THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. **CV 2014-02464**

BETWEEN

TRINIDAD CEMENT LIMITED

Claimant

AND

POINT LISAS STEEL PRODUCTS LIMITED

First Defendant

AND

GTM INSURANCE COMPANY LIMITED

Second Defendant

AND

MANCAD KANCHAN

Third Defendant

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Before the Hon. Madam Justice C. Gobin

Appearances:

Mr. Prakash Deonarine for the Claimant

Mr. Bissoondath Ramlogan S.C. for the First Defendant
Mr. Robin B. Ramoutar for the Second Defendant
Mr. Christopher Henry and Mr. Lester Chariah for the Third Defendant

JUDGMENT

1. The claimant Trinidad Cement Limited is a manufacturer/producer of cement and operates from a facility at Claxton's Bay. For international markets, the operation involves the transport of cement for export in bulk quantities from a packing house to the claimant's jetty via a conveyor system housed by gantries. For the local market trucks load at a designated loading bay then proceed to a weighing scale where the weight of product is recorded before the trucks leave the compound via a fairly well established route.

2. The claimant's case was that on 23rd April 2012 at approximately 2:30 p.m. vehicle TBF 4363 to which a trailer loaded with cement was attached, reversed into a beam – Tower No.7 which supported its Gantry No.2. This was the gantry that housed its export line. The first Defendant Point Lisas Steel Products Limited (PLSPL) was the registered owner of the truck. The driver of the truck was Allan Kanchan the son of the third Defendant Mancad Kanchan. The truck had been delivered to Mr. Mancad Kanchan's possession under the terms of a sale agreement several years before by PLSPL. The formal transfer of ownership had not been registered because of restrictions imposed by the Licensing Authority.

3. TCL claimed that the accident was caused by the negligence of Allan Kanchan who was, at the time of the collision, the servant and/or agent of either PLSPL or Mancad Kanchan.

4. The second named Defendant GTM was at the time of the accident the insurer of the said vehicle. In the course of the proceedings and before a trial date had been fixed GTM settled the claimant's claim (without prejudice) by making a payment of $500,000.00 to it. This sum was the equivalent of the limit on a policy which covered both PLSPL and Mancad.

5. The matter proceeded to trial with the remaining parties. Mancad Kanchan denied that there had been a collision involving the vehicle. He claimed that in any case PLSPL was the registered owner of the vehicle. At all times he accepted that on the day of the accident his son Allan was his servant and/or agent. PLSPL's position was

that while it remained the registered owner of the TBF 4363, it had long before, since about 2006, passed full control of it and its operations to Mancad. It was in the latter's possession on 23rd April 2012. But in any case and more fundamentally, the driver Allan was at no time the servant and/or agent of PLSPL.

6. While the claim for special damage was huge $3,462,415.51, this remained essentially a running down action which called for a finding of fact as to how the accident was caused, who was liable and for an assessment of the loss which flowed from the damage to Tower No.7. The claimant's success on the monetary claim depended on whether the loss alleged was proved to the requisite standard.

7. The claim on the face of it was for a sum expressed in Trinidad and Tobago currency. In the course of closing written submissions, the claimant referred to the loss of sales item in U.S. dollars. This evoked strenuous objection from the defendants. The claimant referred to certain evidence as well as correspondence which did indeed refer to the figure in U.S. dollars.

8. The issues which I had to determine were:

   (i) Whether the claimant (having on the face of his claim form and statement of case claimed damages in Trinidad and Tobago currency could belatedly seek an adjustment to the loss of sales claim to a claim for $1,563, 698.00 US dollars;

   (ii) Did vehicle TBF 4363 collide with Tower No. (7) of the Claimants gantry on 23rd April 2012;

(iii) Whether Allan Kanchan was the servant and or agent of Mancad Kanchan (his father);

(iv) Whether at the time of the accident Allan Kanchan whom it is admitted was driving the vehicle on the day and at the time of the accident, was the servant or agent of the registered owner of the vehicle, Point Lisas Steel Products Limited;

(v) Was the gantry damaged as a result of the collision; to what extent and was the sum claimed by TCL for repairs recoverable;

(vi) Whether as a result of the collision TCL suffered significant loss of sales and if so what was the extent of that loss

9. On 27th July 2017 I indicated my decision in the matter I gave judgment for the claimant against the third defendant and indicated the quantum of damages that I had allowed. I dismissed the claim against PLSPL. I now expand upon the outline reasons I gave then.

