SUPREME COURT OF NOVA SCOTIA
Citation: ***1774142 Nova Scotia Limited v. Deutsche Bank AG***, 2019 NSSC 60

Date: 20190227
Docket: Hfx. No. 458780
Registry: Halifax

Between:

1774142 Nova Scotia Limited

Plaintiff

v.

Deutsche Bank AG, Canada Branch

Defendant

LIBRARY HEADING

Judge:	The Honourable Justice C. Richard Coughlan
Heard:	November 14, 2018 in Halifax, Nova Scotia
Written Decision:	February 27, 2019
Subject:	Civil Procedure – Summary Judgment
Summary:	The plaintiff designed and sold automotive dealer software. Another company TIM Finance provided financing to purchasers of the software. Deutsche Financial Services (DFS) entered into a lending agreement with TIM Finance. The plaintiff guaranteed the loan. DFS discovered TIM Finance had engaged in fraud and called on the plaintiff's guarantee. DFS entered into forbearance agreements with the guarantors. The plaintiff claims the defendant breached the forbearance agreements and commenced an action. The defendant moved for summary judgment.
Issue:	(1) Is the defendant entitled to summary judgment?
Result:	Summary judgment granted. The plaintiff sued the wrong defendant. There is no evidence of any business relations

between the plaintiff and the defendant. DFS is a separate company which is a subsidiary of the defendant. On the facts there was no reason to lift the corporate veil.

The forbearance agreement contained a release and no legally recognized vitiating element which could allow the plaintiff's claims to proceed notwithstanding the release.

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Counsel:	Ian M.P. Gray for the Plaintiff John A. Fabello and Jeremy Opolsky for the Defendant

Coughlan J.

[1] The defendant Deutsche Bank AG, Canada Branch moves for an order for summary judgment dismissing 1774142 Nova Scotia Limited's (TIM Systems) action or in the alternative, to pay security for costs in the amount of $500,000. 1774142 Nova Scotia Limited, formerly TIM Systems Inc., opposes the motion.

[2] In its pre-hearing submissions Deutsche Bank AG, Canada Branch stated it was seeking summary judgment on both the pleadings and on the evidence on the following grounds: the plaintiff fully released the claims asserted in the action; the plaintiff has no cause of action against the defendant; the claim is barred by a limitation period; there is no evidence there as a breach of a forbearance agreement as alleged; there was no breach of a duty of good faith in the performance of the forbearance agreement; there was no interference with business relations as claimed; and the action is an abuse of process.

[3] During oral argument the plaintiff stated it was only seeking summary judgment on the pleadings with regard to the claim of interference with business relations but was seeking summary judgment on the evidence with regard to all grounds for summary judgment including as an alternative basis for the claim concerning interference with business relations.

[4] TIM Systems argues the defendant cannot meet either test for summary judgment and also the motion is premature and should be adjourned until after the parties have disclosed documents.

[5] TIM Systems designed and sold automotive dealer software. It filed a Notice of Action against the defendant on December 23, 2016 and an Amended Notice of Action on October 11, 2017. The plaintiff pleads that at all material times, Richard MacDonald was the operating mind and chief executive of TIM Systems. The company received business financing from the Province of Nova Scotia, a condition of which was that the province would have the right to appoint an interim CEO of the company if it had cause to believe that Mr. MacDonald was acting in a manner constituting a breach of TIM Systems' agreement with the Province. In 1991, Mr. MacDonald was approached by Russell Pynn, a business associate, who suggested forming an independent company to provide financing to purchasers of TIM Systems' software. With Mr. MacDonald's consent, Mr. Pynn incorporated a company named TIM Finance Inc. TIM Finance was controlled by Mr. Pynn; Mr. MacDonald was not involved in its management.

[6] The plaintiff pleads that Deutsche Bank Canada acted as a lender to TIM Finance, financing third party sales of TIM Systems' products. TIM Systems acted as guarantor for TIM Finance's loan obligations.

[7] Unbeknownst to Mr. MacDonald, TIM Finance was engaged in creating fraudulent leases. The plaintiff pleads that the fraud was of an unsophisticated nature and should have been discovered by Deutsche Bank. In June 2001, Deutsche Bank representatives approached Mr. MacDonald to determine whether TIM Systems would honour its guarantee. Mr. MacDonald asked for time to raise the money to satisfy the debt. The plaintiff further pleads:

17. On or about July 11, 2001, Deutsche Bank and Systems concluded a formal arrangement in which, *inter alia*, Deutsche Bank signed a forbearance agreement and advanced funds without repayment terms to allow Systems to address immediate payroll issues and continue in operation in consideration for Systems honouring its guarantee.

18. Unbeknownst to MacDonald, at this time Deutsche Bank, at its most senior level was engaged in a process to sell its investment services division, which is eventually did to GE Commercial Finance for 2.9 billion dollars.

19. MacDonald began seeking investors in Systems to raise the money, *inter alia* to pay monies it had guaranteed. In particular, MacDonald reached an agreement in principle with US-based Electronic Data Systems ("EDS"), a leader in the industry, which would have purchased a 51% equity interest in Systems, for $22 million.

20. After the agreement had been reached with EDS Automotive Retail Group, a subsidiary of parent company, Electronic Data Systems, Deutsche Bank representatives, for reasons known only to them, and contrary to the interests of the Plaintiff, contacted members of EDS' board and discouraged them from approving the purchase, representing that Systems' products were worth far less than the deal envisioned. As a result, the deal fell through. Deutsche Bank representatives similarly disrupted a proposed agreement between Systems and another American-based industry leader, Siebel Systems.

