THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

COMMONWEALTH OF DOMINICA

CLAIM NO. DOMHCV2011/0356

KASSWEBB LIMITED

Respondent/Claimant

AND

NAGICO INSURANCE COMPANY LIMITED

Applicant/Defendant

Before:

Master Charlesworth Tabor (Ag.)

Appearances:

Mr. Ian Benjamin SC with Mrs. Hazel Johnson for the Claimant
Miss Navine Fleming with Mrs. Tamara Carter-Ruan and Mrs. Singoalla Bloomqvist-Williams for the Defendant

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2013: March 11, July 17
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Civil Procedure Rules 2000 (CPR 2000) – application to strike out amended statement of claim under CPR 26.3 (1) (b) - whether privity of contract exists between an obligee under a performance bond and the insurance company that issued the bond, despite mistake with respect to the principal (contractor) of the performance bond – whether the obligee is owed a duty of care by the insurance company under the performance bond – whether the obligee can bring a claim against the insurance company as a result of a default by the principal even though the principal of the performance bond and contractor of the building contract for which the performance bond was issued are two different entities.

RULING

[1] TABOR, M (Ag.): This is an application filed on 4th May, 2012 by the applicant/defendant to strike out the respondent/claimant Amended Statement of Claim. In

support of this application the applicant relies on the affidavit of Merle Lawrence, General Manager of Nagico Insurance Company Limited, filed on 4th May, 2012.

[2] The applicant, Nagico Insurance Company Limited, applied to the court for the following orders:

1. That the Amended Statement of Claim in this matter filed on 21st March, 2012 and of which Further and Better Particulars were given on 26th April, 2012 be struck out in its entirety.
2. That the claim be struck out in its entirety.
3. That the respondent/claimant pays the costs of the applicant/defendant on this application and on the proceedings to date.

[3] The grounds of the application are as follows:

(a) The Amended Statement of Claim and Claim Form disclose no cause of action against the applicant/defendant in that (i) there is no privity of contract between the applicant/defendant and the respondent/claimant and (ii) the "duty" upon which the respondent/claimant premises its claim in negligence (at paragraph 17 et seq of the Amended Statement of Claim) does not exist as between the claimant and the defendant.
(b) Further and in the alternative, at paragraph 20 (v) the respondent/claimant alleges, inter alia, that the applicant/defendant acted fraudulently without pleading the particulars as is required by CPR 2000.

[4] Both parties were ordered by Master Cheryl Mathurin on 20th June, 2012 to file submissions on the duty of care and negligence points. Counsel for the defendant filed submissions in support of the application to strike out the Statement of Claim on 29th June, 2012; while Counsel for the claimant filed submissions on 10th July, 2012 opposing the application. Oral arguments were presented by Counsel on 11th March, 2013 and the decision in the matter was reserved.

Background Facts

[5] On 22nd January, 2010 the claimant (Kasswebb Limited) and Greenheart Homes (Trinidad) Limited (the contractor) entered into a contract to construct a tourist resort in the Commonwealth of Dominica known as Kwanari Ecolodge at a cost of EC$5,120,274.

[6] One of the conditions of the agreement between the them and also a requirement of the institution funding the project was that the contractor would have to obtain a Performance Bond from a reputable insurance company in order to guarantee the due conduct and completion of the building works of the resort in accordance with the building contract.

[7] On 20th April, 2010 the defendant executed a Performance Bond in the sum of US$190,000 in favour of and/or for the benefit of the claimant in respect of the contract for the construction of Kwanari Ecolodge between the claimant and the contractor. The condition of the Bond stipulated that if the contractor shall promptly and faithfully perform

the contract then the Bond would be null and void, otherwise it would remain in full force and effect. However, in the event of a default by the contractor the defendant would be responsible to promptly remedy the default.

[8] In the Amended Statement of Claim, the claimant alleged that Greenheart Homes (Trinidad) Limited breached the building contract in that it failed to proceed diligently with the works and wholly or substantially suspended the carrying out of the works before practical completion in that:

(a) it failed to keep a work program and fell so far behind schedule that it was unlikely that it could or would complete the work contracted for within the contract period;
(b) it left exposed reinforcement steel in incomplete foundation works which was thus compromised and this reduced the value/integrity of work already paid for;
(c) it failed to pay some of its suppliers and employees which resulted in threats being made to the Employer's representatives and which endangered the security of the site;
(d) it wholly suspended the carrying out of works on site abandoning the site on or about the 25th of November, 2010.

