IN THE FULL COURT OF THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE

CIVIL JURISDICTION

2019 FCA BER CIV 4

BETWEEN:

ARMAND RAMDIAL

Appellant

-and-

RANGASAMMY RAWANA of 3349 Hull Avenue Apt 1 B, Bronx, New York 10472, United States of America, represented herein by his duly constituted attorney WALSHAM IFILL of No 43 Village, Corentyne, Berbice, agreeably with Power of Attorney No 1695 of 2017(Berbice)

Respondent

Appearances:

Ms. C. Artiga for the Appellant

Mr. A. Anamayah for the Respondent

Coram their Honours Justices Holder F. J and Sewnarine-Beharry P. J.

Decision of the Honourable Madame Justice Priya Sewnarine-Beharry dated 3 September 2020.

Background

The Respondent and the Appellant entered into an Agreement dated 23rd April 2016(the Agreement) whereby the Respondent agreed to sell an equipped fishing boat for $22,500 USD.

Pursuant to the Agreement, the Appellant agreed to pay the Respondent an initial down payment of $5000 USD on April 23, 2016, payments of $6000 USD each on July 31, and October 31, 2016 and the balance of $5,500 USD on January 31 2017.

The Respondent claimed that the Appellant who has possession of the boat has only paid $10,000 USD leaving a balance of $12,500 USD or its equivalent of $2,625,000 GYD at a rate of exchange of $210 which he has refused to pay.

The Respondent filed a Fixed Date Application (FDA) No 168/17 to recover the balance of $2,625,000 GYD due or alternatively damages in the said sum for breach of contract.

The Appellant in his Affidavit of Defence denied owing any balance. He contended that he paid the total sum of $22,500 USD. He said he paid $5000 USD on the 23rd April 2016; $5000 USD during 25th-28th July 2016 by cheque payable to Tage Boohit and he paid the balance of $12,500 USD in the small amounts, that is to say, he paid $2,500 USD on both 16th August and 14 September 2016; $2000 USD on 18th October 2016; $2500 USD on 8th November 2016 and $1500 USD on both 23 November and 13 December, 2016. He exhibited as Exhibits A1 to A 6 copies of endorsed cheques made payable to the Respondent.

In an Affidavit in Reply, the Respondent claimed that he never received any cheques from the Appellant and that the signatures appearing on the endorsements were forgeries and not his. Further, a visual examination of the endorsements would reveal that the signatures were identical. The Respondent also averred that the parties agreed that payments by cheque would be made to a third party and not directly to the Respondent as he did not have a bank account.

From the Record of the lower Court (FDA No 168/2017) on October 13, 2017, November 10, 2017 and December 8 2017 adjournments were granted to the Appellant to provide proof that the cheques issued were

encashed. On 12 January 2018, when the parties appeared in Court, it was reported to the sitting Judge, Justice G. Persaud by Counsel for the Appellant that the entire sum claimed by the Respondent was paid in the United States of America (USA). Counsel for the Respondent requested an adjournment to verify this information.

On 26th January 2018, notwithstanding the fact that the Appellant provided no proof that the cheques were encashed, Justice Persaud converted the FDA to a Statement of Claim as he was of the view that there were dispute of facts. A Case Management Conference and Pre-Trial Review were conducted and several Notices of Applications to file witness statements out of time and to have the Claimant testify by audio visual link were heard between March 22, 2018 and October 12, 2018, and, were dealt with by Justices Ramlal, Younge and Singh.

The matter was then fixed for trial before Justice Singh on December 19, 2018. On 20th December, 2019, the Court inquired about proof of payments and the Appellant produced what appeared to be copies of cancelled cheques. The court found that this did not provide proof that monies were received by the Respondent and granted a final opportunity to the Appellant to provide proof from the Bank that the cheques were encashed.

On the 6th March 2019, Counsel for the Appellant and Respondent were present along with the duly constituted attorney for the Respondent. However the Appellant was absent. Justice Singh granted judgement to the Respondent, the Appellant having failed to both appear and provide proof that the cheques were encashed.

An Appeal was filed against this order. The grounds stated in the Notice of Appeal were that the learned Judge erred in law and/or misdirected himself when he decided the matter on the witness statements filed without hearing viva voce evidence and disposed of the matter in Chambers and not open court. Further, the learned Judge misdirected himself as it related to Part 29.04 of the CPR by accepting the witness statement of Carlton Charles, a Fingerprint and Handwriting Examiner as evidence without allowing the Appellant the right of cross-examination. Additionally, the learned judge erred in law and/or misdirected himself regarding the cheques and endorsements presented by the Appellant as evidence of payment of the purchase price; and, the learned Judge erred and/or misdirected himself as to the gravity of a dispute which was in the USA where agreement and

payment was conceived and the majority of witnesses and documents were situated in the United States of America which was unfair and highly prejudicial to the Appellant as he could not have filed a witness statement of one Tage Boohit of New York at the relevant time.

