CAYMAN ISLANDS

IN THE COURT OF APPEAL

Civil Appeal

No. 5/1987

B E T W E E N

10-12-87
Reported

CAYMAN ISLANDS NEWS BUREAU LIMITED

Plaintiff/Appellant

and

ROBERT JOSEPH COHEN

First Defendant/Respondent

and

COHEN ASSOCIATES LIMITED

Second Defendant/Respondents

BEFORE:

The Hon. Mr. Justice Zacca, P.
The Hon. Mr. Justice Georges, J.A.
The Hon. Mr. Justice Henry, J.A.

Appearances are:

Mr. Lamontagne, Q.C.,
with him for the Appellants.

Mr. Alberga, Q.C.,
with him for the Respondents.

Heard October 9,10,12, 1987

J U D G M E N T

This is an appeal from an order by a judge of the Grand Court directing that certain proceedings which had been commenced by way of an originating summons should continue as if they had been commenced by way of writ. He ordered that the plaintiff should serve a statement of claim within 14 days and that the costs of the defen-

dants' application to change the form of the proceedings should be the defendants' in any event.

The plaintiff appealed against that ruling but did not seek a stay or the order. The statement of claim was duly delivered and so was the defence and counterclaim after objections had been taken to its late delivery. The plaintiff has sought certain particulars of the defence which have not yet been supplied and has sought inspection of documents.

At the opening of the hearing Mr. Alberga, for the defendants, objected that the plaintiff could no longer proceed with its appeal since by complying with the order made by the judge of the Grand Court, it had, in effect, released its right of appeal and should be estopped from appealing. He relied on Lissenden v C.A.V. Bosch Limited, [1940] A.C. 412. In that case a workman had accepted payments made by the employer under an order which he subsequently challenged on appeal. The objection was taken that once part payment had been accepted the workman could not competently appeal. The objection failed. A principle was, however, formulated by Viscount Maugham at p 420:

> "It is necessary to add that there may well be cases in which a litigant may lose his right of appeal by reason of his conduct after the judgment or award; but this result would not, in my view, depend on 'approbating and reprobating,' but on whether the intending appellant is by his conduct estopped from appealing, or has in equity or at law released his right of appeal".

It is this principle which Mr. Alberga contended should be applied in this case to bar the appeal.

We were satisfied that the objection failed. Compliance with the order of the learned judge in no way constituted such an acceptance of it as to bar the right to appeal. It is clear that by electing to proceed by way of originating summons, the plaintiff was seeking the most speedy method of having its claim determined. The judge ruled

that the action should proceed by writ. Seeking a stay or execution while prosecuting an appeal could only delay matters. It was sensible to continue with pleadings while the appeal came on for hearing so that should it fail, the proceedings would have moved along on the way to trial. Accordingly, the objection was overruled and the appeal continued.

As against the first defendant the plaintiff claimed that he was in breach of his fiduciary duty to the plaintiff. As against both defendants, the plaintiff claimed that they were trustees for the plaintiff of certain contracts entered into by one or other of them with the Government of the Caymans and Cayman Airways to provide sales promotion and public relations services; an order that the defendants account to it for all fees, remuneration and profits received or payable under the said contracts; an inquiry as to such fees, remuneration and profits and an order that the defendants pay to the plaintiff all sums found due and owing to the plaintiff on the taking of such account.

Garth Hudson Davies, the managing director and principal shareholder of the plaintiff company filed an affidavit in support of the claims. It appears from this that since 1977 the plaintiff held a series of contracts with the Government of the Caymans and Cayman Airways. There were a series of Government Information Services contracts, the last of which was terminated by the Government in November, 1984. There was also a series of Government Public Relations and sales promotion contracts, the last of which was dated December 11th, 1985 and a series of public relations and sales promotions contracts with Cayman Airways, the last of which was also dated December 11th, 1985. Although each contract was stated to be for a year, it could be terminated by either side on 90 days notice.

In May, 1984 the plaintiff entered into a service agreement with the first defendant under which the first defendant became managing director of the plaintiff company for a period of 24 months. Attached to the affidavit is a three-page job description of the first defendant's duties which appears comprehensive and includes control over costs and staff.

Garth Davies stated that the first defendant, as managing director of the plaintiff company was closely concerned with the negotiations with the Government of the Caymans and Cayman Airways leading to the contracts dated December 11th, 1985.

