

GRENADA

IN THE COURT OF APPEAL

HCVAP 2010/002

BETWEEN:

SGL HOLDINGS INC.

Appellant

and

AIHAM SHAMMAS

Respondent

Before:

The Hon. Mr. Hugh A. Rawlins

Chief Justice

The Hon. Mde. Janice George-Creque

Justice of Appeal

The Hon. Mde. Clare Henry

Justice of Appeal [Ag.]

Appearances:

Ms. Celia Edwards, QC and Ms. Karina Johnson for the Appellant

Dr. Francis Alexis, QC and Mr. Anselm Clouden for the Respondent

2010: May 4;
August 13.

Civil Appeal – Procedural Appeal – summary judgment – breach of contract – reasonable prospect of successfully defending claim – whether admissions of breach of contract – exclusion clauses in contract – their effect – use of witness statements – costs –

The respondent, a businessman, pursuant to an investment agreement made between him and the appellant company, SGL Holdings Inc. ("SGL"), made an investment with SGL with the intention of receiving high returns. SGL is a company registered in the State of Grenada and carries on the business of trading in foreign currency. SGL would collect funds from its clients and place those funds with another company called Olint Trading Exchange Company ("Olint") based in the Turks & Caicos Islands. Olint then traded the funds on the Forex market. In another document called "HOW IT WORKS" SGL stated that returns on investments as high as 13% and as low as 4% over the past two years with an average of 8% monthly over that same period had been realized. The agreement contained limitation of liability clauses as well as others indicating that a measure of risk was involved. Clause 7 of the agreement provided however that the respondent could, on giving 7 days' notice request encashment of his investment. Olint ran into problems and

the High Court in the Turks and Caicos Islands issued a freezing order against Olint and its principals. As a result no trading could be conducted and no monies could be repaid or returns paid out. The respondent invoked Clause 7 of the agreement. SGL was unable to comply with the request for encashment, as the funds were with Olint whose accounts were frozen by the court order. The respondent filed a claim alleging breach of the agreement seeking the return of his initial investment as well as interest on that sum at a rate of 8% per month. After defences were filed, the respondent applied for summary judgment. The master, notwithstanding ruling that the limitation clauses raised substantive defences, held that SGL had no real prospects of successfully defending the claim having treated certain statements contained in the witness statements of the appellant as admissions of breach of the agreement. She also concluded that the agreement was not to be construed as a whole. It is from this decision that SGL appealed.

Held: allowing the appeal and setting aside the order for summary judgment made by the learned master and directing that the matter proceed to trial and awarding costs in the sum of \$10,000.00 in the court below and also on the appeal:

1. To preclude a judge or master from a consideration of witness statements where they have been filed, in determining whether to grant summary judgment, merely because the witness statements are not sworn affidavits but statements of the witness which will be tendered as evidence in the trial, would be to adopt too rigid an approach. The witness statements, which under the more modern approach are seen as an amplification of one's pleaded case, is perhaps the best source, coupled with the pleadings, from which the judge or master may be better placed to determine whether, a trial is necessary since he/she is able to assess what evidence will be led at the trial and whether on the strength of that evidence, a party has any real prospect of succeeding either on his claim or defence.
2. The master misinterpreted what was stated at paragraph 41 of Mr. Clyne's witness statement by treating it as an admission, which then led her to conclude that there was no issue for trial on the question whether the appellant was in breach of contract.
3. Whether SGL was liable for breach, was very much a live issue for determination particularly having regard to the exclusion clause contained in Clauses 6, the "Force Majeure" Clause in Clause 8, having regard to Clauses 2 and 4 of the agreement – all of which SGL pleaded in its defence.
4. The master, in deciding that the agreement was not to be construed as a whole and thus placing reliance on Clause 7 only, fell into error particularly having recognised, at least that Clauses 4 and 6 of the agreement afforded substantive defences. On this basis alone she ought to have rejected the respondent's application for summary judgment.

JUDGMENT

- [1] **GEORGE-CREQUE, J.A.:** This is a procedural appeal which was heard by the full court. It arises from the decision of the learned master made on 25th January 2010 in which she granted summary judgment in favour of the respondent (“Mr. Shamas”) on his claim against the appellant (“SGL”) for breach of contract on the ground that the respondent had no reasonable prospect of successfully defending the claim. At the time of hearing the application to strike out, witness statements had already been filed in the action.

