[2013] JMCA Civ 37

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 142/2012

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**ASE METALS NV**	**APPELLANT**
AND	**EXCLUSIVE HOLIDAY OF ELEGANCE LIMITED**	**RESPONDENT**

Nigel Jones and Miss Kashina Moore instructed by Nigel Jones and Company for the appellant

Mrs M Georgia Gibson-Henlin instructed by Henlin Gibson Henlin for the respondent

24, 25 April and 27 September 2013

HARRIS JA

[1] I have read, in draft, the judgment of Brooks JA. I agree with his reasoning and conclusion and have nothing further to add.

PHILLIPS JA

[2] I too have read the draft judgment of Brooks JA and agree with his reasoning and conclusion. I have nothing further to add.

BROOKS JA

[3] In or about April 2008, ASE Metals NV (ASE), a corporate entity with its registered offices in Belgium, supplied a quantity of reinforcing steel bars to Exclusive Holiday of Elegance Limited (Exclusive Holiday), a company incorporated and operating in Jamaica. Exclusive Holiday has not paid for the steel, and on 11 February 2010 ASE filed a claim in the Supreme Court to recover the sum of US$885,747.77, together with interest thereon. That sum is said to represent the amount that the parties had agreed that Exclusive Holiday would have paid to settle the amount outstanding on the invoice for the steel.

[4] Exclusive Holiday filed a defence to the claim. Among other things, it acknowledged that it had received some steel but alleged that the steel received was not the grade that it had ordered. It also averred that the steel had not been bundled in the manner that it had specified in its order. Significantly, it further asserted that it was not a party to the agreement that ASE relies upon, in that its name did not appear on the document and that the person who purported to sign on its behalf, did not have any authority to bind it.

[5] On 25 June 2010, ASE filed an application to strike out Exclusive Holiday's defence and, in the alternative, it sought summary judgment against Exclusive Holiday. In its application, ASE asserted that the parties had, since the supply of the steel, agreed that Exclusive Holiday had "acknowledged the indebtedness for the amount claimed and had made a commitment in writing to pay that sum". As a result, it contended, Exclusive Holiday's defence had no reasonable prospect of success.

[6] The application came on for hearing before Sinclair-Haynes J. On 19 April 2012, the learned judge dismissed the application, granted costs to Exclusive Holiday and refused permission to appeal.

[7] ASE has appealed against those orders by way of a procedural appeal. It has challenged the learned judge's finding that Exclusive Holiday had successfully "raised several issues which need to be determined at trial".

[8] Exclusive Holiday filed a counter-notice of appeal. It has asserted that not only is the learned judge's decision correct but that it may be supported by other grounds. Exclusive Holiday has contended that certain procedural defects in the affidavit evidence filed by ASE rendered that evidence inadmissible.

[9] The main issues to be decided in this appeal are, firstly, whether the learned judge applied the correct tests in refusing ASE's application. The second main issue is whether the evidence adduced by ASE was so compelling that Exclusive Holiday had no real prospect of successfully defending the claim. Although this court does not have the benefit of the learned judge's reasoning leading to her decision (partly because the appeal is a procedural appeal and no request was made for the judge's reasons), it is, nonetheless, entitled to carry out its own review of the material that was before her, and arrive at its own conclusion thereon.

[10] In approaching the appeal, the applicable law will first be outlined. That outline will be followed by a summary of the relevant pleadings and evidence, and finally, the applicable law will be applied to those pleadings and that evidence.

The applicable law

(a) The principles concerning applications for summary judgment and for striking out statements of case.

[11] The main principle governing the grant of an order for summary judgment is that a court may grant summary judgment to a claimant if it considers that "the defendant has no real prospect of successfully defending the claim or the issue". Rule 15.2 of the Civil Procedure Rules 2002 (the CPR) states:

> "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 issue; or
>
> (b) the defendant has no real prospect of successfully defending the claim or the issue.
>
> (Rule 26.3 gives the court power to strike out the whole or part of [sic] statement of case if it discloses no reasonable ground for bringing or defending the claim.)"

