

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. 1345 of 2005

BETWEEN

BAKER HUGHES (TRINIDAD) LIMITED

Plaintiff

AND

TRINCAN OIL LIMITED

Defendant



Before The Hon. Madam Justice C. Pemberton

Appearances:

For the Plaintiff: Mr N. Bisnath, and Mrs. L. Mendonca instructed by Ms. A. Bissessar.

For the Defendant: Mr. R. Armour S.C. leading Mr. S. de la Bastide instructed by Ms C. Simon-Thompson.

2005: October 17th

2005: October 28th

2005: December 7th

2006: February 8th

DECISION

[1] Even before CPR 1998, courts were loathe to shut out Defendants unless it was clear that it should do so. At the same time, the courts were very mindful that the Plaintiff ought not to be kept from the judgment seat by the tardiness or as it were intransigence of the Defendant. In other words, whilst the Defendant's right to defend a cause is part of the bedrock of administration of justice, attention must be given to the Plaintiff's right to successfully prosecute his claim during the shortest possible time.

[2] This informs the policy behind Order 14 proceedings. If the Plaintiff has no case, the Defendant may have his claim struck out early in the day. Similarly, if the Defendant has no defence, the Plaintiff ought to be in a position to achieve his judgment in quick time and not having to endure the expense, both in terms of time and finance of a trial.

[3] **ORDER 14 PROCEEDINGS**

There are certain preconditions though, for the Plaintiff to succeed at this stage. He must state his case clearly and his case as endorsed on the statement of claim must be complete and good in itself. He must also prove his case clearly. He must believe that the Defendant does not have a "bona fide" defence or a real prospect of success or be unable to raise issues against the claim, which ought to be ventilated. If these requirements are met, a court is duty bound to enter judgment for the Plaintiff against the Defendant. The Defendant on the other hand must convince the court that there is some real prospect of success if he is allowed to defend or there must be some other reason for the trial. The standard of proof required of the Defendant is not high but what is required is that it must be sufficient to rebut the Plaintiff's belief that he has no defence or that his defence has no prospect of success.

[4] I must make it clear too that whilst I am mindful of Sharma JA's (as he then was)¹ admonition that matters of law raised at this stage should not deter a court from examining issues of law which arise for determination, I am ever conscious of the fact that at this particular hearing I cannot conduct a mini-trial. Choosing between facts is a function for the trial Judge. My purpose is to examine whether the Defendant ought to be allowed to defend this matter on the basis that the facts/position raised are/is **credible**.

[5] **FACTS**

Western Atlas International Inc., Trinidad Branch (WESTERN) Baker Hughes (Trinidad) Limited (BHL)'s predecessors were in the business of providing seismic surveys to clients. Trincan Oil Ltd (TOL) was one such client. WESTERN performed the services and delivered the results. TOL received same and commenced payments. These payments flowed for a period of three years, from September 1998 to December 2001, some twenty payments, until they ceased. There was a series of correspondence between the two parties after that, but payments have not been made to date. On 3^d June 2005 BHL filed a Writ and amended same on 7th June 2005 for the following relief:

- (1) The sum of USD 3,563,173.35 being damages for breach of contract;
- (2) Alternatively the sum of USD 3,563,173.35;
- (3) Mediation expenses of USD 185,729.83;
- (4) Interest at LIBOR plus 2% from the date of the Writ to the date of payment;
- (5) Alternatively interest at 12% from the date of the Writ to the date of payment;
- (6) Costs;
- (7) Further and/or other relief or as the Court deems fit.

¹ See **TRINIDAD HOME DEVELOPERS LTD V. IMN 39 W.I.R. 355**

Schedule "A" was attached to the Writ, which shows details of the account, receipts and the amount outstanding.

[6] TOL entered an appearance on 16th June 2005. BHL filed this application for Summary Judgment on 17th June 2005 seeking:

- (1) An Order for interlocutory judgment in this action against the Defendant for damages for breach of contract as claimed in the Specially Indorsed Amended Writ of Summons to be assessed filed in this action together with interest at LIBOR plus 2% from 2nd June 2005 to the date of payment;
- (2) Alternatively for final judgment in this action against the Defendant for the sum of USD 3,563,173.55 on an account stated as claimed in the Specially Indorsed Amended Writ of Summons filed in this action together with interest at LIBOR plus 2% from 2nd June 2005 to the date of payment;
- (3) Further an order for final judgment in this action against the Defendant for the sum of USD185,729.83 pursuant to a contract providing for mediation as mentioned in the Specially Indorsed Amended Writ of Summons;
- (4) And that the cost of this application and of this action be paid by the Defendant to the Plaintiff certified fit for Advocate Attorney.

