COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2016/CLE/GEN/FP00176

BETWEEN

JERMAINE WILSON

Plaintiff

AND

MEDITERRANEAN SHIPPING COMPANY [MSC BAHAMAS] LTD

First Defendant

AND

FREEPORT CONTAINER PORT LIMITED

Second Defendant

BEFORE:	The Honourable Mrs Justice Estelle G. Gray Evans
APPEARANCES:	Ms Krystle Rolle for the plaintiff
	Mr Sean Moree along with Mrs Aisha Stuart-Smith for the first defendant:
	Mr Dwayne Fernander for the second defendant:
HEARING DATE:	24 April 2017
DECISION DATE	6 July 2017

DECISION

(Application to strike out statement of claim)

Gray Evans, J

1. This is an application by the first defendant, Mediterranean Shipping Company [MSC Bahamas] Ltd to strike out the claim of Jermaine Wilson, the plaintiff, against the first defendant or, in the alternative, to have the first defendant struck out as a party to this action.

2. The plaintiff commenced this action on 9 September 2015 by a specially indorsed writ of summons, as amended and filed on 13 October 2015, in which he claims damages for, inter alia, personal injuries in, and consequential loss suffered as a result of, an industrial accident on 13 September 2012, while in the employ of the second defendant, Freeport Container Port. The plaintiff alleges that his injuries were caused by the negligence of the second defendant for which he also alleges the first defendant is vicariously liable.

3. In its defence filed 2 November 2015 the first defendant denied the plaintiff's claim and avers instead that any injuries caused to the plaintiff were as a result of the seaworthiness of the vessel which was the responsibility of the owners of the vessel, who, at the material time were "Tama Shipping Inc." The first defendant avers further that the plaintiff either caused or contributed to his fall.

4. The second defendant in its defence filed 16 October 2015 also denies the plaintiff's claim and avers, inter alia, at paragraph 10 thereof that the plaintiff's accident was caused solely by negligence on the part of the first defendant; alternatively, the plaintiff's fall was caused solely by negligence on the part of the owners of the MSC Catania. Further or, in the alternative, the plaintiff's fall was caused solely by negligence on the part of the plaintiff.

5. By its summons filed on 25 January 2017, the first defendant seeks an order striking out the plaintiff's claim against the first defendant pursuant to Rules of the Supreme Court (RSC) Order 18 rule 19(1)((b), (c) and (d) and or under the inherent jurisdiction of the Court; alternatively, pursuant to RSC Order 15 rule 6, that the amended writ of summons be amended by striking out the first defendant on the ground that the first defendant has been improperly joined as a party to the action.

6. The first defendant's application is supported by the affidavit of Manuel Ruiz filed on 21 February 2017 in which he deposes, inter alia, as follows:

> 1) That I am advised by my attorneys that the claims in the amended writ are ambiguous and in certain cases, unfounded.
>
> 2) Specifically, at paragraph 9 of the amended writ of summons, it is unclear as to how the first defendant could be vicariously liable for the second defendant.
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> 3) The plaintiff has failed to establish a relationship between the first and second defendants for such vicarious liability to ensue.
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> 4) Further paragraph 23 of the amended writ states that the second defendant was employed by the first defendant which is denied by the first defendant. There are no particulars of the said employment nor is there any reference to any contract between the two entities which would constitute an employment relationship.
>
> 5) In its defence, the first defendant denied that the vessel was one of its carrier ships and identified the ship as a chartered vessel. Furthermore, the first defendant identified the owners of the vessel in paragraph 9 of its defence as Tama Shipping Inc.
>
> 6) The second defendant provided terminal services to the first defendant at the container terminal located in Freeport, Grand Bahama, pursuant to a Terminal Service Agreement dated the 1st January 2008 ("the service agreement").

7) The service agreement does not attribute liability to the first defendant for injuries suffered by an employee of the second defendant performing services in relation to the service agreement.

8) Additionally, a charter party agreement was executed by the plaintiff [second defendant] and first defendant outlining the terms and conditions of charter services between the parties.

9) Clause 1 of the Charter Party Agreement states that the owners are liable for the seaworthiness of the vessel. The said clause specifically states as follows:

> "1. That the owners shall provide and pay for all provisions and immigration fees, wages and consular shipping and discharging fees of the Crew; shall pay for the insurance of the vessel, also for all the cabin, deck, engine-room and other necessary stores, including boiler water and lubricating oil and maintain her class and keep the vessel in a thoroughly efficient state in hull and holds, machinery and equipment for and during the service."

10) Therefore, the charter party agreement clearly indicates that the owners of the vessel are solely liable for the maintenance of the vessel and not the first defendant as alleged.

11) Neither the second defendant nor the owners of the vessel are employees of the first defendant. They are independent contractors of the first defendant.

12) The owners and second defendant were engaged to perform a service for the first defendant and were bound by the terms of the engagement under their respective contracts.

13) Accordingly, the first defendant was never an employee of either the second defendant or an employee of the owner.

14) The injuries suffered by the plaintiff were not as a result of actions committed by the independent contractors in any of the aforementioned situations. The owners of the Vessel had a duty to maintain the Vessel and the second defendant had a duty to ensure safe working conditions for its employees, specifically the plaintiff. In both cases the duty of the Owner of the vessel and the second defendant are non-delegable.

15) Additionally, the first defendant is not vicariously liable for the actions and omissions of the second defendant. It was the duty of the second defendant to ensure safe working conditions for its employees, specifically the plaintiff.

16) The service agreement does not impose a duty upon the first defendant and therefore the first defendant cannot be liable for injuries suffered by the second defendant's employees while working on its chartered vessel.

17) In light of the foregoing, the first defendant had been improperly or unnecessarily made a party to these proceedings.

18) I am advised by my attorneys that the first defendant is not liable for the plaintiff's losses as a matter of law. I am further advised that even if the plaintiff's factual claims are correct, as a matter of law, he would not be entitled to a judgment against the first defendant.