[12] A very similar provision governs the court's approach to applications to strike out statements of case in circumstances such as those in the instant case. Rule 26.3, mentioned in the note to rule 15.2, is the relevant rule. It states, in part:

> "In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court-
>
> ...

> (c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim;..."

[13] The similarity of the effect of these rules allows a conflation of the principles for the purposes of this judgment. Reference hereafter will only be to the principles guiding an application for summary judgment.

[14] The overall burden of proving that it is entitled to summary judgment lies on the applicant for that grant (in this case ASE). The applicant must assert that he believes that that the respondent's case has no real prospect of success. In **ED & F Man Liquid Products Ltd v Patel and Another** [2003] EWCA Civ 472, Potter LJ, in addressing the relevant procedural rule, said at paragraph 9 of his judgment:

> "...the overall burden of proof rests upon the claimant to establish that there are grounds for his belief that the respondent has no real prospect of success..."

[15] Once an applicant/claimant asserts that belief, on credible grounds, a defendant seeking to resist an application for summary judgment is required to show that he has a case "which is better than merely arguable" (see paragraph 8 of **ED & F Man**). The defendant must show that he has "a 'realistic' as opposed to a 'fanciful' prospect of success".

[16] The quote in the last sentence of the preceding paragraph is taken from page 92 of **Swain v Hillman** [2001] 1 All ER 91, in which the standard for considering applications for summary judgment was examined. On examining that decision, it may be extracted from the judgment of Lord Woolf MR that it would be wrong for a court to

require a claimant to prove that a defendant had no prospect of success, as that would be setting the standard too high. **Swain v Hillman** was a case involving an application by a defendant to strike out a claim, but it provides guidance for cases such as the present. Lord Woolf MR stated at page 93:

> "[It was thought that a connected practice direction stipulated that the] judge could only exercise his power under Pt 24 [the equivalent to part 15 of the CPR] if he was certain or, to read the actual language of the practice direction, 'he thought that a claim would be bound to be dismissed at trial'. **If that was thought to be the effect of the practice direction, that would be putting the matter incorrectly because that did not give effect to the word 'real'** to which I have already referred." (Emphasis supplied)

[17] The learned Master of the Rolls went on to say, at pages 93-94:

> "I detect from the judge's judgment that he was looking at the matter on the basis that he had to be certain that the case could not succeed and was bound to fail before he could appropriately accede to the defendant's application.
>
> **Although I consider that the judge therefore adopted the wrong approach for that reason**, I am quite satisfied that he came to the right decision." (Emphasis supplied)

[18] In carrying out its task, a court considering an application for summary judgment, so far as factual issues are concerned, should not seek to conduct a 'mini trial'. Lord Woolf MR, stated at page 95 of **Swain v Hillman**:

> "...the 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."

[19] The court does not, however, have to accept everything which a party places before it. The court in **ED & F Man** established this at paragraph 10 of that judgment:

> "However, that does not mean that the court has to accept without analysis everything said by a party in his statements before the court. **In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents.** If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable..." (Emphasis supplied)

[20] The rationale for the power given in part 15 is conveniently set out by Lord Woolf MR at page 94 of **Swain v Hillman** where he stated, in part:

> "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 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 in the claimant's interests 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**." (Emphasis supplied)

[21] Having set out the law in respect of the court's approach to applications for summary judgment, it is necessary to examine the manner in which an appellate court considers the decision of the court below in respect of such an application.

(b) The approach of the appellate court

[22] The decision to grant or to refuse an application for summary judgment is an exercise of a judge's discretion. An appellate court is always reluctant to interfere with

such an exercise, but may do so where the circumstances so warrant. That view was concisely expressed by Lord Diplock in **Hadmor Productions Ltd v Hamilton** [1982] 1 All ER 1042 at page 1046. Lord Diplock said, in part:

> "On an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. **It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist**..." (Emphasis supplied)

[23] The learned law lord went on to state another basis on which the appellate court may set aside a decision of a judge at first instance. He said:

> "Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the [application] **is so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it**. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons that it becomes entitled to exercise an original discretion of its own...." (Emphasis supplied)

[24] Those views have been consistently applied by this court and have been endorsed in cases such as **Jamaica Citizens Bank Limited v Yap** (1994) 31 JLR 42

at page 51B and, more recently, in **The Attorney General of Jamaica v John McKay** [2012] JMCA App 1.

