IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 811 OF 2002
C.I.C.A. 23 OF 2003

BETWEEN: MERGERS & ACQUISITIONS CORPORATION

PLAINTIFF

AND:
(1) MICHAEL RYAN
(2) JOMICO INVESTMENTS LIMITED
(3) R & R DEVELOPMENT GROUP LIMITED
(4) GRAND CAYMAN RESORT VILLAS LIMITED
(5) R.C. GRAND CAYMAN RESORTS LIMITED
(6) R.C. GRAND CAYMAN RESORT OPERATING LIMITED
(7) R. & R. GRAND CAYMAN RESORT CONDOMINIUM LIMITED
(8) R.C. GRAND CAYMAN RESORTS CONDOMINIUM OPERATING LIMITED
(9) GRAND CAYMAN RESORT VILLAS LIMITED
(10) ARABESQUE HOLDINGS
(11) THE RYAN GROUP S.A.

DEFENDANTS

APPEARANCES: **Mr. Kyle Broadhurst of Broadhurst Barristers for the Plaintiff**
Mr. Jeremy Walton of Appleby Spurling Hunter for The Defendants

BEFORE: **The Hon. Justice Henderson**

HEARD: **April 8, 2005**

JUDGMENT

There are two applications before me. The defendants apply for summary judgment and couple that with an application to strike the statement of claim on the ground that it

discloses no reasonable cause of action. I find it useful to consider the summary judgment application first.

The question before me is whether there is any real or realistic prospect of that Mergers & Acquisitions can establish its standing to sue on the settlement agreement. I must ask whether the claim, on the evidence and arguments presented, bears any reasonable or realistic prospect of success at trial.

That question depends upon the view the Court takes of issues of foreign law, the law of the Province of Ontario. That law must be proved in the same way that other facts are proved - by affidavit evidence. I am not permitted to take judicial notice of Ontario law. I have before me the affidavits of Mr. Paul Pape and Mr. Geoffrey Adair, both experts in the field.

It is worth quoting a passage from *Swain v. Hillman* [2001] 1 All ER 91 in which Lord Woolf said this:

> "…under part 24.2 of the Court now has a very salutary power, both to be exercised in the claimant's favour, or where appropriate, in the defendant's favour. It enables the Court to dispose summarily of both claims or defences which have no real prospect of being successful. The words „no real prospect of being successful or succeeding' do not need amplification, they speak for themselves. The word „real' distinguishes fanciful prospects of success or, as Mr. Bidder submits, to direct the Court to the need to see whether there is a „realistic' as opposed to „fanciful' prospect of success…. It is important that a Judge in appropriate cases should make use of the powers contained in 24.2. In doing so, he or she gives effect to the overriding objectives contained in Part I. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose. And I

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

The genesis of this dispute is found in an investment agreement made as of March 30th, 1998. The parties are described this way:

> "BETWEEN: JOHN VAN LEEUWEN, without personal Liability, on behalf of an investor group of companies to be incorporated (the "Investor Group") and represented by Lions Investment (Cayman) Holdco (Lions 1), Lions Investment (Cayman) Holdco (Lions 2), and Lions Investment (Cayman) Holdco (Lions 3) on the Company and Equity Structure chart annexed hereto as Schedule A (OF THE FIRST PART) and MICHAEL RYAN on his own behalf personally and on behalf of…"

There then follows a list of several corporate entities.

The way in which the party of the first part, Mr. Van Leeuwen, is styled at the beginning of the agreement will seem strange to a Cayman lawyer. There is some amplification of his status in clause 2 of the agreement, which reads:

> "John Van Leeuwen is acting hereunder solely as agent on Behalf of the Investor Group and without personal liability. Forthwith after the signing hereof, he will cause the Investor Group to be incorporated and will cause notice of such incorporation to be given to Orren Merren & Company, Attorneys at Law, Grand Cayman (the "Project Solicitors") and upon such notification and confirmation and the said companies adopting the benefits and burdens of the Investor Group under this Agreement, the Ryan Grand Cayman Group shall thereafter deal with such companies as the party of the first part hereunder."

The investment agreement also provided that the parties agree to execute such further and other agreements and do or cause to be done such further acts or things as may be reasonably required in order to implement the agreement.

