[2022] JMCC Comm 34

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO: SU2021CD00017

BETWEEN	**R.G.A. HOLDINGS INTERNATIONAL INC.**	**CLAIMANT**
AND	**CMA, CGM (JAMAICA) LTD.**	**DEFENDANT**

IN CHAMBERS BY VIDEO-CONFERENCE

Appearances: Shantel Jarrett instructed by Zavia Mayne & Company for the Claimant

Monique James Instructed by Samuda & Johnson Attorneys-at-Law for the Defendant

Heard: 26th September and 11th November 2022

Application to strike out – CPR rule 26.3(1) – Application for Summary Judgment – CPR rule 15.2 – Privity of Contract – Subsidiary company – whether separate from parent company – Forum Non Conveniens – Exclusive jurisdiction clause in contract

<u>BROWN BECKFORD J</u>

INTRODUCTION

[1] R.G.A. Holdings International Inc. **("R.G.A. Holdings")**, the Claimant/Respondent commenced proceedings by way of Claim Form and Particulars of Claim filed January 22, 2021 against CMA, CGM (Jamaica) Ltd. **("CMA Jamaica")**, the Defendant/Applicant,

for damages for loss of cargo which the Defendant, as carrier, failed to deliver at the ports selected in breach of contract or by reason of negligence. R.G.A. Holdings sought the following orders:

1) Damages against the Defendant for loss of cargo valued at **$USD 80,216.00** as a result of to the negligence of the Defendant;

2) Damages for breach of contract;

3) Damages for loss of profit in the sum of **$USD 16,043.20**;

4) Interest thereon for such rate and for such period as this Honourable Court deems just pursuant to the Law Reform (Miscellaneous Provisions) Act;

5) Costs; and

6) Such further and/or other relief as this Honourable Court deems just.

[2] In its defence, the Defendant raised inter alia that:

(i) The Claimant is a stranger to the contract, the contract being made with Ricova International Inc. **("Ricova")**, hence the Claimant had no locus standi to bring the claim;

(ii) The action is time barred; and

(iii) That this court should decline to exercise jurisdiction as the contract contains an exclusive jurisdiction clause;

[3] In its Reply to Defence, the Claimant asserts that Ricova is its subsidiary company through which it engaged the services of the Defendant.

[4] These elements of the defence grounded the Notice of Application filed June 22nd 2021 by CMA Jamaica seeking the following orders:

1) That the Claimant's claim against the Applicant be struck out as the claim is frivolous, vexatious and/or otherwise an abuse of the process of the Court;

2) Alternatively, that Summary Judgment be entered against the Claimant in favour of the Applicant herein;

3) The costs of this Application be awarded to the Applicant to be taxed if not agreed;

4) Such further and /or other relief as this Honourable Court may deem fit;

BACKGROUND

[5] Between May and June 2018, Ricova contracted with CMA Jamaica**,** the agent for CMA CGM S.A., to ship ten **(10)** containers of cargo valued at Eighty Thousand Two Hundred and Sixteen Dollars **($USD 80,216.00)** from the port in Kingston Jamaica to the port in Qasim Pakistan. This cargo was the subject of two Bills of Lading numbered JAM0142320 and JAM0142254. Ricova completed and sent to the Defendant a 'Change of Destination Form' on or around the 6th of July 2018, and on or around the 9th of August 2018 made further request for change of destination of cargo number JAM0142254 from the port in Qasim Pakistan to the port in Chennai India. CMA Jamaica prepared and sent to Ricova a quotation of the additional charges in respect of the request for the change of destination. Ricova accepted the charges as quoted.

[6] On or around the 14th of August 2018, Ricova requested confirmation that the change of destination for JAM0142254 and the new estimated time of arrival was processed. Both cargos were delivered to the port in Chittagong Bangladesh and not the port in Chennai India as requested. As a result, Ricova requested a re-export and/or return of cargo for both shipments. It then completed and submitted the documents and paid the required fees. The cargo was not re-exported or returned.

