COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2013/CLE/gen/00791

BETWEEN

STEPHEN CHROMIK

Plaintiff

AND

ANSBACHER (BAHAMAS) LIMITED

1st Defendant

AND

CHESTER HOLDINGS LIMITED

2nd Defendant

AND

UBS TRUSTEES (BAHAMAS) LTD

Third Party

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Philip Davis QC with him Mr. Darron Ellis of Davis & Co. for the Plaintiff
Mr. Luther McDonald and Ms. Keri Sherman of Alexiou Knowles & Co. for the 1st and 2nd Defendants

Hearing Dates: 15 February 2018

Civil Procedure - Summary Judgment – Whether there is a real prospect of success at trial – Whether there is a triable issue - Third Party – Correspondent or agent – Order 14 Rule 1 and 5 of the Rules of the Supreme Court , 1978

The Plaintiff applied for summary judgment stating that on the evidence adduced, the 1st Defendant had no defence to the claim or such Defence has no real prospect of success. The 1st Defendant says that there is a triable issue as to the nature of the relationship between the Plaintiff and the 1st Defendant and the Correspondent which is not its agent. The 1st Defendant says that the Plaintiff's application for summary judgment is misconceived.

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

1. In granting or refusing an application for summary judgment, the Court must consider whether the plaintiff or defendant has a real prospect of succeeding on the claim or issue as required by Order 14 of the Rules of the Supreme Court.

2. 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.

3. If the pleaded case of the parties indicate that there is a factual issue to be tried, which if proved in favour of the defendant to the application might result in a decision in his favour, then the preemptive power of the Court should not be used.

4. The factual issue of the relationship between the parties and the Third Party is a triable issue. The preemptive power of the Court to grant summary judgment should therefore not be used.

5. There is a triable issue in this matter and therefore summary judgment ought to be refused: **Swain v Hillman and another** [2001] 1 All ER 91 followed.

RULING

Charles J

Introduction

[1] This is an application by the Plaintiff ("Mr. Chromik") for summary judgment on the grounds that the 1st Defendant ("Ansbacher") has no defence to the claim. In other words, Ansbacher has no real prospect of success in its Amended Defence.

[2] For reasons which will become evident later on in the ruling, I dismissed the application for summary judgment with costs to Ansbacher because, in my opinion, there is an issue to be tried.

Brief procedural history

[3] On 26 April 2013, Mr. Chromik commenced this action by a Generally Indorsed Writ of Summons in which he seeks damages in the amount of $451,186.11 for breach of contract and breach of fiduciary duty arising from the gross negligence,

misconduct and/or willful neglect of Ansbacher to affect a sell order of 4,000 Netflix shares pursuant to his instructions on 26 August 2011.

[4] On 10 April 2015, Mr. Chromik filed an Amended Statement of Claim. Ansbacher filed an Amended Defence on 23 April 2015. On 7 December 2017, Ansbacher added Chester Holdings Limited as the 2nd Defendant and UBS (Bahamas) Ltd as a 3rd Party ("UBS").

[5] On 26 October 2016, Mr. Chromik filed the present Summons seeking summary judgment pursuant to Order 14 Rule (1) (1) of the Rules of the Supreme Court, 1978 ("RSC"). The Summons is supported by the affidavit of Andrew Edwards, an attorney and a partner in the law firm of Davis & Co.

The pleadings

[6] The following facts can be distilled from the Amended Statement of Claim and the Amended Defence. By and large, they are not in dispute. On 1 July 2011, Mr. Chromik entered into a Securities Trading and Custodian Agreement ("the Agreement") with Ansbacher that established an account to hold such moneys, stocks, bonds, commodities and other property ("the Account") as shall be deposited from time to time in the account in accordance with the Agreement. Ansbacher admits these facts but avers that the documentation constituting the contract between the parties consisted of Standard Terms and Conditions and also a Telefax/Electronic Indemnity. Ansbacher says that, at trial, it will refer to its contract with Mr. Chromik for its true meaning and effect.

[7] Shortly after the establishment of the Account, Mr. Chromik deposited money, stock and other properties which included 4,000 shares in a company called and known as Netflix.