In mid-1983, Mr. Davies heard rumours that the first defendant planned to take over the contracts with the Government of the Caymans and Cayman Airways. He spoke to the first defendant about this and the first defendant assured him orally and by letter attached to the affidavit that this was not so.

In due course, the time came when the Government invited the plaintiff to submit budget proposals for fiscal 1987. The first defendant advised that a budget showing a 10% increase on expenses and an additional sum for TV equipment should be submitted. In July, 1986 while the response to the budget proposal was being awaited, the first defendant entered into a second service agreement with the plaintiff for a period of 12 months from May 7th, 1986.

On September, 1986, Mr. Davies came to the Caymans to attend the annual marketing meeting between the Department of Tourism and Cayman Airways of the one part and the plaintiff of the other part.

Some days before the meeting which was to be held on September 15th, he received a message that the Member for Tourism wished to see him prior to the meeting. He enquired from the first defendant whether he had any idea what the Member wanted to see him about. The first defendant said he had no idea. Mr. Davies met the Minister immediately before the scheduled meeting and the Minister informed him that the Government of the Caymans intended to terminate their existing contracts with him and would award the contracts to the second defendant. Mr. Davies was asked not to attend the schedule meeting.

Mr. Davies saw the first defendant, after receiving this oral notice of termination. At first, the first defendant denied any prior knowledge of Government's intention to terminate the contracts. In the end, however, he admitted that some two months prior to that date the Member for Tourism had told him that the Government intended to terminate the contracts with the plaintiff and had asked the plaintiff to

submit a proposal. The Member had forbidden him from mentioning the Government's decision to anyone. He realised that the termination of the contracts would mean the loss of his job with the plaintiff, which held no other contracts in the Caymans. Accordingly, he had submitted proposals which the Government had accepted on September 9th, 1986.

In due course, the Government of the Caymans gave written notice of the termination of the contracts. On October 1st, 1986, the first defendant gave written notice of termination under his second service contract. Before the notice period had expired, the plaintiff, by letter dated November 26th, 1986, summarily dismissed the first defendant. The plaintiff, in fact, lost its business and its staff resigned and took up employment with the second defendant.

In an affidavit in support of the proceedings being continued as if the same had been commenced by writ, the first defendant on behalf of himself and of the second defendant, of which he was a director, stated that:

> "many of the allegations made in support of the Plaintiff's claim are untrue and are strongly denied by me. In particular I deny that I acted in breach of fiduciary duty to the Plaintiff and I took advantage of knowledge acquired during my employment to enrich myself by obtaining contracts with Government and C.A.L. at the expense of the Plaintiff. Many of the 'facts' relied upon by Mr. Davies in support of the Plaintiff's claim are denied by me. It is therefore clear that this action will involve a substantial dispute of fact".

The trial judge did not consider that this denial made it clear that there was a substantial dispute of fact. It was too general, merely asserting a dispute but not demonstrating this. In this finding he was correct. He did, however, accept Mr. Rodger's assurance that if the action did go to trial there would be substantial disputes as to fact. While one may with confidence accept an attorney's assurance as to events which have already occurred; it is otherwise as to future

events, except in circumstances where the attorney gives an undertaking as to action he intends to take. If there would be disputes as to fact when the action came to trial, it was possible at the stage of the summons to demonstrate this in Cohen's affidavit and this had not been done. The originating summons had been filed on March 13th, 1987, and the defendants' summons was filed on May 6th, 1987, so there would have been adequate time to have such an affidavit prepared.

Since the hearing before the trial judge, as has been mentioned, pleadings have been filed and both Mr. Lamontagne and Mr. Alberga, without objection, referred in some detail to them. Properly, an appeal should be determined on the record as it was available to the judge at first instance, unless application is made in the prescribed way for the admission of fresh material before the appellate trial. In the absence of objections we did consider the pleadings and they will be taken into account in the determination of this appeal.

Paragraphs 1 to 4 of the Statement of Claim set out a description of the parties. Essentially, they are admitted. The allegation that the second defendant is the alter ego ofthe first defendant is denied, but it is admitted that the first defendant and his wife were the incorporators of the second defendant and that the first defendant is a 60% shareholder in the second defendant. There is a linguistic distinction as to whether the business of the second defendant is "total marketing communications" or public relations, marketing consulting and advertising".

