



[2013] JMSC Civ. 71

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2012 HCV06723

BETWEEN	SUPREME VENTURES LTD	CLAIMANT
AND	CAMIELE BISSENEY	DEFENDANT
	(t/a CAMIELE'S ONE STOP)	

IN CHAMBERS

Mr. John Graham & Ms. Janice Behari instructed by John Graham & Co. for the Claimant

Ms. Lisa Mae Gordon instructed by Malcolm Gordon for the Defendant.

Heard: 15th & 22nd May 2013

**Application to transfer matter to commercial court - Part 71, Rules 71.3 & 71.6
Civil Procedure Rules 2002 - Considerations to be applied**

Mangatal J:

[1] This is an Application by the Claimant, Supreme Ventures Limited to have this matter transferred from the general civil division of the Supreme Court to the Commercial Division. The Application was vigorously opposed by Counsel for the Defendant and an affidavit in opposition to the application was filed. I have noticed that there has been an increase in the number of applications seeking to have matters transferred to the Commercial Court. I trust that this decision will provide some insight as to the considerations involved and thus supply guidance as to when it may be appropriate for such applications to be made.

[2] Commercial enterprise in whatever form has been an essential part of our existence. It is the force which drives development and prosperity within our boundaries. It is the element which gives us competitive advantage over our neighbours. Increasingly, countries are promoting themselves as having an attractive investment climate, in a bid to lure investors to their frontiers. Policy makers throughout the world, including Jamaica, have been feverishly designing an enabling environment outfitted with all the right necessities. One of the most critical components of this enabling environment is ensuring that there are effective legal processes in place to effectively deal with disputes. This is where the Commercial Court has a critical role to play. Heydon J in the Australian decision of **AON Risk Services v ANU (2009) 83 ALJR 951** observed:

Commercial life depends on the timely and just payment of money. Prosperity depends on the velocity of its circulation. Those who claim to be entitled to money should know, as soon as possible, whether they will be paid. Those against whom the entitlement is asserted should know, as soon as possible, whether they will have to pay. In each case that is because it is important that both the claimants and those resisting claims are able to order their affairs. How they order their affairs affects how their creditors, their debtors, their suppliers, their customers, their employees, and, in the case of companies, their actual and potential shareholders, order their affairs. The courts are thus an important aspect of the institutional framework of commerce. The efficiency or inefficiency of the courts has a bearing on the health or sickness of commerce.

[3] The Commercial Court was established to provide a forum in which there would be greater familiarity with commercial disputes. Its operations were meant to enable these disputes to be determined expeditiously, efficiently and without unnecessary formality. This is evident from Part 71 of the Civil Procedure Rules 2002 “the CPR” which deal with proceedings in the Commercial Division. Rule 71.8, for example, provides that a judge of the Commercial Division may at any time, before, during or after the issue of a claim form, order that proceedings be tried without the filing or service of the usual statements of the parties’ cases.

[4] G.T. Pagone, Judge in Charge of the Commercial Court of the Supreme Court of Victoria, Australia, in his article entitled **The Role of the Modern Commercial Court** sums it up beautifully when he says (at pages 3-4):

It is ultimately the courts which facilitate ordered commercial activities by enforcing bargains and resolving disputes which arise in ongoing commercial activity. Business dealings need certainty, predictability and enforcement of deals. Commercial activity therefore needs the courts, and looks to the courts, to create an ordered environment within which to operate

Our commercial community has come to expect, and is entitled to expect, that commercial disputes be resolved by judges who are familiar with commerce and who appreciate the commercial realities of their decisions. It also expects, and needs, commercial disputes to be resolved quickly, predictably, consistently and economically. Business needs quick, efficient, affordable and predictable outcomes for business and the economy to run smoothly. Our legal system cannot afford to fail its business community and must provide a system of dispute resolution that takes account of the context in which disputes arise and the need to resolve them as business continues to be carried on. The legal system, to that extent, is a necessary adjunct and facilitator of efficient business activities. Our system of dispute resolution must, to that extent, be moulded to business needs and exigencies.

