

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

Civil Suit No. 1286 of 2017

BETWEEN:

**HINDS TRANSPORT
SERVICES LIMITED**

CLAIMANT/APPLICANT

AND

**JOSE Y JOSE LIQUID AND SOLID
WASTE MANAGEMENT INC.**

DEFENDANT/RESPONDENT

Before Master Deborah Holder, BSS, Master of the High Court

2018: October 4

2020: August 19

Appearances:

Mr. M. Tariq Khan, Attorney-at-law for the Claimant/Applicant

Mr. Marcel El Daher and Mr. Lemar Quimby of Fitzwilliam, Stone and Alcazar, Attorneys-at-law for the Defendant/Respondent

DECISION

Introduction

- [1] The parties are companies incorporated under the Laws of Barbados. The Claimant/Applicant, “the Applicant”, provides transport services and logistical support to a range of specific projects and the Defendant/Respondent, “the Respondent”, provides waste management services.
- [2] In an application filed 7th February, 2018, the Applicant is seeking summary judgment pursuant to the **Supreme Court (Civil Procedure)**

Rules 2008 (CPR) Part 15 or alternatively an order striking out the Respondent's Defence and Counterclaim pursuant to **Rule 26.3(3)** of the **CPR**.

[3] The grounds are as follows:

- “2. The Defence filed by the Defendant to the Claimant's claim discloses that the Defendant has no real prospect of succeeding in its defence because it is comprehensively butted by the Claimant in the Claimant's Reply to Defence. Further, the Defence to the Counterclaim evidences that the Defendant has failed to provide proof or any adequate proof at all for the defences and claims it has raised against the Defendant.
3. Furthermore, the very nature of the Claimant's Reply to Defence and Defence to Counterclaim undermines the credibility of the Defendant's position, exposes the contradictions of the Defendant's Defence and, provides the Claimant with the opportunity to set out its case and claim against the Defendant in extensive detail, the quality of which evidentially proves beyond the balance of probabilities that the Claimant's version of events is comprehensively corroborated by extrinsic evidence and that the counter explanations provided by the Defendant are mired by factual inconsistencies and misrepresentations as to the events which transpired between the parties. For example the Defendant's reliance based on a payment allegedly made to the Claimant by a cheque which was never delivered (per paragraph 4 of the Defence of the Defendant).
4. An examination of the Claim, the Defence and Counterclaim and the Reply to Defence and Defence to Counterclaim will clearly show that the Defendant has no sustainable case to either defend the Claimant's claim or sue the Claimant by way of its counterclaim.
5. The Defendant therefore has no real prospect of succeeding on its Defence or its counterclaim against the Claimant and the Defence of the Defendant and its counterclaim against the Claimant discloses no reasonable grounds for defending the claim or suing the Claimant by way of its counterclaim.
6. All the substantial facts relevant to the Claimant's claim are before the Honourable Court and the Claimant will contend that the Defendant has no reasonable prospect of

successfully disputing them or indeed prosecuting its counterclaim against the Claimant. And, there is no real prospect that the reception of oral evidence from the Defendant will affect the Honourable Court's assessment of the facts readily available by way of the Claim, the Defence and Counterclaim and the Reply to Defence and Defence to Counterclaim.

7. Notwithstanding and without prejudice to the foregoing grounds, and in the alternative, no sustainable or reasonable defence to the claim of the Claimant has been disclosed by the Defendant in this action. Neither has any reasonable ground been disclosed by the Defendant for bringing the counterclaim against the Claimant.

In these circumstances the Court is entitled to make a finding based on the individual grounds and the grounds taken in their entirety set out herein to strike out the Defence and the Counterclaim raised by the Defendant which would give effect to the overriding objective of dealing justly with this case saving expense and ensuring that the matter herein is dealt with expeditiously and fairly.

The Claimant wishes to rely on the attached affidavit of Dave Hinds in support which accompanies this application.”

Statement of Claim

- [4] The Statement of Claim was filed on 24th August, 2017. In it the Applicant stated that at the Respondent's prompting or request it agreed to sell its “skip operation” to the latter. The said skip operation was made up of one skip truck and two x compactor trucks and ninety skip bins. By an oral contract negotiated between the parties the agreed price was \$721,200.00, payable on or before 15th August, 2015. The Respondent breached the agreement and no payments were made since 30th December, 2016.
- [5] The Applicant alleged that the sum of \$158,930.00 was owed to it by the Respondent who was in breach of the said oral contract made around April 2015 as well as a further sum of \$7,755.00 owed to it for a lift and transport job. This resulted from an oral contract made between the parties and implied from an invoice, dated 3rd December, 2016. The total

amount being sought is \$166,685.00, together with interest and costs. It was also alleged that “by an account stated orally” between the parties, the Respondent agreed that it owed \$158,930.00.

- [6] The Applicant relied on a number of exhibits, such as cheques, invoices, emails, part payment of the account by way of \$22,270.00 worth of cement, a letter of “irrevocable instruction” and a transcript of a WhatsApp conversation.

Defence

- [7] In a very detailed Defence filed on 23rd October, 2017 the Respondent disputed the allegations and denied that there was an agreement to buy the Applicant’s “skip operation” for \$721,200.00. The Respondent agreed that there was an oral contract but it was for the purchase of a skip truck and two x compactor trucks for the sum of \$490,000.00 VAT inclusive. This sum was paid. The sum of \$7,755.00 for the “lift and transport job” was also paid. A cheque no. 2327 dated 3rd February, 2017 is being relied upon.
- [8] The Respondent alleged that the Applicant was in the process of selling the skip bins to other parties when they both agreed that they would negotiate the purchase of 90 of the skip bins by the Respondent. The bins were required for rental to customers therefore a condition of any purchase was that they would be fit for purpose. This condition was expressly made known to the Applicant when the latter made an initial proposal.
- [9] The Respondent asserted that it was false to state that it agreed that \$158,930.00 was owed to the Applicant. The Respondent stated that while certain figures were discussed there was no final agreement. The Applicant made an initial proposal of \$3,400.00 per skip but there was no agreement.

