

**EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA**

IN THE HIGH COURT OF JUSTICE

(CIVIL DIVISION)

CLAIM NO. DOMHCV2023/0109

BETWEEN:

[1] REGINALD WINSTON

Claimant

and

**[1] FIRSTCARIBBEAN INTERNATIONAL BANK
(BARBADOS) LIMITED**

Defendant

Before:

The Hon. Mde. Cybelle Cenac-Dantes

Master of the High Court

Appearances:

Gina Dyer Munro Counsel for the Claimant, Joelle Harris Counsel for the
Defendant

Present:

Reginald Winston Claimant, Jeremy Brereton as representative for the Defendant,
Daleshia Miller representative for the Defendant insurance company

2024: May 8
September 16.

**This decision was handed down by the Master remotely by circulation to counsel for
the parties by email and released to the e-portal on the 16th September, 2024**

The date for hand-down of this decision is deemed to be the 16th September, 2024

DECISION

- [1] **Cenac-Dantes, M.:** The claimant filed an Application for summary judgement under Part 15 of the CPR 2000 on the 3rd September, 2021 with affidavit in support of the claimant under claim number DOMHCV2019/0074, prior to the matter being migrated to the portal. No affidavit in response was filed by the defendant. Submissions were filed by both parties in October, 2021.
- [2] The claimant requested that the court hear the Application under the Old Rules rather than the New as all the relevant filings and written submissions were made under the Old Rules. Counsel for the defendant made no vehement argument for the Application being heard under the New Rules. As there are some differences between Rule 15 under the Old and New Rules, and the implications that would lie in choosing to proceed with and determine the application under the New Rules as it relates to obligations of the parties in the filing of this Application and any Response, and more particularly since all the relevant filings and arguments were made prior to the New Rules of 2023, I consider it appropriate and correct to hear this application under the Old Rules.
- [3] This claim concerns the matter of a 1000-gallon water tank having fallen off the building of the defendant and on to the claimant causing him injury. The claimant sues for damages.

Defendant's case and substantive arguments

- [4] The defendant avers that it was in fact an 800-gallon tank which fell from their premises. They further aver that any injuries suffered by the claimant was not through any negligence attributable to them, but rather to the contractor who had been commissioned to undertake certain works on their roof and who, at all times, was responsible for ensuring the safety of the premises and further, that the contractor bore the risk of any injury sustained to their employees or other persons

as a result of their (the contractor's) negligence. In addition, the defendant indicates that it also relies on the right of indemnification as pleaded.¹

- [5] The defendant submits that the court should be cautious in striking out any defence where there are conflicts of fact on relevant issues, or reasonable grounds exists for believing that a fuller investigation into the facts of the case would add to or alter the evidence, and that a mini-trial on the facts runs the risk of producing summary injustice.² She submitted further, that summary judgment is designed to deal with cases which are not fit for trial.³ I accept this submission.
- [6] The defendant also submits that notwithstanding that no affidavit evidence was filed in response to the application the court is still required to assess the merits of the application, whether the defendant opposes the application or not.⁴ I also accept this submission.
- [7] The defendant relies on its defence and submissions and the contract for services exhibited by the applicant/claimant in submitting that the foregoing is sufficient to establish that they have a defence with a real prospect of success.
- [8] The main contention put forward by the defendant is that the clauses of the contract in dispute must be interpreted by the court in light of the various facts surrounding the conduct of the contract for services in order to find as a fact that the third-party was or was not an independent contractor and therefore wholly responsible for the

¹ Para. 10 of Defendant's submissions in response to application

² Q Homes Ltd v Al's Investment Ltd. [SLUHCV2017/0470, delivered on February 25 2019], Master Actie quoting Mummery LJ in Bolton Pharmaceutical Co. Ltd. v Doncaster Pharmaceuticals Group Ltd. And Others [2006] EWCA Civ 661; Eric Knight et al v Ronnie James et al [ANUHCv2012/0011, delivered January 18, 2013] and Kenneth Burns and June Burns v Redman Limited [SLUHCV2010/0678, delivered April 8, 2013]

³ 1st National Bank of Saint Lucia v Tropical Rental and Investments Ltd. [SLUHCV2016/0050 delivered April 25, 2019]

⁴ Potential Might Group Ltd. v GST International Management Ltd. BVHC (COM) 2011/0120, para. 18, delivered December 22, 2011

incident. This, counsel submits, can only be done at the full trial of the matter, arguing that a mini-trial is not an appropriate, fair or just way to determine the issue.

