REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE
SAN FERNANDO

Claim No CV 2015 - 03308

Between

SKILLCO HOLDINGS LIMITED

Claimant

And

CARRINGTON PETROLEUM SERVICES LIMITED

Defendant

Before the Honourable Madam Justice Eleanor J. Donaldson-Honeywell

Appearances:

Mr. Kerwyn Garcia and Mr Romney Thomas, Attorneys at Law for the Claimant
Mrs. Mohanie Maharaj-Mohan, Attorney-at-Law for the Defendant

Delivered on: July 25th, 2017

Judgment

A. Introduction and summary of decision

1. The instant matter is a Debt Collection Claim involving issues of account reconciliation between former parties to a business arrangement. The Claimant seeks to recover unpaid rent as well as the value of non-returned equipment alleged to be due and owing arising from an arrangement for rental of an oil rig. The arrangement started formally

with a written contract in March 12, 2004 which expired after a year and then the arrangement continued without written formalities from 2005 to November, 2014.

2. Prior to commencing this action the Claimant had, in accordance with a term in the written contract, forcibly terminated the rental arrangement by taking back possession of the Oil Rig but claims that in so doing not all of the equipment was handed over. The Defendant on the other hand alleges that some of the equipment taken with the rig actually belonged to the Defendant. Accordingly, the Defendant filed a counterclaim seeking damages for the said equipment.

3. The Defendant also claimed that the Claimant's accounting as to rent in arrears was incorrect. They say this was so because the Claimant failed to account for oral changes to the terms of the rental arrangement that allowed for waiver of rent when the Rig was on down time for repairs. Additionally, the Defendant counterclaimed for damages based on the Claimant's alleged failure to properly account for insurance money received for damage to the rig that the Defendant had repaired.

4. The Defendant was unable to substantiate that there was any merit to the counterclaims as neither credible evidence nor any written submissions were presented in support thereof. In particular, the aspect of the counterclaim seeking payment for equipment said to have been sourced due to older ones falling into disrepair was not supported by the written agreement. There was a term therein providing for the Defendant to have sole responsibility for maintaining in sound mechanical and working condition all ancillary equipment to the rig.

5. In any event the Defendant had no documentary proof of payments regarding the equipment and gave contradictory evidence as to what the payments were for. Counsel for the Defendant, while providing convincing arguments against parts of the Claim made no written submissions in support of the counterclaims. Essentially, by default therefore, in light of the lack of credible evidence and submissions my decision is that the counterclaims are dismissed.

6. The determination of the matter, as more fully set out hereafter, involved two remaining questions, namely the quantum of rent arrears owed to the Claimant and the value of

equipment, if any, not received from the Defendant at the time of the seizure of the Rig. The Defendant presented evidence through two main witnesses, the principals of the Defendant company, Mr Stephan Carrington and his wife Ms Iris Sookoo. They contradicted each other and their pleaded case under cross-examination to such an extreme extent that one witness, Mr Carrington, actually supported the Claimant's case as to the correctness of the accounting for rent in arrears.

7. In my view, the Claimant has not discharged its burden of proof in respect of the purported consensual variation of the amount of rent to be paid effective June 2013 embodied in its letter attached to the Reply to the Counterclaim. Due to the Defendant's own admission, however, there is sufficient evidence of an oral mutual agreement commencing January 2014 for an increase in rent.

8. On a full consideration of the evidence, therefore, I find that the Claimant has proven on a balance of probabilities that there was no oral agreement for waiver of rent during down times for repairs, that the Claimant properly applied and gave credit to the Defendant for all insurance money, that rent was increased effective January 1, 2014 and that the statement of rent owed is largely correct save that it should be reduced to the original rent for the months June 2013 to January 2014. Judgment is therefore granted in favour of the Claimant for the rental arrears in the amount claimed, less the increase in rent from June to January.

9. The Claimant failed however, to make out as strong and cogent a case with regard to the alleged equipment left with the Defendant. The person hired to seize the rig was a witness for the Claimant, Mr Dexter Browne. He was a credible witness as to his belief that he did not receive all the equipment. The weakness in his testimony was that the belief was not based on any knowledge he had about how to identify the equipment. He was relying on the fact that Mr Douglas Skinner was there as well and pointed things out to him at the time when they together took an inventory. Without Mr Douglas being called as a witness, the evidence was unreliable hearsay. I did not find it credible enough, on a balance of probabilities, to prove exactly what items of equipment were not seized. I accepted Mr Browne as a witness of truth however, that some equipment was not received as he says Mr Carrington told him he "*Has the tools at his residence*."

10. There was also no evidence as to the value of the missing Equipment, other than the unsubstantiated estimate of the Claimant's witness Mr John Skinner. He gave no basis for the quantum of $504,225.00 stated as his estimated value in his Witness Statement and in his oral evidence he spoke about information someone else sourced online. His Re-examination testimony, following on his admission under cross examination that he had no bills for the missing equipment, was as follows:

> *"Q. So Mr. Skinner, if it could assist you, on what basis, in the absence of bills, on what basis did you arrive at your estimate of $504,225?*
>
> *A. My brother, Douglas Skinner went online to the various suppliers in the States of used equipment and came up with that value."*

11. Although shortcomings in evidence of the value of the equipment were underscored by Counsel for the Defendant in her written submissions, there were no submissions in Reply. My decision in all the circumstances is that the claim for the estimated value of equipment not recovered fails. The Claimant has not discharged its evidential burden in proving the special damages claimed in its Statement of Case for the value of equipment not returned. It should still be awarded a nominal sum in the amount of $25,000.00 due to the fact that a substantial loss had, in fact, been proven.