(c) The issue of ostensible authority

[25] There is one other aspect of the substantive law which is relevant to the issues joined between these parties. It concerns the reliance that a third party may place on actions done by a representative of a company. The basis of this aspect of the law is that a company, being an artificial entity, can only act through agents. Those agents may have actual authority from the company to bind it. Even where an agent does not have actual authority to bind the company, third parties may, nonetheless, be entitled to rely on acts done by that agent, where the agent is held out by the company to have the requisite authority. That may be done either by actual representations to that effect, or by placing the agent in a position which usually carries that authority. The resultant authority is said to be an 'apparent' or 'ostensible' authority. These principles were explained by Diplock LJ in **Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd** [1964] 2 QB 480 at pages 503-507.

[26] Lord Diplock, at page 503 of the former report, explained the principle of apparent authority. He said:

> "An "apparent" or "ostensible" authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the "apparent" authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is

a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. **The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract**." (Emphasis supplied)

[27] At pages 505 and 506, Lord Diplock explained the effect of the representation by a company to third parties. He said at page 505:

> "The commonest form of representation by a principal creating an 'apparent' authority of an agent is by conduct, namely, by permitting the agent to act in the management or conduct of the principal's business. Thus, if in the case of a company the board of directors who have 'actual' authority under the memorandum and articles of association to manage the company's business permit the agent to act in the management or conduct of the company's business, they thereby represent to all persons dealing with such agent that he has authority to enter on behalf of the corporation into contracts of a kind which an agent authorised to do acts of the kind which he is fact permitted to do usually enters into in the ordinary course of such business. **The making of such a representation is itself an act of management of the company's business. Prima facie it falls within the 'actual' authority of the board of directors, and unless the memorandum or articles of the company either make such a contract ultra vires the company or prohibit the delegation of such authority to the agent, the company is estopped from denying to anyone who has entered into a contract with the agent in reliance upon such 'apparent' authority that the agent had authority to contract on behalf of the company**." (Emphasis supplied)

And at page 506, Diplock LJ said:

> "**In each of the relevant cases the representation relied upon as creating the 'apparent' authority of**

> **the agent was by conduct in permitting the agent to act in the management and conduct of part of the business of the company**. Except in **Mahony v. East Holyford Mining Co. Ltd.**, it was the conduct of the board of directors in so permitting the agent to act that was relied upon. As they had, in each case, by the articles of association of the company full 'actual' authority to manage its business, they had 'actual' authority to make representations in connection with the management of its business, including representations as to who were agents authorised to enter into contracts on the company's behalf. The agent himself had no 'actual' authority to enter into the contract because the formalities prescribed by the articles for conferring it upon him had not been complied with." (Emphasis supplied)

[28] That outline of the law has been described by the Privy Council, in the recent case of **New Falmouth Resorts Limited v International Hotels Limited** [2013] UKPC 11, as having "stood the test of time" (paragraph 23). **New Falmouth Resorts** was a judgment on appeal from a decision of this court.

[29] Having outlined the law, and noting the absence of any reasons from the learned judge, the relevant pleadings and evidence that were placed before her will now be examined.

(a) The pleadings

[30] In its amended particulars of claim, ASE referred to the supply of the steel and the fact that Exclusive Holiday did not pay the total amount due in respect of the invoice for the steel. ASE went on to aver as follows:

> "5. On or about November 5, 2008 the Claimant [ASE] and the Defendant [Exclusive Holiday] entered into a Settlement Agreement in relation to the outstanding balance (US$885,747.77) on Invoice number 231, The

> Defendant undertook to pay the Claimant by monthly instalments….
>
> 6. The November 5, 2008 Agreement stipulated that the first payment was due in the third week of December 2008 and that interest was at an agreed rate of 12% per annum from the due 1date of invoice number 231 [9 April 2008].
>
> 7. **The Defendant has refused and/or neglected to pay the said sums or any part thereof as agreed in the November 5, 2008 Agreement despite repeated demands**." (Emphasis supplied)