Claimant's case and substantive arguments

- [9] Counsel for the claimant argues that the nature of a summary judgment application necessitates that a respondent must provide affidavit evidence in accordance with Pt. 15 of CPR 2000, because the court is required to examine both the pleadings and the evidence before it to determine whether the defendant in fact has a real prospect of success. She submits that if the defendant has produced nothing to persuade the court that they have a realistic prospect of defending the claim, the court should not allow the matter to proceed to trial.⁵
- [10] Counsel goes on to argue that the respondent's failure to provide affidavit evidence is fatal. She states that the affidavit in support of the application set out certain facts relevant to the clauses of the contract which the defendant failed to dispute. She argues that clauses 19.1 and 12.1 of the contract as pleaded by the defendant do not avail them of the defence as pleaded.
- [11] She goes on to state that the defendant has both failed to plead the defects correction certificate and to address the employer's risks. She argues that the importance of the said certificate goes to establishing the contractor's risk within a specified time.
- [12] In addition, counsel asserts that the contract for service before the court does suggest that there is a contract for service, but that it is absent certain vital elements as referred to in the said contract and which effectively makes the said contract invalid in its written form, but which, while it may be evidence of an oral agreement has unfortunately not been pleaded.

⁵ Pentium (BVI) Ltd and Landcleve Corporation V The Bank of Bermuda [Civ App 14 of 2003, delivered January 12, 2005]

Analysis

- [13] I have considered all the arguments as advanced by both parties and read their submissions and authorities. Non reference to an argument or authority should not be taken as an indication that it has not been fully considered in arriving at my decision.
- [14] I will start off by saying that two cases that were of little assistance, but which the parties placed great reliance on in their respective arguments were **Royal Caribbean Cruises v Dr. Didier et al**⁶ by the defendant and the case of **Michael Phillip Ullmann v Lars G. Abrahamsson Luma Ltd.**⁷ by the claimant. Neither of these cases was helpful to the argument of either.
- [15] **Royal Caribbean Cruises** involved simultaneous applications filed by the defendants to strike out the claim and enter summary judgment. The court found that it was inappropriate to engage both procedures as they each invoked a different test. Further, the claim involved a clear interpretation of statute that would have caused both applications to have failed.
- [16] Counsel for the claimant was attempting to establish with **the Lars case** the invalidity of the contract between the defendant and its third party, or at the least, show that an oral agreement could have existed but had to have been pleaded. Unfortunately, the findings of the court in that case stemmed from a full trial of the matter and not upon a summary assessment of the facts and pleadings as would be required for this Application.
- [17] Rule 15 of CPR 2000 provides that the court may give summary judgment if it finds that the defendant has no real prospect of defending the claim or issue. The Rule also provides that the respondent to the application who wishes to rely on evidence

⁶ SLUHCVP2014/0024 and SLUHCVP2015/0004 delivered June 6, 2016

⁷ SVGHCVP2018/0010

must file affidavit evidence. The supposition is, that in assessing the success of the respondent the court would examine, not only the pleadings of the party but also the evidence it intends to rely on in making a prima facie assessment of his prospects of success.

[18] I accept the argument of the claimant that in a summary judgment application it is incumbent on the party responding to the application to put forward sufficient evidence to satisfy the court that it has a real prospect of succeeding to trial.⁸

[19] While the court is always cautious in granting summary judgment with such applications, a respondent must neither be casual in providing a full answer to the court, nor mislead itself regarding what is needed to satisfy the court that no judgment should be granted. It is quite easy to see how a respondent can treat as interchangeable the requirements under a strike out application and that for entry of summary judgment. The former requires no interrogation of the facts, only the pleadings, while the latter involves some examination of the facts, without descending into a mini-trial of those facts, but only so much as would permit the court to see that there is some substance to the respondent's case.

[20] In the case of **Korea National Ins. Corp. V Allianz lobal Corporate**⁹ the court quite rightly took the view that there is a danger in disposing of arguments summarily which appear at first blush as implausible or depend on establishing facts which, at the time of the application seem very unlikely to have occurred, when a different picture may emerge at trial when all the evidence has been examined and which may prove markedly different from what is presented at an earlier stage in the proceedings. For this reason, the court states, that a judge will normally accept the evidence of the parties at face value and will not be drawn into an attempt to resolve factual disputes of any kind. Notwithstanding, the court goes on further to state that

⁸ Korea National Insurance Corp v Allianz Global Corporate & Specialty AG (formerly Allianz Marine & Aviation Versicherungs AG) [2007] EWCA Civ 1066; [2007] 2 C.L.C. 748

⁹ Ibid

a party cannot complain if, in accepting his evidence at face value, the court adopts a rigorous approach when considering what, if anything, that evidence amounts to.

