

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS

2 CAUSE NO: G0129 of 2015

3 BETWEEN

4

5 1. ALVA SUCKOO
6 2. DIANE MARTINEZ

7 Plaintiffs

8 AND

9

IGNITION TECHNOLOGY GROUP LIMITED

10 Defendant

11
12

13 IN CHAMBERS

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15 **Appearances:** Mr. J Kennedy of Samson & McGrath for the Plaintiffs
16 Mr. K Broadhurst of Broadhurst LLC for the Defendant

17

18 **Before:** The Hon. Justice Ingrid Mangatal

19

20 **Heard:** 2 February 2016

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22 **Draft Judgment**

23 **Circulated:** 23 May 2016 and 31 May 2016

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25 **Judgment**

26 **Delivered:** 31 May 2016



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HEADNOTE

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29 *Civil Practice and Procedure – Application to Amend Writ and Statement of Claim and Substitute Plaintiff - Costs -*
30 *Whether to be Taxed Immediately – Application to Strike Out Pleading – Summary Judgment Application – Defence of*
31 *Tender – Order 20, Order 18 r.16, and r.19, Order 14, 14A and Order 62 r.9 of the Grand Court Rules, 1995 (Revised*
32 *Edition).*

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RULING

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36 **THE APPLICATIONS BEFORE THE COURT**

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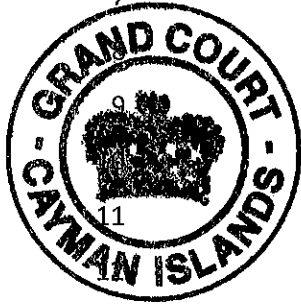
1. The Plaintiffs Alva Suckoo and Diane Martinez (“the Plaintiffs”) were at all material
38 times and continue to be the sole Shareholders in a business registered as Blue Bison
39 Software Consultants Ltd (“Blue Bison”, the proposed plaintiff). Blue Bison, the
40 Plaintiffs and Ignition Technology Group Limited, the Defendant (“Ignition”) entered

1 into negotiations for the sale of the assets of Blue Bison to Ignition in or around
2 December 2012 and concluded with the signing of an Asset Purchase Agreement dated
3 and effective as of the 22 March 2013.

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5 2. Both the Plaintiffs and Ignition have summonses before the Court. Ignition's summons,
6 which was filed 9 October 2015, was first in time, and seeks the following:

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“1. Pursuant to GCR Order 14 and/or 14A judgment be entered in favour of the Defendant on the grounds that the whole or part of the Plaintiffs' claim has no prospect of success or that the Plaintiffs have no prospect of recovering more than nominal damages.

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2. Pursuant to GCR Order 18 rule 19 under/or under the inherent jurisdiction of the Court that the statement of claim be struck out and judgment entered for the Defendant on the grounds that it discloses no reasonable cause of action against the Defendant.”

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19 3. There are two applications, embodied in the Plaintiffs' summons filed 1 December
20 2015. The relief sought is that the Plaintiffs be granted leave to amend the Writ of
21 Summons and Statement of Claim as set out in the proposed amended form attached to
22 the summons. Essentially, the Plaintiffs seek to substitute for the Plaintiffs, Blue Bison.
23 The summons also seeks directions for the trial of the matter.

24

25 4. It is noted that there is no affidavit in support of the Plaintiffs' summons to amend.
26 However, as Mr. Kennedy states in his written skeleton argument, one of the grounds
27 for Ignition's application to strike out is that the improper plaintiff has been named. The
28 Plaintiffs' summons for amendment therefore seems to be responsive to Ignition's
29 strike out application.

30

31 5. Mr. Kennedy proposed that the applications be heard in the following order:-



1. Application to substitute plaintiff;
2. Application to strike out claim;
3. Directions in the event that the claim is not dismissed.

6. In my judgment, Mr. Kennedy was correct, that although Ignitions' summons was filed first, the Court should proceed to consider the application to amend before the strike out/summary judgment application. The proper course is to consider whether an amendment can cure the alleged defect in the claim or pleading, and an opportunity to amend may be given, rather than striking out - see Order 18 Rule 19/2 of the 1999 White Book.

THE DISPUTE

7. The dispute in this case arises from the interpretation of the Asset Purchase Agreement ("the Agreement") and the consequential payment due to Blue Bison. In particular the area of contention relates to the staggered and performance related element of the purchase price and the provision termed the "Earn-Out Amount". In the pleadings, the Plaintiffs aver that there has been a breach of contract and that they are entitled to Earn-Out Amount in the sum of US\$171,520.68, being 23% of the sum of US\$745,743. Ignition, on the other hand, relied upon section 8.1 of the Agreement which entitles Ignition to set-off from the gross revenue sum to Blue Bison, a figure representing the value of obligations that Ignition was required to perform but for which Blue Bison received payment prior to closing. Ignition averred that the total amount due to it from Bison pursuant to the proration is US\$144,756.70. It says that as the proration has not been paid, Ignition has not received that income within the earn-out period and accordingly, the gross revenue is US\$600,986.13. Based upon that figure the amount which Ignition said would be due to Bison is US\$7,951.21. Alternatively, said Ignition, if the proration amount is included within the gross revenue falling within the earn-out period then the total balance in favour of Blue Bison is US\$41,241.25. Ignition further claimed that it has already offered to tender payment in this amount.

