

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: ²⁸⁰ OF 2009

BETWEEN:



EMERALD SEAS LIMITED

Plaintiff

AND

CAYMAN OVERSEAS (W.E.) LIMITED



Defendant

WRIT OF SUMMONS

TO: CAYMAN OVERSEAS (W.E.) LIMITED

THIS WRIT OF SUMMONS has been issued against you by the above named Plaintiff in respect of the claim set out on the next page.

Within 14 days after the service of this writ on you, counting the day of service, you must either satisfy the claim or return to the Court Office, P.O. Box 495G, George Town, Grand Cayman, the accompanying Acknowledgment of Service stating therein whether you intend to contest these proceedings.

If you fail to satisfy the claim or return the Acknowledgment within the time stated, or if you return the Acknowledgment without stating therein an intention to contest the proceedings, the Plaintiff may proceed with the action and judgment may be entered against you forthwith without further notice.

Issued this day of June 2009.

NOTE – This Writ may not be served later than 4 calendar months (or, if leave is required to effect service out of the jurisdiction, 6 months) beginning with the date of issue unless renewed by order of the Court.

IMPORTANT

Directions for Acknowledgment of Service are given with the accompanying form.

STATEMENT OF CLAIM

1. The Plaintiff is and at all material times has been the registered proprietor with absolute title of the land comprised in Parcel no 3, Block 12C in the West Bay Beach South Registration Section of Grand Cayman ("the Plaintiff's Land").
2. The Plaintiff's Land abuts the eastern boundary of the West Bay Road.
3. By a written licence agreement dated 15 May 2004 and made between the Plaintiff and the Defendant ("the First Licence"), the Plaintiff exclusively licensed the Defendant to enter upon that portion of the Plaintiff's Land shown cross-hatched on a schedule marked "A" attached to the First Licence which portion of the Plaintiff's Land was a rectangle extending along the entirety of the boundary between the Plaintiff's Land and the West Bay Road and east therefrom by 100 feet.
4. The said portion was in the First Licence and is in this pleading referred to as "the Lands".
5. The First Licence was for a term of 32 months from 15 May 2004 with provision for earlier termination by either party (which neither party exercised or sought to exercise).

The Claim for Damages for Breach of Contract

6. On its true construction alternatively on its true construction and upon the Defendant's entering upon the Lands under the First Licence, clause 1 of the First Licence imposed obligations on the Defendant to, amongst other things,
 - a. clear the Lands,
 - b. cut down all trees and other growth on the Lands,
 - c. grade or re-grade the Lands and
 - d. fill the Lands to a level of six feet above sea level.
7. The First Licence expressly conferred on the Defendant the right or permission to use the Lands as a staging area for the construction of a condominium complex which it planned to build on the west side of the West Bay Road ("the Works") and implicitly licensed the Defendant to fill the Lands with appropriate material excavated or otherwise generated during and from the Works for the disposal of which the Defendant would otherwise have had to pay a substantial amount.

8. During the term of the First Licence, the Defendant used the Lands as a staging area for the Works and partially filled the Lands with material excavated or otherwise generated during and from the Works.
9. The monetary consideration which the parties expressly agreed would be provided by the Defendant in exchange for the rights and permissions granted to it under the First Licence was the sum of US\$2,500 pcm (monthly in advance).
10. The non-monetary consideration which the parties expressly alternatively impliedly agreed would be provided by the Defendant for the rights and permissions granted to it under the First Licence was or included the due performance of by the Defendant of the obligations imposed by clause 1 as pleaded above.
11. In the premises, the monthly licence fee of US\$2,500 was lower than the Plaintiff could reasonably have demanded for a licence to use the Lands as a staging area for the Works without an attendant obligation to clear and fill the Lands to a specified level such as would increase the economic value of the Lands.
12. The Plaintiff will refer at the trial of this action to the First Licence for its full terms and true effect.
13. Prior to the expiry of the First Licence, the parties entered into a second licence ("the Second Licence") dated 2 January 2007 which was intended to and did run on from the expiry of the First Licence.
14. The Second Licence continued the permissions granted by the First Licence and repeated and re-imposed the obligations contained in clause 1 thereof save that the obligation to fill the Lands to a depth of six feet above sea level was varied to "the level of West Bay or slightly below of the level of West Bay Road in front of the Lands" ("the Varied Filling Obligation").
15. By way of clarifying what the parties meant by the Varied Filling Obligation, Mr Steve Henderson for and on behalf of the Defendant wrote by hand in the margin of the Second Licence beside the words expressing the Varied Filling Obligation the characters "SH (1)".
16. Mr Henderson's annotation was intended to be and is evidence of the parties' contemporary understanding and intention that the Varied Filling Obligation required the Defendant to fill the Lands to 1 inch below the level of West Bay Road.
17. The Plaintiff will rely at the trial of this action in support of the allegation in the previous paragraph and the allegation that the Defendant assumed the Varied Filling Obligation (so far as the same may be denied) on an admission in writing signed on behalf of the Defendant namely the letter of its appointed attorneys to the Plaintiff's attorneys dated 27 March 2009 ("The Admission Letter") in which it is stated on behalf of the Defendant that the Second Licence "has been annotated by Steve Henderson of our client company