[7] To date, the cargo remains at the port in Chittagong resulting in this claim being brought for damages for breach of contract and/or negligence.

SUBMISSIONS ON BEHALF OF THE APPLICANT/DEFENDANT

[8] Counsel Ms. James contends that the claim should be struck out on the basis that the R.G.A. Holdings has no reasonable grounds for bringing this claim. She contends firstly that R.G.A. Holdings is not a party to the Bill of Lading (contract) and thus barred by virtue of the doctrine of privity of contract. She further contended that privity of contract prohibits Ricova from conferring its legally enforceable rights or imposing binding obligations on the Claimant. In these premises, the cause of action is unsustainable. Reliance was placed on **Dunlop Pneumatic Tyre Co. Ltd v Selfridge & Co. Ltd** [1915] A.C. 847 and **Midlands Silicones Ltd. V Scruttons** Ltd [1962] A.C. 466, classical cases expounding on the doctrine of privity of contract.

[9] Secondly, R.G.A. Holdings (the parent company) is not the proper party before the Court as it and Ricova (subsidiary company) are separate legal entities with separate rights and liabilities. This is so even if the parent company has some control over the subsidiary company. She submitted that it was an abuse of process to allow the claim to proceed and it ought to be struck out on this basis as there is no legal foundation for the claim. In support of these submissions she relied on the well-known case of **Salomon v Salomon** [1897] A.C. 22 **("Salomon")** and **Adams v Cape Industries plc** [1990] Ch.433 **("Adams")**.

[10] In support of the application for summary judgment it was submitted that the Bills of Lading should be governed by standard contractual principles and ordinary meaning given to its express terms. As the cargo was delivered in November 2018, the time bar of one year after delivery or the date the goods should have been delivered means the Claimant's case is out of time. She relied on **British Crane Hire v Ipswich Plant Hire** [1973] EWCA Civ 6, **ICS Ltd v West Bromwich** [1998] 1 WLR 896 and **The Sabrewing** [2008] 1 Lloyd's Rep 286.

[11] The applicant also submitted under this head that the exemption clause in the contract was triggered by the request to change the port of delivery and meant the Defendant could not be held liable for the cargo. The exemption clause (Clause 11(6)

would absolve the Defendant of any liability for any loss, damage or delay as alleged by the Claimant. Reliance was placed on **The Starsin** [2003] UKHL 12 and **Ailsa Craig Fishing Co. Ltd v Malvern Fishing Co Ltd** [1983] 1 WLR 964.

[12] It was further submitted that the most appropriate forum for the matter to be heard is Tribunal de Commerce de Marseille on the basis that the parties expressly agreed that this is the appropriate forum. She submitted that there were no new or intervening factors to displace the agreement made. She relied on **Spiliada Maritime Corp. v Cansulex Ltd.** [1986] 3 All ER 843.

SUBMISSIONS ON BEHALF OF THE RESPONDENT/CLAIMANT

[13] Counsel Ms. Jarrett in her submissions in opposition to the application to strike out the claim, contends that R.G.A. Holdings is the parent company of Ricova and holds a controlling interest. In the circumstances Ricova was the agent of R.G.A. Holdings. She referred to the case of **Smith Stone and Knight Ltd. v Birmingham** (1939) 4 All ER 116 where the Doctrine of Agency was used to circumvent the usual principles of company law.

[14] In respect of the application for Summary Judgment she submitted that the Defendant cannot rely on Clause 7 (Time Bar) of the Bill of Lading as the goods were never delivered in keeping with the terms of the Bill of Lading. This was as the Bill of Lading was terminated by the subsequent change of destination request. The change of destination request was confirmed but the Defendant failed to deliver based on the change of destination request. The further request to return or re-export the cargo was never completed or processed and the cargo remains in abeyance. No estimated time of arrival for the cargo had ever been given.

[15] She also submitted that the Defendant cannot avail itself of the provisions of Clause 11(6) (Exemption Clause) of the Bill of Lading, again making the point that the original Bill of Lading was terminated by the subsequent change in destination. She

contended that the goods were never delivered to the amended port of delivery or the COD requests were never processed and/or approved.

