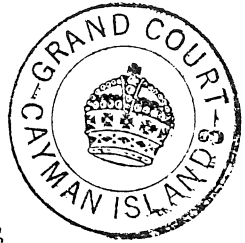


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1 IN CHAMBERS

2
3 IN THE GRAND COURT OF THE CAYMAN ISLANDS

4
5 CAUSE NO. 703 OF 1996



9-02-98

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8
9
10 BETWEEN: CAYMAN WATER COMPANY PLAINTIFF

11
12
13
14
15 AND; (1) CAYMAN HOTEL AND GOLF INC.
16 (2) ELLESMERE BRITANNIA LTD

17
18 DEFENDANTS

19
20
21
22 Appearances:
23 Ramon Alberga QC instructed by Bryan Ashenhiem for the plaintiff.
24 Ian Croxford QC instructed by Cherry Bridges for the defendants.

25
26
27 RULING

28
29 This is the plaintiff's application for further and better particulars of the
30 defence.

31
32 The plaintiff is the licensed concessionaire under the Water (Production and
33 Supply) Law (1996 Revision), ("the Law") for that geographic area of
34 Grand Cayman roughly described as the Seven Mile Beach and West Bay

1 areas and which will be referred to herein, -as in the licence - as “the
2 Licence area”.

3

4 The licence is granted by the Governor-in-Council and is expressed to be
5 exclusive for the Licence area.

6

7 The defendants are described in the pleadings as the developers of a hotel,
8 golf and condominium development (“the Britannia development”) which is
9 located within the Licence area.

10

11 The plaintiff’s claim against them is for an actionable breach of statutory
12 duty and in the alternative for an intentional and unlawful interference with
13 the plaintiff’s performance of its licence in that they have produced and
14 supplied and continue to produce and supply water to properties within the
15 Britannia development for reward, in a manner not permitted by the Law.

16

17 In this regard section 12 of the Law (as amended by Law 4 of 1991) is
18 important:

19 12(1) “Whoever
20 (a) subject to subsection (2) -

- 1 (i) produces water with the intention of
2 supplying it for reward;
3 (ii) supplies water for reward;
4 (b) contravenes any provision of this
5 Law; is guilty of an offence ----
6
7 (2) Paragraph (a) of subsection (1) has no
8 application to
9 (a) - (f) ----
10 (g) Water produced on private residential
11 property for domestic use thereon;
12 (h) water supplied by the management of
13 condominiums, apartment complexes,
14 multi-family dwellings, hotels or any
15 other commercial enterprise, for use
16 on their premises by residents therein,
17 provided that the water so supplied is
18 obtained from a concessionaire.”
19

20 The Law also provides that nothing in section 12(2)(g) or (h) shall affect the
21 production or supply of water (or both) provided that such production or
22 supply (or both) takes place from any water system or works which has
23 been in operation since before the 6th May 1991 - the effective date of the
24 amendment of the Law in 1991.
25

26 The plaintiff claims in this regard that the defendants’ production and
27 supply to properties, even though within the Britannia development, is not
28 “domestic” as those properties are separately and independently owned and

1 that the plant, in any event, is a different plant in terms of its capacity than
2 that which was used prior to 6th May 1991.

3
4 Some pivotal issues which immediately arise are obvious:

- 5
6 (i) is the licence one which is, in effect, an
7 exclusive licence for the Licence area?
8
- 9 (ii) is the production and supply of water by the
10 defendants within all phases of Britannia
11 development to be regarded as coming
12 within section 12 (2) (g); ie: private, for
13 domestic use? or
14
- 15 (iii) is the production and supply from a plant
16 which was in operation before the 6th May
17 1991 and if so has the capacity of the plant
18 increased so as to render it no longer the
19 same plant (for the purpose of the Law) as
20 operated prior to that date?
21
- 22 (iv) if the answer to (ii) is “no” and to (iii) “yes”
23 - would the resultant breach of the Law be
24 one which is actionable at the instance of
25 the plaintiff or only at the instance of those
26 charged with the responsibility of enforcing
27 the Law?
28
- 29 (v) would the plaintiff, in any event, have a
30 separate right of action against the
31 defendants for interference with its
32 contractual rights under the licence?
33

1 It is against that background that this request for further and better
2 particulars (“the particulars”) of the defence is to be considered.