TOL has not put in a Defence to the action, the time limited for so doing not having expired at the date of filing of the application for Summary Judgment.

[7] **AFFIDAVIT EVIDENCE**

I wish to deal with this issue early. It is whether the Defendant's case must be stated in the body of the affidavit. Mr Bisnath contended that TOL did not place its case in the affidavit but in the Written Submissions. This offends against the requirements for Order 14 proceedings and I ought to disregard any of the submissions, which have not been set out in the affidavits. Mr Armour was of a different view. He states that that contention is incorrect. TOL is not required to place every detail of the defence in the affidavit since it is not part of the Court's jurisdiction to try the matter on affidavits or to conduct a mini-trial. In any event TOL is not limited by the affidavit.

[8] **ANALYSIS**

At the outset, I set out the Court's function at this stage is to determine whether the Defendant has a credible defence. Order 14 Rule 4 (1) makes provision for the Defendant to show cause against the application by affidavit "or otherwise to the satisfaction of the Court". Has the Defendant satisfied this requirement?

[9] Mr Armour's main defence as I understand it was that TOL was not liable to make these payments under the contract. This defence was laid on the platform of the construction of the documents – General Agreement dated 20th February 1998 ("AB2"), attached to the affidavit of Alana Bissessar, and filed on BHL's behalf; the Supplemental Agreement No. 1 dated 20th February 1998 ("WC2"), attached to the affidavit of Walter Cukavac and filed on behalf of TOL; the General Agreement dated 9th March 1999 ("WC5") attached to the Walter Cukavac affidavit and the Supplemental Agreement dated 9th May 1999 ("AB1") attached to Alana Bissessar's affidavit and filed on BHL's behalf.

[10] My own reading of the Cukavac affidavit was that this is not a straight case of monies due and owing but concerned a contract for the provision of services, which said services turned out to be un-usable.

[11] To my mind, once the documents have been placed before the court as part of the affidavits, the pleaded case of both parties in this case, it does satisfy the requirements of Order 14 Rule 4. There was nothing sprung from the written submissions or bar table which could be said to have departed from or be different to the basis set in the affidavits.

[12] Paragraph 8 of Charlene Simon-Thompson's affidavit in any event reads:

In and by reason of all the facts and circumstances deposed herein and in the Cukavac affidavit, as well as on the true construction of the relevant agreements referred to herein, in the Cukavac affidavit and in the Bissessar affidavit and, having regard to the role and function of auditors, together with the terms of engagement of Ernst & Young referred to herein, I am advised by Counsel that the Defendant is not liable to the Plaintiff for (i) breach of contract (or for damages consequent thereon) as alleged or at all, (ii) nor is it indebted to the Plaintiff upon an account stated either evidenced by the said letter dated the 21st March 2002 or at all, (iii) nor is it liable for the mediation expenses claimed. I am advised by Counsel further that in all the premises and, having regard to the applicable law, the Defendant has a good defence to the Plaintiff's claim herein entitling it to defend this action and that the application for summary judgment ought to be dismissed, with costs.

This captures the essence of TOL's defence. I do not think that there is any argument in relation to the claim for mediation expenses since this was thoroughly dealt with in the Simon-Thompson affidavit.

[13] In any event, I must stress that at this stage it is for the Defendant to satisfy me, as a matter of law and evidence that he has a credible defence. I go on to say that the Defendant is not even locked in, in his defence by what he reveals on the affidavit at this stage.

[14] **BHL's ARGUMENTS**

BHL's case pure and simple, is that there was a contract entered into by the parties, there was performance and delivery of the services, (and this was admitted by TOL), there was a request for payment by presentation of Invoices as per contract, there were payments made by TOL, there was a cessation of payments, a demand made for the outstanding payments, the demands were not satisfied and the suit filed for the reliefs claimed.

[15] **TOL's ARGUMENTS**

The case is not so simple. TOL says we admit that the parties entered into a contract. It was a contract for services. We further admit the performance and delivery of services, part payments and cessation of payments. However, there was a reason for the cessation. There is a breach of contract by BHL and as such we within our right to stop the payments and furthermore, we are not liable to pay on the contract at all.

