

1 IN CHAMBERS
2 IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 525/06

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4
5 BETWEEN:

6 (1) BRICOLAGE INVESTISSEMENT BENELUX S.A.
7 (A company incorporated in Belgium)

Plaintiff

8
9 AND:

10 (1) HOMEWORLD HYPERMARKET GROUP CO. LTD.
11 (previously TIANJIN HOMEWORLD GROUP CO. LTD.
12 (A company incorporated in the People's Republic of China)

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14 (2) TIANJIN NORTHERN BUILDING MATERIALS TRADE
15 CO. LTD.
16 (A company incorporated in the People's Republic of China)

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18 (3) TIANJIN NORTHERN BUILDING MATERIALS TRADE
19 CO. LTD.
20 (A company incorporated in the People's Republic of China)

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22 (4) XI'AN HOMEWORLD PLAZA CO. LTD.
23 (A company incorporated in the People's Republic of China)

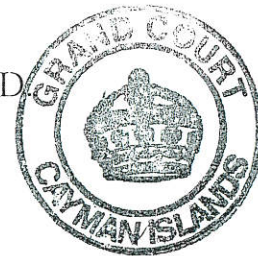
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25 (5) IID (TIANJIN) COMMERCIAL COMPANY LTD
26 (previously TIANJIN HW HOMEWAY CONSTRUCTION
27 MATERIALS HYPERMARKET CO. LTD.
28 (A company incorporated in the People's Republic of China)

29 (6) HOMEWAY (CAYMAN) COMPANY LTD

30 (7) DU XIA

31 (8) YU KUN

32 (9) JEFF DU



33 Defendants

34 BEFORE: The Honourable Madam Justice Levers

35 Appearances:

36 Counsels for the Plaintiff: Mrs. S. Corbett & Mr. D. Henderson & Ms. N.
37 Peters
38



1 Counsels for the 1st to 4th and 6th to 9th Defendants: Mr. M. Imrie, Mr. J.
2 Eldridge, and Mr. C. Lynch

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4 Heard: 27th February, 2007
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JUDGMENT

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7 Levers, J.

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9 This is an application by the First to the Fourth Defendants and the Sixth to
10 the Ninth Defendants pursuant to GCR Order 14 rule 12; Order 12 rule 8;
11 and Order 32, rule 6 for an Order that:
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- 13 1. The Plaintiff's claim against the Sixth Defendant be dismissed and
14 summary judgment be entered for the Sixth Defendant;
- 15 2. Alternatively, the proceeding be struck out as against the Sixth
16 Defendant;
- 17 3. Paragraph 6 of the Order of this Honourable Court dated 8 December
18 2006 (the 'Ex parte Order') granting leave to serve the writ as against
19 the First to Fourth Defendants and the Seventh to the Ninth
20 Defendants be discharged;
- 21 4. The writ be set aside as against the First to Fourth Defendants and the
22 Seventh to Ninth Defendants;

- 1 5. The First to Fourth Defendants' and Sixth to Ninth Defendants' costs
2 of and incidental to this application and the proceeding be paid by the
3 Plaintiff, to be taxed if not agreed, such costs to be secured by and
4 paid from the funds deposited by the Plaintiff in accordance with
5 paragraph 7 of the Ex parte Order (the "Security");
- 6 6. The balance of the Security be held pending an investigation into
7 damage incurred by the First to Fourth Defendants and the Sixth to
8 Ninth Defendants, and that the balance not be released until further
9 order of the Court or written agreement from the parties.
- 10 7. Such further and other consequential orders as may be appropriate,
11 including without limitation, an order that the Mareva injunction
12 contained at paragraphs 1 to 5 of the Ex parte Order be discharged, on
13 the basis of the aforementioned summary judgment and striking-out of
14 the Writ.

15

16 **Background**

17 The parties in this matter are the First to the Fourth Defendants that are
18 called ("the Arbitration Defendants") for ease of reference, and the Fifth
19 Defendant is a company incorporated in the People's Republic of China.
20 The Sixth Defendant is Homeway (Cayman) Company Limited, and the
21 Seventh to Ninth Defendants are individuals.

22

23

1 The Cayman Company was incorporated on 14th November, 2003. Prior
2 to that, in or about 18th June, 2001 (that is nearly two years previously),
3 Arbitration proceedings were commenced against the Arbitration
4 Defendants. The Arbitration proceedings closed on 14th September,
5 2005. Homeway Cayman was incorporated some two years before the
6 Arbitration proceedings closed.

