REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE
SUB REGISTRY, SAN FERNANDO

Claim No. CV2018-04092

Between

PREMIER WELDING AND LOGISTICS SERVICES LIMITED

Claimant

And

TITAN LOGISTICS AND SUPPORT SERVICES LIMITED

Defendant

Before the Honourable Mr. Justice R. Rahim

Date of Delivery: September 07, 2021

Appearances:

Claimant: Mr. R. Kawalsingh and Ms. A. Roopchansingh.

Defendant: Mr. A. Pariagsingh instructed by Ms. A. Ramnanan.

JUDGMENT

Introduction

1. This is a claim for money allegedly owing by the Defendant to the Claimant for services provided to clients of the Defendant. The Claimant, (a private company engaged in the business of the provision of industrial and other supplies as well as a range of inspection services, equipment rentals and the provision of other services in marine and offshore construction), claims that the Defendant (a private company engaged in providing services including logistics, liner, port agents project coordinating and chartering) was an independent contractor that hired it to provide services but the Defendant, says that it was an agent acting on behalf of a principal and is therefore not liable to satisfy the debts incurred by the principal. The main issue in this case therefor concerns the nature of the relationship that existed between the Claimant and the Defendant.

2. In that regard is a matter of common knowledge that logistics companies such as the Defendant have been a feature of the national commercial landscape for many years having regard to the integral part that petroleum production plays in the economy of Trinidad and Tobago and the need of foreign corporations to outsource service resources through the use of the logistic companies.

The Claimant's case

3. The Claimant has claimed the sums of USD$314, 404.33 and TTD$805, 564.74, being outstanding sums due and owing on invoices issued by the Claimant to the Defendant. The case for the Claimant is that it was contracted by the Defendant to provide certain services (albeit on vessels owned by International third parties). Invoices for the work performed were presented to the Defendant from time to time and

although the Defendant paid some of the Claimant's invoices, the sum of USD$314,404.33 is due and owing for invoices 106, 109, 110-112, 116-118, 120-132, 204-206, C/N225, 241, 243, 245, 251, 252, C/N260, C/N271, 311, 325, 327, 355 and 359.

4. It is also the Claimant's case that the Defendant used a lower rate than the prevailing bank rate in its conversion of the USD to TTD, resulting in an underpayment of TTD$805, 564.74. in relation to sums already paid in relation to invoices 20, 23-25, 28-36, 39-45, 48-52, 57, 60-64, 67-69, and 74-79.

5. This claim relates to invoices outstanding in relation to work performed by the international companies Harkand, EMAS, Technip and DB Offshore.

6. Finally, the Claimant avers that it is entitled to be reimbursed for the cost of financing, overdraft and mortgage facilities at the commercial lending rate of 10% per annum from the date of its claim.

The Defendant's case

7. The Defendant denied that it was liable for the money owing and averred that it acted in the capacity of agent for its international clients (the Principals). It pleaded its standard contract entered into between it and the Principal (principal agreement) and claimed that the hiring of the Claimant was in keeping with the specific term set out in the principal agreement in relation to sub-contracting. It is to be noted that the Claimant was not a party to the principal agreement.

8. In so doing, the Defendant set out its standard process for the hiring of third parties. Following a request from the principal, the Defendant would request a quotation from the third party. Once the quotation is

approved by the principal, a purchase order is issued to the third party. Thereafter, and upon the completion of the works, the third party would submit an invoice to the Defendant who pays the invoice upon receipt of payment from the principal.

9. The Defendant says that payment of the Claimant's invoices were usually paid in TT dollars and any invoice paid in US dollars is usually based on the availability of the foreign currency. Further, the Claimant rejected a payment in the sum of TTD$556, 234.24 and requested the same in US dollars.

10. So that the Defendant says, it is not liable as it was merely an agent acting on behalf of several principals.

The Reply

11. In response to the process flow set out by the Defendant, the Claimant replied that it has never received purchase orders from the Defendant for goods and services and averred that all requests for services were made by the Defendant by email.

Issues

12. The issue is therefore;

    i. Whether there existed a relationship of principal/agent between the international companies and the Defendant or whether the Defendant was an independent contractor.
    ii. If the Defendant was acting as an independent contractor then what is the amount due and owing to the Claimant.
    iii. If the Defendant was acting as agent then is the Defendant personally liable to pay the debt.

Evidence of the Claimant

The Claimant called one witness, Anderson Martin.

Anderson Martin

13. Anderson Martin ("Martin") is the Managing Director of the Claimant. He is responsible for making almost all of the Claimant's contractual arrangements. During the period of September 2015 to April 2017, Martin managed the provision of the Claimant's goods and services ordered by the Defendant for the benefit of several international companies.

14. Martin explained the relationship between the Claimant and the Defendant. The Defendant would ask whether the Claimant could provide different services and goods on-board the vessels of international clients, as they would dock at various ports in Trinidad. Most of the discussions for services were conducted verbally and by email correspondence with the Defendant's Executive Chairman, Sieunarine Rambhajan. The Claimant received no purchase orders for any of the services to be performed or goods to be delivered.

15. After the request for service or goods to be supplied (for the sake of convenience in this judgment, a reference to services includes the supply of goods), Martin would email the Claimant's quotation for the required service to Rambhajan. Once the Defendant agreed on the price, the Claimant and Defendant would then agree on a timeframe for commencement and completion. The latter process involved the passing of several items of correspondence between the Claimant and the Defendant regarding the various methods to be employed and the making of arrangements with the Customs and Excise Division for the entry of personnel, tools and equipment by the Claimant at the various Ports. The expenses for the making of such arrangements were always borne by the Defendant. In that regard letters under the hand of the

Defendant addressed to the Customs Division were required for the entry of the personnel of the Claimant. Some of these letters were attached to the witness statement of Martin.