B. <u>Summary of Facts</u>

12. On November 18, 2014, the Claimant re-took from the Defendant possession of a Rig, which it had been renting to the Defendant since March of 2004.

13. At the time that the Claimant re-took possession of the Rig, some $232,160.14 was said by the Claimant to be due and outstanding from the Defendant by way of outstanding rent (see Statement of Case/paragraph 5). Attached to the Statement of Case as Exhibit "C" was a statement showing how this sum was said to have become due and outstanding.

14. Together with the Rig, the Claimant had also rented to the Defendant certain items of equipment which were identified in Schedule A to the parties' rental agreement dated March 12, 2004. When the Rig was taken possession of in November of 2014, certain items of equipment listed in Schedule A were said by the Claimant to have been missing. The pleaded replacement-value of the missing items was said to be

$504,225.00 (see Statement of Case/paragraph 9). No supporting valuation documents have been produced.

15. By this action, the Claimant seeks, as against the Defendant, payment of the outstanding rent in the said sum of $232,160.14 and an order for delivery of the missing equipment or alternatively, payment of the value thereof (i.e., the said sum of $504,225.00).

16. The Defendant disputes these claims. It says that the terms of the original rental agreement dated March 12, 2004 were subsequently varied, including the arrangements as to how the rent was to be applied (see Amended Defence/paragraph 3.1); when rent was to be waived (see Amended Defence/paragraph 3.4); and the extent to which the Defendant would be compensated for damage to the Rig (see Amended Defence/paragraph 3.6). It says that by virtue of the application of these varied terms, and the making of several payments by the Defendant over time, no rent was due and outstanding at the time that the Rig was repossessed. The Defendant also disputes the pleaded replacement value of the equipment in its submissions, stating that special damages had to be specifically pleaded and proved.

17. There is also some dispute as to when the increase in rent was effected. The facts surrounding the increase in rent emerged in the Claimant's Defence to the Counterclaim at para. 2(i):

> *"The Defendant renewed the Agreement at the end of each year of the initial term by holding over under the terms and conditions of the Agreement and paying the monthly rent of $16,500.00 per month plus VAT. The terms of the Agreement were varied by increasing the monthly rent to $20,000.00 plus VAT effective 1st July 2013. The Claimant specifically denies that it informed the Defendant that the sum of $1,500.00 plus VAT per month would be allocated towards the cost of insurance."*

18. This was not previously explained in the Statement of Case but was put into evidence in John Skinner's witness statement, along with the purported letter showing their agreement of 22 March 2013 and the statement of outstanding invoices due to the Claimant by the Defendant as at 17 November 2014. The letter was from John Skinner

to Stephen Carrington outlining rents due and owing from the Defendant. Towards the end of the letter there was a notice of a rental increase which stated:

> *"Since entering into this lease on March 12th 2004, the monthly rental has remained at TT$16,500.00. We therefore now give you notice that effective June 1st 2013, the monthly rental will be increased to TT$20,000 plus Value Added Tax."*

19. The letter tendered into evidence does not contain a signature of either party. The Defendant disputes having ever received this letter but does admit that a mutual agreement was reached that such a variation in rent would take effect in January 2014. Therefore, the period of contention is between June 2013 and January 2014 (a period of seven months).

20. The Claimant does not seek the return of all the equipment initially handed over with the rig in 2004 as they admit that some items are in their possession and item 16 was never handed over.

21. The Defendant also says that the items of equipment identified in Schedule A to the parties' rental agreement dated March 12, 2004 were in some cases never delivered, or were in such poor condition when delivered that the Defendant had to repair or replace them, or were taken back by the Claimant when the Rig was repossessed, or are in the possession of third parties (see Amended Defence/paragraph 7). This, despite the fact that the Defendant signed the rental agreement dated March 12, 2004 which stated not only that the Defendant had inspected the equipment in Schedule A, but had satisfied itself as to the suitability of the equipment for the work intended.

22. The Defendant says that because it purchased many of the items of equipment in Schedule A, those items belonged to the Defendant and the Claimant had no right to seize them and the Defendant counterclaims for damages in respect of what it contends to have been their misappropriation by the Claimant.

23. The Defendant also counterclaims for what is said to have been the Claimant's failure to compensate the Defendant for damage to the Rig and for the Defendant's modifications thereto.

C. **The Pleadings and Issues**

24. The pleadings are set out hereunder:

    i. Statement of Case filed October 6, 2015;

    ii. Amended Defence and Counterclaim filed April 19, 2016; and

    iii. Amended Defence to Counterclaim filed June 15, 2016.

25. On August 30, 2016, the parties filed a Statement of Agreed Issues listing some twenty (20) issues to be determined in this matter. The issues were filed prior to the filing by the parties of their respective witness statements on December 16, 2016, prior to evidential objections being taken and upheld in relation to all of the Defendant's witness statements and prior to the Defendants' witnesses being cross-examined at trial.

