[2014] JMSC Civil 7

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2009 HCV 00557

BETWEEN	**GS TRUCKING LIMITED**	**CLAIMANT**
AND	**SHIPPING ASSOCIATION OF JAMAICA LIMITED**	**1ST DEFENDANT**
AND	**JAMES LEVY**	**2nd DEFENDANT**

Mr. Oswest Senior-Smith & Mrs. Denise Senior-Smith, instructed by Oswest Senior-Smith & Co. for the Claimant.

Mr. Christopher Kelman & Mr. Krishna Desai, instructed by Myers, Fletcher & Gordon for the Defendant.

Claim based on Contractual Licence – Haulage Contract – Commercial Agreements Governing Haulage Trade within the Shipping Industry – Interpretation of Documents - Claim for Damages.

Heard: September 26 & 27, 2011; September 17, 18, 19, 20 & 21, 2012 & February 3, 2014.

F. Williams, J

Background

[1] In this matter, the claimant, a haulage company incorporated on October 3, 2005; and operating primarily on the ports and wharves of Kingston, seeks to recover damages from the defendants.

[2] The basis of its claim is that, through their actions, the defendants have caused a breach of the contractual licence enjoyed by the claimant over some time, giving it free and unrestricted entry to and egress from the wharves – in particular, Kingston Wharves and APM Terminals. This breach, it is contended, occurred on the 5th day of June, 2008, when a trailer owned by the claimant, and hauling a container belonging to ZIM Lines Ltd., on what appears to have been a chassis owned by a company known as Marine Management Services Limited (MMSL), was denied entry to the premises of Kingston Wharves Limited (KWL).

[3] The reason that the claimant contends was ascribed by the 2nd defendant for this denial of entry was the claimant's failure, up to that point, to settle with MMSL, a dispute over the theft or loss of a chassis owned by MMSL from the premises of a consignee company known as Poly Pet Limited (Poly Pet), where it had been left by the claimant, which had delivered a container to Poly Pet.

Summary of the System of Haulage

[4] (On the court's understanding, from the evidence, of the system of haulage that operates on the wharves, a haulier – such as the claimant – would own trucks or tractors or trailer heads (as they are variously called), which are used to haul or draw chassis; but would itself own perhaps only a few chassis (if any at all). The containers, in which goods are shipped, have to be transported atop the chassis, which themselves are attached to the tractors and hauled from point to point. The chassis are rented or leased by the hauliers from companies such as MMSL).

The Defence

[5] The 1st defendant has adopted the acts of the 2nd defendant and has, in its defence, averred that he is not a necessary party to the resolution of the issues in this case and has been unnecessarily joined. Actually, from all indications, the presence of the 2nd defendant at the premises of the 1st defendant seems to have been due to the fact that he, an employee of Jamaica Freight & Shipping Company Ltd (JFS), was sent to the 1st

defendant on secondment or special assignment as trucking verification officer, to assist in the implementation of the arrangements relating to the standard equipment interchange agreement, which will be described in greater detail shortly.

The Decision to Exclude the Claimant

[6] The fact of the decision to exclude trucks belonging to the claimant company from the premises of KWL can be seen in a letter dated August 12, 2008 on the letterhead of Seaboard Jamaica and addressed to the general manager of the 1st defendant. It is exhibit 16A. It reads as follows:

> "Dear Mr. Riley:
>
> We have made a request to Kingston Wharves Limited that they should not allow a company trading as GS Trucking to receive any equipment operated by Seaboard Marine or Seaboard Freight and Shipping Ltd., as the company has failed to settle an outstanding claim by our agents, Marine Management Ltd., for a chassis which was stolen from GS in May of this year. The chassis was leased by GS to haul a Seaboard Container to Poly Pet Ltd.
>
> As the SAJ is responsible for the interchange arrangements being finalized with the truckers association, we ask that you supervise this process on our behalf and ensure that GS trucking is not issued with authorization to haul equipment belonging to the Association's membership, in line with the agreement reached with the PTHA, until GS meets its contractual obligations to Seaboard and/or our agents.
>
> We will keep you informed of progress toward settlement of this issue with GS Trucking."

[7] The letter is copied to Charles Johnston, Chairman of Seaboard.

The Memoranda of Agreement

[8] There are two memoranda of agreement among the agreed documents. The first (exhibit 11), is dated January 30, 2008 and took effect on February 1, 2008. The second (exhibit 12), is both dated and took effect on October 24, 2008.