1 **PLAINTIFFS' APPLICATION FOR LEAVE TO AMEND**

2 8. In relation to the application to substitute and to amend, Mr. Kennedy submitted that
3 although the Plaintiffs are the shareholders of Blue Bison and are named parties to the
4 agreement subject to the litigation, the "seller" and legal entity entitled to the disputed
5 funds is Blue Bison. He therefore submitted that what had occurred in respect of the
6 Writ of Summons and Statement of Claim amounts to an error of pleading and he stated
7 that this is sought to be corrected by substitution of Blue Bison as plaintiff, with
8 consequential amendments. He conceded that costs thrown away by the amendment
9 were to be awarded to Ignition.

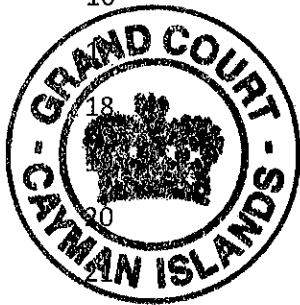
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11 9. When the hearing commenced, both parties indicated that the Defendant consented to
12 the amendment and order for substitution.

13

14 10. Mr. Broadhurst for Ignition, whilst consenting to the Plaintiffs' application for leave to
15 amend the Writ and Statement of Claim, raised the following arguments:-

16



"Plaintiffs Amendment Summons

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12. *While the Plaintiffs' summons seeks leave to amend the Writ of Summons, it is effectively an application for leave to substitute the Plaintiffs for Blue Bison as Plaintiff in these proceedings.*

18

19

13. *By its very nature, this application accepts that the action commenced by the current Plaintiffs could not succeed. The Plaintiffs have accordingly obtained an order granting leave to serve these proceedings outside this jurisdiction, which they should not have obtained. They further have compelled Ignition to respond to an unfounded action by serving the proceedings upon it.*

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14. *Ignition has subsequently incurred costs for which it could take no step to protect itself. Ignition accepts that US\$41,245.25 is payable to Blue Bison pursuant to the Agreement. In the event that Blue Bison had commenced these proceedings correctly*



Ignition would have been entitled to tender that amount into Court, protecting its position with respect to costs in the proceedings. As a result of the Plaintiffs having no valid claim against it that option was simply not available to Ignition. This has clearly prejudiced Ignition's position.

15. Should the Court feel it appropriate to permit the substitution of the Plaintiff in the circumstances as set out above it should do so subject to the following terms:

(i) Ignition should be awarded its costs of the action up to, and including, the date of the substitution of Blue Bison as Plaintiff;

(ii) If Blue Bison is entitled to relief in these proceedings, that relief should only be claimable from the date of substitution

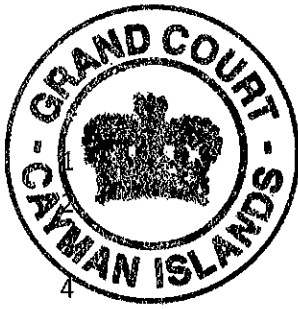
16. The above terms are in accordance with the relevant authorities addressing the position where leave is sought to remove a Plaintiff with no cause of action in favour of another that has standing (See *Attorney-General v. Pontypridd Waterworks Company* (1908) 1 CH 388; *Ayscough v Bullar* (1989) 41 CH. D 341 and *White Book 15/6/18*).

17. It is submitted that the terms are particularly suitable in this case as:

(a) Unfounded proceedings have been issued and served outside of the jurisdiction;

(b) Ignition has been brought before the Cayman Court to defend the proceedings and has incurred costs;

(c) The Plaintiffs are asking to be removed from the proceedings and replaced by Blue Bison, which may not have any assets (it sold its assets to Ignition and it has presented no evidence to the Court on this issue.) There is accordingly a real risk the Blue Bison may not be able to satisfy any costs award made against it;



(d) *As a result of the manner in which the Plaintiffs have conducted the proceedings, Ignition has not been able to take steps to protect itself as to costs.*"

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6 11. I took the view that the points that Mr. Broadhurst made about costs were well made,
7 particularly since, absent this amendment, the claim would stand to be dismissed, the
8 Plaintiffs in their personal capacity having no right to sue. In granting the application
9 to substitute and amend, I ruled that Ignition is entitled to its costs of the action, up to
10 and including the costs of the application to amend and costs thrown away. These costs
11 are to be paid by the Plaintiffs.