16. A perusal of these letter demonstrate that the Defendant on every occasion, set out clearly that is had been appointed local agent for the relevant vessel by the international company that owned the vessel.

17. Upon completion of the work, Martin would prepare an invoice and submit same to the Defendant for payment. These invoices were accepted and received by the employees of the Defendant.

18. According to Martin, all the Claimant's orders and directions came from the Defendant. On many occasions, the Defendant was unable to answer questions raised by the international companies that were relevant to the provision of the services and so referred the international companies to the Claimant. It was only at the request of the Defendant, that the Claimant had direct communication with the international companies to discuss any concerns and answer questions raised by them.

19. Further, the Claimant submitted its invoice to the Defendant directly and, in many instances, it accepted the invoices and paid them immediately. He referred to the relationship as a healthy business relationship. The absence of purchase orders was not unusual nor impermissible as very often the request for services was urgent.

20. Martin testified that, in some instances, the Claimant waited until the international company paid the Defendant to be paid. However, Martin maintained that he was never informed that the Defendant was acting as agent for the international companies and so this was not a term of the contract between the Claimant and the Defendant. In addition,

none of the Defendant's correspondence to the Claimant mentioned that it acted as agent for the international companies or that, to pay the Claimant's invoices, payment had to at first be received from the international companies. Many payments were made by the Defendant almost immediately once its employees signed off on the invoices.

21. Martin pointed out that the accurate sum owed was USD $340,223.26 as per invoice number 5 of the Claimant and not USD $314,401.14, but Rambhajan pleaded with Martin to reduce this sum and he agreed so to do in good faith and in the hope that when reduced the payment would be made. This was the same with the sums owed on invoice number 6, so that even though when tallied the amount owing on the invoice appears to be USD$2,295,552.23, he agreed to accept the sum of USD$2,223,459.85. He did this by the issuance of credit notes for the balance outstanding. In respect of the latter, the Defendant used the lower conversion rate and paid the sum of TTD 14,007,797.00. However, he testified that the proper rate to be used was the bank rate for the period 2015 to 2017 which when used results in the sum of $14,739,723.85. The difference is therefore his claim on invoice 6 in the sum of TTD$731,926.85.

22. Martin says the Claimant required certain overdraft facilities to effectively use and carry out its services. However, the Claimant has been allegedly forced to pay overdraft interest at the rate of 10% per annum.

<u>Cross-examination by the Defendant</u>

23. Martin testified that in most instances, the Claimant submitted its quotation based on phone conversations and emails with the Defendant. He explained that at times he also submitted the quotations to the project team of the international companies

(Harkand, EMAS, Technip and DB Offshore) directly. As to whom he submitted the particular quote, it was his evidence that he would submit the quote to whoever made the request. He admitted that on occasions, the international company would make the request directly to him and so he would submit the quote directly to that company and not directly to the Defendant.

24. He further explained that the international companies would approve the quotation sent to them by the Claimant and indicate to it that it should go ahead and perform the works. Martin testified however that when a vessel docked in Trinidad, the letters of authorization were never issued by the Claimant, but by the Defendant[1].

25. Martin maintained that the Claimant was instructed by the Defendant to bill through them, even if the Claimant received a request from the international companies or the Defendant[2]. He was clear in his evidence that he submitted the invoices to the Defendant even in the case where the international companies had made requests directly to him. Martin denied that there was ever an instance where the Claimant's quotations were rejected by the international companies. He said that where the price was not acceptable to the company making the request, he would negotiate the price with that company. He however accepted that where the request came from the international company, the quotes were pre-approved by them before being sent to the Defendant.

[1] See TB 1, PDF 218 namely a letter of permission dated August 1, 2016 from the Defendant seeking permission from Customs for the Claimant to allow its personnel and equipment on-board the vessel.

[2] See TB 1, PDF 323 namely invoice no. 122 stating the sum was "charged to Harkand".

26. Martin accepted that where the international companies made the request directly to him, he then liaised with the Defendant in relation to the subsequent arrangements. This he did by either an email or a phone call to the Defendant informing it that the international company wanted him to perform the services. He admitted that he had produced no such emails in evidence. He then changed his testimony to the contrary however, he was then confronted with the emails he had in fact produced which seemed to contain no such communication between he and the Defendant informing the Defendant that the international company had asked the Claimant to provide services.

27. In the case where the Defendant made the request to the Claimant, Martin at first stated that the quote he submitted to the Defendant was approved by the Defendant. He then said that there were approvals coming from two of them. When asked specifically about his quote having to be approved by the international company and then the Defendant, he stated emphatically that this was not the case. He then admitted that if the Defendant requested a quote he would not have known whether the Defendant needed to get the quote approved firstly by the international company before approving it itself. He said this was a matter between the Defendant and the international company. What followed was rigid cross-examination on the issue of approvals of the invoices but in the end his testimony remained that, he was not aware of whether there had to be approval as between the Defendant and the international company prior to approval by the Defendant.

28. He was also clear that none of the invoices were submitted to the international companies but were submitted to the Defendant. He also admitted that he was told on many occasions that the Defendant was awaiting payment from the international company so that it could pay the Claimant.

29. He admitted knowledge that Harkand and EMAS both filed for bankruptcy in the USA and that the Defendant through Rambhajan had informed him that as a result payments to the Defendant were delayed[3].