26. After evidential objections taken to all of the Defendant's witness statements were upheld and significant portions thereof were struck out, and after the Defendants' witnesses were cross-examined at trial, the issues that remained, and the issues that now fall for determination by this Court on the Claimant's claim and the Defendant's counterclaim, can be conveniently collapsed into six (6) main issues, which are as follows:

    i. What items of equipment (from those listed in Schedule A to the rental agreement of March 12, 2004) were delivered to the Defendant when the Rig was first rented;

    ii. What items of equipment (from those listed in Schedule A to the rental agreement of March 12, 2004) were recovered from the Defendant when the Rig was repossessed in November of 2014;

    iii. What is the value of the items of equipment that were not so recovered;

    iv. Was rent waived for May, June, July, August and October 2012 as claimed by the Defendant;

    v. If not, what (if any) was the outstanding rent due from the Defendant when the Rig was repossessed in November of 2014; and

    vi. Whether the Claimant unilaterally altered the terms of the agreement by increasing the rent and if so whether the unilateral nature of the change made it void such that the Defendant does not owe as much as claimed.

D. The Evidence and Analysis

27. The Claimant filed two (2) witness statements on December 16, 2016:
    i. John Skinner; and
    ii. Dexter Brown.

28. The Defendant filed five (5) witness statements on December 16, 2016:
    i. Stefan Carrington;
    ii. Stephen Carrington;
    iii. Genevieve Mc Eachrane;
    iv. Lenny Sammy; and
    v. Iris Sookoo.

29. On February 8, 2017, the Court struck out significant portions in all of the Defendant's witness statements. On February 21 and 22, 2017, all of the witnesses (save for Stefan Carrington) were cross-examined.

30. Insofar as the Defendant's witnesses were concerned, the evidence of Stephen Carrington and Iris Sookoo under cross-examination was particularly significant:
    i. Stephen Carrington gave evidence which supported every aspect of the Claimant's case, but especially so in relation to the issue of the sum of rent that was outstanding and due from the Defendant when the Rig was repossessed in November of 2014; and
    ii. Iris Sookoo gave evidence in an unconvincing manner which was manifestly tailored to "meet a case" without any regard for truth or consistency. This was especially evident in her evidence under cross-examination that the Defendant had 'rented' items from among those listed in Nos 4 to 32 in Schedule A to the rental agreement of March 12, 2004, which was in direct contradiction of her witness statement evidence that the Defendant had 'purchased' those items (see para 2 (ix) of her witness statement). Such evidence revealed her to be a witness, whose evidence lacked sufficient credibility to be relied upon.

31. By contrast, the witnesses for the Claimant gave their evidence in a clear, convincing and forthright manner. Their oral evidence was consistent with their witness statements and the Claimant's pleaded case. They were not shaken in cross-examination. Dexter

Brown, the Bailiff hired to repossess the Rig, impressed me as an honest witness, with no 'axe to grind', and who had come only to speak the truth about the exercise he had been contracted by the Claimant to undertake.

32. In deciding on the disputed versions of events given by witnesses for the Claimant and witnesses for the Defendant, the Court has had due regard to the demeanour of the witnesses and the manner in which they gave their evidence. The Court has also borne in mind the important words of Lord Ackner in the Privy Council decision **in Horace Reid v Dowling Charles & Anor. PCA No. 36 of 1987** when at page 6, he stated:

> *"Mr. James Guthrie, in his able submissions on behalf of the Mr. Reid, emphasized to Their Lordships that where there is an acute conflict of evidence between neighbours, particularity in rights of way disputes, the impression which their evidence makes upon the trial judge is of the greatest importance. This is certainly true. However, in such a situation, where the wrong impression can be gained by the most experienced of judges if he relies solely on the demeanour of witnesses,* ***it is important for him to check that impression against contemporary documents, where they exist, against the pleaded case and against the inherent probability of improbability of the rival contentions, in the light in particular of facts and matters which are common ground or unchallenged, or disputed only as an afterthought or otherwise in a very unsatisfactory manner.*** *Unless this approach is adopted, there is a real risk that the evidence will not be properly evaluated and the trial judge will in the result have failed to take proper advantage of having seen and heard the witnesses" (emphasis added).*

Documents:

33. The Claimant filed an Agreed List of Documents on September 16, 2016. The documents agreed between the parties were as follows:
    i. The rental agreement dated March 12, 2004;
    ii. Schedule A to that agreement, identifying items of equipment which the Claimant had also rented to the Defendant in addition to the Rig itself;
    iii. The letter from the Defendant to the Claimant dated June 12, 2013;

iv. The Statement of outstanding invoices due to the Claimant as at November 17, 2014; and

v. The Form of Insurance Acceptance and Agreement from Guardian General Insurance Limited.

34. Copies of these documents were put into an Agreed Bundle of Documents filed by the Claimant on the same day. It is significant that the Defendant agreed to these documents, and in particular Schedule A to the rental the Statement of outstanding invoices due to the Claimant as at November 17, 2014 (which was attached to the Statement of Case as Exhibit "C", as stated above).

35. These documents are central to the resolution of the issues in this case. They are important contemporaneous documentary evidence against which the Court has been able to check the evidence and the demeanour of the Defendant's witnesses.

