

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1999/C-324

BETWEEN CROWN CORK De GUATEMALA PLAINTIFF

AND CARLO PRODUCTS LIMITED DEFENDANT

Mr. John Graham for the Plaintiff
Mr. John Givans for the Defendant

24TH, 25TH October And 29th November, 2001

CAMPBELL, J

On the 6th December, 1999, the Plaintiff, a corporation registered under the Laws of Guatemala, filed Writ of Summons and Statement of Claim against the Defendant, a Company registered under the Laws of Jamaica, for goods sold and delivered by the Plaintiff to the Defendant. Details of the sale were contained in invoices listed in paragraph 5 of the Statement of Claim. On the 7th January, 2000, the Defendant entered appearance.

On the 11th January, 2000, the Defendant filed a defence, paragraph 3 of which stated:

“That if the alleged goods or any of the items were
delivered by the Plaintiff to the Defendant (which is

not admitted), the Defendant avers, that the same were so delivered upon the order of O.G. Smith & Co. Ltd., a limited liability company incorporated in the Cayman Islands, from which the Defendant obtained supplies of goods manufactured by the Plaintiff.”

And at paragraph 5 –

“The Defendant admits that it paid to the Plaintiff the amount of US\$69,234.96 in respect of the invoices mentioned in paragraph 4 of the Statement of Claim”.

At paragraph 6 –

“The Defendant states that it made the aforesaid payments already to the Plaintiff for goods which the Defendant did not order from the Plaintiff and which the Defendant agreed to accept from the Plaintiff after the Plaintiff had already supplied items to Jamaica”.

On the 3rd July, 2000, the Plaintiff filed a Summons for Summary Judgment. The Summons was served on the Defendants on the 15th September, 2000. The application was supported by an affidavit of one Santiago Raul del Pino Teran, the legal representative and general manager of the Plaintiff who was authorised to make the Affidavit on the Plaintiff’s

behalf. This affidavit averted to the defence and states the deponents belief that there is no defence to the claim and at paragraph 10 **inter alia**:

“that all goods referred to in paragraph 5 of the Statement of Claim were ordered by the Defendant and were supplied by the Plaintiff to the Defendant and that the Defendant received the goods”.

The issue joined on the pleadings is whether in respect of the goods particularised in the invoices listed in paragraph 5 of the Statement of Claim there was an agreement between the parties to deliver the invoiced goods to the Defendant. If there was such an agreement, was the goods so delivered to the Defendant.

The Plaintiff's case is that the Defendant acting through the Defendant's agent David Hughes placed written orders for aerosol cans with the Plaintiff and gave the Plaintiff the necessary specifications for the manufacture of the cans. The manufactured cans were delivered to the Defendant.

The Law

Section 79 (1) of the Judicature (Civil Procedure) Law provides as follows:

“79. (1) Where the defendant appears to a writ of summons specially indorsed with or accompanied by a statement of claim under section 14 of this Law, the plaintiff may on affidavit made by himself or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed (if any liquidated sum is claimed), and stating that in his belief there is no defence to the action except as to the amount of damages claimed if any, apply to a Judge for liberty to enter judgment for such remedy or relief as upon the statement of claim the plaintiff may be entitled to. The Judge thereupon, unless the defendant satisfies him that he has a good defence to the action on the merits or discloses such facts as may be deemed sufficient to entitle him to defend the action generally, may make an order empowering the plaintiff to enter such judgment as may be just, having regard to the nature of the remedy or relief claimed.

The section prescribes the procedural framework for obtaining Summary Judgment without proceeding to trial in actions begun by Writ of Summons which are either:

- (a) specifically endorsed with or accompanied by a statement of claim; or
- (b) indorsed with a claim for specific performance etc., of an agreement for the sale or purchase of property.