[9] Greenheart Homes (Trinidad) Limited, in accordance with the building contract, was requested to remedy the acts of default but failed to do so and as a result the claimant exercised its rights to terminate the employment of Greenheart.

[10] As a consequence of Greenheart's failure to remedy the defaults, the claimant made a claim on the Bond to have the works completed. However, the defendant has denied liability to the claimant under the Bond on the basis that:

(a) the Bond was entered into with Greenheart Homes Limited, a Dominican company, and not Greenheart Homes Trinidad Limited;
(b) the Bond is void because the defendant had no intention to enter into contractual relations with the Trinidad company;
(c) the description of Greenheart Homes Trinidad Limited as Greenheart Homes Limited in the Bond document was not a mistake in that the information supplied on the application for the Bond was provided by Greenheart Homes Limited and the Bond was prepared by the defendant based on that information;
(d) alternatively, the Bond is void for misrepresentation of material facts by Andy Boulogne acting on behalf of the Proposer and who was a Director of both companies.

[11] The claimant was forced to complete the project by employing another contractor which has resulted in increased costs. As a consequence, the claimant claims that he has suffered loss due to the negligence of the defendant. In that regard the claimant has alleged that the defendant:

(a) well knew that the claimant would be relying on the Performance Bond issued by it to the contractor, to guarantee the proper performance of the claimant's Kwanari Ecolodge construction project;
(b) well knew that the claimant would not be privy to nor be required to fill out any documentation in respect of the Bond application;
(c) failed to ensure that it was given adequate and/or accurate information by the applicant for the Bond and/or failed to conduct proper inquiry before issuing the Bond.

[12] The claimant has therefore claimed the sum of US$190,000 (EC$516,211), interest from the date of judgment until satisfaction, costs and such further and other relief as the court deems fit.

Principles Governing CPR 26.3 (1)(b) Applications to Strike Out a Claim

[13] The power of the court to strike out a statement of case is provided for by Rule 26.3 (1) of the CPR 2000 which states as follows:

> "In addition to any other power 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 that –
> (a) …..
> (b) the statement of case or part to be struck out does not disclose any reasonable ground for bringing or defending a claim;
> (c) the statement of case or part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings; or
> (d) the statement of case or part to be struck out is prolix or does not comply with the requirements of Part 8 or 10".

[14] The striking out of a statement of case or defence is a draconian step which a court would only take in exceptional circumstances. In Baldwin Spencer v The Attorney General of Antigua and Barbuda et al (Civil Appeal No. 20A of 1997) Dennis Byron CJ (Ag.), as he then was, restated the seminal test that should be applied by the court on an application to strike out when he said:

> "This summary procedure should only be used in clear obvious cases, when it can be seen on the face of it, that a claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court…. Striking out has been described as 'the nuclear power' in the court's arsenal and should not be the first and primary response of the court".

[15] In his judgment in the interlocutory appeal in Tawney Assets Limited v East Pine Management et al (BVI High Court Civil Appeal No. 7 of 2012) Mitchell JA (Ag.) in underscoring the need why the court should proceed cautiously when dealing with an application to strike out noted that:

> "The exercise of this jurisdiction deprives a party of his right to a trial and of his ability to strengthen his case through the process of disclosure, and other

procedures such as requests for further information. The court must therefore be persuaded either that a party is unable to prove allegations made against the other party; or that the statement of case is incurably bad; or that it discloses no reasonable ground for bringing or defending the case; or that it has no real prospect of succeeding at trial".

[16] In Citco Global Custody NV v Y2K Finance Inc. (BVI High Court Civil Appeal No. 22 of 2008) Edwards JA in dealing with an application to strike out noted that:

> "Striking out under the English CPR, r 3.4(2)(a) which is the equivalent of our CPR 26.3 (1)(b), is appropriate in the following instances: where the claim sets out no facts indicating what the claim is about or if it is incoherent and makes no sense, or if the facts it states, even if true, do not disclose a legally recognizable claim.

Also, in Ian Peters v Robert George Spencer (Antigua and Barbuda High Court Civil Appeal No. 16 of 2009), Pereira CJ (Ag.), as she then was, indicated that a statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be determined at trial by hearing oral evidence.