Issue (i) Should I allow a claim for $1 563 698.00 US dollars to be made in US dollars

I refused to allow what in effect was a substantial amendment to the claim at a late stage of the proceedings. What was being sought could not be considered a mere formal or typographical amendment. If it were allowed it would have considerably increased the liability of any party against whom the claimant might succeed. The rules and the authorities on amendments are clear. The claimant was confined to the claim in TT dollars as pleaded.

Issue (ii) – Did vehicle TBF 4363 collide with Tower No. 7

10. I found that it did. My finding turned on an assessment of the credibility of Mancad and Allan Kanchan. Although there were no eyewitnesses to the accident I found on a balance of probabilities that Allan Kanchan did indeed reverse into the structure. I found it significant that on the day of the accident, within hours, both Mancad and Allan gave separate statements in which both admitted that the truck had hit the structure.

11. Allan visited the St. Margaret's Police Station and had an accident report form filled out by No. 11868 PC Sookoo. Mancad went to the TCL Estate Police Charge Room at 3:35 p.m. – just about one hour after the accident. He gave a statement to SRP Snell. In the course of it he (Mancad) stated that he called Allan and told him TCL Police had come to his home and told him "me son bounce the gantry at the packing plant". The son's reported response was critical to my findings. According to Mancad and in his own words:

> "he told me Daddy ah didn't know but Uncle Butty told me I bounce that post. He told me he was behind me and he see me hit it". Mancad continued my son told me he believe he hit the post.

He went on to accept liability for the accident.

12. Mancad does indeed have a brother named "Butty". As it turned out, Allan agreed he (Butty) had been at the TCL compound that day. The report placed Butty on the scene. Allan's apparent willingness to accept what his uncle may have told him was

reasonable and it explained the Kanchan's conduct. I accepted that Allan did indeed make the statement above to his father and I attached significant weight to his earliest response that Butty had told him he had hit the beam. He did not dispute it.

13. Consistently with this position as to liability, both father and son went to PLSPL's offices, met up with Mr. Vijay Siewsaran, Manager Sales and filled out relevant insurance report forms which were signed by both Allan and Mr. Ravi Ramsingh, Managing Director of PLSPL. Mancad also visited Ms. Gloria Jacobs, Planning and Development Manager at the TCL compound soon after, accepted liability and offered to pay for the damage. At the time Mancad believed it was a simple matter of replacing the beam and the costs associated with that structural work.

14. Moreover, about one month later on 18th May 2012, Allan gave a statement to Estate Corporal Seemungal admitting the accident. In the witness box both Allan and Mancad sought to disavow statements they had signed admitting liability. Both feigned limited liability to read and understand what had been recorded. This did not impress me. The Kanchans sought to suggest too that their several admissions of liability came about because they were misled into believing that the accident had been caught by TCL's security cameras. I rejected this. The police reports made by both father and son on the same day of the accident as well as the statements that "Uncle Butty" had seen the collision, came before the visit in which they were allegedly told about camera footage.

15. What has caused me to reject this claim too is that in his defence, the third defendant made no mention at all of the visits on the day of the accident to TCL's Police Post or St. Margaret Police Station. This omission did not reflect well on Mancad's defence and his credibility generally. It has also caused me to reject the assertion that a statement was signed by him only after a visit by security officers on 25th April 2012 who told them it was a small issue to be resolved by the insurance company. It is clear that even before that visit, Mancad and Allan had voluntarily visited estate police at TCL and the St. Margaret's Police to accept liability.

