAROL GOBIN

GOBIN