

1 IN CHAMBERS
2 IN THE GRAND COURT OF THE CAYMAN ISLANDS

3
4 GC CAUSE NO: 304 of 2006

5
6 BETWEEN

7 IAN DAWSON JAMES

8 Plaintiff

9
10 AND:

11 CAYMAN YACHT CLUB LIMITED

12 Defendant

13
14 BEFORE: The Hon. Madam Justice Levers

15
16 Appearance:

17 Counsel for the plaintiff: Mr. L. Freeman of Broadhurst Barristers

18 Counsel for the defendant: Mr. M. Crawford of Maples & Calder

19
20 Heard: 20th September 2006

21
22

JUDGMENT

23
24 Levers, J.



25
26 This is the Plaintiff's application for summary judgment of a specific
27 sum claimed in the Statement of Claim with interest and costs
28 pursuant to the GCR Order 14 Rule 1.

1 The Summons is supported by an affidavit of the Plaintiff. It is
2 opposed by the Defendant.

3

4 The Plaintiff seeks Summary Judgment on the ground that there is no
5 defence to the Plaintiff's claim.

6

7 BACKGROUND

8

9 The Plaintiff is a resident of the Cayman Islands and the Defendant is
10 a company incorporated in the Cayman Islands with registered offices
11 at Queens Gate House, 113 South Church Street, George Town,
12 Grand Cayman.

13

14 On or about July 2002, the Plaintiff entered into negotiations to
15 commence employment with the Defendant, and a written agreement
16 was concluded dated 4th September 2002.

17

18 The Employment Contract contains the usual conditions of salary etc
19 and an Entire Agreement Clause. (Clause 20.1 and 22.1). The
20 Plaintiff was employed as a Development Manager of the Defendant

1 for three years under the contract which was automatically renewable
2 for an additional period of three years, unless terminated by the
3 Plaintiff, upon six months written notice to the Defendant. Another
4 term in the contract worthy of mention is that, if the Defendant
5 required the Plaintiff to resign for reasons other than theft or fraud
6 then the Plaintiff would be entitled to receive a severance payment
7 equivalent to the balance of the fixed employment term or one year's
8 full salary whichever was greater together with the three percent
9 bonus entitlement referred to in the contract.

10

11 The Defendant became insolvent on or about the month of December
12 2005 and could not pay the Plaintiff. After several demands for his
13 wages, the Plaintiff found alternative employment, and continued to
14 live in the Cayman Islands. The Plaintiff's claim is for:

15

- 16 (a) Unpaid salary, expenses and loans and payments;
- 17 (b) Salary deficiencies;
- 18 (c) Severance pay;
- 19 (d) Car allowance;
- 20 (e) Telephone bills to June 2006;
- 21 (f) Health insurance;
- 22 (g) Pension contribution; and

1 (h) Interest.
2

3 The Defendant, on the other hand, alleges that the Plaintiff came to
4 an oral agreement with the Defendant, whereby the Plaintiff agreed to
5 await his remuneration as the Defendant was in the process of
6 negotiating a sale from which the monies due to the Plaintiff would
7 have been paid.
8

9 THE PLAINTIFF'S CASE
10

11 The Plaintiff asks for Summary Judgment on the basis that there is no
12 defence to the whole or part of the Plaintiff's claim. Mr. Freeman on
13 behalf of the Plaintiff submits that the test for determining whether a
14 Defendant has a real and bona fide defence is:

15
16 (1) What the Defendant saying credible?

17 (2) There a fair and reasonable probability of the Defendant having
18 a real bona fide defence?
19

20 The Plaintiff submits that the written agreement supercedes all else
21 especially since there is an entire agreement clause and that an oral

1 agreement cannot vary the entire agreement clause in the written
2 contract.

3

4 Mr. Freeman further submits that under the Labour Law payment of
5 wages is mandatory, that even though the Plaintiff found alternative
6 employment, there should be no deductions of the wages he earned
7 from the salary due under the written contract, and that the full salary
8 is due to him.

9

10 He submits that the expenses are reasonable, and that the Plaintiff
11 was not dismissed.

12

13 THE DEFENDANT'S CASE

14

15 The Defendant has filed a late affidavit with a draft defence attached
16 to it. Mr. Crawford of Maples of Calder on behalf of the Defendant
17 submits that the Defendant should be allowed to file his defence
18 because it has a credible defence to the allegations in the Statement
19 of Claim which are capable of success, namely:

20

1 (1) That in fact the Defendant believed that the Plaintiff had agreed
2 to forbear any demands for payments, pending realisation of
3 the Defendant's assets and that there was an agreement
4 between the Plaintiff and the Defendant in respect of the
5 Plaintiff's ongoing employment or role with the Defendant (this
6 is supported by the email correspondence);

7 (2) That there is a triable issue as to the proper construction and
8 effect of clause 12.3 of the contract of employment, (the clause
9 as to severance);

10 (3) That no demand was ever made by the Plaintiff in respect of his
11 outstanding salary; and

12 (4) The Plaintiff did not make any demands for the re-
13 imbursements.

