

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ST. CHRISTOPHER AND NEVIS

NEVIS CIRCUIT

Civil Claim NO. NEVHCV2010/0165

Between

DHL INTERNATIONAL GmbH

And

Applicant/Claimant

MARCEL HANLEY D/BA Superior Services

1st Respondent/1st Defendant

SUPERIOR SERVICES L & A

2nd Respondent/2nd Defendant

Appearances:

Mr. Anthony Gonsalves and Ms. Sherry Ann-Liburd for the Applicant/Claimant
Ms. Elizabeth Harper for the Respondents/Defendants

2012 March 28

RULING

[1] **REDHEAD J. (Ag.)** This is an application by the Applicant pursuant to Rule 42.2(1) filed on 17th October 2011 for an Order that –

(1) The first Respondent/Defendant make and file an account of all credits given, sales conducted, debts outstanding and monies received by the first Respondent/Defendant from the Applicant/Claimant's customers within the Federation of St. Kitts and Nevis for a period January 2008 to November 2010 in his capacity as Agent of the Applicant pursuant to two Agency Agreements filed 4th January 2006.

(2) The second Respondent/Defendant make and file an account of all credits given, sales conducted, debts outstanding and monies had and received

by the Second Respondent/Defendant from the Applicant/Claimant's customers within the Federation of St. Kitts and Nevis for the period of January 2008 to November 2010 in its capacity as interposed party carrying out of the First Respondent/Defendant Agency Agreement with the Applicant/Claimant.

- (3) An Order for all necessary and proper inquiries and directions for the taking of such accounts.
- (4) An order for payment by the Respondents/Defendants to Applicant/Claimant of the amount certified to be due to the Applicant/Claimant on the taking of such an account.
- (5) Any order that the court deems just
- (6) Costs of the Application.

[2] The Grounds of the Application are:-

(1) By an amended fixed date claim and Amended Statement of claim filed on 18th November 2010, the Applicant/Claimant made a claim against the Respondents/Defendants, inter alia, for the taking of an account and for payment to the Applicant/Claimant of the amount found to be due and owing to the Applicant/Claimant upon the taking of such an account.

(2) Both Respondents/Defendants are accounting parties. The First Respondent/Defendant was the local agent of the Applicant/Claimant by Virtue of two Agency Agreements dated 4th January 2006. The First Respondent/Defendant was also responsible inter alia, to sell the Applicant/Claimant's freight and other related services to the Applicant/Claimant's customers in St. Kitts and Nevis. The First Respondent/Defendant was responsible for the collection of all sums of and/or payments due and owing from the Applicant/Claimant's customers. After collecting the said Sums the First Respondent/Defendant was to pay all said sums collected to the Applicant/Claimant less the Agreed Commission.

(3) From about 9th January 2008, the Second Respondent/Defendant a company duly incorporated by the First Respondent/Defendant and to which the First Respondent/Defendant was Sole Director has been carrying out the Agency Agreement as an interposed party or alter ego of the First Respondent/Defendant. Further, the Second Respondent/Defendant received payments on behalf of the

Applicant/Claimant and has remitted, some payments to the Applicant/Claimant. The Applicant/Claimant claims that both the Respondents/Defendants have failed to pay over the sums collected by them and that the sum of US \$401,859.24 is due and owing to it. The Respondents/Defendants dispute that this amount is due and owing to the Applicant/Claimant.

(4) The Respondents/Defendants are under a duty in equity to render written and true accounts to the Applicant/Claimant of any sales made, credits given, debts outstanding sales, and monies received by them on behalf of the Applicant/Claimant in the circumstances where both Respondents/Defendants collected monies from Claimant's customers.

(5) The First Respondent/Defendant contracted with Applicant/Claimant by virtue of Clause 9 of the Agency Agreement to keep records of all sales conducted and to maintain accurate books and accounts available to the Applicant/Claimant for inspection at any reasonable time.

(6) Rule 41.2 (1)¹ states that if a Claim is made for an account or requires the taking of such an account or requires the taking of such an account, an Application for directions must be made at the Case Management Conference or first hearing. This application is made pursuant to this issue.

[3] This application is supported by an Affidavit deposed to by Keisha Fyfield and filed on 17th October 2010. An Affidavit in Opposition to this application was filed on 22nd March 2012 deposed to by Mr. Marcel Hanley 1st Defendant, Sole Director and beneficial owner of Superior Services Ltd, 2nd Defendant/Respondent.

