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

CAUSE NO: 163 OF 2004

BETWEEN: CAYMAN DISPATCH SERVICES LTD. PLAINTIFF

AND: AIRPORT PROFESSIONAL SERVICES LTD. DEFENDANT

Appearances: **Ms. Melanie Crinis of Campbells for the Plaintiff**
Mr. Ramon Alberga, Q.C. instructed by Margeta Facey-Clarke of Facey-Clarke & Associates for the Defendant

Before: **Hon. Justice Henderson**

Heard: **July 8, 2004 & May 25, 2005**

RULING

On November 23rd, 2001, the parties entered into an agreement providing that the plaintiff Cayman Dispatch Services Ltd. ("CDS") would "invest" $25,000 in the defendant Airport Professional Services Ltd ("APS"). The consideration for this investment was described in the agreement as 35% of the net profits of APS for services provided to Cayman Airways and all other carriers handled by Cayman Airways. The agreement also provided that it "shall remain in effect for the life of APS's contract with Cayman Airways…"

No share subscription form was signed, no resolution of the directors was passed allocating shares, and CDS was never entered in the register of members.

By originating summons filed December 15, 2003, CDS asked for a declaration that the contract "continues in force so long as the defendant has a contract with Cayman Airways Ltd…." On March 15, 2004, CDS applied to me for a declaration to that effect. It argued that the intention of the parties was, in effect, that APS would issue shares to CDS.

I rejected that argument and granted to APS an order declaring that the agreement terminated on November 19, 2004; this gave effect to the termination clause in the agreement. Given the presence of that clause, given the fact that neither party sought to have CDS entered on the register of members (or issued a share certificate), and given that there was no agreement as to the number of shares CDS would receive for its "investment", I concluded that the parties had never intended that APS would issue shares to CDS. I gave oral reasons for judgment; no court reporter was present.

CDS then commenced a second action, cause 163 of 2004, by Writ of Summons on March 25th, 2004. It pleaded that the money was advanced as a loan and asked for repayment of the loan with interest.

On April 7, 2004, APS filed its defence and counterclaim in the new action. It admitted that the money was advanced by way of a loan and pleaded that all of the repayment obligation has been satisfied, including the payment of interest.

On May 4th, 2004 CDS filed a reply alleging that the loan has not been repaid and that interest (calculated as 35% of the net profits of APS) continues to accrue. In support,

CDS made reference to certain findings it says I made during my oral ruling. There is no agreement between counsel as to what I said in that ruling.

APS is now represented by a new attorney. It seeks leave to amend its Defence and Counterclaim by deleting all of the allegations of fact, leaving only the Prayer for Relief, and substituting fresh allegations of fact (but no Counterclaim). The draft Amended Defence contains a denial that the money was advanced as a loan. It refers to the transaction as an "investment" but does not plead any agreement for the sale and purchase of shares. It also pleads, in the alternative, that if the money was advanced by way of loan, the only interest now accruing is that provided for in the Judgment Debts (Rates of Interest) Rules. CDS opposed the application for leave to amend, arguing that the proposed new pleading seeks to place in issue a question which is *res judicata*.

In the absence of a transcript of my reasons for my earlier ruling, and in the absence of agreement between counsel on the content of that ruling, I do not think it fair to refuse this amendment by a strict application of the principle of *res judicata*. All that was actually decided by my earlier ruling is that the agreement "terminated" on November 19, 2003.

However, the question may be approached on a different footing. Order 18, rule 10 (1) of the *Grand Court Rules* reads:

> "A party shall not in any pleading make an allegation of fact, or raise any new ground or claim, inconsistent with a previous pleading of his."

1 Those portions of the draft Amended Defence which seek to characterize the transaction
2 as something other than a loan contradict flatly the admission made by APS in its
3 Defence and Counterclaim. Given the lack of evidence to support an inference that the
4 parties intended a sale and purchase of shares, that admission was a reasonable one. It
5 was not made by accident or mistake.
6
7 Although Order 18 rule 10 is expressed in absolute terms, this court has discretion to
8 allow the withdrawal of an admission made in a pleading. I am satisfied, however, that
9 this is not a proper case to relieve against the rigour of the rule.
10
11 The transaction must be characterized in one of three ways: either the money was
12 advanced by way of a loan, or it represented the purchase price of a certain number of
13 shares, or it is simply a case of money had and received. To characterize the transaction
14 in a pleading as an "investment" without elaboration leaves the matter in an
15 unsatisfactorily ambiguous state. The assertion that there was an agreement for the sale
16 and purchase of shares is bound to fail. There is no evidence as to the number of shares
17 which CDS proposed to buy and no explanation as to how APS could bind itself to pay,
18 by way of dividend, 35% of the net profits earned by it on a certain phase of its
19 operations.
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For these reasons, the application for leave to amend is refused. APS is at liberty to make a fresh application to amend its Defence, but any such amendment must not contradict APS's earlier admission that the money was paid over by way of a loan.

Dated this 3rd day of June, 2005

Henderson, J.
Judge of the Grand Court