- [10] Shortly after the initial proposal was made the Respondent became aware that the Applicant had sold skip bins to others at a much lower price and that a new skip bin from the manufacturer could be bought for \$3,800.00 per skip bin. The proposal was considered unreasonable and exorbitant.
- [11] On 1st September, 2015 the Applicant wrote the Respondent indicating that it would be handing over 67 skip bins at a cost of \$4,000.00 per skip bin. This was an increase of \$600.00 per skip. The Respondent did not agree to this.
- [12] As soon as the Respondent was able to examine the bins it was discovered that approximately 33 of the skip bins were damaged and completely unusable and not fit for purpose. The Respondent stated that they were of no use to its business and decided not to purchase them. As a result the Applicant proposed that it would give the Respondent 20 of the skip bins free of charge.
- [13] The Respondent denied that there was part payment of the account, but stated that because of the business relationship it allowed Arawak Cement Plant, who was indebted to it at the time, to provide the Applicant who was constructing a house, with \$22,270.00 worth of cement. The latter provided a credit memo to the Respondent.
- [14] The Respondent stated that the letter of “irrevocable instruction” for payment of \$208,928.00, which was addressed to its Attorneys, was unsolicited. It did not sign or send the letter to its Attorney-at-law.
- [15] The Respondent averred that there was no contract to purchase the 90 bins but even if there was a contract, which was not admitted, it related only to the 14 bins which were fit for purpose. These bins were fully paid for around December 2016.
- [16] The Respondent denied indebtedness to the Applicant and put the latter to strict proof. It counterclaimed for \$11,731.72 from the Applicant for services rendered for handling, rental and removal of skip bins on 29th

September, 2015 and 31st May, 2015 and stated that it would seek to set off this sum in extinction or diminution of the claim.

- [17] The Respondent also relied on a number of documents including cheques, invoices and letters and denied receiving certain invoices referred to by the Applicant.

Reply to Defence and Defence to Counterclaim

- [18] In an equally detailed Reply to Defence and Defence to Counterclaim the Applicant joined issued with the allegations set out by the Respondent and required that the said allegations be proved. The Applicant denied and rejected much of the Respondent's responses and labelled some allegations as falsehood and distortion of the truth.
- [19] The Applicant maintained that the price for the "skip operation" was settled as a result of a period of negotiations. The stages of negotiation and what transpired were set out. The agreed figure was \$745,000.00 and collateral to the agreement the Respondent had taken possession of the additional 20 skip bins free of charge.
- [20] It was claimed that the Respondent paid the \$40,000.00 towards the outstanding balance of \$231,200.00 "to ameliorate" the Applicant, but later called in a panic stating that his staff was not paid and that critical overheads were not met. The Applicant refunded the Respondent and the latter promised to repay.
- [21] It was stated that the Applicant offered the Respondent payment options. The latter opted to pay over a twenty-four month period without increasing finance charges but reneged on that agreement. The payment of \$22,270.00 in cement was provided "to be set off against" the debt and this was accepted.
- [22] The Applicant stated that the Respondent agreed to pay the full sum from the proceeds of the sale of two properties. Acting on this assurance, Applicant issued the Respondent with a letter of irrevocable instruction.

In spite of this the Respondent issued a letter of irrevocable instruction for one lot and reduced the amount to be paid to the Applicant.

- [23] The Respondent provided five post dated cheques for \$10,000.00 each and no further payments were received. Payment was to commence from 30th July, 2016 but the Respondent reneged on that agreement.
- [24] The Applicant denied that it ever received cheque no. 2327 and that during the period of negotiations the Respondent made any stipulation whatsoever that the skip bins would be reasonably fit for purpose, before agreeing to purchase the same. It was also denied that the \$50,000.00 paid was in full satisfaction of the debt owed to the Applicant.
- [25] The Applicant denied that it was indebted to the Respondent in the sum of \$11,731.72, rather the amount due and owing to the Respondent in their ledger was \$1,691.13. The Applicant denied that the invoices relied upon by the Respondent were sent, issued or otherwise brought to its attention.
- [26] In its Defence to Counterclaim the Applicant also denied that the Respondent ever gave notice to the Applicant that money was owed. It required proof as to when these invoices were issued and when they were delivered to the Applicant seeking payment. It denied that the Respondent was entitled to the sum it counterclaimed, costs or any other relief.

Affidavits

- [27] On 7th February, 2018 Mr. Dave Hinds, Director of the Applicant filed an Affidavit in Support. In it he stated:

“6. The claim between the parties is a contractual dispute. The Claimant alleges breach of contract executed between the parties in or around 22 June, 2015, or in the alternative, upon an account stated between the parties in or around April 2015. Because of the breach the Claimant claims the amount of BDS \$158,930.00. While, furthermore and in addition to the breach of contract and or account stated, the Claimant also claims the sum of BDS \$7,755.00 for

services which it performed for the Defendant on 3 December 2016.”

- [28] He stated that all substantial facts relevant to the Applicant’s case were before the court and that the pleadings filed to date “were dispositive of the entirety of the issues between the parties.” The rest of the affidavit was devoted to legal submissions on summary judgment and striking out.
- [29] On 26th March, 2018, Mr. Anderson Cherry, Managing Director of the Respondent, filed an Affidavit in Response. Mr. Cherry’s affidavit was devoted to the facts. He reiterated the Respondent’s position as pleaded and maintained that negotiations were not completed. He stated that he expressly made it known to Mr. Hinds that the skip bins were required for rental and should be in a condition to allow him to do so. He stated that there was a dispute of facts and that the Respondent had a real prospect of disputing the claim. This dispute could only be resolved if evidence was led and there was cross-examination. He was also advised that since no amount was agreed he had a valid defence.
- [30] He responded to matters raised in the Applicant’s Reply and Defence to Counterclaim. He denied that he wanted to pass off an unexecuted cheque. He deposed that on or around 11th September, 2015, Mr. Hinds asked him to lend him \$40,000.00 as short term assistance to help him meet his payroll. He did so. His son took the cheque to Mr. Hinds. Mr. Cherry also dealt with the \$22,270.00 worth of cement and the proposed sale of one of his lots.

