REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2012- 00691

BETWEEN

LAING SANDBLASTING & PAINTING CO. LTD.

Claimant

AND

DOC'S ENGINEERING WORKS LTD

Defendant

BEFORE THE HONOURABLE MADAM JUSTICE JUDITH JONES

Appearances:

Ms. A. Hasnain for the Claimant.

Mr. V. Maharaj instructed by Mr. S. Seecharan for the Defendant.

RULING

1. Before me is the Claimant's application for summary judgement. I am required by this application to determine whether the Defendant has a realistic prospect of success on its defence to the claim. In this regard a realistic defence is one that carries some degree of conviction and is more than a defence which is merely arguable. [1] It is for the Claimant to satisfy me that the Defendant has no real prospect of succeeding at trial.

2. The claim is for breach of a contract for bailment made between the Claimant and

[1] per Kangaloo J. A. : Western United Credit Union Co-operative Society Limited v Corine Ammon, Civil Appeal No. 103 of 2006 paragraph 3.

the Defendant. By and large the facts as recited by the statement of case and defence are not in dispute. It is not in dispute that the Claimant is the owner of a compressor which was damaged while in the custody of the Defendant pursuant to a contract of hire. Nor is there any dispute with respect to the costs of repairs to the compressor or the amount spent by the Claimant on the adjuster's report.

3. Given the manner by which this case has been pleaded it is perhaps prudent for me at this stage to put to rest the suggestion made in the defence to the effect because the compressor was the subject of an all risk insurance policy taken out by the Claimant and the Claimant received monies pursuant to that policy for the damage to the compressor this somehow prevents it from pursuing this claim. I accept the Claimant's submission that this flies in the face of the principles of subrogation. I am heartened by the fact that the position taken in this regard in the defence is not repeated in the Defendant's submissions before me. In my opinion any suggestions in this regard made in the defence are not maintainable and do not present a defence to the claim.

4. Both the Claimant and the Defendant accept that it was an implied term of the agreement for hire that the Defendant would take reasonable care of the compressor while it was in its custody, care and control. The Defendant however denies that it failed to take reasonable care of the compressor while in its custody and control[2].

5. In this regard the burden of proof is on the Defendant as bailee to prove that the

[2] paragraph 3 of the defence

loss or damage occurred without any neglect, default or misconduct on its part or the part of any servant to whom it may have delegated its duty[3]. I accept the submission of the Defendant that this burden is an evidential one. It therefore requires the Defendant to put before me evidence from which I can reasonably come to the conclusion that it has discharged the burden upon it.

6. In order to do so however the Defendant must first of all by way of the defence filed state the facts upon which it relies to dispute the claim against it.[4] A failure to do so precludes a defendant from relying on an allegation which was not mentioned in the defence unless the court gives permission to do so.[5] The question of my permission does not arise in these circumstances. For the Defendant to be able to lead any evidence to discharge the burden upon it the allegations or statement of facts upon which it relies must first of all be adduced in the defence filed.

7. At this stage therefore I must consider whether the facts as placed before me in the defence, if proved, are sufficient to discharge the burden of proof on the Defendant. If I am of the opinion that the facts pleaded are not sufficient to discharge the burden then, in my view, it follows that the Defendant has no realistic prospect of success on its defence to the claim. If however I am satisfied that the facts pleaded, if proved, are sufficient to discharge the burden on the Defendant then the Claimant's application fails and the case must go to trial.

8. According to the defence pleaded the compressor was to be used by both the

[3] Halsburys laws of England, volume 2, fourth edition reissue paragraph 1840
[4] Part 10.5 of the rules
[5] Part 10.6 of the rules

Defendant's and Mittal Steel Ltd. employees.[6] With respect to that paragraph of the statement of case which avers that in breach of the agreement for hire the Defendant did not take due, or proper care of the compressor while it was in its care and custody[7] the Defendant pleads that:

(a) in order to complete the job at Mittal Steel Ltd. the compressor was required to be moved from one area to another. This was done with the assistance of an overhead crane owned by Mittal Steel Ltd; slings are attached onto the lifting log of the compressor which is manufactured for such purpose and lifted to the designated area.

(b) on the 11th day of March 2008 while being lifted the slings gave way and the compressor was damaged as a result of the fall. This was purely an accident; it was neither intentional nor malicious.

(c) all equipment including the slings used to lift the compressor at Mittal Steel Ltd. are of superior quality as they are all inspected periodically by an approved organization, and their safety seal or stamp of approval is affixed on same before it is used.

9. The Defendant avers that the damage sustained by the compressor was neither spiteful nor intentional, nor was it due to any negligence on the Defendant's part but purely accidental in nature. The Defendant further states that the Industrial Estate is a very volatile, dangerous and unpredictable area, whereby, despite all of the safety measures, policies, procedures and precautions in place accident often occur.

[6] Paragraph 2 of the defence
[7] Paragraph 5 of the statement of case

10. By its defence therefore the Defendant admits that:

1. as the hirer it was under a duty to take reasonable care against any damage to the compressor but denies that it failed to take such reasonable care;
2. the compressor was damaged as a result of a fall which occurred when the slings of an overhead crane owned by Mittal Steel Ltd. gave way; and
3. the compressor was to be used by both its employees and the employees of Mittal Steel Ltd.

11. The only additional facts given by the Defendant in the defence with respect to the circumstances in which the compressor was damaged are: (a) slings are attached unto the lifting log of the compressor which is manufactured for such purposes; and (b) all Mittal Steel's equipment including the slings were of superior quality because they were inspected regularly by an approved organisation and a safety seal or stamp of approval is affixed before they are used.

12. From these facts the Defendant concludes that the fall was purely an accident and not due to any negligence on its part. Unfortunately for the Defendant its conclusions are not facts. Indeed, it is the Defendant's duty to place before me facts from which I can draw these conclusions. While the Defendant also describes the general conditions which obtained in the Industrial Estate, in my opinion, in the absence of a reference to and details of the actual safety measures, procedures and precautions that were put in place to avoid this accident this general description does not assist the Defendant.

13. The only facts adduced in the defence from which the Defendant is asking me to conclude is that it took reasonable care of the compressor is the fact that all Mittal Steel's equipment are inspected periodically and a safety seal or stamp of approval is affixed on them before use. It must be noted that there is no averment that this was in fact the case with the slings used. More importantly the Defendant does not plead that the slings broke. The use of the words "gave way" could for example refer to the fact that the slings were improperly attached to the compressor. In these circumstances the fact that the equipment was inspected periodically does not necessarily disprove a lack of reasonable care on the part of the Defendant or its servants in ensuring that the compressor would not be damaged while being lifted and in particular that the slings would not give way.

14. At the end of the day the difficulty faced by the Defendant is that it fails to plead what it or the persons employed by it did in the particular circumstances in discharge of its duty to take reasonable care of the compressor. In my opinion the fact that the slings have been inspected periodically by an approved organisation and a safety seal or stamp of approval affixed before they are used, even if proved, will not by itself satisfy a court that the Defendant has taken all reasonable steps to avoid the damage that occurred. In my view the consequence of this omission is that the Defendant will be unable at trial to lead any evidence as to what steps were taken at the time by the Defendant or its servants to avoid the damage that occurred. In the absence of such a plea I am satisfied that given the burden of proof upon the Defendant in this regard the Defendant has no realistic prospect of success on its defence to the claim.

15. In the circumstances the Claimant is entitled to summary judgement on the whole of its claim. Accordingly the Defendant shall pay to the Claimant damages in the sum of $170,997.25 together with interest and the costs of this application and of the claim.

Dated this 20th day of November, 2012.

Judith Jones
Judge