[9] The terms of the two documents are for the most part the same; but the latter document contains about three provisions that the earlier one does not.

[10] Their avowed purpose is set out at clause 1 of each of the agreements and is stated to be as follows:

> "1. Purpose. The purpose of this Memorandum of Agreement is to acknowledge the agreement between the Port Trailer Haulage Association (PTHA) and the Shipping Association of Jamaica (SAJ) regarding equipment interchange relating to the protection of equipment owned by Shipping Lines, Truckers and Equipment Companies".

[11] Equally important for a full understanding of the issues in this case, is the stated problem which the agreements sought to address. This problem is set out in clause 2 of the agreements in this way:

> "2. Problem. Over the last year, there has been an escalation in instances of missing containers, chassis and other equipment of shipping lines. These losses are proving costly to the shipping industry and the situation calls for action that includes, inter alia, a Standard Equipment Interchange Agreement for the protection of such equipment".

[12] The signatories to the agreements commit themselves to working toward “the speedy, full and effective execution of the Standard Equipment Interchange Agreement in the common interest of both associations” – that is the SAJ and the PTHA.

[13] Among the specific areas of the agreement are that: (i) the Standard Equipment Interchange Agreement (the SEIA) would be adopted by all members of both organizations. The SEIA template adopted by the industry would be used as the basis for individual agreements to be signed between PTHA members and shipping agents; and the PTHA members would seek to further protect themselves by ensuring that similar agreements were signed by consignees upon delivery.

The Role of the 1st Defendant

[14] There are two other clauses in the agreements that are of particular relevance in this matter. The first, which relates to the role assigned to the SAJ, is set out in clause 5 c. of the agreements:

> “c. The SAJ will be the central monitoring and verification body of trailer haulage on behalf of the shipping and trucking industry.
>
> i. The SAJ will establish a register of trucking companies, ensuring compliance with all regulations concerning equipment interchange.
> ii. The PTHA agrees that it will ensure that its members participate in the scheme of registration established by the SAJ and encourage other truckers to join.”

[15] The other clause, which deals with the conditions under which members of the PTHA would be allowed to haul equipment belonging to SAJ members, (and apparently, the clause based on which the defendants purported to have acted), is clause 5.e of the second agreement, and reads as follows:

> “c. Only truckers who sign the shipping industry Standard Interchange Agreement and who satisfy the insurance

> requirements under the Interchange Agreement and who meet the terms and conditions established for members of the PTHA will be allowed to draw equipment belonging to members of the SAJ."

The Standard Equipment Interchange Agreement

[16] An example of the SEIA is contained in the agreed bundle of documents as exhibit 13. It is in fact a document headed "Standard Trailer Interchange Contract", dated April 22, 2003, and executed between Jamaica Freight and Shipping Company Limited (JFS) and "GS Trucking". It is important to remember at this stage that the claimant in this case was incorporated as a limited-liability company in 2005, so that this agreement could not be said to have been executed by the claimant itself. It would appear that the managing director of the present claimant used the name "GS Trucking" as a trade or business name prior to the formal incorporation of the claimant company.

[17] Among the more-important terms of this document are those setting out the lessee's covenants. Covenants (q) and (w) are the more-relevant ones to this discussion. They read thus:

> "(q) to indemnify the Lessor and the Lessor's Agent against loss or destruction of or damage to any Trailer let hereunder or any part thereof from whatever cause arising and whether or not such loss destruction (sic) results from the negligence of the Lessee".
>
> (w) to indemnify the Lessor its agents, employees, officers and directors against all and any liabilities, obligations, losses, damages, penalties, claims, accidents, suits, costs and expenses including legal expenses of whatsoever kind and nature imposed or incurred by or asserted against the Lessor its agents employees, officers and directors in any way relating to or arising out of the ownership, possession, selection, use, delivery, letting, operation, maintenance, return or condition of any Trailer let hereunder or any failure on the

> part of the Lessee to perform or comply with any terms of this Agreement. The indemnities contained in this sub-clause shall survive the termination of this Agreement".