There is a clause addressing the question of assignment. It provides that the agreement cannot be assigned by the Ryan Group. I take it, then, that the agreement contemplates a possible assignment by the Investor Group.

The agreement is to be construed in accordance with the laws of the Province of Ontario. There is in the law of Ontario provision (in section 21 of the Business Corporations Act, R.S.O. (1990) Chapter B16) for the making of pre-incorporation contracts. Section 21 (1) provides, in accordance with English law, that a person who enters into an oral or written contract in the name of, or on behalf of, a corporation before it comes into existence is personally bound by the contract and is entitled to the benefits thereof. Subsection 2 goes on the say that a corporation may, within a reasonable time after it comes into existence, signify its intention to be bound by such a pre-incorporation contract and adopt it. At that point, the corporation is bound by the contract and the person, often styled a "promoter", who purported to act in the name of the corporation prior to its incorporation ceased to be bound by or entitled to the benefits of the contract.

Subsection 4 is a somewhat unusual provision. It reads:

> "If expressly so provided in the oral or written contract referred to in subsection 1, a person who purported to act in the name

> of or on behalf of the corporation before it came into existence
> is not in any event bound by the contract or entitled to the benefits
> thereof."

Clearly, Mr. Van Leeuwen was acting, or at least attempting to act, in pursuance of s. 21(4).

After the investment agreement was entered into, a dispute developed between the parties. Each side accused the other of breaches of the agreement.

Settlement discussions followed. A number of the terms of a prospective settlement were agreed upon at a meeting and then the principals, Mr. Ryan and Mr. Van Leeuwen, met in a Toronto bar to attempt to settle the outstanding issues. Mr. Van Leeuwen's position is that they concluded a binding and enforceable settlement agreement that night. Mr. Ryan's position is that they did not.

Mr. Van Leeuwen instructed his solicitor to prepare a draft settlement agreement and send it over to Mr. Ryan's solicitor. The covering letter (dated May 6th, 1998) is the standard sort of letter one would expect to see from one solicitor to another in these circumstances. It refers to the enclosed settlement agreement and asks, "Could I please have your comments on the document as soon as possible?"

The draft settlement agreement identifies as the parties of the first part John Van Leeuwen, a Mr. Rosart, a Mr. Anderson and Mergers & Acquisitions Corporation, the present plaintiff.

Clause 2.2, upon which some considerable importance has been placed in this application, reads as follows:

> "M & A Designation.
> J.V.L. hereby confirms and designates M & A as the Investor Group for the purposes of the investment agreement and as the entity entitled to receive the settlement hereunder and hereby confirms that the $2 million US paid or credited under the investment agreement to the Ryan Grand Cayman Group should be repaid to M & A. M& A hereby notifies the Ryan Grand Cayman Group that it adopts the benefits and burdens of the investment agreement as the Investor Group and party of the first part thereunder and as if an original party thereto. J.D.R. and W.A. hereby ratify and consent to the foregoing designation and adoption."

That agreement was never executed. Indeed, no subsequent or second draft was ever prepared.

By letter dated May 14th, 1998, Mr. Ryan's solicitor advised that his client was not prepared to proceed with the settlement and stated his reasons. By a subsequent letter dated May 22nd, 1998, the same solicitor stated his client's position that a binding settlement agreement had not been reached.

There then followed a period of inactivity.

On November 2nd, 2002, Mergers & Acquisitions started the present action. Up to that point, no company had been incorporated to adopt or ratify the pre-incorporation investment agreement or, for that matter, the pre-incorporation settlement agreement.

The limitation period in Ontario for a breach of contract claim is six years. That period would expire May 1st, 2004. Shortly before the limitation period date, in April 2004, a numbered company was incorporated in Ontario.

On April 13th, 2004, that numbered company sent a document styled "Notice and Adoption" to Mr. Ryan and his solicitors. There were two signatories to the Notice and Adoption. Mr. Van Leeuwen notified the Ryan Group that the Ontario numbered company "is the corporation that has been incorporated to assume the benefits and burdens of the Investor Group under the investment agreement, and that [the Ontario numbered company] is the only such corporation that will be so incorporated."

The numbered company, for its part, then notified the Ryan Group that it adopts the benefits and the burdens of the investment agreement.

The following day the Ontario numbered company commenced an action in the Cayman Islands on the investment agreement. That action is not before me.