Paragraphs 5 and 6 set out briefly the substance of the contracts between the plaintiff and the Government of the Caymans in the areas of public relations and government information. These are admitted. Paragraph 7 recites the termination of the government information contract in November, 1984. This is admitted, but there is a dispute as to the reason. The plaintiff alleges that the Government of the Caymans no longer needed the services. The defendants allege that under the personal direction of Mr. Garth Davies, the services had been conducted in a non-credible manner. It seems unlikely that

this dispute will substantially affect the determination of the legal consequences of the events of July, 1987, particularly when regard is had to the fact that the first defendant took over as managing director of the plaintiff in May, 1984.

Paragraphs 8 and 9 recite the plaintiff's contracts with Cayman Airways and aver that from June, 1977, until the end of 1986, the plaintiff provided public relations services for the Government of Caymans and Cayman Airways. The existence of the agreements is admitted as is the fact that services were provided, but it is averred that Mr. Garth Davies undertook these services in an unprofessional manner, so that the Government of the Caymans found him to be no longer a suitable consultant.

Paragraphs 10 to 15 recite the contracts of employment entered into between the plaintiff and the first defendant. The express terms are summarised and implied terms are set out. Essentially, these paragraphs are admitted. There is a denial that the first defendant was Chief Operating Officer of the plaintiff and it is alleged that Mr. Garth Davies placed wide restrictions on the nature, scope and billing of the work undertaken by the first defendant.

Paragraph 16 avers that the contracts with the Government of the Caymans and Cayman Airways were continuous though the practice was to renegotiate the terms yearly. This is denied.

Paragraphs 17 avers that the first defendant as Managing Director and Chief Operating Officer of the plaintiff played a major role in the renegotiations of the Government and Cayman Airways contract in 1985 and 1986. This is denied.

Paragraph 18 sets out the practice followed in such negotiations. Essentially this is agreed. There are denials which appear to centre on language, rather than substance.

Paragraph 19 sets out the allegation of breach of fiduciary duty and particulars of that breach of which there are 12. In effect, the first defendant admits that while in the employment of the plaintiff he submitted a proposal to the Government of the Caymans to provide among other things public relations and sales promotion services to the

Government of the Caymans, but that he did so at the express request of the Government of the Caymans and only after he had been told that there was no possibility of the contracts being awarded to the plaintiff or any company with which Mr. Garth Davies was associated. He denies that he acted in breach of the terms of his service agreement of his fiduciary duty to the plaintiff. He also denies that he took advantage of knowledge acquired whilst in the service of the plaintiff and the opportunities afforded by his position as Managing Director and Chief Operating Officer of the plaintiff to enrich himself. These denials appear to be concerned with inferences to be drawn from facts and the applicability of legal principles.

In relation to the particulars, the first defendant denies that he submitted a budget in direct competition with the budget he had submitted for the plaintiff. This is no doubt based on his position that he submitted his budget only after he had been told that the plaintiff would not in any event be awarded the contract.

The first defendant denies that he submitted the budget which he did submit for the purpose of obtaining the public and sales promotions contracts for his own benefit. Again it would appear that this denial is meaningful only on the basis that the budget had been submitted because the plaintiff would not, in any event, have had his contracts renewed.

The other particulars pleaded are either admitted or admitted with qualifying material.

This examination establishes that there is no area of disputed primary facts of substance in the versions given by the plaintiffs and the defendants. The defendants clearly wish to expand the picture, to establish that the Government of the Caymans would not in any event have awarded the contract to the plaintiff. Mr. Lamontagne, as would be expected, could not see how his client could successfully controvert this, especially if the evidence came from a proper governmental source.

Such factual disputes as do exist are in the area of the inferences to be drawn from primary facts which essentially would be established by documents which would be available for interpretation.

Accordingly, we did not accept the submission that there was a substantial dispute on the facts which made the procedure by way of originating summons inappropriate.

Mr. Alberga contended that, in effect, the plaintiff's claim alleged fraudulent behaviour on the part of the first defendant. Accordingly, it fell within Rule 3A(b) of the Grand Court Civil Procedure Rules. On the face of the pleadings, fraud is not alleged nor is it implied.