21. In or around August of 2001, Deutsche Bank representatives, for reasons known only to them, and contrary to the interests of the Plaintiff, approached the Province of Nova Scotia, and convinced the Province to exercise its right to replace Mr. MacDonald as CEO of Systems.

22. At the instigation of Deutsche Bank, for reasons known only to it, and contrary to the interests of the Plaintiff, while MacDonald was sidelined, Deutsche Bank concluded an agreement with Ford Canada to sell Ford a copy of the source code for TIM Systems' software, at a price of $750,000. This was in spite of Systems having earlier negotiated an option deal

with Ford that would have paid Systems $15 million for a copy of the source code. Deutsche Bank continued to reassure MacDonald that their actions were all part of a bigger plan, while Deutsche Bank was, unbeknownst to MacDonald, preparing to launch a complaint with the RCMP and Canada Revenue Agency.

23. As a result of the complaint to the RCMP, MacDonald was charged with several offenses. The charges against him were stayed on September 14, 2014.

24. As a result of these and other actions by Deutsche Bank and its representatives, the value of Systems rapidly declined from an assessed value of $125 million to a non-operating entity.

25. MacDonald did not become aware of the scope of Deutsche Bank's actions and their role in the collapse of his company until January 2011, when disclosure was made available to him as part of his criminal trial.

26. The Plaintiff says that the Defendant and its representatives, by their actions as herein described caused losses to the Plaintiff, and that these losses were the result of deliberate bad faith on the part of Deutsche Bank and its representatives. The Plaintiff says that Deutsche Bank breached its duty of acting in good faith within the contractual relationship between the Plaintiff and Deutsche Bank.

27. In addition to its general breaches of good faith, Deutsche Bank specifically breached its forbearance agreement with Systems. The Plaintiff also says that Deutsche Bank's behaviour constituted the tort of interference with business relations.

28. [deleted by amendment]

29. The Plaintiff says that Deutsche Bank deliberately destroyed Systems and its related companies in an attempt to cover up their own key role in the Finance fraud, and to avoid negatively impacting on Deutsche Bank's pending division sale to GE Commercial Finance.

[8] Summary judgment on evidence is governed by Civil Procedure Rule 13.04 which provides:

> 13.04 (1) A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action:
>
> > (a) there is no genuine issue of material fact, whether on its own or mixed with a question of law, for trial of the claim or defence;
> >
> > (b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence

> requires determination only of a question of law and the judge exercises the discretion provided in this Rule 13.04 to determine the question.
>
> (2) When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment must be granted without distinction between a claim and a defence and without further inquiry into chances of success.
>
> (3) The judge may grant judgment, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
>
> (4) On a motion for summary judgment on evidence, the pleadings serve only to indicate the issues, and the subjects of a genuine issue of material fact and a question of law depend on the evidence presented.
>
> (5) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.

[9] The manner in which a judge is to deal with a motion for summary judgment on the evidence was set out in detail by Fichaud, J.A., in giving the Court's judgment in **Shannex Inc. v. Dora Construction Ltd.**, 2016 NSCA 89 where he identified five sequential questions to be answered.

> First Question: Does the challenged pleading disclose a "genuine issue of material fact" either pure or mixed with a question of law?
>
> Second Question: If the answer to #1 is no, then: Does the challenged pleading require the determination of a question of law either pure or mixed with a question of fact?
>
> Third Question: Does the challenged pleading have a real chance of success?
>
> Fourth Question: Should the judge exercise the "discretion" to finally determine the issue of law?
>
> Fifth Question: If the motion is dismissed, should the action be converted to an application and, if not, what directions should govern the conduct of the action?

[10] In the same judgment Fichaud J.A. stated each party is expected to put its best foot forward stating at para. 36:

> "Best foot forward": Under the amended Rule, as with the former Rule, the judge's assessment of issues of fact or mixed fact and law depends on evidence, not just pleaded allegations or speculation from the counsel table. Each party is expected to "put his best foot forward" with evidence and legal submissions on all these questions, including the "genuine issue of material fact", issue of law, and "real chance of success". Rule 13.04(4) and (5); Burton, para. 87.

[11] The evidentiary obligation of parties to a summary judgment motion was set out by Bryson J.A., in giving the Court's judgment in **Nova Scotia Association of Health Organizations Long Term Disability Plan Trust Fund v. Amirault** 2017 NSCA 50 at para. 15:

> Putting one's best foot forward is an important obligation of parties to a summary judgment motion. A respondent to a summary judgment motion "must lead trump or risk losing" (Goudie v. Ottawa (City), 2003 SCC 14 (S.C.C.) at para. 32. Assuming there has been adequate time for disclosure, an absence of evidence cannot be overcome by arguing that something might turn up in the future. The Supreme Court emphasized the obligation of the parties in *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2008 SCC 14 (S.C.C.)
>
> > [19] We add this: In the Court of Appeal and here, the case for the plaintiffs was put forward, not only on the basis of evidence actually adduced on the summary judgment motion, but on suggestions of evidence that might be adduced, or amendments that might be made, if the matter were to go to trial. **A summary judgment motion cannot be defeated by vague references to what may be adduced in the future**, if the matter is allowed to proceed. To accept that proposition would be to undermine the rationale of the rule. A motion for summary judgment must be judged on the basis of the pleadings and materials actually before the judge, not on suppositions about what might be pleaded or proved in the future. This applies to Aboriginal claims as much as to any others.