On April 15th, 2004, the Ontario numbered company commenced an action in Ontario on the investment agreement.

The re-amended statement of claim advances two seemingly alternate theories under which Mergers & Acquisitions might be thought to have standing. First, it asserts (in

paragraph 13) that the settlement agreement contains an implied term that John Van Leeuwen, as agent, has full power and authority to deal with that agreement on behalf of the Investor Group including, "without limitation the power to designate the recipient of the benefits and burdens of the settlement." It is also alleged that the very same term was implied by reference into the investment agreement.

In paragraph 15, the plaintiff says that Mr. Van Leeuwen, on behalf of the Investor Group, "directed" the benefit and burden of the agreement to the plaintiff. It goes on to say he assigned the benefit and burden to the plaintiff. The word "directed" does not seem to me to have any legal significance. I take it to be an alternate way of asserting that there was an assignment.

The pleading says that the assignment was in writing and was contained in the letter sent to the defendants on May 6th, 1998 enclosing the draft settlement agreement. It asserts that notice of the "designation" and the assignment was given to the defendants by way of the same letter.

Paragraph 17 pleads the incorporation of the Ontario numbered company, and alleges that because of its ratification of the pre-incorporation acts on its behalf by Mr. Van Leeuwen, it is entitled to the benefits and burdens of the investment agreement "as amended and/or settled".

To succeed at trial, Mergers & Acquisitions would have to show it is entitled to the benefit of the settlement agreement (assuming, of course, that there is an enforceable settlement agreement).

Mergers & Acquisitions was in existence before the investment agreement and the settlement agreement were entered into. With respect to it, these are not pre-incorporation contracts. Section 21 cannot serve to confer standing on Mergers & Acquisitions directly.

Until the incorporation of the Ontario numbered company in April 2004, there was no entity in existence to take on the benefits and burdens of either contract under section 21.

It is at least debatable that the Ontario numbered company's assumption of that role, almost six years later, was invalid because of the delay. Certainly it was a breach of Mr. Van Leeuwen's obligation to incorporate that company "forthwith", an obligation found in the investment agreement. I am, however, prepared to assume, for present purposes, that the Ontario numbered company validly adopted or ratified the investment agreement.

(I should note in passing that this seems inconsistent with the plaintiff's own case. Its case is that the settlement agreement superseded and replaced the investment agreement. In effect, there was no investment agreement for the numbered company to adopt.)

Having adopted the investment agreement, did the numbered company thereby adopt the settlement agreement by implication? There is no express act by that company adopting the settlement agreement.

It is arguable, I think, that the settlement agreement is a collection of rights and obligations which arise from, or flow out of, the investment agreement and that, as a consequence, any adoption of the investment agreement by the Ontario numbered company serves as an adoption of the settlement agreement also. I will therefore assume, for present purposes only, that the Ontario numbered company became entitled, in April 2004, to the benefit of both agreements.

The statement of claim speaks of an implied term in the settlement agreement giving Mr. Van Leeuwen the power to designate the recipient of the benefits and burdens of that agreement.

I do not see how such a term can be implied. Mr. Van Leeuwen's obligation was to incorporate forthwith a new company and cause it to adopt the investment agreement and, presumably, the settlement agreement. How can it be said that he had an implied power to transfer away to another entity – perhaps, as in the very case before me, to a company that was already in existence at the time – the benefits of the investment and settlement agreements? Such a power would be wholly at odds with his role as a mere functionary.

In that regard, I find a passage in a case cited by the defendant's expert, a decision of the Ontario court of Appeal in *1394918 Ontario Ltd. v. 1310210 Ontario Inc.* [2001] 154 O.A.C. 137, persuasive. The Court was speaking of an individual named Stern who entered into an agreement on behalf of a company to be incorporated later and then subsequently accepted the other party's repudiation of the contract.

The Court (which was unanimous) said this at para.15:

> "In electing to accepting the repudiation, Stern was performing as what I have termed a functionary just as he was when he sought out an extension agreement. Section 21(4) of the Act can only work if someone is responsible for carrying the contract forward pending incorporation of the corporate party. However, I disagree with the motion judge's finding that the assignment was effective. By the very terms of section 21 (4), Stern had no entitlement to the benefits of the contract and thus had nothing to assign."