[4] Mr. Hanley at paragraph 5 of his Affidavit deposed:-

“(i) The Claim and the Application purport to seek the same relief. The Applicant by its Application is seeking to circumvent the due process afforded to the litigants.

(ii) The burden of proof is that of the Applicant as it is their Claim. It is the Applicant who should be required to render the accounts as it alleges that the monies are due and owing.

(iii) The duty to account has been duly complied with by the Respondents. The Respondents rendered a final report for the St. Kitts and Nevis operations to the Applicant in 2010. At no time prior to the claim, did the

¹ CPR 2000

Applicant raise with the Respondent that the accounts rendered were unsatisfactory.

(iv) In the alternative and insofar as there is a dispute both as to liabilities and quantum, both parties should be ordered to render accounts to an agreed referee, who based on same should conduct an independent report."

- [5] I make some observations on this Affidavit evidence of Mr. Hanley.
- [6] In (ii) above he makes the point that it is the Applicant who should be ordered to render account because the burden of proof is on the Applicant.
- [7] In my considered view I do not think that the Defendant/Respondent is contending that this court should, take such a contention seriously.
- [8] The allegation of the Claimant/Applicant is that the first named Defendant/Respondent conducted sales, received monies, etc. on its behalf, all the records must be in the possession and or custody of the Defendants/Respondents, what purpose would be served by ordering the Claimant to render an account?
- [9] On the point raised, that he who alleges must prove, is not applicable because the court is not asked to rule on disputed facts.
- [10] If by paragraph [iv] of his Affidavit, Mr. Hanley is contending that there is a dispute as to the amount of money paid to the Claimant, presumably there will be receipts given for payments made to be the Claimant by the Defendants. As I cannot imagine that there would not be any; after an account is rendered there would be a set off in relation to payments made by Defendant to the Claimant. If in fact such payments were made.
- [11] In his Affidavit at paragraph 11 Mr. Hanley swore that he is advised by Counsel and verily believes that by bringing the Application, the Applicant seeks to obtain summarily, the same relief he sought on its claim.
- [12] Mr. Hanley also deposed that "the relevant facts of this matter are in dispute and therefore the question of rendering accounts cannot be and is not simply one of the provision by the Respondents only" (whatever that means).
- [13] It seems to me that the rendering of accounts by the Respondents cannot prevent the disputed facts from being litigated.

- [14] The First named Defendant/Respondent by paragraph 14 of his Affidavit swore. "Specifically the issue of accounts and the amount due and owing is greatly disputed as is evident from the Defences filed on 25th February 2011, which outline several contentious matter and issues of dispute.
- [15] The Defendants have exhibited copies of the Defence. I am confident that the Defendants by presenting an account will not bring an end to the matter. The Defendants will still be able to put forward its defence at trial.
- [16] In this regard, I cannot agree with Miss Harper's argument that the applicant by seeking an order for an account is seeking to subvert due process and obtain judgment summarily. As Miss Harper terms it, "summary injustice."
- [17] Miss Harper argued that the amount owing is disputed and cannot be resolved by the rendering of an account only by the Defendants. She said that the monies due and owing as claimed by the Claimant are incorrect. What is required, according to Miss Harper is full disclosure by all the parties.
- [18] Miss Liburd referred to clause 14 of the Agreement and argued that in short the Defendant has a contractual duty to account to the claimant. Apart from contractual, there is a duty in equity for the defendant as Agent to account to the Claimant as principal.
- [19] She contented that the right of a principal to have an account from his agent, rests upon the fiduciary relationship existing between them. In support of this contention she referred to-
Makepiece v Roger²
Yasuda Finance Mutual Investment v Ryan³
- [20] Rule 41.2 (1)⁴ gives the Claimant an untrammelled right to make the application when it did so. In light of the foregoing I have no option but to grant the application of the Claimant. The Application is therefore granted as per draft order filed with the Notice of Application on 17th October 2011.
- [21] Costs to the Applicant on a Prescribed Cost basis.



A.J. Redhead
High Court Judge

² (1865) 34 L J. 396 CR

³ (1955) 2 WLR 49

⁴ CPR 2000