[16] I propose to deal with the issues as they appear in the application that lies before the court but not in the order stated. I shall examine the claims this order:

- (1) Final judgment for Mediation Expenses incurred;
- (2) Final judgment for USD 3,563,173.35;
- (3) Interlocutory judgment for damages for breach of contract to be assessed.

[17] I must note the difference in language between the relief prayed in the Writ, which speaks to the stated sum of \$3,563,173.35 US as damages for breach of contract and the relief on this Summons, which speaks to damages to be assessed.

[18] **CLAIM FOR MEDIATION EXPENSES**

Mr Bisnath submitted that since the Mediation process failed, the failure of which he attributed to certain acts of non-disclosure to the Mediator by TOL, BHL should recover the sums, which it paid towards Mediation charges since the mediation process arose out of the contract. Mr Armour firmly rejected this submission. Yes, the contract provided for Mediation. Yes, the process failed but the court cannot enquire into the proceedings before the Mediator nor should such a claim succeed but should be struck out as it is a claim in bad faith and is oppressive.

[19] The General Agreement of 20th February 1998 "A.B.2" contains the following:

The parties agree, that should any dispute arise out of or in connection with the subject matter of this Agreement or any Supplement Agreement they will make an attempt to resolve such dispute through non-binding mediation in advance of resorting to litigation.

This is repeated in the General Agreement bearing an effective date of 9th March 1999.

[20] It is admitted by both BHL and TOL that they proceeded to Mediation, which did not resolve the dispute. The terms of the Mediation with respect to payment of charges to the Mediator are contained in the exhibit "C.S.T.1", the relevant provision reading:

These charges will be shared between you equally and will be payable before the date on which the mediation commences.

[21] The words are clear. I do not accept the Plaintiff's submission that Mediator's charges are akin to those of witness expenses and are recoverable by a "successful party" once reasonably incurred. There was no authority for this position. The Mediation process is one voluntarily entered into by the parties upon agreed terms to which they are unequivocally bound.

[22] In any event the Mediator's role was succinctly stated at paragraph 1 of the Terms by the Mediator. There is no evidence produced by BHL that the terms did not reflect anything that it did not previously agree to or by which it now claims, after the fact, that were inimical to it. The relevant part reads:

1. Although I am a Legal Consultant, I do not advise or represent either or both of you or take sides with you, **but act specifically as an independent, neutral and impartial mediator to facilitate the resolution of the differences between you.**

This is the usual role and function of the Mediator. There is nothing in the language used, which departs from this tradition.

[23] The alternative argument advanced by BHL of TOL's purported non-disclosure at the mediation process is further contained at paragraph 2:

The Mediation process is **confidential**

Both of you undertake to one another that you will similarly maintain confidentiality in respect of all statements and matters arising in or from the mediation, **except of course in so far as the need to disclose such statements and matters in order to obtain**

professional advice and to enforce any settlement agreement.

(emphasis mine).

It is clear that none of the exceptions arise on filing of this action or for that matter any action at all.

[24] Charlene Simon-Thompson at paragraph 6 of her affidavit requests upon Counsel's advice, that the claim under this head should be struck out as being one made in bad faith and as oppressive and that the Defendant is not liable for the sums claimed in this regard. Order 14 proceedings allow me to go that far, since as stated above the aim is to provide the parties with a procedural step to secure judgment/resolution of its claim at an early stage without a trial. The facts are undisputed. The language of the contract and the Terms of the Mediation are straight forward and admit of only one interpretation. This part of BHL's cause of action cannot subsist as no cause of action was disclosed or proved in the statement of claim. This claim for Mediation expenses incurred and is therefore struck out with costs, the terms of which I shall determine later in this decision.

[25] **CLAIM FOR FINAL JUDGMENT FOR USD3,563,173.35**

BHL'S CASE

ACKNOWLEDGMENT OF DEBT AND ACCOUNT STATED

One of the bases for this claim for final judgment is that BHL has stated that TOL has acknowledged the debt. BHL drew my attention to several acts of TOL which they say amount to an acknowledgment of debt. They are:

- Payments made by TOL
- Letters written by TOL to BHL speaking to the debt and further asking for forgiveness

- Letter from TOL Auditor to BHL.

