IN THE **SUPREME COURT OF JUDICATURE OF JAMAICA**

IN COMMON LAW

SUIT NO: CL S. 018 OF 1999

| | | |
|---|---|---|
| BETWEEN | THE SHELL COMPANY (W.I) LIMITED | PLAINTIFF |
| AND | CARIBBEAN CEMENT COMPANY LIMITED | DEFENDANT |

Andre Earle for the Plaintiff/Applicant instructed by Rattray Patterson & Rattray.

Garth McBean for the Defendant/Respondent instructed by Dunn Cox Orrett & Ashenheim.

Heard on the 9th and 30th days of July, and the 19th day of October 1999.

IN CHAMBERS

CORAM: COURTENAY ORR J.

INTRODUCTION:

This is a summons in which the plaintiff seeks for orders in the alternative and cumulatively that:

> "1. Judgment be entered for the Plaintiff in the sum of $518,098.00 with interest and costs pursuant to Section 79 of the Judicature (Civil Procedure Code) Law on the ground that the Defendant does not have any or any good defence to this action."
>
> "2. The Defence and Counterclaim herein be struck out and judgment be entered for the Plaintiff in the sum of $518,098.00 with interest and costs, pursuant to Section 238 of the Judicature (Civil Procedure Code) Law, and/or under the inherent jurisdiction of theourt on the ground that the Defence and Counterclaim does not disclose any reasonable action or answer, and is

frivolous, vexations and/or is an abuse of the process of the Court".

The plaintiff is a limited liability company engaged in the sale and distribution of petroleum products. The defendant was at all material times a customer of the plaintiff.

Paragraph 3 of the Statement of claim sets out the gravamen of the plaintiff's complaint as follows:

> "The Plaintiff's claim if for the sum of $518,098.00 being the price of products sold and delivered to the Defendant at the Defendant's request; full particulars have already been delivered to the Defendant or are in its possession".

PARTICULARS

| INVOICE # | DATE | AMOUNT |
|---|---|---|
| 257189 | 02/09/97 | $ 88,780.00 |
| 258694 | 02/10/97 | 91,540.00 |
| 259792 | 23/10/97 | 120,635.00 |
| 260075 | 27/10/97 | 96,508.00 |
| 260530 | 04/11/97 | $120,635.00 |
| | Less amount paid | nil |
| | | $518,098.00 |

In its defence the defendant states as follows:

> "The defendant admits that the said products or goods namely diesel oil was sold by the plaintiff to it but the defendant denies that the said goods were delivered by the plaintiff its agents or servant to the defendant".

Further the defendant avers as follows:

(i) An express term of the said contracts for the sale of the said goods was as follows:

"Special note

Shortages must be agreed with the driver at the time of delivery and noted on invoice for any claim to be considered by the company. The customer is responsible for ensuring that the driver couples delivery lines correctly and for dipping checking and testing of the lorry and his own tanks before and after delivery".

(ii) In breach of the said express term by which actual delivery at the defendants premises and into its storage tanks was to be made, the Plaintiff its agents or servants failed to deliver the said goods.

(iii) By reason of the matter aforesaid the defendant is not liable for the said sum of $518,098.00"

The defendant also filed a counterclaim which reads in part:

"Further the defendant avers as follows:

(I) The plaintiff sold goods to the defendant namely diesel oil by the invoices on the dates and for the prices set out below:"

Then follows a list of 39 invoices showing the invoice number, the date of the invoice and the amount stated therein. At the end of the list a total of $3,744,101.00 appears and then the following calculation is noted:

| | |
|---|---|
| | $3,744,101.00 |
| Less deliveries as per vehicle register (5) | 524,055.00 |
| | 3,220,046.00 |
| Add back delivery dated 14/10/97 | 120,635.00 |
| | $3,340,681.00 |

The counterclaim goes on:

> "6. The defendant paid the plaintiff the total sum of $3,744.01 (sic) for the said goods.
>
> 7. The plaintiff, its agents or servants in breach of the said express terms referred to in paragraph 2 (1) of the defence failed to deliver the said goods sold to the defendant as particularized above.
>
> 8. By reason of the matters aforesaid the consideration for the payment of the sum of $3,340,681.00 has wholly failed and the plaintiff has had and received the said sum to the use of the defendant.
>
> AND THE DEFENDANT COUNTERCLAIMS:
>
> (I) The sum of $3,340.681.00 ....."