E. Law and analysis

Variation

36. Under cross-examination John Skinner did indicate that the Defendant Company never formally acknowledged receipt of the letter by which the Claimant purported to increase the rent effective June 2013. He explained in re-examination, that this type of correspondence was often hand delivered. Stephen Carrington, on the other hand, denied receipt of the letter during cross-examination but then appeared to accept the evidence of the Claimant, in the form of the statement of outstanding invoices, that the increased rent became payable from June 2013. His evidence was as follows under cross examination

> *"Q All right. So turn over the page now. And what I really want to take you to is the third paragraph, which starts in bold print, and it is underlined, "Rental Increase." You see that?*
>
> *A I see that.*
>
> *Q And you see that it says there, "Rental Increase. Since entering into this Lease on March 12, 2004, the monthly rental has remained at*

16,500.00. We therefore now give you notice that effective June 1, 2013, the monthly rental will be increased to $20,000.00 plus value added tax." You see that?

A I am seeing that.

Q Right. You accept that by this notice rent was increased from 16,500.00 to 20,000.00 plus value added tax?

A Well I didn't receive this letter. I remembered discussing this, but we never received that letter.

Q Okay. Let us put aside the receipt of the letter. You say you remember discussing this increase in rent?

A Yes. In January of --

Q 2014?

A 2015.

Q Well, okay. I mean we will give you some leeway. Your case is

A 2014 in fact.

Q Yes. Exactly. Your case is January 2014.

A 2014. Yes. Sorry. 2014."

"Q And you had said that you had discussed it with Mr. Skinner. But you were saying that it was to take effect from 1st January 2014.

A Yes.

Q Not 1st June 2013. You remember you told us that?

A Correct.

Q Okay. Good. So that, my case is and I have to put to you, that you are making a mistake, that in fact it was discussed and agreed between the

Defendant and the Claimant that the rental increase would take effect from 1st June 2013. That is my case I have to put that to you. So you could respond, I agree with that, I don't agree with that.

A I can't remember that.

Q You can't remember.

A No.

Q Okay. Let us see if we could help your memory.

MR. GARCIA: Could the witness please be shown Schedule B to the Statement of Case?

THE COURT: Yes.

BY MR. GARCIA:

Q Right. Remember, Mr. Carrington, earlier this morning, we spent some time going through this document?

A Yes, we did.

Q And remember you had said that you considered Schedule B to be an accurate document, remember you told us that?

A Yes. We did mention this.

Q Did mention that. Look for me under "Date" and you see the first entry under date is March 2012? You see that?

A Yes.

Q Okay. So we are coming down one by one to June 2013. March 2012, rent is 18,975.00, correct?

A Yes, sir.

Q Next one, April 2012, 18,975.00, correct?

A Yes, sir.

Q May, June, July, August, September, no rent, rent waived, correct?

A Correct.

Q November 2012, 18,975.00, correct?

A Correct.

Q December 2012, 18,975.00, correct?

A Correct.

Q January, February, March, April, May, 18,975.00?

A Yes, I see that.

Q And then June 2013 it goes up to $23,000.00, you see that?

A I see that.

Q You accept that VAT on $20,000.00 is $3,000.00? You accept that?

A $23,000.00.

Q Well at the time, VAT at 15% on $20,000.00 was $3,000.00?

A Yes, I see that.

Q Right. So that $23,000.00 is what is being said was owed by way of rent in the sum of $20,000.00 plus VAT on it at $3,000.00 that is what Schedule B is showing, not so?

A Yes, that is what it says.

Q And it is showing that as being owed from June 2013. You see that?

A I see that.

Q And Schedule B as you say is accurate? Yes?

A I see that.

Q Right. Do you now accept that rent in the sum of $20,000.00 became chargeable from June 2013. Do you accept that?

A Okay. I see that.

Q No. But do you accept it?

A Yes. I accept it."

37. The Defendant cites the local decision of **Rian Moyou v Mediserv International**[1] where the commentary on Variation, particularly unilateral variation was discussed.

38. In **Chitty on Contracts**[2] para 23 – 032 the authors state that:
"The parties to a contract may effect a variation of the contract by modifying or altering its terms by mutual agreement."

39. A similar position is expressed in **Hudson's Building and Engineering Contracts**, 10th ed., at page 22:
"A simple contract may be validly varied by the subsequent agreement of the parties, so long as there is consideration to support the variation agreement."

40. The **Halsbury's Laws of England** on Variation[3] further considers:
"A consensual variation is where the parties to a contract agree in a subsequent simple contract to vary its terms as between the parties to the original contract by way of a second contract… At common law, one party cannot unilaterally validly vary the terms of the contract (except by way of release), but such unilateral variation may constitute a repudiation of the contract by him.

[1] CV No. 2012 - 03492
[2] Volume 1, 32nd Edition (2015)
[3] CONTRACT (Vol. 22 (2012)) [582]

However, the original contract may validly grant to one of the contracting parties a unilateral power of variation."

41. It is clear that no such term providing for unilateral variation by the Claimant was included in the contract and the submissions of the Defendant focus on the time at which the written agreement was made.

42. However, there is an additional element not addressed by either party in pleadings or submissions and that is the question of consideration for this variation.

43. The **Halsbury's** discussing the requirements for consensual variation at [583], further indicates:

"Obligations undertaken in one contract may be varied in another, even if the former contract were made by deed. Consensual variation may be by express agreement or may be implied by conduct. The consensual variation must itself amount to a contract."