Applicant’s Submissions

- [31] Mr. Khan asked the court to consider the pleadings and affidavits of the parties in their entirety. He said that they were “key instances” where the evidence supported the Application. He submitted that a careful examination of the Respondent’s pleadings and Affidavit in Response when juxtaposed with the Applicant’s disclosed that the Respondent had

no real prospect of successfully defending the claim or prosecuting the counterclaim. The Respondent had no prospect of succeeding because of the absence of reality.

[32] He said that the purpose of a summary judgment application was to dispose of a weak claim at an early stage of the proceedings where there was a lack of evidence. Also, to enable the court to determine the issues between the parties without the costs, time and resources associated with a full trial.

[33] Mr. Khan also contended that the Respondent's pleadings and affidavit were factually inconsistent; that it was unable to recall its own conduct even though evidence which corroborated the Applicant's claim was made available; that the Respondent failed to properly consider the evidence on which it relied because the said evidence supported the Applicant; that the Respondent's pleadings bore no semblance of reality of the transactions between the parties; the Respondent failed to recognize that the exhibited evidence of the alleged debt on which it relied, showed that "a sizeable portion" of the invoices were settled at the material time and that the Respondent repeatedly compounded its inconsistencies in its Affidavit.

[34] Mr. Khan submitted that the fact that this was an action in contract had not been contradicted. He contended that the matter did not involve a complex claim. Complex facts and issues were not relied upon and the questions of fact and law involved were simple.

[35] He also contended that the test of "no real prospect of succeeding" required the court to undertake an exercise in judgment. In this regard he cited the case *Johnson v. Permanent Value Asset Management Ltd., Lipton and Mackay* BB 2016 HC 22 from the High Court of Barbados, where at paragraph 39 the test was discussed.

[36] He stated that all substantial facts relevant to the Applicant's case were set out in their totality in the pleadings which were filed and the Respondent had no reasonable prospect of successfully disputing the facts on which the Applicant relied. Moreover, there was no real prospect of oral evidence affecting the court's assessment of the facts. He was also of the view that all the evidence which was needed to render judgment was before the court.

[37] Relying on an e-mail dated Tuesday 12th July, 2016 allegedly from Mr. Cherry to Mr. Hinds (marked Appendix 11) Mr. Khan claimed that the Respondent admitted breach of contract and offered to pay \$10,000.00 monthly. This e-mail read in part:

“Good Morning Dave,

Please do not mistake our inability to service our agreement as disregard for the sum owed, nothing could be further from the truth.

Our arrangement was made in good faith and we are in breach of same.

My partner and I have discussed the matter and we have arranged to make payments in the amount of Ten Thousand dollars monthly (BBS \$10,000) commencing July 30th 2016...

We hope this interim measure will quell some of the anxiety surrounding our agreement and the sums outstanding.”

[38] The above response was given to an e-mail from Dave Hinds to Anderson Cherry dated 11th July, 2016 at 1:13 p.m. It said:

“Good morning Andy,

I am quite concerned about the disregard that you show for the amount of \$208,930 due to Hinds Transport, and indeed the pressure which you have put us under.

I agreed to sell you the skip business and even though you could only get the financing for the trucks I also agreed to let you pay me over a period of 18 to 24 months or approximately \$9,000 to \$13,000 per month. Since September 2015, I received no payment, except \$22,000 in cement. I came under severe pressure from my auditors on the matter and they were satisfied with an irrevocable letter to your Attorney to pay \$100,000 of a pending

sale to us for part settlement of that account. In following up this amount, we were informed by your Attorney's office that there is no buyer for the property. To make matters worse, we have received no payment, only wishy washy promises that you will make a call and get back to us, which never happened.

Needless to say our audit is going to be due in four months and I wish to have this matter addressed in a decisive matter. I look forward to an early resolution."

- [39] Mr. Khan pointed out that in these circumstances no issues were raised regarding the amount owed, the conditions of the skip bins and that the cement which was provided by the Respondent was to be treated as payment towards the debt and that a letter of irrevocable instruction was sent as a comfort to the Applicant by the Respondent's lawyers.
- [40] He also asserted that the Respondent was unable to deny that in the initial offer to purchase the skip operation, it volunteered title deeds to the Applicant. He was of the opinion that the Respondent at paragraph 17.6 of its Affidavit in Response attempted "to pass off the issue of the irrevocable letter of instruction" but it could not escape the fact that the said letter spoke for itself.
- [41] Mr. Khan, relying on a WhatsApp note (Appendix 13), argued that there was overwhelming evidence contradicting the Respondent's claim that it had paid the \$7,755.00. He submitted that a closer examination of the several invoices on which the Respondent relied with respect to its counterclaim, disclosed that two of those invoices were settled and they bore the Respondent's stamp, "PAID".
- [42] Mr. Khan said that the Applicant's case was plain and straight forward, not devious and crafty. He concluded that there was no compelling reason for trial. It was his position that the Respondent was given every possible accommodation to liquidate the debt and it had acted in bad faith.

- [43] Relying on a statement¹ that summary judgment was given mainly in straight forward debt actions where there was clearly no defence and where an unscrupulous Defendant would otherwise prolong proceedings until a full trial, with the attendant waste of time and costs, Counsel was of the view that these were precisely the tactics evinced by the Respondent.
- [44] On the striking out aspect of the Application, Mr. Khan submitted that the Defence should be struck out because there were no reasonable grounds for bringing the Defence and Counterclaim and that the Defence and Counterclaim were not sustainable in law.
- [45] He cited *Reynolds-Greene v. Bank of Nova Scotia* (2008) High Court Antigua and Barbuda, No. 443 of 2005, paragraph 52 where **Blenman J** endorsed the dictum of **Potter LJ** in *Partco Group Ltd. v. Wragg* [2002] EWCA Civ 594 on cases where striking out was appropriate. The cases are: *Harris v. Bolt Burdon* [2000] CPLR 9 –an unwinnable case and *Price Meats Ltd. v. Barclays Bank plc* [2002] 2 All ER (Comm) 346 – a valid claim or defence was not raised as a matter of law.
- [46] He contended that based on his analysis of the Respondent’s evidence, the Applicant had made out a strong and convincing case that the Respondent’s defence raised an unwinnable case. He concluded that the Applicant had embarked on an attempt to prolong proceedings knowing that it had no meaningful defence to raise to what was a plain case of debt owed to the Applicant. He did not think that this matter required prolonged and serious argument.