A copy of Invoice 231 was attached to the particulars of claim. The purchaser was named as Exclusive Holidays of Elegance Ltd. 28 Queens Drive PO Box 85 Montego Bay Saint James Jamaica. The pluralisation of the word 'Holiday' is to be noted. A copy of the agreement was also attached to the particulars of claim. The agreement did not refer to Exclusive Holiday of Elegance Limited. Instead it referred to Exclusive Holiday Limited of Montego Bay. It was signed on behalf of "Exclusive Holiday Limited" by Mr Kirk Taylor and by ASE's representative, Mr Matthieu Vinken. The signing was witnessed by ASE's shipping agent, Mr Neville Fenton.

[31] In its claim for relief ASE sought the sum of US$885,747.77 together with interest thereon. The claim was, therefore, based on the agreement between the parties, rather than being a demand for payment for goods sold and delivered.

[32] In its amended further amended defence (referred to hereafter, for convenience, as "the defence"), Exclusive Holiday did not admit that it had ordered the goods that were the subject of invoice number 231. It spoke about the steel that it had received, being of the incorrect grade and improper bundling and asserted that it had

communicated its dissatisfaction with the order that it had received. In respect of the agreement to which ASE alluded, Exclusive Holiday stated:

> "5. **Paragraphs 5 and 6 of the Amended Particulars of Claim are denied and the Defendant says that it is not a party to the Agreement. The Defendant's name is not Exclusive Holidays Limited. In any event the Defendant says that Kirk Taylor whose name appears on the said Agreement does not have the authority to enter into any agreement to bind the Defendant**.
>
> 6. The Defendant says further that payments have been made to the Claimant in respect of the products received on order proposal dated the 19th February 2008. This is a previous shipment [to invoice number 231]. The Defendant has an account with the Claimant and paid money on account not specifically in relation to this shipment that is in dispute. The Defendant therefore disputes the total assessed by the Claimant to be due and payable and puts the Claimant to strict proof of the amount claimed including the itemized amounts in the invoice attached to the Amended Particulars of Claim as it relates to this shipment in so far as the amount is disputed since the goods delivered did not conform to specifications and/or were not ordered by the Defendant." (Underlining as in original. Other emphasis supplied)

[33] The defence went on to deny that ASE was entitled to the amounts claimed or any interest thereon. It asserted that if Exclusive Holiday were liable to ASE for the supply of any goods, that Exclusive Holiday would have been entitled to rely on the "limitation of actions and jurisdiction clauses in the Bills of Lading". There was also a general denial of averments in the particulars of claim.

[34] Despite the foray into the dissatisfaction with the steel and whether the supply was affected by a limitation defence, the issue that was joined between the parties was

whether an agreement had been made between them on 5 November 2008. Undoubtedly, the name of the party bound by the agreement to pay the debt would play a significant factor, as would the capacity of the person purporting to sign on behalf of that party. It is at this stage that the relevant evidence has to be examined.

(b) The evidence

[35] The central document in this analysis is the agreement dated 5 November 2008. The first paragraph bears being cited in full:

> "Agreement made this day of November 5, 2008 between ASE Metals Ltd of Antwerp Belgium called the shipper/ creditor on one part and Exclusive Holidays Ltd of Montego Bay Jamaica called the consignee, on the other part, relevant to an outstanding balance due on a consignment of steel made from the Shipper/Creditor to the consignee/client vide the Shippers / creditors [sic] shipping invoice #610.1869 for an outstanding amount of united State [sic] of America Dollars, Eight Hundred and Eighty Five thousand, Seven Hundred and Forty Seven [sic] and Seventy Seven cents, (US $ 885,747.77)."

[36] The document went on to stipulate a payment schedule and that interest would be paid "at the agreed rate of 12% per annum from the original due date of August 2008 on all balance/balances due an [sic] outstanding until the full sum as stated above is paid and settled…". Another sum representing interest on another invoice was also agreed to be paid.