[8] On 26 August 2011, Mr. Chronik gave written instructions to Ansbacher to liquidate securities held to his credit. Although he did not specify the exact number of shares, it is common ground that Mr. Chromik had 4,000 shares in Netflix which were held by Ansbacher/ UBS as Custodian on the Account in

accordance with clause (2) of the Agreement. That clause states that property was to be held by the Custodian "**or its correspondents selected for such purposes.**"

[9] On 26 August 2011, whether it was through mistake or negligence by Ansbacher and/or UBS, UBS sold 2,000 and not 4,000 Netflix shares at a price of $465,176.05 ($2,325 per share). It is indisputable that, as of that date, 4,000 Netflix shares were available for sale and should have been sold.

[10] By letter dated 20 December 2011, Ansbacher communicated with Mr. Chromik stating that Ansbacher and UBS held a further 2,000 shares in Netflix on account for him. The letter stated, among other things, that "*Ansbacher gave instructions to UBS to sell 4,000 Netflix shares, yet UBS categorically state [sic] that this account did not have 4,000 Netflix shares to sell but that there were only 2,000 Netflix shares to sell. Ansbacher therefore instructed UBS to sell whatever Netflix shares they held (on your behalf). As a result, UBS sold only 2,000 shares*". The letter further states, "*At a later date UBS discovered that it still held 2,000 Netflix shares. To date, those shares are still held on the books of UBS and have not been sold and that there had been a significant reduction in the share price of Netflix.*"

[11] Some eight months later, on 9 May 2012, the remaining 2,000 Netflix shares were sold at a substantially diminished value of $148,495. 35 ($74.25 per share). Between August 2011 and May 2012, the share price of Netflix shares fell and the loss occasioned by the failure to sell the additional 2,000 Netflix shares in August 2011, is $316,680.70; the sum which is now being claimed by Mr. Chromik.

Disputed facts

[12] Mr. Chromik states that UBS was the agent and custodian of Ansbacher. Ansbacher denies that UBS was its agent/custodian and states that UBS was at

all material times an independent contractor with whom it contracted on behalf of Mr. Chromik.

[13] Mr. Chromik avers that Ansbacher and/or its agent/custodian, UBS, in breach of their custodian and fiduciary duties sold 2,000 instead of 4,000 Netflix shares. Ansbacher insists that UBS was negligent in that it failed to execute its instructions relative to the 4,000 Netflix shares and had sold only 2,000 of the same. Ansbacher asserts, that as a result of UBS' negligence, their records reflected that Ansbacher's trading account had only 2,000 shares as at 26 August 2011.

[14] Mr. Chromik states that, as a result of the failure to affect the sell order as directed, Ansbacher was unable and unwilling to disburse any funds held on his account which was communicated to him via email on 19 October 2011, a position that was reaffirmed in the letter of Mr. Larry Roberts, then employee of Ansbacher. Ansbacher states that there were no funds in Mr. Chromik's account to be disbursed owing to the failure by UBS to effect the sell order as directed.

[15] Ansbacher denies that it was negligent or breached any duty owing to Mr. Chromik by reason of UBS' failure to effect the sell order or at all and puts Mr. Chromik to strict proof of the facts and matters alleged in paragraph 12 of the Amended Statement of Claim and the Particulars of Loss.

[16] At paragraph 18, Ansbacher denies that Mr. Chromik is entitled to any relief which he claims.

The issue

[17] The key question is whether Ansbacher and/or UBS is/are liable for losses incurred consequent upon the failure to sell the 4,000 Netflix shares on 26 August 2011.

The parties' contentions

[18] Learned Queen's Counsel Mr. Davis appearing for Mr. Chromik submitted that, at all material times, Mr. Chromik engaged Ansbacher for reward to provide financial services, including custodianship services and their relationship was contractual in nature.

[19] He next asserted that Ansbacher's defence is that it was not itself at fault, that in August 2011, it believed there were only 2,000 Netflix shares available for sale and that the fault lies with a third party. Mr. Davis QC submitted that Ansbacher accepts that there was a breach of contract and negligence as pleaded, however Ansbacher attributes the negligence to be on the part of a third party. This is reflected at paragraphs 14 and 15 of the Amended Defence.

[20] Learned Queen's Counsel next submitted that by Clause 5 of the Agreement, Ansbacher agreed to the following:

> **"The Custodian will be responsible for the performance of only such duties as are set forth herein,or are contained in written instructions given to the Custodian by the Client. It is expressly understood and agreed that the Custodian is not under any duty or obligation to supervise the investment of or to advise or make any recommendation to the Client with respect to the purchase, retention, sale, exchange or deposit of Account Property and accepted by the Custodian."**

[21] By this clause, says learned Queen's Counsel, Ansbacher agreed to accept liability for the performance of any written instructions given by Mr. Chromik. It is not disputed that the Plaintiff sent written instructions to liquidate securities held to his credit. He contended that Ansbacher is estopped from attempting to escape liability for the non-performance of the written instructions by blaming UBS.