Respondent’s Submissions

- [47] Mr. El Daher submitted that in order to determine whether this matter was fit for trial you must look at the facts. He argued that the Respondent should not be deprived of the opportunity to go to trial so that the

¹ Commonwealth Caribbean Civil Procedure 4th ed pp 72-3

credibility of the witnesses could be assessed. He contended that the claim appeared to be a straight forward claim for money until the Defence was filed.

[48] He said that at the 18th March, 2015 there was no contract. He referred to an e-mail of that date from D. Hinds to Mr. Cherry. (Exhibited by the Applicant and marked Appendix 2) where Mr. Hinds stated:

“Following up on our conversation last Friday regarding a possibly serious interest in our skip business, I now outline what we have and some possible prices for your consideration.”

[49] He also referred to the e-mail dated 25th May, 2015 at 4:24 a.m. (Also marked Appendix 2 by the Applicant) from Anderson Cherry to D. Hinds indicating that he was interested in purchasing the trucks and all the bins and offered to provide title deeds to Lot 26 Welches Grove, St. Thomas. Mr. El Daher said that this was an offer. The offer which was made for the trucks was accepted and the Respondent paid the \$490,000.00, but negotiations continued on the bins.

[50] He claimed that there were areas of the Applicant’s pleadings which appear to be incoherent and witnesses must be heard for the facts to be ventilated.

[51] He argued that Mr. Hinds arbitrarily went from an offer of 90 skip bins at \$3400.00 per bin to 67 bins at \$4,000.00 per bin, the total price being \$268,000.00. He maintained that the bins were not fit for purpose and the Respondent was under no obligation to conclude a purchase of the bins. Counsel maintained that no price for the skip bins was agreed, therefore there could be no contract. They were still negotiating. He stated that two years after the initial discussion started they were still talking about the price. He referred to a letter dated 20th April, 2017 from José y José to Hinds Transport Services exhibited by the Applicant and marked “Appendix 12” which read in part.

“I refer to our discussion about the sixty-seven (67) skip bins in which twenty (20) are deemed free. I would like to propose a counter offer to pay \$2 500.00 dollars per bin for the remaining forty seven (47) skip bins. I propose to pay four thousand (\$4,000.00) dollars per month for the next eleven (11) months....starting from the end of April 2017. I hope that this offer is acceptable.”

[52] He denied that the unsigned letter of “irrevocable instruction” dated 16th March, 2016 was the Respondent’s. He also pointed out that there was nothing in the letter dated 13th April, 2016 (the Applicant’s Appendix 10), from Joseph Holdings Inc. to Fitzwilliam Stone & Alcazar to link this to the matter before the court. The letter, which was copied to Mr. Dave Hinds read:

“Re: Lot 3 Superlative, St. George

We have secured a purchaser for the above lot and hereby instruct you that upon completing the sale you are hereby authorised to withdraw from the proceeds of the sale and pay to Hinds Transport Inc. the sum of \$100,000.00.”

[53] He argued that the letter did not state that the money was for the skip bins and the court must have questions as to what this money was for. He was adamant that the facts need to be ventilated and they would put a different “spin” on things. He also stated that the Respondent’s pleadings did not constitute a bare denial and that they were set out coherently. He denied that there was an attempt to frustrate the Applicant. There was no contract, no price was agreed. He maintained that the case should not be short circuited because it suited the Applicant.

[54] In answering the question whether the Defendant’s Defence and Counterclaim disclosed a reasonable ground for bringing or defending the claim, Counsel submitted that the court should be guided by the dictum of **Brooke LJ** in *Chief Constable of Kent v. Rixon and Others* [2000] All ER (D) 476 where there was a dual challenge under their **CPR r.3.4(2)(a)** and **r.24. 2(a)(i)**.

[55] He also cited *Junior Wood Trucking Services Inc. v. Butcher* BB 2014 HC 24 from the High Court of Barbados where the court was guided by that approach in relation to the Claimant's application. The court examined the defence to see if it contained a coherent set of facts which disclosed a legally recognisable claim against the Claimant. Firstly, the court considered whether there was a basis for striking out under **Rule 26.3** of the **CPR** and stated that if the defence was struck out, then summary judgement under **Part 15** of the **CPR** would follow automatically without any need to consider or apply a test for summary judgment.

[56] Mr. El Daher also relied upon *Paradise Beach Ltd. and Paradise 88 Ltd. v. Edghill and Pate* BB 2012 CA 15 where the Court of Appeal held that:

- (1) The court should not engage itself in a minute protracted examination of documents and facts of the case (*Wenlock v. Moloney and Others* [1965] 2 All ER 871 and *Chan Seek v. Alvis Vehicles Ltd.* [2003] EWHC 1238 Ch).
- (2) It was not appropriate to strike out a claim where the central issues were in dispute (*King v. Telegraph Group Ltd.*) 2003 EWHC 1238 (Ch).
- (3) The master or judge exercising his decision to strike out a claim of this nature before trial must pay regard to the overriding objective in Rule 1.1 of the CPR, that is to say, the need to deal with cases justly.

[57] Counsel also addressed the defence of set off. He relied on *Junior Wood Trucking Services Inc.* (supra) where it was said that there were two provisions in **Part 18** of the **CPR** which recognized set off as a viable defence to a claim. There the court discussed the relevant legal principles.