14
15 I do not believe that (3) and (4) have any great merit and therefore, I
16 would, in coming to any conclusion deal with paragraphs (1) and (2)
17 alone. It is my view that the Plaintiff if certain conditions were fulfilled
18 would be entitled to his salary and no demand need have been made.

19

1 Mr. Crawford further submits that the pleadings are defective in that
2 they do not plead with specificity the date of the breach of the
3 contract, the expenses incurred especially in circumstance where the
4 defence is that the Plaintiff agreed to forbear the demand for the
5 salary till the Defendant had realized the sale of the land.

6

7 Mr. Crawford submits that the Plaintiff's defective pleading is
8 highlighted by his defective affidavit in support. For example, he
9 submits that he failed to verify the allegations in the Statement of
10 Claim as required by GCR Order 14 r1. He also submits that the
11 documentation annexed to the affidavit is irrelevant and should be
12 ignored; and that, in fact, no proper evidence is provided by the
13 Plaintiff for expenses.

14

15 The defence submits strenuously that it has an arguable and bona
16 fide defence. That there is an agreement to forbear and that the
17 Plaintiff is not entitled to a severance package, if the clause in the
18 contract (paragraph 12.3) is properly construed. That the Plaintiff has
19 taken it upon himself to describe the circumstances of ceasing to

1 work for the Defendant as a dismissal when there is evidence before
2 the court that the Plaintiff's services were retained by the Defendant.

3
4 THE LAW

5
6 Summary Judgment is a procedure whereby a Plaintiff can apply for
7 judgment against a Defendant, usually without proving the case at
8 trial. The policy behind the procedure is to prevent delay in cases
9 where there is no defence. As Lord Halsbury stated in Jacobs v
10 Distillery Company (1901) 85 Lt 262, HS:

11
12 "There are some things too plain for argument
13 and where they were (defences) put in simply
14 for the purpose of delay which only added to
15 the expense and where it was not in aid of
16 justice that such substance should continue
17 (summary judgment) under RSC, Order 14
18 was intended to put an end to that Statement
19 of Claim and to prevent sham defences from
20 defeating the right of parties by delay."
21

22 The application must be supported by a standard form of affidavit
23 verifying the facts of the claim and deposing to a belief that there is
24 no defence. The Defendant in turn can exhibit a draft defence to its
25 affidavit. A general denial of liability will not suffice. The affidavit must

1 condescend upon particulars per Lord Blackburn in Walingford v The
2 Mutual Society (1885) AC 685 at page 704. It must deal with the
3 specific allegations in the Statement of Claim and state the nature of
4 and facts in support of the defence. The Plaintiff should only apply
5 for Summary Judgment where there appears to be no defence to the
6 action at all. The burden of proof therefore is on the Defendant to
7 show that there is a triable issue. However, it is quite a different
8 matter as Lord Donaldson of Lynton MR said in RG Carter Limited
9 v Clark (1990) 1 WLR at page 578:

10

11 “If the issue of law is not decisive of all the
12 issues between the parties, or if decisive of
13 part of the Plaintiff’s claim, or if some of those
14 issues, is of such a character as would not
15 justify its being determined as a preliminary
16 point because little or no savings in cost would
17 ensue. It is an a fortiori case if the answer to
18 the question of law is anyway dependent upon
19 the undecided issues of fact.”

20

21 In Systems Control Plc v Munro Cooperate Plc (1990) BCC at page
22 386, leave to defend was given where an issue whether the Plaintiff
23 had irrevocably elected to treat a contract as discharged or whether
24 they could enforce it was held to be an issue which should be
25 decided at trial.

1

2 The Order 14 application is intended for liquidated sums where there
3 is no defence to the action in the Plaintiff's belief. I have to ask
4 myself the following questions, is this procedure appropriate to a case
5 for damages for breach of contract. The Plaintiff's Statement of
6 Claim asks for the following relief:

- 7 (1) Unpaid salary for six months;
8 (2) Expenses, loans, payments due as of June 2006. (No details
9 provided);
10 (3) Salary deficiencies. (No details provided and indeed 2006,
11 2007, 2008 estimated amounts);
12 (4) Severance pay;
13 (5) Car allowance (No details provided. No dates provided);
14 (6) Telephone to June 2006 (No details provided. No dates
15 provided);
16 (7) Health insurance – (No dates provided); and
17 (8) Pension contributions (dates provided but it goes on for the 3
18 years which opens itself to a question of construction of the
19 terms of the contract).