by the figure (1") which we understand signifies our client's agreement to ensure that [the Lands were] filled to within one inch of the level of West Bay Road."

18. The term of the Second Licence was six months from 15 January 2007 with provision for earlier termination (which neither party exercised or sought to exercise).
19. The monetary consideration expressly agreed to be paid by the Defendant under the Second Licence was a lump sum payment of CI\$16,000 and a monthly sum of CI\$3,500.
20. The Plaintiff will refer at the trial of this action to the Second Licence for its full terms and true effect.
21. After the expiry of the Second Licence on 14 July 2007, the Defendant remained with the consent of the Plaintiff on the Lands by its officers, employees, agents and/or equipment and tendered CI\$3,500 per month thereafter until October 2007 to the Plaintiff in respect of such occupation.
22. The Defendant quit the Lands in October 2007.
23. In breach of the Varied Filling Obligation the Defendant has not filled the Lands to a level 1" below the level of the West Bay Road but has only done so to approximately 1 foot below the same.
24. In support of the allegation of breach in the preceding paragraph, the Plaintiff will at the trial of this action rely on the statement in the Admission Letter that "our client has also commissioned its own survey that concludes that [the Lands have] ... been filled to approximately 0.9 feet below the level of West Bay Road" and/or the statement to the same effect in the survey report of Cayman Engineering & Surveying enclosed therewith ("the CES Report") and/or the statement in the CES Report that "this difference in level between the site and road level equates to a volume of approximately 3,000 cubic yards of fill."
25. As a result of such breach the Plaintiff has suffered loss and damage

PARTICULARS OF LOSS AND DAMAGE

- a. In order to put the Lands into the state they would have been in had the Defendant fulfilled the Varied Filling Obligation, the Plaintiff will have to incur the cost of so doing particulars of which will be provided in due course

The Claim for Arrears of Licence Fee/Rent

26. Further and/or alternatively, the consensual occupation of the Lands by the Defendant after 14 July 2007 together with the tender of monthly payments for that occupation in the same sum as that tendered on a monthly basis under the Second Licence had the consequence in law that the Defendant continued in occupation under a monthly periodic

licence on the same terms as the Second Licence save insofar as inconsistent with a monthly periodic licence and which accordingly was terminable upon at least a month's notice specified to end on the 14th alternatively 15th day of the notified month.

27. Yet further or in the further alternative, the Defendant's occupation of the Lands after 14 July 2007 was exclusive, by permission of the Plaintiff and at a rent of C\$3,500 per month but without a written agreement and accordingly in virtue of the provision made by section 45 (2) & (3) of the Registered Land Law (2004 Revision) created a periodic monthly tenancy determinable only on at least one month's notice expiring on the 14th alternatively 15th day of the notified month.
28. The Defendant has not given any notice such as would determine the monthly periodic licence or tenancy heretofore pleaded and accordingly such licence or tenancy continues to the date hereof.
29. In breach of its obligations under the monthly periodic licence or tenancy heretofore pleaded, the Defendant has not paid to the Plaintiff any sum by way of monthly licence fee or rent since October 2007.

The Claim for Damages for Trespass

30. Further and/or alternatively the Defendant has throughout the terms of the First and Second Licences entered at will upon and exclusively occupied substantial parts of the Plaintiff's Land other than the Lands and deposited on them approximately 10,000 cubic yards of landfill from the Works as suited its practical needs and commercial convenience.
31. The Plaintiff will rely in support of the allegations in the preceding paragraph on the admissions in that regard contained in the Admission Letter including the statement "the property to the rear of [the Lands] ... contains approximately 10,000 cubic yards of fill, which we understand was placed there by our client" and/or the statements in the CES Report that "from a review of aerial data ... it can be readily seen that the site has been filled well past the 100' wide Zone 1 [the Lands], adjacent to the western boundary of the parcel. This information is further confirmed from a review of topographic data ... that clearly indicates the extent of the filling works that were undertaken on the site Using the available data we are able to demonstrate that Zone 2 [the Plaintiff's Land other than the Lands] contains a volume of approximately 10,000 cubic yards of fill."
32. Such entry upon those parts of the Plaintiff's Land other than the Lands and/or depositing or 10,000 cubic yards of fill thereon was without the knowledge or consent of the Plaintiff and an unlawful and repeated or continuous and enduring trespass upon the Plaintiff's Land.
33. The Plaintiff is the person who is and was throughout the terms of the First and Second Licences and after the expiry of the Second Licence immediately entitled to possession of the Plaintiff's Land and each and every part thereof, save to the extent that the

