

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Port of Spain High Court

Claim No. CV2019-04573

Between

IBI International AB

Claimant

And

TSI Energy Services Limited

Defendant

Before the Honourable Madam Justice Eleanor Joye Donaldson-Honeywell

Delivered on: 8 December, 2020

Appearances:

Ms. Tamara Toolsie and Mr. Stephan Maharaj, Attorneys-at-Law for the Claimant

Ms. Shobna Persaud, Attorney-at-Law for the Defendant

RULING

A. Introduction

1. The Swedish based Claimant, an international supplier of building materials, seeks early pre-trial determination of a Claim against the Defendant to recover sums due for alleged breach by the Defendant of contractual obligations to make payments for goods supplied.
2. The matter for consideration is the Claimant's Application for Summary Judgement filed pursuant to **15.2(a) and 26.1(k) of the Civil Proceedings Rules 1998**, as amended ["CPR"]. Part 15.2 of the CPR provides that:

"The court may give summary judgment on the whole or part of a claim or on a particular issue if it considers that-

(a) On an application by the Claimant, the Defendant has no realistic prospect of success on his defence to the claim, part of claim or issue"

3. Part 26.1(k) of the CPR grants the Court the power to give judgment on a claim after decision on a preliminary issue.
4. The Claimant first filed its Claim Form and Statement of Case in this matter on 6 November, 2019. The Defendant filed a Defence on 11 February, 2020. The matter was initially docketed to Honourable Boodoosingh J as he then was and was fixed for the first case management conference ["CMC"] on 22 April, 2020. The first CMC was postponed based on the parties' agreement to case management directions arising from the Claimant's proposed Amended Statement of Case. By Consent Order dated 21 April, 2020, the Defendant was granted permission to serve an amended Defence on or before 19 May, 2020.

5. Although the Claimant had signalled the intention to file an Amended Statement of Case, the amendment was not filed until 16 June, 2020. The Defendant failed to file an Amended Defence by the agreed due date and did not apply for an extension of time. When the Claimant filed the Amended Statement of Case on 16 June, 2020, it simultaneously filed the application for summary Judgement.
6. The Defendant, upon being served with these documents, did not file a counter application seeking leave to file an amended Defence. In correspondence between the parties, the Defendant indicated that no amendment to its Defence would be filed in relation to an Amended Statement of Case. The Defendant filed no affidavit in response to the Claimant's application for Summary Judgement. This was so, although by an Order in Chambers, directions were given that any evidence by the Defendant on the Summary Judgement application was to be filed by 15 July, 2020.
7. The matter was adjourned for further directions to be given on 20 August, 2020. On that date further directions were issued in Chambers for the filing of written submissions. Before the matter could be addressed at a scheduled hearing on 20 November, 2020, the presiding Judge was elevated and this case was transferred. In order to fully consider the newly assigned case, the date for the application to be addressed was postponed to today's date.

B. Law and Analysis

8. In **Western United Credit Union Co-operative Society Ltd v Corrine Ammon C.A.CIV.103/2006** Kangaloo J.A referred to UK authorities in interpreting the local CPR Part 15. Kangaloo J.A at para. 2 stated as follows:

"i. The court must consider whether the defendant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v. Hillman [2001] 2 All E.R. 91;

ii. A "realistic" defence is one that carries some degree of conviction. This means a defence that is more than merely arguable: *ED & F Man Liquid Products v. Patel* [2003] E.W.C.A. Civ 472 at [8];

iii. In reaching its conclusion the court must not conduct a "mini-trial": *Swain v. Hillman*;

iv. This does not mean that the court must take at face value and without analysis everything that a defendant says in his statements before the court. In some cases, it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v. Patel* at [10];

v. However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v. Hammond (No. 5)* [2001] E.W.C.A. Civ 550;

vi. Although case may turn out at trial not to be really complicated, does not follow that should be decided without the fuller investigation into the facts at trial than possible or permissible on summary judgment. Thus the court should hesitate about making final decision without trial, even where there no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that fuller investigation into the facts of the case would add to or alter the evidence available to trial judge and affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co Ltd* [2007] FSR 63."

9. The dicta of Kokaram J (as he then was) in **Mercury Marketing Limited v VB Enterprises Limited, CV 2014-02694** is also instructive:

"7. The utility of summary judgment applications is that it is both in the interests of the parties to sooner than later deal with the case substantially rather than allow it to linger unnecessarily. The discretion however that is exercised must

always seek to give effect to the overriding objective. See the observations of Lord Woolf in Swain v Hillman [2001] 1 All ER 91....