These constitute sufficient acts of acknowledgment of the debt so that it does not lie in TOL's mouth to say we are not indebted to you. Alternatively BHL says that this final sum came about by way of account stated. Paragraph 14 of the Statement of Claim sets out BHL's claim in the alternative as:

In an account stated by letter dated 21st day of March 2002 from Trincan's agent Earnest and Young to the Plaintiff and signed by the Plaintiff's representative, it was agreed that the sum then due and owing as at 30th September 2001 by Trincan to the Plaintiff was USD 2,704,299.17.

Schedule "A".

[26] TOL'S CASE

TOL views this in a totally different light. These acts are not sufficient to amount to acknowledgment of debt without more. Mr Armour stated that the issues must be examined in the context of the law, which requires that there be a true debt and an absolute acknowledgment. On the evidence, there was no true debt. There was he submits an erroneous assumption on TOL's part that there was a debt to be satisfied. Further, the Auditor's letter does not constitute an absolute acknowledgment of the debt by TOL. BHL he concludes cannot assert that the erroneous payments preclude TOL from saying that the debt has not arisen.

[27] AUDITOR'S LETTER

This is an issue of law. Let us turn to examine the points raised and having so determined and following the case of **TRINIDAD HOME DEVELOPERS LTD. v IMH²**, I shall deal with this issue finally and determinedly³.

² 39 WIR 355

[28] **BHL'S CASE**

Paragraph 8 of the Victor Herde's ⁴ affidavit reads in part:

"The Auditor in verifying information contained in accounts will write on behalf of the company, in order to verify that the debt as recorded in the financial statements is true and correct, but can and will only do so if he has the due authority of the company to do so".

Mr Herde goes on to say that:

"the regular servicing of a debt during an audit period is cogent evidence as to the genuineness of the respective debt and evidentially supports the conclusions that the debt as recorded in the financial statement is true and correct".

He goes on to reiterate that an auditor can only send a letter asking for verification of a debt with the company's authority since to do otherwise would be to disclose the company's financial affairs without authority. He stated that an audit exercise is done under full cover of confidentiality⁵. This Mr Bisnath asserts is a clear statement of practice and supports BHL's position that there was an acknowledgment of the debt by TOL.

[29] **TOL'S CASE**

The letter asking for verification of the debt does not amount to an acknowledgment. The letter was issued by the Auditor in the course of the "enquiry and verification process" carried out as part of the audit function. That is

³ see also **AGRICULTURAL DEVELOPMENT BANK v MALABAR HATCHERIES LTD ET AL HCA 355/2004 per Jamadar J.**

⁴ **filed on behalf of BHL**

⁵ **Para. 11 of the Victor Herde affidavit.**

the function which Messrs Ernst & Young were retained to perform. The letter does not constitute an absolute admission or acknowledgement of the debt since an auditor is not authorized to issue acknowledgments of debts on behalf of its client.⁶

[30] Mr Bisnath countered this argument saying that the authorities cited are distinguishable from the case at bar. He based his submission on dicta from Bergin J. where he said :

"it may be suggested that the auditors are acting as the audited company's agent when they seek information from third parties in relation to the company for the purposes of the audit. Indeed in this case the Bank submitted that "a prudent auditor would be unlikely to be satisfied that a company's financial statements present "a true and fair view" for the purposes of s 297 or s 305 of the Act unless (a) solicitors provided confirmation of directors estimates of contingent liabilities in litigation; and (b) this confirmation was provided directly to the auditor"..... No authority was cited for this proposition and no evidence was called in support of it.

Caution needs to be exercised in respect of such generalizations. Each situation needs to be assessed individually. The responsibility is on the audited company to obtain the detail from third parties and provide it to the auditor. The arrangements made for the auditor making direct contact with third parties may be for the ease of operation of the audit process. When that process is adopted the auditors are acting with the authority of the Company to receive the information, not as the Company's agent,

⁶ See **RE TRANSPLANTERS (HOLDING COMPANY) LIMITED [1958] 2 All E.R. 711; and 789 TEN PROPERTY V WEST PAC BANKING CORPORATION. 50167/03 2005 NS WSC 123**

but as the independent auditor with the authority for such disclosure to be made to them for the purpose of the audit".⁷

It is interesting that the learned judge admitted that no authority was cited for the initial proposition. From this Mr Bisnath concluded that the learned judge not having to deal with the factual matrix of the case at bar did not rule out the possibility of the agency relationship applying in this a case such as this.