20

21 He also seeks interest on the amount that he claims is \$270,876.10.

22

23 It is my view that this a not an appropriate proceeding for this
24 particular case for the following reasons:

25

- 1 1. The Statement of Claim is not specific enough as to the loss
2 and expenses due as of June 2006;
- 3 2. There is evidence that the Defendant sought employment
4 elsewhere and it is therefore a question of construction of the
5 written contract whether (despite his income from an outside
6 source) under the terms of the contract and the law, the
7 payment of salary is mandatory and must be paid;
- 8 3. In circumstances where the Plaintiff and the Defendant agreed
9 to forbear from making a demand for the salary until the sale of
10 land was negotiated, whether the Plaintiff is entitled to have
11 commenced an action without a demand, and whether in fact
12 the Defendant is entitled to reasonable notice;
- 13 4. The Plaintiff does not sufficiently particularize the claim for car
14 allowance, telephone and this court would be hesitant to grant
15 Summary Judgment against a Defendant, not knowing whether
16 those expenses were incurred in the course of the alternative
17 employment or the employment contract under which this
18 action has been commenced;
- 19 5. It is also a question of construction whether there is an
20 entitlement to severance pay. This court is of the view that

1 Clause 12.3 in the circumstances of this case does not give rise
2 to an entitlement for severance pay, but this is a matter for the
3 trial judge.

4
5 For the above reasons, I dismiss the application for Summary
6 Judgment.

7
8 There is also a Summons before me filed by the Defendant for the
9 following relief:

- 10
- 11 1. That the time for filing its defence in this action be extended
12 until the 31st August 2006; and
 - 13 2. That the costs of and incidental to this application be costs in
14 the cause.

15
16 I find that there is in fact a defence which is not a sham. It is credible
17 and I therefore grant the relief sought in paragraph 1 of the summons
18 filed by the Defendant and grant the extension till the 31st October
19 2006.

1 THE QUESTION OF COSTS

2

3 It is usual for the Plaintiff to receive its costs when the Defendant has
4 not filed a defence in time. However, in the circumstances where
5 there was an agreement to forbear, a writ issued with no prior
6 demand or notice, the application for Summary Judgment must be
7 said to be an inappropriate application. I do not believe that costs
8 should be ordered against the defence. I therefore do not award
9 costs to either party, and order that the costs of and incidental to this
10 application be costs in the cause.

11

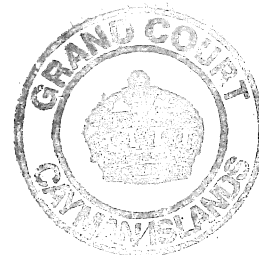
12 Dated this 12th day of October 2006

13



14

15 Judge of the Grand Court



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

3
4 CAUSE NO. 319 OF 2005
5
6
7

8 BETWEEN:
9 SEGOES SERVICES, LTD.

10 Plaintiff

11 AND:

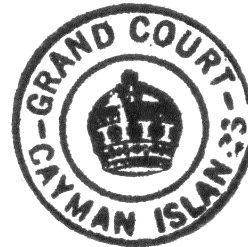
- 12 1) CAMILA UEOKA
13 2) PAMELA KAWESKE
14 3) HIGHLAND CONSULTING LIMITED

15 Defendants
16
17

18 **Appearances:** Mr. Alastair Walters and Mr. Guy Manning of Campbells for
19 the Respondent
20 Mr. Anthony Akiwumi and Mr. Richard Annette of Stuarts for
21 the Applicant
22

23
24 **Before:** Hon. Justice Henderson
25

26
27 **Heard:** September 7, 2006
28
29



30 JUDGEMENT
31
32

33 The second defendant, Pamela Kaweske, was granted leave to appeal against an order
34 granting summary judgment to the plaintiff on this fraudulent preference claim. I granted
35 leave because I considered the defendant to have some prospect of succeeding on the first
36 ground – the question of proof of insolvency. I have now received and considered
37 written submissions from the plaintiff and the second defendant on the question of what,
38 if any, conditions should be included in my order. The plaintiff requests that leave should
39 be granted on condition that the second defendant pays into court the sum of

1 US \$940,402.66 cents within fourteen days. That sum comprises:

2 (a) the whole amount of the judgment debt (US \$865,402.66);

3 (b) the sum of US \$50,000 towards the plaintiffs' costs awarded in the
4 order granting summary judgment; and

5
6 (c) the sum of US \$25,000 as security for the plaintiffs' costs on the
7 appeal.
8

9 The second defendant is not a resident of the Cayman Islands at the present time. She
10 concedes that she has assets in the approximate amount of US \$1,115,000, which include
11 a condominium property in the Cayman Islands appraised (on a forced sale basis) at US
12 \$388,000. She therefore has sufficient assets from which the conditions requested could
13 be satisfied, but insufficient assets within the jurisdiction to satisfy the judgment obtained
14 by the plaintiff and the probable costs of the appeal.