7
8 The Plaintiff alleges that as a result of their anticipated loss in the
9 Arbitration Awards, the "Arbitration Defendants" conspired with each
10 other and the Sixth Defendant, to transfer the shares of the DIY Stores
11 located in China to a purchaser. In or around 2004, there was a proposal
12 to transfer the shares to the Cayman Islands company, Homeway
13 Cayman. That transfer was subject to approval of a Chinese Government
14 department known as "Mofcom". That transaction was not completed, as
15 the approval was not forthcoming.

16
17 No transaction involving Homeway Cayman or any Cayman Islands
18 company ever took place. The Plaintiff, however alleges that the
19 company which has no assets and is a purely holding company was

1 formed in Cayman in order to facilitate the transfer of these shares, to
2 avoid payment of the Arbitral award which was finalized in 2006.

3
4 In essence it is are saying, that the Defendants anticipated a loss some
5 four years before the arbitration proceedings were properly commenced
6 and certainly three years before the award was finalized and incorporated
7 a company with a view to divesting themselves of assets from which the
8 award could be paid. Or it says, that if that is not case, then the fact that
9 Homeway Cayman (although not taking part in the transaction) by its
10 inactivity in not dissenting, acted unlawfully and did damage to the
11 Plaintiff.

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13 The Plaintiff is also saying that these companies have common directors
14 and shareholders and therefore they are all part and parcel of the same
15 entity and all of them took part in a conspiracy to deprive the Plaintiff of
16 the possibility of getting assets to satisfy the Award.

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18 The genesis of this entire matter is that the Chinese companies or the
19 Arbitration Defendants sold their interests to two individuals (the
20 Seventh and Eight Defendants) at a value which it is alleged was

1 considerably less than the market value. That they say is the conspiracy.

2 It is important to note that nowhere did the Plaintiff allege that the
3 Caymanian company took an active part in this alleged conspiracy. It's
4 the lack of action they complain of.

5
6 The factual situation is, that there is evidence now before this Court, that
7 the Seventh and Eight Defendants bought some of the assets, but not all
8 of the assets. The Arbitration Defendants still have substantial assets
9 although the Court has no evidence as to the exact value.

10
11 The Award is over US\$22 million dollars, plus interests.

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13 **The Present Situation**

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15 The Defendants are now seeking to set aside the Award in China for a
16 number of reasons.

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18 The Plaintiff subsequently commenced proceedings in Beijing. It then
19 commenced these proceedings in Cayman, and as a result of the
20 commencement of the proceedings in the Cayman Island, obtained

1 discovery in Atlanta, and obtained a world-wide Mareva injunction. The
2 Mareva injunction was obtained ex parte and most unusually and
3 surprisingly was given for an indefinite period, until further order or till
4 the trial of the action. Based on this, the Plaintiff commenced
5 proceedings in Mauritius and obtained an Order there as well.

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7 The Court is satisfied that the evidence before it shows that the Plaintiff
8 did not make full and frank disclosure at the time of obtaining the
9 Mareva injunction. Subsequently, it had knowledge that the allegations
10 in the Statement of Claim were inaccurate. It had in its possession
11 documents which showed that the allegations could not be substantiated.
12 It did not advise the Court that the Defendants had other assets. (The
13 Respondents' skeleton arguments before this Court alleges that there are
14 other assets and that is not challenged by the Plaintiff). And finally it did
15 not advise the Court that it commenced this action based on a letter from
16 an investigator who said and I quote:

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18 "Please note that the source (word blanked out)
19 self was not involved in approving this transaction
20 and the information was obtained through
21 secondary hearsay channels and we cannot
22 guarantee the accuracy of such information at this
23 stage."

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And that based on those uncertain facts, the Plaintiff filed a Writ of Summons.

At this stage an examination of the Writ of Summons and Statement of Claim is appropriate. The allegation against the Sixth Defendant (which defendant is essential for these proceedings to have been commenced in the Cayman Islands) is conspiracy. Paragraph 22 of the Statement of Claims states:

In the premises, the Defendants (or any two or more together) wrongfully and with intent to injure BIB and /or causes loss to BIB by unlawful means conspired and combined with each other and/or with other persons deliberately and with intent in breach of Article 28 (6) of the ICC Rules and/or harm BIB's economic interests by preventing BIB from enforcing the Award against the Arbitration Defendants. The best particulars that BIB can currently give are as follows:

1. In anticipation of an unfavourable Award and with the intent of evading execution of such Award, on or about 10 November 2005, the Arbitration Defendants and/or HCMH, and/or Mr. Du, and/or Mr. Yu agreed together and caused the Arbitration Defendants to

1 transfer all their shares in HCMH to Mr. Du (79.1%)
2 and Mr. Yu (20.9%) at a significant undervalue and
3 on or about 9 March 2006 Mr. Du and Mr. Yu
4 adjusted their respective shareholdings to 66.04% by
5 Mr. Du and 33.69% by Mr. Yu.