12

13 12. Subsequent to the above ruling on costs, the Court heard argument as to the question of
14 when the costs were to be taxed. On behalf of Ignition it was argued that, as
15 subsequent to the amendment the Plaintiffs would no longer be parties to the
16 proceedings, the costs should be taxed forthwith. Reference was made to G.C.R. O.62
17 Rule 9. Counsel for the Plaintiffs, on the other hand, submitted that the costs should be
18 taxed at the conclusion of the proceedings.

19

20 13. Order 62. Rule 9 provides as follows:-

21 *"Stage of proceedings at which costs to be taxed*

22 *(1) Subject to paragraph (2), the costs of any proceedings shall not*
23 *be taxed until the conclusion of the cause or matter in which the*
24 *proceedings arise.*

25 *(2) If it appears to the Court when making an order for costs that all*
26 *or any part of the costs ought to be taxed at an earlier stage it*
27 *may order accordingly.*

28 *(3) In the case of an appeal the costs of the proceedings giving rise to*
29 *the appeal, as well as the costs of the appeal, may be dealt with*
30 *by the Court hearing the appeal.*

31 *(4) Where it appears to the Court on an application that there is no*
32 *likelihood of any further order being made in a cause or matter, it*



may forthwith order the costs of any interlocutory proceedings which have taken place to be taxed."

4 14. In my judgment, Mr. Broadhurst is correct, given that the matter is concluded as far as
5 the Plaintiffs are concerned, and there is not going to be any further order concerning
6 them. It is therefore appropriate that the costs ordered against the Plaintiffs, who will
7 now with the substitution of Blue Bison, no longer be involved in the proceedings, be
8 taxed forthwith.

9
10 15. In addition, I ruled that Blue Bison is only entitled to such relief as it could have
11 claimed on the date of this ruling. In the instant case, without more, it does not appear
12 that anything turns on that, since the claim is well within the period of limitation.

13
14 16. That therefore left for consideration Ignition's application and the Plaintiff's opposing
15 application for trial directions. In order to make the matter less confusing, when
16 dealing with Ignition's application after the substitution of Blue Bison as Plaintiff, I
17 shall refer to "Blue Bison" and to "the Plaintiff" as opposed to "the Plaintiffs", as and
18 when the context requires.

19
20 **THE DEFENDANT'S APPLICATION SEEKING JUDGMENT OR**
21 **ALTERNATIVELY TO STRIKE OUT THE STATEMENT OF CLAIM.**

22
23 **THE LAW IN RELATION TO THE DEFENDANT'S APPLICATION**

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25 17. **Order 14 rule 12 – Application by defendant for summary judgment**

26 *12 (1) Where in an action to which this rule applies a defence has been served*
27 *by any defendant, that defendant may, on the ground that the whole or*
28 *part of the plaintiff's claim has no prospect of success or that the*
29 *plaintiff has no prospect of recovering more than nominal damages,*
30 *apply to the Court for the Plaintiff's claim to be dismissed and judgment*
31 *entered for the defendant on the whole or part of the claim.*

1 (2) This rule applies to every action begun by writ in the Court other than
2 one of a kind mentioned in rule 1(2).
3

4 **Order 14 rule 14 – Judgment for defendant**

5 14 (1) Unless on the hearing of an application under rule 12 either the court
dismissed the application or the plaintiff satisfies the court that he has a
prospect of succeeding on the whole or part of his claim and, where the
claim includes a claim for damages, that he has a prospect of recovering
more than nominal damages, the court may dismiss the whole or part
claim and give judgment for the defendant.

11 (2) Where the court dismisses an application under rule 12 and allows the
12 plaintiff to proceed with his claim, it shall give directions as to the
13 further conduct of the action and Order 25, rules 2 to 7 shall, with the
14 omission of so much of rule 7(1) as requires parties to serve a notice
15 specifying the orders and directions which they require and with any
16 other necessary modifications, apply as if the application under rule 1 of
17 this order or rule 5 thereof, as the case may be, on which the order was
18 made were a summons for directions.
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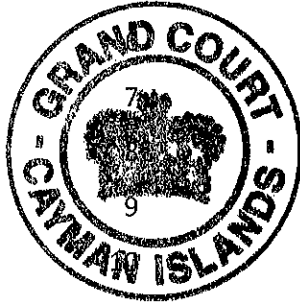
20 **Order 14A – Disposal of Case on Point of Law**

21 *Determination of questions of law or construction (O.14A r1)*

22 1 (1) The Court may, upon the application of a party or of its own motion,
23 determine any question of law or construction of any document arising
24 in any cause or matter at any stage of the proceedings where it appears
25 to the Court that:-

26 (a) such question is suitable for determination without a
27 full trial of the action; and

28 (b) such determination will finally determine (subject
29 only to any possible appeal) the entire cause or
30 matter or any claim or issue.