[16] Counsel further submitted that despite the exclusive jurisdiction clause, the most convenient forum for the evidence to be heard is Jamaica. She grounded this on the following facts:

(i) The place of issue for the Bill of Lading is Kingston, Jamaica;

(ii) The port loading was in Kingston, Jamaica;

(iii) CMA CGM Jamaica Limited signed the Bill of Lading as agents for the carrier CMA CGM Societe Anonyme au Capital;

(iv) All requests for the COD were sent to and processed by CMA CGM Jamaica Limited;

(v) The Claimant communicated directly with the agents and/or employees of CMA CGM Jamaica in relation to issues contained in the claim; and

(vi) The potential evidence and witnesses are closely connected to the Jamaican jurisdiction.

To this end she relied on **Northern Sunshine Farms (Manitoba) Ltd v CMA (CGM) SA & Anor** [2015] JMSC Civ. 217.

[17] Lastly, she maintained that the claim being brought is neither frivolous nor vexatious and is not an abuse of the process of the court as the Defendant owed a duty to the Claimant, and as a result of the Defendant's actions or inactions, the Claimant suffered loss.

ISSUES

[18] The application raises the following issues for the court's consideration:

1) Whether the Claimant has locus standi to bring this claim?

2) Whether this Court should assume jurisdiction to hear this matter?

Before dealing with the issues, it is useful to revisit the law pertinent to an application to strike out a claim and an application for summary judgment, and on which no issue has been taken.

APPLICABLE LAW

Striking Out

[19] Rule 26.3 (1) of the Civil Procedure Rules ("CPR") 2002 (as amended on the 3rd of August 2020), governs applications to strike out a part or whole of a party's statement of case. It reads as follows:

> *26.3 (1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court –*
>
> *a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings;*
>
> *b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;*
>
> *c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or*
>
> *d) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Parts 8 or 10.'*
>
> *put the Defendants on their guard and tell them what to…when the case comes on for trial."*

[20] In the case of **Williams, Wilton v Ajas Limited** [2020] JMSC Civ 104, Simmons J examined several UK authorities[1] which distilled the guiding principles to be contemplated by the Court when considering whether to strike out a statement of case. I find it useful to reiterate below the relevant portions.:

> *In **Coghlan v Chief Constable of Cheshire Police** [2018] EWHC 34 (QB) Edward Pepperall QC (sitting as a Deputy High Court Judge) stated:*
>
> > *"95. While applications to strike out under r.3.4(2)(a) and for summary judgment have in common the core assertion that the other party cannot succeed on its pleaded case, there is of course a difference in approach.* ***Whereas the focus of the enquiry under r.3.4 is upon the pleading, Part 24 requires analysis of the evidence****. That said, the court should be wary of any invitation to weigh competing evidence and make findings upon the papers. Summary judgment is only to be given in clear cases." [My emphasis]*
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> *In **Coghlan v Chief Constable of Greater Manchester Police** [2018] EWHC 1784, Yip J stated:*
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> > *68. In **James-Bowen & Others v Commissioner of Police for the Metropolis** [2016] EWCA Civ 1217, the Court of Appeal noted*
> >
> > *that defendants seeking to challenge claims at an early stage will frequently seek to rely on both provisions but that it is important to appreciate that they provide different grounds of relief.* ***An application under r.3.4(2)(a) is concerned with striking out defective statements of case. It requires the court to examine the statements of case to decide whether the allegations, if established, are capable as a matter of law of supporting the claim.*** *Part 24 is concerned with the prospects of success, in relation to which Moore-Bick LJ said:*
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> > > *It proceeds primarily on the assumption that the statement of case is not defective as a matter of law, but that the pleaded case has no real prospect of being made good at trial. Inevitably the two overlap when the pleaded case is said to be bad in law, because a case which is bad in law has no prospect of success, but in principle it is desirable not to confuse the different procedures.*
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> *69.* ***In relation to an application to strike out under r.3.4(2)(a), it should be assumed that the claimant will be able to establish the facts***