Applicant/Defendant's Submissions

[17] Learned Counsel for the applicant/defendant, Miss Navine Fleming, submitted that the amended statement of claim discloses no cause of action against the defendant as there is no privity of contract between the parties and there is no duty of care. Counsel urged the court that in assessing the application, it must examine whether the claimant can prove the allegations of negligence and mistake on the part of the defendant, and whether the pleadings disclose reasonable grounds for bringing the case and whether it has prospect of succeeding at trial. Counsel noted that even though striking out is drastic it should be done in this case.

[18] Learned counsel has submitted that in consideration of the case at bar, the following pertinent issues would arise:

(a) whether there is a Duty of Care owed to Kasswebb Limited by Nagico Insurance Company Limited;
(b) whether a legally enforceable contract of insurance exists for the benefit of Kasswebb, and upon which Kasswebb Limited can bring a claim against Nagico;
(c) whether Kasswebb Limited is a proper party to this claim based on the fact that it has no privity of contract with Nagico, and the fact that Greenheart Homes Limited is the contracting party with Nagico and not with either Kasswebb Limited or Greenheart Homes (Trinidad) Limited.

[19] With respect to the "duty of care" issue, learned Counsel respectfully submitted that there is no contractual basis in existence as between the claimant and defendant which can give rise to a duty of care being owed to Kasswebb Limited by Nagico. Moreover, Counsel has noted that the claimant has stated no legal basis to support the claim that Nagico owed it a

duty of care. To underscore this point, learned Counsel submitted that that was also admitted by Kasswebb Limited in its amended statement of claim at paragraph 19 where it is stated that "The Defendant well knew that the Claimant would not be privy to nor be required to fill out any documentation in respect of the Performance Bond application" (sic). Learned Counsel has therefore submitted that Nagico Limited is not the party against whom the claimant can legally make a claim as no contract of insurance existed between the parties. Counsel noted further that the claimant cannot show that it is the beneficiary of a contract entered into in its favour. I should add here, though, that the claimant has denied admitting at paragraph 19 of its amended statement of claim that it was not privy to the insurance contract. In fact, the claimant has stated that what paragraph 19 indicated is that the defendant knew that the claimant would not be privy to nor be required to fill out any documents in respect of the Bond application.

[20] Citing Charlesworth and Percy on Negligence, 7th Edition, Page 14, Counsel also noted that the party asserting that another party has been negligent is required to establish that (a) a duty of care exists as between the claimant and defendant, (b) that the defendant failed to attain that standard of care prescribed by law and thereby breached the duty of care, and (c) damage which is both causally connected with such breach and recognized by law, has been occasioned to the claimant. The failure to prove any one of these component elements would result in the dismissal of the action for damages. Counsel has submitted that the claimant has stated no legal basis to support the claim that Nagico owed it a duty of care. In fact, Counsel has noted that (a) there was no duty of care owed by Nagico to the claimant to do or not to do anything, as there was no relationship in existence between them, and (b) Nagico was under no duty of care with respect to GHL to ascertain its vires and financial status.

[21] Learned Counsel has noted further that a contract of insurance is a contract Uberrima Fides – a contract of Utmost Good Faith, and that this places an obligation on the applicant/insured a duty of disclosure of material facts, and a duty not to misrepresent material facts. In the Performance Bond Application of Nagico, Andy Boulonge signed a declaration on behalf of Greenheart Homes Limited declaring as follows:

> "I/we understand that by completing and signing this application, full permission is given to the Insurer or Underwriter to obtain information which may be used to determine my/our eligibility for this Bond. I/we also understand that the Insurer or Underwriter undertakes to hold the information provided in this application in the strictest confidence. I/we warrant that the answers and statements made above are true and complete and that nothing materially affecting this Bond has been concealed by me/us and I/we agree that this application shall be incorporated in and form the basis of the Bond to be executed between me/us and the insurer".

As a consequence, learned Counsel has posited that the insured, Andy Boulonge and Greenheart Homes Limited, were under a duty to disclose to Nagico all facts material to Nagico's appraisal of the risk which were known, ought to have been known, or deemed to be known by the insured, but neither known or deemed to be known by Nagico, and were under an equal obligation not to misrepresent any fact to Nagico. The point should be

noted as well that the declaration also gave the Insurer the latitude to pursue their own inquiry to assess the application.