[31] I do not agree with this argument. From my reading, the law is clear. The Auditor's duties are spelt out in the **COMPANIES' ACT**⁸. None of those support or infer an agency relationship between the auditor and the client, so as to invest the auditor with authority to acknowledge debts on behalf of the client. Further, BHL can advert to no evidence that the relationship in this case went over and above that of auditor and client, inferring a power of the auditor to acknowledge debts on behalf of the company. The auditor's letter to BHL therefore does not constitute an acknowledgment of the debt and cannot be used to support BHL's contention that there was an acknowledgment of the debt by TOL⁹.

[32] **ACCOUNT STATED – ALTERNATIVE CLAIM**

Mr Bisnath as stated above claims that BHL's claim is based on an account stated as contained in the Auditor's letters. Mr Armour is of the view that the pleading and the basis of the pleading do not satisfy the requirements of "account stated". According to **HALSBURY'S LAWS OF ENGLAND** the term "account stated" covers three situations:

- (1) evidentiary;

⁷ See 789 TEN PROPERTY CASE (*infra*)

⁸ **COMPANIES' ACT, CHAP. 81:01 Sections 172 to 174.**

⁹ See further 789TEN PROPERTY CASE (*Supra*) per Bergin J. at para. 62 : "in my view, the fact that the Corporation Act requires an auditor to be independent of the audited company weighs against the implication that an auditor stands in the shoes of an audited company as its agent in receiving information from third parties about the company". See Section 158 COMPANIES ACT (T & T), a fortiori so when performing his normal auditing functions of verification.

- (2) real account stated;
- (3) agreement to pay.

[33] As far as TOL is concerned, BHL's pleadings do not support heads (2) and (3). The basis of BHL's claim lay in (1) – the evidentiary head and reliance is placed on the Auditor's letter, which can be shown to have been erroneous. In keeping with dicta from Viscount Cave in **CAMILLO TANK STEAMSHIP CO. LTD.**,¹⁰ TOL is entitled to take the action to trial for the purpose of showing that the admission was made in error and that there was nothing due and owing to BHL. Not only is TOL entitled to show that the payments were made in error¹¹ but also TOL is entitled to defend the matter on the ground that Ernst & Young was not authorized by TOL to make any admission of the debt on its behalf. This is stated in paragraph 2 of the Walter Cukavac affidavit.

[34] There is no dispute that TOL made twenty payments towards the Invoices as presented. There is as well, no dispute that TOL wrote letters containing the phrases "we are therefore requesting that the debt be written off especially in view of goodwill of our company in absorbing 100% risk in the project..."¹² and to date we have had no response to our letter and as such "we assume there is no longer any debt on our part"¹³. Further, there is no dispute that from the account as presented in "Schedule A", the schedule annexed to the Specially Indorsed Writ, that monies appear to be due and owing. Is that sufficient? Should TOL be debarred from presenting its case and to have a trial, based on this alone?

[35] In his reply, Mr Bisnath reiterated that these letters as well (those attached as "AB4") admitted to acknowledgement of the debt by TOL. He did not address the

¹⁰ **CAMILLO TANK STEAMSHIP CO. LTD v ALEXANDRIA ENGINEERING WORKS (1921) 38 TLR 134**

¹¹ See Vol. 9 (1) **HALSBURY'S LAWS OF ENGLAND 4TH ed. REISSUE para. 1050**. "In order to maintain an action on an account stated there must be a debt due to the Plaintiff An admission founded on the mistaken belief that a debt is due does not enable the action to be brought..."

¹² See "AB4" letter dated 27/05/02 from TOL to Baker Atlas of which BHL is an affiliate.

¹³ See "AB4" letter dated 15/07/02 from TOL to Baker Atlas as per *infra*.

issue of the impact of a mistaken belief on the claim for an account stated. He relied instead on the Auditor's Letters. I have already dealt with the scope of Auditor's duties above. Suffice it to say that the reliance on the Auditor's letter to support the alternative claim of an account stated cannot stand.

[36] **MISTAKE**

Mr. Armour's answer to the contention that the payments made by BHL during the period – coupled with the letters written by TOL to BHL were therefore an acknowledgment of the debt, ought to be defended on the ground that TOL was operating under the mistaken belief that a debt was due and owing. Counsel demonstrated the nature of the mistake and how it arose by reference to the history of the negotiations and contract between the parties and the terms of the contract itself¹⁴. The contention in short was that the predecessor to BHL negotiated a contract for the provision of services and entered into such a contract, the parties then entered into joint venture negotiations, which were shelved when BHL entered the picture. A further agreement was struck between the present parties but the terms for the provision of services were different. In any event the services rendered a product that was un-useable to TOL because of its poor quality¹⁵. It is because of these factors that Simon-Thompson deposed that TOL is not indebted to BHL at all¹⁶ and that the defendant has a good defence to the claim.