30. In relation to disputed invoices, Martin testified the following:

    i. Martin accepted that the Defendant did not instruct the Claimant in relation to the invoices listed in the Defence[4];

    ii. In relation to invoice 245, Martin did not know which international company the invoice was for but the invoice was submitted to the Defendant[5];

    iii. Invoices, 118, 206, 311 were not paid because at that time, the Claimant failed to provide supporting documents;

    iv. Invoices 310, 312-320 were eventually paid, and Martin clarified that an invoice can be paid in USD or the bank conversion rate in TT on the given day.

Evidence of the Defendant

The Defendant called two witness, Shannon Pierre and Dave Kumar.

[3] See TB 3, PDF 68 namely an email dated August 25, 2017 from Sieu Rambhajan to Anderson Martin that states the Defendant is awaiting funds from the international companies.
[4] See TB 1, PDF 438 para. 9 of the Defence.
[5] See TB 2, PDF 311 namely invoice number 245 dated December 14, 2016 that referred to a vessel.

Shannon Pierre

31. Shannon Pierre ("Pierre") is employed by the Defendant as a Logistics Coordinator. His responsibilities involved obligations to Harkand and by extension the Defendant. He explained that the Defendant engaged the services of the Claimant to provide sea fastening services and it was aware of the Defendant's process flow. In addition, the Claimant knew of the Defendant's contractual obligations between the international company and the Defendant acting in the capacity of agent.

32. Pierre similarly explained the process flow when engaging the services of a sub-contractor (the Claimant). He testified that the process flow is practiced by all other third party suppliers. The process if that the Defendant receives a formal request from the principal and then the Defendant requests a quotation on behalf of its client from the Claimant for its goods and services.

33. In a similar situation, Pierre explained that members of EMAS project team, Nicolas Rusch and Stephen Immel directly requested materials and services from the Claimant. As a result, the Defendant was placed in a delicate situation whereby Pierre had to request documentation in order that the representatives of EMAS to receive approval from Customs.

34. Although there were times when payments were delayed, once the Defendant received payments from its principal, the Claimant was consistently paid for its services. However, in some circumstances, the Claimant's invoices were rejected by the principals due to insufficient relevant documents.

35. Pierre testified that the Claimant never objected to the Defendant's methods of payment until the commencement of this claim. Pierre also

maintained that the Defendant had always been appointed agent of the respective principal (EMAS) and upheld its responsibilities as agent.

Cross-examination by the Claimant

36. Pierre testified that the Claimant was aware that the Defendant acted in the capacity of an agent for these international companies[6]. Pierre explained that the Defendant would have tendered for a contract with the international company and if successful was appointed agent.

37. In relation to the process flow to be followed, Pierre testified that he verbally informed Martin of the said process flow. The process flow is that an international company sends a formal request to the Defendant to carry out a particular service, who in turn requests a quote from the Claimant for the said service. Then, the international company approves the quote and the Defendant issues a purchase order to the Claimant. Pierre accepted that there was no documentary evidence of any purchase orders made by him before this Court. He also could not say whether the Defendant informed the Claimant of this process and whether that the Claimant was having issues with outstanding payments.

38. Pierre explained that once the work is carried out by the Claimant, an invoice is submitted to the Defendant, which is then forwarded to the international company for payment. According to Pierre, any price negotiations on the quote should always go through the Defendant, but the Claimant had to consent to the negotiation. In addition, in some instances, negotiations took place between the Defendant and the

[6] See TB 1, namely clause 9.1 of the Harkand Contract Master Services Agreement; Bourbon agreement PDF 514, clause 16; EMAS agreement PDF 467 clause 3.

international company, and thereafter, Martin would be informed of the finalised price.

39. According to Pierre during the period of April to September 2016, he was unaware that the Claimant communicated directly with EMAS for the provision of goods and services. However, Attorney referred him to an email correspondence in which he was copied on for the supply of DNV containers on behalf of and requested by EMAS. Pierre explained that this was one occasion[7].

40. He further explained that the Port knew that the Defendant was an agent of EMAS and importantly, the Claimant requested clearance from Customs for vessels entering the Port through the Defendant. Further, Pierre testified that any invoice paid by an international company to the Defendant is paid to a third party.

41. It was also his testimony that the Defendant would pay the Claimant once it received payment from the international company. He admitted that at no time did he inform the Claimant of the fact that the Defendant was agent and would only make payments to it when payments were received.

Dave Kumar

42. Dave Kumar ("Kumar") is the Manager of Operations/Logistics Manager of the Defendant. Familiar with the practice and procedure adopted by the Defendant in its business dealings.

    Kumar explained the Defendant's process flow when making a purchase for the Defendant's principal. According to Kumar, there was never a purchase order book or form so the Defendant would make the request verbally or via email.

[7] See TB 1, PDF 507-510.

43. In relation to Harkand, Kumar states that the Claimant did business directly with Harkand. Kumar explained this was discovered when the Defendant received no response to its quotation request. However, the Defendant received calls from the Claimant when it could not access its personnel and equipment. This was a result of the Claimant's dealing directly with Harkand which was against the Defendant's procedure.

44. As such, the Defendant was placed in the position to confirm with Harkand a delivery from the Claimant and prepare the necessary documentation for Customs to approve the Claimant's personnel and equipment for delivery on the vessel or to the warehouse. Customs also contacted the Defendant informing it that Kane requested equipment and staff to offload stores and supplies for Harkand.

45. In relation to payment for the Claimant, the Defendant paid by means of Trinidad and Tobago cheques, wire transfers, and US drafts and it never received any query or complaint from the Claimant about the previous methods of payment.

Cross-examination by the Claimant

46. Kumar similarly stated that invoices from the Claimant were always approved by the international company. Kumar testified that the Defendant maintained an informal relationship with the Claimant and requests for services were made verbally or by email. Kumar could not speak to the terms of the agreements the Defendant entered into with the international companies.