The background

- [2] Mr. Shamas is a businessman. SGL is a company registered in the State of Grenada and carries on the business of trading in foreign currency. SGL in carrying on its business in turn did business with a company based in the Turks & Caicos Islands, called Olint Trading Exchange Company (“OLINT”). OLINT traded on the Forex Market. SGL would collect funds from its clients and forward the funds to OLINT. OLINT would trade with the funds on the Forex Market with the prospect of yielding high returns for the client.
- [3] In a document called “HOW IT WORKS”¹ SGL stated the basis of the investment as Forex Trading. It also stated that their traders have paid as high as 13% and as low as 4% over the past two years and that their average was approximately 8% monthly, over that period. An example was also set out for illustrative purposes. This document also stated: “The down side and there is always a down side to risk, is in any given month 80% of your investment is protected and there is a 20% risk”.
- [4] Mr. Shamas, undoubtedly attracted by the high returns to be had, entered into an agreement with SGL on 15th February 2008 (“the Agreement”) and opened an

¹ Mr. Shamas referred to it as a prospectus.

investment account with SGL with his initial investment being \$91,000.00.² The funds were forwarded by SGL to OLINT.

[5] OLINT ran into problems in the Turks & Caicos Islands. The High Court there, issued a freezing order against OLINT and its principals. The result was that all accounts of OLINT were frozen. No trading could be conducted and no monies could be repaid, or returns paid out.

[6] Clause 7 of the Agreement stated as follows:

“This agreement can be terminated at any time by either of the parties. Seven working days however is required to encash margins.”

[7] Mr. Shammass invoked Clause 7 of the Agreement. SGL failed to return the investment and Mr. Shammass filed a claim against SGL and its principal Lester Clyne, alleging breach of the Agreement. Among the relief sought was the return of his initial investment as well as interest on that sum at the rate of 8% per month.

The Pleadings

[8] Mr. Shammass, in his statement of claim (“s/c”) pleaded, among other things, that:

- (1) On 21st July 2008, he demanded that SGL close the account and pay him the sum of \$90,000.00 and \$1,000.00 [para. 13 of S/C];
- (2) Notwithstanding the demand SGL failed to repay the sums [para. 15 S/C]
- (3) He was entitled to contractual interest of 8% on the said sum from the date of the deposit [para. 16 S/C]

[9] SGL in its defence pleaded among other things that:

- (1) in June 2008 the trader had notified SGL that its accounts and thus SGL’s client funds had been frozen; [para. 10 defence]

² Mr. Shammass deposited an initial investment of \$90,000.00 in his name and another \$1,000.00 jointly with another person.

- (2) explained that assets of SGL and its clients had not been returned as a result of the freezing order and that the trader had undertaken to return the assets immediately upon the lifting of the freezing order.
- (3) denied having failed or neglected to account to Mr. Shammass;
[para.14]
- (4) denied that any contractual interest was due to Mr. Shammass;
- (5) Mr. Shammass was informed and knew that his investments were a risk which by investing he was willing to take;
- (6) relied on clauses 2, 4, 6 and 8 of the Agreement.

The Agreement

[10] Clauses 4, 6 and 8 of the Agreement also warrant setting out:

“Clause 4 – Warranties and Guarantees

The Company makes no express or implied warranties save and except for those contained in this Agreement regarding the service provided by it subject to article 6 hereafter. Neither the Company nor its representatives shall be liable for any interruption, inaccuracy, error or omission, regardless of cause in the service provided.

Clause 6 – Liability

The Customer agrees to waive all liability of the Company which arise as a result of this Agreement, save and except for any actions or inactions of the Company which amount to fraud with intent to deceive or gross negligence.

Clause 8 – Force Majeure

Neither party shall be liable for any failure in the performance of any of its obligations under this agreement caused by factors outside its control.”

[11] It is also necessary to recite portions of the witness statement of Mr. Clyne. He stated, among other things, why the funds had not been returned. Critically, at paragraph 36 he stated thus:

“I should point out because of the nature of what we were doing which is forex trading which is a high risk trading and because the funds are not going to remain in our hands we in the agreement with the client always had the client acknowledge that there was a risk and therefore as usual

with these things we had the clients sign an agreement that we would not be liable for the funds without gross negligence on our part.”

Then at paragraph 37 he went on to say this:

“In fact that we do not have the funds not due to any act on our part and so we rely on the non liability clause.”