Counsel for the Appellant submitted to this Court that a witness statement is not evidence as it is an out of court statement and hearsay and cannot be used to prove the truth of the matters asserted. It was further submitted that the dispute of facts that clearly arose on the affidavits filed before the court could only be determined by viva voce evidence.

Additionally, Counsel for the Appellant submitted that the opinion of Mr Charles was unfair, and partisan; Notice of Expert report was not served in accordance with Part 32.02 and even at the stage of pre-trial review the Respondent did not indicate that an expert would be relied on at trial; the expert report was not served on the Appellant within the time set out by the CPR and the report did not comply with the requirements of Rule 32.02(h) by including an Acknowledgement of the Expert's Duty in Form 32;

The expert's report was based on six photocopied TD Bank Cheques provided by Counsel for the Respondent marked Q1-6 but the copies provided in the report were inconsistent with what he said he received. The report also mentioned a photocopy of a general power of attorney but no copy was provided in the report and what was attached were mere extracts of signatures purporting to be that of the Respondent. Counsel for the Appellant further submitted that Mr Charles was tasked with giving an opinion on whether the signature of the Respondent matched the signatures on the cheques and Mr Charles findings that simulated signatures were scanned unto five cheques and that the signatures were simulated was baseless and unreliable. She said that the Appellant was never given an opportunity to lay the necessary foundation to admit copies of cheques with indorsements and requested a new trial in light of her arguments.

Counsel for the Respondent submitted to this Court that since the Appellant's Defence was "payment", the burden was on him to establish/ convince the Court that he in fact paid. He submitted that photocopies of uncashed cheques were not proof of payment and at highest it was merely evidence of an attempt to pay. He stated that the learned Judge, who dealt with the matter prior to its conversion to a Statement of Claim, was not satisfied that the Appellant exhibited proof of payment and gave the

Appellant numerous opportunities to produce evidence or a statement from his Bank. Instead of producing such evidence from the Bank, the Appellant produced copies of 6 endorsements purportedly bearing the signature of the Respondent. Counsel for the Respondent submitted that the endorsements were highly suspicious as a visual examination would reveal that the signatures are all identical. He said the Respondent solicited the assistance of Mr Charles who conducted an examination and comparison with known authentic signatures of the Respondent and submitted a detailed report of his findings and concluded that the signatures appearing on the endorsements were simulations and not those of the Respondents. Counsel for the Respondent submitted that even if Mr Charles report was entirely disregarded the Appellant would be in no better position as the purported endorsements do not prove that the cheques were encashed and payments made. Counsel submitted that the learned Judge had difficulty understanding why a statement from an established bank, for transactions that took place in 2016, could not be obtained, and, on the 20th December 2018 granted the Appellant, an adjournment of some two and a half months to produce the required proof making clear to the parties that should the Appellant fail to produce the required proof, the court would proceed to grant judgement to the Respondent. On 6th March 2019 when the Appellant failed to appear and produce the required proof the court proceeded to grant summary judgement.

The issue that fall for the court's consideration is whether:

(1) Whether the learned judge was correct in disposing the matter summarily;

The CPR 2016 provides that Summary Judgement is available where a FDA is ordered to proceed as if it were commenced by Statement of Claim: See 15.01(2). Rule 15.01(3) further provides that the court may give Summary Judgement on any issue of fact or law, whether or not the Judgement will bring the proceedings to an end. It appears further that a court may of its own initiative grant Summary Judgement on a claim or on a particular issue if the Court is satisfied that the Defendant has no real prospect of successfully defending the claim or issue: Rule 15.02(3).

Stuart Sime in his work A **Practical Approach to Civil Procedure**, 16th edition 2013 at page 270 opined that Summary Judgement can be used by

the court of its own initiative to perform the important function of stopping weak cases from proceeding.

He said at paragraph 24.01:

> "Where there is no real defence, a defendant may go through the motions of defending in order to delay the time when judgement may be entered. It is possible for defendants to put up the pretence of having a real defence to such an extent that some cases run all the way through to trial before judgement can be entered. The CPR provide several ways of preventing this happening. The court can use its power to strike out to knock out hopeless defences, such as those that simply do not amount to a legal defence to a claim. Entering judgement is a related procedure, and is used where a purported defence can be shown to have no real prospect of success and there is no other compelling reason why the case should be disposed of at trial."