[37] As stated above the two parties have approached this matter differently and that difference is evident here. Is this a simple debt collection matter without more as BHL asserts or is it an action that can be defended on the basis that the services provided were not in keeping with those contracted for and therefore there is no obligation to pay and payments made were made in error and furthermore can be recovered as money paid under a mistake?

¹⁴ See **Walter Cukavac affidavit**

¹⁵ See **paragraph 19 of Walter Cukavac's affidavit**

¹⁶ (See **paragraph 8 of Charlene Simon-Thompson's affidavit**)

[38] A claim by one party, which is admitted by the other party to be correct is termed an account stated¹⁷. The law is clear. Once monies are paid under a mistake, they are recoverable by the paying party by way of action. If the alleged debtor discovers that the debt he is servicing is in fact no debt at all then he is entitled to stop payment. If he is sued for the outstanding amount he is entitled to raise in his defence that there is no debt at all. So far, the Defendant has presented a credible defence so as to allow it the opportunity to defend his position in this basis.

[39] Having looked at the totality of the case, that is the pleadings, affidavits and exhibits, and considered Counsel's arguments, I have formed the view that this matter is not one of simple debt but the issues go deeper. One must look to the contract between the parties to determine their rights and liabilities.

[40] This leads neatly into the final area for consideration whether BHL can shut out TOL from defending its claim for damages for breach of contract, thereby allowing entry of an interlocutory judgment with damages to be assessed.

[41] **BREACH OF CONTRACT**

As stated before the parties have approached this differently. One party BHL, from the standpoint of breach of obligation to pay. TOL, from its position sees this as BHL's breach of obligation to provide useable product after "performance" of a contract for services.

[42] Mr Bisnath argued in his written submissions that since TOL did not previously dispute the invoices with respect to the provision of BHL's services they could not raise it now. He further relied on the fact that TOL's complaint about the non-

¹⁷ See Vol. 9 (1) HALSBURY'S LAWS OF ENGLAND 4TH ED. REISSUE PARA 1049.

useability of the services was barred by the **WARRANTIES AND GUARANTEES** clause contained in the General Agreement¹⁸.

[43] Mr Armour spent some time on this so as to bring to the fore that the payment under the contract was contingent upon increased oil production in the Morne Diablo Block stemming from the use of seismic data rather than as BHL asserts that payment was triggered upon the provision of the services and the fact that the price of oil was in excess of \$10.00 US per barrel. To accept BHL's contention would he submitted go against the intention of the parties. Mr Armour drew my attention to several clauses in the contract to buttress his position.

[44] **ANALYSIS**

It has always been my view that a contract for the provision of services is in some respects unique. It may not always be realistic or correct to import principles from a contract to supply goods (sale of goods) wholesale into one for the provision of services. The two are inherently different. As the law relating to trade in services develops we may necessarily see a departure from the traditional application of principles of interpretation of contractual provisions relating to the sale/supply of goods.

[45] In addition, this is a contract concerning the provision of services in the oil and gas industry. The interpretation of these contracts as affecting the rights and obligations of parties may be subject to special conditions as exist in the industry. Contracts must be interpreted so that they make good commercial sense. I hasten

¹⁸ **CLAUSE 11:0 reads:**

Except as provided above and to the maximum extent permitted by applicable law, Western hereby disclaims, denies and negates and customer hereby waives any claim or cause of action whatsoever based on any warranties or representations with respect to the services, surveys or any reports, including without limitation, any express or implied warranties of MERCHANTABILITY, CONDITION, DURABILITY, DESIGN, CAPACITY, OPERABILITY, ABSENCE OR REDHIBITORY DEFECTS, COMPLETENESS, SUITABILITY, UTILITY OR FITNESS FOR ANY PARTICULAR PURPOSE OR USE.

to add though that the express terms of the contract define the nature, scope and extent of the rights and obligations of the parties in terms of performance and enforcement, all to be done in good faith.