At Paragraph 41 he stated:

“We remain committed to the return of the client's funds and as soon as we have them the Claimant would be paid but we recognise no liability to the Claimant for the funds which we do not have”

The Master's decision

[12] After setting out the test to be applied in respect of summary judgment gleaned from well recognised authorities³ and with which neither side takes issue, the learned master arrived at certain conclusions. I set out below the full text of the learned master's reasoning leading her to the conclusion that SGL had no real prospects of successfully defending the claim. It is this reasoning and the conclusion reached with which SGL takes issue.

[57] The evidence satisfies me that Shammas placed US\$91,000.00 with SGL for investment with the understanding that he would gain an average of 8 per cent interest thereon per month, and that he could call in his investment giving 7 days notice. It seems to me that SGL breached the agreement in one respect. It failed to return the investment to Shammas in accordance with clause 7 of the Agreement.

[58] SGL concedes that Shammas advanced the money. It concedes that Shammas made demands for encashment, and it concedes that SGL has failed to return the funds. SGL is not suggesting that Shammas is not entitled to a return of his funds or that SGL is not obligated to repay the funds invested. In fact Clyne acknowledges in paragraph 41 of his witness statement that SGL remains committed to the return of the funds. The only issue is as to interest payable. Accordingly, there seems to be no issue for trial in respect of the breach of contract and for return of the funds. The only issue is with respect to the interest obligation of

³ See: *The Bank of Bermuda Limited v Pentium (BVI) Limited* Civ. App. 14/ 2003 (BVI – unreported) ; *Swain v Hillman* [2001] 1AER 91

SGL. I am of the view that SGL is obligated to pay interest on the sums invested at the rate of 8% per month.

[59] SGL's defence to the claim is that the funds are not in the hands of SGL, but in the hands of OLINT and that those funds have been frozen in the Cayman Islands (sic). This to my mind is not a valid defence to the claim. I therefore agree with Shammass that the explanation given for the non return of the funds does not afford SGL a defence to the claim for breach of contract and the return of the funds.

[60] However, SGL also places reliance on the limitation of liability clause 6 of the Agreement as well as Clause 4, of the Agreement, which to my mind are substantive defences. They seem to be suggesting that because of clauses 4 and 6 of the Agreement, the court is estopped from granting summary judgment for breach of contract and the return of the funds. Is SGL approbating and reprobating? SGL has already conceded that it is obliged to return the funds.

[61] Clause 7 of the Agreement is clear. It cannot have been contemplated that there could be no legal recourse if SGL had failed to return the funds that Shammass advanced to it for investment. SGL by acknowledging that it is still committed to the return of the funds impliedly agrees that there is no question as to the interpretation or enforceability of Clause 7 of the Agreement.

[62] ...

[63] Clause 7 of the Agreement is clear. I am unable to agree that the agreement must be construed as a whole to determine whether SGL should be required to repay Shammass his money or determine whether SGL is in breach of the contract for failing to repay the money."

The grounds of appeal

[13] Even though the grounds of appeal are listed as eight in number they may conveniently be considered as raising the following issues:

- (1) whether the witness statements filed in the claim in readiness for trial ought to have been taken into account in considering the application for summary judgment;

- (2) whether, based on the pleadings and evidence before the court, the learned master could properly conclude that there was a breach of contract;
- (3) whether, having found that clauses 4 and 6 of the Agreement were substantive defences, she was entitled to disregard those defences and enter summary judgment;
- (4) whether it was open to the master to conclude that Shammass was entitled to 8 percent interest per month.

Use of the witness statements

[14] Learned Queen's Counsel Ms. Edwards on behalf of SGL contends that it was wrong for the learned master to make use of the witness statements which had been filed following the Case Management Order in readiness for trial in determining Shammass' application for summary judgment. In short, she says, that a witness statement is not evidence until its content is given at trial. She relies on rule 29.2(1) **CPR 2000** which, in essence, says that any fact which needs to be proved by evidence of witnesses is to be proved at trial by oral evidence given in public. She also relies on rule 29.8(1) the gist of which is that if a party has served a witness statement the witness must be called to give evidence unless the court orders otherwise; as well as on rule 29.12(1) which says that a witness statement may be used only for the purpose of the proceedings in which it is served.