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[1] **[2020] JMSC Civ 104, para 27-29**

***pleaded in the Particulars of Claim (see TBS v Metropolitan Police Commissioner** [2017] EWHC 3094 (QB) at [7]).*

*70. An application for summary judgment may succeed where a strike out application would not but the court should be satisfied that all substantial facts relevant to alleged cause of action are before the court and that there is no real prospect of oral evidence affecting the court's assessment of the facts **(see S v Gloucestershire County Council [2001] Fam 313)**.*

*71. The court will not strike a claim out or give summary judgment lightly. A claim is only to be struck out if it is clear and obvious that the claim, as pleaded, cannot succeed. I bear in mind what Judge LJ said in **Swain v Hillman** [2001] 1 All ER 91:*

> *To give summary judgment against a litigant on papers without permitting him to advance his case before the hearing is a serious step.*

[My emphasis]

*In **TBS v Metropolitan Police Commissioner** [2017] EWHC 3094 (QB), Nicol J outlined the principles in the following terms:*

The principles to be applied on a strike out application

7. There was no significant difference between the parties as to these principles which I can summarise as follows:

- *i) I must assume that the Claimant will be able to establish the facts pleaded in the Particulars of Claim – see for instance **X v Bedfordshire County Council** [1988] 2 AC 633 at 740H. Sometimes a strike out application is combined with an application for summary judgment. For the latter purposes the Court has to decide whether the Claimant has a reasonable prospect of making out his or her factual assertions. That is not this case.*

- *ii) A claim should only be struck out if it is certain to fail; **Barrett v Enfield LBC** [2001] 2 AC 550, 557 and **Richards v Hughes** [2004] PNLR 35.*

- *iii) In an area of law which is developing, it is not normally appropriate to strike out a claim. It is better that such development should take place on the basis of 'actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purposes of the strike out.' Ibid.*

- *iv) In what may be regarded as an example of the previous principles, the Court should be slow to strike out a claim in negligence at an early stage on the basis that the claimant has no prospect of demonstrating that it would be fair, just and reasonable to impose a duty of care unless the position is very clear. Such a question of*

legal policy is generally better decided at trial – ***James-Bowen v Commissioner of Police for the Metropolis*** *[2016] EWCA Civ 1217 at [34]. (I was told that the Supreme Court has granted permission to appeal in that case, but, for the time being at least, the Court of Appeal's decision stands).*

v) However, 'if the court is satisfied that the case as pleaded cannot succeed on established rules of law, even if developed in accordance with principle, it must say so and relieve the parties from the expense and inconvenience of being required to deal with a claim that cannot succeed.' ***James-Bowen v Metropolitan Police Commissioner*** *(above) at [14]."*

[21] These principles mirror those espoused by Batts J in the case of **City Properties Limited v New Era Finance Limited** [2013] JMSC Civil 23. He said[2];

On the issue of the applicable law, the section is clear and means exactly what it says. ***There must be reasonable grounds for bringing or defending a claim. These reasonable grounds must it seems to me be evident on a reading of the statement of case.*** *It is well established and a matter for which no authority need be cited, that upon an application to strike out pleading, no affidavit evidence need be filed, the issue is determined by reference to the pleadings.*

Therefore it seems to me that when the rule refers to "reasonable grounds" for bringing a claim it means nothing more or less than that the claimant has disclosed in the pleading that he has a reasonable cause of action against the defendant. *He does this by pleading facts supportive of the existence of a cause of action or defence as the case may be. Having read the judgment of Sykes J in Sebol Ltd., the learned judge appears to have juxtaposed the bare necessity to show a cause of action known to law with the need to show reasonable grounds for bringing the action. He then proceeded to say the rule as it was now had been expanded. However, it never was the case that a claimant needed only to plead a cause of action known to law. Indeed, a claim even under the old rule might be struck out if for example a known cause of action (say negligence) was pleaded but the pleaded facts failed to allege a connection between the defendant and the claimant (by for example not pleading the driver of a motor vehicle was the defendant's servant or agent).*