[22] Mr. Davis QC also relied on clause 8. By this clause, Ansbacher agreed to the following:

> **"Notwithstanding anything contained in this Agreement, the Custodian shall not be liable for any loss to or any diminution in value of, the Account Property except where it is proven that the said loss or diminution in**

> **Account Property value resulted from the Custodian's wilful neglect or misconduct."**

[23] Further clause 5 of the Standard Terms and Conditions states:

> **"In opening and maintaining an account for the customer, neither the bank nor any of its agents….. shall be under any liability…….save in the case of gross negligence or wilful misconduct."**

[24] Learned Queen's Counsel contended that the failure of Ansbacher to sell the 4000 shares and to take months to locate and sell the missing 2,000 shares was amazing. Ansbacher puts itself out to the world as an expert bank, and it should be held to that standard. The fact that 2000 shares went missing months after a sell order demonstrates evidence of wilful neglect, wilful misconduct and gross negligence on behalf of Ansbacher and/ or the third party. Mr. Davis QC submitted that Ansbacher is in breach of the contract and specifically, the preceding clauses, by failing to sell and locate the missing shares and is therefore liable to Mr. Chromik for the loss in value of the shares.

[25] Learned Queen's Counsel submitted that the bank/customer relationship is contractual in nature and as such, Ansbacher had a contractual duty to its customer to exercise reasonable care and skill. According to Mr. Davis, Ansbacher is merely attempting to evade liability by stating it gave instructions to sell 4,000 shares but its obligation goes beyond giving instructions to sell. It must sell and it becomes liable for its failure to sell all of the shares.

[26] Mr. Davis QC further submitted that the record reflects that Ansbacher initially gave instructions to sell 4,000 shares but recanted those instructions when it accepted UBS' stance that there were only 2,000 shares. Ansbacher not only recanted those instructions but then directed UBS to sell 2,000 shares. According to Counsel, a competent bank would have held its position and provide documentary proof to its agents.

[27] Learned Counsel for Mr. Chromik next submitted that Ansbacher's actions or inactions in respect of the losing or misplacement of 2,000 shares for months are an example of wilful neglect, wilful misconduct and gross negligence. Counsel maintained that as a professional bank that trades in security and shares, it was clearly aware that in trading shares, one day could be a lifetime in respect of the fluctuation of the price of shares. Ansbacher should have contemplated that a failure to find and sell the shares could lead to the client's shares losing value. It should have foreseen this possibility.

[28] Mr. Davis QC submitted that Ansbacher is liable in contract and also in negligence.

[29] Mr. Davis QC next asserted that even if the third party is culpable, that does not exonerate Ansbacher from liability as it is well-established that the principal of agency attributes the authorized actions of the agent to its principal: see ***Encyclopedia of Banking Law*** and **Bank Melli Iran v Barclay's Bank** [1951] 2 Lloyd's Rep. 367 at 376 where it is stated that:

> **"The terms of the contract between the issuing bank and the correspondent bank are as set out in the issuing bank's instructions (assuming of course that the correspondent bank accepts the instructions). As between the issuing bank and the correspondent bank, the relationship is unless otherwise agreed, that of principal and agent."**

[30] Learned Queen's Counsel also submitted that the relationship between Ansbacher and the third party is one of a principal and its agents, UBS.

[31] He next submitted that a company is entitled to sue in respect of torts committed against it, and it can be sued for a tort committed by it. As the company is an artificial legal entity, all torts of a company (even torts of omission) are committed through agents and a company is vicariously liable for the acts of an agent or employee acting within the scope of his authority or in the course of his employment. The position was affirmed by the House of Lords in the **Credit Lyonnais Nederland NV v Export Credits Guarantee Department** [1998] 1 Lloyd's Rep 19 page 6 para 3 where the judge accepted and stated:

"The passage in the judgment of Blackburn J. as reported in McGowan & Co. v. Dyer (1873) L.R. 8 Q.B. 141, 143 is as follows:

> **In Story on Agency, the learned author states, in section 452, the general rule that the principal is liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances, and omissions of duty of his agent in the course of his employment, although the principal did not authorise, or justify, or participate in, or indeed know of such misconduct, or even if he forbade the acts, or disapproved of them".**

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[32] Learned Queen's Counsel submitted that Ansbacher authorized UBS to sell shares on its behalf and therefore, its position that UBS is negligent and therefore liable is patently misconceived and unsustainable. Consequently, Ansbacher is liable to Mr. Chromik for the loss in the diminution of shares.

