IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2016CD00223

BETWEEN	**JAMAICA LEGEND LTD.**	**1ST CLAIMANT**
	PERCIVAL HUSSEY	**2ND CLAIMANT**
AND	**PORT KAISER OIL TERMINAL S.A.**	**1ST DEFENDANT**
	RUSAL ALPART JAMAICA (A PARTNERSHIP)	**2ND DEFENDANT**

Application for Interim Payment – Application for Summary Judgment – Whether Doctrine of Privity of Contract abolished – Whether a non-party beneficiary can enforce an agreement – Lease terminated by mutual consent of Lessor and Lessee – Whether a third party can claim damages – Whether assignor of the Lease has locus standi to make a claim.

Dr. Mario Anderson for Claimant

Mr. Michael Hylton, QC and Ms. Anna Gracie for 2nd Defendant.

Heard: 20th September, 2016 and 14th October 2016.

IN CHAMBERS

BATTS, J.

[1] By a document entitled "Ex parte Notice of Application for Court Orders," filed on the 10th August 2016, the Claimants seek the following Orders:

a) That the Defendants disclose to the Applicants/Claimants any settlement agreements made pursuant to the Claim 2015 CD00021 between the 1st and 2nd Defendants or made otherwise.

b) That the 2nd Defendant be restrained, whether by themselves, associated companies, their servants and/or agents from paying to the 1st Defendants any sums arising or due from any settlement agreement pursuant to claim 2015 CD00021, between the 1st and 2nd Defendant, until this claim is determined.

c) Alternatively, that the Defendants pay any sums arising or due, paid over and/or received from the settlement agreement pursuant to Claim 2015 CD 00021 into Court, until the Claim is determined.

d) Further that the Defendants pay an additional sum of US$5 million into an escrow account at a local bank until this claim is determined.

e) The costs of this application to be costs in the claim.

f) Further and such other relief as the court deems just."

[2] The 2nd Defendant has responded with an application for Summary Judgment which was filed on the 24th August, 2016. The First Defendant has it seems not been served with the Claimants' application (or the Claim) and is unrepresented before me.

[3] I had for consideration :

(a) Affidavit of Percival Hussey in support of Notice of Application for Court Orders filed on the 10th day of August 2016.

(b) Affidavit of Urgency filed 10th August 2016

(c) Affidavit of Bevan Shirley in opposition to Notice of Application for Court Orders and in Support of Application for Summary Judgment filed on the 24th August 2016.

(d) Further affidavit of Percival Hussey filed 29th August 2016.

(e) Second affidavit of Bevan Shirley filed 2nd September 2016

(f) Third Affidavit of Percival Hussey filed on the 19th August 2016.

(g) Third Affidavit of Bevan Shirley filed on the 20th September 2016.

(h) Affidavit of Service of Eleanor Hussey filed on the 19th September, 2016

[4] The parties have each filed Written Submissions and Authorities. Their Counsel, as agreed, made oral submissions limited to 30 minutes each. Claimants' Counsel made it clear that this was not an application for a Mareva Injunction or any type of freezing order. He said, and his written submissions confirmed, that the application was pursuant to Rule 17.1(1) (i) of the Civil Procedure Rules for an Order for Interim Payment. He sought also an Order pursuant to Rule 17.1(1) (k) that a Specified Fund, being the amount agreed in settlement between the two (2) Defendants, be paid into court. The Claimants also seek disclosure of the terms of the settlement agreement pursuant to section 144 of the Companies Act and Rule 17.1 (1)(g)(ii) of the Civil Procedure Rules. The 2nd Defendant's application for Summary Judgment is pursuant to rule 15.2 (a) of the Civil Procedure Rules 2002. It is contended that the Claimants have no real prospect of succeeding in its claim against the 2nd Defendant.

[5] I have read and carefully considered the written submissions, authorities and the affidavits filed in this matter. Both sets of applications were argued together. I will treat first with application for summary judgment and then with the Claimants'

applications. In so doing I will not repeat the detailed content of the affidavits or the respective submissions.

[6] It is clear to me that the claim against the 2nd Defendant has no real prospect of success. The 2nd Defendant is entitled to an order for summary judgment against the Claimants. The material facts are that on the 31st August, 2011 the 1st Claimant entered into a lease of 2 storage tanks for a term of 5 years. The 2nd Defendant was the lessor. On or about the 4th March 2013 that lease was surrendered and another lease of 7 tanks (which included the last mentioned 2 tanks) entered into. Certain preparatory works involving mainly the cleaning of the tanks, had to be done prior to commencement of the lease.

