

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

Civil Division

VIRGIN ISLANDS

Claim No. BVIHCV2020/0189

BETWEEN:

**BERT MADURO dba
PRE-OWNED TRANSPORT**

Claimant

-and-

[1] ISLAND SHIPPING & TRADING LTD
[2] TROPICAL SHIPPING AND CONSTRUCTIONS LIMITED
[3] LEROY MOSES
[4] CALVIN ROBINSON

Defendants

Before Master Alvin S. Pariagsingh

Appearances: Richard G. Rowe, Daniel Davies and Allydah George for the Claimant;
Marie- Lou Creque for the First Defendant.

2022: September 26;
October 31

DECISION

First Defendant's application to strike out claim
alternatively for summary judgment

[1] **PARIAGSINGH, M** : - Before the Court is the First Defendant's application seeking an order that this claim be struck out against the First Defendant or alternatively for summary judgment.¹

[2] This matter had reached the stage of pre-trial review when it was discovered that there may be an issue with the parties who were sued. The matter was sent back to the

¹ Application filed on July 29, 2022

Master for further management. It was common ground that the named Second Defendant was struck off the register and was not restored at the time the claim was issued.

[3] When this matter came before me Counsel for the Claimant sought and was granted leave to withdraw the claim against the Third and Fourth Defendants. Counsel adopted this position on the basis of responses he received pursuant to a Part 34 CPR request.²

[4] The Claimant then filed an application to add parties to this claim and for permission to amend the claim.³ At the hearing of this application however, Counsel for the Claimant sought and was granted leave to withdraw the application and directions were given for the parties to file submissions on the issue of costs.⁴

[5] Counsel for the Claimant, at the time the application to add parties and amend the statement of case was withdrawn, indicated that he intended to file a separate claim against new Defendants and continue to pursue this claim.⁵

[6] Subsequent to the matter being adjourned for a decision on costs the instant application was filed.

STRIKING OUT:

[7] The Court will be slow to strike out a party's case except in cases where it is clear that the claim is abusive or any defects cannot be cured by other methods. The Court will also consider any other options available that would be just before it deploys the nuclear option of striking out. The posture of the Court's position was stated by Thom JA in **Agnes Danzie et al v Cecil Anthony SLUHCVP2015/0009** at paragraph 13 where it is stated:

² Order dated May 17, 2022

³ Application filed on April 20, 2022.

⁴ Order of July 25, 2022.

⁵ Captured in the second recital in the order dated July 25, 2022.

“It is a well-established principle that the court’s power to strike out a statement of case should only be used sparingly (*Real Time Systems Limited v Renraw Investments Limited and Others* [2014] UKPC 6). Also, in *Salfraz Hussain v Birmingham City Council and Others* the English Court of Appeal, in considering the exercise of discretion to grant relief from sanctions where judgment was entered in default, stated: ‘it must be kept in mind that discretionary powers are not to be exercised in order to punish a party for incompetence—they must be exercised in order to further the overriding objective’. In exercising his discretion, the learned judge was required to consider what was the appropriate response having regard to all of the circumstances, including whether there were other alternatives available that would be just in the circumstances.”

[8] **Part 26 rule 26.3(1) of the Civil Proceedings Rules 2000 as amended**⁶ states that:

‘26.3(1) In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that –

- (a) there has been a failure to comply with a rule, practice direction, order or direction given by the court in the proceedings
- (b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;
- (c) the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings; or
- (d) the statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10’

SUMMARY JUDGMENT:

[9] Pereira CJ in **Dr. Martin Dider et al v Royal Caribbean Cruises Ltd et al**, **SLUHCVP2014/0024** at paragraph 23 outlined the approach the court ought to take in an application for summary judgment:

‘While a claimant’s pleaded case may be properly constituted, it may very well be completely hopeless in the face of a defendant’s defence, and therefore, the claimant will have no real prospect of succeeding. Similarly, a defendant who puts forward a defence which clearly cannot stand up to a claimant’s pleaded case will have no real prospect of successfully defending the claim. In either of these instances, it would be appropriate for the court to enter

⁶ After referred to as CPR

summary judgment on the claim pursuant to Part 15 of CPR provided that the issues in the claim are ones which are suitable to be dealt with using the summary procedure. In disposing of a claim summarily, the court would essentially consider the legal issues in the case, determine, on a balance of probabilities and in light of the affidavit evidence adduced by the parties, whether one party or the other has no real prospect of succeeding on the claim and enter judgment accordingly. This will be a judgment on the merits.