[18] Exhibit 14 is also a copy of an equipment interchange agreement and appears to be that drafted around the time of the execution of the memoranda of agreement in 2008. This agreement also contains clauses which might have an impact on the resolution of the issues in this case – specifically clause 4.5 A, B and C, which deals with "Lost, Stolen or Destroyed Equipment". The relevant clause is set out in full hereunder:

> "4.5 A In the event that the Equipment in lost, stolen or destroyed (including a constructive total loss) during the Interchange Period, and while settlement is pending, the Line shall receive compensation equal to the applicable demurrage charges set out in the Line's Freight Tariffs for each day a trailer remains out of operation beyond the normal free time.
>
> 4.5 B The Haulier agrees to pay the Line for the replacement cost of all units of Equipment lost, stolen or destroyed plus cost of special Equipment or accessories, less depreciation, calculated as of the date of written notification and agreement to settle by the Haulier that the unit was lost, stolen or destroyed. The aforesaid notwithstanding, for any unit of Equipment leased by the Line from a third party, the payment to be made by the Haulier to the Line under this section shall not be less than the payment due from the Line to that third party lessor.
>
> 4.5 C The Haulier also agrees to reimburse the Line for all fees, customs duties and taxes with regard to any Equipment or piece of Equipment which is lost, stolen or destroyed during the Interchange Period."

[19] We may now proceed to look at the issues and evidence in this case.

The Issues

[20] The claimant, in its written submissions, has proposed that the matter be viewed along the lines of five issues, which it states to be as follows: (i) what was the decision of the defendants? (ii) whether the decision of the defendants is invalid and/or lawful? (iii) Whether the claimant was entitled to enter the premises of Kingston Wharves Limited and APM Terminals in light of its fulfillment of the requirements to do so? (iv) Whether the claimant is entitled to damages arising from the decision of the defendants? (v) What is the effect of the liability accepted by the consignee to the defendants?

What Was the Decision of the Defendants?

The Evidence

Mr. Ainsworth Williams

[21] The first witness for the claimant was its managing director, Mr. Ainsworth Williams. Consistent with the pleadings, his evidence was to the effect that he, personally, had been in business as a haulier, before registering the claimant company, for a period of some seven years- that is, from the year 1998 or thereabouts. The claimant company therefore operated on the premises of Kingston Wharves and APM Terminals for some three years. He is of the view that the claimant had a contractual licence to operate on those premises (see paragraph 5 of his supplemental witness statement).

[22] Paragraph 10 of the said supplemental witness statement indicates the background to the dispute concerning the stolen chassis. He indicates in that paragraph that Poly Pet agreed to compensate MMSL. There was some delay in settling the matter as the parties (that is, Poly Pet and MMSL) could not agree on the value to be ascribed to the chassis. The matter was eventually settled in or about November of 2008 in the sum of two hundred thousand dollars ($200,000). At no time did the claimant refuse to compensate MMSL.

[23] Whereas KWL is a member of the 1st defendant; MMSL is not. Neither is MMSL a shipping agent (which grouping the 1st defendant represents).

[24] New regulations to govern the haulage industry were communicated to him by the Port Trailer Haulage Association (PTHA), of which he is a member, on October 23, 2008. He complied with these requirements. The requirements, which were four-fold, might be summarized as requiring: (i) membership of the PTHA; (ii) having valid all-risk insurance; (iii) execution of the interchange agreement; and (iv) valid goods-in-transit insurance. On compliance with these requirements, a haulier was to be issued with a sticker indicating such and which would have entitled that haulier to enter the premises of members of the 1st defendant. However, despite the claimant complying with these requirements, the defendants still denied it entry – in that up to December 9, 2008, its bearer who was sent to attempt to comply fully with the requirements did not receive the expected assistance from the 2nd defendant.

[25] It was only the grant of an injunction by this court on October 27, 2009 that enabled the claimant once again to enter the premises of KWL and APM. The 1st defendant filed an appeal against the grant of the injunction; but later withdrew the said appeal.

The Defendants' Case

[26] The defendants, on the other hand, whilst denying the existence of any contractual licence in favour of the claimant, contend that they did not deny him entry to the two premises. They however say that what they did was to lawfully deny the claimant an "approved-trucker sticker". They contend that the 1st defendant's power to do so derives from the memoranda of agreement that were introduced to govern the haulage trade; and is in keeping with its role as the central monitoring and verification body in respect of the new regime. The 1st defendant was entitled to refuse to issue such a sticker to the claimant as a result of what it considered to have been the claimant's refusal to first settle the matter of the stolen chassis.

