

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **CIVIL DIVISION**

3 **CAUSE NO. 568 of 2012**

4
5
6 **BETWEEN:**

7 **CAYMAN HEALTH LTD.**

8 **Plaintiff**

9 **AND:**

10 **TRINCAY MEDICAL SERVICES LTD.**

11 **Defendant**

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15
16 **Appearances:**

Mr. Kyle Broadhurst of Broadhurst LLC for Cayman Health Ltd.
Mrs. Stacy Thompson of Stacy Thompson Chambers for
Trincay Medical Services Ltd.

17
18
19
20 **Before:**

Hon. Justice Richard Williams

21
22 **Heard:**

26th June 2013

23
24 **Draft Judgment circulated:**

12th July 2013

25
26 **Date of Judgment:**

23rd July 2013



27
28 **JUDGMENT**

29
30 **Application**

31 1. I have before me the Plaintiff, Cayman Health Ltd.'s ("CHL"), Summons dated
32 16th January 2013 and filed pursuant to GCR Order 14, applying for final
33 judgment against the Defendant for the amount claimed in the Statement of Claim

1 with interest and costs. In the Summons CHL seeks an order dismissing the
2 Counterclaim of the Defendant pursuant to GCR Order 14, rule 12.

3
4 2. Further or in the alternative CHL seeks, in the Summons, an order that the
5 Defence and Counterclaim be struck out pursuant to GCR Order 18, rule 19(1)
6 (a), (b), (c), and/or (d) and/or under the inherent jurisdiction of the Court, and
7 judgment be entered in favour of CHL, on the grounds that the Defence and
8 Counterclaim:

- 9 (a) discloses no reasonable defence of cause of action;
10 (b) is scandalous, frivolous or vexatious;
11 (c) may prejudice, embarrass or delay the fair trial of the action;
12 (d) is otherwise an abuse of the process of the Court.



13
14 3. The Defendant, Trincay Medical Services Ltd ("TMSL"), although it opposes the
15 application, has failed to file an affidavit.

16
17 **The Procedural Background**

18 4. Proceedings were initiated by a Writ of Summons and Statement of Claim filed
19 on 10th December 2012. CHL's claim is for

- 20 (i) The sum of CI\$69,859 being outstanding fees for services
21 rendered, and
22 (ii) Contractual interest, as at 30th November 2012 amounting to
23 CI\$7,248.81 and continuing at a compound rate of 2% per month;
24 or

- 1 (iii) Alternatively, interest in accordance with Section 34 of the
2 Judicature Law (2007 Revision) at the prescribed rate, at 7th
3 December 2012 amounting to CI\$2,008.72 and continuing at the
4 rate of CI \$4.56 per day; or
5 (iv) Interest as aforesaid for such periods and at such rate as the Court
6 sees fit;
7 (v) Costs.
8

9 5. The Summons had inserted in it a hearing date of 19th June 2013. It is important to
10 note that at the foot of the Summons the following was set out:

11 *“TAKE NOTICE that a party intending to oppose this application,*
12 *or to apply for a stay of execution should send to the opposite*
13 *party, to reach him in sufficient time to enable him to reply and in*
14 *any event not less than three days before the date above*
15 *mentioned, a copy of the affidavit intended to be used.”*
16



17 6. On 21st December 2012, TMSL filed its Defence and Counterclaim. Paragraph 6
18 of the Defence reads:

19 *“Paragraphs 6-14 are denied and the Defendant will state that*
20 *they notified the Plaintiff of irregularities in invoices being billed*
21 *to said Defendant and that despite the irregularities the Defendant*
22 *continued to use the Plaintiff’s services in good faith that the*
23 *irregularities would be rectified and would cease. The*
24 *irregularities included over-billing and billing of patients to the*
25 *Defendant that were not patients of the Defendant. The Defendant*
26 *discontinued use of the Plaintiff’s services in approximately June*

1 2012 at which point they lost confidence in the Plaintiff to produce
2 accurate invoices with respect to the Defendant's account."
3

4 7. Paragraph 7 of the Defence reads:

5 *"The Defendant will state further that they have maintained a*
6 *willingness to pay the amounts which have legitimately accrued to*
7 *the Plaintiff for its laboratory services rendered to the Defendant*
8 *and the Defendant has been frustrated in this regard to the extent*
9 *that the billing irregularities are so rife that the exact amount*
10 *owed can only be determined by an audit of the entire period that*
11 *the Defendant used the Plaintiff's services. The Defendant was in*
12 *the process of conducting this audit internally when these*
13 *proceedings were commenced and the Defendant served with the*
14 *Plaintiff's Writ of Summons. The Defendant therefore specifically*
15 *denies that it is the amount of KYD \$77,107.96 which is owed to*
16 *the Plaintiff."*
17

18 8. Paragraph 8 of the Defence reads:

19 *"The Defendant will state further that the Plaintiff had a*
20 *responsibility to prepare accurate invoices to them and to conduct*
21 *its own audit before commencing the suit in light of the*
22 *Defendant's repeated assertions that the invoices tendered were*
23 *irregular and that had the Plaintiff so acted inconsistencies would*
24 *have been apparent to them and the appropriate adjustments made*
25 *to the invoices."*
26

27 9. At paragraph 9 of the Defence TMSL plead a general traverse.