47. Kumar supported the testimony of Pierre that the Claimant was aware that only when the Defendant was paid by the international companies would it be paid. Kumar could not state if Martin was aware of this process flow.

48. Attorney referred Kumar to two invoices with the same sum of $15,005.00 USD[8]. He was unable to say why the sum was the same and was unaware of the process when an invoice is received by the Claimant.

49. Kumar testified that Harkand did not communicate with the Defendant or its representatives when it formed a relationship with the Claimant. However, when referred to an email letter Kumar accepted that Harkand sought the contact information of Martin[9].

50. Kumar explained that the port contacted the Defendant when vessels were docked, as it was the agent for the international companies. He could not recall if there was a relationship between the Claimant and the Defendant before July 2015[10].

The Court's Approach

51. In ***Horace Reid v Dowling Charles and Percival Bain***[11], Lord Ackner delivering the judgment of the Board stated that where there is an acute conflict of evidence, the trial judge must check the impression that the evidence of the witnesses makes upon him against:

i. Contemporaneous documents;
ii. The pleaded case; and
iii. The inherent probability or improbability of the rival contentions.

[8] See TB 2, PDF 401, namely an invoice dated October 20, 2017, from the Claimant addressed to the Defendant and an invoice dated October 17, 2017, from the Defendant addressed to Technip.

[9] See TB 1, PDF 24 namely an email dated September 16, 2015 from Harkand addressed to Kumar to provide contact information for Martin.
[10] However See TB 1, PDF 604, 605 namely email correspondences in 2016 that shows a relationship between the Claimant and the Defendant.
[11] Privy Council Appeal No. 36 of 1897 at page 6.

First Issue

Whether there existed a relationship of principal/agent between the international companies and the Defendant or whether the Defendant was an independent contractor

Submissions of the Claimant

52. The primary submission of the Claimant is it was employed by the Defendant as a sub-contractor to perform services requested by the international company.

53. The Claimant relied on the decision of ***Aqualon (UK) Ltd/Shipping Co v Vallana*** (1994) 1 Lloyd's Rep. 669, where Mance J (as he then was) at p. 674 identified a few factors to determine whether a party to a contract of carriage was a forwarder or carrier:

    a. *the terms of the particular contract including the nature of the instructions given, for example whether they were to carry or for carriage or were to arrange carriage (although in Tetroc the use of the words "kindly arrange onward transport" was not regarded as of much importance in the face of what were regarded as other indications of responsibility as carriers); in this connection the nature and terms of any governing conditions also arise for consideration;*

    b. *any description used or adopted by the parties in relation to the contracting party's role;*

    c. *the course of any dealings, including the manner of performance – at least in so far as it throws light on the way in which the parties understood their relationship; thus whether or*

not the contracting party informed the goods- owner of or identified the actual arrangements made for carriage may be one factor in determining the former's role (see Tetroc at p. 195 col.2);

d. *the nature and basis of charging (in particular whether an all-in fee was charged, leaving the contracting party to make such profit as he could from the margin between it and costs incurred); this was a factor to which Mr Justice Hobhouse in the circumstances of Elektronska attached considerable significance (cf. p. 52, col.2), although in Texas Instruments it was outweighed in by other factors;*

e. *the nature and terms of any CMR note issued..."*

54. The Claimant submitted that it is important to interpret the terms of the various contracts entered into between the Defendant and the international companies. The Defendant was not an agent whereby it arranged the performance of work and services on behalf of the international companies. The Claimant also raised the point that in the above agreements, the Defendant at its own expense insured the international companies' vessels in its name or the name of the international company.

55. The Claimant further submitted that the use of the word 'agent' is used in a non-legal sense and does not change the circumstances of there being no contractual relationship between the international companies and the Claimant.

56. In relation to the claim for invoices 106, 109, 110-112, 116-118, 120-132 the Claimant submitted that Harkand requested services directly from the Claimant following the Defendant's provision of the

Claimant's contact information to them. In addition, the Claimant's invoice No. 245 was also issued following the Defendant's provision of the Claimant's information to Bibby Subsea.

57. The claim for invoices 204-206 and C/N 225 was due to the direct request by the Defendant to provide DNV containers on board EMAS' vessel. Likewise, the Defendant directly requested the service of the Claimant which accounts for the claim of invoices 241, 243, 251, 252, 325, 327, 355, 359 (Technip) and 311 (Bourbon).

58. The Claimant submitted that the Defendant's preparation of customs documents is evidence of effecting the performance of services on behalf of the international companies. The Claimant further says that all of its invoices were stamped and signed off by the Defendant which supports that there was a contract with the international company to perform requested services through the employment of the Claimant. It used an example of an invoice was submitted to Technip that was rejected, re-submitted and subsequently approved. Technip who in turn submitted same under a subcontract reference number.

Submissions of the Defendant

59. The primary submissions of the Defendant is that it sub-contracted the Claimant for the provision of sea fastening services.

60. To begin with, the Defendant states that although there were no official purchase order forms, emails generated between the Claimant and the Defendant can take the form of a purchase order, which is in compliance with the Defendant's process flow.

61. The Defendant also relied on the Harkand and EMAS agreement in submitting that it acted as agent of the international companies[12].

62. The Defendant relied on the case of ***H.J. Stauble Limited v Amertrin Marine & Logistics Services Limited***[13] in its argument that it always acted as agent and facilitated transactions between the Claimant and the international companies. According to the Claimant, this case can be distinguished from the instant case, because the agent in ***H.J Stauble Limited*** provided administrative or processing fees. In this case, Bereaux J (as he then was), found that there was no privity of contract between the parties, and therefore no liability was incurred by the Defendant.