7. In opposition to the first defendant's application, the plaintiff relies on his affidavit filed 19 February 2016 in which he deposes that on 13 September 2012 whilst employed by the second defendant he suffered an industrial accident on board a vessel owned by the first defendant herein. That as a result of the said accident he suffered and continues to suffer from severe injuries to his face, wrist and back. The plaintiff also adopts and swears to the contents set out in his amended writ of summons and statement of claim filed 13 October 2015 as follows:

1) On the 13th September 2012 the plaintiff was employed by the second defendant as an Operations Stevedore onboard one of the second defendant's carrier ships.

2) That the first defendant, Mediterranean Shipping Company SA (MSC) is a global container shipping company with a registered office in Freeport, Grand Bahama, The Bahamas.

3) That the second defendant is a privately owned and operated port of Hutchison Port Holdings (HPH), and a major hub for worldwide transshipment of containerized cargo with a registered office in Freeport, Grand Bahama, The Bahamas.

4) That at the material time the second defendant and the first defendant were bound by an employment contract.

5) That the second defendant operated as a shipping carrier for the first defendant.

6) That at the material time the second defendant was the agent/servant of the first defendant.

7) That on the 13th of September 2012 the plaintiff suffered an industrial accident due to the defendants' negligence and failure to provide a safe and conducive working environment.

8) That while in the course of his duties, checking the under-deck to make sure everything was properly placed and restrained, the plaintiff held onto a railing on the second defendant's vessel and the railing broke/popped loose causing the plaintiff to fall 30ft through the under-deck.

9) That the second defendant was negligent and the first defendant is vicariously liable for the omission and actions of the second defendant.

10) That the fall was caused by the negligence of the defendants.

11) By reason of the defendants' negligence the plaintiff sustained personal injuries in the form of severe injuries to his face, back and wrist.

12) By reason of the defendants' negligence the plaintiff continues to feel pain and suffering and has had a loss of amenities.

13) That on the said date the plaintiff wore the necessary protective gear inclusive of hard hat, steel toe boots, overalls etc.

14) That the plaintiff in no way caused or contributed to his fall on the 13th September 2012.

15) That the plaintiff was responsible for the maintenance of his sixty (60) year old mother before this incident occurred.

16) By reason of the defendants' negligence the plaintiff has suffered and incurred aggravated damages in that his employment contract was wrongfully terminated by the second defendant for utilizing sick days as a result of injuries sustained on the vessel of the second defendant.

17) That the plaintiff was given authorization by his Doctor to take sick days due to his condition.

18) That the plaintiff presented documentation of the said authorization to the Human Resources Department of the second defendant.

19) That as a result of the extent of the plaintiff's injuries he is unable to work or to find alternative means of employment.

20) By reason of the defendants' negligence the plaintiff has incurred damages, expenses and loss.

21) That the plaintiff further claims interest on any sum found due at such rate and for such periods as the Court deem just, pursuant to Section 2 and 3 of the Civil Procedure (Award of Interest) Act.

22) That the plaintiff claims as against the defendants are loss and damages incurred as a result of the negligence of the defendants on the 13th of September 2012.

Particulars of negligence:

23) At the material time the second defendant was employed by the first defendant.

24) That the plaintiff was employed by the second defendant.

25) That on the 13th of September 2012 when the accident occurred the plaintiff was acting in the course of his employment with the defendant.

26) That the railing(s) onboard the second defendant's vessel was defective and/or faulty.

27) The defendants were negligent in that they failed to:

a. Make proper or adequate safety checks so as to prevent any defect to the railings.

b. Ensure that the working conditions and environment of the plaintiff was safe and conducive to the course of the plaintiff's employment.

c. Alert the employees as to the presence or potential dangers associated with the said defective railing.

d. Maintain a safe and conducive working environment by replacing the faulty railings.

28) The plaintiff will rely on the happening of the accident as evidence in itself of the negligence of the defendants.

29) By reason of the defendants' negligence the plaintiff has sustained pain, injury, suffering, loss and damage.

8. Counsel for the first defendant makes the following observations and submissions:

1) The plaintiff's claim does not establish the existence of a duty of care owed to him by the first defendant and, therefore, his claim of negligence against the first defendant will not be sustainable at trial.

2) The plaintiff alleges at paragraph 27 of the amended statement of claim, that the first defendant had a duty to maintain the seaworthiness of the vessel. However, by clause 1 of the Charter Party Agreement dated the 27 September, 2006 ("the Charter Party Agreement") between Tama Shipping Limited Partnership, the owners of the Vessel ("the Owners"), and the first defendant, it is the Owners and not the plaintiff who are liable for the seaworthiness of the Vessel. Clause 1 of the Charter Party Agreement provides that the owners shall, inter alia, "...pay for the insurance of the vessel...keep the vessel in a thoroughly efficient state in hull and holds, machinery and equipment for and during the service":

3) The first defendant is not vicariously liable for the actions and/or omissions of the second defendant as there was no contract of employment between the First defendant and second defendant at any material time.

4) The Terminal Service Contract dated 1 January, 2008 ("the Service Agreement") which established and governed the relationship between the first defendant and the second defendant does not contain any express and/or implied provisions

which imputed liability on the first defendant for injuries suffered by the second defendant's employees while on the Vessel.

5) The Service Agreement is an agreement for the provision of services. Therefore, the second defendant was at all material times an independent contractor, and not an employee of the first defendant.

6) The plaintiff, in paragraph 2 of the amended statement of claim, concedes that "the second defendant is a privately owned and operated port of Hutchison Port Holdings (HPH) and a major hub for the worldwide trans-shipment of containerized cargo".

7) It is clear that the first defendant had little to no control over the operations of the second defendant. The very fact that the second defendant was at liberty to delegate its obligations pursuant to the Service Agreement demonstrates that it was an independent contractor and not an employee of the First Defendant. Therefore, at trial it would be highly improbable that the plaintiff would be able to sustain an argument that the second defendant was an employee of the first defendant.

