

16.3.98



IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 161 OF 1997

BETWEEN: Sunny Sensations Inc. PLAINTIFF

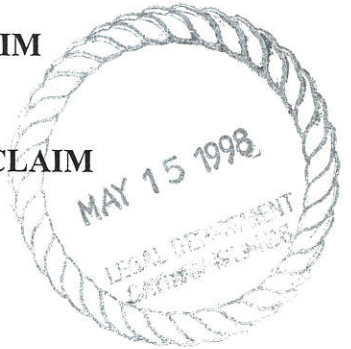
AND: English Shoppe Ltd. DEFENDANT

AND BETWEEN: English Shoppe Ltd. PLAINTIFF BY COUNTERCLAIM

AND: Sunny Sensations Inc. DEFENDANTS
Deiter Schupp & Nancy Williams BY COUNTERCLAIM

For the Plaintiff - Mr. Steven Roy
For the Defendants - Mr. Ward Sykes

Before Harre CJ



JUDGMENT

This was a summons by the plaintiff pursuant to Order 14 of the Grand Court Rules for an Order that summary judgment be entered in its favour for a sum which it claimed to be owing to it in respect of goods sold and delivered to the defendant, together with interest and costs. A defence and counterclaim naming Deiter Schupp and Nancy Williams, as well as the original plaintiff, as defendants to the counterclaim had already been served prior to the summons. Another summons sought an order that this defence and counterclaim be struck out on the basis that it disclosed no reasonable cause of action and was otherwise an abuse of the process of the court.

It is common ground that Schupp was at all material times an employee of English Shoppe Ltd. and the manager of the English Shoppe in George Town, Grand Cayman. Nancy Williams was also an employee. The thrust of the defence was that the

1 plaintiff company was for the purposes of its dealings with the defendant
2 indistinguishable from its proprietors and controlling minds, Schupp and Williams; a
3 denial that the goods in respect of which payment is claimed were supplied by the
4 plaintiff or by Schupp or Williams; that if they were delivered they were provided by
5 Schupp and Williams in their personal capacities and payment was made in part to
6 Schupp personally and on his direction; and both Schupp and Williams owed
7 fiduciary duties to the defendant which they breached in various ways which are
8 pleaded. On the basis of the pleaded conduct of Schupp and Williams the defendant
9 claims set off against any moneys found due to the plaintiff and in the event that such
10 set off exceeds the amount found due to the plaintiff then the defendant counterclaims
11 against the plaintiff, Williams and Schupp for that amount. There is also a claim by
12 the defendant for damages for breach of contract and fiduciary duty and other relief.

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14 An affidavit in response to the plaintiff's application for summary judgment was
15 sworn by Margaret Arch on behalf of the defendant. She depones to her belief that the
16 legal issues between English Shoppe Ltd., Sunny Sensations Inc., Schupp and
17 Williams can only be properly dealt with in one proceeding, that Schupp and
18 Williams profited handsomely and unlawfully by receiving benefits or cash from the
19 English Shoppe and that if a judgment or payment was made to the plaintiff it would
20 be in reality a payment or judgment for the benefit of Williams, Schupp or both
21 against whom there are substantial claims by the English Shoppe. The plaintiff's case
22 is that the matters are totally distinct and the defence and counterclaim disclose no
23 reasonable cause of action against it.

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1 An analysis of the English authorities as to what orders should be made where a
2 defendant raises a setoff or counterclaim is to be found at note 14/3-4/13 in the 1997
3 edition of the Supreme Court Practice. The conclusion is reached that among the four
4 different classes or groups of orders which can be made in such cases is that where a
5 defendant sets up a bona fide counterclaim arising from the same subject matter as the
6 action and connected with the grounds of defence. In such a case the order should not
7 be for judgment on the claim subject to a stay pending trial of the counterclaim but
8 should be for unconditional leave to defend.

9
10 With regard to counterclaims against additional parties GCR Order 15 Rule 3 (1)
11 reads as follows -

12
13 “Where a defendant to an action who makes a counterclaim against
14 the plaintiff alleges that any other person (whether or not a party to
15 the action) is liable to him along with the plaintiff in respect of the
16 subject matter of the counterclaim, or claims against such other
17 person any relief relating to or connected with the original subject
18 matter of the action, then, subject to rule 5(2) he may join that other
19 person as a party against whom the counterclaim is made.”

20
21 Rule 5(2), there referred to, provides that if it appears on the application of any party
22 against whom a counterclaim is made that the subject matter of the counterclaim
23 ought for any reason to be disposed of by a separate action the court may order the
24 counterclaim to be struck out or may order it to be tried separately or may make such
25 other order as may be expedient.

26
27 These rules follow the English Rules of the Supreme Court. In Note 15/3/1 of the
28 1997 edition of the Supreme Court Practice Order 15 r 3 is described as a further

1 application of the principal that as far as possible all matters in controversy between
2 the parties may be completely and finally determined and all multiplicity of
3 proceedings concerning any of those matters avoided. The same note also usefully
4 observes that paragraph (1) of the rule is wider in scope than the former Order 21 Rule
5 11 since it allows the joinder of a person to the counterclaim made against the plaintiff
6 not only where that person is liable "along with" the plaintiff but also where the relief
7 claimed against that person relates to or is connected with the original subject matter
8 of the action.

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10 There is an issue as to the credibility of Schupp and misconduct by him and Williams
11 is pleaded. There are disputed issues of fact which are not and cannot be fully
12 addressed by the affidavit evidence. Moreover, while the mere fact that the defendant
13 has served a defence will not in a proper case necessarily prevent the plaintiff from
14 making the requisite affidavit swearing to the belief that there is no defence and
15 proceeding under Order 14, the plaintiff has not provided any sufficient explanation as
16 to why he holds such belief in spite of the service of the defence and counterclaim.

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18 I am satisfied that unconditional leave to defend should be given in this case and that
19 the prayer that the defence and counterclaim be struck out on the basis that it discloses
20 no reasonable cause of action and is otherwise an abuse of the process of this court
21 should be dismissed. The position of the plaintiff company and of Schupp and
22 Williams and the relief claimed against them relate to and are connected with the
23 original subject matter of the action to an extent which makes it entirely appropriate

1 that all matters in issue should be dealt with in this same action and they are clearly
2 pleaded.

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4 I have already ordered that security for costs by the plaintiff, which is a foreign
5 corporation with no known assets, be fixed at \$3,000, with \$1,000 to be paid into
6 court forthwith and the balance of \$2,000 within 14 days. I now order that service of
7 the defence and counterclaim be effected by service upon the plaintiff and the
8 defendant to the counterclaim at the office of C.S. Gill & Co. and, in addition, by
9 prepaid first class post to 965, NW 75 Terrace, Ocala, Florida 33482 USA. I did
10 order on 23rd July 1997 that costs of the hearing on that day be in the cause.

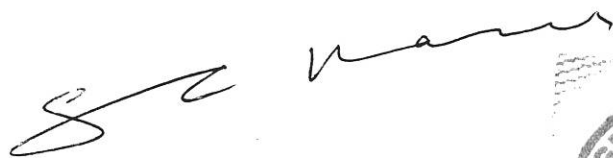
11 Although there was little merit in the plaintiff's application for summary judgment I
12 will make the same order in respect of that summons, failing an application to be
13 heard on that matter within 14 days of the date of this ruling.

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18 23rd April, 1998

G.E. Harre
Chief Justice



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