[15] Learned Queen's Counsel Dr. Alexis counters that argument by reliance on the High Court decision in **Boston Life and Annuity Company Limited v Dijon Holdings Limited et. al**⁴ in which Hariprashad-Charles, J at paragraph [79] of her judgment had this to say:

"I conclude with what Dr. Archibald submitted are some of the criteria which the court should have regard to; namely....the witness statements and also...whether the case is capable of being supplemented by evidence at trial."

⁴ BVIHCV 2006/0070 (BVI – unreported)

The court at the time of the hearing rightly urged counsel to exercise caution in reliance on this decision given a subsequent decision of the Court of Appeal in the same action which may have impacted thereon.⁵

- [16] Dr. Alexis also relied on a passage from the judgment of Lord Hobhouse in **Three Rivers District Council v Governor and Company of the Bank of England**⁶ at paragraph [161] where in speaking of the requirements for successfully pleading the tort of misfeasance in public office he said in part:

“....At the pleading stage the party making the allegation of dishonesty has to be prepared to particularise it and, if he is unable to do so, his allegation will be struck out. The allegation must be made upon the basis of evidence which will be admissible at the trial....”

On this basis counsel submitted that the test is whether the evidence would be admissible if the matter goes to trial.

- [17] I am inclined to agree with Dr. Alexis, QC that this would be a correct approach. On an application for summary judgment the court is weighing the question whether, without conducting a mini trial, the matter is one which should be concluded by summary judgment or whether the matter should proceed to trial for a full ventilation of the issues by the leading of evidence and cross examination and all that a full trial entails. To my mind, to preclude a judge or master from a consideration of witness statements where they have been filed, on considering whether to grant summary judgment, merely because the witness statements are not sworn affidavits but statements of the witness which will be tendered as evidence in the trial, would be to adopt too rigid an approach which places form over substance to no useful purpose. On the other hand, the witness statements, which under the more modern approach are seen as an amplification of one's pleaded case, is perhaps the best source, coupled with the pleadings, from which the judge or master may be better placed to determine whether, a trial is

⁵ See: *Employers International and others v Boston Life and Annuity Company Limited* (HCVAP 2007/005 – BVI). It is to be noted that this appeal was against a Master's decision refusing an extension of time to the Defendants to file evidence in support of their opposition to Boston Life's application for summary judgment. The Court of appeal remitted the matter to the High Court. This would have included presumably a re-hearing of the summary judgment application once the Defendants' evidence was filed.

⁶ [2001] UKHL 16

necessary since he/she is able to assess what evidence will be led at the trial and whether on the strength of that evidence, a party has any real prospect of succeeding either on his claim or defence. This exercise does not entail the acceptance of what is contained in the witness statements as truth but calls for the weighing of the evidence of a Claimant as against that of a Defendant. I do not consider the master's approach in taking into account the witness statements as being improper. Accordingly, I find no merit in this ground of complaint.

The Master's conclusion that the Agreement was breached

- [18] On a review of paragraphs 57 to 60 of the learned master's decision it becomes clear the reasoning applied by the master in arriving at her decision. This was based on her interpretation of what she considered SGL to be saying at paragraph 41 of Mr. Clyne's witness statement. She elevated the statement to the effect that 'SGL remained committed to the return of the funds' to a concession by SGL that it was obliged to return the funds. This, in my view, was an error as a reading of the entirety of paragraph 41 in and of itself makes it clear that no such concession was made by SGL and further that SGL was saying in the very same paragraph that it was not liable by virtue of the exclusion of liability clause contained in the Agreement and on which it placed reliance in paragraphs 19 and 20 of its pleaded defence. It is by virtue of this misunderstanding of paragraph 41 which led the master to conclude as she did in paragraph 58 that "there seems to be no issue for trial in respect of breach of contract and for the return of funds" and to state in paragraph 60 that "SGL has already conceded that it is obliged to return the funds" and further to conclude at paragraph 61 that "SGL by acknowledging that it is still committed to the return of the funds impliedly agrees that there is no question as to the interpretation or enforceability of clause 7 of the Agreement." Were it not for this misinterpretation I have no doubt that the learned master would not have arrived at the conclusion she did and would have fully appreciated that an issue of whether or not the Agreement had been breached, or, put another way, whether SGL was liable for breach, was very much a live issue for determination particularly having regard to the exclusion clause contained in Clause 6, the

“Force Majure” Clause contained at Clause 8, coupled with Clauses 2 and 4 of the Agreement – all of which SGL pleads in its defence.

