[2015] JMSC Civ. 217

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2010HCV04853

BETWEEN	**NORTHERN SUNSHINE FARMS (MANITOBA) LTD.**	**CLAIMANT**
AND	**CMA, CGM SA**	**1ST DEFENDANT**
AND	**CMA, CGM (CANADA) INC.**	**2ND DEFENDANT**
AND	**CMA, CGM (JAMAICA) LTD.**	**3RD DEFENDANT**
AND	**KINGSTON CONTAINER TERMINAL (KCT) SERVICES LTD.**	**4TH DEFENDANT**

Ms Ayana Thomas instructed by Nunes Scholefield Deleon & Co for the Claimant

Mr. Kwame Gordon instructed by Samuda and Johnson for 1st, 2nd and 3rd Defendants/ Applicants

Mrs. Alexis Robinson instructed by Myers Fletcher & Gordon for the 4th Defendant.

Heard: November 24, 2014 and March 11, 2015.

Contract - Stay of Proceedings - Agreement to refer to a foreign court - Discretion - Defendant applying to invoke exclusive jurisdiction clause - Whether strong case shown by claimant for not staying proceedings despite foreign jurisdiction clause - CPR Rule 9.6 (1-5) - CPR Rule 20.3

Bertram-Linton J. (Ag.)

INTRODUCTION

[1] The claimant's expectation that its 3500 (100 lb) bags of red kidney beans would be transported and be safe here in Jamaica, proved to be false. The cargo was found to have damage from wetting and infestation. It filed a claim seeking damages from the 3rd defendant on October 1, 2010.The claim was subsequently amended on December 8, 2010 to include the other defendants.

BACKGROUND

[2] The Second Amended Claim form and Second Amended Particulars of Claim, seeks damages for the loss of the cargo in question due to negligence and breach of contract on the part of the 1st 2nd and 3rd defendants. The 4th defendant was contracted by the 3rd defendant to store the containers. Upon inspection by the Jamaica Customs department, water was seen on the floor of the 4th defendant's storage area and the bags holding the beans showed wetting, rot, maggot and mole infestation. It is no surprise that the shipment was condemned**.**

These applications for consideration today ask for;

1. "A declaration that the Supreme Court of Jamaica has no jurisdiction to try the claim herein and the court should not exercise jurisdiction in this claim.
2. Such further and other relief as this honourable court deems just in the circumstances"
3. Costs of this application to be awarded to the Applicant/3rd Defendant."

[3] It was first made on January 1, 2011 on behalf of the 3rd defendant, there are also applications on behalf of the 1st and 2nd defendants in similar terms filed on 12th October, 2012 and 14th February, 2013 respectively, who all deny any liability for the damage to the cargo and are relying on the jurisdiction clause contained in Clause 30 of the Bills of lading. It provides:

"30. ***Law and Jurisdiction***

(1) Law of application

Except as specifically provided elsewhere herein, French law shall apply to the terms and conditions of this bill of lading and French Law shall also be applied in interpreting the terms and conditions hereof.

(2) Jurisdiction

All actions against carrier under the contract of carriage evidenced by the Bill of lading shall be brought before the "Tribunal de Commerce de ***MARSEILLE"*** *and no other court shall have jurisdiction with regards to any such action. Actions against the merchant under the contract of Carriage evidenced by this Bill of Lading may be brought before the "Tribunal de Commerce de* ***MARSEILLE****" or, in carrier's sole discretion in another court of competent jurisdiction."*

The Application is supported by the Affidavit of Clide Nesbeth filed on the 22nd February, 2011.

[4] I have had full cognizance of the written and oral submissions filed on 8th October, 2012 and made in chambers from the 3rd defendant and will refer to them as are necessary and relevant to my decision.

[5] In summary, defence Counsel Mr. Gordon submits that the clause is clear and unambiguous as to jurisdiction and should be enforced, because the claimant accepted these terms. It is only the carrier he reiterates, that has the option and the discretion to select another jurisdiction in the event of a dispute. The claimant should only be facilitated to go outside of the agreement if 'strong cause' was shown, and the burden of proof of this 'strong cause' was on the plaintiff, who he contends has not discharged this burden.

[6] In support of his contention he cites among others the case of **Aratra Potato Co. Ltd. v Egyptian Navigation Co. (The El Amria) [1981] 2 Lloyd's Report 119**. In this case, there was a dispute similar to the one before us. The plaintiffs lost their cargo of bags of potatoes that were carried by sea in the defendant's vessel. The potatoes were found to be in a significantly deteriorated state at the port of discharge and the plaintiffs sued both the ship owners and the harbour company. The defendant ship owners sought a stay of proceedings in the case since it wanted to rely on a jurisdiction clause contained in the bills of lading.