[27] In this regard, its actions tie in directly with the commercial purpose of the memoranda. On a purposive construction of the memoranda, the defendants' actions must be viewed as being justified. A number of cases were cited in this regard, for example: (i) **Prenn v Simmonds** [1971] 3 All ER, 237; **Reardon Smith Line Limited v Hansen-Tangen** [1976] 3 All ER, 570; and **Investors' Compensation Scheme Limited v West Bromwich Building Society** [1998] 1 All ER, 98. Briefly, these cases are to the effect that, in construing contracts, the factual background known to the parties might be considered (**Prenn v Simmonds**); regard could also be had to the commercial purpose of the contract (the **Reardon Smith Line Ltd**. case); and "the matrix of fact against which a contractual document was to be construed…" could also be considered (the **ICS v West Bromwich** case).

[28] The evidence of Mr. Trevor Riley, the general manager of the 1st defendant, is to similar effect: the 1st defendant's actions were justified by the memoranda of understanding that were in place at the time.

Background to the 1st Defendant's Role and Function

[29] By way of background, it is useful to set out paragraph 2 of Mr. Riley's witness statement, as it provides information on the role and function of the 1st defendant. It reads as follows:

> "2. The 1st Defendant is a registered Trade Union duly incorporated under the provisions of the Trade Union Act and is a representative organization of wharf and terminal operators, shipping agents, shipping lines, stevedoring contractors and operators on the port of Kingston. Its principal activities include the provision of several categories of labour on the port of Kingston."

The Evidence of the Expert

[30] To similar effect, as well, is the evidence of Fritz Pinnock, who was appointed an expert and who has extensive experience and education (to the level of a doctoral degree) in shipping and logistics. In a nutshell, his view is that the actions of the 1st

defendant were justified, being in accordance with international shipping practice. International shipping practice fixes liability for leased equipment squarely on the trucker. The memoranda and interchange agreements in question are in keeping with this practice.

[31] His opinion is that when the claimant looked to Poly Pet, the consignee, to compensate MMSL, that represented a serious breach of both the spirit and the letter of the memoranda of understanding and the accepted norms and practices governing interchange agreements.

Discussion

[32] Whether the claimant's servant's inability to access the premises of KWL and/or APM was due to a direct refusal to allow entry (as is the evidence given on behalf of the claimant); or was due to the refusal to issue an "approved trucker" sticker, is, in the court's view, of no real moment. What matters is the practical effect of any action that was taken. There is no dispute that the practical effect of any action that was taken was to result in the claimant being unable to enter the two premises (or, at the very least, one), to deliver or collect containers in the course of its business or trade. There can also be no doubt that the claimant's inability to enter both or either of the said two premises stemmed (at least initially), from what the defendants regarded as its refusal to settle the matter with MMSL; and what the claimant contends to have been delay due to the two negotiating parties' inability to agree on a sum in which to settle the matter.

[33] Prior to the grant of the injunction, it, is difficult to descry what the reason could have been, if not the initial one; the uncontroverted evidence from the claimant's principal being that, apart from a brief period in which there might have been documents outstanding, the claimant satisfied the principal requirements and was desirous of satisfying them all; but was hindered or prevented from doing so by the withholding of assistance by the defendants.

[34] At the end of the day, therefore, the court finds that the decision of the defendants was to exclude the claimant as a result of the claimant's failure to settle the matter directly and quickly with MMSL.

The Other Issues

[35] The other issues in the case that have been identified by the claimant's counsel, are, in the court's view, not readily amenable to discrete analysis. For example, considering whether the decision of the defendants was unlawful and/or invalid, involves a consideration of the effect on the issue, if any, of the consignee's acceptance of liability; and also involves a consideration of whether the claimant was entitled to have entered the two premises. Let us proceed, however, to examine the other issues that arise.

Did the Claimant have a Right to Enter the Premises?

[36] The question of whether the claimant had the right to enter the two premises has to be examined against the background of the memoranda of agreement and the interchange agreements, as well as other facts that obtain in the instant case.