8) The doctrine of vicarious liability only extends to independent contractors in exceptional cases. The author of Charlesworth & Percy on Negligence, Twelfth Edition commented at paragraph 3-173:

9) An exception to the general rule that employers are not vicariously liable for the negligence of an independent contractor arises where the employer himself assumes a duty of care. Once he has assumed this duty of care he cannot delegate the performance of this duty to another employee or to an independent contractor. Lord Denning in the decision of Cassidy v. Ministry of Health [1951] 2 K.B 343 at page 363:

10) Another exception arises where a duty of care is imposed by law.

11) The first defendant did not at any material time assume a duty of care in relation to the employees of the second defendant. This is evident as there were no express and/or implied provisions in the Service Agreement to this effect. Additionally, there is no non delegable duty imposed by law on the first defendant as the plaintiff's injuries were not suffered in circumstances which involved dangerous things, dangers on the highway, duties imposed by statute or an act which involves a special risk of damage.

12) As a matter of law, it is highly improbable that the plaintiff will sustain its claim against the first defendant.

13) Therefore, to allow the plaintiff's claim against the first defendant to proceed to trial would be a waste of time and money, amounting to an abuse of the process of the court.

14) Alternatively if the court is not minded to exercise its discretion pursuant to Order 18 rule 19 (1) (b) and (d) and or its inherent jurisdiction, it is submitted for the foregoing reasons that the first defendant is neither a proper nor necessary party to these proceedings and should, therefore, be removed pursuant to RSC Order 15 rule 6 (2).

8. In opposition to the first defendant's application, counsel for the plaintiff makes the following observations and or submissions:

1) The first defendant owed the plaintiff a duty of care either through vicarious liability or occupier's liability.

2) The plaintiff was employed by the second defendant who at the material time was the agent/servant of the first defendant, when he sustained injuries on board the first defendant's vessel.

3) The second defendant being the general employer of the plaintiff owed a duty of care to him to provide safe working conditions, *inter alia* and prevent injury. The second defendant being the servant/agent of the first defendant at the material time renders the first defendant vicariously liable

4) Alternatively, the first defendant owed a common duty of care to the plaintiff as an authorized/lawful visitor on board the first defendant's vessel per the doctrine of Occupier's Liability.

5) The plaintiff relies on the principle of res ipsaloquitur in that the facts proffered by him speak for themselves as it pertains to the fact of the accident and the negligence of the defendants collectively at the material time: one as the immediate employer and the other as the controlling owner/principal of the vessel where the accident occurred.

6) Prima facie evidence such as the registered name of the vessel, logo/branding, and control of the ship equate to the first defendant being the owner of the vessel. So, for all intents and purposes, the first defendant was the owner of the vessel in relation to this action.

7) Moreover, pursuant to Clause 8.9 of the aforesaid Service Agreement, the relevant vessel and all occupants of the vessel are the agents and/or servants of the first defendant. Furthermore, it is implicit in the contract that all matters concerning safety on board the vessel were the responsibility of the first defendant (Clauses 6.2.g.ii, 6.6, 7.4.1.d, 7.8 d &i) and not the second defendant.

8) That alternatively the vessel was a representative agent of the first defendant, therefore, rendering the first defendant liable for all actions stemming from it.

9) That the first defendant has proffered as a defence a charter agreement between itself and a third party which they allege is the "owner" of the vessel where the accident occurred.

10) The plaintiff strenuously rejects this assertion and do not accept the vessel's name as proffered by the first defendant in the absence of the accident report with photographs, carriage contract and the relevant sailing schedule.

11) The plaintiff contends that without the proper interrogatories and discovery via the aforementioned documents it is arguable whether the vessel on which the plaintiff sustained his injuries is the vessel to which the first defendant speaks. This is a factual debate and a matter for trial.

12) Moreover, pursuant to the common law doctrine of privity of contract the plaintiff rejects this defence by the first defendant of simply attempting to delegate its liability to an unknown third party. That it is unknown whether the third party ever existed or whether the third party is still in existence.

13) The second defendant as the immediate employer of the plaintiff at the material time was not a party to any charter party agreement of any kind between the first defendant and any third party. In fact, in the agreement between the first and second defendants, it is the first defendant to whom the second defendant was obliged to report faults or discrepancies relative to the vessel (Clause 6.2. g. ii). Clause 10.0 of the Service Agreement is also relevant in that it expressly states that the obligations between these two parties are non-delegable.

14) Moreover, any contract between the first defendant and a third party cannot, confer rights or impose obligations arising under it on the plaintiff, only the parties thereto.

15) It would be unfair and unreasonable to bind the plaintiff to the terms of an agreement in which he has no interest or stake.

16) All knowledge of the agreement and whether there are any subsequent or supplemental agreements lie preeminently within the first defendant's knowledge and thus the onus of proof of same is on the first defendant.

17) Furthermore, any burden established by such a document cannot reasonably be passed on to the plaintiff under the doctrine of privity of contract. There exist no exceptional circumstances in this case that could rebut the application of that doctrine.

18) More importantly, it is open to the first defendant to enforce the terms as between itself and the alleged third party to claim indemnity or contribution for any damages claimed/awarded by simply commencing third party proceedings pursuant to the Rules of the Supreme Court. See Raynard Canter v Bahamas Hot Mix Company Ltd. And Machinery & Energy Ltd. Bah SC No. 01167 of 2012.

19) The first defendant's application to strike out is an attempt to prejudice and/or delay the fair trial of the plaintiff's action.

20) The duty to ensure a safe and functioning vessel pursuant to the Service Agreement rests ultimately with the first defendant and in light of the foregoing, it is undeniable that the first defendant owed a duty of care to the plaintiff.

Breach of duty of care

21) The first defendant breached the duty of care owed to the plaintiff pursuant to the principles of vicarious liability and/or occupier's liability.

22) The first defendant is vicariously liable for the second defendant's failure to provide a safe and conducive working environment, inter alia.