[12] The first question to be determined is whether the motion is premature. The plaintiff submits that the parties should be permitted to exchange documents and conduct discovery before any motion for summary judgment on the evidence is entertained by the court. The plaintiff cites Rule 13.04(6)(b), which permits a judge to adjourn the hearing of a summary judgment motion for any just reason, including to permit disclosure, production, discovery, presentation of expert evidence, or collection of other evidence. The defendant argues that the plaintiff has had ample time to collect enough evidence to put its best foot forward and respond to a summary judgment motion.

[13] This is not the first proceeding brought by Richard MacDonald in relation to the same financing arrangements between TIM Finance, TIM Systems, and Deutsche Financial Services (DFS). Mr. MacDonald filed an action in his personal capacity against Deutsche Bank AG, Canada Branch in 2015, and added Deutsche Bank AG as a defendant in 2016. That action, containing many of the same allegations as the current action, was dismissed when Hood J. granted summary judgment on the pleadings: **MacDonald v. Deutsche Bank AG**, 2016 NSSC 284. Two months later, this action was brought on behalf of TIM Systems.

[14] According to the pleadings, Mr. MacDonald discovered in January 2011, as part of the disclosure in his criminal trial, that the defendant torpedoed deals TIM

Systems was negotiating with EDS and Siebel, and that it convinced the Province to remove him as CEO of the company. That evidence, then, has been in Mr. MacDonald's possession for more than seven years. During those years, Mr. MacDonald could presumably have obtained further relevant evidence from individuals at EDS, Siebel, and the Province. This is hardly a case where the motion for summary judgment has caught the plaintiff off guard, nor does the plaintiff's ability to defend against them hinge on the exchange of documents and discovery examinations. The motion is not premature.

[15] In support of its motion the defendant filed an affidavit of David Gynn, the Chief Financial Officer and Chief Operating Officer of Deutsche Bank AG, Canada Branch. Mr. Gynn gave evidence on the various Deutsche Bank entities. Mr. Gynn was not involved in the relationship between DFS and TIM Finance.

[16] The plaintiff filed an affidavit of Karyl K. Clements. Ms. Clements was discovered on September 27, 2018. In her affidavit Ms. Clements stated she was not involved in the relationship between Deutsche Bank, DFS and TIM Finance. In her discovery Ms. Clements confirmed during her employment with TIM Systems she was not involved with Deutsche Bank, never met or spoke to any Deutsche Bank employees, did not have any role in performing any of the contractual requirements that any of the TIM companies had with Deutsche Bank.

During her employment with TIM Systems, Ms. Clements did not review any of the contracts between any of the TIM companies and Deutsche Bank. Ms. Clements said Richard MacDonald, the current President and Secretary of 1774142 Nova Scotia Ltd. was more knowledgeable than her about the issues with Deutsche Bank.

[17] The following facts are not disputed:

[18] The plaintiff 1774142 Nova Scotia Limited was formerly TIM Systems Incorporated. Richard MacDonald is the President, Secretary and Director of TIM Systems.

[19] The defendant Deutsche Bank AG, Canada Branch is a branch or division of Deutsche Bank AG a bank incorporated under the laws of the Federal Republic of Germany. Deutsche Bank AG, Canada Branch is the division under which Deutsche Bank AG conducts business in Canada. Deutsche Bank AG, Canada Branch is not a separate legal entity from Deutsche Bank AG.

[20] Deutsche Bank Canada (DB Canada) was a subsidiary of Deutsche Bank AG. DB Canada was incorporated under the *Bank Act*, SC 1991, c.46. DB Canada operated through different divisions including DFS.

[21] In 2000, DB Canada applied to the Office of the Superintendent of Financial Institutions Canada in connection with the proposed reorganization of its business into a foreign bank branch of Deutsche Bank AG. The application contained the following description of the DFS division of DB Canada:

> Deutsche Financial Services division of Deutsche Bank Canada … provides wholesale inventory financing to retail dealers across Canada in commercial and consumer durable products, as well as accounts receivable and asset-based financing and inventory control and portfolio management services.

[22] The restructuring, which took place in 2001, transferred the banking business of DB Canada to a branch of Deutsche Bank AG, and transferred the financial services operations carried on by DFS into Deutsche Financial Services Canada Corporation ("DFSCC"), a separate Canadian corporation indirectly owned by Deutsche Bank AG, through Deutsche Financial Services Corp. ("DFS US"). On November 1, 2002, GE Commercial Finance purchased the worldwide Deutsche Financial Services commercial inventory from Deutsche Bank AG for $2.9 billion USD. This business included DFS US. Since that time, the lending business originally carried on by DFS division, and then DFSCC, was sold to GE and has not been affiliated with Deutsche Bank AG. On March 26, 2003, DB Canada was dissolved as a Schedule II Bank under the *Bank Act* and continued as DBC Continuance Inc., a company incorporated under the *Canada Business*

Corporations Act, R.S.C. 1985, c. C-44. In 2015, DBC Continuance Inc. was dissolved in the ordinary course.

[23] On May 12, 1997, TIM Finance entered into a Business Credit and Security Agreement ("Loan Agreement") with DFS. DFS was formally identified as "Deutsche Financial Services, a division of Deutsche Bank Canada, a Canadian chartered bank". The purpose of the agreement was to provide TIM Finance "with a credit facility for working purposes". The Loan Agreement required TIM Finance to produce multiple guarantees. The required guarantors included TIM Systems. On May 2, 1997, TIM Systems executed a guarantee in favour of the DFS. TIM Systems was represented by the law firm of McInnes Cooper & Robertson in connection with the execution of the guarantee.