1 10. The Counterclaim simply repeated paragraphs 1 to 10 of the Defence and stated
2 that, as a consequence of their actions, CHL's claim was unenforceable in light of
3 the invoicing and irregularities. The only claim is for a declaration that the
4 amount of CI\$\$77,107.96 is not owed.



5
6 11. TMSL filed its Acknowledgement of Service of Writ of Summons after it had
7 filed its Defence and Counterclaim, namely on 24th of December 2012. TMSL
8 indicated therein its intention to defend the claim.

9
10 12. On 16th January 2013, CHL filed the Summons which I am considering herein. A
11 hearing date was fixed for 19th June 2013. The filing of the Summons after the
12 filing of the Defence and Counterclaim does not preclude CHL from applying for
13 summary judgment.¹ CHL filed an Affidavit in support of the Summons sworn by
14 Stephen Pickering on 14th May 2013.

15
16 13. On 1st February 2013 the Listing Form was submitted by Mr. Broadhurst to the
17 Listing Officer. The Listing Form, which was signed by Mrs. Thompson, brought
18 her dates to avoid, (dates which included the whole of July, August and
19 September) to the attention of the Listing Officer. In his accompanying letter Mr.
20 Broadhurst requested that the matter be listed before Mrs. Thompson's July dates
21 to avoid, preferably in March or April 2013.

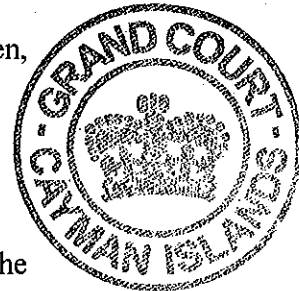
¹ McLardy v Slateum (1890) 24 QBD 504 Pollock B at page 506

1 14. Mr. Broadhurst indicated that he received his Summons from the Registry with
2 the hearing date of 19th June 2013 inserted in or around April/May 2013. The
3 Summons was served on the offices of Mrs. Thompson, on 21st May 2013.

4
5 15. On 28th May 2013 Mrs. Thompson contacted the Listing Office to inform them
6 that the date conflicted with a part-heard Court fixture. On the same date the
7 attorneys for CHL indicated that they could not agree to the fixture being broken,
8 unless the matter could be given a new date on or before 26th June 2013.

9
10 16. On 5th June 2013 an email was sent by Mr. Broadhurst in which he stated that he
11 was proceeding on the basis that 19th June 2013 hearing would be effective as no
12 communications had been received in reply to his firm's email of 28th May 2013.
13 On the same day, Mrs. Thompson responded to Mr. Broadhurst's email reiterating
14 her professional difficulties and requesting information about when the listing
15 form had been submitted and when the hearing date had been first been endorsed
16 on the Summons. Later that day, Mr. Broadhurst wrote to Mrs. Thompson
17 reiterating that his client could not consent to an adjournment to September to
18 accommodate her dates to avoid.

19
20 17. There were further email exchanges between the attorneys and the Listing Officer
21 on 5th June 2013. Mr. Broadhurst indicated that it would be inappropriate to have
22 the matter listed only for mention as this would result in the substantial hearing,



1 of an application for summary judgment issued in January 2013, being adjourned
2 until October 2013.

3
4 18. On 10th June 2013 the Listing Officer indicated that she was endeavouring to list
5 the matter before Mrs. Thompson's leave commenced on 28th June 2013. On the
6 same date the Listing Officer indicated that it could be listed on 26th June and
7 sought the consent of the parties. On 10th June 2013 Mr. Broadhurst confirmed his
8 availability. On 11th June 2013 Mrs. Thompson sent an email to the Listing
9 Officer in which she stated:

10 *"Please set for June 26th 2013."*
11

12 On the face of the emails, both parties were agreeing to 26th June 2013, being the
13 effective hearing date of the Summons. Therefore, the Court is entitled to expect
14 both parties to be fully prepared for the hearing.
15

16 19. It is significant that on 19th June 2013, Mr. Broadhurst wrote to Mrs. Thompson
17 concerning the parties' evidence for this hearing. Mr. Broadhurst pointed out that
18 no evidence had been filed by TMSL in answer to the Summons for summary
19 judgment. Although he was not required to do so, he again reminded Mrs.
20 Thompson that the minimum time for service of TMSL's evidence is three clear
21 days prior to the hearing. He reminded her that any such evidence should be filed
22 by on 20th June 2013. Having regard to this reminder and the Notice set out at the



1 foot of the Summons, Mrs. Thompson and her client should have been fully aware
2 about the requirement to file their evidence in a timely fashion.

3
4 20. On 24th June 2013 the Clerk of Court received a letter from Mr. Broadhurst dated
5 21st June 2013. In the letter reference was made to the Affidavit sworn by Stephen
6 Pickering on the 14th May 2013. The Affidavit and exhibits contain confidential
7 information in relation to medical patients. Mr. Broadhurst indicated that both
8 parties were in agreement that it was necessary for the Affidavit and all future
9 affidavits produced in the proceedings which included similar confidential
10 information to be sealed by the Court, so that only the parties and the Judge had
11 access to them. He enclosed a draft order. I note that the Court file contains an
12 Affidavit sworn by Stephen Pickering on 12th March 2013, but filed on the 23rd
13 May 2013. The Affidavit is in support of an application for the sealing of the
14 affidavit.

