IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO 2009 HCV 03570

BETWEEN	RALSTON THOMAS	CLAIMANT
AND	UNITED GENERAL INSURANCE COMPANY LIMITED/ ADVANTAGE GENERAL INSURANCE COMPANY LIMITED	DEFENDANT

Miss Danielle Archer for the Claimant

Mr. Michael Hylton Q.C. and Mr. Kevin Powell instructed by Michael Hylton and Associates for the Defendant

Civil Practice – Application for Summary Judgment – Defendant countermanding cheques drawn in favour of Claimant – Subsequently paying the sum due - Claim for fraud – Whether cause of action still subsisting – Whether loss resulting from the defendant's conduct – CPR rule 15.2

BROOKS, J.

2nd and 22nd March, 2010

United General Insurance Company Limited/Advantage General Insurance Company Limited on July 3, 2009, had an unwelcome visitor. He was Mr. Ralston Thomas, the bailiff for the parish of Saint Catherine. The purpose of Mr. Thomas' visit was to execute a Writ of Seizure and Sale issued by this court against the company.

The company responded, no doubt, to save the embarrassment. It presented Mr. Thomas with two cheques, each one in the sum of $3,804,984.30; totalling $7,609,968.60. The sums were to settle a judgment

debt and Mr. Thomas' bailiff's fees. A covering letter issued by the company explained the payments. Mr. Thomas was the payee named on the cheques. Satisfied, Mr. Thomas left the premises.

He lodged the cheques to his account. On July 8, 2009 the cheques were dishonoured. Mr. Thomas acted swiftly. He immediately filed this claim alleging fraud, seeking damages for recovery of his fees and for fraud. The Claim Form was served on the company on July 9, 2009.

The company issued a new cheque to him in the sum of $7,547,783.87 on or about July 28, 2009. This latter cheque was honoured and a further payment made in settlement of his claimed fees, but Mr. Thomas is not satisfied. He wishes to pursue his claim for damages for what he perceives as deceitful conduct by the company.

The company has not filed a defence but now applies for summary judgment on the basis that Mr. Thomas' claim has no real prospect of success. With the issue of the bailiff's fees having been resolved, two main issues arise for determination:

a. does a claim for fraud stand any real prospect of success, and

b. does Mr. Thomas' claim demonstrate that he has suffered loss?

Additional Facts

It is important to note, before dealing with the law, that the company has supported its present application with an affidavit sworn to by Ms. Odia S. Reid on October 5, 2009. This affidavit exhibits an order of this court, made on the very day that Mr. Thomas received the cheques. The order is for a stay of execution of the judgment which Mr. Thomas was charged with effecting. The application for the stay was supported by an affidavit which was also sworn to by Ms. Reid. Although that affidavit was sworn to on July 2, 2009, the application itself was filed on July 3. It seems that the order was secured after the cheques had already been issued. I shall refer to Ms. Reid's later affidavit in due course.

The Company's stance

Mr. Hylton Q.C. made the submissions on behalf of the company. I hope I do him no disservice by summarizing the submissions thus:

a. The bailiff's fees having been settled, Mr. Thomas' claim in that regard cannot succeed;

b. None of the particulars of fraud set out in the Particulars of Claim amount to fraud;

c. Having received an order for stay of the execution, the company was entitled to countermand the cheques;

d. Mr. Thomas' particulars of claim does not disclose that he sustained damage and if no damage results from the company's action there is no cause of action;

e. Mr. Thomas cannot argue that he will lead evidence of damage at the trial; it must be disclosed in his pleadings.

Learned Queen's Counsel submitted that the circumstances of the dishonouring of these cheques were outside the realm of deceit and fraud contemplated by the law concerning dishonoured cheques. He relied on, among others, the cases of *Three Rivers District Council v Bank of England (No. 3)* [2001] 2 All ER 513, *ED & F Man Liquid Products Ltd. v Patel and another* T.L.R. April 17, 2003 at page 224, [2003] ECWA Civ. 472, *Derry v Peek* (1889) LR 14 App. Cas. 337 and the unreported decision in *Stewart and others v Samuels* SCCA 02/2005 (delivered 18/11/05).

Mr. Thomas' position

Miss Archer, on behalf of Mr. Thomas submitted that there was a real prospect of success. Again, I summarize the submission, hoping that I do no disservice.

a. The consequence of a dishonoured cheque is that an immediate cause of action accrues to the drawee against the drawer of that cheque;

b. The drawee is entitled to recover more than just the face value of the cheque and nominal damages for the dishonour;

c. The remedy may be in the form of general damages

d. Mr. Thomas can prove the ingredients of the tort namely:

(i) "That the alleged representation consisted of something said, written or done which amounts in law to a representation;

(ii) That the Defendant was the representor;

(iii) That the Claimant was the representee;

(iv) That the representation was false;

(v) Inducement and materiality;

(vi) Alteration of position;

(vii) Fraud; and

(viii) Damage."