6

7 And the particulars go on in sub-paragraph 2 to allege:

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9 2. HCMH, and/or Mr. Du, and/or Mr. Yu, and/or Jeff Du
10 and/or Homeway Cayman agreed that the share capital of
11 HCMH should be transferred to Homeway Cayman and
12 that Homeway Cayman should be sold to Home Depot,
13 in order to further the said unlawful transfer at an
14 undervalue and/or to allow the parties thereto to realize
15 the benefits thereof.

16 3. HCMH, Homeway Cayman, Mr. Du, Mr Yu and Jeff Du
17 knew of the Arbitration Defendants' obligations under
18 the ICC Rules and have intentionally or recklessly caused
19 or induced the Arbitration Defendants to enter into the
20 transaction at an undervalue in order to put the
21 Arbitration Defendants' assets beyond the reach of the
22 Plaintiff, and/or have intentionally or recklessly
23 prevented or hindered the Arbitration Defendants from
24 performing their obligations under the ICC Rules for the
25 same purpose.

26

27 And the Plaintiff then claims an injunction against Homeway Cayman, and
28 damages for conspiracy and in the alternative, as against the Seventh and
29 Eighth Defendants, damages for procuring or inducing a breach of contract.

30

1 It is abundantly clear from the Statement of Claim that the only allegation
2 against the Caymanian company is contained in paragraph 22 (2). Based on
3 those pleadings, learned Counsel for the Defendant, Mr. Imrie, submits that
4 the Plaintiff's own evidence and allegations as set out in the Writ have no
5 reasonable prospect of success against Homeway Cayman and that there is
6 not sufficient connection with the Cayman Islands to ground jurisdiction.
7 He submits that there is no basis on which the Court could or should
8 exercise jurisdiction in respect of the foreign defendants. He further submits
9 that the Plaintiff has fundamentally changed its position and did not appear
10 to have explained that to the Court at the second ex parte hearing on 3rd
11 January, 2007.

12
13 The Plaintiff, on the other hand, argues that it has an arguable case and that
14 it now wishes to amend the Statement of Claim. To date there is no pending
15 application before this Court for leave to amend the Statement of Claim.
16 Mrs. Corbett on behalf of the Plaintiff admits that the Statement of Claim
17 needs substantial amendment, and she further states that she intends to
18 amend. She asks for leave to amend. This Court, of course, does not have a
19 proposed amendment before it and it is trite law that I cannot give leave to

1 amend without a proposed amendment being before me. Mr. Imrie makes
2 further submissions regarding the allegation of conspiracy.

3

4 **Conspiracy**

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6 It is well established that there are two types of conspiracy:

- 7 (1) Conspiracy to injury by the use of unlawful means; and
8 (2) Conspiracy to perform an unlawful act or to use unlawful
9 means.

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11 The authorities indicate now, that if there were two purposes to this
12 conspiracy and the intent to injure was not the predominant purpose, the
13 conspiracy would fail. It is also not sufficient for the Plaintiff to show that
14 there was only foreseeable injury. To the extent that there remains any
15 factual dispute between the parties in this case, it is as to: (a) the purpose of
16 a transaction, and (b) the effects of the transaction. The Plaintiff says that the
17 purpose and effect of the transaction was to harm it, so that the Arbitration
18 Defendants could not pay the Award if it was properly enforced. This is
19 against the background that company was formed some three years before
20 the Arbitration Award was made and further against the background that the
21 Cayman company took no active part, save and except, to enter into an

1 agreement which was never completed, as the condition upon which it rested
2 was not performed.

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4 It is quite right to say that the statement of Michael Briggs, QC (sitting as a
5 deputy judge of the High Court of England and Wales, (Chancery Division)
6 in Derksen v Pillar (unreported, 17 December 2002) sets out succinctly
7 what constitutes conspiracy:

8

9 “The law does not prescribe any single or rigid
10 mode of analysis of conspiracy, where a series of
11 frauds or other wrongs is inflicted upon a claimant
12 by a changing group of defendants, acting loosely
13 in concert but with different degrees and periods of
14 involvement in the specific wrongs complained of.
15 Sometimes, the event may best be analysed as a
16 series of separate conspiracies between those
17 concurring in each of the relevant frauds. In other
18 cases, the better analysis may be that there was a
19 single conspiracy to injure the claimant by all
20 available means, implemented at different times by
21 different defendants by a series of acts capable of
22 being categorised as separate frauds.”