[58] Counsel was satisfied that the Respondent had a real prospect of successfully defending the claim and prosecuting its counterclaim. He

cited *Swain v. Hillman and another* [2001] 1 All ER 91 where “real prospect” was discussed.

- [59] Mr. El Daher stressed that a summary judgment application did not involve conducting a mini trial. Further, if there were factual issues to be tried, which if proved might result in a decision in favour of the Respondent, then the pre-emptive power of the court should not be used.
- [60] He argued that the Respondent’s pleadings and affidavit disputed the obligation to compensate the Applicant on its full claim, therefore the extent of liability is in issue. He did not believe that the Defence was weak and doomed to fail, and that it should be struck out at this early stage. He further submitted that the weight of evidence in favour of the Applicant was not strong enough to place the Defence out of the realm of success.
- [61] Mr. El Daher contended that whether the skip bins were reasonably fit for purpose was an issue. He referred to **section 15(a)** of the **Sale of Goods Act Cap 318**. He cited the old case *Gardiner v. Grey* (1815) 171 ER 46 where the court held that without any particular warranty the purchaser had the right to expect a saleable article answering the description of the contract. **Lord Ellenborough** said: “The purchaser cannot be supposed to buy goods to lay them on a dung hill.”
- [62] He contended that the skip bins were not fit for purpose of renting to customers and the Respondent was never able to use them in its business. He submitted that, as a result of the poor condition of the bins, consideration had failed.
- [63] He was of the opinion that the bins were not in compliance with their warranty and were delivered without any final agreement as to the price of each skip bin. As a result, the Applicant’s claim must fail or in the alternative the sum claimed was in excess of a reasonable price for the

skip bins due to their condition and the Respondent was at liberty to reject the same.

[64] Mr. El Daher denied that there was an account stated between the parties. He relied on the definition in Halsbury's Laws of England 5th Edition, Volume 22 (2012) contract, paragraph 611. He stated that Applicant's claim was in the evidentiary category of accounts stated, in that reliance was placed on invoices and e-mails. He reiterated that the price per skip bin was not agreed and stated that the Respondent would show that the debt was not due and or was unreasonable in the circumstances.

[65] He also considered "settled Account" using the definition in Halsbury's Laws of England 5th Edition, Volume 47, Equitable Jurisdiction Paragraph 52. He contended that in law the Respondent was entitled to challenge the condition of the skip bins. He submitted that there was no balance struck between the parties, no account settled.

[66] On the issue of failure of consideration Counsel cited Camillo Tank Co. v. Alexandria (1922) 38 T.L.R. 134 at 141 referred to in Siqueira v. Noronha (1934) AC 332 at 337 and 338, Lemere v. Elliott (1861) 6H & N 656 and Jacobs v. Fisher (1845) 1 CB 178.

Law and Discussion

[67] **Supreme Court (Civil Procedure) Rules 2008**

15.1 This Part sets out a procedure by which the court may decide a claim or a particular issue in a claim without a trial.

Grounds for summary judgment

15.2. The court may give summary judgment against a party on the whole claim or on a particular issue if

- (a) it considers that
 - (i) the claimant has no real prospect of succeeding on the claim or issue; or
 - (ii) the defendant has no real prospect of successfully defending the claim or issue; and

- (b) there is no other reason why the case or issue should be disposed of at a trial

26.3(3) The court may also, in addition to all other powers under these Rules, strike out, at a case management conference or otherwise upon an application on notice, a statement of case or part of a statement of case if it appears to the court

- (b) that the statement of case or the part to be struck out discloses no reasonable ground for bringing or defending a claim;

2.3 “Statement of case” includes

- (a) an application, statement of claim, defence, counterclaim, ... or defence and a reply to defence.”

[68] The court has accepted the following:

1. “The purpose of summary judgment proceedings brought by claimants is to provide early judgment in cases in which the defendant has no realistic prospect of success, and any defence raised will merely have the effect of delaying judgment.” (Commonwealth Caribbean Civil Procedure, 4th edition pages 72-3 by Gilbert and Vanessa Kodilinye.)
2. “The main distinction between striking out and summary judgment is that the former is aimed at the weakness in the manner in which the issues are set out in the statements of case, whereas the latter is used in cases or defences that are weak on the facts and since summary judgment is defined as ‘a procedure by which the court may decide a claim or a particular issue without a trial,’ it is clear that it applies also to cases or defences based on misconceived points of law.” (Ibid page 72.)

[69] In Swain v. Hillman (supra) Lord Woolf MR pointed out at page 92h that there was a relationship between r.3.4 and r.24.2 of their CPR (Rule 26.3 and Rule 15.2 of CPR 2008). The power of the court under Pt 24 was wider than under r.3.4. Under r.3.4 the court generally was only concerned with the statement of case which it was alleged disclosed no reasonable grounds for bringing or defending the claim.

[70] **Lord Woolf MR** made it clear at page 95b that:

“Useful though the power is under Pt 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial.... [T]he proper disposal of an issue under Pt 24 does not involve the judge conducting a mini-trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily.”

[71] The learned authors of Blackstone also stated that it was improper to conduct what is in effect a mini trial involving protracted examination of documents and facts as disclosed on a striking out application.² Reliance was placed on the dictum of **Danckwerts LJ** in Wenlock v. Moloney, [1965] 2 All ER 871 at 874 G and H that:

“[T]his 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 produce a trial of the case in chambers, on affidavit only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power.”

[72] The case law supports the need for caution when one has to determine whether to make use of the power under **Rule 24.2**. However in appropriate cases the court should not avoid exercising its discretion under this rule. Therefore **Lord Woolf MR** in Swain v. Hillman (supra) at page 94b was also clear that:

“It is important that a judge in appropriate cases should make use of the powers contained in Pt 24. In doing so he or she gives effect to the overriding objectives contained in Pt 1. It saves expense, it achieves expedition; it avoids the court’s resources being used up on cases where this serves no

² Blackstone’s Civil Practice 2011 Chapter 33.6

purpose, and I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is the claimant's interest to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know that as soon as possible."

