

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION**

2016/CLE/gen/01667

BETWEEN

AJ TELECOM (BAHAMAS) LIMITED

Plaintiff

AND

BAHAMAS TELECOMMUNICATIONS COMPANY

Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Darron Ellis of Davis & Co. for the Plaintiff
Mr. Randol Dorsett with him Mr. Raynard Rigby of Baycourt Chambers for the Defendant

Hearing Date: 29 May 2018

Civil Procedure - Summary Judgment – Whether there is a triable issue – Action governed by laws of (i) State of New York or (ii) England – Order 14 Rule 1 and 5 of the Rules of the Supreme Court , 1978

The Plaintiff sued the Defendant for breach of contract and claims damages in the sum of \$1,255,172.50 plus ongoing interest at 1.5% per month or part thereof, general damages, interest and costs. The Defendant filed a Defence and Counterclaim for special damages together with interest and costs.

In the interim, the Plaintiff applied for summary judgment on part of the claim alleging that, the Defendant is bound by the contract and therefore, it is a simple case for summary judgment. The Defendant denied that it owed the Plaintiff any late fees and other payments and filed a Counterclaim alleging that it is entitled to damages from the Plaintiff. The Defendant further alleged that there are a multitude of triable issues including a jurisdictional hurdle which the Plaintiff faces.

HELD: dismissing the Plaintiff’s Summons for summary judgment with costs to the First Defendant

1. The decision on a summary judgment application does not involve the judge conducting a mini trial. The judge should not therefore apply the standard which would be applicable at trial, namely the balance of probabilities on the evidence presented. By the very nature of the proceeding, the testing of evidence is not an option: **Swain v Hillman and another** [2001] 1 All ER 91 at 95b.
2. If the pleaded case of the parties indicate that there are factual issues to be tried, which if proved in favour of the defendant to the application might result in a decision in its favour, then the preemptive power of the Court should not be used.
3. There are conflicting evidence between the parties therefore the preemptive power of the Court to grant summary judgment should not be used.
4. If at all, this Court has jurisdiction to try this action, there are many issues to be resolved at a trial. Therefore, summary judgment ought to be refused: **Swain v Hillman and another** [2001] 1 All ER 91 followed.

RULING

Charles J

Introduction

- [1] By Summons filed on 31 August 2017, the Plaintiff (“AJ Telecom“) seeks Summary Judgment against the Defendant (“BTC“) pursuant to Order 14 Rule 1(1) of the Rules of the Supreme Court (“RSC“) (“the 1st Application”).
- [2] Then, on 14 March 2018, AJ Telecom filed another Summons seeking Summary Judgment against BTC for \$112, 957.35 (“the Summary Judgment Application”). This application was the focus of the hearing before me except for the preliminary issue of cost which BTC seeks on the 1st Application. I will return to this later on.
- [3] AJ Telecom relies on two affidavits of Wesley Lambert, one filed on 4 September 2017 and the other on 23 May 2018 respectively. BTC relies on the affidavit of Nicole Watkins filed on 16 March 2018 and the Second Affidavit of Nicole Watkins filed on 18 May 2018 to oppose the application for Summary Judgment.

The parties

- [4] AJ Telecom is a Company duly incorporated in the Commonwealth of The Bahamas and carries on business within the Commonwealth focusing mainly on the provision and repair of telecommunications services. BTC is also a Company

duly incorporated in this country and carries on business which includes the supply, sale and installation of telecommunication equipment and related services within the Commonwealth, primarily on the Island of New Providence.

The pleadings

[5] By a Generally Indorsed Writ of Summons filed on 19 December 2016 and an Amended Writ Statement of Claim filed on 29 July 2017, AJ Telecom sued BTC for breach of contract and claims special damages in the sum of \$1,255,172.50 (plus ongoing interest at 1.5% per month or part thereof), general damages, interest and costs. On 13 July 2017, BTC filed a Defence and a Counterclaim for special damages in the sum of \$31,477.60 together with interest and costs.

[6] In order to have a better understanding of this case, I set out relevant paragraphs of the Amended Statement of Claim and the Defence. However, before doing so, I am impelled to say one or two things about the Amended Statement of Claim. Order 18 Rule 6(1) of the RSC states as follows:

“...Every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits.”

[7] As I scrutinize the Amended Statement of Claim, I am troubled by its contents. I expect lawyers to comply with the Rules.