23

24 Had the pleadings in this case been supportive of the allegation that the
25 common design was to transfer the assets held by IIDTC to a third party
26 purchaser and that Homeway Cayman, although it did not eventually
27 participate in the executed sale of assets to Home Depot, did, in fact by its

1 silence or inactivity partake in the conspiracy to divert the assets received
2 from the Arbitration Defendants, so as to render the Arbitration Defendants'
3 judgment proof, this application would not, I am assured have been made.
4 But the pleadings do not allege that.

5

6 Pleadings are exchanged by the parties in actions. They (pleadings) have a
7 number of functions:

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9 (a) To inform the other side of the case they will have meet to ensure they
10 are not taken by surprise at trial;

11 (b) To define the issues that need to be tried (so as to save costs at trial)
12 and to limit the ambit of discovery and the evidence that needs to be
13 prepared;

14 (c) To present the trial judge with a precise statement of the contentions
15 advanced by the parties.

16

17 Pleadings are usually the first documents read by a judge and obviously it is
18 necessary that they are carefully drafted. A party may lose some relief or
19 defence by not pleading it sufficiently especially if the Court refuses leave to
20 amend.

21

1 It is trite law to say that every pleading must contain the necessary
2 particulars of any claim, defence, or other matter intended to be advanced at
3 trial. The allegations should be stated in a summary form and as briefly as
4 the nature of the case permits. When in Metall und Roshstoff AG v
5 Donaldson Lufkin & Jenrette Inc. [1990] QB 391, CA, per Lord Denning
6 MR said:

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“It is sufficient for the pleader to state the material
facts. He need not state the legal result. If, for
convenience, he does so, he is not bound by, or
limited to, what he has stated.”

13 The word “material” means necessary for the purpose of formulating a
14 complete cause of action; and if any one “material” statement is omitted, the
15 statement of claim is bad. (See *Bruce v Odhams Press Ltd.* [1936] 3 All ER
16 287 at page 294).

17

18 The clear implication of those statements is that it is improper to plead facts
19 which are contrary to the known and uncontested documentary evidence.

20 (See *Re Unisoft Group Limited (No 3)* [1994] 1 BCLC 609 at page 618h).

21

1 It is important that the facts contained in the Statement of Claim are
2 accurate, at least to the best of the Plaintiff's knowledge. Indeed, in England
3 today, one has to sign a statement of truth. The purpose of the statement of
4 truth is to eliminate claims in which a party has no honest belief and to
5 discourage claims unsupported by evidence which have been put forward in
6 the hope that something may turn up on disclosure or at trial.

7

8 This is precisely what happened in this case. The Plaintiff obtained a
9 Mareva injunction, it then used these proceedings to get an order for
10 disclosure in Atlanta. That disclosure however revealed certain
11 documentation which proved that the Plaintiff's pleaded facts were totally
12 inaccurate.

13

14 Despite that and despite getting a Mareva on inaccurate factual pleadings,
15 the Plaintiff has not sought to amend. Instead, at the hearing when it became
16 apparent that the Plaintiff's attorney could not support the Summons, Mrs.
17 Corbett conceded that the Statement of Claim needs amendment.

18

19 The proposed amendments are not before the Court. The Court cannot give
20 leave to amend without knowing the form of the amendment, as any grant of

1 leave to amend must avoid injustice to the Defendants. The details are
2 therefore essential.

3

4 The parties seeking leave to amend need the exercise of the Court's
5 discretion. The Court is obviously competent to refuse to exercise its power
6 if the proposed amendment will serve no useful purpose. An amendment
7 will be useless if it is unarguable on the merits. As with many other
8 interlocutory applications, the evidence and the merits of the substantive
9 claim will usually be incomplete and untested by cross-examination. But
10 the Court in an application for leave to amend will need to satisfy itself that
11 the case sought to be raised, is fairly arguable. In this case the merits are
12 not even visible and I have been asked to give leave to amend.