15
16 21. Upon consideration of the contents of the Affidavit I am content to approve the
17 draft order. Accordingly I order that:

- 18
19 (i) The Affidavit of Stephen Pickering dated 12th March 2013 and produced
20 in support of the Plaintiff's application for summary judgment and/or
21 strike out, shall be sealed by the Court, and only the parties shall have
22 access to it;





1 (ii) Any future affidavits produced in these proceedings which refer to
2 confidential patient information, shall also be sealed by the Court and only
3 the parties shall have access to them; and

4 (iii) Costs in the cause.
5

6 22. To ensure that there is no delay in providing the Order, and as both parties seek
7 the making of the Order, I have signed the same, directed that it be sealed and
8 given to the parties prior to the completion of this judgment.
9

10 23. On 26th June 2013 the hearing commenced in the normal manner. However, I
11 interrupted Mr. Broadhurst, when he was part way through his submissions, to
12 seek confirmation from Mrs. Thompson that her client had failed to file any
13 affidavit evidence. It was at this stage that Mrs. Thompson brought, for the first
14 time, to the Court and to Mr. Broadhurst's attention the fact that she had filed a
15 Summons prior to coming into Court at 9:30 a.m. seeking leave to amend the
16 Defence. The Court was then shown a draft copy of the Summons. The Court was
17 informed that a proposed draft amended defence had still not been prepared. It is
18 unclear at what stage during the hearing, if at all, Mrs. Thompson would have
19 raised this application if I had not sought clarification about the lack of affidavit
20 evidence.
21

22 24. During the hearing I afforded Mrs. Thompson an opportunity to explain why, if
23 she had sought to properly make this application, a draft amended defence had not

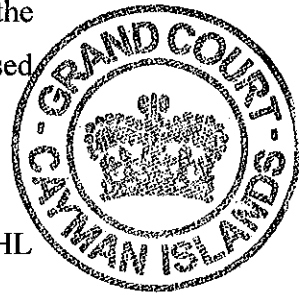
1 already been prepared. Rather surprisingly, at a later stage of her submissions on
2 this point, Mrs. Thompson, made an oral application for leave to file an affidavit.
3 Again, no affidavit for which leave was being sought had been prepared by Mrs.
4 Thompson. The reason given for the very late applications in the absence of any
5 pleadings, was that, due to the detailed content of the Affidavit of Mr. Pickering,
6 the 29 clear days after receipt of the same was not sufficient time to enable an
7 amended defence to be drafted.



8
9 25. During the hearing I gave an Ex Tempore Ruling in relation to the oral
10 applications for an adjournment to enable the Defence to be amended and an
11 affidavit to be filed. That Ex Tempore Ruling is recorded in my notebook and I do
12 not now intend to repeat the contents herein in any detail. In my ruling I reminded
13 myself that CHL were required to file and serve their affidavit evidence not less
14 than 10 days prior to the hearing. I found that Mr. Broadhurst had in fact served a
15 sworn but un-issued copy of the affidavit on Mrs. Thompson 33 clear days prior
16 to the hearing and had served an issued copy on Mrs. Thompson 29 clear days
17 prior to the hearing. I was satisfied that 29 days was more than enough time for an
18 amended defence to have been drafted and summons seeking leave to amend to
19 have been prepared and served. I was also satisfied that:

- 20 (i) as TMSL had had 26 clear days in which to file and serve their affidavit,
21 (ii) as the Summons clearly set out the required time frame for filing any
22 affidavit evidence, and

1 (iii) as Mr. Broadhurst had in writing drawn to Mrs. Thompson's attention the
2 lack of affidavit evidence and the time frames for providing the same,
3 there had been ample time and opportunity for an affidavit to have been
4 drafted, filed and served. From what the Court was told by Mrs.
5 Thompson it appeared that the preparation of either pleading had not even
6 commenced. Accordingly, having reminded the parties that any defendant
7 who produces evidence in such a way should not assume that an
8 adjournment would be granted, having considered all of the circumstances
9 of the case including the unmeritorious approach to preparation for the
10 hearing taken by TMSL and potential prejudice to both parties, I refused
11 the application for an adjournment.
12



13 26. I note that at paragraph 29 and 30 of Mr. Pickering's Affidavit he states that CHL
14 claims, as an alternative to the Court granting summary judgment in the full
15 amount alleged to be owed that CHL, the amount owed, which is not disputed
16 between the parties, preserving the right to pursue the remainder which is in
17 dispute. He states that the January letters highlight a dispute totalling
18 CI\$16,576.41 for testing done between January 2011 and June 2012. Mr.
19 Pickering goes on to say that CHL claims CI\$69,859.15 in the Writ of Summons
20 in respect of the principal amount due and taking TMSL's objections at the
21 highest, that CI\$53,282.74 should be awarded by way of summary judgment.
22