[37] Apart from the agreement document, a critical part of the evidence that is relevant to these issues is contained in an affidavit by Mr Robert Andries, the managing director of ASE. Mrs Gibson-Henlin, on behalf of Exclusive Holiday submitted that Mr

Andries' affidavit should be rejected, firstly, because it was not in accordance with section 22(4) of the Judicature (Supreme Court) Act. The second basis on which Mrs Gibson-Henlin complained about that affidavit is that the exhibits were not identified in accordance with rule 30.5(4) of the CPR. On these bases, which form the core of Exclusive Holiday's counter-notice of appeal, Mrs Gibson-Henlin argued that the contents of Mr Andries' affidavit could not have been properly considered by Sinclair-Haynes J and should not be considered by this court.

[38] Mr Jones, on behalf of ASE, submitted that there had been compliance with the provisions of section 22(4). He argued that the general tenor of the document indicated that the document had been signed before a notary public and that the authority of the notary public to so sign, had been verified by the appropriate person. He, as he was obliged to do, nonetheless, accepted that the compliance was not readily apparent since the relevant portion was not in the English language. In respect of the breach concerning the exhibits, learned counsel accepted that there had been a failure to properly identify the exhibits. He, however, argued that the breach was one that this court could address within its power, given by rule 26.9 of the CPR, to cure minor procedural breaches.

[39] Two cases were cited by Mrs Gibson-Henlin in support of her submissions. Neither one is authority for a principle which would render a foreign language document inadmissible, as a matter of course, due to the absence of an English translation. Both, however, highlighted the need for a translation. In **Ricco Gartmann v Peter Hargitay** SCCA No 116/2005 (delivered 15 March 2007), Harrison

JA referred to **Re Saifi** [2001] 4 All ER 168 and, at paragraph 21 of his judgment, explained the relevant principle to be extracted from that case. He said:

> "In **Re Saifi**…it was said that the fact that a deposition is recorded in a foreign language, but unaccompanied by a certified translation, may not necessarily lead to the deposition being inadmissible, although, generally speaking, a certified translation is necessary."

[40] In both those cases, it was the content of the documents which was critical to the decision. In the instant case, it is not the content of the document which is critical but, rather, its compliance with procedural requirements. This is not to minimise the importance of the requirement of the statute, but the issue of compliance may be considered less strictly than in a case where the contents of the document are in issue.

[41] In the instant case, the impugned affidavit, in its jurat, stated that Mr Andries had sworn to it before Frank Celis. Below Mr Celis' name are the words "geassocieerd Notaris". A signature, which is assumed to belong to Mr Celis, asserts, in part, that the document had been "[s]een for legalisation of the signature of Mr Andries, Robert". On the back of the document is what seems to be a certificate signed by Lignier Jean-Paul. It states as follows:

> "Vu pour la légalisation de la signature de:
> Gezien voor de legalisatie van de handtekening van:
> Gesehen zur Legalisation der Unterschrift von:
>
> Brussel/Bruxelles/Brüssel
>
> Celis, Frank
> N° 9805100615864960
>
> Cette légalisation ne garantit pas l'authenticité du contenu du document.

Deze legalisatie waarborgt de authenticiteit van de inhoud
van het document niet.
Diese Legalisation dient nicht dem Beweis der Echtheit des
inhalts des Dokuments."

[42] Accompanying Lignier Jean-Paul's signature is a stamp which bears the phrases:

"Service Public Federal Affaires Etrangeres"

and,

"Commerce Exterieur et Cooperation au development"

[43] The term "geassocieerd Notaris", which is Frank Celis' title, is Dutch for "associated notary", while a basic translation of the French portion of the document seems to indicate that Lignier Jean-Paul is verifying Frank Celis' authority to sign documents. The translated phrases, respectively state in English:

Seen for the legalisation of the signing of:

and,

This legalisation does not guarantee the authenticity of the
content of the document.