Among the cases cited by learned counsel were *Swain v Hillman* [2001] 1 All ER 91, *Gaynor v McDyer and another* [1968] IR 295, *Kpohraror v Woolwich Building Society* [1996] 4 All ER 119 and the unreported decision in *Anderson v The Attorney General and another* C.L. A. 017 of 2002 (delivered 16/7/2004).

The Particulars of Claim

The relevant portion of the amended Particulars of Claim states:

"8. The Claimant avers that the Defendant in issuing the said dishonoured cheque acted fraudulently.

PARTICULARS OF FRAUD

(a) Presenting the Claimant with ...cheques...well knowing that it was its intent to [countermand]/dishonour the said cheques.
(b) Presenting the Claimant with dishonoured cheques.
(c) Dishonouring/countermanding the said cheques.
(d) Deceiving the Claimant into believing that the said cheques represented "settlement of the judgment debt, interest, costs and Bailiff's fees" [quoted from the covering letter] when it knew that it had no intention of paying the Claimant any Bailiff's fees.
(e) Refusing to pay the Claimant, the relevant Bailiff's fees for the execution of the said Order for Seizure and Sale.
(f) Deceiving the Claimant that by the presentation of the said cheques the Claimant's Bailiff's fees would have been paid.
(g) Falsely representing to the Claimant that the said cheques were in settlement of the relevant Bailiff's Fees well knowing that this was not so.
(h) Countermanding the said cheques given to the Claimant, the Claimant having executed the Order for Seizure and Sale.
(i) Deceiving the Claimant that the presentation of the said cheques was in satisfaction of "the judgment debt, interest, costs and Bailiff's fees" upon the Claimant's execution of the Order for Seizure and Sale and then countermanding the said cheques.
(j) Representing a falsehood to the Claimant, to wit, that the presentation of the said cheques was in satisfaction of "the judgment debt, interest, costs and Bailiff's fees" and then countermanding the said cheques.

9. By reason of the matters aforesaid the Claimant has suffered loss and damage....

10. Further, the Claimant has been embarrassed, humiliated and has suffered great distress by virtue of the Defendant's act of dishonouring the said cheques. At all material times the [Claimant] relied upon the honouring of the said cheques to pay the Assistant Bailiffs who had been commissioned by the Claimant to assist in the execution of the Order for Seizure and Sale. The Claimant suffered great distress and embarrassment in not being able to pay over to the Assistant Bailiffs that which was due to them in the face of their requests for payment....

WHEREFORE THE CLAIMANT CLAIMS;

...
(ii) Damages for Fraud..."

The Law in relation to orders for summary judgment

Part 15 of the Civil Procedure Rules 2002 (CPR) provides the guidance for assessing applications for summary judgment. Rule 15.2 sets out the test to be applied in applications of this type. It states, in part:

> "The court may give summary judgment on the claim or on a particular issue if it considers that –
>
> (a) The claimant has no real prospect of succeeding on the claim or the issue..."

Undoubtedly, it is for the applicant, in this case the company, to establish that there is no such prospect. So said their Lordships in the case of *E.D. & F. Man Liquid Products Ltd.* mentioned above.

It is often said that the court is not entitled to embark on a mini-trial when assessing the prospects of success of a party's case. If the case is based on a point of law which is obviously bound to fail, or after relatively short argument proved to be so, then summary judgment may be granted. If, however, there are arguable points of law then summary judgment ought not to be granted. (See *Swain v Hillman* cited above.)

Analysis

Does the claim for fraud have a real prospect of success?

Mr. Hylton Q.C. criticized the fact that the Particulars of Claim did not refer to the tort of deceit. To his credit however, he did not submit that that was fatal to the claim. Part 8 of the CPR which stipulates what should

be included in Claim Forms and Particulars of Claim does not require special words or formulations. As will be shown below, there is precedent for a claim using the nomenclature of "fraud".

Learned Queen's Counsel sought to distinguish the facts of this case from that of a dishonoured cheque where a benefit, such as money's worth, was obtained by the drawer of the cheque. It is clear however that the company did achieve a benefit by drawing and delivering the cheques; it caused the bailiff to stay his hand.

Mr. Hylton also submits that the particulars of claim do not disclose fraud. I must, respectfully, differ from learned Queen's Counsel in that regard. Over and over again the pleadings allege that the company issued cheques with no intention of them being honoured. The inference is drawn from the contents of the covering letter and the fact that the cheques were countermanded. The company may well have an explanation showing that it acted honestly. It is for the company to provide that explanation.