Defendant's occupation of the Lands after 14 July 2007 created a tenancy thereof as heretofore pleaded in the alternative.

34. By reason of the Defendant's unlawful trespass on the Plaintiff's land as heretofore pleaded, the Plaintiff has suffered loss and damage

PARTICULARS OF LOSS AND DAMAGE

- a. The Defendant's entry upon and use of the Plaintiff's Land at will for its own commercial purposes amounted to exclusive occupation and enjoyment of the parts of the Plaintiff's Land so entered upon and used for those purposes the extent of which, the Plaintiff will contend, is at least as great as that set out in the CES Report (the Plaintiff reserving the right to plead further on this issue once its own expert surveying and/or engineering evidence is to hand) and accordingly
 - b. The Plaintiff is entitled to claim as mesne profits in respect of the Defendant's trespass a sum equivalent to a commercial rent in respect of the Defendant's exclusive occupation which the Plaintiff contends should be assessed, *pro rata* in relation to the area occupied, as the monthly sum payable under the First and Second Licences plus a value reflecting the fact as heretofore pleaded that the monthly sum payable under those licences was calculated on the basis that part of the consideration for the First and Second Licences was the performance of the Defendant's obligations thereunder and, in particular, the obligations to clear and fill the Lands in accordance with the Varied Filling Obligation.
 - c. The Plaintiffs claim for mesne profits is for the period running from 15 January 2004 to 14 October 2007 being on or about the date on which the Defendant quit the Plaintiff's Land.
35. Further and/or alternatively, by reason of the brazen and outrageous nature of the Defendant's trespass which amounted to the assumption of rights of ownership over the Plaintiff's Land for its own commercial purposes and profit and/or the achievement of an aim which it could not otherwise achieve save by payment to the Plaintiff of more than the Defendant was prepared to pay, the Plaintiff is entitled to aggravated damages and/or exemplary damages to punish the behaviour of the Defendant and teach it that tort does not pay and/or restitution and/or an account of all enrichment to the Defendant derived from its wrongful behaviour at the Plaintiff's expense.

The Claim for Interest

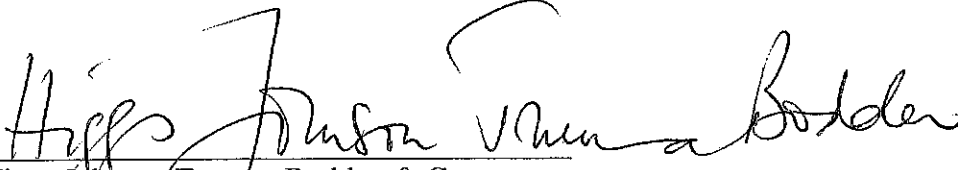
36. The Plaintiff is entitled to and claims pursuant to section 34 of the Judicature Law (2007) Revision interest on all sums found due to it for such periods and at such rates as to the Court may seem just.

AND THE PLAINTIFF CLAIMS:-

- (1) Damages for breach of contract
- (2) Damages for trespass
- (3) Aggravated damages in respect of trespass
- (4) Exemplary damages in respect of trespass
- (5) Restitution
- (6) An account of profits earned or made through trespass upon the Plaintiff's Land
- (7) Arrears of licence fee or rent at US\$2,500 pcm from and including 15 October 2007
- (8) Interest pursuant to section 34 of the Judicature Law aforesaid
- (9) Costs
- (10) Further or other relief

RAYMOND DAVERN

Served and filed this 9th day of June 2009


Higgs Johnson Truman Bodden & Co

THIS WRIT was issued by Higgs Johnson Truman Bodden & Co, Attorneys at Law for the Plaintiff, whose address for service is P.O. Box 866, Anderson Square Building, Shedden Road, George Town, Grand Cayman, KY1-1103, Cayman Islands.

DIRECTIONS FOR ACKNOWLEDGMENT OF SERVICE
OR WRIT OF SUMMONS

1. The accompanying form of Acknowledgment of Service should be completed by an Attorney acting on behalf of the Defendant or by the Defendant if acting in person.