I doubt that the new rule invites any further examination than an examination of the statements of case to ensure that the facts as alleged support a reasonable cause of action against a defendant. It seems to me that the new wording more accurately reflects the approach the courts took to the interpretation and application of the old rule. It may be, and Sykes J

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[2] **[2013] JMSC Civil 23, paras 9-11**

> *is respectfully correct in this regard, that occasions may arise when a pleading discloses an unreasonable cause of action or defence on its face. I suppose if for example, it fails the de minimis test as regards quantum.* ***However, as litigants are not to be driven from the judgment seat without a hearing on the merits, it ought to be an extremely rare case indeed where a court will find a cause of action or defence in existence but that it is "unreasonable" for the claimant or defendant to be allowed to rely on it, and to do so at an interlocutory stage of the proceedings.*** *[Emphasis Mine]*

[22] These extracts make clear the different approaches between an application to strike out and an application for summary judgment. Though the considerations may at some points overlap, the focus of the Court in this area is to see whether the case of the Claimant can be supported on the law and on the facts, on its pleaded case.

Summary Judgment

[23] In the alternative to seeking relief to strike out of the claim, CMA Jamaica sought summary judgment on the basis that the R.G.A. Holdings has no real prospect of successfully defending the claim. **Part 15 of the CPR** empowers the court to determine a claim, or a particular issue, where the court considers that the claimant, or the Defendant, has no real prospect of successfully defending the claim or issue. **Rule 15.2 of the CPR** states:

> *15.2 The court may give summary judgment on the claim or on a particular issue if it considers that –*
>
> *(a) the claimant has no real prospect of succeeding on the claim or the issue; or*
>
> *(b) the defendant has no real prospect of successfully defending the claim or the issue.'*

Mangatal J in **Eureka Medical Limited v Life of Jamaica Ltd**[3] simplified the Court's understanding of these provisions by stating *"Summary Judgment is really designed to deal with cases that do not merit trial at all."*[4]

[24] In the recently decided Court of Appeal case of **Somerset Enterprises Limited and anor v National Export Import Bank** [2021] JMCA Civ 12 **("Somerset")** Brooks P reminded us of the rationale for these provisions. He said[5];

> *Summary judgment is one of methods provided by the CPR to assist the court in achieving its overriding objective. Where a party's case is hopeless, it is in its interest and the interest of justice that it be advised as soon as possible.*

This was a restatement of the position earlier settled by the Privy Council in **Sagicor Bank v Taylor Wrigh**t [2018] UKPC 12, **("Sagicor Bank")** where Lord Briggs delivering the opinion of the Board said[6]:

> *Part 15 of the CPR provides, in Jamaica as in England and Wales, a valuable opportunity (if invoked by one or other of the parties) for the court to decide whether the determination of the question whether the claimant is entitled to the relief sought requires a trial. Those parts of the overriding objective (set out in Pt 1) which encourage the saving of expense, the dealing with a case in a proportionate manner, expeditiously and fairly, and allotting to it an appropriate share of the court's resources, all militate in favour of summary determination if a trial is unnecessary.*

[25] The considerations that should engage the court are also outlined by Brooks P in the **Somerset** case and bears repeating below[7]:

> *The party that seeks the summary judgment must assert that the respondent's case has no real prospect of success. If that party asserts that belief, on credible grounds, a respondent seeking to resist an application for summary judgment is required to show that he has a case "which is better than merely arguable". In order to successfully resist the other party's assertion, the respondent must prove that its case has "a*

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[3] **(2005) Supreme Court of Jamaica No HCV 1268/2003 (unreported)**
[4] **Ibid. para 7**
[5] **[2021] JMCA Civ 12, para 22**
[6] **[2018] UKPC 12, para 16**
[7] **[2021] JMCA Civ 12, para 25**