While the phrases on the stamp mean:

Federal Public Service Foreign Affairs

and,

External Trade and Cooperation in development

[44] The foregoing does not purport to be an official translation. It is sufficient to indicate, however, that there has been, as Mr Jones has submitted, compliance with the provisions of section 22 of the Judicature (Supreme Court) Act. The relevant portions of the section state:

> "(2) Affidavits, declarations and affirmations concerning matters or proceedings in any Court in this Island may be sworn or taken-
>
> …
>
> (c) in any foreign state or country **before any person having authority by the law of such state or country to administer an oath** in such state or country.
>
> (4) Where any affidavit, declaration or affirmation is sworn or taken in any foreign state or country before any person authorized by paragraph (c) of subsection (2) the signature or seal of such person and his authority to administer an oath in such state or country **shall be verified by a certificate of one of the officers set out in paragraph (b) of subsection (2) or by a certificate under the seal of the appropriate person having such power of verification in such state or country**." (Emphasis supplied)

[45] These circumstances, in the absence of any provision to the contrary, allow the application of the well-known maxim in law that means, "all acts are presumed to have been done rightly and regularly". It must be said, however, that this aspect of the matter could have been easily avoided by ASE's attorneys-at-law securing a certified translation into English.

[46] The relevant portions of rule 30.5, which ASE has breached in attaching the exhibits to Mr Andries' affidavit, state as follows:

> "(1) Any document to be used in conjunction with an affidavit must be exhibited to it.
>
> …
>
> (4) Each exhibit or bundle of exhibits must be –
>
> (a) accurately identified by an endorsement on the exhibit or on a certificate attached to it signed

by the person before whom the affidavit is sworn or affirmed; and

(b) marked

(i) in accordance with rule 30.2(e); and

(ii) prominently with the exhibit mark referred to in the affidavit."

[47] Part 30 of the CPR does not stipulate any consequence of failure to comply with its rules. In that regard, Mr Jones is correct that the court is entitled by rule 26.9 of the CPR to not only stipulate that the breach does not invalidate the attachment of the exhibits to Mr Andries' affidavit, but to make an order to rectify the breach. The rule states:

"(1) This rule applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or court order.

(2) An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders.

(3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.

(4) The court may make such an order on or without an application by a party."

[48] This procedural breach should not cause the deprivation of an otherwise deserved order. It falls within the ambit of the principle cited by Morrison JA in his judgment in **James Wyllie and Others v David West and Others** SCCA No

120/2007 (delivered 13 August 2008). In upholding a decision of Sinclair-Haynes J, Morrison JA stated at paragraph 13:

> "Sinclair-Haynes J cited with approval the recent observation of the Caribbean Court of Justice in **Watson v Fernandez** [2007 CCJ (AJ), CCJ Appeal No CV 2 of 2006 (delivered 25 January 2007)] that 'Justice is not served by depriving parties of the ability to have their cases decided on the merits because of a purely technical procedural breach committed by their attorneys (paragraph 39). I entirely agree."

That reasoning was supported by this court in an application to set aside Morrison JA's decision in that case (see **James Wyllie and Others v David West and Others** Application No 8/2009 (delivered 30 July 2009)).

Analysis

[49] ASE, on those principles should not have Mr Andries' affidavit and its exhibits excluded from consideration because of these technical breaches. It is entitled to have an order rectifying the situation and to have the affidavit and the exhibits considered.

[50] In considering his affidavit, it may be noted that Mr Andries has demonstrated, through a record of communication between the parties, that:

a. Mr Kirk Taylor, who had signed the agreement at the centre of the dispute, identified himself in e-mail correspondence as "Executive Vice President Exclusive Holidays/Tropical Tours Destination Management Company…" (see, for example, page 46 of the record)

b. There was no complaint about the quality or bundling of the steel. Mr Taylor blamed the failure to pay for the product on "a dramatic down turn in the world economy especially in Jamaica there has been very little construction and most of the steel is still in the yard." (See page 52 of the record).

c. In every e-mail sent by Mr Taylor to ASE, he indicated one or other of the following:

(i) that he was waiting on Mr Fred Smith (one of Exclusive Holiday's directors) to give directions concerning payment;

(ii) that he was working on arranging a payment; or

(iii) that he regretted that a payment had not been made as promised.