[24] On June 25, 2001, DFS served a demand letter and a Notice of Intention to Enforce Security on TIM Finance. TIM Finance acknowledged that it was in default of an amount of $20,890,210.04, calculated as of May 31. TIM Finance and each of its guarantors requested that DFS temporarily forbear from enforcing its rights and remedies against them.

[25] On July 12, 2001, DFS entered into a forbearance agreement with TIM Systems and others. The parties to the July forbearance agreement were TIM Finance, TIM Systems, Deutsche Financial Services, a division of DB Canada, and

other guarantors of TIM Finance. Terms and conditions applied to the forbearance, including the obligation of TIM Finance and its guarantors to employ their best efforts to obtain a written general security agreement from TIM Systems, providing a security interest to DFS over all of the company's property as collateral security for TIM Systems' obligations as guarantor. That general security agreement was executed between DFS and TIM Systems on July 16, 2001. The forbearance also required TIM Finance and its guarantors to obtain share pledge agreements in favour of DFS from all of the shareholders of TIM Systems, TIM Dealer Services Incorporated (TDSI), and a numbered company. TIM Finance and its guarantors were required to pay to DFS the whole amount owing no later than December 31, 2001. Finally, the July forbearance also granted releases to DFS, its parent corporations, subsidiaries and affiliates, and others, by TIM Finance and each guarantor, including TIM Systems. The July forbearance was executed by Pierre Cote on behalf of TIM Systems. Richard MacDonald executed the July forbearance for a different guarantor, Cote & MacDonald Limited.

[26] Effective August 1, 2001, TIM Systems and its affiliates entered into a source code license agreement with Ford Motor Company of Canada. Ford paid $730,000 for the source code license.

[27] On October 18, 2001, another forbearance agreement was executed. The parties to that agreement were DFSCC, TIM Systems, TIM Software Solutions Incorporation, and TDSI. TIM Systems acknowledged that DFSCC had performed all of its obligations and that it had no offsets or defences to the payment of the debt owing to DFSCC:

> TSSI, TDSI and Systems acknowledge that DFS has performed all obligations on its part to be performed under the Security Agreement, the Guarantees and the General Security Agreement and that TSSI, TDSI and Systems have no offsets nor defenses to the payment of the Debt due DFS, whether under the Security Agreement, the General Security Agreement or any Guarantee.

[28] The October forbearance included a release in favour of DFSCC, its parent corporations, subsidiaries, affiliates and others. The October forbearance was executed by Pierre Cote on behalf of TIM Systems. Richard MacDonald executed the October forbearance for TDSI.

[29] The parties disagree on whether the remaining evidence discloses a genuine issue of material fact. The plaintiff submits that it has produced enough evidence to establish that there is a genuine issue of material fact as to whether the defendant interfered with TIM Systems' business relations and, in so doing, breached the forbearance agreement and its duty of good faith under it. In other words, the plaintiff says the defendant has failed to discharge its onus to show that there is no genuine issue of material fact. The plaintiff relies on three pieces of evidence

attached as exhibits to Ms. Clements' affidavit. The first is an e-mail chain which it says proves that the defendant contacted prospective partners of TIM Systems and caused those deals to fall apart. On August 16, 2001, Kurt Olnhausen at Siebel wrote to Richard Apicella at Deloitte, with the subject "RE: TIM White Paper":

> Richard,
>
> I got a call from our M and A guys asking about this. It appears that someone has talked to DeutchBank [*sic*]. Probably TIM and I guess that someone from Deloitte has talked with our corporate. We need to get a lid on this because it will cause us all kinds of trouble. Please take care of it for me.
>
> KO
>
> On the same day, Mr. Apicella forwarded the e-mail from Mr. Olnhausen to Bill Clements at TIM Systems, and wrote:
>
> Bill
>
> You can see the msg below from Kurt of Siebel, let's keep this to ourselves until we can firm it up a little more, I've already handled the leak within Deloitte.
>
> Thanks
>
> Rich
>
> Also on the same day, Bill Clements forwarded the e-mail chain to Richard MacDonald and stated:
>
> Richard
>
> This is not good. Can you fix this asap. Thanks.
>
> Bill

[30] On August 17, Richard MacDonald forwarded the e-mail chain to Bill Blight then of DFSCC and wrote:

> Bill, as you can see, someone from Deutsche has been asking questions which could upset or delay our pending relationship with Deloitte/Seibel [*sic*] needed to service debt. Please let the appropriate people know that this needs to be under control.
>
> Regards, Richard

[31] Finally, Richard MacDonald e-mailed Bill Clements, his colleague at TIM Systems, included a copy of the earlier e-mails from the chain, and wrote the following:

> Bill,
>
> I have been in conversation with Deutsche (see attached) and have been assured that no outside communications regarding TIM have taken place. It would be helpful to have any specific info to ensure that any future potential leaks are handled.
>
> If you have the opportunity to talk to Rich, I would appreciate it if you could let him know that a couple of major decisions internally here are hinging on receipt of the white paper. Specifically we are under time line pressure to accept a revised go forward contract with Ford of Canada. Of course, we would not proceed with this arrangement except to preserve our initiative with Ford Mexico and other Ford global opportunities.
>
> In the event the white paper is delayed until next week, would it be appropriate to have Rich bring Deutsche up to speed directly? This would certainly eliminate any potential future leaks from that party.