1 (2) Upon such determination the court may dismiss the cause or matter or
2 make such order or judgment as it thinks fit.

3 (3) The court shall not determine any question under this Order unless the
4 parties have either:-

(a) had an opportunity of being heard on the question;
or

(b) consented to an order or judgment on such
determination.

(4) Nothing in this Order shall limit the powers of this Court under Order
10 18, rule 19 or any other provision of these Rules.

11

12 **Order 14A r 2 – Manner in which application under rule 1 may be made.**

13 2 An application under rule 1 may be made by summons or motion or
14 (notwithstanding Order 32 rule1) may be made orally in the course of
15 an interlocutory application to the court.

16

17 **Order 18 rule 19 – Striking out pleadings and indorsements**

18 19(1) The court may at any stage of the proceedings order to be struck out or
19 amended any pleading or the indorsement of any writ in the action, or
20 anything in any pleading or in the indorsement, on the ground that:-

21 (a) it discloses no reasonable cause of action or defence, as
22 the case may be; or

23 (b) it is scandalous, frivolous or vexatious; or

24 (c) it may prejudice, embarrass or delay the fair trial of the
25 action; or

26 (d) it is otherwise an abuse of the process of the court;

27 and may order the action to be stayed and dismissed or judgment to be
28 entered accordingly, as the case may be.

29 (2) No evidence shall be admissible on an application under subparagraph
30 (1) (a).

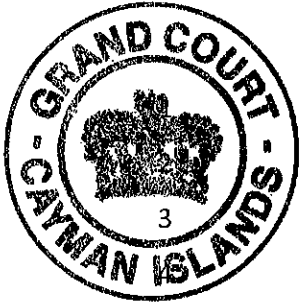


(3) *This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading.*”

5 **DEFENDANT’S SUBMISSIONS**

6 **ORDER 14 APPLICATION**

- 7 18. As I understand Mr. Broadhurst’s submissions, the application to strike out under Order
8 18 Rule 19 applied only in circumstances where Blue Bison had not yet been
9 substituted as the correct Plaintiff. Hence, in his skeleton argument, Mr. Broadhurst
10 also sets out Ignition’s position in the event that the Court was minded to substitute
11 Blue Bison as Plaintiff. He submits that the claim should still be dismissed in those
12 circumstances, as Blue Bison has no reasonable prospect of establishing that it is
13 entitled to any amount more than the US\$41,245.25 that Ignition accepts is payable by
14 it to Blue Bison.
- 15
- 16 19. Mr. Broadhurst referred to the Affidavit of Graham Pearson, President and CEO of
17 Ignition, filed 8 December 2015 in support of Ignition’s application - in particular
18 paragraphs 12 - 28 where the relevant provisions of the Agreement and the calculations
19 of the amount due to Blue Bison are set out. Counsel submits that the Agreement
20 provided for the sale of the assets of Blue Bison to Ignition for an initial payment of
21 US\$150,000 and then further amounts calculated annually for the two years after
22 completion based upon a percentage, 23% of the gross revenue earned by Ignition from
23 the assets purchased (“the Earn-out”) - s.2.2.2 of the Agreement.
- 24
- 25 20. The submission continues that, one of the primary assets purchased by Ignition was the
26 business contracts of Blue Bison (“the Assumed Contracts”) - section 1.1.3 of the
27 Agreement. The Assumed Contracts typically comprised of one year of services to a
28 client in exchange for an annual fee. Ignition purchased the Assumed Contracts and
29 claims that it was accordingly entitled to the revenue from those contracts from the
30 completion date. Further, that it was also obliged to perform the obligations relating to
31 those contracts - s.3.3 of the Agreement. Blue Bison had already received payment in



full for some of the Assumed Contracts purchased by Ignition. Ignition therefore claims that it was entitled, pursuant to s. 8.1 of the Agreement, to a proration payment to compensate it for the revenue that was attributable to the obligations it performed post completion. By way of example, if there were 6 months of service to be provided after completion, Ignition claims that it would be entitled to 6 months of the revenue prepaid to Blue Bison.

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21. Counsel referred to the fact that the Plaintiffs and Blue Bison say that they dispute Ignition's interpretation of the Agreement and that, however, they have never indicated on what basis they do so.

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ORDER 14A

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23. Ignition's position with regard to this alternative relief is that, to the extent that Blue Bison seeks to put forward an alternative argument, these are issues that can plainly be determined pursuant to Order 14A.

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BLUE BISON'S RESPONSE TO THE DEFENDANT'S APPLICATION

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24. Mr. Kennedy responded to Ignition's multi-faceted application in turn, in a number of ways. One of the considerations which he regarded as important to note was that, subject to the agreement of the "Gross Revenue" figure and to their defence of set off, Ignition do not seek to defend the plaintiff's claim to entitlement to payment as claimed in the Statement of Claim. i.e. the claim is prima facie conceded subject to quantum.