44. It further explains that in order to amount to a contract, all the elements of a contract must be in place, including consideration for the new promise:

"Since a variation, as opposed to a waiver, involves an alteration by way of contract of the contractual relations between the parties, the agreement for variation must itself possess the characteristics of a valid contract. Thus to effect a variation the parties must be ad idem in the same sense as for the formation of a contract, and negotiations for variation which do not result in agreement have no such effect. Further, the agreement for variation must be supported by consideration or made by deed. Where the contract is still executory on both sides, consideration may be found in the mutual surrender of rights or the conferment of benefits on each party by the variation. However, where the variation is capable of benefiting only one party, it will not generate its own consideration; and the same will be true even where the variation is capable of benefiting either party but is in fact made only for the benefit of one."

45. **Wilken & Ghaly on The Law of Waiver, Variation and Estoppel** 3rd Edition supports this position:

> *"...the Court should find that a variation is supported by consideration in all cases where it is possible to find that the variation results in the accrual of a benefit to the parties to the contract. Further, the Court should not find that a variation of contract is invalid even if the practical benefit is merely the due performance of existing obligations under the contract to be varied to the benefit of both parties."*

46. Due to the fact that no submission or pleading was made on this point it is not possible to make a determination on a lack of consideration in the present case. Further, there being no formal contract but just month to month holding over, consideration may have been contained in the willingness to continue the contract. It was open to the Claimant therefore, as the company renting the rig, to increase the rent as it saw fit once reasonable notice was given and the Defendant was entitled to refuse to pay the increase but then would have to end the rental arrangement.

47. The Defendant has admitted its liability to pay the increased sum effective January 2014. Due to the inconsistencies in the evidence of both witnesses on this point, it appears that the Claimant, upon whom the burden of proof lies, has failed to properly establish that the agreement would be effective June 2013. The unsigned letter containing no letterhead or acknowledgment of receipt is insufficient to prove that the Agreement was reached at that time. The responses given by Mr. Carrington under-cross-examination though coming very close to appearing to be in agreement that rent was increased effective June 2013 did not amount to sufficient unequivocal proof on a balance of probabilities. It was unclear to me whether Mr Carrrington, who unlike his wife presented as a quiet, diffident witness who wanted to be agreeable, was simply agreeing that that was what the account he was being questioned about said.

48. The admission of the Defendant does however constitute sufficient evidence that there was a mutual agreement for the increase in rent to take effect from January 2014. The figure claimed by the Claimant would therefore have to be decreased to take into account this change.

Value of equipment not recovered

49. The second legal point raised is that the amount claimed by the Claimant for the value of the equipment not recovered has not been specifically proven – **British Transport Commission v Gourley [1956] AC 185**.

50. It is well settled that to justify an award of special damages the Claimant must satisfy the court both as to the fact of damage and its amount - **Grant v Motilal Moonan Limited and Rampersad**[4]. The decision of the local Court of Appeal in **Anand Rampersad v Willies Ice Cream Ltd**[5] analysed the duty to prove special damages. In respect of a claim for special damages, Archie, JA (as he then was) emphasised the particularity with which a Claimant must establish his loss:

*"I wish to emphasise at the outset that the fact that a Defendant may not challenge the values of destroyed items given by the Plaintiff does not automatically entitle the Plaintiff to recover whatever is claimed. The rule is that the Plaintiff must prove his loss. The correct approach is as stated by Lord Goddard, CJ in **Bonham Carter v Hyde Park Hotel** [1948] 64 Law Times 177:*

> *"Plaintiffs must understand that if they bring actions for damages, it is for them to prove their damage, it is not enough to write down the particulars, so to speak, throw them at the head of the court saying 'this is what I have lost, I ask you to give me these damages.' They have to prove it."*

51. This is so even where there has been no denial of the amount by the Defence. The guidance from **McGregor on Damages**[6] on the burden of proof at trial is that a Claimant must still prove his loss even where the defendant fails to deny the allegations of damage or suffers default:

> *"The Claimant has the burden of proving both the fact and the amount of damage before he can recover substantial damages. This follows from the general rule that the burden of proving a fact is upon him who alleges it and not upon him who denies it, so that where a given allegation forms an essential*

[4] Civ. App. No. 162 of 1985
[5] Civ. App. No. 20 of 2002, 8
[6] McGregor, The Law of Damages (The Common Law Library, 19th ed. Sweet & Maxwell, London 2014) [50-001]

part of a person's case, the proof of such allegation falls on him. Even if the Defendant fails to deny the allegations of damage or suffers default, the Claimant must still prove his loss."

52. In **The Great Northern Insurance Company Ltd v Johnson Ansola**[7], the Court, applying **Ratcliffe v Evans (1892) 2 QB 524, 532-533**, indicated that the degree of strictness of proof that is required depends on the particular circumstances of each case. It considered:

> *"[I]t seems clear that the absence of evidence to support a Plaintiff's viva voce evidence of special damage is not necessarily conclusive against him. While the absence of supporting evidence is a factor to be considered by the trial judge, he can support the Plaintiff's claim on viva voce evidence only. This is particularly so where the evidence is unchallenged and which, but for supporting evidence, the judge was prepared to accept. Indeed in such cases, the Court should be slow to reject the unchallenged evidence, simply and only on the basis of the absence of supporting evidence. There should be some other cogent reason."*