[37] The claimant has sought to peg its claim on the concept of a contractual licence. But is this a viable contention? A contractual licence has been defined in **Halsbury's Laws of England**, 4th Edition, Reissue, Volume 9 (1), paragraph 981as follows:

> "981. **Contractual licences**. A contractual licence is a licence supported by consideration but not coupled with a grant. At common law, such a licence might be effectively revoked at any time, whether or not it contained provisions regarding its duration and the licensee's only remedy was an action for damages. However, equitable principles now prevail …"

[38] Accepting this definition as correct, one would be hard pressed to fit within it the circumstances of the claimant in this case. For one, the circumstances of this case do not show the existence of any contract directly between the claimant and the defendants. Rather any such contractual relationship would have existed between a

member of the 1st defendant and a consignee client of the claimant and between that consignee and the claimant itself.

[39] A practical example that is often used of a contractual licence is that of a guest staying in a hotel – that guest being permitted or given a contractual right to stay there pursuant to a contract entered into between himself and the hotel, with consideration flowing from him or her (the licensee). No similar parallel can be drawn here. It is therefore doubtful that the claimant has succeeded in establishing the existence of a contractual licence (in the usual sense in which the term is used), though, without a doubt, a licence of some sort seems to have existed.

[40] However, even if the claimant has not, with the expected clarity, established the existence specifically of a contractual licence, we still need to examine whether the circumstances of this case indicate a right (by whatever name might be used to describe it) to have entered the premises in question and also, we must simultaneously examine whether the defendants had a right to exclude the claimant.

[41] In this regard it is necessary to remember that the claimant did not come into existence until it was incorporated on October 3, 2005. The well-known case of **Salomon v Salomon** (1897) AC, 223, is the authority to which reference is routinely made to establish the now-trite proposition that a limited liability company is a different and separate legal entity and has a separate legal personality from its members or directors. The two corollaries of this are that (i) any contractual licence or right to enter the two premises must relate to the claimant company itself and not to its principal, Mr. Williams; and (ii) any contractual relationship contended for by (in particular) the defendants must relate again to the claimant company and not to its principal, who might have used the trade name “GS Trucking”, before incorporation of the limited-liability company.

[42] There is uncontroverted evidence that for some time the claimant had been able to enter the premises of KWL and APM without let or hindrance in order to haul containers

in keeping with its business or trade. This would have occurred between the date of its incorporation and that date in 2008 when its driver was denied entry. Indeed, it is not without significance that the defendants are not contending that the claimant (were it not considered to have been in breach of the MOA and SEIA), would not have had the right to enter the two premises in the normal course of its business.

[43] In relation to the defendants' contention that they had the right to act in relation to the claimant as they did, the court has given careful consideration to the evidence of the expert, Dr. Pinnock. Much of it is accepted by the court, which regarded him as a witness of great knowledge and experience. His evidence as to the practice of the haulage industry – that is, as to the trucker being fixed with liability or responsibility where equipment is lost or stolen is accepted as well. One important question for the court to resolve, however, is, practice apart, whether there is anything with the binding force of law on which the defendants can rely to entitle them to act as they did. In embarking on this enquiry, the court is not oblivious to the dicta in the cases cited by counsel for the defendants, such as **Prenn v Simmonds** and the others. In those cases, however, there was no doubt about the existence of contractual relationships between or among the parties who were at loggerheads. Can the same be said of the circumstances of the instant case?

Contractual Obligations?

[44] In the instant case, if we take the memoranda of agreement first, it is instructive to look at the language of the relevant documents. A perusal of them indicates that they are framed and expressed in the future tense – expressive of goals, objectives, expectations and a state of affairs that are desired; but not yet attained. So that, for example, when exhibit 11 is looked at (the MOA dated January 30, 2008), there is quite a liberal use of the word "will" and phrases such as "will sign"; "will ensure"; "will work toward" and so on. The later MOA is no different (the MOA dated October 24, 2008). It speaks (in clause 4, for example), to the fact that the parties:

"will work toward the speedy, full and defective execution of

> the Standard Equipment Interchange Agreement in the common interest of both associations".

[45] At clause 5, it states that:

> "a. The Standard Equipment Interchange Agreement will be adopted by all SAJ and PTHA members.
>
> b. PTHA members will sign separate agreements with each shipping agent based on the Standard Equipment Interchange Agreement template adopted by the industry…"

[46] This last paragraph in fact indicates that the clear intention was that it was through each specific SEIA to be signed between the individual trucker and the individual shipping agent that contractual relations were to have been established; and these agreements were to have fit within the more-general framework of what obtains in practice worldwide. The MOAs, therefore, were in fact agreements to agree, signifying the general desire to put certain intentions into contractual form. Is there any evidence that such a contract existed between the claimant company on the one hand and any other entity, the terms of which might have empowered the defendants to have acted as they did?