[46] It is in that context that the Lord Hoffman¹⁹ approach urged upon me by Mr Armour is one to which I am favourably disposed. Thus to put it in context, I understand the position to be this. That in order to assess whether TOL has a credible defence to BHL's claim in breach of contract, I should study the contractual documents as provided using the following principles:

- (1) Interpretation is the ascertainment of the meaning, which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
- (2) The background (or) "matrix of fact" subject to the requirement that it should have been reasonably available to the parties and to the exception mentioned next, (it) includes absolutely anything, which would have affected the way in which the language of the document would have been understood by the reasonable man.
- (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of intent.

I do not think that this issue has surfaced on the affidavits as presented.

- (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words.... The meaning of the document is what the parties using those words against the

¹⁹ **INVESTORS COMPENSATION SCHEME LTD. V WEST BROMWICH BUILDING SOCIETY [1998] 1. All E.R. 98, 114 g - 115 e.**

relevant background would reasonably have been understood to mean.

- (5) The “rule” that words should be given their ‘natural and ordinary meaning’ reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention, which they plainly could not have had. Lord Diplock made this point more vigorously when he said in Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios [1984] 3A11 ER at 233, [1985] AC 191 at 201:

‘...if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business sense’.

[47] In accordance with paragraph 2 of Lord Hoffman’s principles, this background information was supplied by TOL in Walter Cukavac’s affidavit as satisfying this first step. It is then up to BHL to refute this at the trial. If differences emerge, I should think that these questions are best left for ventilation at trial.

[48] Therefore applying the Hoffman principles, I should allow TOL to defend this action so that the Trial Judge may interpret the contract the General Agreements, and the Supplemental Agreements against the admissible background which has been provided by the parties – provided that they satisfy the court that the information is such that was reasonably available to the parties in the situation that

was in existence at the time of the contract so as to ascertain the true intention of the parties at that time.

[49] This thinking would encompass the specialized consideration of trade in services in the oil and gas industry, which I referred to above. One of those “things” highlighted by Mr Armour would have been the “risk” factor in this venture and the question of who bears the risk in this arrangement. Further, one would have to look at and interpret the Warranties and Guarantees Clause in that light as well. From this approach, it seems that TOL ought to be allowed to defend this matter. To my mind these issues tend towards showing that TOL has a credible defence. Whether they will succeed to aid TOL’s successful defence of the matter is another issue, one which will be ventilated at trial and not for my determination at this stage.

[50] **DIFFERENT CLAIMS**

I do not wish to dwell on this issue unduly. Mr Armour’s point that the relief prayed in the Writ with respect to breach of contract was final relief, and different to that in the application, which was in a sum stated for interlocutory judgment with damages to be assessed, is well taken. Because of my conclusions, suffice it to say though, that it would not have been fatal to BHL’s position on the hearing of this application since they could have been granted leave to amend to pursue whichever relief they chose.

[51] **CONCLUSIONS**

I think that BHL has discharged its burden with respect to the procedural requirements of:

- (a) verifying the facts upon which the claim is made; and
- (b) stating its belief that there is no defence to the claim²⁰.

²⁰ See Order 14 Rule 2 (1) RSC 1975

On the other hand even though the burden of proof required by TOL is not high it still had to show cause why BHL's prayer should not be granted. TOL had to convince me that it had a credible or reasonable defence. TOL's standard however goes not to the balance of probability as at trial but to whether the defence as advanced at this stage is enough to rebut BHL's statement of belief. This has been achieved. In other words TOL has convinced me that there is a defence and there are arguable issues²¹. TOL is permitted to defend this matter.

I now make the following Order:

ORDER:

- That the Plaintiff's claim for Mediation expenses in the sum of USD 185,729.83 is struck out with costs certified fit for Counsel in any event to be taxed in default of agreement.
- That the Plaintiff's application for summary judgment pursuant to Order 14 RSC 1975 is hereby dismissed.
- That the Plaintiff do pay the Defendant's costs certified fit for Senior Counsel to be taxed in default of agreement.
- That the Defendant do file and serve its defence within fourteen (14) days of the date of this Order.
- Thereafter the matter to take its usual course.

I place on record my gratitude to all Attorneys-at-law in this matter.

CHARMAINE PEMBERTON
HIGH COURT JUDGE

²¹ per **JESSEL M.R., ANGLO - ITALIAN BANK V WELLS [1878] 38 L. T. 197 p. 201, C.A.**