[8] Now to the Amended Statement of Claim. In paragraph 3, AJ Telecom asserts that between March 2013 and September 2014, it entered into a series of written contracts (Quotes and Purchase Orders) with BTC by which it agreed to provide goods and services to BTC in exchange for monetary payment within 30 days after the delivery of its invoice to BTC. Both parties agree by these contracts that any outstanding payment after 30 days of receipt of the corresponding invoice will result in BTC accruing interest and late fee charges on the outstanding amount until satisfied. The parties further agreed that any discount granted by AJ Telecom

to BTC on the overall invoice amount will be forfeited if the corresponding invoice was not satisfied by BTC within the 30 day period. The parties further agreed that any purchase order issued on an expedited basis would be subjected to an additional cost of 25% of the value quoted in the contract. AJ Telecom says that BTC is in breach of these contracts by failing to satisfy the invoices and/or satisfying the invoices outside the 30 day period thereby losing discounts and incurring late fee charges, expedited fees and interest. AJ also says that BTC is in further breach of these contracts by failing to satisfy the loss discounts and expedited fees.

- [9] In its Defence, BTC states that except that AJ Telecom provided services to BTC in exchange for monetary payment, paragraph 3 is denied. BTC states that AJ Telecom provided quotes to BTC for services required by BTC. Purchase Orders were thereafter generated by BTC for the purposes of providing payment to AJ Telecom. BTC denies the alleged terms as set out in paragraph 3 as the same was never raised, discussed or agreed between the parties. BTC contends that its Purchase Orders do not contain any terms or conditions of contract save for dollar values and descriptions of work. BTC puts AJ Telecom to strict proof of the existence of a written contract outside of the Purchase Orders or at all.
- [10] In paragraph 4, AJ Telecom asserts that the actions of BTC has caused it to suffer financial loss and damages. BTC makes no admission.
- [11] In paragraphs 5 - 24, AJ Telecom gives very detailed particulars of breaches. BTC admits that it issued Purchase Order No. 1077038 and AJ Telecom provided the services thereto. BTC further states that none of the conditions of contract alleged by AJ Telecom at paragraph 5 governed the relationship between the parties and as such, were never brought to its attention or agreed between the parties. BTC says that it did not agree to a 30 day payment term and makes reference to the relationship between the parties and the course of dealings prior to the issuance of the referenced Purchase Order. BTC never paid pursuant to a 30 day payment arrangement. BTC says that it paid the sum set out in the Purchase Order to AJ

Telecom for the services rendered. BTC denies that it acted in breach of the alleged contract and contends that the sums claimed by AJ Telecom for expedited fees, discounted fees and late fees were not mutually agreed by the parties and were never due to AJ Telecom.

- [12] At paragraph 6 of the Defence, BTC asserts that save that it issued Purchase Order No. 1077437, the paragraph is denied. BTC reiterates its position as set out above. BTC admits that AJ Telecom was paid by way of Purchase Orders for services rendered but denied that expedited fees, discounted fees and late fees were included.
- [13] BTC states that all of the Invoices and Purchase Orders recited in paragraphs 7 to 20 of the Amended Statement of Claim have been paid. BTC contends that payment was delayed in instances where AJ Telecom requested to be paid in US dollars instead of Bahamian dollars.
- [14] At paragraph 21, BTC asserts that save that it paid the sum of \$4,204.81 to AJ Telecom, paragraph 5 is denied.
- [15] At paragraph 22, BTC states that save that it issued Purchase Order No. 107624 for services to be carried out by AJ Telecom at Man-O-War Cay, the remainder of the paragraph is denied.
- [16] BTC denies that it failed to satisfy the invoice set out at paragraph 23 of the Amended Statement of Claim and says that it has satisfied the total sum of \$8,131.20 to AJ Telecom by wire transfer on 31 December 2015 to AJ Telecom's United States Bank Account.
- [17] BTC denies paragraph 24 of the Statement of Claim and puts AJ Telecom to strict proof of the alleged expense, financial loss and damage. BTC denies the alleged contract and reiterates its position that such terms were never agreed by BTC.

[18] BTC counterclaimed against AJ Telecom for special damages of \$31,477.60. It also seeks interest and cost.

[19] As can be gleaned from the above pleadings, there are conflicting evidence of facts.

The summary judgment test

[20] Order 14 sets out the procedure by which the Court may decide a claim or a particular issue without a trial.

[21] O 14 r 1(1) of the RSC provides as follows:

“Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has entered an appearance in the action, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against the defendant.”