(See pages 46, 47, 52, 57, 59, 61, and 63 of the record)

[51] Mr Smith deposed in an affidavit that Mr Kirk Taylor was "not authorized to act on [Exclusive Holiday's] behalf". In emphasising the point, Mr Smith exhibited documents which he said were, respectively, a valid order to and invoice from, ASE. Both of these, he accepted, bound his company. These are at pages 85 and 87, respectively, of the record. The curious thing about those documents, however, is that

the signature on them, which is placed above Exclusive Holiday's full name, bears no resemblance to Mr Smith's signature on his affidavit or on the exhibit slips, attached thereto. Also of significance, as will be assessed later, is the fact that the company's name is set out as "Exclusive Holidays of Elegance Ltd.", with the pluralisation of the word "Holiday".

[52] Although accepting that the court does not pretend to have expertise in the area of handwriting, even a cursory examination reveals a striking similarity between the signature on those accepted documents, and Mr Kirk Taylor's signature on the agreement of 5 November 2008 (see page 92 of the record). The similarity extends, as well, to the signature on the *pro forma* invoice that gave rise to invoice number 231. By observing that similarity and combining it with the fact that Mr Smith accepts that the document bearing that signature binds his company, it may be concluded that Exclusive Holiday did authorise Mr Taylor to sign documents that bound it.

[53] There is authority for the court conducting its own examination of documents in circumstances such as these and drawing conclusions therefrom. Mr Jones brought to our attention the case of **Re Sookram, deceased** TT 1982 HC 54 (delivered 22 July 1982) in support of the principle. In that case, Persaud J addressed the court's ability to "use its own eyes" in making up its mind "on the genuineness of a disputed handwriting". The learned judge referred to **Bankay v Sukhdeo** (1975) 24 WIR 9, in which the Court of Appeal of Trinidad and Tobago cited other "high authority" for the principle. In the latter case, Haynes JA said, in part, at pages 16-17 of the report:

> "But the trial judge went further. He himself compared the signature with the admitted signatures of the deceased and on the evidence of his own eyes reached 'a firm conviction that the signature on the will was indeed that of the testator and no one else'."

Although that exercise took place in the context of a trial, the principle should not preclude similar action in circumstances such as these.

[54] Haynes JA emphasised that where a court does use its own eyes, it should exercise caution and should look for other evidence to support its finding on an examination of the document. He continued, at page 17, by saying:

> "...Lord Birkenhead in the Privy Council in **Wakeford v Lincoln** ((1921), 90 LJPC 174, PC)...said…at p 179: 'Questions depending upon handwriting are in many cases doubtful, and in the past have given, and in the future will give, cause for great anxiety in courts of justice. But upon them, as upon other matters, it is necessary to come to a conclusion.'…'**Looking at the papers before them, their Lordships upon the evidence of their own eyes, have reached the conclusion that there can be no doubt upon the matter**.' But despite their firm view that the errant clergyman had signed the register, Lord Birkenhead went on to say this: 'If this were the only piece of evidence, their Lordships, although without doubt in their own minds as to the authenticity of the writing, would not willingly rest their judgment on a single fact as to which error might be possible'." (Emphasis supplied)

[55] Based upon the above learning, which is respectfully accepted as representing the law on the point, it would have been open to Sinclair-Haynes to examine these signatures and discern from that examination that, not only did Mr Smith not sign the documents that, he accepted, bound Exclusive Holiday, but that in all likelihood it was Mr Taylor who had signed them.

[56] However, that is not the only evidence that reveals that Exclusive Holiday held out Mr Taylor as being capable of binding it. The e-mail sent by Mr Taylor, as mentioned before, revealed that he held executive status at the company. It has not been denied that Mr Taylor was an Executive Vice President of Exclusive Holiday. There is also affidavit evidence from Mr Jason Jones, one of ASE's attorneys-at-law, that he had been informed by ASE's representative that Mr Smith was present at the time that Mr Taylor signed the agreement in question. Mr Neville Fenton, who was mentioned above as having signed as a witness, was the broker who had introduced Exclusive Holiday to ASE. Mr Jones' statement constitutes hearsay but would be admissible for the purposes of applications for summary judgment as well as other interlocutory proceedings (see rule 30.3 of the CPR and **McMillan and Others v Khouri** SCCA No 111/2002 (delivered 29 July 2003)).