[32] The second piece of evidence is what purports to be a transcript of a meeting on July 12, 2001, between DFS executives Bill Blight and Robin Seed, and TIM Systems executives Mr. MacDonald, Pierre Cote, and Donald Cleveland. According to the plaintiff, this transcript shows that DFS coerced TIM Systems to sign the July 12 forbearance agreement by stating, "We have a guarantee from TIM Systems, OK, and we can collapse the whole shooting match on that one". The plaintiff also points out that Mr. Blight said, "We're looking at close to a $9

million fraud as I am sure you have been apprised of because of the false documents that have been presented to us from various companies and that requires a huge dam to hold back." This statement is relevant to the third piece of evidence the plaintiff relies on – an affidavit filed by James H. Taylor, Jr. in an Ontario court proceeding between Deutsche Financial Services Canada Corporation and Russell Pynn of TIM Finance. In the affidavit, sworn on September 13, 2001, Mr. Taylor stated that he is Vice President, Asset Review of DFSCC, the sole shareholder of Deutsche Financial Services Canada Corporation, the successor in interest to DFS, a division of Deutsche Bank Canada. Mr. Taylor further stated:

> 24. In or about June 2001, as a result of the cash flow problems experienced by TIM and the ensuing delinquent payments to DFS, DFS issued demands and Notice of Intention to Enforce Security pursuant to the *Bankruptcy and Insolvency Act*.
>
> 25. On July 12, 2001, the parties entered into a Forbearance Agreement, a copy of which is attached to this Affidavit as Exhibit "8" which stated, inter alia, that Grant Thornton, chartered accountants, would be appointed as Monitor for DFS with full access to all business and financial records of TIM for the purpose of reviewing and monitoring TIM's lease transactions. …
>
> 26. The Forbearance Agreement was negotiated and executed before DFS had sufficient or any facts to conclude that it was the victim of an extensive fraud.
>
> 27. I am advised by Bill Blight, the Senior Vice-President for DFS, and do believe, that on or about July 13, 2001 MacDonald and Ed Lane (a financial officer for TIM) provided him with information regarding TIM leases, having a face value of approximately $9,000,000, which leases were with corporations controlled by directors, officers, shareholders or employees of TIM or TIM Retailers.

[33] According to the plaintiff, Mr. Taylor's statement that DFS was unaware of the fraud at the time the July 12 forbearance agreement was executed is contrary to the transcript and proves that DFS has acted in bad faith in relation to this matter and attempted to fraudulently conceal information from the court and the plaintiff.

Wrong Defendant

[34] Deutsche Bank AG, Canada Branch says it should succeed on the motion for summary judgment as TIM Systems has sued the wrong party. Deutsche Bank AG, Canada Branch is a stranger to this proceeding. It was not a party to the Business Credit and Security Agreement, TIM Systems guarantee or either of the forbearance agreements. It had no dealings with TIM Systems.

[35] Is there a genuine issue of material fact?

[36] The evidence is that Deutsche Bank AG, Canada Branch is a division of Deutsche Bank AG.

[37] DB Canada was a subsidiary of Deutsche AG. DFS was a division of DB Canada. The Business Credit and Security Agreement, the TIM Systems guarantee and the July Forbearance Agreement included DFS and TIM Systems as parties. DFSCC and TIM Systems were among the parties to the October Forbearance Agreement. Deutsche Bank AG, Canada Branch was not a party to any of the

agreements. There is no evidence of any business relations between TIM Systems and Deutsche Bank AG, Canada Branch. TIM Systems does not dispute any of these facts, but says the corporate veil should be lifted as Deutsche Bank AG, Canada Branch is a division of Deutsche Bank AG which was the parent of DB Canada.

[38] There are no genuine issues of material fact.

[39] Is a determination of a question of law either pure, or mixed with a question of fact required?

[40] This case raises the issue of the liability of a parent company for a subsidiary and whether the corporate veil between Deutsche Bank AG including Deutsche Bank AG, Canada Branch and DB Canada should be lifted.

[41] Normally a parent corporation is not liable for a subsidiary corporation. In giving the Court's judgment in **Nova Scotia v. Waverly Construction Co.** (1972) 4 N.S.R. (2d) 232 (N.S.S.C. – A.D.) Cooper J.A., stated at paras. 19 and 20:

> 19. Counsel for the Crown in support of his contention that Tidewater was the agent of Waverley referred us to a number of authorities but to none where a parent company was held liable for the negligence of a servant of its subsidiary company on the ground that the latter was the agent of the former. It is trite law that a corporation is a separate legal entity distinct from its members - Salomon v. Salomon & Co., [1897] A.C. 22. Gower in Modern Company Law, 3rd ed. at p. 189, said -

> "the only principle is that laid down in Salomon's case, and in general the courts have rigidly applied it.... In these exceptional cases the law either goes behind the corporate personality to the individual members, or ignores the separate personality of each company in favour of the economic entity constituted by a group of associated concerns; these two types of case cannot be clearly separated and the principle is the same in both."

20. In Ebbw U.D.C. v. South Wales Traffic Area Licensing Authority, [1951] 2 K.B. 366, Cohen, L.J., said at p. 370:

> "Under the ordinary rules of law, a parent company and a subsidiary company, even a 100 per cent. subsidiary company, are distinct legal entities, and in the absence of an agency contract between the two companies one cannot be said to be the agent of the other. That seems to me to be clearly established by Salomon v. Salomon & Co. Ltd., [1897] A.C. 22, and by the observations of Tomlin, J., in British Thomson-Houston Co. Ltd. v. Sterling Accessories Ltd., [1924] 2 Ch. 33."
>
> It would appear that this statement cannot be taken as meaning that an express agency contract must have been entered into between the parent company and the subsidiary company. Counsel for the Crown referred us to Smith, Stone & Knight, Ltd. v. Birmingham Corporation, [1939] 4 All E.R. 116. Atkinson, J., held that the parent company, the plaintiff, was entitled to compensation for removal and disturbance on the compulsory acquisition of the premises occupied by its subsidiary. The question, put shortly, was whether or not the subsidiary company was carrying on the parent company's business or its own. Was the subsidiary merely the agent of the plaintiff parent company for the carrying on of the business? Was the parent company in fact carrying on the business albeit in the name of the subsidiary company?