[33] Mr. Davis QC argued that Ansbacher has no Defence to the claim. Therefore, the Court should grant summary judgment.

[34] Learned Counsel for Ansbacher, Mr. McDonald submitted that Mr. Chromik's application is misconceived as Ansbacher has a good and arguable defence. He further submitted that by instituting this action against Ansbacher, Mr. Chromik has joined the wrong party as a defendant. Furthermore, he submitted that the test which the Court has to apply under Order 14 Rule (1) (5) is whether there is any "*triable issue or question*" or whether '*for some other reason there ought to be a trial*."

[35] Mr. McDonald submitted that there is a triable issue of the relationship between the parties. Mr. Chromik says that it is one of contract and that the failure to sell the shares even if caused by the negligence of the third party is the responsibility of Ansbacher. On the other hand, Ansbacher alleges that, as regards the shares, the relationship between Mr. Chromik and itself was contractual and that the third party (UBS) was not Ansbacher's agent but an independent contractor.

[36] Mr. McDonald next submitted that Mr. Chromik is a customer; Ansbacher is the bank which whom the money was placed, and between the two of them, there

was an agreement – the Securities Trading & Custodian Agreement. Under that agreement, the property was to be held by the custodian or its correspondence selected for such purposes and it is Ansbacher's position that UBS was its correspondence and not its agent, as alluded to by Mr. Davis QC.

[37] Learned Counsel Mr. McDonald referred to an extract from **Principles of Banking Law** by Ross Cranston MP, QC, (2001 Edition). At page 230, the learned author stated:

> **"B. THE CORRESPONDENT'S ERROR**
>
> **An important legal issue is whether, in the event of a correspondent bank's error, the customer can sue either its bank or the correspondent…."**

[38] Mr. McDonald submitted that the sole purpose for introducing this extract is to demonstrate that the correspondent may not necessarily be an agent of the bank and, in the present case, that is an issue to be tried. On this basis, says Mr. McDonald, the summary judgment application is misconceived.

The summary judgment test

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

[40] O 14 r 1 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."**

[41] 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.

[42] Put another way, O 14 r 5 states that the Court may give summary judgment on a claim or an issue if it considers that the defendant has no real prospect of successfully defending a claim or issue. Under O14, the Court has a very salutary power, to be exercised in a plaintiff's favour or, where appropriate, in a defendant's favour. It enables the Court to dispose summarily of both claims and defences which have no real prospect of being successful.

[43] 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.

[44] 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".**

[45] 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."**

[46] 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

[47] 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.

[48] Learned Queen's Counsel Mr. Davis premised his arguments by submitting that this is a case of breach of contract by Ansbacher and /or Ansbacher own negligence simpliciter and/or negligence through a third party for which it is vicariously liable. He submitted that UBS was the agent and custodian of Ansbacher. In its Amended Defence, Ansbacher denies that UBS was its agent/custodian and states that UBS, was at all material times, an independent contractor with whom it contracted on behalf of Mr. Chromik. Given the state of the evidence before me, I am unable to discern what contract Ansbacher breached to make a finding that it is liable in contract.

[49] With respect to the claim in negligence against Ansbacher, this is an even more insurmountable task for Mr. Chromik since Ansbacher insists that UBS was negligent in that it failed to execute its instructions relative to the 4,000 Netflix shares and had sold only 2,000 of the same. Ansbacher asserts that, as a result of UBS' negligence, their records reflected that Ansbacher's trading account had only 2,000 shares as at 26 August 2011. If Ansbacher gave those instructions to UBS, then would Ansbacher still be negligent?

[50] In my opinion, there is at least one issue to be tried, namely the relationship of the parties, and the Court is unable to determine this issue on pleadings and submissions in the absence of witness statements, viva voce evidence and cross-examination.

[51] While the Court has a duty to actively case-manage matters, the Court ought not to be over-zealous and drive litigants from the judgment seat. Having found that there is at least one issue to be tried, and in the exercise of my discretionary powers, I will dismiss the summary judgment application with costs to the Defendants to be taxed if not agreed.

Dated this 28th day of February, A.D., 2018

Indra H. Charles
Justice