[5] Part 71.3 of the Civil Procedure Rules 2002 sets out the type of matters which are considered to be “Commercial Claims” or for which “Commercial Proceedings” can be commenced. The Rule States:

“71. 3 In this part “commercial Claim” includes any case arising out of trade and commerce in general and any case relating to –

(a) admiralty proceedings

(b) contracts relating to ships and shipping;

(c) contracts relating to aircraft;

(d) the international carriage of goods by land, sea, air

- or pipeline;**
- (e) the exploitation of oil and gas reserves;**
 - (f) insurance and reinsurance;**
 - (g) banking, negotiable instruments, financial services and international credit;**
 - (h) the purchase and sale of commodities;**
 - (i) hire purchase transactions;**
 - (j) the operation of international markets and exchanges;**
 - (k) the construction and performance of business documents and contracts including agency;**
 - (l) questions connected with or arising from commercial arbitrations;**
 - (m) franchising agreements; and**
 - (n) any other matter or any question of facts or law which is particularly suitable for decision by a judge of the Commercial Division.**

[6] In deciding whether a matter should be heard by the Commercial Court, the nature of the dispute would have to be looked at to see whether:

- a. The parties are engaged in trade or commerce and the issue is one which arises out of a business dispute; OR
- b. The dispute falls within one of enumerated category (a-m); OR
- c. The substance of the matter is sufficiently specialized to justify being heard by a judge with expertise in that area (as contemplated by the umbrella clause at n).

[7] It would have been foolhardy for the rule makers to narrow down exactly the type of matters which could be described as being commercial. Commercial law itself is a very diverse and constantly evolving area of the law. By using the word “includes”, the

rule makers were clearly suggesting that the definition of what is a commercial claim is not limited by, or exhausted within, the categories set out in the section.

[8] In the first instance, a commercial claim is regarded as any case which arises out of trade and commerce. It seems that when a Judge is looking at whether a claim is one which arises out of trade and commerce, regard must be had to the commercial reality of the issues in question. It will involve the judge looking at the practical application of what it is that is being claimed. This was the approach taken by the Judge in the Eastern Caribbean Supreme Court decision of **Alexy Bobrov v Lenta Ltd Claim No. BVIHC 214 of 2011** delivered January 31, 2012, emanating from the British Virgin Islands. The case concerns an application brought by a company, Lenta Ltd to have proceedings transferred from the High Court to the Commercial List. Lenta Ltd is a well known BVI registered company which holds the entire issued share capital of a Russian company, Lenta LLC. Mr. Bobrov alleged that he served as the general director/CEO of Lenta LLC and this was contingent on him being entitled to a stock option that was to be part of his remuneration. Mr. Bobrov subsequently brought a claim in the High Court in which he was seeking among other things to enforce certain agreements relating to the grant of the stock option which he said formed part of his contract of employment. Counsel for Lenta sought to have the proceedings transferred from the High Court to the Commercial Court pursuant to CPR 69A.4 (4). In opposing the application, Counsel for Mr. Bobrov argued that the claim did not arise out of the transaction of trade or commerce, but is a claim arising under his employment contract. However the Judge Bannister J (Ag) was of the opinion that the case arises out of the transaction of trade and commerce. At paragraph 15, he said

“Lenta LLC is a vast commercial enterprise. In order to carry on that commercial enterprise, it must act through agents, such as General Directors/CEOs. The terms upon which such agents are appointed are a necessary part of the transaction of commerce...”

[9] Even though Part 69A.1 (2) of the Eastern Caribbean Supreme Court Rules does not specifically have the construction of agency contracts among the enumerated

category (for which our Civil Procedure Rules provide at Rule 71.3(k)), the approach taken by the judge is what is instructive. In cases where the matter does not fall within the specified category, and the Court is considering whether a case is one which arise out of trade and commerce, the Court will have to look at the commercial picture as a whole. The Court will look at what is being claimed and whether it advances the essence of commercial realities. It would require the Judge to step into the position of a “business man” to appreciate the significance of the issue. It is for this reason, Lord Goff, in commenting on the role of the Commercial Court in his article Commercial Contracts and the Commercial Court (1984) LMCLQ 382 said:

“We are there to help businessmen, not to hinder them; we are there to give effect to their transaction, not frustrate them; we are there to oil the wheels of commerce, not to put a spanner in the works, or even grit in the oil.”