[10] In relation to the alternative relief of summary judgment sought, the First Defendant would be entitled to summary judgment if the Court is of the view that on the claim or particular issue, it considered that the Claimant has no realistic prospect of succeeding on the claim or issue.⁷

THE FIRST DEFENDANT'S SUBMISSIONS:

[11] The First Defendant relies on two grounds in the application. Firstly, the First Defendant contends that it is the wrong party sued. It contends that at all times it was the agent of an overseas principal. As such it contends that the Claimant not having sued the principal, the action against the agent must fail. Secondly, it is further contended that the claim is an abuse of the process of the Court.

[12] The Claimant has not filed any affidavit in opposition⁸. Both parties in their written submissions focused on the legal position applicable to principal and agent.

[13] The First Defendant contends that it is merely a shipping agent of the company with whom the Claimant contracted, Tropical Shipping and Construction Company Limited (Tropical) a company doing business in and from Florida, USA.

[14] It contends that as the principal, Tropical must be named as a party to the claim. Reference was also made to **rule 5.17 CPR**. The First Defendant submitted that the Claimant contracted directly with Tropical and made payment to them at its office.

⁷ CPR 15.2

⁸ Thought only necessary if the alternative relief of summary judgment is considered.

Reliance was placed on the decision of Byron CJ (as he then was) in **Bannister v Anguilla Connections Limited**⁹. In that case the Court restated the general rule that a contract of an agent is the contract of the principal. Consequently, the agent is not normally entitled to sue in his own name.

[15] Further, the First Defendant contends that the claim against it, as agent, is unsustainable without inclusion of the principal. Reference was made to **Tawney Assets Limited v East Pine Management Limited**¹⁰ citing **Baldwin Spencer v Attorney General of Antigua and Barbuda**. The court emphasized that striking out is a drastic step which should only be used in clear and obvious cases when it can clearly be seen on the face of it that the claim is unsustainable or an abuse of process.

[16] The First Defendant further contends that the claim against it for damages for negligence as a bailee and for breach of contract is unsustainable.

THE CLAIMANT'S SUBMISIONS:

[17] The Claimant contends that his claim against the First Defendant was aptly pleaded. The Claimant contends that at all times he believed that Tropical and the First Defendant were one and the same. He relies on the fact that the both companies occupy and share the same office. The Claimant relies on the case of **Croy Bros Shipping Ltd v Baldan Ltd**¹¹ for the proposition that forwarding agents can be held personally liable because they did not give notice that they were acting as agents.

[18] The Claimant contends that his cause of action against the First Defendant is in bailment. He submits that it does not turn on whether or not the First Defendant is an agent. He submits that bailment is a separate cause of action which can be related to both contract and tort and in fact is a type of trust. He further submitted that the issue of whether the First Defendant is a bailee will require a finding of fact to be determined

⁹ Anguilla civil appeal No. 7 of 1997

¹⁰ BVIHCVPA2012/007

¹¹ [19997] 2 Lloyd's Rep 58

at trail. Reliance was also placed on the learning in **Halsbury laws of England Vol 1 (2017)** where it is stated:

‘A bailee of goods can bail goods to another bailee. This happens, relatively frequently, in the context of international shipping where different bailees may be responsible for goods at different stages of a voyage’

[19] The Claimant contends that even if the First Defendant are agents of Tropical, it can still be entirely liable.

[20] In relation to the submission of the First Defendant that agents are generally not able to sue in its name, the Claimant relies on **Lee Cooper Ltd v CH Jeakins & Sons**¹² where Marshall J states that:

“the nature of the operations carried out by a forwarder, and the contractual arrangements under which he does so, may render such a person a principal rather than an agent”

RESOLUTION OF STRIKING OUT:

[21] In resolving the issue, the Court first had regard to the pleaded case against the First Defendant. The pleaded case is that the Claimant contracted with the First and Second Defendants to ship a vehicle from the USA to this jurisdiction. In doing so, the First and Second Defendants became bailees with an implied duty to secure and indemnify the Claimant against all damages except those expressly forbidden¹³

[22] The pleaded case is further that in the month of November 2017 the Claimant was informed that the vehicle was delivered into the possession of the First and Second Defendants and has remained in their possession since then.¹⁴

¹² [1967] 2 QB 1

¹³ Paragraph 10 of the Statement of Claim

¹⁴ Paragraph 11 of the Statement of Claim

[23] The First Defendant denies that it contracted with the Claimant or that it ever received the vehicle.¹⁵

[24] It is therefore a disputed fact whether there was a contract between the Claimant and the First Defendant. It is also a disputed fact whether the First Defendant received the vehicle. Resolution of the issue of the contract will turn on some evidence. Since striking out is strictly on the pleadings I am not minded to strike out the claim against the First Defendant.

RESOLUTION OF THE SUMMARY JUDGMENT:

[25] Summary judgment allows the Court a greater latitude to consider the evidence on an issue and make a determination of whether the Claimant has a realistic prospect of success on the claim or issue.