1 25. Further, that even after the disputed set off is deducted, Ignition concedes that the sum
2 of US\$41,245.25 is owing to the Plaintiff, see paragraph 29 1st Affidavit of Graham
3 Pearson. The primary position taken by the Plaintiff is accordingly, that Ignition is
4 aware that a reasonable cause of action exists.
5

6 **Defendant's Application Pursuant to GCR Order 14 that judgment be entered in**
7 **favour of the defendant on the grounds that the whole or part of the Plaintiffs' claim**
8 **has no prospect of success or that the Plaintiffs have no prospect of recovering more**
9 **than nominal damages.**
10

11 **Nominal Damages**
12

13 26. Counsel submits that the first issue to be dealt with is whether or not the conceded sum
14 owing of \$41,425.25 can be described as nominal damages. Counsel submits that in
15 contract, an award of nominal damages is a formal recognition that the plaintiff has
16 satisfied the requirements of breach of contract as a cause of action but has not
17 demonstrated the existence of any relevant loss. Reference was made to The Law of
18 Contract 5th Edition Lexis Nexis Chapter 8.18. It was posited that the sum of
19 \$41,425.25 by itself demonstrates a real and indeed substantial loss.
20

21 **No prospect of success**
22

23 27. Reference was made to paragraphs 29 and 30 of the Affidavit of Graham Pearson,
24 which contains the following paragraphs side by side:

25 "29. The Defendant has on more than one occasion offered to pay
26 Bison the amount outstanding to it, namely US\$41,425.25.
27 Despite this the Plaintiffs' have issued these proceedings
28 claiming that they are entitled to US\$171,520.68.

29 30. I have read the Defence filed by the Defendant in these
30 proceedings and the facts and matters stated in that document
31 are true. For the reasons, explained in the Defence and in
32 paragraphs 21 through 29 above, I verily believe that the
33 Plaintiffs' claim has no prospect of success." (Counsel's
34 emphasis)

1 28. Mr. Kennedy submits that it is simply impossible to reconcile these 2 statements. The
2 admission in paragraph 29 is sufficient to deem this application vexatious and should be
3 dismissed.

4
5 29. Counsel argues that Ignition is required to show that Blue Bison's claim is
6 unsustainable in order to obtain its dismissal. If Blue Bison can show more than a faint
7 possibility of succeeding on at least part of its claim, Ignition's application will fail.
8 Reference was made to *In the matter of Omni Securities Limited (No.3)* [1998 CILR
9 275]. The submission is that this possibility can be demonstrated by reliance solely on
10 both the pleadings and the evidence of Ignition.

11
12 30. Mr. Kennedy referred to the following concluding remarks of Chief Justice Smellie in
13 *Omni Securities* as affirming this position:

14 *"Ex facie, and purely from the narrow view the*
15 *present evidence affords, it seemed to me in that regard that*
16 *the plaintiff could have an arguable case – a reasonable*
17 *prospect of success – at least in relation to the alleged*
18 *unlawful payment of dividends. This ultimately totaled some*
19 *SFr.14,2m. According to the statement of claim and is*
20 *therefore in and of itself no small matter. The rules (O.14, r.*
21 *12(2)) enjoin me not to strike out a plaintiff's claim if it shows*
22 *such a prospect of success even if only on one aspect of its*
23 *claim.*

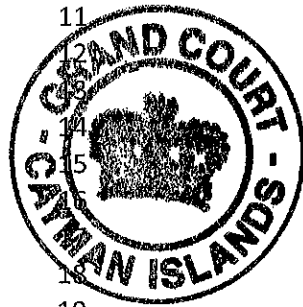
24 *In any event, I also conclude that it would have been*
25 *inappropriate to seek to dispose of any of these involved*
26 *issues on a summary basis without the benefit of full discovery*
27 *and on the basis only of untested affidavit evidence.*
28 *Notwithstanding the court's powers to strike out which*
29 *proceeds upon some analysis of the evidence, there can be no*
30 *usurpation of the role of the trial judge and no abridgement of*



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(c) Any determination of the question of construction which is sought will not bring the claim to a close. The Plaintiffs' particulars of breach of contract is framed (Statement of Claim paragraph 10a) as follows:

"The Defendants have failed to pay the sum of USD\$171,520.68, or any part of it, or such other sum as may be found due and owing upon the establishment of the true quantum of the Gross Revenue in accordance with paragraph 9 of these Particulars of Claim."