[42] In **Yaiguaje v. Chevron Corporation** 2018 ONCA 472, Hourigan J.A., in giving the Court's judgment stated at para. 57:

> It is important to understand the distinction between corporations and their shareholders. Pursuant to s. 15(1) of the *CBCA*, Parliament has made a clear policy choice that corporations have "the rights, powers and privileges of a natural person." This is not, as the appellants suggest, a mere legal fiction. It is a bedrock principle of our corporate law. Consistent with the law established in *Salomon*, Parliament has entrenched in our law the notion of corporate separateness. That means that corporations are separate entities from their shareholders, capable of carrying on business and incurring debts on their own behalf. Thus, if a judgment debtor is a parent corporation, it and not its shareholders or subsidiaries, is responsible for the debts it incurs. It also means that a corporation's assets are its own and do not belong to related corporations.

[43] In a similar vein, Kevin P. McGuinness writes in *Canadian Business Corporations Law*, 3rd ed., vol. 1, (Toronto: LexisNexis Canada, Inc., 2017):

> §7.44 Whatever the factual relationship between a corporation and its shareholders might be, the corporation cannot simply be regarded as a creature or puppet of its shareholders in point of law, for the law deems it to be a separate person. … Mere control is not sufficient to justify piercing the corporate veil. It is settled law that the separate personality of a company and its shareholders will not be ignored merely because it might be said on some basis to be fair in the circumstances for this to be done.

[44] Is this a case in which the corporate veil should be lifted?

[45] Circumstances in which a court should lift the corporate veil were set out in **White v. E.B.F. Manufacturing Ltd.** 2005 NSCA 167 where Saunders J.A., in giving the Court's judgment stated:

> [49] At the hearing before us counsel for the appellant and intervenor urged that the corporate veil ought not to be lifted except in the most serious of cases where fraud, or deceit, or use of a corporation for an improper purpose is both pleaded and proved. With respect, I think that submission invites a far too restrictive approach, implying that only the most egregious or criminally unlawful circumstance will entitle a court to lift the corporate veil. I do not understand that to be the law.
>
> [50] In *Littlewoods Mail Order Stores Ltd. v. Inland Revenue Commissioners*, [1969] 1 W.L.R. 1241 (C.A.) Lord Denning declared at page 1255:
>
> > . . . The doctrine laid down in *Salomon v. Salomon & Co*. [1897] A.C. 22, has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited company through which the courts cannot see. But that is not true. The courts can and often do draw aside the veil. They can, and often do, pull off the mask. They look to see what really lies behind. . . .
>
> [51] In *Le Car GmbH v. Dusty Roads Holdings Ltd.*, 2004 CarswellNS 138 (S.C.), Murphy, J. accurately identified three situations where courts have lifted the corporate veil:
>
> > (a) where failure to do so would be unfair and lead to a result "flagrantly opposed to justice";

> (b) where representations are made or activities undertaken for a fraudulent or other objectionable, illegal or improper purpose to facilitate doing something that would be illegal or improper for an individual to do personally; and
>
> (c) where the corporation is merely acting as the controlling shareholder's agent.

> [52] Courts will often pierce the corporate veil where the company is an agent or the mere alter-ego of the controlling shareholder or parent company. … In *Aluminum Co. of Canada v. Toronto (City)*, 1944 CarswellOnt 71 (S.C.C.), at ¶ 15-16, Rand, J., referred to the Court's earlier decision in the case of *Toronto v. Famous Players Canadian Corp.*, [1936] 2 D.L.R. 129 as having:
>
> > 15 . . . settled that the business of one company can embrace the apparent or nominal business of another company where the conditions are such that it can be said that the second company is in fact the puppet of the first; when the directing mind and will of the former reaches into and through the corporate façade of the latter and becomes, itself, the manifesting agency.
> >
> > . . .
> >
> > 16 The question, then, in each case, apart from formal agency which is not present here, is whether or not the parent company is in fact in such an intimate and immediate domination of the motions of the subordinate company that it can be said that the latter has, in the true sense of the expression, no independent functioning of its own.

[46] The plaintiff relies on **Kaehler v. SystemCare Cleaning & Restoration Ltd.**, 2018 NSSC 219, a case involving a claim against a franchisor for the negligence of the employee of a franchisee. The issue before the court in that case was whether the employee "had apparent authority to act as agent for the Defendant, such that agency by estoppel can arise and result in the Defendant being liable for the work and actions in question": para. 13. This was not a case about lifting the corporate veil to expose a parent company to liability for the actions of its subsidiary. The **Kaehler** decision is of no assistance to the plaintiff.

[47] There is an issue of law. Does TIM Systems have a real chance of success?

[48] There was no evidence that DFS or DFSCC were carrying on business for or acting as agents for Deutsche Bank AG or Deutsche Bank AG, Canada Branch. When asked during oral argument the basis for lifting the corporate veil the reason raised by TIM Systems was that William Blight's e-mail address in the e-mail chain of August 16 and 17, 2001 ended in "edb.com". He also noted some of the individuals in the e-mail chain referred to "Deutsche Bank" which, he submitted, proved there was confusion as to with whom TIM Systems was actually dealing.

