IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2008 HCV 5290

BETWEEEN	**HELLMANN NETWORK INC.**	**CLAIMANT**
AND	**A.N.I. CARGO SERVICES**	**DEFENDANT**

Mr. Robert Collie for the Claimant instructed by Myers Fletcher & Gordon

Ms. Dianne A. Edwards for the Defendant

Heard: April 28 and May 20, 2010

Simmons, J (Ag.)

1. This is an application to set aside a judgment entered in default of acknowledgment of service and to set aside the order for seizure and sale.

2. The grounds on which these orders are sought are as follows:-

    i. That the Claim Form and the Particulars of Claim were not served on the Defendant.

    ii. That the Claimant and the Defendant are parties to an Agreement which requires that all matters in dispute should be referred to arbitration.

    iii. That the Defendant has a real prospect of successfully defending the Claim.

3. The applications are supported by the affidavit of Nicholas Redwood dated the 21st April 2010, the supplemental affidavit of Nicholas Redwood dated

the 26th April 2010 and the further supplemental affidavit of Nicholas Redwood dated the 28th April 2010

Chronology of the events

4. February 13, 2009 — A request for default judgment was filed and a judgment entered in the sum of US$5,136.43 and EUR$2,284.21 plus costs of J$22,130.19

February 15, 2010 — The Order for seizure and sale was made.

April 21, 2010 — The defendant filed an application to set aside the Order for Seizure and sale.

April 22, 2010 — The defendant filed an application to suspend the order for Seizure and Sale.

April 28, 2010 — The defendant filed an application to set aside the order for Seizure and Sale. This application was amended to request that the default judgment be set aside.

November 7, 2008 — The claimant filed an action in which it claimed the following:-

i. Specific performance of a contract for the delivery of cargo or damages for the loss/non-delivery of telephone equipment in the sum of US$8,229.00.

ii. The sums of US$5,000.00 and EUR$2,223.53 or the Jamaican dollar equivalent.

iii. Interest.

November 10, 2008 — Service was effected on the defendant by registered post.

5. The defendant sought to rely on the provisions of rules 13.2 and 13.3 of the ***Civil Procedure Rules, 2002 (C.P.R.)***. Under 13.2 the Court must set aside a default judgment if the defendant has not been served. Where rule 13.3(1)

is concerned, the court has the discretion to set aside the judgment if the defendant has demonstrated that he has a real prospect of successfully defending the claim. However, the court is obliged to consider two additional factors in the exercise of its discretion. They are:-

i. whether the defendant made the application as soon as "reasonably practicable" after finding out that judgment had been entered.

ii. whether a good explanation has been given for the failure to file an acknowledgement of service or defence.

Service

6. With respect to rule 13.2 Miss Edwards submitted that the Claim Form and the Particulars of Claim were never served at the registered office of the defendant as the company at the time of the purported service had changed its location.

7. The claimant on the other hand relied on the affidavit of service by registered post, deponed to by Harold Spencer which states that the Claim Form and the Particulars of Claim were sent by registered post to the defendant at 4 Fourth Avenue Newport West, Kingston 13 on the 10th November 2008. This was buttressed by the affidavit of Allan Laidley sworn to on the 27th April 2010, which states that a search was done at the Office of the Registrar of Companies which revealed that the defendant's registered office was in fact, situated at 4 Fourth Avenue Newport West, Kingston 13 at the date of posting.

8. The further affidavit of Nicholas Redwood, the General Manager of the defendant clarified the situation in that it exhibits a Notice of Change of Registered Office dated the 31st December 2004 which was not lodged at Office of the Registrar of Companies until the 3rd August 2009.

9. Mr. Collie submitted that the defendant was properly served within the meaning of **section 387** of the ***Companies Act*** when the documents were posted to the address stated in the documents lodged at the office of the Registrar of Companies. He further stated that the defendant could not rely on the Notice of Change of Registered Office as that document was lodged some time after service was effected. In addition, he pointed out that the defendant admitted receiving a letter that was sent to that address in July 2008 and that the claimant was entitled to rely on the information lodged at the office of the Registrar of Companies.