[26] On the issue of whether there was a contract between the Claimant and the First Defendant what is pleaded and relied on are two documents. First the bill of lading and second, the receipt for payment of shipping fee.

[27] The bill of lading is made between Tropical Shipping and Construction Limited and the Claimant. Less there be any doubt, the First Defendant is not even mentioned. This is the Claimant's document. A document that was annexed to his Statement of Claim filed some two odd years ago. It is pellucid that the contracting parties were the Claimant and Tropical. At paragraph 9 of his statement of claim the Claimant contends that he contracted with Tropical.¹⁶

¹⁵ Paragraphs 6 and 7 of the Defence of the First Defendant

¹⁶ Paragraph 9 "..... When these improvements were completed the Claimant who had for many years operated a rates agreement with Tropical Shopping, contracted the company by email to ship his motor truck from West Palm Beach, Florida in the United States of America to Port Purcell Sea Port in Tortola British Virgin Islands..."

[28] On this issue I can see no realistic prospect of the Claimant succeeding on showing a contract between him and the First Defendant.

[29] The second document only supports my position above. The receipt for payment of the shipping costs was issued from Topical to the Claimant. Again, there is no mention of the First Defendant. Like before, this document was annexed to the Claimant's statement of claim.

[30] It is clear that the contracting parties were the Claimant and Tropical. There is no pleading of any transfer of liability during voyage to the First Defendant as a forwarder. Surely if that was the Claimant's case that material fact would be pleaded.

[31] The law advanced by the Claimant although correct in my view does not assist him. For the First Defendant to be a bailee there has to be delivery of the goods. The Claimant's own document is inconsistent with this. The Claimant relies on a bill of sale that shows that the goods were to be delivered and shipped by Tropical.

[32] Further, the Claimant also annexed to his statement of claim a document which he contends was presented to his agent on May 25, 2018.¹⁷ This document is a draft release the Claimant contends that his agent received with a settlement offer. This release purports to release "Tropical Shipping & Construction Company Limited, its parent company, subsidiaries, and /or affiliated companies, the M.V. Asian Sun Voyage Number 7, her master, owners, charterers, operators, employees, agents, representatives and underwriters". In my view the Claimant's own document shows that Topical was the contracting party who was negotiating and offering a settlement on behalf of everyone involved. This document was in the possession of the Claimant, by his own pleading, about 2 years before the claim was filed.

¹⁷ Exhibit "BM8" to statement of claim

[33] For these reasons, I am of the view that the Claimant does not have a realistic prospect of proving the existence of a contract between him and the First Defendant. The First Defendant is accordingly entitled to summary judgment on this issue.

COSTS:

[34] Costs follow the event. There is no reason to depart from the general rule. The applicable costs regime is prescribed costs. Quantum of costs is always at the discretion of the Court. In determining the appropriate percentage of prescribed costs I am mindful of the stage at which this application was made. This application could have and ought to have been made much earlier than it was. In resolving this application, I have not considered any documents filed except the pleadings and the documents filed pursuant to the application. The other documents filed, in particular the witness statements, were not necessary before this application was made.

[35] The First Defendant has raised in its submissions the issue of costs on the withdrawal by the Claimant of the application to add parties and amend the claim which I indicated would be dealt with at the next hearing. The First Defendant is entitled to the costs of that application as in my view the Claimant only withdrew the application after the First Defendant made its arguments and filed its affidavit in opposition. This costs would ordinarily fall to be assessed summarily.

[36] In my view the summary judgment application disclosed the claim in its entirety. The First Defendant will not be entitled to two sets of costs. The First Defendant will not be entitled to costs of the application and costs of the claim. The proportional approach in my view is to only allow costs of the claim on the prescribed scale and adjust the percentage to reflect the work done.

[37] In this regard, I am only prepared to allow cost recovery at 60% of the prescribed costs on a claim with a value of \$65,261.03.¹⁸ By my calculation the costs payable is in the sum of \$5,873.49.

ORDER:

[38] It is hereby ordered that:

1. Summary judgment is entered for the First Defendant against the Claimant in this claim on the basis that the Claimant has no realistic prospect of succeeding on this claim against it; and
2. The Claimant shall pay the First Defendant's costs of this claim on the prescribed scale, allowed at 60% of the prescribed costs recoverable on a claim with a value of \$65,261.03 quantified in the sum of \$5,873.49.

**Alvin Shiva Pariagsingh
High Court Master**

By the Court,

Registrar

¹⁸ Comprises the sum claimed \$60,347.23, transport costs claimed \$2,739.80 and \$2,175.00 shipping costs. The sum of \$4,000.00 claimed as legal fees was not considered.