[49] Considering the evidence TIM Systems attempt to lift the corporate veil has no real chance of success and summary judgment should be granted.

Release

[50] If I am in error that the corporate veil should not be lifted I will address the issue whether TIM Systems signed a release which fully discharged all claims related to TIM Systems guarantee of the loan to TIM Finance which encompasses the claims in this action.

[51] Is there a genuine issue of material fact?

[52] The Forbearance Agreement dated October 18, 2001, signed by TIM Systems contained a release which stated:

> TSSI, TDSI and Systems, for themselves and for their respective agents, partners, servants, employees, attorneys, heirs, successors and assigns, have this day RELEASED and by these presents do RELEASE, ACQUIT and FOREVER DISCHARGE DFS and its predecessors, successors, assigns, managers, shareholders, representatives, parent corporations, subsidiaries and affiliates, agents, servants, employees, attorneys, officers, and directors, each in their respective corporate and individual capacities (collectively, the 'Released Parties") from any and all claims or causes of action, suits, debts, sums of money, accounts, reckonings, covenants, contracts, controversies, agreements, promises, rights, variances, trespasses, damages, judgments, executions, claims and demands whatsoever which they have, which are based on facts or circumstances which arose or existed from the beginning of time to the date hereof, whether known or unknown, asserted or unasserted, equitable or at law, arising under or pursuant to common or statutory law, rules or regulations, and which arose in the course of dealings between any of the Released Parties and TSSI or TDSI or Systems, or any of them, or which are directly or indirectly attributable to the Security Agreement, the Guarantees, the General Security Agreement, or the rights, interest, covenants, or agreements evidenced thereby, or any security therefor, all loan modification documents, any documents or instruments executed or delivered in connection with the foregoing, or the negotiation, execution, delivery, administration, management, collection or enforcement thereof(collectively, the "Applicable Transactions"). The foregoing release shall relate to any and all claims and causes of action of any kind or character relating to the Applicable Transactions, growing out of or in any way connected with or resulting from the acts, actions, or omissions, of any of the Released Parties, or any agent, servant, employee, attorney, officer or director of any of the Released Parties, including, without limitation, any loss, costs, or damage arising or incurred in connection with any breach of fiduciary duty, breach of any duty of fair dealing, breach of confidence, undue influence, duress, economic coercion, conflict of interest, negligence, bad faith, malpractice, intentional or negligent infliction of mental distress, tortious interference with contractual relations, tortious interference with corporate or partnership governance or prospective business advantage, breach of contract, deceptive trade practices, libel or slander (without admitting or implying that any such claim or cause of action exists or has any validity).

[53] The release is broad. In it the plaintiff then TIM Systems Incorporated among others released Deutsche Financial Services Canada Corporation and its predecessors, successors, assigns, managers, shareholders, subsidiaries and affiliates, agents, servants, employees, attorneys, officers and directors…from any and all claims or causes of action … based on facts or circumstances … to the date of the agreement, whether known or unknown … which arose in the course of

dealings between any of the released parties … and Systems … which are directly or indirectly attributable to the Security Agreement, the Guarantees, the General Security Agreement …

[54] In **Shannex Inc. v. Dora Construction Ltd.** supra, Fichaud J.A., summarized the law in relation to releases:

> A valid release, given for consideration and signed by someone who is represented by independent legal counsel, and without a legally recognized vitiating element like misrepresentation, undue influence or duress, discharges the civil claims that are clearly cited in the Release. A later lawsuit for the released claim will be summarily dismissed or struck as an abuse of process. This well-established principle is essential for the orderly settlement of disputes.

[55] The release was given for consideration as set out in the Forbearance Agreement. In the agreement the parties represented that each of them had received independent legal advice.

[56] In its written submissions TIM Systems submitted:

> The evidence shows that the Bank was aware of the losses it had suffered as a result of the fraud perpetrated by TIM Finance no later than July, but was quite prepared to swear to the Ontario Superior Court of Justice that it has no idea if it had suffered losses in September. The bank says there is a release specifically holding harmless the company that the plaintiff has sued. The plaintiff, by contrast, says that that release is part of a contract that the bank breached, and that in any event the release was obtained by deception and fraud, which vitiates the release.

[57] In oral argument the only issue raised concerning the release was that a vitiating element existed.

[58] TIM Systems relies heavily on the email chain to show that DFS was asking questions that derailed its deal with Siebel, and lied about it to Mr. MacDonald. I disagree. The e-mail from Kurt Olnhausen at Siebel to Richard Apicella at Deloitte stated, "It appears that someone has talked to DeutchBank [*sic*]. **Probably TIM** and I guess that someone from Deloitte has talked with our corporate." This suggests that Mr. Olnhausen thought that TIM Systems had been talking to Deutsche Bank about the deal. Mr. Apicella at Deloitte then e-mailed Bill Clements at TIM Systems, and stated, "You can see the msg below from Kurt of Siebel, **let's keep this to ourselves** until we can firm it up a little more, **I've already handled the leak within Deloitte**." Next, Bill Clements e-mailed Richard MacDonald, and said, "This is not good. Can you fix this asap. Thanks." Mr. MacDonald then forwarded the e-mail chain to Bill Blight at DFS, and wrote:

> Bill, as you can see, someone from Deutsche has been asking questions which would upset or delay our pending relationship with Deloitte/Seibel [*sic*] needed to service debt. Please let the appropriate people know that this needs to be under control.
>
> Regards, Richard *[Emphasis added)*

[59] Mr. MacDonald appears to have interpreted the earlier e-mails as evidence that Deutsche Bank had been "asking questions", but the e-mails themselves do not bear that out. Furthermore, in Mr. MacDonald's next e-mail to Bill Clements at TIM Systems, he stated:

> Bill,
>
> I have been in conversation with Deutsche (see attached) and have been assured that no outside communications regarding TIM have taken place. …

[60] The only evidence, then, is that DFS assured Mr. MacDonald that it was not asking questions about TIM. There is no evidence whatsoever that those assurances turned out to be false. According to the plaintiff's pleadings, Mr. MacDonald obtained evidence to that effect in January 2011, as part of the disclosure in his criminal trial. There is no affidavit from Mr. MacDonald, and this alleged evidence is not otherwise before the court.