13

14 **Leave to Serve out of the Jurisdiction**

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16 There is yet another aspect of the Law that needs to be looked at which is the
17 leave given to serve the Writ out of the jurisdiction. The only connection
18 with the Cayman Islands is that the Sixth Defendant is a holding company
19 incorporated in the Cayman Islands. All the other defendants and all the
20 other material events that took place in these proceedings are outside the

1 jurisdiction. The Court is unaware of where the alleged agreement was
2 formed but that was never completed and the particulars which are relied
3 upon for the conspiracy are that the share capital of HCMH should be
4 transferred to Homeway Cayman and that Homeway Cayman should be sold
5 to Home Depot. The consequences of that sale not having gone through the
6 Plaintiff suffered no damage as a result of that particular agreement. No
7 reliance in my view can be placed on that incomplete transaction to ground
8 jurisdiction.

9
10 The transfer to Home Depot (USA) has nothing to do with the Cayman
11 company and the undervaluing of the shares should be related to the second
12 transfer with which the Cayman company had nothing to do. The
13 agreement is to sell shares to the two individuals directors who are the
14 common directors of the Chinese companies. The Plaintiff's attorney, Mrs.
15 Corbett submits that that is sufficient to imply that the parties were ad idem
16 on this undervalued transfer of shares. With respect I cannot agree.

17

18 I agree with counsel for the First to Fourth and Sixth and Ninth Defendants
19 that the following legal principles are relevant to this aspect of the
20 application:

1 (a) The Court has inherent jurisdiction to revoke leave given ex parte
2 upon new matters being brought to its attention, if it holds that it gave
3 its original leave under a misapprehension;

4 (b) The Court should set aside an order for leave to serve a writ out of the
5 jurisdiction, if the allegations on which the order was made turned out
6 to be unfounded; and

7 (c) If the material facts relied upon to support an ex parte application
8 proved to be inaccurate and if the applicant could not have obtained
9 the ex parte relief if it had stated the facts correctly, then the court
10 should discharge those ex parte orders.

11
12 Mrs. Corbett submits strenuously that the evidence shows that the
13 Cayman Company was silent and/or inactive when the second transaction
14 (which was the subject matter of the alleged unlawfulness) took place
15 and that it must mean that it knew what was happening. Although not
16 pleaded she seeks to succeed in this application. Regrettable as it is, I
17 cannot deny the Defendants the relief sought on the basis that the
18 Plaintiff's attorney would seek an unknown amendment.

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20 The Sixth Defendant in this case submits that the pleadings are:
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- (a) Defective;
- (b) That the evidence does not support the pleadings
- (c) That even taken at its highest, the evidence when looked at carefully is not supportive of any damage that has been suffered by the Plaintiff;
- (d) That in this case an ex parte Mareva injunction draconian by nature was obtained based on inaccurate facts. The inaccuracy of those facts was brought to the attention of the Plaintiff who did nothing when the matter came before the Court in January 2007. If this Court holds that the Mareva should be discharged against the Sixth Defendant, because the Writ should be set aside and that the Statement of Claim is bad, then the Mareva granted ex parte against all the Defendants should be discharged;
- (e) Finally, he submits that the only nexus with the Cayman Islands is the Cayman company against which the pleadings are defective and therefore the Writ should be set aside.

I agree with counsel for the Defendants Mr. Imrie and I therefore order as follows:

1. The Plaintiff's claim against the Sixth Defendant be dismissed and Summary Judgment be entered for the Sixth Defendant.

- 1 2. Paragraph six of the Order of this Honourable Court dated 8th
2 December, 2006 granting leave to serve the Writ as against the
3 First to Fourth Defendants and Seventh to Ninth Defendants be
4 discharged.
- 5 3. The Writ be set aside as against the First to Fourth Defendants and
6 the Seventh to Ninth Defendants and the balance of the security be
7 held pending an investigation as to damage incurred by the First to
8 the Fourth Defendant and the Sixth to the Ninth Defendants and
9 that the balance not be released until further order of the Court or
10 written agreement of the parties.
- 11 4. An order that the Mareva injunction contained at paragraph 1 to 5
12 of the Order of this Honourable Court dated 8th December, 2006
13 be discharged forthwith as Summary Judgment has been granted
14 and the writ struck out.
- 15 5. An inquiry into damages, as a result of the discharge of the
16 Mareva injunction, Costs of this application to the First and
17 Fourth Defendant and Sixth to Ninth Defendants on an indemnity
18 basis, such costs to be taxed if not agreed.
- 19 6. And such costs to be secured by and paid from the fund deposited
20 by the Plaintiff in accordance with paragraph 7 of the Ex parte
21 Order.

22 Dated this 12th day of March 2007

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24 Judge of the Grand Court