[22] Despite signing the declaration, learned Counsel has noted that Andy Boulonge and Greenheart Homes Limited failed to disclose and/or misrepresented the following facts to Nagico when applying for the Bond:

(a) That Greenheart Homes Limited (GHL) i.e., the Dominican Company, did not have any construction contract with Kasswebb Limited. GHL therefore had no insurable interest in the construction contract between Greenheart Homes (Trinidad) Limited and Kasswebb Limited.
(b) That the contract which Kasswebb Limited had entered into and which the Bond was being sought to cover, was a contract with Greenheart Homes (Trinidad) Limited and not GHL for which the documentation was provided.
(c) That at the material time, Andy Boulonge the Director of GHL, stood charged before the courts of Trinidad with 11 charges of fraud allegedly perpetrated by Mr. Boulonge in his capacity as Managing Director of Greenheart Homes (Trinidad) Limited, the company which had contracted with Kasswebb Limited.
(d) On the Performance Bond Application Form that Mr. Boulonge completed, he answered "No" to the following questions: (i) Has the applicant ever failed in business, whether under a previous name or not; and (ii) Do you have any liens, claims or judgments against you. Of course these answers are false and amount to misrepresentation.

[23] Nagico approved the application for the Bond on behalf of GHL on 20th April, 2010. The application was expressly, and by agreement between the parties, incorporated in and formed the basis of the Bond. However, in January, 2011 a representative of Kasswebb Limited informed Nagico that Greenheart Homes (Trinidad) Limited had defaulted on the construction contract and that it intended to make a claim for compensation under the Performance Bond that Nagico had issued to GHL. The construction contract presented to Nagico was one between Greenheart Homes (Trinidad) Limited and Kasswebb Limited and was the first time that Nagico became aware of the existence of the Trinidad Company. Nagico denied the claim on the basis that it had no contract with the Trinidad Company nor any intention to enter into any contract with the Company, and further that in any event the contract was obtained through misrepresentation and non-disclosure of material facts committed and omitted by GHL and its Director Andy Boulonge and was voided.

[24] The issue of the Performance Bond is central to this case. Learned Counsel for the applicant has agreed that a Performance Bond was entered into between Mr. Andy Boulonge, as agent for and as a Director of Greenheart Homes Limited and Nagico, guaranteeing the performance of a building contract entered into between Greenheart Homes Limited and Kasswebb Limited in favour of Kasswebb Limited. However, learned Counsel has argued that the claimant has failed to show that there has been a breach by Greenheart Homes Limited and the obligation of Nagico to perform under the Performance Bond arises from an agreement with Greenheart Homes Limited. In any event, it is the

position of Nagico that the claimant is not a party to the Performance Bond and cannot sue on it.

[25] Learned Counsel in addressing the issue of the privity of contract, submitted that a contract of insurance is governed by the rules which form part of the general law of contract. It is noted, therefore, that one of the issues which must be considered is legal entitlement, that is, there must be in existence a legally binding contract and the insurer must be legally bound to compensate the other party. In the case at bar, the contract of insurance which the claimant wishes to rely on is a contract between Nagico and GHL which was purported to have been made to indemnify the claimant in the event of a default by GHL pursuant to the alleged construction agreement between GHL and the claimant. However, there was never any construction agreement between GHL and the claimant, but instead between Greenheart Homes (Trinidad) Limited and the claimant.

[26] Learned Counsel has submitted that unless a third party has a contractual right or statutory right to do so, it cannot file a claim against an insurance company under an insurance contract to which he is not a party. The third party would have to file a claim against the contractor under the construction contract and seek to join the insurance company as a party. In the present case, Counsel has noted that no party to the construction contract was a party to the insurance contract, and further the claimant has not filed a claim against the party with whom it contracted the construction services i.e., Greenheart Homes (Trinidad) Limited.

[27] It is noted further by learned Counsel, that an additional difficulty for the claimant would be the absence of a finding of fact by any court that there has been any default under the construction contract with Greenheart Homes (Trinidad) Limited which would require the insurer to satisfy its obligations under the Performance Bond with Greenheart Homes (Trinidad) Limited. Without such a judicial finding or an admission by Greenheart Homes (Trinidad) Limited, the claimant would not be able to invoke the terms of the Performance Bond if in fact Greenheart Homes (Trinidad) Limited had one. Counsel opined that this further emphasizes the lack of privity which affects the claimant in its claim against Nagico.

[28] Learned Counsel further submitted that the common law rule is that nobody except a party to a contract can acquire rights under it and that it would be wrong to allow C to sue on a contract when he could not be sued on it. In support of this contention learned Counsel cited Lord Haldane LC in Dunlop v Selfridge [1915] AC 847 when he stated:

> "My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue upon it. Our law knows nothing of a jus quaesitum tertio arising by way of contract".