[47] In regard to this question, the only specific contract that has been put in evidence is exhibit 13 – that is the "Standard Trailer Interchange Contract" dated April 22, 2003. Apart from the fact that it bears a date that precedes by some five years the date of the incident giving rise to this suit, the document presented to the court as an exhibit was not signed by the lessor (JFSCL). Far more importantly, however, the other party to the contract (the lessee) is not the claimant, which is a limited-liability company; but "GS Trucking" – in other words, it is signed by Mr. Ainsworth Williams in his personal capacity, using "GS Trucking" as a trade name.

[48] This, the true position, reveals an inaccuracy in the contents of paragraph 10 of Mr. Riley's witness statement, where it is said that:

> "…In fact, during 2008 the Defendant (sic, really meaning the claimant) and the 1st Defendant's member JFS had a subsisting Interchange Agreement dated 22nd day of April 2003 which had similar terms and conditions as outlined above."

[49] So when, as in exhibit 16A, JFS requests that authorization for the claimant to haul containers for the 1st defendant's members not be granted:

> "…until GS meets its contractual obligations to Seaboard and/or our agents…"

it is, at best, unclear what these "contractual obligations" are and to whom they are owed.

[50] Further, the said document of April 22, 2003 shows that the document had a lifespan of twelve (12) months only. These are the clear terms of clause 8.8 of the said document:

> "8.8 This Agreement shall be operative for a period of twelve months from the date hereof however it may be terminated prior to such date by the Lessor or the Lessor's Agent only:-
>
> (a) on the giving to the Lessee of one (1) month's notice; or
> (b) on any Trailer let to the Lessee being found to contain drugs or other contraband after having been drawn by such Lessee."

Further Concerns

The Incident of June 5, 2008

[51] The claimant, through its driver, Omar Robinson and secretary, Rosemarie Berry, have testified to the barring of a truck belonging to the claimant on June 5, 2008 from the premises of KWL.

[52] There is a denial to be found in paragraph 21 of Mr. Riley's witness statement in these terms:

> "21…The 1st Defendant has no power to ban any trucker, including the Claimant, from entering any wharf premises or hauling equipment belonging to non-members of the 1st Defendant and has never done, or purported to do so and specifically denies ever having instructed KWL or APM Terminals to ban the Claimant from their wharf premises".

[53] In paragraph 22 the request that was made of the 1st defendant by Seaboard in exhibit 16A is summarized thus:

> "22. The 1st Defendant on 12 August 2008 was requested by letter written by its member Seaboard Jamaica not to issue authorization for the Claimant to haul any equipment on behalf of SAJ members due to a failure of the Claimant to settle an outstanding obligation to Seaboard and its agent MMS." (emphasis added).

[54] The words that were used in exhibit 16A, it will be remembered, were that KWL:

> "…should not allow a company trading as GS Trucking to receive any equipment operated by Seaboard Marine or Seaboard Freight and Shipping Ltd….
>
> …and ensure that GS trucking is not issued with authorization to

> haul equipment belonging to the Association's membership"...
> (emphasis added).

[55] One important consideration is this: How would the defendants have seen to the carrying out of Seaboard's request? Would they have allowed the claimant's trucks on the premises and then not allowed them to receive the equipment? Or, on the other hand, would it not likely have been through the more-practical method of barring the trucks of the claimant from entering the two premises or either of them? In the court's view, the latter is the method that the defendants would likely have used. Additionally, it should be remembered that the clause in the memorandum of agreement dealing with the approved-trucker sticker is a feature not of the first memorandum of January 30, 2008; but only that of October 24, 2008; so that method of exclusion would not have been available in June of 2008. A curious feature of the general evidence for the defendants, however, is that there appears to be a focus on the right not to issue an approved-trucker sticker.