63. In further support that the Defendant acted as agent, it referred to the correspondence from Martin to Harkand and Technip in which the Claimant accepted that its quotations had to be approved by the international companies. The Defendant also argued that the Claimant required an authorization letter from the Defendant addressed to Customs. Further, the Defendant relied on a recommendation letter on behalf of the Claimant to provide sea fastening services for Dongbang Transport Logistics Co. Ltd[14].

64. Finally, the Defendant submitted that the Claimant submitted its invoices to the Defendant and it would add its agent fee then submit same to the international party. It is only when the invoices were approved by the international company that the Claimant was paid. In response to this point, the Claimant submitted that the Defendant cannot raise this new averment. Further, the Claimant made the point

[12] See TB 1, PDF 445 namely clause 2.6 of the Harkand agreement; and TB 2, PDF 469 namely the EMAS agreement, clause 5.
[13] CV2008-00195
[14] See TB 1, PDF 227 namely a letter of recommendation dated November 7, 2017.

that the Defendant did not submit a separate invoice representing agency fee to the international companies.

Law and Analysis

The Law of Agency

65. The author of **Bowstead and Reynolds on Agency**[15] states succinctly:

Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly consents so to act or so acts.

. . .

Where the agent's authority results from a manifestation of consent that he should represent or act for the principal expressly or impliedly made by the principal to the agent himself, the authority is called actual authority, express or implied. But the agent may also have authority resulting from such a manifestation made by the principal to a third party; such authority is called apparent authority.

66. The learned authors of Halsbury's[16] defined the law of agency as:

The terms 'agency' and 'agent' have in popular use a number of different meanings, but in law the word 'agency' is used to connote the relation which exists where one person has an authority or capacity to create legal relations between a person occupying the position of principal and third parties.

The relation of agency typically arises whenever one person, called the 'agent', has authority to act on behalf of another, called the 'principal',

[15] (17th ed., 2001)
[16] **Halsbury's Volume 1 (2017) para 1**

and consents so to act. Whether that relation exists in any situation depends not on the precise terminology employed by the parties to describe their relationship, but on the true nature of the agreement or the exact circumstances of the relationship between the alleged principal and agent. If an agreement in substance contemplates the alleged agent acting on his own behalf, and not on behalf of a principal, then, although he may be described in the agreement as an agent, the relation of agency will not have arisen. Conversely, the relation of agency may arise despite a provision in the agreement that it shall not.

A servant or an independent contractor, though not necessarily the employer's agent, may often have authority to act as such when relations with third parties are involved. Nevertheless, an agent, as such, is not a servant. An agent, although bound to exercise his authority in accordance with all lawful instructions which may be given to him from time to time by his principal, is not, unless he is also the servant of the principal, subject in the exercise of his authority to the direct control or supervision of the principal.

The essence of the agent's position is that he is only an intermediary between two other parties, and it is therefore essential to an agency in this sense that a third party should be in existence or contemplated. If a person who is employed as an agent to buy or sell property for another seeks to sell his own property to his principal or to buy the property of his principal, he violates the first condition of his employment, and changes the intrinsic nature of the contract between them.

67. The learned authors[17] then also described how an agent's authority may arise:

[17] **Halsbury's Volume 1 (2017) para 29**

As has been previously stated, the authority of the agent may be derived expressly from an instrument, either a deed or simply in writing, or may be conferred orally. Authority may also be implied from the conduct of the parties or from the nature of the employment. It may in certain cases be due to the necessity of circumstances, and in others be conferred by a valid ratification subsequent to the actual performance. In addition, a person may appear to have given authority to another, and acts within such apparent authority may effectively bind him to the third party. There would also, in certain circumstances, appear to be the possibility that the court will imply an equitable agency where no agency exists at common law.

An agent cannot be said to have authority solely on the basis that he holds himself out as having it.

68. In a general sense, an agent is a person who introduces parties that may wish to transact business. The act of introducing those parties in no way binds them to the transaction. In the decision of ***Compression & Power Services (1988) Limited v Power Generation Company of Trinidad and Tobago***[18], the Court of Appeal agreed with the trial Judge that the nature of the contact was one to effect carriage and not merely to arrange the carriage of the generator. Mendonça J.A. cited the English Court of Appeal case of ***Marston Excelsior Ltd v Arbuckle Smith & Co***[19], in which the court ruled that the remuneration which the agent received for the transportation of the goods will determine if the role is one of agency. The court understands the court to be saying that each case turns on its own facts and the weight to be attributed to each circumstance may vary depending on the facts of the case under review.

[18] Civil Appeal No. P249 of 2012
[19] [1971] 2 Lloyd's Rep 306 (CA)

41. ….In this case, whether the Defendant (Arbuckle Smith) was liable for the loss claimed turned on whether it contracted as carrier or as forwarding agent. Lord Denning M.R. in the course of his judgment stated:

"I will take the points in order. First, Marston Excelsior say that Arbuckle Smith were not mere forwarding agents, but were themselves carriers. They say that Arbuckle Smith were head contractors who made a contract of carriage whereby they promised to carry the goods through from Rotterdam to Vienna; that Arbuckle Smith sub-contracted the transit from Rotterdam to Vienna to Rhenania, and Rhenania, in turn, sub-contracted the road portion from Bamberg and Regensburg to Schmidbauer. In answer, Arbuckle Smith say that they were forwarding agents in the ordinary sense of the word. They were not themselves carriers. They were only making arrangements with others to carry. They rely on the well-known words of Mr. Justice Rowlatt in Jones v European and General Express Co. Limited (1920) 25 Com. Cas 296 at p298:

"It must be clearly understood that a forwarding agent is not a carrier; he does not obtain possession of the goods; he does not undertake delivery of them at the other end unless prevented by some excepted cause of loss or something which affords an excuse. All that he does is to act as agent for the owner of the goods to make arrangements with the people who do carry – steamships, railways, and so on – and to make arrangements so far as they are necessary for the intermediate steps between the ship and rail, the customs or anything else…"

Discussion and findings

69. The written contract entered into between the Defendant and the International Companies is set out in as standard form contracts of the Defendant. The clauses of this contract must be examined but they are not by themselves determinative of the issue of agency. The court must examine all of the circumstances to determine whether the contract was one on the part of the Defendant to effect the services or merely to arrange the services.