Learned Counsel has submitted, therefore, that there is no privity of contract between the claimant and defendant, and that Kasswebb's proper recourse is against Greenheart Homes (Trinidad) Limited, and not against a stranger, Nagico. Learned Counsel has accepted hypothetically though, that if there was a valid, non-voidable and enforceable insurance contract with Greenheart Homes (Trinidad) Limited, notwithstanding the lack of privity to that contract on the part of Kasswebb; Nagico would be liable in such

circumstances to satisfy its obligations under the Bond. She noted that this would be because of the very nature of a Performance Bond, and also because an ordinary contract can provide for one of the parties to provide a benefit or indemnity to a non-party to the contract.

[29] With respect to issue of mistake, learned Counsel has advanced the position that because of the claimant's alleged admission that there is no privity of contract between the claimant and the defendant, it cannot properly be submitted by the claimant that a "mistake" was made by Nagico in naming GHL in the Performance Bond instead of Greenheart Homes (Trinidad) Limited. Counsel has noted that only one of the parties to the contract can assert that a mistake has occurred. A stranger to the contract, even though an intended beneficiary under the contract, could not seek rectification of the contract between the parties. To underscore this point learned Counsel cited Halsbury Laws of England 4th Edition, Vol. 25 at Paragraph 92 which states:

> "Where the policy issued does not correctly embody a contract previously agreed between the parties, either party may apply for its rectification. Rectification will only be granted on the strongest evidence of mutual mistake. Rectification can be claimed after loss has been suffered. In order to obtain it must be shown that there was prior agreement between the parties differing from that purporting to be embodied in the policy; if the parties were never in fact in agreement the court may order the policy to be set aside and premiums returned".

Learned Counsel contended that the court does not have the power, statutory, inherent or by the common law to correct a mistake in a contract at the behest of a person not a party to the contract. Counsel noted that Nagico, who is a party to the contract, has asserted that no mistake was made since the information provided for the Bond was provided by the Director of GHL and it was that information that was used in the Bond. As a consequence, Counsel opined that the contra proferentem rule does not apply and it is not a question of ambiguity or lack of clarity which requires an interpretation of the contract. Counsel noted further that although the claimant alleges mistake, no particulars of fact of the alleged mistake have been pleaded.

[30] Learned Counsel has submitted, therefore, that the court is obliged to interpret the Performance Bond as it finds it and that it cannot amend it by substituting one party for another at the behest of a non-party. Finally, Counsel further submitted that Nagico is not the party against whom the claimant can legally make a claim as no contract of insurance exists between the parties, nor can the claimant show that it is a benficiary of a contract entered into in its favour.

Respondent/Claimant's Submissions

[31] Learned Senior Counsel for the respondent/claimant, Mr. Ian Benjamin, first submitted that the defendant has advanced the wrong test by which the application should be adjudicated. He noted that the correct test, which is binding on this court, can be found in Citgo Global Custody NV v Y2K Finance Inc. (BVI High Court Civil Appeal No. 22 0f 2008), where it was stated:

> "On hearing an application made pursuant to CPR 26.3 (1)(b) the trial judge should assume that the facts alleged in the statement of case are true. Despite this general approach, however, care should be taken to distinguish between primary facts and conclusions or inferences from those facts. Such conclusions or inferences may require to be subjected to closer scrutiny".
>
> "Among the governing principles stated in Blackstone's Civil Practice 2009 the following circumstances are identified as providing reasons for not striking out a statement of case: where the argument involves a substantial point of law which does not admit of a plain and obvious answer; or the law is in a state of development; or where the strength of the case may not be clear because it has not been fully investigated. It is also well settled that the jurisdiction to strike out is to be used sparingly since the exercise of the jurisdiction deprives a party of its right to a fair trial, and its ability to strengthen its case through the process of disclosure and other court procedures such as requests for information; and the examination and cross-examination of witnesses often change the complexion of a case".

[32] It was also submitted by learned Senior Counsel that all the matters raised by Counsel for the defendant are issues of facts to be determined by a court after hearing the evidence. He noted that an issue as to mistake is an issue of fact and that an issue as to duty of care is quintessentially an issue of fact applying the relevant law.