23) It is common law that an "occupier" means a person who is in physical possession of premises (land or vessel), or a person who has responsibility for, and control over, the condition of premises, the activities conducted on the premises or the persons allowed to enter the premises. It is also of much note that there can be more than one occupier of the same premises.

24) An occupier of the premises owes a duty of care to persons entering on the premises in respect of damages to them or their property. The duty is to take such care as in all the circumstances of the case is reasonable to see that each person entering on the premises [in this case the vessel] are reasonably safe while on the premises.

25) The plaintiff as outlined in the plaintiff's statement of claim suffered serious injuries after falling some 30 feet into the first defendant's vessel due to a rusted and corroded railing that broke/popped loose whilst carrying out his authorized duties on board the first defendant's vessel.

Casual connection &foreseeability of harm

26) The defendants' breaches are an actual and proximate cause of the plaintiff's injuries (but for the working environment/premises being unsafe the plaintiff would not have suffered injury). Furthermore, the defendants have no defence to their individual and/or collective breach of their duty of care owed to the plaintiff.

27) Pursuant to the common law occupier's liability the court must consider the circumstances of the plaintiff's entry onto the premises/vessel. The plaintiff was authorized to enter onto the first defendant's vessel for the purpose of carrying out the first defendant's work. Therefore, the first defendant must have had the knowledge of the likelihood of persons such as the plaintiff (employee of the second defendant) being on the vessel and ensured that his entry was safe.

28) There is no evidence of the first defendant implementing any notice or warning that the railing/cable that caused the fall was unstable or otherwise defective so that the plaintiff may avoid the use of same.

29) The injuries sustained by the plaintiff were foreseeable given the potentially hazardous type of work and the inherently dangerous environment on board the container vessel. Thus the harm caused was one, in all the circumstances which the first defendant as the occupier ought to have reasonably foreseen and provide protection for.

30) In light of the foregoing, it cannot be denied that the plaintiff has satisfied all four requirements necessary to establish the claim of negligence against the first defendant herein.

31) In all the circumstances the first defendant was negligent in ensuring a safe vessel for the plaintiff which resulted in the plaintiffs injuries.

Vicarious Liability

32) The first defendant cannot be absolved of liability or reasonably removed from this action.

33) The second defendant is either the servant and/or agent of the first defendant. Additionally, the first defendant is the owner and/or controlling principal of the vessel where the plaintiff's accident occurred.

34) It is conceded on the facts that the plaintiff would not have come into contact with the vessel (site of the accident) in the absence of the first defendant and as such it would be unfair to deem the second defendant solely liable (which again is a matter for trial).

35) That the first defendant is vicariously liable for the injuries sustained by the plaintiff on board its vessel. The primary element of vicarious liability is that there must be a special relationship between the tortfeasor and the person who is being held vicariously liable. As stated in this case there is a longstanding contractual relationship between the defendants in this action.

Relationship between first &second defendant

36) The first defendant ("Line") has employed the second defendant ("Terminal Operator") from 2002 to the present (Clause 2.1 and 4.0 of the Service Agreement) to implement certain services on a scheduled continuous basis for remuneration, *inter alia*.

37) The ship on which the plaintiff suffered his accident was at the material time owned by the first defendant and/or was a bareboat charter under the full control of the first defendant.

38) The vessel that the plaintiff suffered his accident bore the logo/branding, color code and initials "MSC" of the first defendant. (See Affidavit of Lavardo Thomas dated 19th November, 2015).

39) The first defendant asserts, which the plaintiff denies, that the vessel was not owned by it and has proffered a name of a vessel claiming it to be a vessel owned by an unknown third party.

40) The Plaintiff does not accept this and has requested both the accident report and photographs taken pursuant to the Affidavit of one Lavardo Thomas, sailing schedule, tariff and maintenance report of the vessel relative to the period surrounding the 13th of September, 2012.

41) It is also of much note that the document (Clause 3.1) does not specify what type of charter it was whether bareboat or other, which has much significance.

The Test

42) Mckenna J the case of Ready Mixed Concrete (South East) Ltd. v Ministry of Pension and National Insurance [1968] 2 QB 497set out the relevant considerations for distinguishing a contract for service from that of service. He posited at page 515 (15): "I must now consider what is meant by a contract of service. A contract of service exists if these three conditions are fulfilled:

> (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.
>
> (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.....
>
> ....As to (ii). Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted.
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> "What matters is lawful authority to command so far as there is scope for it and there must always be some room for it, if only in incidental or collateral matters." –Zuijs v. Wirth Brothers Proprietary, Ltd. (1955) 93 C.L.R. 561, 571
>
> To find where the right resides one must look first to the express terms of the contract, and if they deal fully with the matter one may look no further. If the contract does not expressly provide which party shall have the right, the question must be answered in the ordinary way by implication.

43) It is of note that pursuant to clauses 5.1, 6.0-7.10 of the Service Agreement the second defendant performs services for the first defendant set out therein, for remuneration as per Clauses 7.0 & 9.0.

44) The first defendant by the expressed and implied terms of the Service Agreement is the master with the controlling powers and the second defendant is the servant in all the circumstances.

45) Pursuant to the Service Agreement the first defendant enjoys exclusive rights and/or first preference of the second defendant's facilities and terminal services (Clause 5.1.). In fact, the second defendant is bound to attain permission from the first defendant to do otherwise.

46) Moreover, the first defendant's control extends to the land and premises used by the Terminal Operator, the second defendant, for works to be carried out for the Line, the first defendant. (Clause 1.0).

47) The first defendant instructs the second defendant on and has exclusive control over:

a. What cargo to discharge, off load, number of packages and contents' (Clause 6.4 b.i);

b. Port of origin, port of load, port (intermediate and final) of destination, outbound vessels, manner of delivery, time of delivery, passage of delivery and which container vessel belonging to the line involved (Clauses 6.4 b. ii and 7.1.2);

c. Who berths at the second defendant's Port (Clause 4.2 and 6.2 a);

d. The order in which and how the container vessels are berthed/worked on (Clause 4.2); and

e. When to check the temperature recording equipment, inter alia (Clause 6.2 g (I & ii).