The terms of the contract between the Defendant and the International companies

70. The contracts between the Defendant and Harkand and EMAS-AMC Inc. are two separate contracts.

The Harkand contract[20]

71. This contract is named a Master Logistics Service Agreement. Clause 1.1. defines the scope of services and recites that the Contractor (Defendant) agrees to supply a wide range of services to the Company (Harkand). It also provides for executed purchase orders. Clause 1.4 provides that the Defendant may not utilize any third party in connection with the performance of the services without Harkand's prior express written consent. Any such party is referred to as a sub-contractor.

72. Clause 2.1 falls under the rubric of Standards of Performance; Relationship of the parties. It provides that the Contractor shall perform *or cause to be performed* (emphasis mine) all of the services in a competent and workmanlike manner and that all goods,

[20] Written contract attached to Defence as "A"

equipment, materials or supplies furnished by it or any of its sub-contractors will be free from defects.

73. Clause 2.7 makes it abundantly clear in terms that the Contractor is at all times an independent contractor and that the contract does not create an agency, employment, partnership, joint venture or fiduciary relationship between the Contractor and Harkand. Further, the clause prohibits the Defendant from representing to any person or entity that it is an agent. Finally, under clause 2.7 the Contractor remains solely responsible for the payment of all compensation, benefits and employment taxes for the sub-contractors.

74. Under the rubric Payment and Invoicing, the contract provides at clause 3.1 that the consideration for the contract is to be paid to the Contractor in accordance with set fees and a corresponding order. In that regard the Contractor is mandated to submit invoices for payment.

75. Other clauses provide for the Contractor to be responsible for insuring the goods and other insurance.

<u>The assessment of all of the relevant circumstances</u>

76. In the view of the court, the terms of the contract make it pellucid that the Defendant was an independent contractor contracted to supply the services and goods themselves. In that regard the agreement specifically excluded the relationship of agency between the parties and makes the Defendant solely liable for non-performance and breach of standards even though those breaches may be the fault of subcontractors. The agreement makes it clear that Harkand accepts that in the performance of its obligations under the contract, the Defendant may have to sub contract out some of the work. However, the essential clauses maintain that be that as it may, the Contractor

assumes the responsibility and liability for the performance any such sub-contractor even though approved by Harkand. This is entirely consistent with the existence of a contract that imposes the obligation on the Contractor to perform the services while acknowledging that it may need to sub contract in order so to do. Such terms do not derogate from the obligation imposed on the Contractor to perform the services.

77. Despite the terms of the contract, though it appears that the Defendant in fact conducted its business with the Claimant as though it was an agent of Harkand and not an independent contractor. In that regard, it was made clear that payment would only be forthcoming to the Claimant when the Defendant received money from Harkand. Further, that all quotations required the approval of Harkand for the job to go forward. The evidence of Martin is telling in that it demonstrates that even in the case where Harkand made a request directly to him, all further dealings including the approval of the quotations and invoices had to be secured and paid through the Defendant. In this regard, the court notes that there are several invoices that record that the invoices were charged to Harkand by the Defendant and Martin accepted this to be the case.

78. Additionally, the nature of the jobs for which the Claimant was hired related to the performance of services on and the provision of goods to ships owned not by the Defendant but by Harkand. The Defendant was therefore not contracting services for its use but on behalf of Harkand for the use and benefit of Harkand.

79. Further, the court has accepted that the Defendant did not disclose the agreement between itself and Harkand to the Claimant. However, the court finds that notwithstanding, the Claimant must have been aware that it was providing services to Harkand through the Defendant as an agent because of the course of dealings between the two parties over

the period. The court also accepts the evidence of Martin that he had been informed by Rambhajan on at least one occasion and by the Defendant throughout the course of dealings that the Defendant had to await approval of the invoice and payment by Harkand in order for the Claimant to be paid.

80. The court is fortified in its view by the evidence of Martin in cross-examination wherein he admits receiving some requests for services directly from Harkand but having at all times to then deal with the Defendant in relation to further arrangements for Port permission and payment in relation to those services which would have been performed on Harkand's vessels.

81. Finally, in relation to the fees chargeable two matters are of note. Firstly, the cost of the works were not approved by the Defendant but were at all times approved by Harkand even in the case where the Defendant negotiated the cost downward from that originally quoted by the Claimant. Even in such a case, the evidence is that the approval of Harkand was still required.

82. Secondly, the fees payable to the Defendant were set rates pursuant to the Fees/Charges set out in Exhibit B to the agreement between the Defendant and Harkand. While the details of the fee structure was not attached to the agreement, the fact that such a fee was paid in such a manner and on such a basis is not disputed and is therefore not in issue in this case.

83. Also, the agreement provides that after the expiration of one year, the fees were to be mutually agreed annually requiring written approval of Harkand. The fee payable to the Defendant was therefore mutually exclusive of the cost of the work, which would have been agreed by Harkand and subsequently invoiced. Further, that fee was a set fee which could only be changed by mutual agreement. It was not the case

therefore that the Defendant was free to charge the Claimant whatever rate or fee it desired thereby making its own profit margin on each job. This in the court's view is a major consideration, which while not a factor that outweighs the others is substantive so as to swing the pendulum much further in the direction of agency.