[33] With respect to the issue of privity of contract, learned Counsel has noted that the submissions of the defendant make it unnecessary for the claimant to respond since Kasswebb is the only party that can sue on the Performance Bond. Counsel noted that the Performance Bond on its face refers to three separate parties as required by law, namely; Nagico (the Surety), Kasswebb as Obligee (the Employer) and Greenheart Homes Limited as Principal (the Contractor) and it expressly provides that:

> "No right of action shall accrue on this Bond to or for the use of any person or corporation other than the Employer named herein or his heirs, executors, administrators, successors and assigns of the Employer".

Counsel submitted therefore that the claimant is privy to and entitled to bring an action on the Bond. Counsel noted further that the Performance Bond refers to and expressly incorporates the building contract of 22nd January, 2010 between Kasswebb and Greenheart Homes (Trinidad) Limited, and that the only conflict is one over the names i.e., Greenheart Homes (Trinidad) Limited instead of Greenheart Homes Limited. He suggested that this was an error and is an issue arising on the amended statement of claim on which evidence must be led and a determination be made by the court after trial.

[34] Learned Counsel has taken issue with Counsel for the defendant with the statements in her submissions that (a) the Performance Bond is a contract Uberrima Fides - of utmost good faith; and that (b) there must be a finding of fact by a court that there has been a default under the construction contract and that the claimant (Employer) cannot without

such a judicial finding or an admission by the contractor (Principal) seek to enforce the terms of the Performance Bond. It is the view of learned Counsel, that these statements appear to have been based on the misconception by the defendant that the Performance Bond is a contract of indemnity and not a contract of guarantee.

[35] To highlight the differences between insurance and suretyship, learned Counsel cited MacGillivray on Insurance Law 11th Edition, Pages 1016-1018 where the learned notes that:

> "There are three elements of distinction between contracts of guarantee and insurance in this passage. First, the motives of the parties; an insurer takes business for money, while a surety undertakes responsibility as a friend perhaps for no consideration. Secondly, the manner of dealing; an insurer usually receives his business by dealing with the insured (often through a broker) not by dealing with the person whose fidelity or solvency he is insuring, while a surety will usually be approached by the principal debtor. Thirdly, the means of knowledge; an insurer has no means of acquainting himself with the nature of the risk and must rely on the insured to disclose all material facts, while the surety is usually fully aware of the risks he is being asked to assume or is, at least, in as good a position as the creditor to discover the true nature of the risk. If, therefore, there is evidence that the "guarantor" relied on the creditor to inform him about the risk, this will support the conclusion that the contract is one of insurance; if, however, he is sought by the principal debtor who explains the risk to him or leaves him to make his own inquiries, the contract is more likely to be held to be one of guarantee".

Learned Counsel has submitted, therefore, that a contract of guarantee is not a contract of utmost good faith, and the duty of disclosure is limited to exceptional circumstances. Counsel has also submitted that in the absence of an express provision in the Bond there need not be a judicial finding of default or acceptance by the Contractor that it is in default, to trigger the Surety's obligations under the Bond. In support of this submission Counsel cited Halbury's Laws of England, 4th Edition, Vol. 20, Paragraph 159 which states:

> "It is not necessary for the creditor before proceeding against the surety to request the principal debtor to pay or to use him although solvent unless this is expressly stipulated for ….".

[36] With respect to the defendant's position in seeking to avoid its obligations under the Bond by claiming that the contract of suretyship is voidable because of the misrepresentations made by the Principal Debtor to it when applying for the Bond, learned Counsel cited Chitty on Contracts, Vol. 2, Paragraphs 44-024 – 44-028 to underscore the point that the grounds on which a contract of suretyship can be vitiated have not be shown to exist in the present case. In Chitty the learned author noted:

> "In general, a contract of suretyship may be vitiated on the same grounds as other contracts, for example it may be voidable on the ground of the creditor's fraud or undue influence. However contracts of suretyship give rise to two particular

questions which relate to possible vitiating elements; the first is under what circumstances the contract may be vitiated by the pre-contractual conduct not of the creditor but of a third party, notably the principal debtor ….".

"For a party to a contract to avoid it on the ground of fraud, misrepresentation or actual undue influence, he must show some action or conduct by the other party to the contract whether this is a misrepresentation of fact or wrongful conduct amounting to undue influence".

"More difficult, therefore, is the question whether a creditor may be affected by the fraud, misrepresentation, or actual undue influence of a third party, often the principal debtor, on the surety and whether he will be affected by the existence of a relationship which gives rise to a presumption of undue influence between such a third party and the surety ".