Here **Lord Justice Brandon** gave the leading judgment in the Court of Appeal, he said:

> *"Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction is not bound to grant a stay … The discretion should be exercised by granting a stay unless strong cause for not doing so is shown,. The burden of proving such strong cause is on the plaintiffs.*
>
> *In exercising its discretion the court should take into account all the circumstances of the particular case. In particular but without prejudice to the above, the following matters, where they arise, may properly be regarded:*
>
> a) *In what country the evidence on the issues of fact is situated, or more readily available and the effect of that on the relative convenience and expense of trial as between the English and foreign courts*
> b) *Whether the law of the foreign court applies and if so, whether it differs from English law in any material respects.*
> c) *With what country either party is connected, and how closely.*
> d) *Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages*
> e) *Whether the plaintiffs would be prejudiced by having to sue in a foreign court because they would: (i) be deprived of security for*

their claim (ii) be unable to enforce any judgment obtained (iii) be faced with a time bar not applicable in England or (iv)for political, racial, religious or other reasons be unlikely to get a fair trial."

The application is made pursuant to Rule 9.6 of the Civil Procedure Rules (CPR).

[7] The claimant counters that CPR Rule 9.6 (1) - (5) has not been complied with and the defendants should therefore be treated as having accepted the court's jurisdiction. In addition, she says that despite the exclusive jurisdiction clause, the court should exercise its jurisdiction over the claim based on the live disputes as to, the nature of the action, the question of where the damage occurred and who is responsible. She adopts the principle enunciated by Mr. Gordon from the **Aratra potato case**, as to the need for strong reasons to be shown in order for the Jamaican courts to exercise jurisdiction. Among these reasons, she says the most compelling is that the 3rd defendant has implicated the 4th defendant and others as being responsible for the breach, and the 4th defendant was not a party to the contract under discussion, also that the Limitation period for bringing the case in the French court has passed. Miss Thomas as well, filed written submissions on October 31st, 2012 in which she outlined what she proffers as strong reasons and other considerations that the court should consider in the exercise of its discretion.

THE LAW

[8] CPR Rule 9.6 Provides

(1) " A defendant who-

(a) disputes the court's jurisdiction to try the claim; or

(b) argues that the court should not exercise its jurisdiction, may apply to the court for a declaration to that effect.

(2) A defendant who wishes to make an application under paragraph (1) must first file an acknowledgment of service

(3) An application under this rule must be made within the period for filing a defence. (Rule 10.3 sets out the period for filing a defence)

(4) An application under this rule must be supported by evidence on affidavit.

(5) A defendant who-

(a) files an acknowledgment of service; and

(b) does not make an application under this rule within the period for filing a defence, is treated as having accepted that the court has jurisdiction to try the claim."

ISSUES

[9] A. Can the defendant invoke Rule 9.6 in the circumstances of this case?

B. Should the court exercise its discretion to grant a stay of the proceedings in the current circumstances and acknowledge that the French court is the proper place for litigation in this matter to take place?

DISCUSSION AND ANALYSIS

Issue A

[10] On the 19th January, 2011, Acknowledgement of Service of the claim was filed on behalf of the **3rd defendant**, which said that service of the claim was on the 9th December, 2010. The third defendant's application challenging the jurisdiction of the court was first filed on 24thJanuary, 2011.Based on the calculation of the time for filing the defence (CPR Rule 10.3) it would have been due on the 20th January 2011.[also see CPR Rule 3.4(i) which indicates that time runs during the Michealmas term vacation]. The 3rd defendant then in response to the original claim would have been out of time allotted to challenge the court's jurisdiction.

[11] The **2nd defendant**'s Acknowledgment of service filed on 5th February,2013 confirms receipt of the claim on the 13th May 2012.This defendant was served outside of the jurisdiction [CPR Rule 7.5 applies 28/56 days] time for filing the defence was the 8th of July2012. Their defence was in fact filed on the 14th February, 2013. The 2nd defendant then in response to the original claim would have been out of time allotted to challenge the court's jurisdiction.

[12] The **1st defendant** acknowledged service on the 9th August, 2012 and says they were served on 22nd May; 2012.This defendant was also served outside the jurisdiction[CPR Rule 7.5 28/56] the time for filing the defence to the original claim would then expire on or about 17th September2012.the defence was actually filed on the 12th October, 2012.

[13] All three defendants would be barred from challenging jurisdiction except that the Claimant then filed an Amended Claim Form and Amended Particulars of Claim on the 8th October, 2010 and a Further Amended Claim Form with Amended Particulars of Claim on the 27th of November, 2013.

CPR Rule 20.3 (1) says that:

> *"A defendant served with amended particulars of claim or a claimant served with an amended counterclaim may amend the defence once without permission within 28 days of service of the amended particulars of claim or counterclaim as the case may be."*

The defendants would have the optional, additional 28 days after service on them of the both sets of amended documents to file their defence. The last of these three applications were filed in February 2013 long before the most recent of the amendments. The Claimant cannot have it both ways it cannot complain that the time has passed but ignore the logical consequences of their amendments. I therefore find that the challenges on the issue to jurisdiction are not out of time and the defendants are within their rights to invoke the discretion of the court as provided for in CPR Rule 9.6.