48) The second defendant is bound by the instructions of the first defendant (sailing schedules, pre-storage plans for discharging and loading etc) Clauses 6.1, 6.3 and 6.4) in carrying out its services to the first defendant.

49) The first defendant issues its own contracts of carriage in respect of the cargo to be transported by the container service and irrespective of the container vessel in which the cargo is to be carried the second defendant must perform the work with no inquiry into same (Clause 3.2 SA).

50) The relationship between the first and second defendant was akin to that of a master and servant/ employee and employer in all the circumstances.

51) When one looks at the degree of control and authority the first defendant has over the functioning of the second defendant's services to it, there is a reasonable inference of a master/servant relationship.

52) Mckenna J also held in Ready Mixed Concrete at page 2 that "The inference that parties under a contract were master and servant or otherwise was a conclusion of law dependent on the rights conferred and duties imposed by the contract and if the contractual rights and duties created the relationship of master and servant, a declaration by the parties that the relationship was otherwise was irrelevant.."

Liability per the relationship between the first and second defendant

53) Moreover, the Service Agreement between the first and second defendant does in fact contain express and implied provisions imputing liability for personal injury claims to the first defendant, *inter alia*.

54) The agreement provides that: "the Line (first defendant) shall defend, indemnify and hold harmless the Terminal Operator (second defendant) from and against all claims, costs, demands whatsoever and by whomsoever made or preferred in excess of the liability of the Terminal Operator under the Contract and without prejudice to the generality of this clause this indemnity shall cover all claims, costs and demands arising from or in connection with the negligence of the Terminal Operator, direct and indirect subcontractors and their respective servants and agents" (Clauses 8.3, 8.5*).

55) Clause 8.6 lends that "Notwithstanding the provisions of clauses 8.3-8.5 the Terminal Operator (second defendant) shall not be liable for any direct or indirect or consequential losses whether the same shall result from damage, delay or detention to or any cargo, container, or vessel, or otherwise and whether the same shall arise from a cause for which the Terminal Operator is otherwise liable or not."

56) Clause 8.7 goes on to state that the provisions under 8.3 to 8.6 apply irrespective of whether a claim is based on contract or on tort.

57) Furthermore, the first defendant is liable under the Service Agreement to ensure good condition of the Container Vessel's condition and structure for the second defendant to properly execute its work (Clause 7.8 j).

58) It is also of note that the agreement provides that the second defendant shall have no liability whatsoever where there has been no fault, neglect or negligence on the part of its employees, servants' agents or subcontractors (Clause 8.3). It is of note that the Second Defendants in their defence at paragraphs 8 & 10 have

sought to cast the burden of liability on the first defendant herein (which is obviously a factual argument and a matter for trial).

59) Clause 8.11 lends also that the time bar for the Line's recourse actions against the Terminal Operator for cargo damage, equipment damage and personal injury shall be 12 months from the time of such damage or injury occurring.

Employer's Liability for Independent Contractor

60) It is conceded that "generally" an employer is not vicariously liable for the negligence of an independent contractor. Therefore, if the Court is minded to view the second defendant as an independent contractor, this is a case that fits within the exception to the rule allowing liability to attach to the first defendant.

61) As capitalism evolved and traditional patterns of work relations vary, the control test theory as expounded upon by Mckenna J in the case of.....failed to account for the complexities that arose out of the various business relationships and interactions that modern business required. The Court is asked to take judicial notice via case-law that a growing number of workers seem to occupy positions somewhere between these two established categories.

62) In the case of Stevenson, Jordan and Harrison v McDonald Evans Ltd [1952] 1 T.L.R. 101, Lord Denning devised the Organization Test, which was deemed more flexible and in line with the practices of modern business. The test gives weight to how integral the service rendered is to the operation of the business to distinguish between contracts of service and those for service.

63) Per Denning, L.J.: "It is often easy to recognise a contract of service when you see it, but difficult to say where the difference lies. A ship's master, a chauffeur, and a reporter on the staff of a newspaper are all employed under a contract of service; but a ship's pilot, a taxi-man, and a newspaper contributor are employed under a contract for services. One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it."

64) The first defendant's business is concerned with loading, shipping and offloading cargo for delivery. It is submitted that as the major and premier container port in The Bahamas the second defendant provides an exclusive and indispensable service to the first defendant business (Clause 5.1) and not merely accessory. In the absence of the second defendant the first defendant's cargo would not be loaded onto or off loaded/ discharged pursuant to services described in the agreement.

65) Alternatively, in exceptional circumstances an employer (first defendant) can be held liable for the torts of his Independent contractor (second defendant).

66) In the case of Jane Ellis v The Sheffield Gas Consumers Company [1853] 2 118 E.R. 955, it was held that "Though a person employing a contractor to do a lawful act is not responsible for the negligence or misconduct of the contractor or his servants in executing that act, yet, if the act itself is wrongful, the employer is responsible for the wrong so done by the contractor or his servants, and is liable to third persons who sustain damage from the doing of that wrong."

67) Where, in the course of doing a job for the employer, the contractor commits a tort of strict liability as in this case the second defendant for all intents and purposes failed to "ensure safe working conditions for its employees, inter alia" in an inherently dangerous environment (Ryland's Fletcher Rule).

68) In this regard we rely on the doctrine of res ispa loquitor. Where it is settled that where the thing is shown to be under the management or control of the defendant or his servants and the accident is such as in the ordinary course of things does happen if those who have the management fail to use proper care, it affords reasonable evidence in the absence of explanation that the accident arose from want of care/negligence *(Scott v London and St Katherine Docks Co).*

69) Where the activity causing the damage is under the control of one or several servants of the defendant and the claimant is unable to identify which particular servant had control, he may still invoke the doctrine so as to make the defendant vicariously liable.