[73] Likewise, in the same case **Judge LJ** at page 96b and c said:

"To give summary justice against a litigant on paper 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 in the court to give summary judgment against a claimant, but limited to those cases where, on the evidence, the claimant has no real prospect of succeeding."

[74] **Lord Woolf's** observation, quoted above, was endorsed by **Lord Hope of Craighead** in the House of Lords in *Three Rivers District Council* [2001] UK HL 16, [2003] 2 AC 1.

Striking Out

[75] It is settled that the jurisdiction to strike out should be used sparingly. "The reason is that the exercise of the jurisdiction deprives a party of its right to a trial, and of its ability to strengthen its case through the process of disclosure and other court procedures such as requests for further information. Further, it has always been true that the examination and cross-examination of witnesses often changes the complexion of a case. It was accordingly the accepted rule that striking out was limited to plain and obvious cases where there was no point in having a trial."³

(a) *The statement of case discloses no reasonable ground for bringing or defending the claim.*

[76] On hearing such an application it will be assumed that the facts alleged are true (see *Morgan Crucible Co. plc v. Hill Samuel and Co. Ltd.* [1991] Ch 295 per **Slade LJ**).⁴

³ Ibid Chapter 33.6

⁴ Ibid chapter 33.7

“A defence may be struck out if it consists of a bare denial or otherwise fails to set out a coherent statement of facts, or if the facts it sets out, even if true, do not amount in law to a defence to the claim.”⁵

“A defence may be struck out if it does not answer the claim being made.”⁶

[77] In *Three Rivers District Council v. Bank of England (No. 3)* (supra) **Lord Hope of Craighead** said that under **r.3.4 (Rule 26.3 (b))** the court generally is only concerned with the statement of case which it is alleged discloses no reasonable ground for bringing or defending the claim.

[78] Making use of the words of **Brooke LJ** in *Chief Constable of Kent v. Rixon and others* (supra), the Applicant has made a “double barrelled challenge” to the Respondent’s Defence.

[79] I therefore accept Mr. El Daher’s submission that there is guidance in this case which the court can utilize.

[80] **Brooke LJ** said:

“[I]f...a defendant makes a double-barrelled challenge under both CPR 3.4(2)(a) and CPR 24.2(a)(i) the court will normally start by considering the first challenge for which it will normally not need to consider evidence. If the claimant’s statement of case is found to contain a coherent set of facts which disclose a legally recognisable claim against the defendant, the defendant is under the new rules entitled to try and persuade the court that notwithstanding that fact the claimant has no real prospect of success. It is at this second stage that the court will normally have to consider any evidence the parties may adduce.”

[81] In *Wragg & Anor v. Partco Group UGC Ltd.* [2002] EWCA Civ 594, striking out under **Rule 3.4 (2)(a)** (no reasonable ground for bringing or defending) was discussed. After stating that this ground applied to a statement of case which raised an unwinnable case where continuance of proceedings was without any benefit to the Respondent and would waste

⁵ Ibid Chapter 33.7

⁶ Ibid Chapter 33.8

resources on both sides (*Harris v. Bolt Burden* (supra)) and a claim or defence which was not a valid claim or defence as a matter of law (*Price Meats Ltd. v. Barclays Bank plc* (supra)), **Potter LJ** went on to give the following explanation:

“47. Case (i) refers to a case which is unwinnable on the merits, whereas case (ii) refers to the failure of a claim which is misconceived or, upon facts or matters pleaded is bound to fail as a matter of law.

48. However, both are methods by which a claim or part of a claim may be disposed of summarily, and without regard to all available evidence as to the matters of contest.”

[82] **Potter LJ** also made the point that a case was not suitable for striking out if it raised a serious live issue of fact which could only properly be determined by hearing oral evidence.

[83] The following excerpt is also valuable:

“Judges often apply the test of whether the claim is bound to fail, so that even a case ‘fraught with difficulty’ will not be struck out (*Smith v. Chief Constable of Sussex* [2008] EWCA Civ 39, [2008] P1 QR P12; *K v. Central and North West London Mental Health NHS Trust* [2008] EWHC 1217 (QB), [2008] P1 QR P19). The apparent implausibility of a case on paper is not in itself enough to justify striking out (*Merelie v. Newcastle Primary Care Trust* [2004] EWHC 2554 (QB), *The Times*, 1 December 2004). Nor is it appropriate to strike out a claim where the central issues are in dispute (*King v. Telegraph Group Ltd.* [2003] EWHC 1312 (QB), LTL 9/6/2003).”⁷

[84] In determining the strike out aspect of the application the court will assume that the facts are true. The court also has to examine the defence to discern whether it contains a coherent set of facts and whether these facts disclose a legally recognizable defence. The court therefore is not

⁷ Ibid Chapter 33.8

required to consider or juxtaposed the statement of claim with the Defence in order to arrive at its decision.

- [85] Having examined the Defence, the Respondent's position is that: (1) It does not owe the debt. (2) An agreement was only reached on the price of the trucks. (3) There was no contract for the ninety skip bins. (4) There were negotiations and proposals but no agreement was reached on the price. (5) The proposed price was exorbitant and some skip bins were damaged and were not fit for purpose. They were rejected. (6) Fitness for purpose was a requirement of any agreement to purchase the skip bins.
- [86] In his submissions Mr. El Daher raised a number of issues as arising from the Defence. These include extent of liability, fitness for purpose, lack of consideration etc.
- [87] The Defence is not a bare denial. The factual issues in dispute are identified and are contested. The parameters of what was agreed have to be determined. Was there a contract and if so what were the terms? The transaction was conducted orally. Supporting documents from the parties such as e-mails, WhatsApp notes, invoices must be scrutinized and explained so that they are not construed out of context. Each party has, in their pleadings, already disavowed some of the invoices emanating from the other.
- [88] The facts are coherent and one cannot say at this stage that the case is unwinnable or bound to fail either on its merits or as a matter of law.