[7] It is the case for the Claimants that the cost of that preparatory work proved prohibitive and therefore a partner had to be found. The result was as pleaded in Paragraphs 11 and 12 of the Particulars of Claim.

> **"11. Thereafter in or around June 2014, it was agreed by the Claimant, the 1st Defendant and the 2nd Defendant that the Claimant would assign its lease to the 1st Defendant on condition that the "preparatory works" on the storage tanks would be executed and completed by both the 1st and 2nd Defendants prior to the 1st Defendant taking possession of the storage tanks.**
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> **12. On June 7, 2014 the Claimant assigned its Lease Agreement dated March 4, 2013 to the 1st Defendant on the additional terms contained therein including the consideration of payment of US$200,000 and a transfer of 5% of the shares of the 1st Defendant to the Claimant. A copy of the Assignment of Lease and the issue shares is attached and marked as C."**

[8] The 2nd Defendant was not a party to the assignment of the lease to the 1st Defendant or to any agreement to transfer shares. There is no allegation, or evidence, that consideration relative to that assignment flowed to or from the 2nd Defendant.

[9] It is common ground, that the 1st and 2nd Defendants entered into a lease agreement with respect to the said tanks. Mr. Hylton Q.C. in a comprehensive analysis demonstrated that there were differences in the terms of the lease entered into with the 1st Defendant. Most notably and relevant for present purposes is that the scope of the preparatory work was different. This is important because it is the case for the Claimants that the Defendants failed to execute the preparatory work. They alleged that it was a breach of duty of care, whether contractual or in negligence, because the Claimants had been retained by the 1st Defendant to render consulting services relative to the operating of the port (and the cleaning of the tanks). The termination of the lease between the 1st and 2nd Defendants therefore caused loss to the 1st and 2nd Claimants or either or both of them.

[10] The Claimants' counsel has been unable to point to any evidence, documentary or otherwise, that the 2nd Defendant agreed to indemnify the Claimants in the event the lease agreement between the 1st and 2nd Defendants ended or was not performed. There was no contract of indemnity or guarantee of performance, either oral or in writing. The Claimants' counsel wished the court to infer that the 2nd Defendant had knowledge of the obligations contained in the agreement entered into between the Claimants and the 1st Defendant. This knowledge he submitted was sufficient to render the 2nd Defendant liable. He further submitted that there was a special relationship between the Claimants and the 2nd Defendant because it was the 2nd Defendant who had introduced the principals of the 1st Defendant to the Claimants.

[11] These submissions are, with respect untenable. These are commercial entities venturing into commercial arrangements. The fact that one may have brought

the other two together is insufficient to create legal relations or duties of care. There is no evidence that the 2nd Defendant gave any assurance to the Claimants as regards the 1st Defendant's ability to perform, or otherwise. The 2nd Defendant denies being aware of the details of discussions between the Claimants and the 1st Defendant but it seems to me, even if they were aware, no duty of care arose or could arise.

[12] The Claimants' counsel urges this court to say that although they were third parties to the lease agreement between the 1st and 2nd Defendants, they are entitled to sue on the lease or for its breach. He urged that the doctrine Privity of Contract was all but abolished. He relied on the judgment of my brother Sykes, J ***In the matter of Dyoll Insurance Company Limited (In liquidation) Claim NO. HCV1267 of 2005***. A case it should be noted in which I appeared as junior counsel to Mr. RNA Henriques QC. This submission also fails. In the first place, the Claimants assigned their lease to the 1st Defendant. A new one was then entered into by the 2nd Defendant with the 1st Defendant. No consideration passed between the Claimants and the 2nd Defendant. There was not even an exchange of promises. There is no representation of fact alleged or proved. In these circumstances, there is no basis to impose a duty on the 2nd Defendant or any contractual obligation even if one discredits the privity doctrine.

[13] The situation is clearly distinguishable from that considered by Sykes, J who was considering a matter in which the relevant contract was a "fronting" agreement. At all material times the local insurance company acted as a front because the reinsurer had no licence to offer insurance within the jurisdiction. The premiums, the assessment of the risk and terms of coverage were determined by the reinsurer, while the premium, although collected by the insurer, was paid over to the reinsurer. It was not difficult for the Honourable Mr Justice Sykes, in such circumstances, to adopt and apply decisions in the United States to the effect that in similar situations an exception to the privity doctrine arose.