23 27. During the course of the hearing it was conceded by Mrs. Thompson, on firm
24 instructions from her client given in Court, that a consent judgment could be
25 entered in favour of the CHL in the sum of CI\$60,000. This was because TMSL

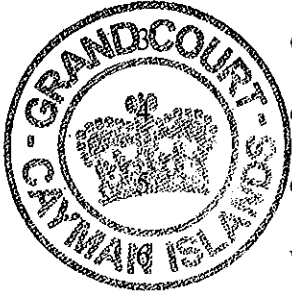
1 did not dispute that this sum was owed. Therefore, by consent, during the hearing
2 I ordered that CHL be awarded CI\$60,000 as partial judgment against TMSL and
3 entered judgment in that amount. Prior to concluding the preparation of this
4 judgment a draft order, which had been approved by both parties, was submitted
5 by them for my consideration. On 2nd July 2013, I signed the order, which
6 provided that:

- 7 (i) Judgment was entered for CI\$60,000,
- 8 (ii) TMSL's oral applications for adjournment were refused, and
- 9 (iii) Judgment with respect to all remaining issues was reserved. That Order
10 has already been sealed and provided to the parties. This has put CHL in a
11 slightly better position than the alternative claim sought for this hearing
12 set out at paragraph 29 and 30 of Mr. Pickering's affidavit.



13
14 **Factual Background**

15 28. CHL operates a medical laboratory in Grand Cayman. TMSL operates a
16 polyclinic with medical facility on Grand Cayman which offers medical services
17 to the public through a team of physicians. By agreement between the parties
18 CHL agreed to receive biological samples sent by physicians working for TMSL,
19 undertake the requested testing of those samples and provide the results of that
20 testing to TMSL. TMSL agreed to pay CHL fees for the provision of these
21 services.

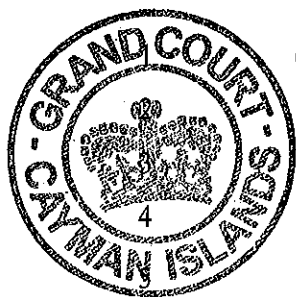


1 29. CHL submit that the agreement was partly oral, partly written and partly by
2 conduct and/or as a result of a course of dealing between the parties. CHL
contended in the Statement of Claim that the oral part of the agreement was made
during three meetings held at TMSL's premises in Camana Bay in 2010. CHL set
out at paragraph 5 in the Statement of Claim the terms of the agreement they feel
were reached by the end of the meetings, namely:

- 7 (i) TMSL would place orders for testing in paper form:
- 8 (ii) The paper orders would be sent with the biological samples to be tested,
9 via CHL's courier;
- 10 (iii) CHL would undertake testing of the samples and provide the results to
11 TMSL;
- 12 (iv) Where payment was made by TMSL within specified periods, discounts
13 would be applied to the fees charged by CHL; and
- 14 (v) CHL would issue monthly paper invoices to TMSL for the provided
15 services.

16
17 30. In relation to the part of agreement in writing, CHL contend at paragraph 6 in the
18 Statement of Claim, that it was contained in, or could be inferred from the
19 following documents:

- 20 (i) Various paper orders for testing, endorsed by signatures, accompanying
21 biological samples dated between April 2010 and June 2012;
- 22 (ii) Monthly paper invoices sent by CHL to TMSL;
- 23 (iii) Email notifications of the applicability of discounts to the charges
24 rendered by CHL against TMSL for their services;
- 25 (iv) Reminders for outstanding fees sent by email, by CHL to TMSL; and



- (v) TMSL were notified by written notice in March 2012 that the discount to the fee was withdrawn and the rate of interest that CHL would charge TMSL on outstanding fees would be compound interest at a rate of 2% per month.

6 31. In relation to the part of agreement made by conduct, CHL contend at paragraph 7
7 in the Statement of Claim, that the conduct consisted of or could be inferred from
8 the following:

- 9 (i) In full knowledge of the matters referred to in paragraphs 5 and 6 of the
10 Statement of Claim TMSL continued to place orders with CHL between
11 April 2010 and June 2012: and
12 (ii) Save for a small outstanding balance, invoices rendered by CHL between
13 April 2010 and September 2011 was satisfied by TMSL.

14
15 CHL relies upon what it terms a continued course of dealing, which they
16 contained reflects TMSL's agreement and acceptance of the above terms.
17 Alternatively, CHL contended that by its silence TMSL permitted and induced
18 CHL to believe that it had agreed to and accepted the said terms. CHL state that
19 due to placing reliance upon TMSL's conduct it continued to provide its services
20 to them.

21
22 32. CHL contended it provided services to the value of CI\$103,201.88. CHL state
23 that interest on outstanding fees charged at a contractual compound basis of 2%
24 per month, amounted to CI\$12,558.29, by 30th of November 2012. It is agreed



that TMSL made payments totalling CI\$38,661.21. CHL submits that, despite demands for payment, this leaves an outstanding principal balance of CI\$69,859.15, outstanding interest of CI\$77,248.81 as of 30th November 2012, making a total of CI\$77,107.96. CHL claim that the non-payment of CI\$77,248.81 amounts to a breach of contract.