53. In the present case the Claimant simply states a value for the equipment not recovered in the statement of case and, although the Defendant did not specifically put the Claimant to proof in its Defence, this value is disputed by the Defendant. The figure claimed is quite a large sum and appears to be arbitrary. In the circumstances, as it has been determined that there, in fact, has been a breach of the contract and that the Claimant would have suffered some losses for the missing equipment, a nominal sum will be awarded instead of the quantum claimed

54. In **Pan Trinbago v Keith Simpson and others**[8] the Court of Appeal considered: *"The court fixes a small sum, referred to as nominal damages, in order to mark the fact that there has been a breach of contract, but not in any way to compensate the claimant, where no loss has been proven. Nominal damages are generally awarded to mark the fact that there has been a breach of contract in circumstances where there is no*

[7] Civ. App. No. 121 of 2008
[8] Civ. App. No. S-027 of 2013

quantifiable loss caused by the breach. The quantum of nominal damages to be awarded is at the discretion of the court, having regard to the particular circumstances of the case."

55. The **McGregor on Damages**[9], states the position as follows:

> *"Nominal damages may also be awarded where the fact of a loss is shown but the necessary evidence as to its amount is not given ... In the present case the problem is simply one of proof, not one of absence of loss but of absence of evidence of the amount of loss."*

56. In the Privy Council decision of **Greer v Alstons Engineering**[10], it was held that a nominal award of $5000 was sufficient in a case where the fact of loss had been shown but insufficient evidence as to its amount was given. As stated by Sir Andrew Leggart:

> *"Although the loss under this head was unquantified, it is the duty if the court to recognise it by an award that is not out of scale. The sum of $5000 may indeed be regarded as on the low side; but it is not so low as to be wrong in principle and to warrant any interference by their lordships."*

57. In my view, an award of TT$5000 would not be proportionate and just in the circumstances of the instant case as there was a loss proven, although it has not been quantified. In the case of **The Mediana**[11], the court was of the opinion that nominal damages does not mean "small damages". In the words of Lord Halsbury LC:

> *"Nominal damages is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right, which though it gives you no right to any real damages at all, yet gives you the right to the verdict or judgment that your legal right has been infringed ...But the term "nominal damages" does not mean small damages. The extent to which a person has a right to recover what is called by the compendious phrase damages, but may also be represented as compensation for the use of something that belongs to him depends upon a*

[9] 18th Edition, p. 326, para. 8-002
[10] [2003] UKPC 46 [6]
[11] [1900] AC 113, 116

variety of circumstances, and it certainly does not in the smallest degree suggest that because they are small they are necessarily nominal damages."

58. This decision was applied in **RBTT Merchant Bank Ltd and others v Reed Monza Ltd and others**[12], and an award of $250,000 was made as nominal damages. In the decision of **Persad v Persad-Maharaj**[13] a nominal award of $15,000 was made in the circumstances where the value of bottling equipment taken without permission by the Defendant and not returned, could not be ascertained.

59. In the present circumstances of no credible or reliable evidence regarding the value of the items, a just award for the Claimants would be damages in the sum of TTD$25,000.00 for breach of contract having regard to the absence of a specific challenge to the sum in the Defence and the cogent evidence of the Claimant that there would be losses sustained by the unreturned equipment.

F. Findings on the Issues

60. As pointed out above, the rental agreement of March 12, 2014 was an agreed document at trial. It provided, among its terms, not only that the Defendant had inspected the equipment in Schedule A, but had satisfied itself as to the suitability of the equipment for the work intended and hired that equipment.

61. In the face of this mountain of evidence as to this issue, contained in an agreed document, the Defendant therefore set itself the quite improbable task of establishing at trial, that (as was the evidence in the witness statements of Stephen Carrington and Iris Sookoo) the items of equipment in Schedule A were not all delivered when the rental agreement was entered into.

62. The Defendant failed to establish that the items of equipment in Schedule A were not all delivered when the rental agreement was entered into. This is with the exception of item 16 which the Claimant admits was never delivered.

[12] CV2010-03699
[13] CV2007-00923

63. The cross-examination of Stephen Carrington on this issue made it clear that the Defendant inspected each of the items in Schedule A at the time that it entered into the rental agreement and, in signing the agreement, had confirmed delivery to it of each such item, Surprisingly he even admitted to receiving item 16 which the Claimant concedes was never delivered.

64. Mr. Carrington's evidence was as follows:

> *Counsel:* *Look at the first page of that agreement – at Clause 1, under 'WHEREAS".*
>
> *SC:* *I see it.*
>
> *Counsel:* *Do you see it says there that "The Hirer has advised the Owner that they have been contracted by the Petroleum Company of Trinidad and Tobago Limited to undertake a well servicing programme in the Guayaguayare field and in respect of which it wishes to lease a rig complete with all the associated equipment as specified in Schedule A"?*
>
> *SC:* *Yes.*
>
> *Counsel:* *That is the 'Schedule A' to which you refer in para 2 (vii) of your Witness Statement – not so?*
>
> *SC:* *Yes.*
>
> *Counsel:* *So, in entering into this agreement, you [and by 'you' I mean the Defendant] wanted to lease a rig that had all the associated equipment specified in Schedule A to the agreement – not so?*
>
> *SC:* *Yes.*
>
> *Counsel:* *Look at Clause 2, under 'WHEREAS".*
>
> *SC:* *I see it.*

Counsel: *You see it says there 'The Hirer has inspected the rig and associated equipment specified in Schedule A and satisfied itself as to the suitability of the rig and associated equipment for the work intended"?*