[22] Rule 2 (1) provides as follows:

“An application under rule 1 must be made by summons supported by an affidavit verifying the facts on which the claim, or the part of a claim, to which the application relates is based and stating that in the deponent’s belief there is no defence to that claim or part, as the case may be, or no defence except as to the amount of any damages claimed.” [Emphasis added]

[23] Under O 14 r 5, the test to be applied by the Court is whether there is any “*triable issue or question*” or whether “*for some other reason there ought to be a trial*”. If a plaintiff’s application is properly constituted and there is no triable issue or question nor any other reason why there ought to be a trial the Court may give summary judgment for the plaintiff.

[24] In **Swain v Hillman and another** [2001] 1 All ER 91 at 92, Lord Woolf MR said that “the words ‘no real prospect of succeeding’ do not need any amplification, they speak for themselves. The word ‘real’ distinguishes fanciful prospects of success”.

At page 95b, Lord Woolf MR went on to say that summary judgment applications have to be kept to their proper role. They are not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. Further, summary judgment hearings should not be mini-trials. They are simply to enable the Court to dispose of cases where there is no real prospect of success.

- [25] In **Three Rivers District Council v Governor and Company of the Bank of England** (2001) UKHL 16, para. 95. the Court expanded on this point by stating that summary judgment is easier in simpler cases as opposed to the more difficult ones and stated as follows:

“The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be taken that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in *Swain v Hillman*...that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all”.

- [26] The common law also aids in highlighting the importance of a full trial to achieve the interests of justice and therefore, the power of summary judgment should be approached as a serious step which should be used cautiously and sparingly. This point was accentuated by Judge LJ in **Swain** when he said at page 96(a) – (c):

“To give summary judgment against a litigant on papers without permitting him to advance his case before the hearing is a serious step. The interests of justice overall will sometimes so require. Hence, the discretion to the court to give summary judgment...if there is a real prospect of success, the discretion to give summary judgment does not arise merely because the court concludes that success is improbable. If that were the court’s

conclusion, then it is provided with a different discretion, which is that the case should proceed but subject to appropriate conditions imposed by the court.”

[27] Further, summary judgment should only be granted by a court in cases where it is clear that a claim (or **defence**) on its face obviously cannot be sustained or in some way an abuse of the process of the court. In **Bolton Pharmaceutical Co. 100 Ltd v Doncaster Pharmaceuticals Group Ltd and Other** [2002] EWCA Civ. 413, Mummery L.J. stated:

“17. It is well settled by the authorities that the court should exercise caution in granting summary judgment in certain kind of case. The classic instance is where there are conflicts of fact on relevant issues which have to be resolved before judgment can be given....A mini trial on the facts...without having gone through normal pre-trial procedures must be avoided, as it runs a real risk of producing summary injustice.

18. In my judgment, the Court should also hesitate about making a final decision without a trial, where, even though there is no obvious conflict of fact at the time of the application. Reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case.”

[28] Therefore, the Court should be cautious since it is a serious step to give summary judgment. Nonetheless, a plaintiff is entitled to summary judgment if the defendant does not have a good or viable defence to his claim. This is also in keeping with the overriding objective of Order 31A to deal with cases justly by saving unnecessary expense and ensuring timely and expeditious disposal of cases. It is also part of the Court’s active case management role to ascertain the issues at an early stage and to decide what issues need full investigation at trial and to dispose summarily of the others.

Analysis and Conclusion

[29] Having comprehensively set out the summary judgment test, I now turn to the evidence, of course, very conscious that I should not apply the standard which

would be applicable at trial, namely the balance of probabilities on the evidence presented. In other words, I am cautioned that I should not conduct a mini trial.

- [30] Learned Counsel Mr. Ellis submitted that the issue before the Court is a simple one: either the Court accept that the expressed main words of the contract are binding or not on BTC. He submitted that BTC is bound by the contract and therefore summary judgment should be granted in the circumstances. He next submitted that the evidence with respect to the late payments can be gleaned from the several Exhibits attached to Mr. Lambert's affidavit where, essentially he wrote to BTC requesting payment. For instance, at Exhibit "WL 3", Mr. Lambert wrote to Teresa and Anastasia on 5 June 2013 stating, among other things, that "*However, we still have not been paid for the Robinson Stadium foundation, the tower erection and the additional grounding wells Mr. Kenneth Whymys requested we drill, and the unloading and organizing of the eight (8) containers.*" Later on in this email he wrote "*Please pay us as agreed so we can continue to reinvest this money in your projects.*"
- [31] It is plain from these Exhibits, that AJ Telecom is seeking payments from BTC to which BTC, in its Defence, contradicted. So, AJ Telecom says one thing and BTC says another thing which brings into play that there are factual issues to be resolved.
- [32] In addition, from the documentary evidence produced by Mr. Lambert, AJ Telecom is seeking payments from BTC with respect to late fees and other payments: see Exhibit "WL6". In that regards, Mr. Ellis refers to the Terms and Conditions for Sale of Products and Services. At first blush, one sees a Contract but there is no signature indicating the parties to the Contract. If I were wrong to say so, and the parties to the Contract are BTC and AJ Telecom, then AJ Telecom faces what appears to be a jurisdictional hurdle: Article 16 speaks to the Governing Law of this contract and it states:

“Governing Law and Dispute Resolution

16.1 This Contract shall be governed by and construed in accordance with the laws of (i) the State of New York if Buyer’s place of business is in the U.S. or (ii) England if the Buyer’s place of business is outside the U.S., in either case without giving effect to any choice of law rules that would cause the application of laws of any other jurisdiction (“the Governing Law”). If the Contract includes the sale of Products and the Buyer is outside the Seller’s country, the United Nations Convention on Contracts for the international Sale of Goods apply.

16.2 All disputes arising in connection with this Contract, including any question regarding its existence or validity, shall be resolved in accordance with this Article 16. If a dispute is not resolved by negotiations, either party may, by giving written notice, refer the dispute to a meeting of appropriate higher management, to be held within twenty (20) business days after the giving of notice. If the dispute is not resolved within thirty (30) business days after the giving of notice, or such later date as may be mutually agreed, either party may commence arbitration or court proceedings, depending upon the location of the Buyer, in accordance with the following:

(a) if the Buyer’s pertinent place of business is in the U.S., legal action shall be commenced in federal court with jurisdiction applicable to, or state court located in, either Cobb County, Georgia or the location of Buyer’s principal place of business; or (b) if the Buyer’s pertinent place of business is outside the U.S. , the dispute shall be submitted to and finally resolved by arbitration under the Rules of Arbitration of the International Chamber of Commerce (“ICC”)....”

[33] Learned Counsel Mr. Dorsett submitted that the Defence raises a number of cogent reasons why Summary Judgment cannot be granted. He identified the following:

1. The issues in dispute require consideration of a multitude of triable issues;
2. The issues in dispute are clouded in a number of substantial disputes of fact;
3. The issue in dispute are governed by foreign law which require expert analysis, and which is not amenable to a summary disposition but rather should be dealt with at a trial;

4. The issue which AJ Telecom now seeks to divorce from the other aspects of its claim, which are to be determined at trial, should not be separately determined as they arise from the same facts and in particular from the alleged oral agreement which is the subject of this dispute. This is evident from AJ Telecom's own case;
5. The issue which AJ Telecom now seeks to divorce from other aspects of the claim, which are to be determined at trial, should not be separately determined, as it is part-linked to BTC's Counterclaim, which is also to be determined at trial.
6. BTC does not raise these matters as mere arid technical points but rather pray them in aid of its bona fide defence to the claims brought against it and therefore ought be afforded a thorough and detailed examination of the issues in dispute, at trial;
7. AJ Telecom claims is for substantial sums of money and its attempts to rush to Judgment in summary proceedings as opposed to a trial is inequitable, unnecessary and unjust.

[34] Besides the issue of whether this Court has jurisdiction to hear this matter, there are many issues which need to be determined at trial. While the Court has a duty to actively case-manage matters, the Court ought not to be over-enthusiastic and drive litigants from the judgment seat. Having found that there are issues to be tried and there is a Counterclaim to which no Defence has been filed, on any view, critical aspects of this action must be tried. In any event, AJ Telecom has not satisfied me that BTC owes it any amount of money for late fees payment. This is also a triable issue given what is stated in BTC's Defence. In the exercise of my discretionary powers, all of the issues should go to trial.

[35] Accordingly, I will dismiss the Summary Judgment application with costs to BTC to be taxed if not agreed.

[36] There is the other issue of costs on the first application for Summary Judgment. I am not convinced that AJ Telecom should be condemned in cost for the abandonment, so to speak, of this application.

[37] Since the Summary Judgment application fails, the parties will ensure that the matter is ready for a Case Management Conference on 5 November 2019 at 2:30 p.m. The trial of this action will take commence on 12 January 2021 with a time estimate of 3 days.

Dated 16th day of July, A.D., 2019

**Indra H. Charles
Justice**