10. I accept the submissions of counsel for the claimant and find that the defendant was properly served with the Claim Form and Particulars of Claim.

11. It must now be considered whether the court should exercise its discretion in favour of the defendant under rule 13.3 of the ***C.P.R***.

Real Prospect of Success

12. Counsel for the defendant submitted that the defendant has a real prospect of successfully defending the claim.

13. In support of this argument she first indicated that the subject matter of the claim arose out of a written agreement between the parties which stipulates, that all matters of dispute are to be referred to arbitration.

14. Secondly, in its proposed defence which is exhibited to the supplemental affidavit of Nicholas Redwood, the defendant denies that it owes the sums claimed and puts the claimant to strict proof of the debt. The defendant also states that the particulars in relation to those sums are insufficient for it to provide a more detailed defence. In relation to the cargo, the defendant states that it was unable to clear the goods as a result of the claimant's failure to provide the necessary documentation.

Arbitration

15. Counsel for the defendant submitted that by virtue of clause 12.3 of the agreement between the parties, the dispute ought to have been referred to arbitration. The clause states:-

> *"All disputes between the Principal and the Agent arising from this Agreement shall be fully and finally settled under the rules of conciliation and arbitration of the International Chamber of Commerce (ICC) by one arbitrator appointed in accordance with the said rules………the venue for the arbitration shall be Aruba…."*

The claimant's failure to refer the matter to arbitration it was submitted, amounted to a good defence in law, and as such the judgment ought to be set aside.

16. Counsel for the claimant argued, that the defendant could not at this stage seek to rely on the arbitration clause as by making the application to set aside the judgment and the order for seizure and sale it had taken a step in the proceedings within the meaning of Section 5 of the ***Arbitration Act***. The section states:-

> *"If any party to a submission, or any person claiming through or under him, commences any legal proceedings in the Court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any steps in the proceedings, apply to the Court to stay the proceedings, and the Court or a Judge thereof, is satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."*

Mr. Collie relied on the case of ***Ford's Hotel Company Ltd. v. Bartlett*** [1896] AC 1 in which it was held by the House of Lords that where a defendant applies to extend the time in which to file a defence he would

have taken a step in the proceedings and would not be entitled to rely on the arbitration clause.

17. In this matter, counsel for the defendant has applied to set aside the judgment and the order for seizure and sale. There is no request for permission to file a defence although a draft defence was exhibited to the affidavit of Nicholas Redwood filed on the 26th April 2010. Does this amount to a step being taken in the proceedings? In this regard rule 13.5 of the ***C.P.R***. is instructive. The rule states:-

> *"Where judgment is set aside under rule 13.3, the general rule is that the order must be conditional upon the defendant filing and serving a defence by a specified date."*

18. In the circumstances, the fact that the defendant has not sought an order for its defence to be filed out of time does not change the nature of the application. Accordingly, it is my view that the defendant has taken a step in the proceedings.

19. It was also submitted, that the defendant has not demonstrated to the court that it was *"…ready and willing to do all things necessary to the proper conduct of the arbitration..."* as required by section 5 of the ***Arbitration Act.*** The case of ***Piercy v. Young*** (1879) 14 Ch D 200 was cited in support of this point. In that case the defendant applied for a stay of court proceedings on the basis that the agreement stipulated that disputes were to be referred to arbitration. The order was granted and the plaintiff appealed.

Jessell, M.R. stated that the court below should have required the defendant to produce an affidavit indicating *"his readiness and willingness to refer to arbitration"* before making a decision on whether to grant a stay of proceedings.

20. In this matter, no affidavits have been filed which indicate a state of readiness on the part of the defendant to proceed to arbitration.