16. I found it significant too that Allan put himself at the scene of the accident and admitted to reversing in close proximity to the tower. I believe that in doing so he did in fact collide with it. He may not have known it at the time but shortly after he was told by his Uncle Butty who had seen it. I attached no weight to the evidence of Estate Constable Seemungal that named officers of the OWTU had in fact witnessed the accident and given statements. These statements did not influence me at all. There was sufficient admissible evidence on which I concluded that TBF4363 did indeed hit the tower.

Issue (iii) was Allan the servant and or agent of the third Defendant Mancad Ali

17. On the Defence of the third Defendant, it is accepted that Allan was the servant and or agent of his father.

Issue (iv): Was Allan the servant and or agent of Point Lisas Steel Products Limited?

18. I accepted the submissions of Senior Counsel for PLSPL that the Claimant failed to establish that on the date of the accident Allan Kanchan was its servant and/or agent. The law on this is considered trite. The owner of a vehicle does not incur liability for damage caused by it merely by being the owner. It must be established that the driver was driving as his/her servant and/or agent. The decision of the P.C. in the case of **Rambarran v. Gurrucharran [1970] 1 All ER 749** which approved **Hewitt v. Bonvin** (1940) 1 KB 188 is binding on our Courts.

19. It confirms the simple proposition that while ownership of a motor vehicle is prima facie evidence that the driver was the servant and/or agent of the owner and that the owner is therefore liable for the negligence of the driver, that inference may be displaced by the evidence that the driver had the general permission of the owner to use the vehicle for his own purposes, the question of service or agency on the part of the driver being ultimately a question of fact. The onus of proof of agency rests on the party who alleges it. It must be established by the plaintiff if he is to make the owner liable, that the driver was the servant or agent of the owner.

20. TCL's pleaded case against PLSPL rested on a bare statement that at all material times – Allan – was the servant and/or agent of the first and or third Defendant. At the time of filing TCL must have been aware from pre-action correspondence dated 19th September 2012 that PLSPL was denying agency. In that correspondence PLSPL had specifically denied that the vehicle was being used at the time of the accident, in the course of its business. PLSPL went further. It included in the response a copy of the agreement which clearly indicated that the vehicle had been sold to the third

Defendant, but ownership had not yet been formally transferred because of licensing restrictions.

21. TCL did nothing further by way of pleading or evidence to meet PLSPL's answer. It may be that Claimant chose to rely on Mancad's statements to the effect that he had entered into the sales agreement specifically on the basis that he would use it as a transport vehicle and that proceeds of his income would go toward liquidating his debt to Point Lisas Steel Products Limited. TCL may have also relied on the statement contained in Mancad's defence that on the day of the accident, TBF 4363 was being used in connection with the business of PLSPL. If that was the case, this reliance was misplaced.

22. When the Kanchans filed their witness statements, it would have been more than clear that Allan was collecting cement for N. Ramrattan Hardware under a private transport arrangement made between him and that hardware store with Mancad's permission. The cross-examination of both Mancad and Allan Kanchan established conclusively that at the time of the accident Allan was driving with his father's permission and he was on his and his father's business. It confirmed that what they have is a typical family arrangement. Allan's father allows him use of the truck for his and their joint family income. The transport arrangement had nothing to do with the business of PLSPL.

23. This evidence sharply contradicted the statements pleaded by the third defendant on the point and further undermined his credibility. If Mancad used money obtained from the profits of his transport business to pay installments or any money that might

have been owed under the sales agreement, that was not sufficient to change the result that his evidence clearly established that he was not at the time the servant and/or agent of Point Lisas Steel Products Limited.

Was the Gantry damaged as a result of the collision with Tower No.7 - To what extent and is the costs of repairs claimed recoverable?

24. The north face of the North column of Tower No.7 was indeed damaged as is evident by a visible kink in the structure and seen on a photograph. TCL's expert, Mr. Rasheedali Mohammed presented a comprehensive technical report of the damage and the repairs that became necessary. Shortly after the accident he visited the site and made several observations. He concluded that as a result of the impact, the North column of Tower No.7 was forced out of its base support and came to rest on the eastern side of the column. This movement that occurred to Tower No.7 had caused the trusses on either side of Tower No.7 to come to rest in a lower position than in its designated position. As a result movement occurred throughout the length of the two trusses on either side of the Tower No.7 connection to Tower No.6 and No.8.