SC: *Yes*

Counsel: *So, the agreement says that you [and by 'you' I mean the Defendant] inspected the equipment in Schedule A – not so?*

SC: *Yes*

Counsel: *And that you were satisfied as to the suitability of the equipment in Schedule A for the work intended – not so?*

SC: *Yes.*

Counsel: *Look at Clause 3, under 'WHEREAS".*

SC: *I see it.*

Counsel: *You see it says there that 'The Owner has accepted the Hirer's offer to hire the rig and the associated equipment'?*

SC: *Yes.*

Counsel: *So that, according to what the agreement says, you inspected the equipment in Schedule A, satisfied yourself as to the suitability of the equipment for the work intended, and offered to hire the equipment – not so?*

SC: *Yes*

Counsel: *Look at 'WHEREBY IT IS AGREED as follows', at Clause 1.*

SC: *I see it.*

Counsel: *You see it says there that 'The Owner will let and the Hirer will take on hire upon the following terms and conditions all and singular the rig and its ancillary equipment described in the Schedule A hereto'?*

SC: *Yes*

Counsel: *So, according to the agreement, you took on hire the equipment in Schedule A, after you inspected the equipment in Schedule A, satisfied yourself as to the suitability of the equipment for the work intended, and offered to hire that equipment from the Defendant – not so?*

SC: *Yes.*

Counsel: *The agreement doesn't say that you did not take on hire Item 16 in Schedule A – does it?*

SC: *No.*

Counsel: *It says that you took on hire all of the equipment in Schedule A – not so?*

SC: *Yes.*

65. Later on in his cross-examination, Mr. Carrington gave the following evidence:

Counsel: *I put it to you that you [and by 'you', I mean the Defendant] inspected all of the equipment in Schedule A, item No. 16 included – do you accept that?*

SC: *Yes*

Counsel: *I put it to you that you satisfied yourself as to the suitability of all of the equipment in Schedule A, item No. 16 included, for the work intended – do you accept that?*

SC: *Yes*

Counsel: *And I put to you that you took on hire all of the equipment in Schedule A and did not have to purchase a single item in Schedule A before the tenure of the initial contract – do you accept that?*

SC: *Yes*

66. Both the contemporaneous documentary evidence and the viva voce evidence of the Defendant's own witnesses therefore made it clear that all of the items of equipment

(from those listed in Schedule A to the rental agreement of March 12, 2004) were delivered to the Defendant when the Rig was first rented.

67. The Court rejects the Defendant's evidence that, owing to the poor condition in which the items were delivered, the Defendant was forced to purchase items Nos 4 to 32 in Schedule A. Such evidence was shown, in cross-examination of Mr. Stephen Carrington, to be palpably untrue.

68. The case for the Claimant on these issues is that the Statement of outstanding invoices due to the Claimant as at November 17, 2014, which was exhibited to the Statement of Case as Exhibit **"B"**, was a full, a true and an accurate statement of the rent due and outstanding from the Defendant to the Claimant.

69. Mr. Carrington's evidence given under cross-examination confirmed the accuracy of Exhibit **"B"**, in every single respect, line by line. Under cross-examination, Mr. Carrington's evidence as to the accuracy of Exhibit **"B"**, was as follows:

Counsel: *Look now para 13 of your Witness Statement?*

SC: *I see it.*

Counsel: *You see you say there that the down time rent was waived for May 2012, June 2012, July 2012, August 2012 and October 2012?*

SC: *Yes.*

Counsel: *And you say that this is evident in Schedule B of the statement of case?*

SC: *Yes.*

Counsel: *Now, we will look at Schedule B of the statement of case in a minute. But before we do so, look at paras 10 and 11 of your Witness Statement?*

SC: *I see them.*

Counsel: *You see you refer in those paras to the Defendant having received from the Claimant the sum of $150,000.00 paid by Guardian General Insurance Limited pursuant to an insurance policy?*

SC: *Yes.*

Counsel: *Now let us look at Schedule B of the statement of case – could the Witness be shown?*

SC: *I see it.*

Counsel: *Schedule B contains 6 columns – not so?*

SC: *Yes.*

Counsel: *Date'; 'Rent'; 'Payment Date'; 'Amount Paid'; 'Outstanding'; and 'Waived' – not so?*

SC: *Yes.*

Counsel: *And under 'Payment Date', Schedule B is showing the first date of the payment of rent as being March of 2012 – not so?*

SC: *Yes.*

Counsel: *And that the second date of the payment of rent as being April of 2012 – not so?*

SC: *Yes.*

Counsel: *And when you say, in para 13 of your Witness Statement, that it is evident in Schedule B that the down time rent was waived for May 2012, June 2012, July 2012, August 2012 and October 2012 – you are referring to the fact that, under the column 'Rent', Schedule B shows no payments of rent due in respect of the months May 2012, June 2012, July 2012, August 2012 and October 2012 (under 'Date') – not so?*

SC: *Yes.*

Counsel: *So that, in your evidence in this matter about rent having been waived from waived for May to October 2012, you are relying on what is said in Schedule B – aren't you?*

SC: *Yes.*

Counsel: ***That is because, as far as you are concerned, Schedule B is an accurate reflection of the rent that was due over the period from May 2012, up to October 2012 – not so****?*