Issue B

[14] In order to exercise my discretion, I will need to consider whether or not Jamaica is '*forum conveniens'* for the relevant issues. Where the parties have agreed in a binding contract to submit their disputes to the jurisdiction of a foreign court, the Jamaican court will not in general, allow the parties to depart from their agreed choice. Initially I must look at whether the clause is an exclusive or non-exclusive one. This issue was examined in ***Sinochem International Oil (London) Co Ltd v Mobil Sales &***

Supply Corporation &Sinochem International Oil Ltd (Third Party) [2000] 1 Lloyd 's Report 670, where the court looked at the specific wording of the clause to determine whether it was optional or obligatory as to jurisdiction. The learned author of the book "**Enforcement of Maritime Claims" 4th edition** has interpreted the learning from that case at page 320 paragraph 12.65 as follows;

> *"In deciding whether or not a clause is exclusive, a distinction has been drawn between an intransitive clause by which parties agree to submit themselves to a court chosen by one of them and a clause having a 'transitive sense' and by which the parties agree to submit disputes to a particular court. A clause of submission followed by the reservation of an option in one party to bring suit elsewhere leads to the conclusion that the clause is exclusive in respect of the other party."*

[15] In the case before us the Bill of lading specifies that litigation must be brought in a French court but then reserves the right to the carrier only, to bring an action "in *carrier's sole discretion in another court of competent jurisdiction."* This clause is then is an exclusive jurisdiction clause.

"Where the exclusive jurisdiction clause is in favour of a foreign court and, but the claimant initiates proceedings in England,… the court's discretion should be exercised in favour of granting a stay unless a strong case for not doing so is shown: per Ruth Hayward, "Conflict of Laws" 4th edition at page 34.(Re the Sinochem case above)

[16] I therefore adopt this learning as persuasive and apply the principles to the case before me. After examining the circumstances of this case I find that the claimant has indeed made a strong case enough to convince me not to grant the stay of proceedings. The considerations I have used in my determining whether the claimant has made a strong case are not unlike those used in the Aratra potato case. For instance, a) which is the most convenient forum for the evidence b) how close are the connections and the potential evidence of the parties and the witnesses to the relevant countries, c) whether the defendant is only seeking a procedural advantage. In this regard I agree with the

submissions that there is a live dispute as to where and how the damage took place. The 3rd defendant's own defence as filed led to the inevitable inclusion of the 4th defendant who would not be bound by the exclusive jurisdiction clause. In fact it is even a live issue as to whether the 3rd defendant itself is bound by the exclusive jurisdiction clause.

[17] The strongest and most compelling argument for not granting the stay is that, if the clause was upheld it would lead to separate additional proceedings on the same facts having to be pursued in different jurisdictions. The first three defendants have implicated the 4th in the issue of liability. The 4th defendant was not a party to the contract and similarly the 3rd defendant has distanced itself from the contract of carriage. If the stay was granted it may lead to separate suits for breach of contract and negligence in different countries and the distinct possibility of inconsistent verdicts. If the claimant is successful in recovering for the damage to the cargo it will be easier to apportion liability if all parties are before the court at once. In addition the claimant has raised without any dispute from the defendants that the period for bringing the claim in respect of the bill of lading in France has expired, so there is a distinct possibility that the claimants would be left without a means of adjudication on the damage to the cargo, of which damage and destruction is not in dispute .This was seen as a strong reason not to grant the stay in the case of The Vishua Prabha [1979]2 Lloyd's Rep.286.

[18] These are not unlike the issues before the court in **Citi-March v Neptune Orient Lines [1996] 2 All ER 545**, the plaintiffs contracted with the defendant, a company incorporated and carrying on business in Singapore, for the carriage of consignments of clothing to London. The bills of lading incorporated an exclusive jurisdiction clause in favour of the courts in Singapore. Following delivery in London, it was found that some of the items were missing. The plaintiffs commenced proceedings in the English court against the fist defendants and three other companies, who were based in England, which had stored goods on their premises prior to delivery to the plaintiffs. The first defendant applied to have service of the English proceedings set aside on the basis of the exclusive jurisdiction clause.

[19] Coleman, J held that if the jurisdiction clause was upheld, requiring the plaintiffs to pursue the claim in Singapore, it was probable that separate proceedings against the three companies would have to be pursued in England. This would lead to a clear risk of inconsistent decisions on the facts. The plaintiffs would lose the benefit of a composite trial and would be precluded from having the benefit of obtaining the evidence of all four defendants. Therefore this was a strong reason in favour of ignoring the jurisdiction clause and maintaining the action in England. The issues touch and concern all the defendants and so in keeping with one of the overriding objectives of the court to save time and expense I make the following orders.

The court therefore orders as follows:

1. That the applications of the 1st, 2nd and 3rd defendants for a declaration that the Supreme Court of Jamaica has no jurisdiction to try the claim herein is refused.

2. The 3rd defendant's application to set aside default judgment entered against it which was adjourned pending the outcome of this application is to proceed.