8. A Court will always hesitate before making a final decision without a trial. The Court must always be sensitive to the utility of the procedures of disclosure and cross-examination in the determination of the accuracy of factual propositions. However, where there are no reasonable grounds to suggest that no full examination at trial will unearth or alter the present evidence a Court should not flinch at the prospect of granting summary judgment.”

10. In the present case, the Claimant submits that the Defendant’s Defence amounts to no more than a bare denial of the Claim. The Defendant’s Defence to the Claimant’s detailed claim is five paragraphs long and is set out in its entirety below:

“1. The defendant admits paragraphs 1-2 of the Defence.

2. The defendant acknowledges that he placed the orders for the goods stated in paragraph 3 of the Statement of Case and that same was received as in paragraph 4.

3. The defendant contends there was an implied warranty that the goods were fit for the purpose required.

4. The defendant contends however that the said goods were defective and unusable for the purpose requested.

5. In the premises that the defendant shall contend that the said amounts claimed by the claimant are not due and owing.”

11. Only paragraph 4 of the Defence contains the Defendant’s substantive Defence. It pleads that the goods were defective and unusable for the purpose required but the pleading is unsupported by particulars or by documentation. In fact, no documents at all are attached to the Defence.

12. Counsel for the Defendant submits that the Defence is not a bare denial. Counsel's contention is that the Claimant's Statement of Case supports the pleading that the goods were not fit for the purpose required, as does the Claimant's Affidavit of Mr. Brian Patience filed in support of the present application.
13. Counsel contends at para 14 of submissions that the "*Claimant's own evidence in their statement of case clearly sets out the flesh of the defendant's contention in relation to the statement that goods were unsuitable in reference to pro forma invoice #31002*". Counsel for the Defendant did not specify the paragraph of the Claimant's Statement of Case relied on to prove this point in the Defendant's case.
14. However, on a review of the pleadings, note is taken of paragraphs 9 and 10 of the Statement of Case which address the subject matter of complaints made by the Defendant about defects in certain shipments of ply. These particular complaints were only raised after the Defendant received the Claimant's pre-action demand letter dated 23 September, 2019.
15. The Claimant disclosed as an attachment to the Statement of Case, email correspondence dated 30 September, 2019 sent by the Defendant's director Mr Stephen Bail. The email is an indication from the Defendant that it considered that, in relation to two shipments addressed in Invoice #31002 and Invoice #30907, "*the shipment of form ply received from IBI International was severely damaged*". In the email, the Defendant asked the Claimant's Company for "*a discount of 50% and payment terms of USD \$2000 monthly to clear off the balance due*".
16. This email correspondence cannot *per se* be considered evidence by the Claimant of lack of fitness of the goods being supplied to the Defendant for the purpose required. It is patent that there is no evidence of actual damage to the goods in the emails. There is simply a complaint from the Defendant's company director, and no acceptance by the Claimant of the truth of this indication that the ply was damaged. Further, it is clear that

the Defendant and its agents were not refusing to pay for the goods but simply requesting a discount due to damage. There is an indication in the Defendant's email that this batch of ply had to be sold by the Defendant at half cost but no documentary proof of such sale is provided.

17. In the instant application for Summary Judgment, the affidavit of the Claimant's witness Mr. Patience is forthright in outlining earlier events when another shipment was alleged to be defective. This preceded the issues addressed in the emails attached to the Statement of Case. In the affidavit evidence filed in support of the application for summary judgment, the Claimant candidly disclosed that there was a telephone call between the parties' agents and an inspection of Shipment #1 (Order No. 30743) by the Claimant in February 2019. The evidence in this affidavit supports, to an extent, the contention by the Defendant that there had been a dispute as to the quality of some of the goods. At para. 11 of the affidavit Mr. Patience avers:

"In or around March 2019 Mr Bail advised me that the cost of filling the gaps in the form ply was TT\$35,000.00, but to date, no such invoice has been submitted to IBI and there is no evidence that any such work was in fact undertaken by TSI. Further, among the 6 shipments of material for which TSI has not paid, there are only 3 shipments of form ply. TSI has never made any complaint as to the quality of the other goods supplied."

18. This statement contemplates that the Claimant may have conceded in February 2019, to compensate the Defendant for work to be done on the material delivered in Shipment #1. This evidence, coupled with the email discussion between the parties when the Defendant sought a 50% discount for two later shipments, provides a realistic Defence by the Defendant as to non-payment for those shipments.