Representative agent

70) Further, a principal will be vicariously liable for the acts of an agent in circumstances where the agent acts as a 'representative'.

71) In the event the Court is minded to accept the first defendant's allegation that there were "*other owners of the vessel*", the plaintiff says, at the material time the owners had given up the custody, care and control of the vessel to the first defendant through sole factual possession and thus rendering the first defendant liable for the negligence encountered.

72) We commend the case of Scott v Davis [2000]HCA 52 5 at paragraphs 43-45where it lends:

"Barwick concerned liability for the conduct of a servant. But it is impossible to think that a judge as great as Willes J would have stated the law as he did if he thought that the principal was only liable for the acts of an agent when the agent was a servant. The distinction between agents for whom the principal was liable and those for whom they were not liable must have been in the forefront of Willes J's mind in Barwick .....When Willes J referred to the liability of the principal for the acts of an agent, he must surely have had in mind the distinction between agents who were servants and those who were independent contractors. Yet he went beyond confining the principal's liability to wrongs done by servants. When Barwick was decided, the generally accepted test for distinguishing between the servant and the independent contractor was the right to control the manner in which the agent did the work. .....Three years after the decision in Barwick, Willes J himself applied the control test in holding that stevedores were not the servants of the master or owner of a vessel and that the master or owner was not liable for the negligence of the employees of the stevedores. His Lordship said that "[i]n one sense, indeed, they may be said to be agents of the owner; but they are not in any sense his servants". That was because the stevedores were "altogether independent of the master or owner". That is, notwithstanding that the stevedores were "[i]n one sense" agents of the owner, the owner was not liable for the negligence which could be imputed to the stevedores. This suggests that, in speaking of liability for the acts of agents as well as servants in Barwick, Willes J was referring to agents who, though not servants, were not so independent of the principal that they would be classified as independent contractors."

73) See also page 13 of Scott v Davis where it reads: "Some years earlier, in Christmas v Nicol Bros Pty Ltd16, in the Supreme Court of New South Wales, Jordan CJ said, delivering the judgment of the Court, in a case concerning a motor vehicle: "If a person sustains physical injury to himself or his property through the negligent use of an article by another person, it is the user of the article who is liable in tort. Its owner is not liable as such; but he too incurs liability if, for example, it is established that the user was his employee, and that the use was in the course of his employment. If so, his ownership is of itself irrelevant to his liability, which is vicarious and arises out of the relationship of

master and servant ... As an exception, however, to the general rule, in the special case of a vehicle plying for hire in a public street or used there for the conveyance for hire of passengers or goods, the owner is in New South Wales liable as well as the driver, by virtue of ss 4 and 260 of the Transport Act, 1930 ... But, save in this special case, in order to fix with vicarious liability a person other than the negligent driver himself, it is necessary to show that the driver was at the time an agent of his, acting for him and with his authority in some matter in respect of which he had the right to direct and control his course of action. If this is proved, liability is established on the part of the other person, and it is immaterial whether he is the owner of the vehicle or has begged, borrowed or stolen it."

74) The relevant vessel was being used at the first defendant's request and for the first defendant's purposes solely. Therefore, even if there was a third party owner he did not act independently, but as a representative of the first defendant, which accordingly must be considered as itself conducting the action in his [sic] person (See paragraph 38 of Scott v Davis).

75) See also paragraph 51 of Scott v Davis which reads: "..... Lord Selborne said that a principal was liable for the wrongs of his agent committed in the course of his service and that no exception could be taken to the principle as stated by Willes J in Barwick. Lord Selborne said that it "is a principle, not of the law of torts, or of fraud or deceit, but of the law of agency". That his Lordship intended the principle to apply to an agent who was not a servant is clear from his later statement: "It is of course assumed in all such cases that the third party who seeks the remedy has been dealing in good faith with the agent in reliance upon the credentials with which he has been entrusted by the principal, and had no notice either of any limitation (material to the question) of the agent's authority, or of any fraud or other wrongdoing on the agent's part at the time when the cause of action arose."

76) For the foregoing reasons, the first defendant's application to have the plaintiff's action struck out as against the first defendant should be dismissed with costs awarded to the plaintiff.

9. In response, counsel for the first defendant makes the following observations and submissions:

1) The plaintiff relies on three causes of action which have not been pleaded, namely: occupier's liability, agency and res ipsa loquitor; and the facts and allegations pleaded in the amended statement of claim do not expressly or impliedly give rise to any of them;

2) RSC Order 18 rule 10 states that (1) A party shall not in any pleading make an allegation of fact, or raise any new ground or claim, inconsistent with a previous pleading of his; and RSC Order 18 rule 6(1) requires a party to state the material facts on which the party pleading relies for his claim or defence;

3) As the allegations of fact pleaded by the plaintiff do not give rise to any of the aforementioned causes of action, the plaintiff is precluded from relying on such "new causes of action";

4) Further, the facts as pleaded in the amended statement of claim have not sufficiently established any of the aforementioned causes of action on which the plaintiff now wishes to rely;

5) The Charter Party agreement is clearly labeled a "Time Charter" and not a bareboat charter as alleged by counsel for the plaintiff at para 43 of her submissions;

6) Halsbury Laws of England Fourth Edition Reissue vol 43(2) defines a charter at paragraph 1413 as:

"a contract to perform services for a specified period in consideration of payment for hire during which the charterer is entitled to use the vessel. Under a time Charter Party which is not by demise, the ship-owner retains possession of the vessel through the master and crew, who remain his servant. The chartered is entitled to determine how the vessel is to be employed within the agreed limits."

7) By comparison a bareboat charter is a type of Charter Party by demise and is defined at paragraph 1414 as:

> "A Charter Party without a crew or master...where the hull is the subject matter of the Charter Party. A Charter Party by demise is not, strictly speaking, a contract of carriage, but rather a contract for hire of the vessel as a chattel...the charterer becomes for the time being the owner of the ship; the master and crew are, or become to all intents and purposes, his employees, and through them the possession of the ship is in him. The owner has, however, divested himself of all control either over the ship, over the master and crew, his sole right being to receive the hire specified in the Charter Party and to take back when Charter Party comes to an end."