5

6

7

33. CHL contend that at the outset TMSL would settle their invoices on a weekly basis by cheque. CHL stated that after the first few months payments were made monthly. CHL state that, after that, TMSL failed to satisfy invoices that were being raised and that arrears accrued from September 2010. They state that agreements were made between the parties for payments to be made to clear the accrued arrears, but TMSL further defaulted and arrears increased.

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34. In support of their contention CHL produced a series of emails commencing 2nd April 2012 and running to 3rd September 2012. In the emails TMSL are informed about the level of arrears. In an email sent on the 17th May 2012, TMSL were reminded of an agreement for the continuation of service if a cheque was received every week until the balance reached a reasonable figure. In an email dated 28th May 2012 CHL refers to TMSL's agreement to pay \$5,000 per week effective 23rd April 2012. In the email CHL go on to say that:

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"Please note that effective from the end of the month on any payments not received within 45 days result in the full charges and the 28% discount will not be applicable to your account."

1 Further emails followed and in an email dated 21st June 2012 TMSL state that
2 their medical director had been spoken to about the outstanding balance and the
3 cheque would be delivered on that day. On 11th July 2012 CHL sent a reminder
4 about payments that were due and that the May 2012 invoice must be paid in full
5 by 15th July in order to receive the 25% discount. The email set out the figure for
6 the level of arrears with interest that had accrued at 2%. CHL also indicated in the
7 email that TMSL's written and verbal promises to pay off arrears on a regular
8 basis had not been adhered to and that the full amount of arrears was due and was
9 accumulating 2% interest rate. In an email dated 12th July 2012 CHL
10 acknowledged payment of \$7,000 and mentioned that there would be a 30%
11 discount. I noticed that rather confusingly this is different to the level of discount
12 mentioned in the previous emails which had been 25% and 28%.

13
14 35. CHL's attorneys sent a demand letter to TMSL on 19th October 2012. On the
15 same date TMSL sent a letter to CHL headed:

16 *"Ref: Payment on account"*

17
18 in which they stated:

19 *"Please accept these post-dated cheques as payment for*
20 *outstanding laboratory bills from Trincay Medical Services Ltd."*

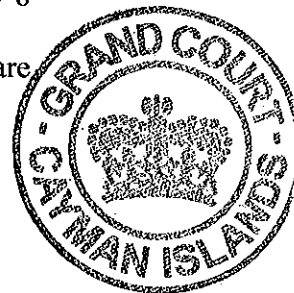


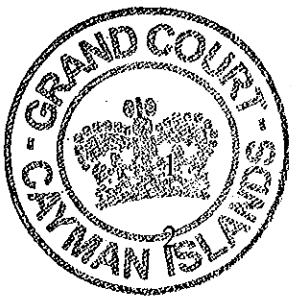
1 CHL contend that a number of CI\$5,000 post-dated cheques accompanied the
2 letter. I am also told that CHL refused to cash the cheques, not wishing to be
3 regarded as accepting the figure of the arrears suggested by TMSL.

4
5 36. For the reasons referred to in the Defence and mentioned in paragraphs 6 to 8
6 herein, TMSL now contest the figures for the amounts owed. These reasons are
7 that:

- 8 (i) The tests were not ordered,
- 9 (ii) Some individuals tested were not patients of TMSL,
- 10 (iii) There had been double billing for the same test and incorrect fees had
11 been charged.

12
13 37. CHL say that at no time prior to their demand of October 2012 did TMSL raise
14 any of the concerns set out in their Defence. As TMSL have chosen not to file an
15 affidavit, there is no evidence before the Court in support of their pleaded
16 contention that they notified CHL of irregularities and thereafter continued to use
17 their services. In the email evidence that is before the Court there is no mention of
18 concerns about billing irregularities being raised by CHL. In fact, the emails seem
19 to reflect an acceptance by TMSL that sums were past-due and do not reflect an
20 offer not to clear arrears in a timely manner but over a protracted period of time.
21 There is no particularisation in the Statement of Claim of any notification of a
22 concern about irregularities prior to January 2013, by which time no further
23 transactions were taking place between the parties. CHL contend that that the





allegations in the Defence and Counterclaim and in the January letters are attempts by TMSL to improperly avoid or delay payment of the sums due

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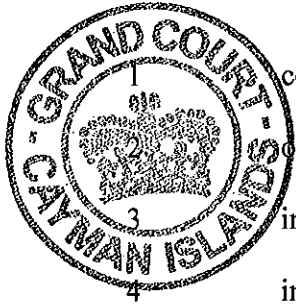
4 38. In a letter dated 2nd January 2013 from Mrs. Thompson to Mr. Broadhurst, CHL
5 outlined in a schedule "*anomalies*" in invoices that had been received for the
6 period January 2012 to June 2012. CHL contended in the letter that the difference
7 was CI\$10,717.38. Mrs. Thompson stated that her client was keen to settle the
8 matter, but on terms which acknowledge that the amounts due will have to be
9 revised. In the letter, Mrs. Thompson asked for the post dated cheques to be
10 returned. She also set out her client's proposal that there be \$10,000 paid each
11 month until the arrears owed are cleared, apparently intending that the figure
12 would be arrived at after the parties had discussed settlement.