84. The court therefore finds that the Defendant was in law the agent of Harkand, its principal. The obligation of the Defendant was to arrange the provision of goods and services and not to provide them itself. The issue of whether the Defendant may have acted contrary to the terms of the agreement with Harkand is one between those parties on the contract. Suffice it to say that in the court's view, Harkand appeared to treat the Defendant as its agent in all dealings despite the terms of the agreement. It follows that Harkand treated the relationship between it and the Defendant as one of agency so that the Defendant was vested with actual implied authority to act as agent. In so finding, the court also finds that the fact that no purchase orders were received by the Claimant is of no moment to the issue having regard to the course of dealings.

<u>The EMAS-AMC Inc. contract</u>[21]

85. The terms of this contract are equally pellucid. EMA-AMC Inc. is referred to therein as the "Company" and the Defendant is referred to as the" Representative". The agreement is headed "Logistics & Customs Representative Master Service Agreement". Clause 5 thereof carries the rubric "The scope and extent of the appointment" and reads;

> *"The Company hereby appoints the Representative or its permitted assign as its true and lawful agent and attorney to act*

[21] Written contract also attached to Defence as "A" (second document)

on its behalf in customs and logistics related matters that may be transacted within the Market, subject to other limitations set forth herein."

86. Under the rubric "Obligations of the Representative" in clause 6, the contract reads;

"6.1 The Representative shall perform the Work for the Company in the Market with all due care and diligence and on such terms and conditions as set by the Company in the Agreement and applicable Work Order. At any given time, such services may include:

(a) Services related to the inward/outward clearance of the Company's vessel, equipment, and personnel, including customs, immigrations, and port fees, and payment of Customs Duties;

(b) Services related to the ground transportation and accommodation of Company personnel;

(c) Arranging for the provision of fuel and bunkers;

(d) Services related to the disposition of excess and refuse material; and

(e) Services related to the support of Company's business relationship with local vendors.

Notwithstanding the foregoing, Representative will not be liable for costs, fees, and/or penalties resulting from wrongful or inaccurate information provided by Company related to the inward/outward clearance of the Company's vessel, equipment, and personnel and Company shall indemnify and hold Representative harmless from claims of Third Parties arising therefrom."

87. Clause 6.3 reads;

> *"6.3 The Representative shall communicate all relevant information to the Company and shall comply with reasonable instructions concerning the work and other activities requested by the Company."*

Clause 6.4 reads;

> *"6.4 The Representative shall provide to the Company in respect of each Disbursement, transaction, or summary accounting made on the Company's behalf a copy of the accounting documents and/or data pertaining thereto."*

88. In relation to payment, under clauses 8, 9 and 10, the agreement is that the Defendant is paid the sum agreed to in the work order. This sum includes disbursements for which the Defendant is to be reimbursed. The effect of the clauses is that the amount to be paid to the Defendant is work specific and is to be reckoned in regard to each job but must be agreed by the Company. The agreement further provides for liability and indemnity, matters that are not relevant to the issue before the court.

<u>The assessment of the relevant circumstances</u>

89. The agreement clearly establishes a relationship of agency between the Defendant and EMAS-MC and the circumstances of the course of dealings between the parties also support this relationship. The evidence as applicable to Harkand is in large measure equally applicable here and the court sees no reason to repeat it. Suffice it to say that the court finds that it was equally understood by the Claimant that the Defendant was an agent of EMAS-MC and would routinely obtain instructions from them, approvals of quotations, work orders

and fee payments. The evidence shows that the Defendant would have to await funds paid in order to pay the Claimant. It was also clear to the Defendant that the service and goods being provided were being provided to EMAS-MC through its local agent the Defendant.

90. It follows that the Defendant acted as agent of EMAS-MC with the expressed authority so to do on the part of EMAS-MC and the court so finds.

91. When the findings made by the court are applied to the relationship between the Defendant and its other International clients, it remains clear that the approach of the Defendant has been consistent in that it has at all times acted as agent for those companies and those companies have treated the Defendant as its agent thereby vesting the Defendant with implied authority to act as agent in the case where no written agreement exists.

92. In relation to the case of ***H.J. Stauble Limited*** (supra), the court agrees with the submission of the Claimant that the facts of that case were different to the facts of this case. In that case, His Lordship found that there was not privity between the Claimant and the Defendant as the services performed by the Claimant for the third party (Superior) was not covered by the Master-Vendor contract between the Defendant and Superior. In the present case, the ruling of the court is that the services performed by the Defendant were so done as agent of its principal, namely the international companies so that the Principal is liable for the acts of the Defendant, its agent, the Defendant having acted on behalf of the International companies with expressed authority so to do. So that while the facts are distinguishable, the principles enunciated in ***H.J. Stauble Limited*** remain applicable.

Adverse Inference

93. The Claimant submitted that an adverse inference should be drawn against the Defendant's failure to call its Executive Chairman, Sieu Rambhajan who could have explained the contract documents entered into between the Defendant and the international companies and by extension the Claimant. Rambhajan also would have been able to clarify the foreign exchange rates for the invoices mentioned in paragraph 1 of the Defence.

94. In ***Ian Sieunarine v Doc's Engineering Works (1992) Limited***[22], Rajnauth-Lee, (as she then was), drew assistance from the decision of ***Wisniewski v Central Manchester Health Authority***[23] and the well-known principle that in certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.

95. In **Surujbally Samaroo v Kishore Ramsaroop and Ann-Marie Ramsaroop**[24], this court also considered the principle and outlined the test to be considered.