The finding of substantive defences

- [19] The learned master, notwithstanding concluding that Clauses 4 and 6 of the Agreement were substantive defences, appeared to have concluded that since there was a conceded breach of contract, Clauses 4 and 6 were of no moment as this would amount to SGL approbating and reprobating. As I have already stated above, this is based on a misinterpretation of a statement contained in the witness statement of Mr. Clyne which led the learned master into error. Further, she went on to treat Clause 7 as taking precedence over Clauses 4 and 6 in the Agreement and presumably, Clauses 2 and 8 although no mention was made whatsoever of those two latter clauses. Curiously, at paragraph 63, whilst concluding that Clause 7 of the Agreement was clear, she went on to hold that the Agreement was not to be construed as a whole. No reason was given for adopting this course and appears to flout the first principles of construction of agreements.
- [20] Dr. Alexis, QC sought to support this conclusion and contended that this case did not involve conflicting facts but rather was concerned with the construction of two documents namely, the Agreement and the document entitled “How it Works”. He posited that SGL was seeking to use Clause 6 to trump Clause 7 of the Agreement and that once a customer invoked Clause 7 of the Agreement then Clause 6 became inoperable. I am unable to accept this line of reasoning. It would seem to me more logical and in keeping with the tenor of the Agreement as a whole and as contended by Ms. Edwards, QC, that the defences contained in the Agreement would more likely than not come into play at the time the customer calls in the funds and they are not returned. Further, quite apart from reliance on the exclusion clause itself the circumstances as to whether it successfully avails SGL would involve some factual findings since the exclusion clause itself is a limited one.

[21] Dr. Alexis, QC also sought to invoke the contra proferentem rule as the basis for reading down Clause 6 in the Agreement in favour of Clause 7. He relied on the statement of the rule as enunciated in the case of **Tam Wing Chuen and Anr. v Bank of Credit and Commerce Hong Kong Ltd. (in Liq.)**⁷. At page 77, Lord Mustill had this to say:

“...The basis of the contra proferentem principle is that a person who puts forward the wording of a proposed agreement may be assumed to have looked after his own interests, so that if words leave room for doubt about whether he is intended to have a particular benefit there is reason to suppose that he is not”

[22] I am unable to see how the contra proferentem rule is engaged in this case. There is no assertion or suggestion of ambiguity in the clauses in the Agreement. The learned master adverted to none. To the contrary, the learned master stated that Clause 7 was clear, [para 63]. In my view, the approach of the Master in deciding that the Agreement was not to be construed as a whole and thus placing reliance on Clause 7 only also amounted to an error in principle particularly having recognised at least that Clauses 4 and 6 afforded substantive defences. Having so found, she fell into error by disregarding them. On this basis alone she ought to have rejected Mr. Shammās' application for summary judgment.

[23] He also relied on statements of Saunders CJ[Ag.] in **Bank of Bermuda Limited v Pentium** paragraphs 23 and 24 where he opined to the effect that:

- (1) an indemnity or an exclusion clause in a contract which seeks to exclude liability of a party for breach of contract would in essence be struck down as invalid, and
- (2) that such a clause was to be construed against the party seeking to rely on it.

[24] It is to be observed that the exclusion clause in the Agreement is not one excluding all liability but is limited in respect of fraud and gross negligence. The

⁷ [1996] 2BCLC 69

learned master's reference at paragraph 62 to limitation or exclusion clauses being held by the courts, in certain circumstances to be invalid does not assist as this point was not further developed. Further, she did not find that the exclusion of liability clause in the Agreement was invalid.

The award of 8% interest per month

- [25] Dr. Alexis, QC, more or less conceded that the award of interest at 8% per month cannot be sustained. The simple reason is that the Agreement contains no such provision. Dr. Alexis urges an interest rate applicable under the **Judgments Act**. Based on the conclusion I have reached as set out below I need not address this further.

Conclusion

- [26] For the reasons given, I would allow this appeal and set aside the order for summary judgment made by the learned master so that the matter may proceed to trial for a determination of the issues raised on the Defence of SGL.

Costs

- [27] Happily, the parties have agreed the quantum of costs in the court below and on this appeal in the sum of \$10,000.00 and \$10,000.00 respectively. Accordingly, the respondent shall bear the costs of the proceedings below in the sum of \$10,000.00 and also on this appeal in the like sum.

Janice George-Creque
Justice of Appeal

I concur.

Hugh A. Rawlins
Chief Justice

I concur.

Clare Henry
Justice of Appeal [Ag.]