In Brown v Rivlin, Court of Appeal Civil Division Transcript, February 1st, 1983, there was an application for summary judgment. The plaintiff and the defendant had been partners and it was alleged that the defendant had made out cheques to clients of the partnership for rent which had been collected on their behalf, had altered the cheques by making them payable to cash and then had withdrawn the money and kept it. In other instances, having received cheques made out to cash he had encashed them and accounted only for part of the proceeds. At p 8, Eveleigh, L.J., said:

> "It was contended on behalf of the appellant that the plaintiff's claim was excluded from Order 14 proceedings by Order 14(1)(2)(b) as being 'an action which includes a claim by the defendant based on an allegation of fraud.' However, we think it is clear that an allegation of fraud forms no part of the plaintiff's case. He has no need to allege fraud at all and does not do so".

The language of Grand Court Rule 3A is sufficiently close to that of Order 14(1)(2)(b) to make this approach applicable. Unless a claim of fraud is actually pleaded or proof of fraud is a necessary ingredient for establishing a right to the relief claimed, Rule 3A cannot be invoked. Accordingly, this submission must fail.

It was also contended that whenever a plaintiff claims a declaration as one of the remedies, proceedings by way of originating summons are inapplicable. No authority was cited and it seems unlikely

that there could be any. It is generally acknowledged that summons can appropriatedly be used where it is sought to have a legal document or a statute interpreted in the light of agreed facts. It may well be appropriate to ask in such proceedings for a declaration of the rights and entitlements of the parties concerned. It could hardly be logical to make proceedings by way of originating summons inappropriation in such cases merely because a declaration had been claimed, though, but for such a claim, the procedure would have been inappropriate.

An important submission and one which found favour with the judge at first instance was that in cases where there was a disputed allegation of breach of fidicuary duty, proceedings by way of originating summons were inapplicable. The defendant could insist on having the issues for determination formulated with the accuracy which should be inherent in the process of pleading, an accuracy which may not be so precisely achieved by the exchange of affidavits.

Reliance was placed on Re Sir Lindsay Parkinson and Company Limited's Trusts Deed, [1965] 1 All E.R. 609. Buckley, L.J. stated at p 610:

> "Under that rule it was, I think, open to the plaintiffs to institute those proceedings either by originating summons or by writ; by the terms of the rule the matter is left in the discretion of the plaintiffs, but I desire to say that in my view, clearly, proceedings by beneficiaries against trustees of a contentious nature, charging the trustees with breach of trust or with default in the proper performance of their duties, whether the matters with which the trustees are charged are matters of commission or omission, ought normally to be commenced by writ and not by originating summons; for in such proceedings it is most desirable that the trustees should know before the trial precisely what is alleged against them. The appropriate form of proceedings therefore, in my view, are proceedings by writ in which what is alleged by the

> parties will be clearly defined in the pleadings, in which the parties can, if they wish, seek further and better particulars of the matters alleged by their opponents, and in which there is full discovery; for where allegations of this kind are made against trustees, it is right that they should have available to them the full machinery which exists in the case of proceedings instituted by writ and conducted on pleadings, to discover precisely what the charges are that are levelled against them. I say that because I do not want it to be thought that the proceedings in this case constitute a precedent of the way in which, in normal circumstances, proceedings raising matters of the kind which the plaintiffs seek to raise in these proceedings should be instituted.
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> The reason why in the present action the proceedings were by originating summons rather than by writ was, at any rate to a very great extent, the fact that at the time when the proceedings were issued, the matters in issue between the parties had become of great urgency, and it was thought proceedings instituted by originating summons could be got before the court more speedily than proceedings instituted by writ. I am not saying that that was not a reasonable view to take.
>
> I have said what I have said merely in order to make clear that I think in ordinary circumstances proceedings by way of originating summons ought not to be regarded as appropriate in such a case as the present".

The fact of that case are not set out so that the nature of the controversial issues do not appear. In our view the statement does no more than reiterate the well know rule. Proceedings may be contentious because there is disagreement as to the legal consequences which ensue from facts which are largely undisputed. They can be contentious because facts are in dispute, though once the facts are ascertained, the legal consequences are clear. In a case of the second kind, proceedings by way or originating summons would be in-

appropriate. In a case falling within the first category, proceedings by way of originating summons are appropriate. The fact that a claim for breach of fiduciary duty is disputed, though there is no substantial dispute as to the facts, cannot be enough to exclude the procedure by way of originating summons. Otherwise Rule 3A of the Grand Court Rules would include among matters to be constituted by writ alone, claims for breach of fiduciary duty.

For these reasons we allowed the appeal with costs in this court and below.

DELIVERED this 10th day of June 1987.