

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

CAUSE NO. 425 OF 2006

BETWEEN:

TEMPORARY SERVICES INSURANCE LTD.

Plaintiff

AND:

**ADVANTAGE SERVICES GROUP II, L.L.C.
(formerly known as Advantage Leasing and Staffing, L.L.C.)**

Defendant

Appearances: **Mr. Edward Drummond of Maples and Calder for the
Plaintiff/Applicant
Mr. Kenneth Farrow of Mourant for the
Defendant/Respondent**

Before: **Hon. Justice Henderson**

Heard: **January 8 and January 23, 2008**

JUDGMENT

The Plaintiff Temporary Services Insurance Ltd. (“TSIL”) seeks summary judgment on its claim in debt arising from a shareholder agreement with the Defendant Advantage Services Group II, L.L.C. (“Advantage”) and the dismissal of Advantage’s pleaded counterclaim.

The shareholder agreement is part of a captive insurance scheme set up by TSIL. Under the agreement, the directors are to determine from time to time the financial obligation of a shareholder to TSIL, and that determination shall “absent manifest error, be final and binding on all parties.”

Pursuant to such a determination by the directors, TSIL has sent invoices to Advantage which remain unpaid. Advantage does not seek to challenge the effect of the shareholder agreement and mounts no direct defence of TSIL’s claim. It does, however, plead a counterclaim and claim the right to set off any damages which may be awarded to it against the amount owing to TSIL.

Advantage argues that the nature of the scheme and the relationship and dealings between the parties were such that TSIL acquired, in addition to its contractual obligations, a duty of care owed to Advantage to exercise certain rights it had under reinsurance agreements so as to ensure that Advantage was not prejudiced by mismanagement of the claims handling process. That process had been carried out by two third parties who, it is alleged, processed claims in a negligent manner and cause the obligations of Advantage to TSIL (which were based closely upon the actual claims experience) to increase substantially and unjustifiably. Advantage says that any damages award in its favour against TSIL should be set off against the invoiced amount because that amount, itself, has been inflated by TSIL’s negligence. As to the possible co-existence of a duty of care in tort and contractual obligations with respect to underwriting functions, see *Henderson et al v. Merrett Syndicates Ltd. et al* [1995] 2 A.C. 145 (HL).

During argument, Mr. Drummond for TSIL identified a number of deficiencies in the amended defence and counterclaim. In implicit recognition of the difficulties, Mr. Farrow for Advantage has, at the end of argument, presented the court with a draft re-amended defence and counterclaim. He has undertaken to file a summons seeking leave to amend and to adduce fresh evidence on the summary judgment application. The re-amended counterclaim contains an alternative allegation that TSIL's duty of care in respect of the claims handling process must be determined by the law of California; the fresh evidence, which is not yet in affidavit form, is expert evidence on the applicable law in California.

Mr. Drummond urges me to ignore these eleventh hour requests and give him the judgment he should be entitled to on the present state of the pleadings.

Despite the lateness of the request, I am satisfied that Advantage should be permitted to amend its pleading again and introduce the fresh evidence it has gathered. I grant leave to amend in substantially the form of the draft pleading submitted during argument. The amended pleading is to be filed and delivered within seven days; TSIL is at liberty to file an amended reply and defence to counterclaim within fourteen days thereafter.

TSIL has argued that, as a condition of granting Advantage leave to defend, I should require payment of the invoice amount into court. Mr. Farrow says that Advantage is not

at present in a position to pay that amount so any such order will be tantamount to granting summary judgment to TSIL.

The counterclaim rests upon an assertion of a legal principle which is controversial and uncertain. It cannot be said, however, that it is doomed to failure. The counterclaim has sufficient merit that it must be allowed to proceed. I am also satisfied there is at least some prospect of success for Advantage's claim to a set off.

In these circumstances, I am satisfied that the proper order is as follows:

- 1) judgment is awarded to the Plaintiff in accordance with paragraphs 1, 2, 4 and 5 of its prayer for relief;
- 2) execution of the judgment referred to in paragraph (1) is stayed until the counterclaim is disposed of;
- 3) Advantage is given leave to pursue its counterclaim upon condition that it pays the costs of this action to date to TSIL forthwith and in any event of the cause.

I have considered TSIL's request for costs on an indemnity basis but do not consider that Advantage's need to re-amend its counterclaim at the last minute is a sufficiently serious dereliction of duty to merit such an award.

Dated this 29th day of January, 2008

Henderson, J.
Judge of the Grand Court