The relevant statutory provisions on which these applications are based are Sections 79, (summary judgment) and Section 238 - striking out pleadings.

The provisions are as set out hereunder:

> "*Title 13. Leave to Sign Judgment and Defend when Writ Specially Indorsed*.

*Judgment on writ specially indorsed under S.14, notwithstanding appearance*.#1

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.

*Striking out pleadings*.

238. The Court or a Judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer; and in any such case, or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court or a Judge may order the action to be stayed or dismissed or judgment to be entered accordingly, as may be just."

Both sides filed affidavits to substantiate their positions. In her affidavit, Darlene Jackson-Anderson, Purchasing and Stores Manager of the defendant admits that the goods as set out in the 5 invoices noted in paragraph 3 of the statement of claim, i.e. the

subject matter of the claim, were sold to the defendant for the sum of $518,098.00 but she denies that they were delivered, and it is this issue which is pivotal to the plaintiff's claim. She admits too that the defendant has not paid that sum.

It is also common ground between the parties that:

(I) Each of the 5 invoices on which the plaintiff's bases its claim contained the following notation:

"Special note

> Shortages must be agreed with the driver at the time of delivery and noted on invoice for any claim to be considered by the Company. The customer (defendant) is responsible for ensuring that the driver couples delivery lines correctly and for dipping, checking and testing of the lorry and his own tanks before and after delivery. The Company reserves the right to charge interest or to adjust the price for exchange rate fluctuations in respect of any overdue balance."

(ii) None of the invoices mentioned in the plaintiff's claim contain a note indicating that there were shortages in the deliveries.

(iii) The sum of $518,098.00 claimed by the plaintiff remains unpaid.

(iv) The duty arising under the 'Special Note' for the correct coupling of delivery lines and for the dipping, checking and testing of the lorry and the tanks before and after delivery is that of the defendant.

(v) Wayne Jackson a former servant or agent of the defendant signed all 5 invoices, the subject matter of the plaintiff's claim, in the section headed "Customer's Signature", thus acknowledging receipt of the goods.

(vi) Prior to 30th September, 1997, Wayne Jackson appeared to have and did have authority to receive such deliveries and had signed for such deliveries which were not questioned.

(vii) The first written notification of the termination of Wayne Jackson's authority was a letter dated 26th November 1997, which the defendant received on 1st December 1997.

## THE PLAINTIFF'S AFFIDAVITS

The plaintiff relies on two affidavits of Christopher Barrett, the first dated 7th May 1999, and a Supplemental affidavit dated 7th July 1999. In addition to those facts which are common ground these affidavits allege the following facts:

At no time did the defendant agree or seek to agree that there were shortages in the deliveries regarding the claim for $518,098.00 or the counter claim for $3,744,101.00.

The gas oil valued at $3,744,101.00 the basis of the defendant's counter claim was delivered.

## THE DEFENDANT'S AFFIDAVIT

Darlene Jackson-Anderson, the Purchasing and Stores Manager of the defendant Company deposed to the only affidavit filed by the defence. In it she made the following statements in defence:

Whilst admitting that during the periods September 2, 1997 to November 4, 1997, the plaintiff sold gas and diesel oil valued at $518,098.00 she denied that the goods were delivered at the defendant's premises.

The records of the Company support this allegation in that they reveal that the motor vehicle registered 3482 CC which is alleged to have delivered the goods did not enter the defendant's premises during the abovementioned period.