[14] I respectfully depart from any suggestion that there is no doctrine of privity of contract or that it has lost its relevance. To say so is to potentially undermine the established rules of commerce and commercial men. Busy bodies cannot be allowed to seek contractual remedies for agreements to which they are not party, even if they are intended beneficiaries. An agreement becomes binding when there is consideration be it in the way of a promise or of specie. The consideration moves from one party to the other. This case demonstrates precisely why the doctrine of privity is still relevant. It would be so unfair for a court to impose a contractual duty on the 2nd Defendant in favour of the Claimants who are non parties to the lease and from whom no consideration flowed. The 2nd Defendant would then not be able to terminate its lease, or otherwise bring it to an end, without the concurrence of a non-party .I see no reason why a person, merely because they expected to benefit in some way from its performance ,should be afforded such influence . I do not think that is the law, nor did Sykes J. intend to propound any such general principle .The learned judge ,it seems to me,,articulated criticisms of the strict application of the doctrine .He also demonstrated exceptions to the rule: so that where the parties intended (expressly or by implication)to confer enforceable rights on a third party, or, where the substance if not the form of the contract, rendered the beneficiary a party to the agreement, an exception to the doctrine arose.

[15] There is similarly no reason on the evidence to import a duty of care .No fiduciary relationship exists between the 2nd Defendant and the Claimants, nor is any circumstance demonstrated on the evidence to give rise to a duty situation such as to import Lord Atkinsons' famous "good neighbour" principle.

[16] The impossibility of the Claim is made clearer when it was revealed that the 2nd Claimant is a director of the 1st Defendant. He was therefore, or ought to have been, aware of the terms of the agreement between the 1st and 2nd Defendants. He should also be aware of the decision to terminate the lease and the or any settlement. If he was not, then it is a matter between himself, as 10% shareholder and director, and the 1st Defendant. The, or any, alleged cause of

action against the 2nd Defendant is not apparent on the Claim or the evidence before me in its support. I therefore dismiss the Claim against the 2nd Defendant.

[17] The Claimants' application does not therefore call for consideration in relation to the 2nd Defendant. However, in the event another court takes a contrary view of my decision on the summary judgement application, I will outline briefly my position. It seems to me that the application for an interim payment cannot succeed. The rule requires that in order to obtain an interim payment the Claimant needs to demonstrate certainty of success against the Defendant. In this case it is fair to say that the Claimants are almost certain to fail in their claim. Insofar as the application for an injunction preventing payment is concerned, it is common ground between the parties that the settlement sum has already passed from the 2nd to the 1st Defendant. The money having been paid there is no fund due to the 1st Defendant in the possession of the 2nd Defendant. The claim for payment into court of a fund therefore fails. The law could not envisage a Defendant paying twice, as the Claimants seems to want the 2nd Defendant to do. The Claimant seeks discovery of the details of the settlement agreement. The 2nd Defendant points to the fact that the agreement contained a confidentiality clause. However, had there been a case for the 2nd Defendant to answer, I would have been prepared to order specific disclosure given that the terms of that agreement may be relevant to the issue of damages. There being no breach of contract or relevant duty of care, as I have found, then there is no basis for disclosure. As regards the application that the the 2nd Defendant pay $5 million into an escrow account, there is no basis in law for this. There is as yet no judgment against the 2nd Defendant and there is no certainty of success at trial.

[18] Insofar as the Claimants' applications with regard to the 1st Defendant are concerned, I am not satisfied that there has been service. The Claimants filed an affidavit sworn to by the 2nd Claimant's wife. In that document, she states that her husband is a director of the 1st Defendant and that she served the claim and Notice of Application with affidavits on him. She also alleges service on the 1st

Defendant by sending the documents by registered post to another director of the 1st Defendant at an address in the United States of America. I do not accept that there has been service on the 1st Defendant. The 2nd Claimant has in effect served process on himself. He has placed himself in a position of conflicting interests. There is no evidence he has brought the matter to the attention of his other directors. As regards service by registered post outside the jurisdiction, it seems to me permission to do so is required Rule 7.2. The Claimants' application in relation to the 1st Defendant cannot therefore be considered. An application for substituted service has been filed and I have adjourned that for hearing on a date when this judgment is to be delivered.

[19] In the result my decision is as follows:

1. Summary Judgment is granted for the 2nd Defendant against the 1st and 2nd Claimants. The claim against the 2nd Defendant is dismissed.

2. The Claimants Notice of Application dated 10th August 2016 is dismissed.

3. Costs to the 2nd Defendant against the 1st and 2nd Claimants to be taxed or agreed.

David Batts
Puisne Judge