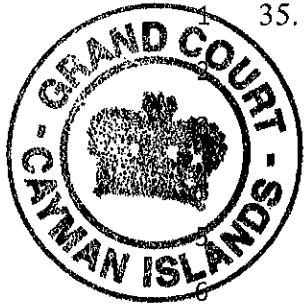
(i) Because of the nature of the Agreement, the true quantum of the Plaintiffs' claim is not within its knowledge as the invoices, books and records that vouch the Gross Revenue making up the Plaintiffs' claim are in the custody, possession and power of the Defendant. These will only be provided on discovery which has not yet taken place. As a result, the Court cannot determine this action finally at this time.

(d) The mechanism under O14A is not going to lead to any significant cost savings. The parties do require in this case to undertake discovery and to file witness statements. The factual evidence in the case is not likely to be extensive and therefore a full trial of this matter is not likely to be much different in complexity, time or costs than a hearing under O 14A."

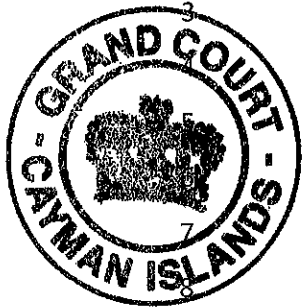
Question of Law or Construction

34. Whilst Counsel submits that the question of law or construction is not properly formulated, Blue Bison assumes that for the purposes of this hearing, the thrust of Ignition's argument is that Ignition's interpretation of the contract is correct in the following respects:-

That section 8.1 of the agreement entitles the Defendant to set off from the Gross Revenue sum due to the Plaintiff a figure representing the value of obligations that the defendant was required to perform but for which the plaintiff received payment prior to closing.



- 1 35. As a result of this interpretation Counsel states that he and his client understand the
2 argument to run that Ignition deducts the Earn-out Amount from the Gross Revenue
3 in respect of these invoices and treats the balance as a debt-owing performed, or the
4 amount of a payment made, by Ignition in respect of a liability of Blue Bison within
5 the meaning of Section 8.1
- 6
- 7 36. Blue Bison denies that this is correct as a matter of interpretation of the Agreement
8 by reference to both the Agreement itself and by reference to the factual matrix
9 surrounding the sale.
10
- 11 37. To refer to but one argument of construction that is available to Blue Bison, Mr.
12 Kennedy says that to put forward that contention, Ignition will have to argue that
13 Schedule 1.2.4 to the Agreement (Excluded Assets) does not exhaustively list the
14 invoices to which it applies despite the wording of the Schedule being "*all revenue*
15 *of Seller that is reflected in invoices issued to customers on or before 1st March 2013*
16 *[.]is reflected here.*" Counsel indicates that he expects this argument will be
17 unsuccessful.
18
- 19 38. Mr. Kennedy also argues that on this basis Ignition has not made a payment or
20 performed an obligation which Blue Bison was liable to perform within Section 8.1.
21 After the closing date, it is submitted that the party liable to perform the obligations
22 in respect of invoices raised prior to 1 March 2013, was Ignition. Such an obligation
23 is an Assumed Obligation because it relates exclusively to the ownership and
24 operation of the Purchased Assets. It follows, proffers Mr. Kennedy, that Ignition is
25 outside of Section 8.1 and the proration mechanism.
26
- 27 39. This interpretation, Counsel suggests, is consistent with business common sense.
28 Reference was made to *Rainy Sky SA and others v Kookmin Bank* [2011] UKSC
29 50. Further, it was opined that this interpretation is to be preferred to the
30 interpretation placed on s. 8.1 by Ignition.
31



1 40. Further canons of construction that should be considered Counsel submits, are as
2 follows:-

- 3
- (a) The contract should be construed as a whole.
 - (b) The Contra Proferentem maxim should be used to interpret the provision against the defendant.
 - (c) The court is entitled to look at the surrounding circumstances.- see *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98.
- 7
9

10

11 41. It was Mr. Kennedy's stance that the above are non-exhaustive and not fully argued
12 for the purpose of the hearing of this application under O. 14A which is opposed not
13 only in substance but also on the basis that this was not a matter to be properly
14 placed before the court in a 1 hour slot at this stage of the litigation.

15

16 42. Mr. Kennedy further charged that the purpose of this summons being brought by
17 Ignition is simply to elicit the legal arguments which are properly reserved for the
18 trial of the matter. This purpose, he contended, is an entirely improper use of the
19 utilized Rules.

20

21 43. If the Court regards this case as one suitable for determination under O.14A then the
22 submission continued, the proper order is for directions to be agreed, a properly
23 formulated question be placed before the court and the matter to be set down.

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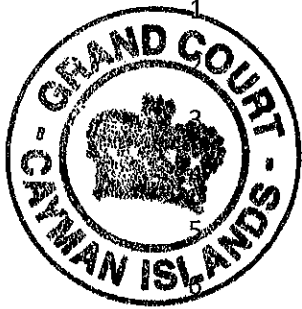
25 44. Counsel submits that this will serve no useful purpose and the matter should simply
26 proceed to directions and trial.