8) In light of the above definitions, the main distinctions between a barefoot charter and a time charter is that under a barefoot charter the charterer has possession and control of the vessel along with the right to appoint the crew and master, while in the time charter, the vessel and crew are chartered for either a period of time or for a particular voyage;

9) As is apparent from the content of the Charter Party agreement and the aforesaid definitions, that the first defendant never had possession or control of the vessel. The owners of the vessel remained in possession and control during the tenure of the charter.

10) Accordingly the first defendant did not have a duty to maintain the seaworthiness of the vessel, as enumerated in clause 1 of the charter party agreement.

11) As submitted previously, the terms of the Service Agreement between the first and second defendants are inconsistent with an employment contract and we say further that the suggestion that the first defendant is the employer of the second defendant is absurd when considering the consequences; that the Employment Act would govern their relation and upon the termination of the Service Agreement notice pay or severance would be due. That cannot be correct.

12) It is unclear how the plaintiff continues to contend that the first defendant is the owner of the vessel in light of the Charter Party agreement, which is a time charter. The assertion that because the vessel bore the logo of the first defendant, this confers ownership right to it is void of any legal merit. This logic would amount to the renter of a car acquiring the car by placing his/her name on the car doors.

    - Perhaps, but it would not, in my view, be unreasonable for a pedestrian injured by that vehicle while the same was being driven by the renter whose name was placed on the car doors.

13) In the absence of evidence to refute the Charter Party agreement, there can be no serious contention that the first defendant owns the vessel.

14) The plaintiff's claim that by the nature of the business of the first defendant, a duty is owed to the second defendant due to the integral role which it plays is an absurd assertion as neither the first nor second defendant is inextricably reliant on the other; rather they do business because it is profitable and convenient.

15) The suggestion becomes more unsustainable when one considers if one were to accept that the first defendant owes some agency/employee duties to the second defendant or vice versa, every airport would be considered an agent/employee of every airline company which used its facilities.

16) This is clearly not the case in the current circumstances. The plaintiff is completely misguided on the law on this point.

17) In relation to the plaintiff's submissions that the owner of the vessel is an agent of the first defendant, it is submitted that this concept is severely misconstrued. It is impractical or impossible rather for an owner of a chattel to be an agent of the party leasing it.

18) It is trite law under the principles of agency that the agent is authorized to act on behalf of the principal to create legal relations with a third party. Such an arrangement is clearly not the position in the current circumstances.

19) When understanding such principles the owners of the vessel would not be the agents of the first defendant and there is nothing in the evidence to suggest that owners of the vessel carried out or facilitated tasks on behalf of the first defendant who the plaintiff has alleged to be the principals.

20) The Charter Party agreement makes it clear that the owners remained in possession and control of the vessel at all times.

10. RSC Order 18 rule 19 (1) provides that the Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground, inter alia, that:

(a) ....

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court;

And the Court may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

11. In addition to its discretionary powers under RSC Order 18 rule 19(1), the Court also has inherent jurisdiction to strike out proceedings before it which are obviously frivolous or vexatious or an abuse of its process.

12. Such proceedings include, inter alia, obviously unsustainable, spurious, or hopeless proceedings as well as those involving the improper use of the court's machinery. See Attorney-General of the Duchy of Lancaster v London and North Western Railway Company [1892] 3 Ch 274; Willis v Earl of Beachamp (1886) 11 P. 59; the Private Trust Corporation Limited v Vohra and others [2009] 2 BHS J No 21; Suffolk House Management (1985) Limited v Nash Worldwide Holdings Ltd [2014] 1 BHS J No. 55; and Turner v Harajchi and others[2015] 2 BHS J. No. 21; 2002/CLE/gen/01419. See also Practice Note 18/19/16 of the White Book 1999.

13. Jeune P, in the case of Young v Holloway [1895] P. 87 at 90, opined that the pleading must be "so clearly frivolous that to put it forward would be an abuse of the process of the Court." And in the case of E.T. Mailen Ltd v Robertson [1974] I.C.R. 72, cited with approval in Ashmore v British Coal Corp. [1990] 2 Q.B. 338, it was said that the expression "frivolous or vexatious" includes proceedings which are an abuse of the process. See Note 18/19/16 the White Book 1999.

14. In The Bahamas Court of Appeal case of West Island Properties Limited v Sabre Investment Limited and others [2012] 3 BHS J. No. 57, Allen P., delivering the majority decision of the Court, on applications made pursuant to RSC 18 rule 19(1) (d) said:

> "30 Concerning Order 18 rule 19(1)(d) R.S.C., both Bramwell B. and Blackburn J. in the cases of Castro v. Murray L.R. 10 Ex. 213, 218 and Dawkins v. Prince Edward of Saxe-Weimar 1Q. B.D. 499, 502 respectively, underscored the fact that the court possesses a discretion to stop proceedings which are groundless and an abuse of the court's process. The discretion, as Mellor, J. in Dawkins v. Prince Edward of Saxe-Weimar indicated, must be exercised carefully and with the objective of saving precious judicial time and that of the litigant.

...

57 Lindley, L.J. in the leading Court of Appeal case of the Attorney-General of the Duchy of Lancaster v. London and North Western Railway Company [1892] 3 Ch. 274, considered a similar order which allowed pleadings to be struck out and dismissed on the ground of being frivolous and vexatious. The learned judge at page 277 said that:

> "It appears to me that the object of the rule is to stop cases which ought not to be launched - cases which are obviously frivolous or vexatious, or obviously unsustainable"

15. RSC Order 15 rule 6 (2) of the which provides as follows:

> "(2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on any application –
>
> (a) Order any person who has improperly or unnecessarily been made a party orwho has for any reason ceased to be a proper or necessary party, to cease to be a party."