The Defendant has not denied receiving goods from the Plaintiff, but asserts that it made no orders for the particular goods from the Plaintiff, it was O.G. Smith & Co. Ltd., that did that. The Defendant contends that, there is no privity, no agreement between the Plaintiff and himself as to the delivery of the goods. Additionally, he has already been billed for some of the goods (for which the Plaintiff claims) by O.G. Smith & Co. Ltd. The Defendant also points to the Plaintiff 's case and say that the date of the invoices which are listed in paragraph 5, range from November 1998 to May 25, 1999. However the exhibited orders and correspondence which are to evidence the Defendant orders and acceptance fall outside that period.

The Defendant also contends that David Hughes, the former managing director of the Defendant, now deceased, visits to the Plaintiff factory, were not linked in anyway to the invoices particularised in paragraph 5 of the Statement of Claim. The Defendant asserts that although some of the goods in the affidavit filed in opposition to the Summons is referable to some of the invoiced goods in the Plaintiff's Statement of Claim, those goods were received from O.G. Smith & Co. Ltd., who was the consignor on the Customs Duty Document for the clearance of the goods through Customs.

I was referred in argument to the 1965 Annual Practice of the Supreme Court and in particular O.14 r.3 at page 188.

O.14 is intended to prevent a man clearly entitled to money from being delayed, where there is no fairly arguable defence to be brought forward (**Anglo-Italian Bank v. Wells (and Davies)** (1878) 38 L.T. 197 C.A. per Jessel, M.R. at page 199”

The note to the practice rules 1965. (U. K.) for) O.14.4. at page 189 states:

“The Defendant’s affidavit must condescend upon particulars and should, as far as possible, deal specifically with the Plaintiff’s claim and affidavit, and state clearly and concisely what the defence is, and what facts are relied on as supporting it

The Defendant has set out in the affidavit in opposition, the facts upon which he seeks to rely, e.g. that Hughes was not acting as the Defendant’s agent for the purposes of the visits to the Plaintiff’s factory, that the Defendant had arrangements with O. G. Smith & Co. Ltd in relation to a portion of the goods for which the Plaintiff claims, that the Defendant had unilaterally accepted goods from the Plaintiff which had been delivered to Jamaica. The Defence goes beyond a mere general denial, and does condescend to the facts.

On the defence raised there is a triable issue, as to whether the goods came to the Defendant directly from the Plaintiff or from a third source, O.G.Smith & Co. Ltd. We make no comment on the efficacy of the defence other than that the dictum of Peterkin, C.J, in **Williams v Williams** (1978) 30 W.I.R. 77 at page 80 letter F is pertinent.

The procedure for Summary Judgment requires that leave ought to be given whenever there is an issue to be tried, even though the judge or the Master may think the Defendant will fail, provided of course, that there is no good ground for believing that the so-called defence is sham. In short, the Defendant is not bound to show a good defence on the merits. He must, however, satisfy the judge that there is an issue in dispute which ought to be tried or that there ought for some other reason to be a trial of the claim.

Conditional Leave

Counsel for the Plaintiff urged the Court that should leave be granted to the Defendant this is a fit and proper case in which terms should be imposed on the Defendant. This should be in the form of a payment in Court (into an interest bearing account).

The Court was referred to **Lloyd's Banking Co. v. Ogle** (1876) 1 Ex. D. 263 where it was said that conditions should be imposed "when there is something suspicious in the Defendant's mode of presenting the case. The

Defendant claims that his defence is good on the merits, and the defence is not a sham, and it is not even shadowy”.

I see no sign of bad faith, neither is there anything in the circumstances which is suspicious in the manner the Defendant has presented his case. The Defence was filed almost five months prior o the Summons for Summary Judgment and approximately one month after the filing of the Writ of Summons and Statement of Claim.

In **Lilian Newman v. Delroye Salmon**, S.C.C.A 15/93 it was held that where serious question of fact were to be resolved at the trial the defendant ought not to be shut out by the Court by being put on onerous terms to pay money into Court as a condition precedent to obtaining leave to defend.

The application for Summary Judgment is dismissed. Unconditional leave to defend is granted.