15
16 The plaintiff says its request is justified in light of the second defendant's failure to
17 comply with a Mareva Injunction granted by this court. The second defendant takes the
18 position that the Mareva Injunction has never been served upon her.

19
20 The Mareva Injunction (in paragraph 6 (b)) contained an order for substituted service; it
21 was served on Woodward Terry & Company, the second defendant's then attorneys of
22 record, in accordance with that order. An affidavit of service has been filed.

23
24 The Mareva Injunction was obtained on the basis of an affidavit of Kenneth Kryss, which
25 was served on Woodward Terry at the same time as the injunction itself. The second
26 defendant swore an affidavit in response; her affidavit was dated August 30th, 2005 and

1 was filed in these proceedings on September 30th, 2005. In that affidavit, she quotes at
2 great length from the affidavit of Mr. Kryz and responds to his affidavit on a paragraph
3 by paragraph basis. She also refers repeatedly in her affidavit to the granting of the
4 Mareva Injunction and the consequent restraint upon her assets. She said she would
5 apply for a review of the injunction with a view to having it set aside.

6
7 In light of this evidence, the argument that the injunction has not been served upon the
8 second defendant is wholly without merit.

9
10 The plaintiff argues that the second defendant is in breach of the Mareva Injunction and
11 has no intention of complying fully with it. In her own affidavit material, the second
12 defendant disclosed that she has sought advice from a United States attorney as to the
13 enforceability of the Mareva Injunction there and has been advised that it would be
14 difficult, and perhaps impossible, to enforce it.

15
16 The second defendant took approximately thirteen months to make disclosure of her
17 assets in compliance with the Mareva Injunction. This was done on September 5th, 2006.
18 Other evidence before me shows that in the recent past she has held significantly greater
19 assets which are wholly unaccounted for in her disclosure affidavit.

20
21 In her first affidavit (sworn August 30th, 2005), she said she owned:

22 (a) securities worth in excess of US \$1.5 million dollars;

23 (b) assets with a value in excess of US \$1,000,000.00 managed for her by
24 AALL Trust and Banking Corporation Ltd.;

1
2 (c) property she owned jointly with either her husband or son at
3 42 Carla Way, Broomfield, Colorado, United States;

4 (d) a bank account at HSBC Canada;

5 (e) an annual income of US \$100,000.
6

7 The asset disclosure affidavit contains no explanation as to where these assets have gone.

8 In addition, documentation before me suggests she has been earning income in the form

9 of management fees and property rentals but the asset disclosure affidavit contains no

10 details of these. The second defendant has not disclosed what happened to the alleged

11 preference payment of US \$830,390.66 received from the plaintiff and the subject of the

12 summary judgment. She does not disclose what happened to certain payments of

13 approximately US \$700,000 transferred from an account in her name with the plaintiff to

14 an account in her name at HSBC (Canada) Inc. in April, 2005.
15

16 Where the second defendant does make disclosure of bank accounts, she gives only the

17 name of the bank and the supposed credit balance; she does not specify at which branch

18 of the bank the account is held and does not provide account names or numbers. She has

19 disclosed the ownership of some valuable jewelry and rare coins but does not provide any

20 details of individual items, their value, or the location in which they are held.
21

22 She does not disclose the ownership of any securities at all. I accept the plaintiff's

23 observation that this is improbable. She said previously that she owns securities with a

24 value in excess of US \$1.5 million dollars, she ran an investment advisory business, and

1 has said she has been investing successfully in medical companies since she was twenty-
2 five years old.

3
4 I am satisfied that the second defendant can afford to pay into court the value of the
5 judgment under appeal and the amounts requested by the plaintiff as security for its costs.
6 I am satisfied the Mareva Injunction has been served upon her and she has failed to
7 comply with it fully or on a timely basis. I am satisfied the plaintiff has reasonable
8 grounds for its apprehension that, after an unsuccessful appeal, the full amount of the
9 second defendant's judgment debt and costs will not be paid.

10
11 In these relatively unusual circumstances, I find that the plaintiff is entitled to the
12 conditions it has requested. The second defendant has said she will consent to an order
13 that the condominium in the Cayman Islands be sold and the money paid into court.
14 Assuming that this sale will generate the sum of US \$358,900 (the anticipated forced sale
15 price less realtor and attorney's fees), the unsecured amount of the judgment debt will
16 then amount to US \$506,502.66. I order that leave to appeal is granted to the second
17 defendant on condition that she pay into court or otherwise secure that sum, plus the sum
18 of US \$75,000 as security for costs, within fourteen days.

19
20 Dated this 18th day of September, 2006

21
22 *Henderson, J.*

23 Henderson, J.
24 Judge of the Grand Court