After completion it must be delivered or sent by post to the Law Courts, PO Box 495, George Town, Grand Cayman.

2. A Defendant who states in his Acknowledgment of Service that he intends to contest the proceedings must also serve a defence on the Attorney for the Plaintiff (or on the Plaintiff if acting in person).

If the Statement of Claim is indorsed on the Writ (i.e. the words "Statement of Claim" appear at the top of page 2), the Defence must be served within 14 days after the time for acknowledging service of the Writ, unless in the meantime a summons for judgment is served on the Defendant.

If the Defendant fails to serve his defence within the appropriate time, the Plaintiff may enter a judgment against him without further notice.

3. A Stay of Execution against the Defendant's goods may be applied for where the Defendant is unable to pay the money for which any judgment is entered. If a Defendant to an action for a debt or liquidated demand (i.e. a fixed sum) who does not intend to contest the proceedings states, in answer to Question 3 in the Acknowledgment of Service, that he intends to apply for a stay, execution will be stayed for 14 days after his Acknowledgment, but he must, within that time issue a Summons for a stay of execution, supported by an affidavit of his means. The affidavit should state any offer which the Defendant desires to make for payment of the money by instalments or otherwise.

See over for notes for guidance

Please complete overleaf

Notes for Guidance

1. Each Defendant (if there are more than one) is required to complete an Acknowledgement of Service and return it to the Courts Office.
3. For the purpose of calculating the period of 14 days for acknowledging service, a writ served on the Defendant personally is treated as having been served on the day it was delivered to him.
4. Where the Defendant is sued in a name different from his own, the form must be completed by him with the addition in paragraph 1 of the words "sued as (*the named stated on the Writ of Summons*)".
5. Where the Defendant is a **FIRM** and an attorney is not instructed, the form must be completed by a **PARTNER** by name, with the addition in paragraph 1 of the description "Partner in the firm of (.....)" after his name.
6. Where the Defendant is sued as an individual **TRADING IN A NAME OTHER THAN HIS OWN**, the form must be completed by him with the addition in paragraph 1 of the description "trading as (.....)" after his name.
7. Where the Defendant is a **LIMITED COMPANY** the form must be completed by an Attorney or by someone authorised to act on behalf of the Company, but the Company can take no further step in the proceedings without an Attorney acting on its behalf.
8. Where the Defendant is a **MINOR** or a **MENTAL PATIENT**, the form must be completed by an Attorney acting for a guardian *ad litem*.
9. A Defendant acting in person may obtain help in completing the form at the Courts Office.

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: OF 2009

BETWEEN:

EMERALD SEAS LIMITED

Plaintiff

AND

CAYMAN OVERSEAS (W.E.) LIMITED

Defendant

ACKNOWLEDGMENT OF SERVICE
OF WRIT OF SUMMONS

If you intend to instruct an Attorney to act for you, give him this form **IMMEDIATELY**.

Important. Read the accompanying directions and notes for guidance carefully before completing this form. If any information required is omitted or given wrongly, **THIS FORM MAY HAVE TO BE RETURNED.**

Delay may result in judgment being entered against a Defendant whereby he may have to pay the costs of applying to set it aside.

1. State the full name of the Defendant by whom or on whose behalf the service of the Writ of Summons is being acknowledged.

2. State whether the Defendant intends to contest or otherwise participate in the proceedings (*tick appropriate box*)

Yes No

3. If the claim against the Defendant is for a debt or liquidated demand, AND he does not intend to contest the proceedings, state if the Defendant intends to apply for a stay of execution against any judgment entered by the Plaintiff (*tick box*)

Yes No

Service of the Writ of Summons is acknowledged accordingly

(Signed).....

[Attorney] for

Please complete overleaf

Notes on address for service

Attorney: where the Defendant is represented by an attorney, state the attorney's place of business in the Cayman Islands. A Defendant may not act by a foreign attorney.

Defendant in person: where the Defendant is acting in person, he must give his post office box number and the physical address of his residence or, if he does not reside in the Cayman Islands, he must give an address in Grand Cayman where communications for him should be sent. In the case of a limited company, "residence" means its registered principal office.

Indorsement by plaintiff's Attorney (or by plaintiff if suing in person) of his name, address and reference, if any, in the box below.

Higgs Johnson Truman Bodden & Co.
PO Box 866
Anderson Square Building
George Town KY1-1103
Grand Cayman
Ref: RD/501689-1

Indorsement by defendant's Attorney (or by defendant if suing in person) of his name, address and reference, if any, in the box below.

[Empty box for defendant's attorney indorsement]