Summary Judgment

(b) The defendant has no real prospect of successfully defending the claim

- [89] While there is no requirement under **Rule 26.3** for filing of evidence in support, **Rules 15.5(1)** and **15.5(2)** require the filing of affidavits. The parties have done so.

[90] An affidavit is a voluntary declaration of facts written down and sworn to by the declarant.⁸ The Applicant’s affidavit merely sets out the legal submissions that were made by its Counsel and therefore adds nothing to the factual circumstances of this matter.

[91] An appropriate definition of what is meant by “no real prospect of successfully defending” can be found in *Swain v. Hillman and another* (supra), at page 92J where **Lord Woolf MR** said:

“Under r24.2, (Rule 15.2 CPR 2008) the court now has a very salutary power, both to be exercised in a claimant’s favour or, where appropriate, in a defendant’s favour. It enables the court to dispose summarily of both claims or defences which have no real prospect of being successful. The words ‘no real prospect of succeeding’ do not need any amplification, they speak for themselves. The words ‘real’ distinguishes fanciful prospects of success or, as Mr. Bidder QC submits, they direct the court to the need to see whether there is a ‘realistic’ as opposed to a ‘fanciful’ prospect of success.”

[92] The following note, taken from the Caribbean Civil Court Practice 2011, explains the relevant test to be used.

“The test under Part 15 (ENG CPR 24) is whether there is a real prospect of success in the sense that the prospect of success is realistic rather than fanciful; when undertaking this exercise, the court should consider the evidence which can reasonably be expected to be available at the trial – or lack of it; it is not appropriate for the court to undertake an examination of the evidence (without a trial) and adopt the standard applicable to a trial (namely, the balance of probabilities). See *Royal Brompton Hospital NHS Trust v Hammond (No. 5)* [2001] EWCA Civ 550, [2001] BLR 297. The rule ‘...is designed to deal with cases which are not fit for trial at all; the test of ‘no real prospect of succeeding’ requires the judge to undertake an exercise of judgment, he must decide whether to exercise the power to decide the case without a trial and give summary judgment; it is a discretionary power; he must then carry out the necessary

⁸ Black’s Law Dictionary 9th edition page 66.

exercise of assessing the prospects of success of the relevant party; the judge is making an assessment not conducting a trial or a fact finding exercise; it is the assessment of the case as a whole which must be looked at; accordingly, ‘the criterion which the judge has to apply under CPR Pt 24 is not one of probability; it is the absence of reality.’ *Three Rivers District Council v. Bank of England (No. 3)* [2001] UKHL 16, [2001] 2All ER 513 (Lord Hope at paras 95 and 158).” (Note 12.3 pages 144-5).

- [93] One is also reminded that when applying the test of whether the Respondent has a case with a real prospect of success, this must be done while having regard to the overriding objective of dealing with the case justly.⁹

Burden of Proof

- [94] **Rule 15** of the **C.P.R.**, like **r24.2** of **CPR (UK)** is not specific on the burden of proof. It merely sets out the circumstances under which the “court may give summary judgment against a party.”
- [95] Based on the oft-cited case *E.D. and F. Man Liquid Products Ltd. v. Patel* [2003] EWCA Civ 472, [2003] CPLR 384, the burden is on the applicant to show that the respondent’s case has no real prospect of success. However it has been pointed out that **Potter LJ** was dealing with an application to set aside judgment therefore this is no more than an obiter dictum. Nevertheless in *Director of Assets Recovery Agency v. Woodstock* [2006] EWCA Civ 741 the Court of Appeal said that the onus was on the applicant.

Standard of Proof

- [96] If the balance of probabilities is not the standard then what is it?
- “The standard of proof required of the respondent is not high. It suffices merely to rebut the applicant’s statement of

⁹ Ibid Chapter 34.10.

belief. The ...court must apply a negative test. The respondent's case must carry some degree of conviction."¹⁰

(c) ***No other compelling reason why the case should be disposed of at a trial.***

[97] The above has been interpreted as “some other reason for trial.” There was no significant discussion on this apart from Mr. Khan's submissions at paragraph 42 above.

Mr. Cherry's Affidavit evidence¹¹

[98] Mr. Cherry took the opportunity to restate facts and to clear up some of the matters raised in the Applicant's pleadings. Much has been made of cheque No. 2327 dated 3rd February, 2017. (See paragraph 7 above). Mr. Cherry in his affidavit tacitly accepted that the \$7,755.00 was not paid, though Mr. Hinds was aware that it was available for collection since February 2017. In this regard he accepted the Applicant's Appendix 13, a transcript of a WhatsApp conversation on 31st August, 2017 which was sent by himself after he was served with court documents for this matter.

It read in part:

“3. You call me in February and asked me for the tractor payment and I told you it was ready and it could be collect[ed] and yet you put me in court for that. (I will send that payment to you[r] attorney, as soon as I pass this matter to my attorney because it was my mistake just as much as it was your[s] that the payment was not collected.”

[99] He explained that his initial offer of the title deeds was predicated upon the “friendship and business relationship” of the parties. He had a house for sale and Mr. Hinds wanted to buy a house for his daughter. He felt that this would assist the on going negotiations. Alternatively he would sell the house and use proceeds to pay for the skip bins once an agreement was reached. Likewise, the \$22,270.00 worth of cement

¹⁰ The White book 24.2.5

¹¹ Also see paragraphs 29 and 30 above

provided would be subtracted from the eventual purchase price once an agreement was reached.

[100] He also explained that he did send the unsigned letter of “irrevocable instruction” which he received from Mr. Hinds to his attorneys for their consideration. However the letter dated 13th April, 2016 (at paragraph 52) above from Joseph Holdings Inc. to Fitzwilliam Stone and Alcazar emanated from a request from Mr. Hinds for “paperwork to satisfy his auditors.” This sale was not completed because the purchaser could not raise the balance of the purchase price.