25. I did have some reservations about the evidence of Mr. Mohammed only because from a non-engineer's perspective I thought that it would have been necessary in order to assess the actual damage – especially consequential damage to the conveyor system to have had an internal inspection of the gantry. Mr. Mohammed's photographs generally did not assist me in identifying any damage if such may have been visible from the ground. Mr. Mohammed himself could not point to very much of what might have indicated actual damage on the photographs which he produced. His

involvement in the restoration project, as a supervisor of a contractor who was not on TCL's approved list of contractors for what looked like lucrative contract, caused me to question his independence. But that concern was soon put to rest.

26. This was because, the third Defendant produced his own report from Rivelin Consultants, which in a large measure corroborated the evidence of Mr. Mohammed on the technical and engineering aspects. I assessed Mr. Mithra Rampersad, the expert who presented the Rivelin report, to be a helpful and independent professional. His candid acceptance that he relied on the reports and drawings of Mr. Mohammed, did not undermine the value of his evidence. I was impressed that Mr. Rampersad was able to identify damage at the point connecting the tower to the gantry, on the claimant's photographs, even when for some reason Mr. Mohammed could not.

27. The Rivelin report supported TCL's case on the effect of the collision and the extent of the damage to the gantry and the lines. Mr. Rampersad helpfully explained that "by their structural nature trusses are sensitive to movement". He accepted too, that since both the east and west trusses of the gantry system are directly connected to Tower No.7 any substantial movement in the latter would result in movement in the connected trusses. Mr. Rampersad agreed that it was unlikely that "in place" repairs (which had been suggested as a cost cutting measure) would have been able to achieve the exacting original alignments required for a gantry system such as the claimant's. Generally he supported the opinion and actions recommended by Mr. Mohammed and he confirmed the reasonableness of the repair works that had been undertaken by the claimant.

28. On the important issue of costs of the corrective works, Mr. Rampersad placed the estimate of the reasonable costs of the repairs closer to 1.8 million dollars. His modification and lower adjustments on the claimant's figures would have been based a difference of opinion as to the claimant's deduction for salvage and with his omission of any or the sum claimed in Mr. Mohammed's report for electrical work. I found that the discrepancy between his assessment of the repair costs and the claimant's was explained. Mr. Rampersad's evidence assisted me in better understanding how the damage was in fact sustained and it caused me to accept the Claimant's claim for the remedial works.

Did the Claimant suffer loss of sales as a result of the damage to the gantry/what was the extent of that loss?

29. The last question caused the most difficulty. The claim was made in the sum of $1 563 698.00, which represented loss of sales for the period 23:04:12 to 12:10:12. TCL's case was that from the date of the accident, 23rd April 2012 to 12th October 2012, gantry No.2 was out of service and the conveyor system was rendered inoperable. TCL relied on the evidence of Mr. Naiem Jamadar, Marketing Supervisor III to establish this aspect of the claim for significant financial loss.

30. Mr. Jamadar stated that as a result of the damage, TCL had to find alternative means of moving cement bags. The company was forced to engage the services of Doc's Engineering works to transport their product. This was not the first time that they had hired Doc's. Indeed since around 2001, from time to time, whenever there was a

malfunction in gantry lines, TCL would engage the services of Doc's to have their trucks load cement from the packing plant for transportation on to the jetty facilities for export. TCL incurred transportation expenses following the accident using Doc's in the sum of $226,609.80 for the period 23rd April 2012 to 12th October 2012. He explained that the use of road transportation of product as opposed to the automatic conveying system resulted in reduced export sales for the period. Essentially this arose because bags were transported on a less frequent basis and this caused delays.