[57] Against that body of documentary evidence, Exclusive Holiday's averment, that Mr Taylor did not have the authority to bind it, rings quite hollow. It is apparent that Exclusive Holiday permitted him to make representations to the contrary to third parties. It is also to be noted that subsequent to the date of the agreement, Mr Taylor sent an e-mail to ASE in which he explained the failure to make the first payment for which the agreement had called. The e-mail, which had been copied to Mr Smith, stated:

> "…Nothing was sent in december [sic] as there was very little economic activity however there should be some payment in january [sic] but I will not be able to give you more details until next week…"

[58] Mr Taylor's position is quite consistent with the position of the agent in **Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd**. The headnote accurately summarises the facts and the decision in that case. It states:

> "K., a property developer, and H. formed the defendant company to purchase and resell a large estate. K., personally, agreed to pay the running expenses and to be reimbursed out of the proceeds of the resale. K. and H. and a nominee of each were appointed directors of the company. The articles of association contained power to appoint a managing director but none was appointed. K. instructed the plaintiffs, a firm of architects, to apply for planning permission to develop the estate and do certain other work in that connection. The plaintiffs executed the work. The plaintiffs claimed their fees, the amount of which was not in dispute, from the defendant company. The county court judge held that, although K. was never appointed managing director, he had acted as such to the knowledge of the board of directors of the defendant company and he gave judgment for the plaintiffs. The defendant company appealed.
>
> On the Court of Appeal's finding that K. had no actual authority to employ the plaintiffs but had ostensible authority as he acted throughout as managing director to the knowledge of the board:-
>
> *Held*, that K.'s act in engaging the plaintiffs was within the ordinary ambit of the authority of a managing director and the plaintiffs did not have to inquire whether he was properly appointed; it was sufficient for them that under the articles of association there was in fact power to appoint him as such and accordingly the defendant company [was] liable for the plaintiffs' fees."

[59] Finally, there is Exclusive Holiday's complaint that it is not its name that appears on the agreement but rather "Exclusive Holidays Ltd". It would be pedantic indeed for any court to hold that this mis-description would allow Exclusive Holiday to avoid liability under this agreement. Taking into account the subject matter of the document,

the e-mail correspondence concerning the supply of the steel and the payment therefor, and the persons who were the signatories to the document, it would fly in the face of logic, that it was some other entity which was to have been bound by this agreement.

Conclusion

[60] Although there were no reasons produced to this court for Sinclair-Haynes J's decision, it appears that she did not take into account the body of evidence that made it plain that Exclusive Holiday had no realistic prospect of successfully defending this claim. It is best that the parties be informed of this without having to undergo the loss of time and to incur the expense involved in a trial. In the circumstances, this court has examined the evidence and been able to exercise its own discretion.

[61] This case may well be considered a borderline one and dependent on its particular facts, bearing in mind the procedural defects and the approach to Mr Taylor's signature. It would not, however, be consistent with the spirit of dealing with cases justly for this case to be set for trial merely to show that the signature on all the relevant documents are Mr Taylor's and that the varying spellings of the company's name was due to inattention to detail rather than a reference to a completely different entity. Both those positions, based on the documentary evidence, would be untenable.

[62] Based on that reasoning, the appeal should be allowed, the judgment of Sinclair-Haynes should be set aside, and summary judgment should be granted to ASE according to its particulars of claim.

HARRIS JA

ORDER

1. The affidavit sworn by Robert Andries, and filed by the appellant herein on 24 June 2010, shall stand as properly filed and may be referred to along with its exhibits.

2. The appeal is allowed and the cross-appeal is dismissed.

3. The decision of Sinclair-Haynes J made herein on 19 April 2012 is set aside.

4. The appellant's application for summary judgment is granted.

5. Judgment for the appellant in the sum of US$885,747.77 together with interest thereon at the rate of 12 per centum per annum from 7 August 2008 to the date of payment.

6. Costs of the appeal, the counter-notice of appeal and in the court below to the appellant to be taxed if not agreed.