3

4 I take them in turn but having regard also to the following general principles
5 as stated in the case law and in the Rules of Court:

6

7 “ The requirement to give particulars reflects the overriding principle that
8 the litigation between the parties and particularly the trial, should be
9 conducted fairly, openly, without surprises and, as far as possible, so as to
10 minimise costs” - (the view approved in RSC 1997 Edition page 308 and in
11 Astrovlanis Compano Narieva SA v Linard [1972] 2 All E.R. 647 at 649).

12 An important corollary to these principles is, however, that while particulars
13 are intended to inform the other side of the case it has to meet, that is to be
14 distinguished from requiring the other side to disclose the mode in which its
15 case is to be proved. The distinction between the obligation to provide
16 particulars and that of responding to interrogatories is not one which is
17 always readily observed by parties seeking particulars.

18

19

1 Under paragraph I of the Defence

2 Subject to discovery of the duly executed licence and save that it is not
3 admitted that any licence was “exclusive”; paragraph I of the statement of
4 claim is admitted.

5

6 The plaintiff nonetheless requests the further particulars of “the facts and
7 matters relied upon in support of the denial that the licence is exclusive”. In
8 response, the defendants state that the plaintiff is not entitled to particulars
9 of a denial.

10

11 Mr. Croxford develop the defendants’ position on this by pointing out that
12 the defence is a bare denial of the exclusivity of the licence not one which is
13 inseminated by additional averments so as to become a factual allegation or
14 a “negative averment”.

15 Examples of such “negative averments” are seen in IRC v Jackson (1960) 3
16 All E.R. 31 and McLaughlin v McLaughlin (1920) p. 439, where further and
17 better particulars were required.

18

1 Mr. Alberga has, however, quite clearly demonstrated that as the denial
2 stands, it leaves open the possibility of at least two separate and distinct
3 allegations of fact and as such the plaintiff ought not to be left to speculate
4 which it is that the defence intends. One possibility could be that it is to be
5 alleged that there was some other agreement which varied the expressed
6 exclusivity of the licence. Another that the Governor had no power to issue
7 an exclusive licence in the first place. A third possibility which also
8 emerged during the arguments is that whatever - as between the plaintiffs'
9 and the Governor - is the construct of the licence as to exclusivity, that
10 cannot bind the defendants.

11

12 I think it is plain that where such possibilities arise the defence should give
13 the particulars it intends to rely upon in this respect in order to avoid the
14 waste of time and money which may otherwise result in the plaintiff having
15 to prepare to answer the three possibilities, and perhaps others, which might
16 inferentially arise from the bare denial in paragraph one of the defence.

17

18

19

1 Under paragraph 3(2)

2 In the defence it is here averred that “the second defendant has at all
3 material times supervised the management and operation of the plant by
4 Hyatt Britannia Corporation Ltd.”

5

6 The plaintiff is concerned that it is to be alleged that it has joined the wrong
7 entity as defendant and so has raised the following matters to be addressed
8 in particulars:

9 - “Whether the defendant avers that Hyatt
10 Britannia is a producer and supplier of water
11 along with or to the exclusion of the
12 defendants.

13 - How or why it is material that Hyatt
14 Britannia manages and operates the plant.”

15

16 The defence responded that the matter is sufficiently pleaded. I agree. The
17 defence was obliged to disclose the facts about the role of Hyatt Britannia
18 and purports to do so in paragraph 3(2). In averring that matter of fact the
19 defence does not purport to traverse by denial the averment in paragraph 4
20 of the statement of claim that the first defendant produces and supplies
21 water to condominiums and subdivisions within the development. Nor is
22 there a denial that the development was developed by the second defendant

1 but is no longer owned by it, that aspect of the development having been
2 sold on to individual purchasers who, nonetheless, make payment to the
3 second defendant for water supplied by it.

4

5 On that state of the factual averments it then becomes a matter, in my view,
6 for the plaintiff to decide whether or not to join Hyatt Britannia Ltd as a
7 defendant.

8

9 Under paragraph 3(3) of the Defence

10 This request for particulars arises from a fundamental difference of
11 approach taken by the plaintiff and the defendants over the manner in which
12 the Britannia Development is described.

13

14 The plaintiff describes the development as including the condominiums and
15 subdivision properties, whereas the defendants describe the development as
16 including those properties as well as the hotel, golf course and beach club
17 properties.

18

1 This distinction is of fundamental importance to the case as the plaintiff has
2 no complaint over the supply of water to the latter three properties as they
3 remain owned by the defendants and so the supply would be for “domestic
4 purposes” within the contemplation of the Law. The plaintiff’s concern is
5 with the supply to the condominiums and subdivision properties which have
6 been sold on to third parties and so the production and supply to them is
7 said to give rise to the claim.