[10] We see that the rule makers have set out properly what could be described as examples of matters which would be described as being a commercial claim. As indicated before, this is to my mind not intended to be an exhaustive list, given the expansive nature of commerce. However it would perhaps have been appropriate if the rule makers had also set out the kind of matters which would not fall within the jurisdiction of the Commercial Court or even set a monetary limit. It is my understanding that there are discussions being had to cover such considerations and this may result in amendments to the Rules. Be that as it may, there are some matters which by their nature could not be considered commercial claims, even though the parties or one of the parties may be of a commercial complexion. Corporate status is not determinative of whether a matter is to be filed in the Commercial Court; it is the nature of the dealing between the parties and the resultant dispute that will be decisive. So, for example, in some jurisdictions such as Australia, an ordinary action for recovery of debt, actions for the enforcement of mortgages and other securities, actions for the recovery of possession of land and other landlord and tenant claims, vendor-purchaser and other conveyancing disputes, are excluded from being filed in the Commercial Court, unless there is some commercial issue of import that necessitates the expertise of the Court.

[11] In the absence of such express provisions, I recently gave an oral judgement on the 1st February 2013 in the case of **Wayne Ann Development Ltd v Squatters (unknown) Claim No. CD 00105 of 2012** (which involved some 150 squatters) in which I held that adverse possession claims are not of themselves claims which fall within the definition of a “commercial claim.” This is so, even if the registered proprietor had purchased the particular parcel of land for commercial development. The resultant dispute between the registered owners and the squatters involved claims to interests in land and issues as to whether claims to title have been extinguished, but is not really of a commercial nature. It is understandable that in the infant stage of the Court, one may not want to be too restrictive in the kind of matters to be filed. However, as the Court’s muscles are flexed with time, there may be some merit in wanting to set out explicitly the kind of matters which should not be filed in the Commercial Court.

[12] If the matter is one that does not arise out of trade or commerce per se or does not fall within the confines of the stated lists, the judge is given a discretion to allow matters which in his/her opinion require the specialist assistance from the Judges of the Commercial Court. Here the Judge has power to hear matters which are complicated and which are of importance to commercial life. It may be the Judicial Review of an administrative action which threatens to stifle the economic flow of business. It may be a company law issue which affects how corporations organize themselves. At the heart of the consideration is whether the substance of the matter is of importance to commercial life.

[13] The decision in the **Alexy Bobrov v Lenta Ltd claim**, suggests that apart from looking at the definitional characteristic of what is considered a commercial claim, the judge must also consider whether permitting or transferring a matter to the commercial list would further the overriding objective. The Judge must bear in mind also the purpose for which the Commercial Court was established.

[14] In the instant case, Supreme Ventures, a limited liability company entered into an agency type agreement with the Defendant, with the Defendant being expressly stated to be an independent contractor. Supreme Ventures is seeking to recover certain

amounts of proceeds pursuant to that agreement. The Defendant is alleging that Supreme Ventures did not carry out its part of the bargain and has also filed a counterclaim. Mr Graham in his Notice of Application filed on behalf of Supreme Ventures, relied upon Rules 71.3(h), (k) and (n) of the CPR. I agree with Miss Gordon that perhaps the word “commodities” in Rule 71.3(h) may well have a somewhat specialized meaning in the world of trade and commerce, or at any rate, I agree that the products sold by the Defendant as agent for the Claimant, (i.e. game tickets and pin codes), do not fit comfortably into the meaning of the word “commodities”. However, this is clearly a transaction that is of a commercial nature as well as one which involves “the construction and performance of business documents and contracts including agency.” Relationships of this kind are part of the commercial arrangements entered into by juridical and natural persons and for which agreements are entered into. As Lord Goff puts it, “The staple diet of the Commercial Court can be summed up in one word – Construction”. That is, the Commercial Court is concerned primarily in helping parties construe their agreements in determining their respective rights.

[15] In addition I agree with Miss Gordon that when interpreting Rule 71.3, the Court must have regard to the overriding objective of dealing with cases justly. This includes rule 1.1(e) which speaks to the Courts need to allocate an appropriate share of the Courts resources, whilst taking into account the need to allot resources to other cases. The Commercial Court should therefore not be used to secure a practical advantage for claims which bear no real commercial interest. If such matters were allowed to cloud the list, it would ultimately defeat the very essence of what the Commercial Court is to represent and the vital role it was designed to perform. However, the present matter in my judgment falls squarely within the meaning of commercial claim as set out in Rule 71.3 of the CPR, particularly, Rule 71.3(k). I see no harm, indeed it would be just, to deal with this matter by having it transferred to the Commercial List. I would therefore make the following orders:

1. That this Claim be transferred to the Commercial List
2. A sealed copy of the Claim Form is to be Up-stamped and filed in the Registry of the Commercial Division.
3. Costs to be Costs in the Claim.
4. Claimant's Attorneys-at-Law to prepare file and serve the formal order.