27

28 **Ignition in Reply**

29

30 45. It should be pointed out that in reply, Mr. Broadhurst highlighted that the ruling in
31 *Omni Securities* was based upon G.C.R. Order 14, Rule 12 as it was in 1998. At
32 that time, Counsel submitted, what needed to be established was that "*the plaintiff's*



1 claim has no prospect of success or that the plaintiff has no prospect of recovering
2 more than nominal damages". It was accordingly submitted that it was now
3 therefore possible for a defendant to seek judgment on part of a plaintiff's claim.
4 The position of the Defendant was therefore that Blue Bison has no prospect of
5 success on the part of its claim exceeding the admitted amount of US\$41,425.25
6 (which would be met with a defence of tender) and had filed no evidence in support
7 of such a claim.

8
9 **RESOLUTION OF THE DEFENDANT'S APPLICATIONS**

10 **Application Pursuant to GCR Order 18 rule 18 that the Statement of Claim be struck**
11 **out as disclosing no reasonable cause of action.**

12
13 46. It is in my view trite, that as argued by Mr. Kennedy, on an application to strike out
14 as disclosing no reasonable cause of action, no evidence is admitted.- see *Attorney-*
15 *General of Duchy of Lancaster v L&N.W. Ry* [1892] 3Ch 278 and Note 18/9/5
16 Supreme Court Rules.

17
18 47. The power will be exercised only in plain and obvious cases and a reasonable cause
19 of action means a cause of action with some chance of success when only the
20 allegations in the pleadings are considered.

21
22 48. When reviewing the pleadings I agree with Mr. Kennedy, that once the substitution
23 of Blue Bison is made, it is obvious that a reasonable cause of action exists since the
24 defence to the claim presently involves a claim to a set off, and may ultimately
25 involve a defence of tender. However, as previously mentioned, in fairness to
26 Ignition, it does appear that the strike out application was aimed solely at the fact
27 that the claim was originally brought by the wrong plaintiff.

28
29 **THE SUMMARY JUDGMENT APPLICATION**

30 49. I should state that although the Statement of Claim has to be amended, because all
31 parties plainly contemplated and understood that the Court is now considering a
32 claim for summary judgment against Blue Bison, I did not consider it necessary to

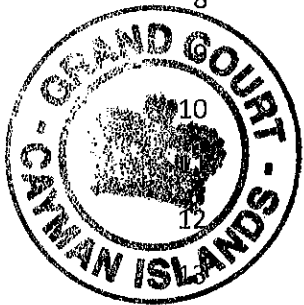
1 delay a consideration of this application. It was the wish of Counsel on both sides
2 that I considered all of the applications at the same time.

3
4 50. I agree with Mr. Kennedy that the sum which Ignition claims to have offered to pay
5 before suit cannot be treated or classified as nominal damages.

6
7 51. Order 14 is intended to enable a defendant to obtain a quick judgment where there is
8 clearly a claim with no real prospect of success. I took some time to consider this
9 application to see whether, given that it involves points of law and construction of
10 the Agreement, whether the point was short and depends on just a few documents,
11 and to see whether the matter was suitable for disposition on a summary judgment
12 application. However, having reviewed the Agreement, the skeleton arguments, and
13 some of the contemporaneous documents, it appears to me that this is not a simple
14 type of question of construction. The background knowledge available to the parties
15 and the facts and circumstances known or assumed by them at the time that the
16 Agreement was executed, are relevant to its meaning. Further, although I did
17 proceed to hear this matter for longer than an hour, I agree with Mr. Kennedy that in
18 the time allotted for these applications, there may not have been an adequate
19 opportunity for the relevant issues to be addressed in argument. In the result, I am of
20 the view that this is a claim that has a real prospect of success. Blue Bison ought to
21 have filed an affidavit in opposition to the application, which was more fulsome than
22 simply exhibiting correspondence and communications between the parties.
23 However, notwithstanding that failure, on the material before me I am satisfied that
24 the claim to a sum in excess of US\$41,425.25, being US\$171,520.68, in respect of
25 breach of contract is not fanciful, and has a real prospect of succeeding. It follows
26 that I am therefore of the view that Ignition is not entitled to judgment on Blue
27 Bison's claim whether a portion or part thereof, or at all.

28
29 **ORDER 14A APPLICATION**

30 52. In addition, in relation to the O. 14A application, I agree with Mr. Kennedy that the
31 question of construction to be determined is not formulated, as it is required to be, in





1 clear and precise terms - see 1999 White Book, note O.14A r. 2. Further, and
2 importantly, in my judgment, there may well be a matrix of fact and material
3 circumstances which the Court should take into account in construing the
4 Agreement, which were known to the parties, and in respect of which it may be
5 necessary to have evidence in witness statements, (albeit of a minimal nature) and
6 cross-examination. There may well be a need for oral evidence in relation to the
7 light in which the Agreement and relevant documents are to be construed. Further, in
8 so far as Blue Bison rely upon amounts received by Ignition and in respect of which
9 they require a proper accounting and documentary evidence from Ignition, a proper
10 resolution of the issues, including quantum, may well be assisted by the process of
11 discovery.