"Older authorities give clear support for three propositions. First, a creditor is responsible for the actions and is imputed with the knowledge of any agent whom he chooses to employ in the transaction. … Secondly, where the creditor knows of or is otherwise a direct party to the misrepresentation or undue influence by the principal debtor to the surety, then the contract of suretyship is voidable at the latter's option. …Thirdly, where the dealings are such as fairly to lead a reasonable man to believe that fraud must have been used in order to obtain the surety's concurrence, the creditor is bound to make inquiry and cannot shelter himself under the plea that he was not called on to ask, and did not ask any questions on the subject. In some cases willful ignorance is not to be distinguished in its equitable consequences from knowledge".

Learned Counsel has submitted that while it is alleged that the misrepresentations of the principal debtor made the suertyship contract voidable, the defendant has not alleged that any of the situations outlined in the three propositions existed which would be capable of vitiating the suretyship contract because of the pre-contractual conduct of the principal debtor. He has submitted, therefore, that not only is the claimant a party to the suretyship contract and entitled to enforce it, but it is not affected by any misrepresentations made by the Contractor when applying for the Performance Bond.

[37] Learned Counsel in his final submission has addressed the issue of the duty of care. He noted, citing Charlesworth and Percy on Negligence, 11th Edition, Paragraph 2-02, where it is stated:

"The word "duty" connotes a relationship by which an obligation is imposed upon one person for the benefit of another to take reasonable care in all the circumstances".

He further noted that there is a clear relationship of proximity between the claimant and the defendant in that the defendant purported to issue a contract of guarantee for the benefit of and in favour of the claimant. Learned Counsel has, therefore, submitted that the

neighbour principle long established in Donoghue v Stevenson (1932) AC 562 is satisfied. The principle is stated as follows:

> "Who then in law is my neighbor? …persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which can be called in question".

Based on this principle, learned Counsel has suggested that the claimant is clearly closely and directly affected by the defendant's act. He noted that the defendant's act is its purported issue of a valid Performance Bond in favour of the claimant, which said Bond stated that only the claimant can sue on it, in the event of any default in the performance of the construction contract for the claimant's Kwanari Ecolodge project. Learned Counsel has noted as well that the loss suffered by the claimant caused by the defendant's breach of duty under the Performance Bond would be an application of the Hedley Byrne principle that was applied in Henderson and Others v Merrett Syndicates Limited and Others, 3 WLR (1994).

[38] Learned Counsel has argued that the defendant surety was aware that the claimant required a Performance Bond for the building contract and knew that the claimant would act in reliance on it. The Performance Bond issued by the defendant incorporated the terms of the building contract and specified that if the contractor defaulted on the contract it would be liable to the claimant. Learned Counsel is also of the view that from the Defence advanced by the defendant that it would appear that the defendant did not look at the building contract, the performance of which it was guaranteeing, or that it issued a Performance Bond in respect of the building contract without paying attention to who were the contracting parties and failed to ascertain certain basic information from the Principal before issuing the said Bond.

[39] It is opined by learned Counsel that if the defendant is right that no effective Bond was issued in law because they were mistaken as to who the Principal was, then this mistake was caused by their own negligence. He noted that they were purporting to guarantee a contract that they either had not seen or failed to properly ascertain the contracting parties to it and also failed to conduct basic due diligence on the Principal.

[40] In the premises, learned Counsel has posited that if the Bond is void the claimant would not be able to recover on it and as such would suffer loss. That loss would have resulted from the negligence of the defendant and as such damages are payable by the defendant to the claimant for that loss.

Analysis and Conclusion

[41] The court has reviewed the very helpful submissions of both learned Counsel and has perused the pleadings in the matter as well as the documentary evidence that have been

provided by the parties, namely, the Performance Bond and the Building Contract.

[42] The crux of the matter before the court centers on the Performance Bond and the Building Contract. In the former, the parties to the agreement are Greenheart Homes Limited and Nagico, with Kasswebb as Obligee; while in the latter, the parties are Greenheart Homes (Trinidad) Limited and Kasswebb Limited. The fact that Greenheart Homes Limited and Greenheart Homes (Trinidad) Limited are not the same parties in either the Performance Bond or the Building Contract is the core of the problem. This situation has grounded the basis for the defendant's contention that there is no privity of contract between the claimant and defendant and that the duty upon which the claimant brings its claim in negligence against the defendant does not exist.