31. Mr. Jamadar explained the methodology he used to determine the quantum of the loss occasioned by the comparative inefficiency of trucks doing what the automatic conveyor system would do. He collected data from the company server as to the tonnage of cement that was sold. He converted that figure into "slings" which is a measure of a number of bags that a palette can hold. He verified the member of slings that had actually been sold. He checked the number of slings the company had budgeted would be sold. He calculated the value in difference between the two that is budgeted sales and actual sales. The information as to the sales budget for 2012 is contained in a detailed annual report which is prepared by the TCL's Marketing Department every year. It is based on history of clients' dealings. It forecasts the estimate of sales for the coming year. The 2012 budget was prepared in November 2011.

32. I am not satisfied that this formula was appropriate for calculating the loss of sales at all. I would go so far as to say I found this methodology to be flawed. Forecasts in the circumstances could only have been helpful if actual orders for product were

received from customers. However useful sales forecasts may have been for internal budgetary/management and production purposes, they are of little relevance or assistance in the analysis of what financial loss TCL actually incurred. This was loss which was required to be strictly proved.

33. Mr. Jamadar accepted that all the cement that TCL produced for export actually moved from the packing plant to the jetty by ground transport. The breakdown of the conveyor system did not have an effect on production. At worst, it caused delay in transporting cement from one part of TCL compound to the jetty which was less than 10 minutes away. The claimant failed to establish that this delay in turn resulted in a drop in sales or in the company's income. There was no evidence that the delay caused any customer to cancel orders so as to more directly and negatively impact projected sales.

34. I would have thought that the claimant could more properly and reliably prove it suffered loss of sales, if it did at all, by demonstrating that orders could not be filled or had to be cancelled as a result of these delays in ground transportation. No records or accounts were produced which indicated a difference in the actual orders for the period and the actual sales. In the absence of such I have to conclude that no loss of sales was actually sustained by reason of the damage to the gantry. I considered the absence of such records significant.

35. But other circumstances raised questions about what may have caused loss of sales, if indeed there was such. The accident took place at a time when there was a major strike at TCL. It began according to Mr. Jamadar, around February/March 2012 and

it lasted about three to four months. The accident occurred in April. Workers in the production and packaging departments were also involved in the industrial action.

36. TCL has not indicated how the industrial action affected the projections contained in its sales budget, and indeed Mr. Jamadar sought to undermine the effect on production. Given though that he accepted that all that was produced actually reached the jetty and was shipped, I am inclined to believe that the strike action had a more serious impact on the forecast of sales and production than the company cared to admit

37. The evidence of Mr. Krishendath Maharaj, Supervisor of Doc's established that even before the date of the accident, on 10th April and on 8th April, gantry No.2 was not in operation. He produced receipts for transportation which predated the date of the accident. He said he did a lot of work during that period because all the boats had to be loaded for export. This suggests that export operations were not necessarily affected when a gantry line was down.

38. The answers of Mrs. Jacobs confirmed that at the date of the accident gantry No.2 was not being utilized. I understood her to say that the use of the gantry is actually market driven – it is only when they actually need it that the line is scheduled for operation. There are two lines – line one is used for the local market but they were able to use it for export when line No.2 went down although it does not go directly down the jetty. This evidence further undermined the claim for loss of sales and it further undermined the reliability of the methodology adopted by TCL for the

calculation of loss of sales. In the circumstances I found that the claimant failed to prove the alleged loss of sales.

Disposition

39. The Claimants claim against the first Defendant is dismissed with costs on the prescribed scale. There shall be judgment for the claimant against the third Defendant Mancad Kanchan. The third defendant is to pay the claimant's costs on the prescribed scale. As to the quantum of damages: -

    (a) The Claimants claim for loss of sales is disallowed.

    (b) The claim for repairs to the gantry in the sum of $1,934,635.05 less salvage value of $262, 527.03 is allowed $1,672,108.02.

    (c) The claim for transportation costs in the sum of $226,609.80 is allowed.

    (d) Of the total of the sums allowed the sum of $500,000.00 paid by the second defendant to the Claimant is to be discounted.

40. The parties were invited to make further submissions on the calculations of interest and the quantum of costs.

Dated this 8th day of August 2017

CAROL GOBIN
JUDGE