[21] In the submissions of counsel in the **Korea v Allianz case**, the Appeal court was of the view that the argument that the judge failed to make allowance for the likelihood that additional evidence relating to various aspects of their defence would be available at trial to cast a more benevolent light on events was unfounded. The court held that *“it is incumbent on a party responding to an application for summary judgement to put forward sufficient evidence to satisfy the court that it has a real prospect of succeeding at trial. If it wishes to rely on the likelihood that further evidence will be available at that stage, it must substantiate that assertion by describing, at least in general terms, the nature of the evidence, its source and its relevance to the issues before the court. The court may then be able to see that there is some substance in the point and that the party in question is not simply playing for time in the hope that something will turn up. It is not sufficient, therefore, for a party simply to say that further evidence will or may be available, especially when that evidence is, or can be expected to be already within its possession. Allianz was quite entitled, if it so choose, to confine its evidence to the factual allegations in the defence, but having done so, and having failed to give any indication of what other evidence can be expected to be available at trial, it cannot complain that the court has not speculated about whether there might be any such evidence, and if so what its nature might be.”*

[22] The Appeal court in **Korea v Allianz** went further to indicate that, *“it was not necessary to put forward compelling evidence, simply enough evidence to raise a real prospect of being able to persuade the court that in the circumstances the words spoken at the meeting were intended to give rise to a binding agreement. As it is, they have chosen to stand on the defence and counterclaim on the grounds that it contains all that is necessary for their purpose. In those circumstances I think the court must proceed on the basis that nothing else is likely to emerge at trial that will affect the construction to be placed on what was said at the meeting.”*

- [23] The defendant has chosen to base its arguments on the facts as alleged in its defence only. Having filed no affidavit in response, it is therefore convenient to begin by identifying what those facts are, and then to consider whether, in light of the other evidence before the court they can establish that they have a real prospect of defending the claim.
- [24] The defendant admits that a tank fell from their premises, albeit an 800 and not a 1000-gallon tank. They do not admit any injuries suffered by the claimant but say that if that is so, then the said injuries were not occasioned by any negligence attributable to them but rather to the contractor who had been commissioned to undertake certain works on their roof and who, at all times, was responsible for ensuring the safety of the premises and that it is the contractor who bears the risk of any injury sustained to their employees or other persons as a result of their (the contractor's) negligence. The defendant indicates that it also relies on the right of indemnification as pleaded. Both parties rely on the contract for services and conditions of contract forming part of the said contract as exhibited by the claimant and pleaded by the defendant at paragraphs 6,7,9,10 & 11 of its amended defence.
- [25] I agree with the submission of counsel for the applicant/claimant that the absence of an affidavit in response is fatal to the defendant. This is not a matter of pure interpretation of a contract as counsel for the defendant has submitted. The clauses contained in the contract are straightforward. There is no dispute between the parties as to the content of the contract and that there contain therein both employer's and contractor's risk.
- [26] The contract is the entire limb upon which the defence turns. Clause 12.1 as pleaded by the defendant sets up the contractor's risks, but the determination of the contractor's risks rest upon those risks that do not fall to the employer. Clause 19.1 provides that it is the contractor who is responsible for the safety of all activities on the site. A simple perusal of the contract reveals two things:

- (1) That an affidavit in response and some documentary evidence was required to support the defence, and
- (2) The contract is void ab initio.

The contract is void ab initio

[27] There may in fact be no valid agreement between the parties. At section 2 of the contract, headed "*Forms of bid, qualification information and letter of acceptance*", the "*notes on standard form of letter of acceptance*" states that the letter of acceptance will be the basis for formation of the contract as described in clauses 33 and 34 of the instructions to bidder. It goes on to state that this standard form of letter of acceptance should be filled and sent to the successful bidder only after evaluation of bids has been completed. No where in the agreement has evidence of a letter of acceptance been provided. If the letter of acceptance forms the basis of the formation of the contract then it cannot be said that a written contract in fact exists between the defendant and its contractor. While the relationship between the defendant and its contractor has the potential to form the basis of an oral agreement, this was not pleaded. Having only pleaded the written contract, and the contract on its face providing no evidence of a valid contract subsisting between the defendant and its contractor, the defendant would not be afforded the indemnity protection and third-party liability they seek in their defence.