13

14 39. In a letter dated 15th January 2013 Mrs. Thompson informed CHL that her client
15 had continued the process of reviewing the invoices and had discovered further
16 billing anomalies. She said that these were for the period January 2011 to
17 December 2011 and that they amounted to \$5,859.03 and again provided a
18 schedule.

19

20 40. Upon receipt of the January letters, CHL reviewed the invoices and cross-
21 referenced them with the documentary evidence and the challenges made by
22 TMSL. Attached to the Affidavit of Mr. Pickering sworn on 14th May 2013 are



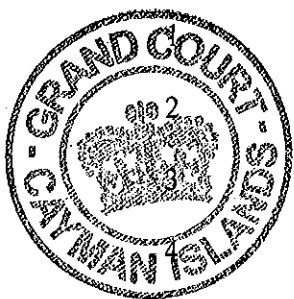
copies of the invoices raised by CHL. Mr. Pickering also exhibited test results order requisitions and written correspondence between the parties supporting the invoices. Mr. Pickering also exhibited a spreadsheet responding to the complaints in both of the January letters.

5

6 41. When carrying out this review CHL accept that there were a few instances where
7 the complaints of TMSL had been justified. Having conducted a full review they
8 found that for the period January 2011 and December 2011 that \$418.04 should
9 be deducted and for the period January to June 2012 that \$921.09 should be
10 deducted. Mr. Pickering noted that, despite some of the complaints raised by
11 TMSL predating the invoices upon which these proceedings are based, a credit
12 had still been given where it was justified. Mr. Pickering exhibited to his
13 Affidavit, an amended spreadsheet containing the amount that CHL say is owed
14 by TMSL, namely, CI\$80,093.78.

15

16 42. In his affidavit, Mr. Pickering sought to address the complaints raised by TMSL.
17 The first complaint was that the tests billed for had not been ordered or the person
18 tested was not a patient of TMSL. Mr. Pickering outlined the procedure whereby
19 the physician at TMSL placed the order for the testing in a form called a
20 requisition. The forms which came from TMSL contained an electronic signature
21 of the physician who was ordering the test, as well as information about the
22 patient's details. Mr. Pickering has exhibited requisitions to meet the claim that

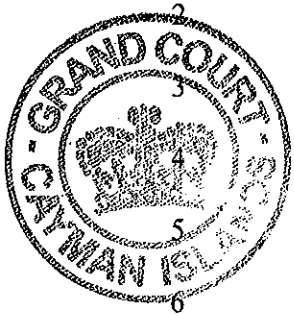


tests had not been ordered. In the attached spreadsheet he made reference to the requisitions in support of his contention that the tests were ordered. In the affidavit, he accepts that where it is agreed that the amount should not have been billed to TMSL that amount has been deducted and referred to in the spreadsheet.

5 Mr. Pickering notes that TMSL have raised complaints about a number of
6 invoices, which do not form part of the sums claimed by CHL. He has also
7 referred to these in the attached spreadsheets. Mr. Pickering states that they had
8 already reviewed the invoices before CHL issued the claim and removed the
9 invoices from the bill. He said that in instances where payment was made directly
10 by the patient that the related invoices contained a nil charge and therefore were
11 not included in the claim.

12
13 43. When dealing with the complaint of a test being double-billed Mr. Pickering
14 stated that on occasion a number of samples need to be taken from a patient
15 and/or a number of tests may need to be taken on a single sample. Mr. Pickering
16 has noted in the attached spreadsheet where he contends that appropriate multi-
17 testing has taken place, where the disputed test does not actually form part of the
18 claim and finally, where CHL agree that double-billing has occurred.

19
20 44. When dealing with the claim of incorrect fees being charged Mr. Pickering
21 informed the Court that most tests have a reference number, a CPT code. He
22 noted that most tests are subject to standard fees and exhibited a document setting



1 out the codes and fees. Mr. Pickering remarks that the complaints of overbilling
2 are not particularised in the Defence and this has made it difficult for CHL to
3 respond. Mr. Pickering accepts that some of the tests complained of by TMSL are
4 specified in the open correspondence from them. Mr. Pickering states that in the
5 attached spreadsheets he has responded to the specific tests complained of, and
6 attached invoices for the testing. He notes that there were instances when the
7 standard fee had been exceeded and he had reduced the invoiced amount down to
8 the standard rate.

9
10 45. Mr. Pickering referred to '*special tests*' which are not covered by the standard
11 fees. He states that CHL charge for the cost of special tests, plus an additional set
12 percentage uplift. Mr. Pickering noted that these tests are ordinarily performed
13 overseas and that they frequently take place after verbal discussion with the
14 treating physician who has requested testing. Although TMSL refer to
15 handwritten notes which they say recorded the verbal requests, Mrs. Thompson
16 indicated that they were challenged. Mr. Pickering said that the invoices for
17 special tests were sent to TMSL each month and they were not queried, and
18 TMSL were content to continue ordering the same type of tests.