In considering whether to grant Summary Judgement, the court must consider the evidence submitted by the parties and may weigh the evidence, evaluate the credibility of a deponent and draw reasonable inferences from the evidence: Rule 15.02(4).

The Judge must also give adequate notice of the hearing for summary judgement and the opportunity to fully and fairly present one's case. Moreover, if there are issues of fact that may be determined in a party's favour and would result in judgment in that party's favour it is inappropriate to enter summary judgement.

In the instant case, the learned Judge adjourned the hearing of the matter on October 13, 2017, November 10, 2017 and December 8 2017 for the Appellant to provide proof that the cheques issued were encashed. On the 20th December, 2020, the Appellant produced what appeared to be copies of cancelled cheques. The court found that this did not provide proof that monies were received by the Respondent and granted further adjournment of two and a half months to the Appellant to provide proof from the Bank that the cheques were encashed. It was obvious that the Judge was endeavouring to discover whether the Respondent was in fact paid and the Appellant had a real Defence in which case the FDA could have been dismissed or whether the Appellant had no real prospect of successfully defending the matter in which case judgement would be given for the Respondent. In this regard the Appellant cannot be said not to have adequate notice that the learned judge was considering summary judgement nor can it be said that the Appellant was denied an opportunity to fully and

fairly present his case when the very purpose of the numerous adjournments was to allow him the opportunity of demonstrating he had a real defence.

It may be appropriate at this juncture to dispose of the ground of Appeal that"the learned Judge erred and/or misdirected himself as to the gravity of a dispute which was in the USA where agreement and payment was conceived and the majority of witnesses and documents were situated in the United States of America which was unfair and highly prejudicial to the Appellant as he could not have filed a witness statement of one Tage Boohit of New York at the relevant time."

From the Record it appears that the Appellant was represented on each occasion that the Respondent made various applications. Not once did the Appellant through his Counsel object to those applications. Further it does not appear from the Record that the Appellant made any application to file witness statements of Tage Boohit or other persons or any further documentary evidence for the court's consideration. It is all very convenient for him to say only now that the Court was unfair to him.

In **Banque de Paris et des Pays- Bas (Suisse) SA vs Costa de Naray** [1984] 1 Lloyd's Rep 21 Lord Ackner said at page 23 that it is trite that, "the mere assertion in an affidavit of a given situation which is to be the basis of a defence does not, ipso facto, provide leave to defend; the court must look at the whole situation and ask itself whether the defendant has satisfied the court that there is a fair or reasonable possibility of the defendants having a real or bona fide defence."

The Defence raised by the Appellant was one of payment and the onus was on him to prove that monies were received by the Respondent.

The Appellant contends that he issued six cheques to the Respondent for the balance of the debt. His contention that the Respondent endorsed same impliedly suggests proof that the Respondent was paid.

The **Bills of Exchange Act,** Cap 90:13 Section 74 (1) defines a cheque as "a bill of exchange drawn on a banker, payable on demand."Section 3(1) describes a bill of exchange as "an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay, on demand or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person, or to the bearer."

Section 74(2) provides further that the provisions of the Act applicable to Bills of Exchange payable on demand apply to a cheque. Section 60(1) provides that a bill is discharged by "payment in due course". "Payment in due course" means payment made at or after the maturity of the Bill to the holder thereof..."

Therefore, the issuing of a cheque is not proof of payment it is merely an *order* to the bank to pay a sum of money from a person's account to the person in whose name the cheque has been issued. Further, copies of an endorsed cheque cannot logically be proof of payment because, for example, if **A** presents a cheque to be encashed at the Bank, which was issued to him for a debt owed, and that cheque is dishonoured, the bearer would not be paid.

In order to successfully raise his Defence, the Appellant had to prove that the moneys he ordered the bank to pay to the Respondent were in fact paid to and received by the latter. He could do this in several ways: he could present correspondence received from the Bank to this effect; he could present Bank Statements issued to him demonstrating that his account was debited and the Bank paid the relevant sums to the Respondent; or, he could present the returned cheques stamped by the Bank to show the bearer/drawee was paid.

It is no defence that these Bank Statements were misplaced and or cannot be found. The Appellant ought to have made a request to the Bank for the information. This he did not do.

The contention that the learned judge erred in law and/or misdirected himself regarding the cheques and endorsements presented by the Appellant as evidence of payment of the purchase price is also without merit.

