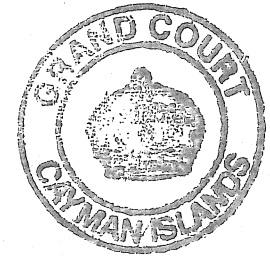


5/6/08



1 IN CHAMBERS

2 IN THE GRAND COURT OF THE CAYMAN ISLANDS

3 CAUSE NO: 566 of 2007

4

5 BETWEEN: KENT RANKIN PLAINTIFF

6

7

8

9 AND: ANTHONY SCOTT FIRST DEFENDANT

10 EDITH MARTIN SECOND DEFENDANT

11 LUCY EBANKS THIRD DEFENDANT

12

13

14 Before: The Honourable Madame Justice Levers

15

16 Appearance:

17 Mr. DaCosta and Mr. Young

18 Mr. Scott Wilson

19

20 Heard: 5 June 2008

JUDGMENT

21

22 Levers J.

23 Mr. Kent Rankin the plaintiff in this matter issued a writ which was served

24 on the defendants on the 7th January 2008. On the 18th of January 2008 the

25 defendants requested further and better particulars of the plaintiff's claim.

26 And on the 22nd February 2008 a formal request for further and better

1 particulars was served on the plaintiffs' attorney. Application by the
2 plaintiff for judgment in default was applied for on the 22nd February 2008.
3 That application was not granted by the Registrar and in March 2008 an
4 application for summary judgment was made by the plaintiff. On the 3rd of
5 June 2008 a defence and counter-claim was filed without leave of the court
6 (relying on the text of Miss Deborah Barker). The position taken was that
7 until a summary judgment was entered there is no particular requirement for
8 leave to be granted before filing a defence.

9 Whilst it is not particularly pertinent at this stage (this being an application
10 for summary judgment) I believe it is important to clarify the issue as to the
11 time within which a defence should be filed. Under Order 18 Rule 2
12 subsection (1):

13 “Subject to paragraph (2), a defendant who gives notice of intention to
14 defend an action must, unless the court gives leave to the contrary,
15 serve a defence on the plaintiff before the expiration of 14 days after
16 the time limited for acknowledging service of the writ or after the
17 statement of claim is served on him, whichever is the later.
18 Subsection 2 reads. If a summons under Order 14 rule 1, or under
19 Order 86 rule 1, is served on a defendant before he serves his defence
20 paragraph (1) shall not have effect in relation to him, unless by the
21 order made on the summons he is given leave to defend the action
22 and, in that case, shall have effect as if it required him to serve his

1 defence within 14 days after the making of the order or within such
2 other period as may be specified therein”.

3
4 In my view I respectfully disagree with the interpretation of the text relied
5 upon by Mr. Scott Wilson as paragraph 2 subsection (1) makes it mandatory
6 to file a defence before the expiration of 14 days when notice to defend has
7 been given. There is nothing in the Grand Court Rules that say that 14 days
8 is subject to a judgment in default being entered.

9 This court however intends to look at the defence and counterclaim of the
10 first and third defendants filed without leave in order to decide on the merits
11 of the summary judgment application.

12 Reinforcing my view of the position is the fact that if the application is made
13 for summary judgment after filing an acknowledgment of service but before
14 filing a defence there is no need to file a defence before the hearing. After
15 the hearing the court can give directions which will include providing a date
16 for filing the defence. The defendants will however have to file evidence to
17 show that they have a good defence.

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1 The test for entering summary judgment is that:

2 (a) the claimant has no real prospect of succeeding in the claim or
3 issue or that the defendant has no real prospect of success in
4 defending the claim or issue and

5 (b) there is no other compelling reason why the case or issue should
6 not be disposed of at a trial.

7 The burden of proof on an application for summary judgment, it appears was
8 settled in ED and F Man Liquid Products Ltd. v. Patel, 2003 CPLR: Page
9 384. It rests on the applicant to prove that the respondent's case has no real
10 prospect of success.

11 An application for summary judgment is decided applying the test
12 enunciated above, and having regard to the overriding objective of dealing
13 with the case justly. The question whether there is a real prospect of success
14 is not approached by applying the usual balance of probability standard of
15 proof or whether there is a claim that is arguable.

16
17 In Swain v Hillman, 2001 AER 91. Lord Wolfe M.R. said the words "No
18 real prospect of succeeding", did not need any amplification as they spoke
19 for themselves. The word *real* directed the court to the need to decide
20 whether there was a realistic as opposed to a fanciful prospect of success.
21 The phrase does not mean "real and substantial prospect of success" nor

1 does it mean that the summary judgment will not be granted unless the claim
2 or defence is bound to be dismissed at trial. It is not a question of a mini
3 trial being held on the evidence. It is simply summary hearings to dispose of
4 the case where there is no prospect of success. *In Swain* (supra) The Master
5 of the Rolls went on to say that summary judgment applications have to be
6 kept within their proper role, they are not meant to dispense with the need
7 for a trial where there are issues which should be considered at trial.

8

9 The defence on the merits could be for example:

- 10 (a) a substantive defence, (frustration illegality etc.) or
- 11 (b) a point of law destroying the claimant's cause of action or
- 12 (c) a denial of the facts supporting the claimant's cause of action or
- 13 (d) further facts answering the claimant's cause of action.