21. Counsel for the claimant also submitted that in any event, a stay of proceedings could not be granted to allow the matter to proceed to arbitration after a judgment has been entered. In this regard, he relied on the decision of the Court of Appeal in ***Sommerville v. Coke & another*** (1989) 26 J.L.R. 550. In that case, the defendant appealed against an order refusing a stay of proceedings after a judgment in default of appearance for outstanding rental was entered against him. The lease agreement provided that money spent on repairs for damage arising from an Act of God was to be set off against the rental. Neither party attempted to use the procedure. The Court held that section 5 of the Arbitration Act could not have been intended to relate to a case in which a final judgment had been entered. The court reasoned that if the section were to apply to such cases, the arbitrator would be adjudicating on a matter already dealt with by the Court and such a situation, according to Forte, J.A. would be *"untenable"*.

22. Miss Edwards argued that the Arbitration Act was not applicable to this case as the agreement between the parties stipulated that the *"... Agreement shall be subject to and interpreted by the laws of Aruba"*.

23. The issue arises as to whether the choice of law clause applies to both procedural and substantive matters which may arise in a dispute between the parties. No submissions were made on this point. However, it is accepted that under the principles of private international law, that whilst the substantive rights of the parties to an action may be subject to foreign law all matters relating to procedure are governed exclusively by the lex fori. This point was made by Lord Hodson in ***Boys v. Chaplin*** [1971] A.C. 356 at 378-379, where he cited with approval the following statement of Lord Brougham in ***Don v. Lippmann*** (1837) 5 Cl. & Fin. 1, 13:-

> *"the law on this point is well settled in this country, where this distinction is properly taken, that whatever relates to the remedy to be enforced, must be determined by the lex fori, the law of the country to the tribunals of which the appeal is made."*

24. Lush, LJ in ***Poyser v. Minors*** (1881) 7 QBD 329 at 333 attempted to define the law of procedure in the following terms:-

> *"The mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right,*

> *and which by means of proceeding the court is to administer the machinery as distinguished from its product."*

25. It is however, recognised that the distinction between what is procedural as against substantive is largely dependent on the facts in each case. In this matter, it is my view that the choice of law clause relates to the validity of the agreement and the determination of the issues in dispute after the matter is referred to arbitration. The mechanism for ensuring that the parties adhere to the agreement to arbitrate appears to be a procedural matter which falls within the jurisdiction of this Court as this is where the claim was filed and the relief from execution is being sought.

26. I have therefore found that the assessment of that part of the defence relating to the issue of arbitration must be done in accordance with the laws of Jamaica, the *lex fori*.

27. In addition rule 9.3(4) of the ***C.P.R.*** only permits the filing of an acknowledgement of service before a request for judgment is filed at the registry. This rule is similar to that considered by the court in the ***Sommerville*** case, in which it was stated that an appearance could not be entered after judgment without the leave of the court. As such, any appearance entered after judgment would be of no effect until the said judgment was set aside or where its sole purpose was to submit to the judgment. The appearance could therefore only be used as the basis to apply to *"restore the status quo of the suit to where it was before the*

entering of judgment or to allow the defendant to submit to the judgment so as to participate in any issues which are still to be resolved after judgment."

28. I have accepted the submissions of counsel for the claimant and find that in light of the entry of the judgment in default of acknowledgement of service, the matter cannot now be referred to arbitration.

29. Having found that the defendant has taken a step in the proceedings and that the matter cannot proceed to arbitration after the entry of judgment, I have concluded that there is no reasonable prospect of the defendant successfully defending the claim on the basis that there is an arbitration agreement between the parties.

30. With respect to the substantive issues raised in the proposed defence, counsel for the defendant has submitted that delivery of the goods was not possible as it never had them in its possession. Miss Edwards referred to the affidavits Mr. Nicholas Redwood sworn to on the 21st April 2010 and the 26th April 2010, in which he states that the company was unable to clear the goods as the required documents were not supplied by the consignee and in any event they were told by the consignee that the supplier had sent the wrong equipment. In relation to the moneys claimed, the defendant has stated that no funds were received by the defendant from the claimant nor were any instructions given to the claimant to make any payments on its behalf.