The dipstick reading of the tanks where the goods should have been delivered showed no change during the relevant period, and the condition of the pump showed a "lack of use for some time".

The investigations by the Police and the defendant suggest that Wayne Jackson and the plaintiff's driver conspired to steal the goods.

At the time of the conspiracy Wayne Jackson was not authorised to receive delivery of the goods.

Both men have been arrested and are awaiting trial.

The absence of notification or agreement regarding the shortages is due to the conspiracy between the plaintiff's driver and Wayne Jackson. The authority of Wayne Jackson to receive deliveries was terminated on 30th September, 1997.

There is also the bald allegation that the plaintiff's driver Joel Wedderburn knew of the termination, but nothing is said as to how he would have known.

## THE SUBMISSIONS ON BEHALF OF THE PLAINTIFF

Mr Earle puts forward the following arguments in support of his summons:

### (a) On the Issue of Summary Judgment

The defence is untenable.

The issues raised involved a pure question of law, that is, whether there had been a delivery of the goods sold. Therefore in keeping with the decision of the Court of Appeal of Trinidad and Tobago in Trinidad Home Developers Ltd v I.M.H. Investment Ltd. 39 WIR 355, the Court should decide the issue on the hearing of this summons. That decision was applied by the Court of Appeal in Peter Williams (Snr) et al v United General Insurance Co Ltd SCCA No 82/97 judgment delivered June 11, 1998.

In doing so the Court held that the principle extended to applications under Section 79 and 238 of the Civil Procedure Code.

A seller who is required to deliver goods at the premises of the buyer fulfills his obligation if he delivers them there to a person apparently having authority to receive them. Galbraith and Grant Ltd. v Black [1922] 2 K B 155, Benjamin on Sale of Goods 4th Edition paragraph 8-22, Chitty on Contracts 26th Edition paragraph 4840.

At all material times Wayne Jackson appeared to have the authority to receive the goods on behalf of the defendant and he had signed all the relevant invoices in the appropriate section.

Ostensible or apparent authority is the authority as it appears to others - per Lord Denning in Hely - Hutchinson v Brayhead Ltd. [1967] 3 All ER 102.

Wayne Jackson was represented as having ostensible or apparent authority by virtue of his having signed the invoices the subject matter of the plaintiff's claim as well as previous invoices in respect of which there was no query by the defendant and indeed the defendant had paid for them.

In law notice must be given to a third party in order to terminate apparent or ostensible authority - Willis Faber and Company v Joyce 27 TLR 388. Halsbury's Laws of England 4th Edition Volume 1 paragraph 201.

The defendant had done nothing to terminate Wayne Jackson's apparent authority prior to November 26, 1997. The defendant is therefore estopped from denying his authority before that time.

Wayne Jackson was acting within the scope of his apparent or ostensible authority and therefore even if he was, he acted fraudulently he still bound his principal Bowstead on Agency 14th Edition paragraph 230.

Any opportunity to steal or otherwise behave fraudulently, that may have accrued to Wayne Jackson while acting within the scope of his apparent or ostensible authority, renders his principal (the defendant) liable to the third party, (The plaintiff.) - Lloyd v Grace , Smith & Company [1911 - 13] All ER R 51.

It may be argued that both the defendant and the plaintiff were innocent parties if there were collusion between the agents of both parties. On the facts of the instant case the defendant is the one who caused the state of things on which the other (the plaintiff) acted and therefore the defendant should be the one to suffer - Drew v Nunn [1874 - 80 ] All ER Rep. R 1144 at 1147.

(b) On the Issue of Striking Out the Defence and Counter Claim

The Court may exercise this power pursuant to Section 238 of the Judicature (Civil Procedure) Code Law or under the inherent jurisdiction of the Court.

In view of those facts which are common ground between the parties, the defence and counter claim should be struck out. Moreover the affidavit in support of the defendant's application shows that the defendant has no sustainable defence.