> *'realistic' as opposed to a 'fanciful' prospect of success" (see paragraphs [14] and [15] of **ASE Metals NV v Exclusive Holiday of Elegance Limited** [2013] JMCA Civ 37). In determining whether there is any real prospect of succeeding, the judge should not conduct a mini-trial.*

It is important to note that in an application for summary judgment, the burden of proof lies on the applicant to prove that the defendant has no real prospect of successfully defending the claim. Who bears the burden of proof was restated in **Howell (Delroy) v Royal Bank of Canada et al and Ocean Chimo Ltd v Royal Bank of Canada et al** [2021] JMCA Civ 19 **("Howell")**. Phillips JA said[8]:

> *It appears to be well settled now that the burden of proof on an application for summary judgment rests on the applicant to prove that the respondent's case has no real prospect of success. However, once the applicant asserts their belief on credible grounds, a respondent seeking to resist an application for summary judgment is required to show that he has a case that is better than merely arguable (**ED&F Man Liquid Products Ltd v Patel and another [2003] EWCA Civ 472**).*

I take this to mean that the applicant is not obliged to prove that the defence is bound to fail at trial before obtaining summary judgment.

[26] The last of the elements that the court must have in its consideration is found in the case of **Sagicor Bank**. The Privy Council held that disputed facts are only necessary to be resolved by a trial *"if their outcome affects the claimant's entitlement to the relief sought"*.[9] However, if the disputed facts do not affect the Claimant's entitlement, a trial of those issues is unnecessary, and a waste of time and resources.

ANALYSIS OF ISSUES

LOCUS STANDI

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[8] **[2021] JMCA Civ 19, para 114**
[9] **Sagicor Bank v Taylor Wright [2018] UKPC 12, para 17**

[27] The status of a subsidiary company versus its parent company is settled law. The subsidiary is a distinct legal entity. Its corporate veil can only be pierced where the company was formed with the intent of carrying out some wrongdoing.

[28] In **Adams v Cape Industries plc** [1990] Ch. 433, relied on by the applicant, the English Court of Appeal states the law quite clearly. Under consideration in that case was whether a company was domiciled in the jurisdiction by the presence of its subsidiary. The Court stated[10]:

> *There is no general principle that all companies in a group of companies are to be regarded as one. On the contrary, the fundamental principle is that "each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate legal rights and liabilities:" The Albazero [1977] A.C. 774, 807 per Roskill L.J.*

It goes on to say:[11]

> *[T]he court is not free to disregard the principle of Salomon v A. Salomon & Co. Ltd. [1897] A.C. 22 merely because it considers that justice so requires. Our law, for better or worse, recognises that the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities.*

The court also went on to say that there is no presumption that the subsidiary is the agent of the parent company nor that it is the parent's alter ego.

[29] **Prest v Petrodel Resources Limited and others** [2013] UKSC 34 **("Prest")**, Lord Neuberger called **Salomon** *"a clear and principled decision, which has stood unimpeached for over a century"*.[12] Lord Sumption noted that *"[t]heir separate personality and property are the basis on which third parties are entitled to deal with them and commonly do deal with them."* **Prest** also made it clear that the court may be justified in piercing the corporate veil of the company's separate personality if it was being *"abused*

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[10] **[1990] Ch. 433, pg 532 para D**
[11] **Ibid. pg 536 para G**
[12] **[2013] UKSC 34, para 66**

for some wrongdoing". The question on appeal in **Prest** was whether the Court has the power to order the transfer of several properties owned by companies that were wholly owned or controlled by a husband to his wife as matrimonial property.