[61] As to the affidavit from Mr. Taylor, an incorrect date, without more, does not raise a genuine issue of material fact regarding the conduct of the defendant. It falls far short of showing bad faith or dishonesty by Mr. Taylor, DFSCC, or DFS.

[62] There were suggestions, at various times during the hearing, that the transcript of the July 12 meeting between DFS executives and TIM Systems executives showed that DFS forced TIM Systems to sign the July forbearance agreement by threatening to "collapse the whole shooting match" on the basis of TIM Systems' guarantee. Although it was unclear whether the plaintiff was arguing that this conduct amounted to a vitiating element, I will address it in any event. First, the plaintiff argued that the conversation contained in the transcript

related to the forbearance agreement. It appears, however, the discussion is about the general security agreement, or "collateralized guarantee", that would give DFS a security interest in all of the property of TIM Systems. For example, at 0:56, Bill Blight stated:

> A couple of things…the collateralized guarantee. That was already on the table before the 140 went in the bank. So that one we need to have.

And at 1:42, he said:

> And further, we talked about…over TSI. We have a copy of that agreement that's been prepared also. This one is straight forward. It does not require council [*sic*], it is simply…TSI has already provided a guarantee to DFS, so what we're doing is, in essence, obtaining the same type of thing, a collateralized guarantee. It just simply needs a signature of yourself and Pierre but we need to have this document completed, well this one's already been signed. It just needs to be a [*sic*] the collateralized guarantee just needs to be released because, as I said, this one was already on the table Friday.

At 3:12, Pierre Cote of TIM Systems stated:

> At the end of the day we'll all find out. I know but I read through the thing and in laymen's language – it gives you full control of everything that we're dealing with to do whatever you wish with. But at the end of the day…

Mr. Blight responded at 3:35:

> Okay, just hold that thought. You've got full control. We're looking at close to a $9 million fraud as I am sure you have been apprised of because of the false documents that have been presented to us from various companies and that requires a huge dam to hold back. So we took a leap of faith and said look, we will take security over the various companies because the people it shows their cooperation that they are willing to give us this collateral for us to all work together through this. However, even if you folks sign these documents you can walk out the door today, tomorrow file CCAA and away you go. You folks are still in control after this and Don will say that's correct. Right? So I'm asking for these documents to be executed because [*sic*] evidence of good faith and we're all going to walk through it. From the control point that you raised Pierre you are still in control. You can still file creditor protection from ourselves or BMO or the Nova Scotia government, whoever, and then take your business down that road.

Mr. Cote replied at 5:05:

> Yeah, and that's absolutely – working with you, that's a given, okay, so that's reciprocal. All right. The only thing is that is if, is if we execute the documents and from what I gather, I don't know if this is the opinion we'll get at the end of the day, part of the opinion, if there's a shortfall at the outcome, which apparently there potentially could be, we're still on the hook for that shortfall. So-

[63] Mr. Blight proceeded to make the only reference to the forbearance agreement that appears in the transcript at 5:44:

> Okay, but again, we have, I appreciate the point, but these documents are still tying up corporate assets. **They're not tying up personal assets as a result of the forbearance agreement that we initially started off**. We asked for personal guarantees from the full-time people because of the negotiations that have gone on with these two fine gentlemen on your behalf, those were taken off the table, so the personal assets that you folks have is not on the table in any of these documents. It's still upholding in the corporate arena.
>
> [*Emphasis added*]

[64] From the above passage, it appears that the forbearance agreement had been executed already. Even if the discussion did relate to the forbearance agreement, however, the comment by DFS executives that they could "collapse the whole shooting match" based on the guarantee given by TIM Systems is merely a statement of fact, not a threat. DFS was under no obligation to temporarily forbear from enforcing its rights and remedies against TIM Systems and the other guarantors. If TIM Systems refused to execute the agreements required by DFS in exchange for that forbearance, it was open to DFS to enforce its rights and remedies under the existing guarantee. Reminding TIM Systems of that fact hardly amounts to a vitiating element. There are no genuine issues of material fact.

[65] Is there an issue of law?

[66] The question of law is whether the material facts before the court establish a legally recognized vitiating element that would allow the plaintiff's claims against the defendant to proceed notwithstanding the release executed by the plaintiff as part of the October forbearance agreement.

[67] There are no material facts upon which the court could find a legally recognized vitiating element. The release clearly applies to the claims made against the defendant, it was given for consideration, and the plaintiff represented that it had obtained independent legal advice on the meaning and effect of the release before executing it. The plaintiff's claims are barred by the release and summary judgment should be granted on this basis.

[68] The motion is granted and the proceeding dismissed. It is not necessary for me to deal with the other arguments raised by the defendant.

[69] If the parties are unable to agree, I will hear them on the issue of costs.

J.