16. Further, the court should exercise its discretion to strike out a pleading only in plain and obvious cases. See Hubbuck& Sons v Wilkinson Heywood & Clark [1898] 1 Q.B. 86; Wenlock v Maloney [1965] 2 All ER 871; Sandy Port Homeowners Association Limited v Bain [2015] 2 BHS J. No. 102.

17. In Wenlock v Moloney,Danckwerts LJ made the following observation:

> "The position is very clearly expressed by Lord Herschell in *Lawrence v Lord Norreys....* He said, 'It cannot be doubted that the court has an inherent jurisdiction to dismiss an action which is an abuse of the processes of the court. It is a jurisdiction which ought to be sparingly exercised, and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved.' In that case the application succeeded in the Court of Appeal and the House of Lords because those courts concluded that the story told in the pleadings was a myth, and so the action was an abuse of the process of the court. It was a plain and obvious case... There is no doubt that the inherent power of the court remains. But this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way."

18. In Three Rivers District Council v Governor and Company of The Bank of England [2001] 1 All ER 13 Lord Hope commented on the ruling in Wenlock v Moloney and after quoting from the decision of Danckwerts LJ, he stated that the somewhat rigid position taken by the court in Wenlock, had been modified in the Privy Council case of Williams and Humbert Ltd v W& H Trade Marks (Jersey) Ltd, Rumasa SA v Multinvest (UK) Ltd[1986] 1 All ER 129 where Lord Templeman said that if an application to strike out involved a prolonged and serious argument the judge should, as a general rule, decline to proceed with the argument unless he not only harbours doubts about the soundness of the pleading but, in addition, is satisfied that striking out will obviate the necessity for a trial or will substantially reduce the burden of preparing for the trial or the burden of the trial itself

19. In considering the first defendant's application, I remind myself that the striking out jurisdiction of the court is a summary one which was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action, as to do that is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral

evidence tested by cross-examination in the ordinary way. Per Danckwerts LJ, Wenlock v Moloney.

20. So, having set out in full the observations and submissions of counsel on both sides, I do not propose to rehash the pros and cons of the application.

21. Suffice it to say that, as I understand their respective cases and submissions, in a nutshell, the defendant contends that the plaintiff's claims against it are unsustainable as a matter of law in that, firstly, at the date of the plaintiff's accident, the first defendant was not the owner of the vessel on which the plaintiff suffered his mishap; and secondly, there was no employee/employer relationship between the first and second defendants that would make the first defendant vicariously liable for the acts of the second defendant.

22. Therefore, the first defendant submits, the plaintiff's action against it is scandalous, frivolous and vexatious and/or an abuse of the process of the court.

23. On the other hand, the plaintiff's position is that at the time of the accident, the first defendant was in possession of the vessel on which the accident occurred, therefore, as counsel for the plaintiff argues, even if there were "*other owners of the vessel*", at the material time the owners had given up custody, care and control of the vessel to the first defendant through sole factual possession, thus rendering the first defendant liable for the negligence encountered by the plaintiff

24. The plaintiff says further that the said Service Agreement contains express and implied provisions imputing liability for personal injury claims to the first defendant; one such provision being "to ensure good condition of the Container Vessel's condition and structure for the second defendant to properly execute its work" (Clause 7.8 j). Consequently, by virtue of the relationship between the first and second defendants, the first defendant is vicariously liable for the negligence of the second defendant.

25. As for counsel for the plaintiff's submissions regarding occupiers liability, res ipsa loquitur and agency, counsel for the first defendant argues that not only were those causes of action not been pleaded, but the facts and allegations pleaded in the amended statement of claim do not expressly or impliedly give rise to any of them.

26. In that regard, I note that while the plaintiff does not specifically plead the doctrine of res ipsa loquitur, his averment at paragraph 28 of his amended statement of claim, in my judgment, raises the issue. In that regard, the plaintiff pleads that he "will rely on the happening of the accident as evidence in itself of the negligence of the defendants." Then, at paragraph 6, he pleads that at the material time the second defendant was the agent/servant of the first defendant.

27. Moreover, I note that in its defence (paragraph 8), the second defendant avers, inter alia, that at the time of the plaintiff's accident, the "installation and/or maintenance of the said railing was the responsibility of either the owner and/or charterers of the vessel at the time of the industrial accident." Then at paragraph 10, the second defendant avers, inter alia, that "the accident was caused solely by negligence on the part of the first defendant."

28. In the circumstances, I remind myself of the admonition of Lord Craighead in the case of Three Rivers District Council and others v Bank of England (No. 3) [2001] 2 All ER 513, [2001] UKHL 16 at paragraph 95, that "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."

29. So, while, the plaintiff may have some pleading issues with his amended statement of claim, I have not been persuaded by the arguments of counsel for the first defendant that such issues may not be "cured" by amendment.

30. And, while it is accepted that an action against an improper property would be frivolous and vexatious and an abuse of the process of the court, I am not persuaded that the first defendant in this case, as the operator of the vessel on which the plaintiff is alleged to have had an accident and sustained injuries is an improper party to an action in which the plaintiff alleges his accident was caused by negligence.

31. In the circumstances, I am not persuaded that this case falls into the category of cases which are "obviously unsustainable, spurious, or hopeless" or "so clearly frivolous that to put it forward would be an abuse of the process of the Court";

32. In the result, I accept the submissions of counsel for the plaintiff that this is not a proper case in which to exercise the court's discretion under RSC Order 18 rule 19 (1)(b), (c) and or (d) or under the inherent jurisdiction of the court, to strike out the plaintiff's claim as being scandalous, frivolous and vexatious; and otherwise an abuse of the process of the court, and I, therefore, refuse the first defendant's application and dismiss the same.

33. And, for the foregoing reasons, I also refuse to order the removal of the first defendant as a party to these proceedings.

34. Costs will be in the cause.

DATED this 6th day of July A.D. 2017

Estelle G. Gray Evans

Justice