To remain within the boundaries of section 21(4), Mr. Van Leeuwen's obligation was to preserve the benefit of the pre-incorporation contracts for the company, or companies, he was about to incorporate, not give the benefit away to a third party.

Mr. Pape's evidence on this point is entirely persuasive.

I find that on this branch of the case the plaintiff has no realistic or reasonable prospect of success.

As I have said, the plaintiff also argues (in paragraph 15 of the statement of claim) that Mr. Van Leeuwen assigned the benefit and burden of the settlement agreement to

Mergers & Acquisitions and the assignment was ratified retroactively by the Ontario numbered company.

Two types of assignment fail to be considered – legal and equitable.

Under Ontario law, as Mr. Pape's evidence makes clear, a legal assignment requires notice in writing to the other party to the contract (in this case, Mr. Ryan and his group).

The plaintiff relies upon the May 6th, 1998 letter from his solicitor as notice of assignment. That letter makes no mention of an assignment. It just encloses a draft agreement and asks for comments.

The draft may be taken to refer to an assignment, but it refers to one prospectively, not retrospectively. The draft is just that – a draft. It can have no legal effect until executed and delivered. The most that can be said for the draft is that it evidences an intention by Mr. Van Leeuwen that, if and when the settlement agreement was executed, there would be an assignment to Mergers & Acquisitions. There is no realistic or real prospect of success on this branch of the plaintiff's argument.

An equitable assignment under Ontario law does not require notice, but there must be evidence of an intention on the part of the assignor to transfer the benefits and burdens to the assignee.

There is no evidence of such an intention here. As I have said, the draft settlement agreement evidences an intention to assign to Mergers & Acquisitions upon execution of the document, but it remained a draft. It was never executed. The Ryan Group took the position that there was no settlement agreement. Mr. Ryan's solicitor may never have mentioned the draft to his client, in light of his instructions. The draft was a mere proposal and nothing more. I agree with Mr. Pape's conclusion that it cannot be relied upon to confer legal rights. It is not evidence of an unequivocal intention to assign regardless of whether the settlement agreement is ever executed.

Finally, I should return to one of the assumptions I made earlier in favour of the plaintiff's claim. I share the view of Mr. Pape that, on the plaintiff's own case, there was no power in the Ontario numbered company (when it eventually was incorporated) to ratify a purported assignment of the settlement agreement some six years earlier.

Article 3 of the draft settlement agreement states:

> "This settlement agreement shall supersede and replace all of the rights and obligations of any of the parties hereto under the investment agreement."

It was intended to be a complete replacement for the investment agreement. If, as the plaintiff says, the settlement agreement is binding and enforceable, then, by April 2004, there was no investment agreement capable of adoption or ratification by the numbered company. That being so, and in light of the fact that the numbered company never purported to adopt the settlement agreement itself, it had no power to ratify a supposed assignment of the settlement agreement prior to its incorporation.

For these reasons, I have concluded that the claim as pleaded has no real or realistic possibility of success at trial. It follows that I need not consider further the strike out application.

The application for summary judgment is allowed and the claim is dismissed.

[Submissions on Costs]

THE COURT: Costs in this case should follow the event. The starting point is that the defendants are entitled to their costs of the action. It is also appropriate, as Mr. Walton effectively concedes, that certain portions of the time spent on this case should not be a component of that costs award.

I think the plaintiff should have its costs of the abuse of process strikeout application, because it was successful there, and of the morning upon which there had to be an adjournment because of the late delivery of Mr. Pape's affidavit. To my recollection there are no other portions of this proceeding where the plaintiff would be entitled to costs.

[Application for Leave to Appeal]

THE COURT: I don't think I can ultimately deny you leave to appeal if that's what you want to do. We need to remember that summary judgment is meant to be summary. The automatic request for leave to appeal in every case where summary judgment is granted

or, for that matter, refused is something we should try to avoid. I'm going to adjourn your leave application. You can come back here any time on 24 hours' notice to your friend. I think it would be useful for us to avoid falling into the practice of automatically asking for leave in these matters. It prolongs the case. It adds to the cost. It does all those things Lord Woolf said we were trying to avoid. Take some instructions and decide whether you really want this issue to be tried.

Dated this 26th day of April, 2005

Henderson, J.
Judge of the Grand Court