No affidavit in response or documentary evidence

[28] Counsel for the claimant identified for the court that disclosure had been made by the defendant as early as July 30, 2021. Looking at the lists of documents, all that was disclosed was the contract as pleaded and a purchase order. No disclosure is made of any letter of acceptance and the court must infer therefore that there is none. Further, the defendant had the opportunity, by order of the court of September 29, 2021 to file its affidavit in response which could have assisted the court to understand the extent of its evidence as it related to the validity of the contract. They

opted to file no evidence in response as it pertained to the letter of acceptance or the defects correction certificate. Neither the defence as filed, nor the documentary evidence disclosed by the defendant has assisted it in challenging this application. The defendant has failed to fully expose its case to scrutiny to allow the court to determine whether it truly has a case with a real prospect of success.

- [29] The law is well-worn on the point, that once it is clear that facts are in dispute, neither the parties nor the court should succumb to the temptation to investigate them in depth, since the dispute can normally only be resolved at trial, but, the court is also clear, that that position can only be reached when both parties have set out their competing positions and the evidence on which those positions are based.¹⁰
- [30] Having provided nothing to the court to persuade it of the validity of this contract, either on its face or in the evidence submitted, the very foundation of the defence must fail.
- [31] Part of the claimant's argument is that the agreement is unsigned. A cursory perusal of the contract reveals the truth of the statement.
- [32] Further, even were I of the view that there was a valid contract, the defendant has yet again failed to provide any evidence regarding the period of the liability of the contractor. Clause 12.1 as pleaded by the defendant defines contractor's risks as *"from the start date until the defect's correction certificate has been issued, the risks of personal injury which are not employer's risks are contractor's risks"*
- [33] Clause 1.1. of the contract defines completion date as the date of completion of the works as certified by the project manager in accordance with sub-clause 55.1.

¹⁰ Supra, n.8

- [34] Therefore, there is a specified time period which demarcates when the contractor remains liable for acts of negligence and that is during the life of the contract, prior to its completion.
- [35] The defendant provided no evidence of the start date of the contract. Section 4 of the contract at page 69 and headed ‘contract’, the start date is specified as “*the date of site possession*” and goes on further down to state that “*the site possession shall be within five (5) business days of delivery of the letter of acceptance.*”
- [36] No evidence was led as to the contractor having taken possession of the site following submission of its letter of acceptance. No letter of acceptance was disclosed. The extent of the contractor’s liability rests solely upon direct evidence of the start of the contract and the completion date of that contract. The completion date relies on direct evidence of certification by the project manager in accordance with clause 1.1 and sub-clause 55.1 of the contract. With neither affidavit evidence nor documentary evidence the court can only infer that none of these exists, the defendant being expected to have such pertinent information already in its possession. To subject this matter to a trial, when the defendant, at this summary stage has been unable to make out its defence leaves the court with little confidence that not much else will change.
- [37] Had the defendant pleaded all the facts it intended to rely on, rather than so casually pleading the contract for its full terms, and presuming that the court was bound to allow it to proceed to trial without at least satisfying the court of a defence that could stand up to scrutiny, it is very unlikely that this application would have succeeded. A defendant must make its defence out from the outset and not leave its evidence and facts to chance because it runs the risk that the court will declare their matter unfit for trial.
- [38] Case management seeks to weed out the chaff from the wheat. Pleadings must be robust. This is not a cat and mouse game; all parties are required to show their hand

as early as the first pleading. If one wishes to wait or chooses to recline and allow ones pleadings to speak, without more, when such an application is put up challenging the defence, then the outcome will be inevitable.

[39] **My order is as follows:**

- (1) The Application of the claimant for summary judgment against the defendant is granted.
- (2) I have taken into account the importance of the matter to the parties and the rigorous arguments on both sides, together with the written work undertaken to get the matter to this stage. I therefore summarily assess costs in favour of the claimant in the amount of \$2,500.00.
- (3) Case management on the assessment of damages is to be listed for a date to be fixed by the court.
- (4) The claimant is to take carriage of the order after judgement.

BY THE COURT

REGISTRAR