SC: ***Yes****.*

Counsel: ***And you are relying on what is said in that part of Schedule B because, as far as you are concerned, the whole of Schedule B is an accurate document – not so?***

SC: ***Yes****. [Emphasis added]*

70. Having accepted that Schedule B was an accurate document, Mr. Carrington went on to give the following evidence under cross-examination:

Counsel: *Look at what Schedule B says, under 'Payment Date', about the payment of rent for the period from December 2012 up to April 2013 (under 'Date') – you see it says that 'INS PAY' in relation to those months?*

SC: *Yes.*

Counsel: *I am instructed that 'INS' means insurance – do you accept that?*

SC: *Yes.*

Counsel: *Do you accept that for the period from December 2012 up to April 2013, Schedule B is showing that the rent was paid by insurance?*

SC: *Yes.*

Counsel: *Schedule B is also accurate in relation to that – not so?*

SC: *Yes.*

Counsel: *I suggest to you that for the period from December 2012 up to April 2013, rent was paid by applying the net proceeds of the sum of $150,000.00 paid by Guardian General Insurance Limited pursuant to the insurance policy to which you refer in paras 10 and 11 of your Witness Statement – isn't that right?*

SC: *This insurance payment was charged to the rent. This was never discussed that insurance was paid to rent.*

Counsel: *Fair enough. But Schedule B is giving credit to you by putting insurance towards rent – not so?*

SC: *Yes, that is what it says.*

Counsel: *Now I have looked at paras 14, 15, 18 and 19 of your WS, and I have counted 8 payments of rent that you have identified in those paras – you accept my count?*

SC: *Yes.*

Counsel: *Let's go through the 8 payments for good order's sake, shall we?*

SC: *Ok.*

71. There then followed a detailed analysis of Schedule B, in which each and every single payment of rent said by the witness to have been made, was matched with its corresponding entry in Schedule B, and in the course of which it was established that each and every such payment was fully accounted for.

72. At the end of this passage of Mr. Carrington's cross-examination, the following exchange took place:

Counsel: *So, we've gone through all of the 8 payments you identify in your WS as having been paid in relation to rent– not so?*

SC: *Yes.*

Counsel: *And as we have seen, the full value of each and every one of those payments is accounted for in Schedule B – not so?*

SC: *Yes.*

Counsel: *And you relied on schedule B because it is accurate in every respect, right?*

SC: *Yes.*

Counsel: *And you accept that it fully accounts for all of the rent that was paid, over the period from March 2012, up to November 2014, when the Rig was repossessed - not so?*

SC: *Yes.*

73. It is indisputable that, both from the documentary evidence and from Mr. Carrington's analysis of same, rent was in fact never waived for May, June, July, August and October 2012 as claimed by the Defendant.

74. Schedule B, which Mr. Carrington's cross-examination showed was accurate, establishes that when the Rig was repossessed in November of 2014, the outstanding rent due from the Defendant to the Claimant was $232,160.14, as claimed and as pleaded.

75. It puts the lie to the Defendant's claim that the terms of the original rental agreement dated March 12, 2004 were subsequently varied, including the arrangements as to how the rent was to be applied (see Amended Defence/paragraph 3.1); when rent was to be waived (see Amended Defence/paragraph 3.4); and the extent to which the Defendant would be compensated for damage to the Rig (see Amended Defence/paragraph 3.6). It makes nonsense of the Defendant's claim that, by virtue of the application of these varied terms, and the making of several payments towards rent by the Defendant over time, no rent was due and outstanding at the time that the Rig was repossessed.

76. Overall, it destroys the Defendant's case in answer to the Claimant's claim, as well as the Defendant's counterclaim.

77. The Claimant has not discharged its burden of proof in respect of the purported consensual variation embodied in its letter attached to the Reply to the Counterclaim. Due to the Defendant's own admission, however, there is sufficient evidence of a mutual agreement commencing January 2014 for an increase in rent. The Claimant's claim must therefore be reduced to take into account the original rental sum for the months June 2013 to January 2014. The increase after VAT amounts to $4,025. The total increase for the seven month period is $28,175. Therefore the sum claimed by the Claimant, reduced by this amount, amounts to $203,985.14.

78. Further, the Claimant has not discharged its evidential burden in proving the special damages claimed in its Statement of Case for the value of equipment not returned. It has sufficiently established a basis to be awarded a nominal sum in the amount of $25,000.00 due to the fact that a substantial loss had, in fact, been proven.

G. Decision

79. For all of the above reasons, the Court hereby:

i. Awards the Claimant judgment for the sum of $203,985.14 by way of unpaid rent, together with interest thereon at 9% per annum from the date of the filing of the Claim to the date of this Judgment;

ii. Awards the Claimant judgment for the sum of $25,000.00 with interest thereon at 9% per annum from the date of filing of the Claim to the date of this Judgment as payment for the value of missing equipment;

iii. Orders that the Defendant is to pay the Claimant the costs of this action calculated on the amounts awarded using the prescribed basis under CPR 67.5

iv. Dismisses the Defendant's counterclaim; and

v. Grants the Claimant an award of costs of the Defendant's counterclaim to be paid to the Claimant by the Defendant calculated on the amount counterclaimed by the Defendant using the prescribed basis under the CPR.

vi. Orders that there be liberty to apply.

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Eleanor Joye Donaldson Honeywell

Judge

Assisted by: Christie Borely, JRC 1