> *[58] Thus the Court must be satisfied first that a prima facie case had been made out on a material issue or that there is a case to answer on that issue. It is then for the Court to consider whether the proposed witness may have been expected to give material evidence on that issue. If the answer is yes, the Court must then have regard to the reason for the witness' absence and can then draw adverse inferences due to the absence of evidence.*

[22] HCA No. 2387 of 2000, p. 7.
[23] (1998) 7 PIQR 323.
[24] CV2007-03190

96. The court is of the view that a prima facie issue was not made out by the Claimant on the issue of agency/independent contractor and that in fact, when all of the relevant circumstances were considered, the evidence pointed firmly in the opposite direction than that which the Claimant sought to establish. Therefore the failure to call Mr. Sieu Rambhajan is not one in respect of which the court ought to drawn an adverse inference against the Defendant on the issue and the court respectfully declines the invitation so to do.

Third Issue: Whether the Defendant is personally liable for the Claimant's debt.

Submissions of the Claimant

97. The second issue does not arise for consideration having regard to the ruling of the court above.

98. The Claimant made the point that even if there was no privity of contract between the international companies and the Claimant, the Defendant nonetheless was obligated to provide services on-board the vessels of the international companies. Therefore, the Defendant is liable to pay the outstanding invoices issued by the Claimant.

99. The Claimant also submitted that there is no provision mentioned in the contracts above for the sub-contractor to be paid directly by the international company. As result of no expressed terms, the international companies have no right to pay the Claimant directly.

100. The Claimant also addressed the issue of the bankruptcy proceedings of Harkand and EMAS in submitting that it possesses no lien on the international companies for the money due to the Defendant to pay its outstanding invoices.

101. In relation to disputed exchange rates, the Claimant submitted that the Defendant accepted that it used a lower rate as opposed to the daily exchange rate. The Claimant argued that the Defendant did not contest this evidence and the Claimant is entitled to the outstanding sum of TTD$805,119.54.

102. The Claimant says if this court finds it acted as agent, the Defendant remains personally liable to pay the Claimant although it received no funds from the international companies and despite the bankruptcy proceedings.

Submissions of the Defendant

103. The Defendant did not directly address this issue. Though, it submitted that the parties were not free to contract without the terms of the contract approved by the international company. As such, the proper party to this claim ought to be the international companies. Further, the Defendant has not received payment from the international company for invoices 118, 206 and 311.

Law and Analysis

104. If there is a principal/agent relationship and the agent (Defendant) acts within its authority, the principal (international company) is bound by the acts of the agent. An agency relationship can be either expressed or implied (apparent).

105. The learned authors of Halsbury's[25] stated the following:

[25] **Halsbury's Laws of England, Volume 1 (2017), para. 126**

As a general rule, any contract made by an agent with the authority of his principal may be enforced by or against the principal where his name or existence was disclosed to the other contracting party at the time when the contract was made.

Where the principal is undisclosed, the authorised contract of the agent may also as a general rule be enforced by or against the principal. If, however, the agent contracts in such terms as to imply that he is the real and only principal, evidence to contradict the terms of the contract will not be admitted. Whether he has contracted in such terms or not depends upon the construction of the particular contract. Where an agent contracts in his own name but not in terms which are consistent only with his having done so as principal, oral evidence may be admitted to prove the identity of the principal.

If a person contracts with an agent honestly believing him to be the principal and makes the contract with the agent for reasons personal to the agent, the real principal cannot sue upon the contract. If, however, the agent's contract related to the principal's goods, the principal may have a right to claim against the other contracting party for conversion or upon an implied contract to pay for the goods.

Where a contract is made without the actual or ostensible authority of the principal, it cannot be enforced by or against the principal, unless it is a contract which purports to be made on behalf of a principal and is capable of being, and has been, ratified by the principal in question.

106. Further, in relation to liability the authors stated[26]:

[26] **Halsbury's Laws of England, Volume 1 (2017), para. 130**

Where a contract is made by an agent on behalf of a foreign principal there is no presumption that the agent necessarily incurs personal liability and has no authority to establish privity of contract between the principal and the third party. Where the intention of the parties is not clear or the terms of the contract are in dispute, the fact that the principal is a foreigner is a factor to be taken into account in determining whether in the circumstances the contract is enforceable by or against the foreign principal or whether the agent is personally liable.

107. Therefore having regard to the findings of the court, the principals remain liable for the sums due, the Defendant having acted within the ambit of its expressed and implied authority. In relation to the sum of TTD$805,119.54 being the amount owed when the proper bank rate is used, it must be borne in mind that the payment made by the Defendant was made in behalf of the principal who bears liability for the debt. To the extent that the Defendant admits that a lower rate was used, such an admission is not an admission of liability on the part of the Defendant for payment of the difference owed but is an admission that the principal owes such sum to the Claimant. The Defendant therefore bears no liability for the said sum in keeping with the ruling of the court above.

Disposition

108. I relation to costs, the court accepts the submission of the Defendant consistent with its own findings that it is a reasonable inference that the Claimant knew at all times that the Defendant was acting as agent of the international companies but proceeded nonetheless to pursue the claim. The court therefore sees no reason to

depart from the general rule that the successful party is entitled to its costs from the unsuccessful party. The order of the court is therefore;

i. The claim is dismissed.

ii. The Claimant shall pay to the Defendant the prescribed costs of the claim based on the value of the claim being one of USD$314,404.33 (converted at the date of judgment to TTD$2,134,549.79 at the rate of 6.79 TTD to one USD) plus TTD$805,564.74 amounting to a total value of TTD$2,940,114.53.

Ricky Rahim

Judge