The Role of Poly Pet

[56] Another interesting point in this case is the role played by Poly Pet in the dispute concerning the loss of the chassis. This point has three aspects: (i) For one, Poly Pet accepted liability and engaged in dialogue with MMSL with a view to compensating it for the stolen chassis and in fact ultimately settled the matter in the sum of $200,000. That is the uncontroverted evidence. (ii) Second, when suit was eventually filed by attorneys-at-law representing MMSL; it was filed against the claimant not pursuant to any interchange agreement or memoranda of agreement; but alleging breach of an alleged oral agreement arising from the earlier-mentioned 2003 agreement. Paragraph 4 of the particulars of claim in that suit show that it is specifically mentioned that the 2003 agreement had expired. Those pleadings were drafted and filed by the firm that now represents the defendants. (iii) Additionally, although, through the letter of demand MMSL sought a sum in excess of $500,000; the matter was eventually settled in the sum of $200,000, thus lending some credence to the claimant's contention that there

was delay in the settling of the matter due to discussions and negotiations between the parties.

The 2nd Defendant – An Unnecessary Party?

[57] As previously indicated, the 1st defendant has averred in its defence that the 2nd defendant was unnecessarily joined to the action and has adopted his acts.

[58] In the court's view, however, it is important to consider the facts of this case and in particular the fact that the 2nd defendant was not, strictly speaking, an employee of the 1st defendant and the particular arrangements between the two defendants quite possibly would not have been known to the claimant at the time of filing this claim. Neither would the claimant have known the posture that the 1st defendant would have adopted with respect to the actions of the 2nd defendant. In these circumstances, it cannot successfully be argued that the joinder of the 2nd defendant was unnecessary. It will, of course, however, be a matter for the 1st defendant whether it might wish to indemnify the 2nd defendant in light of the posture that it has adopted where his actions in this matter are concerned.

Conclusion

[59] From the foregoing, the conclusion to which the court has come is that there is no effective contract that empowered the defendants to do what was done; and since the claimant enjoyed the right to enter the two premises and this access was abruptly discontinued, the claimant is entitled to be paid damages by the defendants. Yes, there were discussions and arrangements in place governing the relationship between truckers and the various other players in the industry. So that, whereas the claimant might have offended against the spirit of the arrangements; it has not broken the letter of any contract. It was only if it had that it could have been denied its claim.

[60] The court finds that there is no contractual basis for the defendants to have acted as they did in excluding the claimant from entering the premises. Such power or right is not to be found in the memoranda of agreement or the interchange agreements that

have been considered. Such matters might have been contemplated at some time or the other; but not given the status of a contractual right or clothed with contractual force.

[61] Also of significance is the fact that MMSL is not a member of the 1st defendant and so could not have relied on the terms of the memoranda of agreement.

[62] For the avoidance of doubt, however, the court wishes to observe that, unlike with respect to KWL, the evidence concerning the claimant's exclusion therefrom being sufficient; it is not so with APM Terminals. The court finds that the claimant's evidence as to its exclusion from those terminals is not of a sufficient standard to discharge its evidential burden. The court, therefore, is not in a position to say that the claimant was, in fact, excluded from APM Terminals.

Disposition

[63] This matter was originally set down for a week for the hearing of evidence - for a determination of liability and, if warranted by the finding of liability, the quantification and award of damages. However, as it became apparent near to the middle of that week that the week would not have sufficed for the court to deal with both liability and damages, the court, in exercise of its case-management powers pursuant to rule 26 of the Civil Procedure Rules, rather than part-hearing the matter to some indeterminate date, decided to use the week to deal solely with the question of liability.

[64] Apart from the award of damages that the claimant seeks, it also seeks a permanent injunction and a declaration that it is entitled to enter the premises of KWL and APM Terminals. On one view, these orders that have been prayed for might no longer be necessary. The reason for this is to be found in the grant of the interlocutory injunction and the subsequent abandonment of the appeal from the said grant. However, for the avoidance of all doubt it may be best for these orders that have been sought to be made, the claimant having demonstrated to the court's satisfaction that it is entitled to them.

[65] The court regrets and apologizes to the parties for the delay in the delivery of this judgment. The issues affecting the timely delivery of judgments are well known; and, hopefully, will shortly be addressed.

[66] It is therefore hereby declared and ordered as follows: That there be -

i. Judgment for the claimant against both defendants, with damages to be assessed
ii. That the trucks of the claimant, its servants and/or agents are entitled to have access to the premises of Kingston Wharves Limited and APM Terminals.
iii. An injunction to restrain the defendants, whether by themselves, their servants and/or agents or otherwise howsoever from obstructing the entrance to or otherwise preventing the trucks of the claimant from gaining access to the premises of Kingston Wharves Limited and APM Terminals.
iv. Costs to the claimant to be agreed or taxed.