Kpohraror, cited by Miss Archer, is authority for the principle that a person may recover substantial damages in contract for loss of business reputation, resulting from a cheque being wrongly dishonoured. That case involved a banker and its client and so is not on all fours with the instant case. It is sufficient basis, however, for the issue to be considered arguable.

The thrust of the company's case, I find, turns on what occurred after the cheques were issued. Mr. Hylton's submission is that the company, having secured a stay of execution, was entitled to countermand the cheques. That, in my view, is the crux of its case. Mr. Hylton cited no cases in support of the proposition. Assuming it to be a valid point (regardless of the absence of existing authority) however, it seems to me that it is a point which has to be supported by evidence. Ms. Reid's affidavit of October 5, does not give a reason for the company's action; she only exhibited the order for the stay. It seems to me that merely showing that a stay was granted is not enough to allow the company to secure its objective at this stage.

It is my view that the countermanding of a cheque calls for an explanation. The reasons motivating the countermanding of the cheques, is a matter of evidence for the company to adduce. This must be done at a trial and it is for the trial judge to decide whether the explanation is sufficient to amount to a successful defence to the claim.

Does Mr. Thomas' claim demonstrate that he has suffered loss?

Learned Queen's Counsel submitted that a claimant can get no damages for embarrassment humiliation and distress. As part of that submission he asserted that there was not sufficient particularity in Mr. Thomas' claim of loss to allow a court to award Mr. Thomas damages.

Mr. Hylton emphasised that the payment of the second cheque was made later in July 2009. Relying on *Derry v Peek*, cited above, Mr. Hylton correctly submitted that there can be no liability if there is no loss. Therefore, runs the submission, if Mr. Thomas can prove no damage, then the claim must fail.

On the question of insufficient particularity, Mr. Hylton relied on the judgment of Harris J.A. in *Gordon v Stewart* SCCA 02/2005 (delivered 18/11/2005), as authority for the proposition that the deficiency in the pleadings cannot be cured by evidence at trial. At the stage of the application for summary judgment, says Mr. Hylton, the judge hearing the application has to consider the evidence available at that point in time.

I find that, in applying the principle to the instant case, Mr. Hylton is not on good ground. Firstly, there is authority for general damages to be awarded for deceit. In *Shelley v Paddock and another* [1979] 1 Q.B. 120 a plaintiff, who had been swindled out of her money in a fraudulent real estate deal, secured a judgment for substantial general damages for the distress resulting from the fraud. Bristow, J, in a fairly brief discourse, at page 131, dealt with the issue this way:

> "[The defendant's counsel] ...very candidly and realistically says that this being an action in fraud, there is no principle which prevents [the plaintiff] from recovering damages for mental and physical suffering which the fraud may have caused....on principle it seems to me – and this is a principle illustrated also in the

> law of libel where your right to the integrity of your reputation has been infringed – she is entitled to recover damages under that head and I shall award the £500 which she claims."

The decision was upheld on appeal (*Shelley v Paddock and another* [1980] 1 All ER 1009) but, considering the concession by the defendant's counsel, it does not appear that any complaint was made at the appellate level, against this aspect of the judgment. It is significant to note that the cause of action, even in those pre-CPR days, was said to be "fraud".

The entitlement to damages for mental distress and injured feelings was recognized by counsel on both sides in *Archer v Brown* [1985] 1 Q.B. 401. The learned trial judge relied on *Shelley v Paddock,* cited above, among the cases on which he relied in awarding £500 for general damages under this head. The learned author of *McGregor on Damages* 16th Ed. at paragraph 1993 criticized some of the learned judge's reasoning on the point in *Archer v Brown* but accepted the validity of the award.

The second observation on Mr. Hylton's submission is that I find that the pleading does have sufficient particularity to ground the claim. In his amended Particulars of Claim, Mr. Thomas described at paragraph 10, quoted above, that his embarrassment and humiliation arose from the fact that he was unable to pay his Assistant Bailiffs who had accompanied him on that particular job.

Rule 8.9 (2) of the CPR requires that the statement of case must be as short as is practicable. In this era of the CPR, there is no requirement that pleadings must be exhaustive. The basics of the statement of case must be contained in the document but it must be borne in mind that the witness statements will be provided to the defendant in good time. This will sufficiently alert that party as to the case it will have to meet at trial.

In considering all these matters, I find that the company has failed to convince me that its application should succeed.

Conclusion

The complaints against the pleadings in Mr. Thomas' statement of case are not well founded. There are sufficient particulars to show that his claim does have a real prospect of success. Assuming that Mr. Thomas' evidence supports those pleadings, then it would be for the company to show why it countermanded the cheques and whether it was entitled so to do.

The orders therefore are:

1. The application for summary judgment is refused;

2. The time for the Defendant to file and serve its defence is hereby extended to 31st March, 2010;

3. Costs to the Claimant to be taxed if not agreed.