[30] Both of these cases come on for consideration by our Court of Appeal in **International Hotels (Jamaica) Limited v Proprietors Strata Plan No 461** [2013] JMCA Civ 45. Morrison JA (as he then was) stated[13]:

> *It is therefore clear that a company generally falls to be treated as an independent person, separate and distinct from its shareholders, capable of holding land and other property, entering into contracts and incurring debts and other liabilities in its own name.* ***In the context of groups of companies, each company is also a distinct entity and a subsidiary does not fall to be regarded as an agent of the parent by reason only of the fact that the parent is its controlling shareholder. In this regard, it is generally irrelevant that the parent and the subsidiaries share or have common directors or other officers****. (emphasis mine)*

And in respect to lifting the corporate veil further said, speaking of **Prest[14]**:

> *Although the court confirmed that there is a limited category of cases in which it might be appropriate to pierce the corporate veil, it squarely located the jurisdiction to do so within the context of cases of abuse of a company's separate legal personality "for the purpose of some relevant wrongdoing" – per Lord Sumption at para [27]).*

[31] The Bills of Lading clearly state the shipper to be Ricova International Inc. and not R.G.A. Holdings International Inc. There is no evidence of any subsequent dealing with any company other than Ricova, and there is no evidence suggesting Ricova was acting for anyone other than itself. R.G.A. is mentioned for the first time in the claim. The cases show that the subsidiary is not the automatic agent of the parent company. There must be some evidence from which it could at least be inferred that the subsidiary is acting as agent for its parent. The parent company is not entitled to simply step in the shoes of its subsidiary for the purpose of this action. R.G.A. Holdings is therefore not the proper party

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[13] **[2013] JMCA Civ 45, para 63**
[14] **Ibid. para 65**

to bring this claim, there being no contract formed between it and the Defendant. The Defendant's application to strike out the Claimant's claim succeeds on this basis.

FORUM NON CONVENIENS

[32] The bill of lading which sets out the terms of the contractual relationship, the shipper and the carrier, contained an exclusive jurisdiction clause which stipulated that the applicable law was French Law and that all claims were to be brought before the Tribunal de Commerce de Marseille, a French court. CMA Jamaica contends that R.G.A. Holdings (if it were the proper party before this court) was bound by this exclusive jurisdiction clause.

[33] R.G.A. Holdings' reliance on **Northern Sunshine Farms** I fear is more apposite to CMA Jamaica. Bertram-Linton (Ag) (as she then was) admirably distilled the relevant law and considerations in an application for a stay of proceedings under **CPR Rule 9.6 1-5** and **CPR Rule 20.3** where a foreign jurisdiction clause had been invoked. She noted, after considering relevant authorities, that the Court should grant the stay of proceedings unless a strong case is made out for not doing so. In that case she considered as compelling to the stay being granted that there were other parties to the action who were not bound by the exclusive jurisdiction clause. She felt that in the circumstances there could be separate proceedings being pursued in different jurisdictions which could lead to inconsistent outcomes.

[34] This is not the position in the case at bar. The only parties are the contracting parties, who freely entered into this contract. In the circumstances I do not find it as compelling that the witnesses are located in this jurisdiction and that the cargo was also loaded in this jurisdiction. These facts were known to all the parties at the time the contract was entered into. In addition, **Northern Sunshine Farms** was decided prior to the COVID 19 Pandemic when the ease of giving evidence remotely may have been less accommodating. I believe the court can take judicial notice that all over the world, Courts engaged with technology in more substantial ways that reduced the need for face to face interactions, which arrangements continue.

[35] The applicant did not specifically engage **CPR Rule 9,** but indicated in its Acknowledgement of Service that it would be filing an application challenging the Court's jurisdiction to hear the claim. It appears the Defendant would be out of time to make an application under this rule. Nonetheless, if not for the decision made earlier, the Court would be inclined to stay the proceedings rather than enter summary judgment.

[36] With respect to the issues raised as to whether the time bar and exclusion of liability clauses are applicable, it is clear that the question whether these clauses have been breached could only be determined on an assessment of the evidence. Summary Judgment would not therefore be given in the Defendant's favour on this basis.

[37] For the preceding reasons, the Applicant fails in its application for summary judgment but succeeds on its application to strike out the claim.

ORDER

1) The Claimant's claim is struck out.

2) Cost of the application to be the Applicant's to be taxed if not agreed.

3) Applicant's attorney-at-law to prepare, file and serve order.

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JUDGE