There are 3 essential issues to be decided:

> "(I) Whether or not the Defendant is liable to the Plaintiff in the sum of $518,098.00 for goods sold and delivered.
>
> (ii) Whether Wayne Jackson had ostensible or apparent authority to acknowledge the receipt of the

said goods on behalf of his principal (i.e. the defendant) thereby estopping the Defendant from denying liability in the said sum of $518,098.00.

(iii) Whether or not the Defendant is entitled to a counter claim of $3,340,681.00 as against the Plaintiff"

There is no arguable defence.

The Submissions On Behalf of the Defence

Mr McBean puts forward the following points:

1. On The Application for Summary Judgment

(a) There are issues of law, and issues of fact to be tried in the instant case.

The Triable issues of fact are:

"(1) What role was played by the Plaintiff's agent (the driver of the vehicle assigned to deliver the fuel) in the diversion of the fuel from the defendant's premises.

(ii) Where and under what circumstances did Wayne Jackson the Defendant's agent sign for fuel?

(iii) Did Wayne Jackson ever see the goods for which he purportedly acknowledged receipt?

(iv) What happened to the fuel or diesel oil which the Defendant alleges never actually reached its premises?

If the evidence showed criminal activity by the plaintiff's driver and if Wayne Jackson signed for the goods at some place other than the defendant's premises, then the legal situation would be quite different from that advanced by the plaintiff. Hence the issues are not pure issues of law.

(2) On the Application to Strike Out
The Defence and Counter Claim

Whether considered pursuant to Section 238 of the Judicature (Civil Procedure Code) Law or the inherent jurisdiction of the Court, this application must fail. The defendant's claim that the goods were not delivered is a valid defence. The defendant does not rely on shortages in delivery as suggested by the plaintiff's counsel but upon non-delivery.

## THE COURT'S ANALYSIS AND CONCLUSION

### The Standard of Proof in Summary Judgment

In Ricci Burns Ltd v Toole [1989] 1 WLR 993, [1989] 3 All ER 478, the English Court of Appeal defined the standard of proof in summary judgment as follows:

> "[It] (has been described as requiring 'no reasonable doubt' in Jones v Stone [1894] AC 122, 124 per Lord Halsbury)
> ..... Judgment, when entered, is final, apart from appeal. A reasonable doubt as to the possibility of success of the defendant on some issue of fact raised on the affidavit evidence must preclude summary judgment against him because the doubt cannot be resolved in the summary proceedings, and the defendant would, if judgment were given have no opportunity of proving that he was against the apparent probabilities, right on that issue ... the defendant cannot be denied the right to contest the issue. If the case put forward by the defendant is such that the Court regards it as suspicious. ...Conditions maybe imposed on the leave to depend.
> ...The imposition of the condition will impose some test upon the honesty of the defendant's purpose in advancing the defence and provide some protection to the plaintiff".

This issue has been also put from the perspective of the defendant showing cause why summary judgment should not be entered. Ackner LJ, as he then was, had this to say in Banque de Paris et des Pays-Bois (Suisse) SA v de Noray [1984] 1 Lloyd's Rep 21 at 23.

> "It is of course trite law that Order 14 proceedings are not decided by weighing the two affidavits. It is also trite that the mere assertion in an affidavit of a given situation which is the basis of a defence does not, ipso facto, provide leave to defend. The court must look at the whole situation and ask itself whether the defendant has satisfied the court that there is a fair or reasonable probability of the defendants having a real or bona fide defence".

In National Westminister Bank plc v Daniel [1994] 1 All ER 156, the English Court of Appeal adopted the test propounded earlier by Ackner LJ. In doing so Glidewell LJ said at 160:

> "I regard the test formulated by Webster J in [Paclantic], with respect to him as being too narrow and restrictive. I think it right to follow the words of Ackner LJ ... or indeed those ... of Lloyd LJ in Standard Chartered Bank v Yacoub; is there a fair and reasonable probability of the defendants having a real or bona fide defence? Lloyd LJ posed the test: is what the defendant says credible? If it is not, there is no fair or reasonable probability of him setting up a defence."