[43] It is clear from the evidence that the Performance Bond expressly referred to and incorporated the Building Contract, however, there was clearly a conflict with the names recorded in both documents. While Counsel for the defendant has advanced the view that the conflict in the names was no mistake, I do not share that view and support the position advanced by Counsel for the claimant that the conflict in the names was indeed an error and should be resolved at trial since the only person who can provide the answer is Mr. Andy Boulonge.

[44] On the issue as to whether the defendant owed the claimant a duty of care, both Counsel have advanced divergent positions. Counsel for the defendant has stated categorically that the claimant has stated no legal basis to show that the defendant owed it a duty of care, and also argued that no contractual basis exist between the parties which could give rise to a duty of care. Again, I must express my agreement with the position advanced by Counsel for the claimant.

[45] While Counsel for the defendant's position is essentially grounded in contract and the alleged absence of privity between the claimant and defendant, the position of the claimant is essentially grounded in the general law of tort. In that regard, Counsel for the claimant has cited the learning from Donoghue v Stevenson and the well-established neighbour principle. Base on this principle, he noted that there is a clear relationship of proximity between the claimant and the defendant since the defendant purported to issue a contract of guarantee for the benefit and in favour of the claimant. It is noted further that if in fact the Bond issued by the defendant was not effective in law because of their mistake as to the Principal, this mistake was caused by their negligence in purporting to guarantee a contract that it would appear was not properly vetted by them.

[46] Support for the claimant's position on the duty of care issue is provided by Lord Goff of Chieveley in Henderson v Merrett Syndicates Limited when he stated:

> "It has been accepted, since before 1964, that an insurance broker owes a duty of care in negligence towards his client, whether the broker is bound by contract or not. Furthermore, in Punjab National Bank v de Boinville [1992] 1 Lloyd's Rep. 7 it was held by the Court of Appeal, affirming the decision of Hobhouse J., that a duty of care was owed by an insurance broker not only to his client but also to a specific person whom he knew was to become an assignee of the policy".

On the basis of this learning, it is clear that the claimant would have a cause of action against the defendant in tort.

[47] The jurisdiction to strike out a statement of case under rule 26.3 (1) (b) of the CPR is quite draconian and should be exercised in the clearest of cases where the court is satisfied that the case is hopelessly flawed for whatever reason and that it has no real prospect of succeeding at trial. All the authorities on this jurisdiction are clear on the point that a statement of case should not be struck out if there exist some issue of fact that would best be determined after the hearing of evidence at a trial.

[48] In the case at bar, there are a number of issues that Counsel for the claimant submitted should be determined at trial. One such issue and perhaps the most fundamental one to the resolution of this case, is whether a mistake was made with respect to the Principal of the Performance Bond issued by Nagico, in that the Principal should have been Greenheart Homes (Trinidad) Limited rather than Greenheart Homes Limited. Mr. Andy Boulonge, the Managing Director of both companies, who was the Proposer for the issuance of the Bond, is the only person who can provide the answer as to the question of mistake. This answer can only be obtained in a trial.

[49] It is the view of the court, therefore, that this is a matter that should proceed to trial for the issues of facts to be determined. In the premises, the application to strike out the statement of case is dismissed.

Costs

[50] At the case management hearing on 28th September, 2012 before Master Christine Pulchere (Ag.), the claimant was ordered to pay costs to the defendant. In this regard, the defendant was to file a note of costs within 7 days which would be assessed on the adjourned hearing on 21st November, 2012. When the matter came up for hearing on 21st November, 2012 before Master Agnes Actie (Ag.), it was adjourned to March, 2013 since Mr. Tommy W. R. Astaphan, Counsel for the defendant, was unable to attend since he was at the time sitting as a Judge in Montserrat. In the circumstances, on the hearing of the application on 11th March, 2013 Counsel on both sides agreed that the issue of costs should be determined at a subsequent date. In hearing the application I have awarded costs to the claimant.

Order

[51] In the circumstances, and for the reasons set out in the foregoing the court orders as follows:

(1) The application filed on 4th May, 2012 to strike out the statement of claim is dismissed.

(2) The matter should resume its normal course with a further case management hearing date to be set by the court.

(3) Costs to be assessed, if not agreed.

[52] The court is grateful for the helpful written and oral submissions and authorities of learned Counsel on each side.

Charlesworth Tabor
Master (Ag.)