Grounds for application:

[101] I will briefly mention a few matters arising therefrom. On the matter of providing proof in ground (2), it is my opinion that the Respondent is not required to treat this application as a trial. Affidavit evidence was filed in addition to several documents. Orders for discovery and witnesses statements have not yet been given by the court. The analysis that the court has been invited to undertake in ground (3) on the balance of probabilities is analogous to trial of the case on paper. This too is not the approach to be taken in a summary justice application. With regard to the Applicant’s declaration in ground (6) that all its evidence is before the court, the Respondent has made no such declaration. Finally, it is not farfetched to say that oral evidence can “change the complexion” of a case.

Counterclaim

[102] The Respondent counterclaimed for the sum of \$11,731.72, a minuscule sum in the context of this claim, which it wanted to set off against the debt. According to the Applicant only \$1,691.31 was outstanding. Mr. Khan queried set off in the face of denial of the debt. A set off¹² is a

¹² Blackstone. Chapter 34.37

ground of defence, available if the parties are the same, the sum is liquidated, the debts are mutual. Given the affidavit evidence about the cheque for \$7,755.00, it is anticipated that an appropriate amendment would follow to reflect partial denial. This however will not affect the skip bin issue.

Conclusion

[103] Essentially this matter has been presented as an open and shut case. The court was invited to find that there was an absence of reality in the Respondent's defence. Labels such as "falsehood", "distortion of the truth" have been used in response to certain aspects of the defence. Mr. Khan has launched much criticism on the Respondent's defence. Not only was it described as factually inconsistent, incoherent and misrepresenting the events but the Respondent was accused of making use of unscrupulous tactics without having a defence.

[104] This brings me to a timely warning about tactics given by **Mummery LJ** in **Doncaster Pharmaceuticals Group & Ors v. Bolton Pharmaceutical Co. 100 Ltd.** [2006] EWCA Civ 661. He said:

"[9] I also wish to say a few words about the litigation expectations and tactics of claimants and defendants. Claimants start civil proceedings...in the expectation that they will win and often in the belief that the defendant has no real prospect of success. So the defence put forward may be seen as a misconceived, costly and time wasting ploy designed to dodge the inevitable judgment for as long as possible. There is also a natural inclination on the part of the optimistic to go for a quick judgment, if possible, thereby avoiding the trouble, expense and delay involved in preparing for trial.

[11] The court also has to guard against the cocky claimant, who having decided to go for summary judgment, confidently presents the factual issues as simpler and easier than they really are and urges the court to be

“efficient” ie to produce a rapid result in the claimant’s favour.”

[105] I agree with Mr. Khan that this is not a complex claim and that it does not “rely on complex facts and issues involving questions of law and fact where the law is not simple.” I however do not interpret this to mean that all cases falling outside of that designation must be summarily disposed of. The Applicant’s case may be plausible on paper but the Respondent too has its story and as stated previously it is not a case of bare denial.

[106] The mainstay of the Applicant’s case is an e-mail allegedly from Mr. Cherry admitting breach and a letter of “irrevocable instruction” from one Joseph Holdings Inc. to Fitzwilliam Stone and Alcazar.

[107] I have considered all pleadings, affidavits, written and oral submissions. I reiterate the fact that the court is not required to conduct a mini-trial, nor a fact finding exercise. My function is to make an assessment; to undertake an exercise in judgment.

[108] Urging caution in granting summary judgment in certain kinds of cases **Mummery LJ** in *Doncaster Pharmaceuticals Group and Ors v. Bolton Pharmaceutical Co. 100 Ltd.* (supra) offered a timely reminder that:

“[17]...A mini trial on the facts conducted under CPR Part 24 without having gone through normal pretrial procedures must be avoided as **it runs a real risk of producing summary injustice.**” (My emphasis)

[109] In *Director of Assets Recovery Agency v. Robert Lloyd Woodstock* (supra), **Hughes LJ** at [14] stated that summary justice was justified in a case where it might be possible to say that the story which was advanced by the defendant was so obviously untrue that it was fanciful to suggest that it would be accepted. His opinion was that however flimsy the appellant’s story might have appeared to others, there was little direct evidence. Therefore the matter depended on showing that the defendant and his witnesses were lying. He felt that “more than the fog of suspicion

which was all that was cast over it” was required. The appeal was allowed.

[110] I have referred to the comments of **Hughes LJ** because even though I can see shortcomings in this defence as pleaded, the Respondent’s story cannot be described as so obviously untrue that it is fanciful and will not be accepted. The affidavit evidence demonstrates that there is a different interpretation of events. In addition, documents exhibited by the parties become meaningful with the input of their authors. The court will be better able to grasp their significance.

[111] The facts and central issues are in dispute. The Respondent maintains that if there was no agreement as to price it cannot be held liable. There was no written contract and what was agreed has to be determined. An agreement is not a mental state but an act and as an act is a matter of inference from conduct. The parties are to be judged by what they have said or written or done.¹³ The law takes an objective view rather than a subjective view of agreement. Its starting point is mutual assent.¹⁴ There are matters to be investigated at trial. The Respondent and its witnesses, if any, must also be shown to be lying. In this matter the benefit of evidence which is tested by cross-examination will be invaluable.

[112] I have assessed the case as a whole. All relevant circumstances have been taken into account to ensure that justice between the parties is achieved. Most importantly, the overriding objective has been kept at the forefront. I am not satisfied that the defence as pleaded is hopeless; that it cannot be argued with some degree of conviction; that it is not fit for trial at all, and that there is an absence of reality. This is not a “plain and obvious” case which must be cut short at this stage. Any perceived deficiencies are not sufficient to cause me to conclude that the Respondent has no real prospect of successfully defending the claim or

¹³ Furmston, Cheshire, Fifoot and Furmston’s Law of Contract 15th ed. (2007), p. 38.

¹⁴ Chitty on Contracts, Volume 1. 30th ed (2008) para 1-004.

prosecuting its counterclaim, or that there is no compelling reason for trial. The case management aspect of this case must proceed.

Disposal

- [113]
1. The application is dismissed.
 2. The Respondent is awarded costs of this application to be agreed or assessed.

MS. DEBORAH HOLDER, BSS
Master of the High Court