Earlier in Crown House Engineering v Amee Projects Ltd (1990) 6 Const. LJ 141 at 154, Bingham LJ sounded a warning regarding the use of applications for summary judgment.

He said:

> "The high cost of litigation, and the premium on holding cash when interest rates are high, greatly increase the attractiveness to commercial plaintiff's of procedural short cuts such as are provided by Ord 14 (summary judgment) and Ord. 29 R 12 (Interim Payments). A technical knockout in the first round is much more advantageous than a win on points after 15. So plaintiffs are understandably tempted to seek summary judgment or interim payments in cases for which these procedures were never intended ...
> ... Ord 14 is for clear cases, that is, cases in which there is no serious material factual dispute and , if a legal issue, there is no more than a crisp legal question as well decided summarily as otherwise".
> (emphasis supplied)

Other Legal Principles Applicable

I adopt the test stated in National Westminister Bank plc v Daniel (supra). I also accept the various statements of legal principle so ably enunciated by Mr Earle in his submissions and in particular: That if there is an issue of pure law the Court should decide the issue. Trinidad Home Developers case, (supra): That where a seller who is required to deliver goods at the premises of the buyer, delivers them there to a person having apparent authority to receive them, he fulfils his obligation Galbraith and Grant v Black (supra); that notice should be given to a third party in order to terminate apparent or ostensible authority, Willis False and Company v Joyce (supra); the dictum of Lord Denning in Hely Hutchinson v Brayhead (supra) and that a fraudulent agent may still bind his principal.

I am aware of the danger of according a dictum a quasi - legislative status, but I accept the words of Lush LJ in Galbraith and Grant Limited v Black [1922] 2 KB 155 at 157, cited by Mr Earle as being a correct statement of the law. He said:

> "A vendor who is told to deliver goods at the purchaser's premises discharges his obligations if he delivers them there without negligence to a person apparently having authority to receive them. He cannot know what authority the actual recipient has. His duty is to deliver the goods at the proper place and, of course, to take all proper care to see that no unauthorized person receives them. He is under no obligation to do more. If the purchaser has been unfortunate enough to have had access to his premises obtained by some apparently respectable person who takes his goods and signs for them in his absence, the loss must fall on him, and not on the innocent carrier or vendor".
>
> (emphasis added)

Mr Earle's submissions overlook the fact that the defendant's case challenges the ingredients for a successful denial of liability by the vendor as outlined above.

The defendant alleges that the goods were in all probability not delivered at the defendant's premises. It asserts too that the plaintiff's carrier did not act without negligence, but that he conspired with Wayne Jackson to defraud the defendant. That would make both agents joint tort feasors and therefore without a full trial in which all the facts are aired it would be impossible to say which principal, if any, could escape liability or be less to blame.

> In the KOURSK P. 140 AT 151, 156 AND 159, the following principle is stated:
>
> "Persons are said to be joint tort feasors when their respective shares in the commission of the tort are done in furtherance of a common design"

The defendant is saying contrary to the dictum of Lush LJ quoted above, that the plaintiff's agent is anything but an "innocent carrier". Mr McBean's pointing out that the defence is one of non-delivery not mere shortages, gives force to the claim that there is an arguable defence.

Mr Earle laid stress on the terms of the special note contained in all the relevant invoices. To my mind that would not alter the reasonableness of the defence, if Wayne Jackson and the plaintiff's agent were conspiring together to defraud their principals or the defendant alone.