From the Record in this court and that of the court below no other evidence would have been forthcoming. The parties had already filed their affidavits of witness statements, the evidence upon which they intended to rely on at trial and there was no evidence of payment.

In examining the realistic prospect of Appellant successfully defending the claim the learned Judge was required to examine the evidence submitted by the parties, weigh the evidence, evaluate the credibility of a deponent and draw reasonable inferences from the evidence in accordance with Rule 15.02(4). The contention that the learned Judge erred in law and/or

misdirected himself when he decided the matter on the witness statements filed without hearing viva voce evidence is without merit as Part 15.02(4) allowed him to do so.

In **Sagicor Bank Jamaica Limited vs Taylor- Wright** [2018]UKPC 12 Lord Briggs at pages 6 to 7 paragraphs 16 to 18 stated that there was no justification for proceeding to trial if there was no real prospect of successfully defending a claim. At paragraphs 16 to 18 of the judgement he said:

> 16. Part 15 of the CPR provides, in Jamaica as in England and Wales, a valuable opportunity (if invoked by one or other of the parties) for the court to decide whether the determination of the question whether the claimant is entitled to the relief sought requires a trial. Those parts of the overriding objective (set out in Part 1) which encourage the saving of expense, the dealing with a case in a proportionate manner, expeditiously and fairly, and allotting to it an appropriate share of the court's resources, all militate in favour of summary determination if a trial is unnecessary.
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> 17. There will in almost all cases be disputes about the underlying facts, some of which may only be capable of resolution at trial, by the forensic processes of the examination and cross-examination of witnesses, and oral argument thereon. But a trial of those issues is only necessary if their outcome affects the claimant's entitlement to the relief sought. If it does not, then a trial of those issues will generally be nothing more than an unnecessary waste of time and expense.
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> 18. The criterion for deciding whether a trial is necessary is laid down in Part 15.2 in the following terms: "The court may give summary judgment on the claim or on a particular issue if it considers that - (a) The claimant has no real prospect of succeeding on the claim or the issues; or (b) The defendant has no real prospect of successfully defending the claim or the issues." That phraseology does not mean that, if a defendant has no real prospect of defending the claim as a whole, that there should nonetheless be a trial of an issue.

The Appellant submitted that Mr Charles opinion was unfair and partisan, Notice of Expert report was not served in accordance with Part 32.02; there was no indication at pre-trial review that the Respondent would be relying on an expert at trial and the expert report was not served on the Appellant within the time set out by the CPR. However, neither the Appellant nor Counsel for the Appellant, who was served with the applications and present at the hearing of those applications made by the Respondent to file witness statements of Mr Charles out of time raised any objections to the Respondent's course of action and cannot seek to do so now.

The Appellants also took issue with Mr Carlton Charles affidavit of witness statement and his report omitting the documents which he used to make comparisons and his findings. Although the report did not attach these documents they were expressly described therein. Mr Charles expressly mentioned the cheques by a printed number on the cheque leaf. These cheques were attached to the Appellant's Affidavit of Defence, his witness statement and Affidavit of Documents. The General Power of Attorney and Promissory Note which contained the genuine signatures of the Respondent by which Mr Charles conducted his analysis were attached to the Respondent's affidavit in support of his FDA. It appears that the learned judge was concerned with proof of payment and not Mr Charles evidence.

In any event, assuming that the matter had proceeded to trial, Carlton Charles's evidence would not have affected the outcome of the matter. The court was likely to attach little or no weight to his evidence as no Acknowledgement of the Expert's Duty in Form 32 was filed; If Charles's evidence was disregarded in its entirety the Appellant still could not prove the monies were paid by the Bank and received by the Respondent. Further it is noteworthy, that the Respondent's evidence that the parties agreed that payment would be made to a third party because the Respondent had no bank account was not disputed.

In this instant case, there was no genuine issue of material fact and no justification for proceeding to trial and the FDA ought not to have been converted to a Statement of Claim. The learned judge correctly disposed of the matter summarily saving the parties the expense of a trial and the court valuable judicial time.

In the circumstances:

(1) The Appeal is dismissed;
(2) The Judgement of His Honour Justice Navindra Singh dated 6th March 2019 is affirmed;

Priya Sewnarine-Beharry

Puisne Judge

3 September 2020.

Matter adjourned to 11 September 2020 for the court to consider whether costs should be awarded.

11 September 2020.

The court unanimously ordered that there shall be no order as to costs.

Priya Sewnarine-Beharry

Puisne Judge

11 September 2020.