12
13 **THE PLAINTIFF'S REQUEST FOR SUMMARY JUDGMENT FOR THE SUM OF**
14 **US\$41, 425.25 AND DIRECTIONS FOR TRIAL**

15
16 53. Blue Bison argues that, not only does it have a claim with a real prospect of success,
17 but that the Court should now turn around and award Blue Bison summary judgment
18 in the sum of US\$41,425.25. However, in my judgment, this would not be
19 appropriate, given the matters raised by Ignition in relation to the defence of tender
20 before action.

21
22 54. Order 18, Rule 16 of the GCR, deals with the defence of tender. It provides as
23 follows:

24 *"18.16. Where in any action a defence of tender before action is*
25 *pleaded, the Defendant must pay into Court in accordance with Order*
26 *22 the amount alleged to have been tendered, and the tender shall not*
27 *be available as a defence unless and until payment into Court has been*
28 *made."*

29
30 55. Ignition has raised the issue of tender in its defence. Additionally, as argued in
31 relation to the application to amend and to substitute Blue Bison, had the
32 proceedings been correctly commenced with Blue Bison as the Plaintiff, Ignition



could have tendered that amount into Court, protecting its position as a defence, and with respect to the costs of the proceedings. Now that the correct plaintiff is being substituted before the Court, in my judgment, Ignition ought to be allowed the opportunity (as it is entitled to do) to put its position in alignment with the defence raised. Ignition is, in any event, entitled to file an amended defence responding to the amended statement of claim.

6

7

8 56. The defence of tender consists in the defendant having always been ready and
9 willing to pay the debt and having tendered it before action to the plaintiff, who
10 refused to accept it. It is a performance of the contract by the defendant so far as he
11 could perform it. It allows a defendant to say that in the circumstances, the plaintiff
12 was not and is not entitled to maintain an action against him. When there is a plea of
13 tender before action, not only must the sum be paid into Court, but the fact that the
14 money has been paid into Court must be stated in the defence - see Bullen and Leake
15 and Jacob's Precedents of Pleadings, 12th Edition, pages 1314-1316 and Order 22,
16 Rule r. 7 of the GCR.

17

18 57. In my judgment, it would not therefore be appropriate, particularly having regard to
19 the fact that the proper plaintiff is only now being substituted, (and there is in fact no
20 application by Blue Bison for summary judgment before the court), for the court to
21 enter summary judgment. Such an application would therefore be premature.
22 However, in any event, I venture to say that provided Ignition maintains its plea, as
23 expected, of tender before action, pays the money into Court and so pleads, it could
24 not be said that such a defence would have, in the circumstances, no reasonable
25 prospect of success. This is because the construction and interpretation of the terms
26 of the Agreement are not straight forward and issues involved in this case require
27 trial.

28

29 58. In addition, for the reason that the pleadings are not yet properly closed, it would be
30 inappropriate to make directions for trial at this time.

31

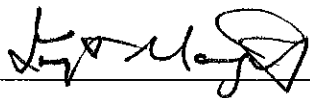
1 59. I therefore make the following orders:
2

3 **On the Plaintiffs' summons**

- 4 1. The Plaintiffs are granted leave to amend the specially endorsed Writ of
5 Summons and the Statement of Claim, in the form annexed to the Plaintiffs'
6 Summons filed 1 December 2015. Blue Bison Software Consultants Ltd, the
7 substituted Plaintiff, is only entitled to such relief as it could claim from the date
8 of this ruling.
9
- 10 2. The Defendant is entitled to its costs of the action up to and including the
11 application to amend and costs thrown away. These costs are to be paid by the
12 Plaintiffs Alva Suckoo and Diane Martinez and are to be taxed forthwith.
13
- 14 3. The amended Writ of Summons and Amended Statement of Claim are to be
15 served on the Defendant's Attorneys within 14 days of the date of this Order.
16
- 17 4. The Defendant is granted leave (although same is not strictly necessary), to file
18 and serve an amended Defence, if so advised, within 14 days of the date of
19 service of the Amended Statement of Claim.
20

21 **On the Defendants' summons**

- 22 1. The relief claimed in paragraphs 1 and 2 of the Defendant's summons filed 9
23 October 2015 is refused.
24
- 25 2. Costs to the substituted Plaintiff Blue Bison Software Consultants Limited, to be
26 taxed if not agreed, such costs being those accruing at the hearing subsequent to
27 the grant of the application to amend/substitute.
28

29 

30 **THE HON. JUSTICE MANGATAL**
31 **JUDGE OF THE GRAND COURT**