19
20 46. In his Affidavit Mr. Pickering also referred to '*further testing*' which was required
21 to make an accurate diagnosis. These tests were also carried out overseas and
22 TMSL was charged a reasonable percentage above the actual costs to pay for

1 CHL's services. The testing was on occasion verbally requested by TMSL's
2 physicians or requested in requisition or by correspondence. Mr. Pickering
3 contends that only five of the disputes raised by TMSL relate to this further
4 testing. It is contended that CHL had no issue with the level of charges because,
5 as with the special tests, they never queried the monthly invoices and were
6 content to continue to order the tests.



8 **The Law - Summary Judgment**

9 47. What amounts to an unanswerable case under Order 14 and what suffices for
10 leave to defend? The brief answer is that CHL must be able to satisfy the Court
11 that TMSL cannot have any bona fide answer to the Statement of Claim. Thus, if
12 TMSL can put forward facts which, if true, would constitute a prima facie
13 defence, CHL cannot take advantage of Order 14. Further, and for completeness
14 sake, an arguable point of law may defeat the application. Also, for the purpose
15 of Order 14, TMSL's pleadings must be accepted as true except where they are
16 contradicted by their own documents or are palpably false. Evidence of bad faith
17 or of the Defence being a sham or of suspicious circumstances surrounding it may
18 negate its acceptance and justify conditional leave to defend. Leave to defend may
19 be granted in the absence of an issue or question in dispute which ought to be
20 tried if it appears to the Court that "*for some other reason there ought to be a*
21 *trial.*" To express it even more succinctly, Order 14, as has been repeatedly said
22 and applied is for cases where, there being plainly no defence and no other reason

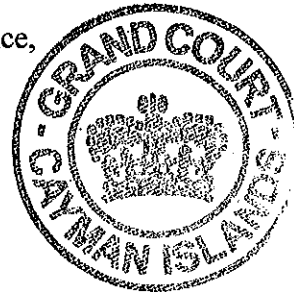
1 for trial, it would be unjust (and abusive of the process of the Court) to permit a
2 trial.

3
4 48. During the hearing Mrs. Thompson embarked on a rather laborious exercise of
5 going through the spreadsheets. The time spent on such an exercise would have
6 been drastically reduced if an affidavit in reply highlighting why the
7 representations made in the affidavit and exhibits were questionable had been
8 filed. A defendant who, when faced with a summary judgment application, should
9 understand that they place themselves at risk by not filing any affidavit evidence,
10 this is especially so if the Defence is not well drafted.

11
12 **Conclusion**

13 49. It is evident from an examination of the pleadings (even having regard to the
14 unimpressive nature of those filed by TMSL), reading the affidavit and exhibits
15 filed by CHL, hearing the submissions, despite the absence of any affidavit
16 evidence filed on behalf of TMSL that there are issues of fact between the parties.
17 It is still arguable that, despite the force of Mr. Broadhurst's submissions which
18 were grounded on the substantial detail of the procedures followed by CHL when
19 processing and invoicing the disputed tests, on the pleadings and evidence there
20 may be accounting errors, an arguable dispute in relation to interest claimed and a
21 need to clarify whether TMSL was entitled to a discount and at what rate.²

² See paragraph 34 above outlining 3 different rates referred to by CHL



1 50. Summary judgment should not be entered in this case where there are, at the very
2 least, disputed issues of material fact regarding the matters mentioned in
3 paragraph 49. Until these issues are determined, which will require findings of
4 fact in relation to the terms of the agreement between the parties, procedures
5 followed and may well need a determination of issues surrounding the credibility
6 of the various witnesses, it would not be appropriate to enter judgment.



7
8 51. Despite the forceful presentation of CHL's case, I am not satisfied that there is
9 plainly no defence in relation to the balance of its claim including interest. I am
10 not satisfied that there is no reasonable doubt that CHL is entitled to its judgment.
11 This is a case where CHL, to their credit, accept that there have been some
12 anomalies in their accounting procedures, and as a result, the system cannot be
13 regarded as being beyond question. This is a case where the parties, for reasons
14 best known to themselves felt it appropriate to depart from the good commercial
15 practice of having a formal written agreement, meaning that there is less clarity
16 than one would hope on issues such as discount, interest and procedure for special
17 or further testing. CHL have gone to great lengths to try to clarify these issues,
18 TMSL have not help themselves by failing to file an affidavit refuting Mr.
19 Pickering's assertions. However, on the documents before the Court, including
20 the contents of TMSL's two letters and attachments of January 2013 which were
21 properly exhibited by Mr. Pickering and drawn to the Court's attention by Mr.
22 Broadhurst, there is still a small degree of uncertainty in the Court's mind. Having



regard to the forcefulness of the submissions made by CHL, if TMSL continue to litigate this matter in the current manner, TMSL should think very carefully about the cost implications of a contested final hearing.

5 52. Since there is an arguable Defence this is not the time for the Court to determine
6 it, as it is not clear that it must fail. Whilst CHL's case was certainly well argued
7 and highlights forceful contentions, there are some issues of fact which could, if
8 accepted by the Trial Court, raise a possible defence. In order to determine the
9 issue, the Court will need to consider the actual course of events and their
10 significance as well as the credibility of likely witnesses.