19. However, the Defendant's reliance solely on the Claimant's Statement of Case and affidavit as particularising its case means that there is no Defence made out in relation to the three remaining shipments. Those shipments did not contain "form ply" in relation to which complaints had been made (Invoices No. 31001, 31006 and 31009).
20. The Claimant's Amended Statement of Case contains claims under six invoices (set out at para. 4) amounting to a total of US\$230,867.30. The Defendant's pleading at paragraph 4 of the Defence that the goods were defective, though lacking in specificity, can potentially be supported by the information included in the Claimant's Statement of Case regarding complaints about three shipments covered by invoice #31002, 30743 and 30907. There is a realistic prospect of success. However, this only puts forward a Defence to three of the claims for the sum of US\$164,721.75.
21. The Defendant was required to include in its Defence a statement of all the facts on which it relies to dispute the claim against it – **Rule 10.5(1) CPR**. The Defendant has entirely failed to do so in respect of the Claims for payment under the other three invoices. The Claimant, therefore, succeeds in obtaining summary judgment for these three sums.
22. A possible partial defence arises from the Defendant's pleadings as to the Claimant's Claims under Invoices 30743, 30907 and 31002. The Claimant in its pleadings and affidavit has candidly disclosed the factual matrix for such a Defence. It is possible that the Defendant will provide evidence on these three shipments to support its Defence. Looking at the pleadings as a whole and the affidavit evidence before the court, the Defendant may prove, in due course, a realistic Defence by way of witness statements and cross-examination of the Claimant's witnesses at trial.
23. However, as the case stands, there may be evidential objections raised by the Claimant later in the proceedings when the Defendant files Witness Statement. These possible objections may be on the ground of the Defendant's failure to plead certain aspects of its own case. **CPR Rule 10.6(1) CPR** provides:

“The defendant may not rely on any allegations which he did not mention in his defence, but which he should have mentioned there, unless the court gives him permission to do so.”

24. Lord Woolf in **McPhillemy v Times Newspapers Ltd 3 All ER 775** provides guidance on the purpose of pleadings:

“The need for extensive pleadings including particulars should be reduced by the requirement that Witness Statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party’s Witness Statements, will make the detail of the nature of the case the other side has to meet obvious. This does not mean that pleadings are not superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular, they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules.” [Emphasis added]

25. The Defendant may face some challenges in preparing its evidence based on the generality of its own pleadings. However, at this stage it remains to be seen what evidence the Defendant will tender. If the matter proceeds to the stage of exchanging witness statements, consideration can be given as to whether the evidence can be admitted. However, in keeping with the overriding objective of the CPR, parties are urged to consider the amount of money involved in the remainder of the claim, lack of complexity in the issues, and the advantages of expeditious resolution, which render this case appropriate for a negotiated settlement.

C. Conclusion

26. In the circumstances, the Claimant has shown that the Defendant has no realistic prospect of success in relation to its Claims under Invoices no. 31001, 31006 and 31009. Summary Judgment will be granted to the Claimant on these sums.

EJD. Honnell

27. In relation to the claims under the three remaining Invoices no. 30743, 30907 and 31002, the Defence of the Defendant stands and the Claimant's application is dismissed.

28. It is hereby ordered:

- i. Summary Judgment for the Claimant in the amount of USD\$66,145.55 plus interest at the contractually agreed rate of 12% to the date of judgment December 8, 2020 totalling USD \$14,552.35, which is computed as follows:
 - a. Invoice No. 31001 dated 1 February 2019 in the sum of US \$30,210.80 from 15 February 2019;
 - b. Invoice No. 31006 dated 28 January 2019 in the sum of US \$12,244.00 from 16 February 2019;
 - c. Invoice No. 31009 dated 16 January 2019 in the sum of US \$23,690.75 from 1 February 2019.
- ii. Statutory interest at the rate of 5% on the judgment debt until the date of payment.
- iii. The Defendant is to pay the Claimant's costs on the summary judgment on the prescribed basis in the sum of TTD \$41,266.50.
- iv. The Claimant's Application for Summary Judgment is dismissed as to the amount of USD\$164,721.75 for invoices dated and in the amount as follows:
 - a. Invoice No. 30743 dated 28 December 2018- US\$79,022.00;
 - b. Invoice No. 30907 dated 20 February 2018- US\$34,962.50;
 - c. Invoice No. 31002 dated 18 January 2019- US\$50,737.25.

- v. The costs of this application will be costs in the cause.

EJD. Honeywell

.....
Eleanor Joye Donaldson-Honeywell
Judge