14 An example of a triable issue is that the defendant was an agent rather than a
15 principle.

16

17 In this case the first and third defendants have raised a point of law in
18 addition to denying the facts. Whether the defences are fanciful or not is for
19 the court to decide. The second defendant has vacated the premises and is
20 no longer a necessary or relevant party to the proceedings. Where a clear cut
21 issue of law is raised by way of a defence in an application for summary
22 judgment, the court should decide it immediately. But where the point of
23 law raised, is of some complexity and can only be argued relying on the

1 facts of the case then the court should be careful in entering judgment. It is
2 only in a clear cut simple case that summary judgment should be allowed.
3 In this case the defence relies on section 28 subsection (g) of the Registered
4 Land Law 2004 Revision and The Succession law.

5
6 The Facts

7 The property in question is George Town Central Block 14 CJ parcel 5,
8 which has been owned by Vernal Ebanks Clarke for some 30 years. It is
9 alleged by the plaintiff that she had an absolute interest in the property until
10 approximately 1983, when Phillip Beatman Ebanks was added to the
11 register. The property was charged by Phillip with the consent of Vernal.
12 At the time of Mr. Beatman Ebanks passing there were outstanding charges
13 against the property, and Vernal Ebanks Clarke became responsible for these
14 debts. It was therefore decided that that the property would be sold. The
15 plaintiff became the purchaser of the property.

16
17 The plaintiff alleges that the defendants were permitted by licence to remain
18 on the premises. Mrs. Edith Martin the second defendant has now vacated
19 the premises. The defendants through their attorneys have filed several
20 affidavits and draft defences and have made an issue of the fact that Mrs.
21 Ebanks Clarke came into possession of the property by virtue of the Last
22 Will and Testament of Mr. Luther Ebanks Junior, who appointed Mrs.
23 Ebanks Clarke and Mr. Phillip Beatman as trustees of the relevant estate on
24 behalf of the five children, who were the children of the Luther Ebanks
25 Junior. One of those five children is the third defendant Lucy Ebanks.

26

1 The question that arises at this stage is, “Was Luther Ebanks Junior in a
2 position to devise the land? Or could he have done so, and was he the legal
3 beneficial owner of the land in order to have the capacity to do so?” Is this a
4 fanciful defence? Or does it have a real prospect of success?

5
6 Another question that arises is whether a licence was in fact granted or
7 needed to be granted by Mrs. Ebanks to the defendants. This is of course a
8 question of fact and cannot be decided at this stage. The further question
9 that arises out of the facts is whether in fact the first and third defendants
10 waived their rights by accepting money or agreeing to do so in exchange for
11 their interest? This argument is based on the fact that at the time of that sale
12 Vernal Ebanks gave bank drafts to the various persons on the land and that
13 this was as a result of an agreement and a promise to leave the premises. It
14 is admitted by the third defendant Lucy Ebanks, that she did receive certain
15 sums of money. But in her defence she alleges that she is now willing to
16 give it back. The defendants argue however, that this was a gratuitous gift
17 and that it does not negate the overriding interest that they have on the land.

18
19 An overriding interest is derived say from section 28 (g) of the Registered
20 Land Law 2004 revision. It reads: “Unless the contrary is expressed in the
21 register, all registered land should be subject to such of the following
22 overriding interest as for the time being subsists and affect the same without
23 there being noted on the register the rights of the person in actual occupation
24 of land or in receipt of the rents and profits thereof save where enquiry is
25 made of such person and the rights are not disclosed”. It goes on, “Provided
26 that the Registrar may direct registration of any of the liabilities, rights and
27 interests hereinbefore defined in such manner as he thinks fit”. The

1 defendants argue that this gives them an overriding interest as Mr. Rankin as
2 the purchaser should have made enquiries of the persons on the land himself
3 and prove that their rights were not disclosed.

4
5 There is however another element which must be looked at in this context
6 and that is that Mr. Rankin was working through an agent, who Mr. Rankin
7 alleges, assured him that the persons had agreed to leave on the basis of
8 receipt of these cheques. A Mr. Anthony Scott who is the first defendant,
9 now claims he is in fact willing to leave but that the value of the land is
10 greatly under-rated and that if he receives a greater sum of money he will
11 vacate the premises. The defendants argue that there is an arguable issue as
12 to the veracity and effect of the cheques and these documents.

13 Mr. Scott Wilson for the defendants' submission is that there is no reason to
14 doubt the veracity of what the defendants are saying in this matter. That is
15 not with respect, the criteria for summary judgment. The criteria is, "Is there
16 a real defence or is the defence fanciful or is it a complex issue of law".

17 I have to be satisfied under Order 14 that there is plainly no defence to the
18 claim not which case I find more credible. I find there is in fact an arguable
19 defence and that there are points of law which need to be argued. I therefore
20 refuse the application for summary judgment.

21
22 I disagree with Mr. Wilson's submission that the plaintiff instigated these
23 proceedings knowing exactly what the first and third defendants' claims
24 were likely to be.

25
26 Therefore on the question of costs, I would normally invite the parties to
27 make their submissions, but in this case in view of the defendants delay even

1 though they required further and better particulars to file a defence which
2 they now have done without particulars, I make no order for costs. Each
3 party must bear their own costs.

4

5 I also direct that the first and third defendants are given leave to file their
6 defences within 14 days of the date hereof.

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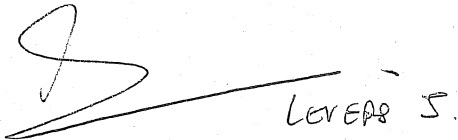
9 Dated this 5th day of June 2008

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Judge of the Grand Court.

 Leveas S.