11

12 53. I am satisfied that TMSL, has demonstrated, but only just due to the low-standard
13 of its pleadings, that there is a question of fact which ought to be tried and which,
14 if accepted, raises an arguable defence and I refuse the application for summary
15 judgment in relation to the remaining parts of CHL's claim.

16

17 54. I have received an application that, if leave to defend was granted, then it should
18 be conditional. It is of course important that I have regard to the principles set out
19 by Lord Diplock in **M v Yorke Motors v Edwards** [1982] 1 WLR 444. I
20 received submissions in relation to conditional leave and Mrs. Thompson did not
21 seek to persuade me that it would be impossible for TMSL to comply with a
22 reasonable financial condition, as opposed to merely finding it difficult. Having



regard to this, if I were to impose a reasonable financial condition, there is no submission before me that it would amount to an impossible condition and be tantamount to entering judgment.

5 55. In this case, due to the unmeritorious manner in which TMSL has hitherto
6 presented its case, I hold a current view that the disclosed Defence to the majority
7 of the balance of the claim is one with little substance, but is still such that I feel
8 unable to disregard it completely and enter final judgment for CHL. Although
9 CHL's case appears strong, it cannot be said that a Trial Court could not find the
10 Defence or part of the Defence established. Having regard to that I grant
11 conditional leave to defend.

12
13 56. The amount of any payment into Court ordered as a condition for granting leave is
14 in the Court's discretion. The more uncertain the defence, the more likely it is that
15 a Court will order the entire amount claimed to be paid into court. I also have
16 regard to the degree of uncertainty caused by the lack of a formal written
17 agreement between the parties, in particular, having regard to the issues
18 surrounding interest. That said, I acknowledge the submissions of Mr. Broadhurst
19 that agreements surrounding pricing and interest do not need to be set out in an
20 initial agreement and can arise from the conduct of the parties.

21

1 57. Having regard to all the circumstances of this case I am satisfied that the payment
2 into Court should equate only to the balance of the principal sum in the claim,
3 namely CI\$\$9,859.15. This figure should not be read by either party as an
4 indication that the Court does not view there to be force in the claim for interest
5 made by CHL. The order I make is that unless TMSL pays the sum of
6 CI\$\$9,859.15 into Court, on or before the 13th day of August 2013, CHL may
7 enter final judgment against TMSL for the amount claimed in the Statement of
8 Claim, plus interest and costs. If the said sum is paid into Court TMSL may
9 defend the action.

10
11 58. The normal order in such circumstances in relation to this part of CHL's
12 Summons would ordinarily be costs in cause. However, as I have not received
13 submissions from the parties in relation to costs, and due to the order of 26th June
14 2013 in relation to the \$60,000 partial judgment being silent as to costs, I will
15 reserve costs.

16
17 **CHL's Strike Out Application**

18 59. CHL apply for an order that TMSL's Defence and Counterclaim be struck out
19 pursuant to GCR O.18, r.19(1)(a), (b), (c) and (d). There is, of course, an inherent
20 power in the Court to strike out proceedings which are an abuse of process.

21



1 60. The purpose of O.18, r.19 is only to provide a remedy in clear and plain cases.
2 The application under r. 19(1)(a), unlike the other grounds, must be determined
3 upon the pleadings alone and does not involve consideration of evidence. Whether
4 or not it is a weak case is not relevant unless the Court is satisfied that it has no
5 chance of success. If it requires a detailed scrutiny of documents or assessment of
6 the evidence, the Court will leave those matters to be determined at trial.
7 Although the Court is not precluded from considering evidence in relation to an
8 application under paragraph 19(1)(d), it is not to be treated as a means of having
9 clearly contentious issues determined summarily. Such determination is for the
10 final hearing and in some cases may not be decided on affidavits alone without
11 discovery or cross examination.

12
13 61. Having regard to my reasoning in relation to the summary judgment claim this is
14 not a case in which I can find that it is clear and obvious that the Defence is
15 hopeless. Although I have concerns about the quality of the pleaded Defence, they
16 are not so to amount to an abuse of process of the Court. I remind myself that
17 strike out applications must be used very sparingly and only in clear-cut cases.
18 Despite certain reservations concerning the Defence, I cannot at this stage say that
19 there is no prospect at all of success. This case is not one in which I should utilise
20 my limited jurisdiction to strike out.



1 62. In relation to the poorly drafted Counterclaim, it is not a true Counterclaim and it
2 does not establish a reasonable cause of action against CHL. It is rightly
3 submitted that it does not add anything to the Defence, nor does it represent a
4 separate claim. In the circumstances of this case, in which the issue before the
5 Court is the amount of fees owed to the Plaintiff, a declaration that the amount is
6 not owed is not an appropriate remedy. Accordingly, I strike out the Counterclaim
7 pursuant to Order 18 r.19(1)(a), (c) and (d).

8
9 63. I reserve the costs, to enable the parties to make submissions at a later date
10 concerning this part of the Summons.

11
12
13
14 Dated this 23rd day of July 2013.

15
16
17
18
19 **The Honourable Mr. Justice Richard Williams**
20 **JUDGE OF THE GRAND COURT**
21