The case of E and E Thomas v H.S. Alper and Sons [1953] CLY 3277, The Times June 26, 1953, is instructive on the issue of the parties making their own rules regarding delivery. The note in the Current Law Year book reads as follows:

> A consignment of boxes was sent by the sellers to the buyer's premises. The van-driver being unable to find anyone to take delivery unloaded the boxes and drove away. The buyers refused to pay for the goods on the grounds that they had not received them and that in any event they were protected by a clause in the contract of sale which provided:
>
> > "Proof of delivery will only be accepted when a delivery note is signed by the company's receiving clerk"
>
> The County Court judge found that the goods had been delivered and gave judgment for the sellers for their price. The Court of Appeal (Evershed M.R. Birkett and Romer LJJ) dismissed the appeal. Held that although the parties might agree between themselves that the production of a signed delivery note should be a condition precedent to a claim for payment, they could not by such a clause oust the court's jurisdiction to decide the case according to the ordinary rules of evidence"

The Court's Ruling on The Application for Summary Judgment

I hold therefore that the special note on the invoices that:

> "Shortages must be agreed with the driver at the time of delivery and noted on the invoice for any claim to be considered by the company"

does not oust the jurisdiction of the Courts in this matter, moreso as the defence is one of non-delivery not shortages : and further fraud vitiates everything; and if the plaintiff's driver is guilty of fraud that would prevent the plaintiff, his principal from relying on such a protective clause.

Moreso, the very passage in Halsbury's Laws of England 4th Edition Vol. 1 paragraph 201 cited by Mr Earle shows the importance of the bona fide of the person dealing with the agent who has ostensible authority.

It reads thus:

> 201. Third person led to believe in authority The cases in which notice of termination has been held to be necessary are, in general cases in which the third person had been induced to believe through the act of the principal that the agent had authority, and therefore depends on the principle of apparent authority. ... In such cases, in the absence of actual notice or of constructive notice by lapse of time, or other indications the principal will remain liable to those dealing in good faith with the agent on the assumption that his authority still continues.
>
> (emphasis mine)

If as the defendant alleges, the plaintiff's agent acted fraudulently he would not have been dealing with Wayne Jackson in good faith.

I find therefore that there are serious issues of fact to be tried: as to whether the plaintiff's agent actually delivered the goods at the defendant's premises, and whether

there was a conspiracy between him and Wayne Jackson. In the circumstances, I do not think that this is a proper case in which to give summary judgment and so the application is dismissed.

The Application To Strike Out The Defence

The principles governing such an application are similar to those of one for summary judgment. Thus it is a basic rule that where the application is made on the basis that no reasonable cause of action or defence etc. is disclosed, it is only in plain and obvious cases that this jurisdiction should be exercised - per Lendley MR in Hubbock v Wilkinson [1899] 1 QB 86 at 91. A few years earlier in Attorney General of Duchy Lancaster v London and N.W. Railway [1892] 3 Ch 274. The English Court of Appeal held that this procedure under Order 18 v 19 (the equivalent of our Section 238) should only be used when it can be clearly seen that a claim or answer is on the face of it "obviously unsustainable". Nor is it a proper exercise to embark on a minute and protracted examination of the documents and facts of the case to ascertain whether the plaintiff (and by the same token the defendant) really has a cause of action (or a defence).

Lord Pearson, in Drummond-Jackson v British Medical Association [1970] 1 WLR 688 propounded the test of a reasonable cause of action, as one with some chance of success when only the allegations in the pleading are considered. It has also been laid down that so long as a statement of claim or the particulars disclose some cause of action, or raise some question fit to be decided by a judge or jury, the mere fact that the case is a weak one, and not likely to succeed is no ground for striking it out - Moore v Moore (1915) 31 TLR 418. Wenlock v Moloney (1965) 2 All ER 871.

I find that the defendant has raised an arguable defence and that it is therefore not a frivolous or vexations defence. To my mind there are issues that cannot be resolved

by the affidavits, but will require a full airing in oral evidence which may be tested by the searchlight of cross-examination.

The application to strike out the defence therefore also fails. In the result both applications on this summons are refused, with costs to the defendant to be taxed if not agreed.

Finally, I wish to thank both counsel for their very able written submissions, which have made hearing these applications a stimulating and enjoyable exercise.