8

9 Essentially then the matter pivots around the issue of ownership of the
10 properties in the condominiums and subdivisions. But that - I agree with
11 Mr. Croxford - is a matter of public record and so is as much within the
12 domain of the plaintiff as of the defendant. I do, however, take the view
13 that the defendants should assist in the saving of time and costs by
14 providing particulars of any properties within the condominium or
15 subdivision areas of the development which are still owned by either of
16 them.

17

1 As they were all developed by the defendants, details of other properties
2 transferred to third parties but still supplied with water by the defendants
3 will be a matter of accounting if and when liability is established.

4

5 A request was also made hereunder for copies of planning approvals but
6 properly abandoned by Mr. Alberga during the arguments.

7

8 Under paragraph 4 of the defence

9 The defence has admitted the supply of water produced by the plant to
10 various parts of the development; ie: “the development” as defined in the
11 defence.

12

13 The plaintiff seeks particulars as to the times when water was supplied to
14 the various areas of the development, and the prices charged.

15

16 The defence objects on the basis that details of the quantities supplied to the
17 various areas are already provided in a schedule and that the request as to
18 prices is really in the nature of interrogatories as the defence itself makes no
19 issue of prices.

1

2 I accept the validity of the defendants' objections having regard to the
3 schedule which gives a summary of water supplied from 1993 to 1996,
4 including, and in particular, to the areas in dispute. To the extent the
5 matters of quantum of supply and prices will be relevant to the trial, I am of
6 the view that the matter is sufficiently pleaded as it stands. As in the case of
7 the request under paragraph 3(3), further details may become relevant if and
8 when liability is established. If required sooner, then I agree with Mr.
9 Croxford that discovery should be specifically sought as the further
10 relevance is a matter to be established by the plaintiff.

11

12 Under paragraph 12 of the defence

13 The defence has admitted to the "modification and modernisation" of the
14 plant. The plaintiff seeks details of all works which might have resulted in
15 the increase of the capacity of the plant. The defence has replied that
16 further particulars are provided in the maintenance logs which are available
17 for the plaintiff's inspection and asserts that the plaintiff would have had
18 this information had it done the appropriate inspections upon discovery.
19 Mr. Croxford also argued that it would be a waste of time and money for the

1 defence to extract those details when, in any event, the plaintiff's expert
2 witnesses will need to inspect the logs themselves to arrive at their own
3 opinions as to the extent of the changes to the plant. Moreover, global
4 figures as to the increase in capacity have already been given: 315000 U.S.
5 gallons per day as at 6th May 1991 to 400,000 U.S. gallons per day since
6 1995.

7
8 The request for further and better particulars of those at this stage suggests
9 the non-acceptance of the particulars given and is therefore in the nature of
10 interrogatories.

11

12 Under paragraph 20 of the defence

13 Hereunder the plaintiff seeks particulars of the averment that the plaintiff
14 "aided and abetted" any breach of the Law by the defendants in that at
15 various times during the currency of the plaintiff's licence the plaintiff
16 bought quantities of water from the defendants which was produced at their
17 plant. This paragraph of the defence is also to be considered in the context
18 of paragraphs 17,18 and 19 where particulars of those alleged transactions

1 and the agreements by which they were done are set out as the basis for a
2 specific defence of estoppel.

3

4 When taken in that wider context, it is my view that the defence in
5 paragraph 20; ie: that of being aided and abetted by the plaintiff in any
6 breach of the Law - is sufficiently well pleaded.

7

8 The application has ended in mixed results but more in favour of the
9 defendants than the plaintiff. I am nonetheless of the view that costs should
10 be in the Cause as each and every aspect of the request was contested by the
11 defence to the end. I so order.

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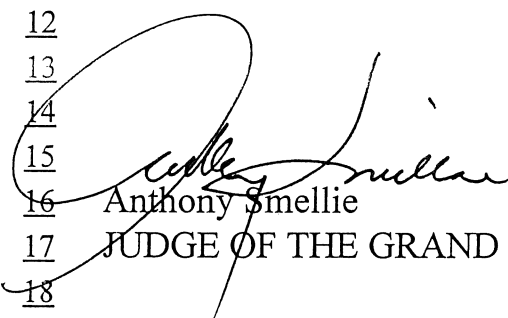
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20

21 Dated this 9th day of February 1998


Anthony Smellie
JUDGE OF THE GRAND COURT