31. Mr. Collie, in response submitted that the proposed defence outside of the issue of arbitration is insufficient as it amounts to a mere denial by the defendant that it owes the sums claimed. He asked the court to find that the said defence is without merit and to refuse the defendants application. He stressed that a claimant should not be lightly deprived of his judgment. The case of ***International Finance Corporation v. Utexafrica*** [2001] All ER (D) 101 (May) was cited in support of that point. Specifically, counsel referred to the judgment of Moor-Bick, J. in which the following statement was made:-

> *"A person who holds a regular judgment, even a default judgment, has something of value and in order to avoid injustice he should not be deprived of it without good reason. Something more than a merely arguable case is needed to tip the balance of justice to set the judgment aside."*

31. I do not agree that the statements contained in the proposed defence amount to a mere denial of the debt. The test to be applied, according to Lord Woolf M.R. in ***Swain v. Hillman*** [2001] 1 All E.R. 91, is whether there is *"a realistic as opposed to a fanciful prospect of success"*. This definition was applied by Mangatal, J. (Ag.) (as she then was) in ***Malcolm v. Metropolitan Management Transport Holdings Ltd. & Dickson,*** Suit No. C.L. 2002/M225 delivered on the 21st May 2003. It was also approved by McDonald, J. (Ag.) (as she then was) in ***Givans & anor. v. Cummings,***

Claim No. 2007HCV02617, delivered on the 28th March 2007. This test requires proof that defendant has more than a merely arguable defence. It must however, be borne in mind that the court in making its assessment is not required to embark on a mini trial of the case (see ***Citizens Bank Limited v. Green*** Suit No. C.L. 1998/C120 delivered the 6th January 2009). In this matter, there appear to be issues of fact joined between the parties. Firstly, the defendant states that it cannot return goods that it never received due to the claimants own default. Secondly, it denies owing any money to the claimant as it neither received any funds from the claimant, nor instructed them to make any payments on its behalf. These in my view, are matters of evidence which need to be fully ventilated before a tribunal of fact. The court will have to assess the evidence and the credibility of the witnesses in order to do justice between the parties.

The promptness of the application

33. The claimant asserts that the Bailiff went to the defendant's premises to execute the order for seizure and sale on the 19th March 2010. The defendant denies this and states that this occurred on the 4th April 2010.The first application in this matter was filed on the 21st April 2010. At most, this represents a delay of approximately one month. Mr. Redwood in his supplemental affidavit sworn to on the 26th April 2010 indicates that the delay was as a result of the company not having received the Claim Form and Particulars of Claim and the

difficulties experienced by counsel in procuring copies of the documents on the Court's file. Whilst it is acknowledged that the company may not have had these documents in hand, they were in fact delivered to its registered office as required by law. The defendant was the author of its own demise by failing to file the Notice of Change of Registered Office within a reasonable time of its relocation.

34. I have considered the circumstances and am of the view that the explanation given for the length of time taken to make the application satisfies the standard contemplated by rule 13.3(2) (a) of the ***C.P.R.***.

Explanation for failing to file an acknowledgment of service

35. The defendant has advanced the same reasons stated in the preceding paragraph for its failure to file an acknowledgment of service. It appears that the predicament in which the Defendant found itself was entirely of its own making. Accordingly, I have not accepted those reasons as a reasonable explanation for delay.

Conclusion

36. Having found that the proposed defence has a realistic prospect of success it must be determined whether in light of all the circumstances the judgment ought to be set aside. Prior to the 18th September 2006, a defendant was required to satisfy all of the tests

contained in rule 13.3 of the ***C.P.R.*** Under the present regime, the primary consideration is whether the defendant has a real prospect of successfully defending his claim. The other factors are to be considered but a failure to satisfy one or both of them will not necessarily be fatal to the application. Having found that the proposed defence has a real prospect of success and the applications were made in a timely manner, it is ordered as follows:-

a. The application to set aside the judgement entered on the 13th February 2009 is granted;

b. The application to set aside the Order for Seizure and Sale made on the 15th February 2010 is granted;

c. The defendant is permitted to file and serve its defence within seven (7) days of the date of this order;

d. Costs of the application and costs thrown away to the claimant to be taxed if not agreed.