In The Supreme Court of Bermuda

CIVIL JURISDICTION

2003: No: 486

BETWEEN:

CHARLES SIMONS

Plaintiff

-and-

LIONEL DARRELL

First Defendant

-and-

DOLORES DARRELL

Second Defendant

JUDGMENT

Date of Hearing: 27 & 28 May 2008

Date of Judgment: 11 June 2008

Mr. Jaymo Durham, Smith & Co., for the Plaintiff

Ms. Narinder Dosanjh, Christopher Francis Forrest, for the Defendants

Introduction

1. These proceedings arise from a business arrangement between the plaintiff ("Mr. Simons") and the defendants (respectively "Mr. and Mrs. Darrell" or "the Darrells") relating to the business known as the SeaView Health and Fitness Centre ("the Business"), which operated from premises on North Shore Road in

Pembroke Parish (which premises I will refer to as "the Gym"). One of the issues in the proceedings is whether the Business was operated by Mr. and Mrs. Darrell, or by a company which they and family members had incorporated under the name of SeaView Holdings Ltd. ("the Company"). It is Mr. Simons' case that Mr. and Mrs. Darrell were the owners and operators of the Business, whereas the case for the Darrells is that the Business was owned by the Company, which then traded under the name of SeaView Health and Fitness Centre.

2. Mr. Simons was one of four or five personal fitness trainers who made their services available to clients of the Business, for a fee which was a matter of agreement between the clients and the trainers. In return for this access to the clients of the Business, the trainers were obligated to pay a monthly fee to the Business. There is an issue between the parties as to whether the agreement between Mr. Simons on the one hand and either Mr. and Mrs. Darrell or the Company as owners and operators of the Business on the other were in written form. Mr. Simons' position is that he never signed the form of agreement which was signed by other trainers. Although the amended statement of claim referred to the agreement between the parties as being partially in writing and partially oral, Mr. Durham indicated at the outset of proceedings that the contract was not partially in writing and that that part of the statement of claim should be struck. For Mr. and Mrs. Darrell, the position was that Mr. Simons signed the same form of personal trainer agreement as had been signed by other trainers, and that they had been unable to produce the document because Mr. Simons' personal file had gone missing.

3. It is common ground that on 4 November 2003 Mr. Simons' contract was terminated by Mrs. Darrell. The case for Mr. Simons is that that termination was a breach of the agreement, and that it was an express or alternatively an implied condition of the agreement that Mr. Simons would be given reasonable notice of any termination. He claims damages by way of loss of earnings in consequence of the alleged breach. For the Darrells, the claim is, firstly, that Mr. Simons'

contract is with the Company, not Mr. and Mrs. Darrell. It is then said that it was a term of the contract between the Company and Mr. Simons that the Company could discontinue his services by notification in writing, and that this was done on or about 4 November 2003. Alternatively it is said that Mr. Simons repudiated the contract, which repudiation the Company was entitled to and did accept. Alternatively, if the contract was between Mr. Simons and Mr. and Mrs. Darrell, it is again said that Mr. Simons breached the terms of that contract. I will come to the full terms in due course. Finally, in relation to the claim for damages, this is disputed both on the basis that Mr. Simons' earnings were not at the level claimed, and that he mitigated his loss by means of alternative employment, so reducing the claim for damages.

The Pleadings

4. The statement of claim is in relatively short terms, and I have already referred to the material ones. The only other aspect that needs to be mentioned is that shortly before the trial, Mr. Durham sought and obtained leave to add the words "a licence to" after the words "agreed to pay rent for" appearing in paragraph 3 of the statement of claim. The consequence is that (subject to the change referred to in paragraph 2 above) that paragraph now reads:

> "In or about April 2000 by an agreement, partially in writing and partially oral, between the Plaintiff and the Defendants, the Plaintiff agreed to pay rent for a licence to the use of the Defendants' premises such use including but not limited to the facilities and equipment thereat."

5. In my view, the inclusion of the word "licence" added nothing to the claim. One is bound to consider the full terms and effect of the agreement between the parties, and to characterise the agreement or part of it as a licence makes no difference to such consideration. Perhaps the word was used to qualify the use of the word "rent" to describe the payment required to be made by the trainers (including Mr. Simons) to the Business. This was a word used by the owners of

the Business – see for instance the letter of 16 December 2002 addressed to the personal trainers in relation to an increase in rent. In truth, the payment was simply a fee required by the Business from the trainers in return for access to the Gym and to the clients of the Business.

6. The re-amended defence is a fuller document which requires a more detailed review. The contract between the Company and Mr. Simons was said to be partly in writing and partly oral. In fact, a signed version of the written document was not available because of the missing file, although Mr. and Mrs. Darrell gave evidence that Mr. Simons had signed the same form of personal trainer agreement as had been signed by other trainers. The pleading maintained that it was an express term of the contract that Mr. Simons would require any person whom he trained at the Business premises to pay their entrance dues and sign into the premises. It was said to be an express term of the contract that Mr. Simons as a trainer would ensure that his clients were members of the Gym or that they paid the daily rate prior to each session.

7. There were further terms set out, said to be either express or implied. I will make reference only to those which have relevance for the purpose of these proceedings. These were:

    - that Mr. Simons would not abuse any confidential information obtained from his position.
    - that he would at all times act in a professional manner while in the Gym.
    - that he would ensure that all clients were members of the premises, or, if non-members, paid the daily rate (a duplication of the express term previously referred to), and
    - that he would display a high level of professionalism at all times.

8. The amended defence then set out some six alleged breaches, two of which may be run together. Firstly, it alleged that Mr. Simons trained clients without ensuring that they were members in good financial standing or had paid the daily usage fee; secondly, that he was openly and blatantly disrespectful to the shareholders, directors and managers of the Business; thirdly, that he was disrespectful to the female members of the Gym, such that his behaviour gave rise to complaints, and that he obtained confidential information in relation to such female members; fourthly, that he abused the complimentary ticket system run by the Business for the purpose of introducing new members, and lastly, that he failed to pay the monthly rental fee.

The Evidence

9. Mr. Simons was the only person to give evidence in support of his case. He referred in his witness statement to the fact that he been employed as the manager of the Business, but that this had come to an end in April 2000, following which he had acted only as a fitness trainer. Mr. Simons maintained that there had long been a misunderstanding on the part of Mr. and Mrs. Darrell as to his obligations in that capacity, and maintained that he was not employed by the Business, that he was a sub-contractor, and that he had never seen the contract which Mr. and Mrs. Darrell said that he had signed. Specifically, he maintained that it was not his responsibility to ensure that clients had paid their fees for the use of the Gym, and he said that he had not been given any warning in regard to any failure on his part in this regard. With regard to the complimentary training tickets, Mr. Simons did not accept that these had been abused. He said that they were given to trainers for those trainers to distribute as they chose, with no stipulations given as to how they were to be used. Mr. Simons denied any disrespectful activity toward female clients, and said that no such clients had ever made a complaint or terminated his services as a result of his conduct. He agreed that he had accessed the Gym's computer to obtain client phone numbers, but said that this was because his cell phone had been damaged. Again, he said that he had never been reprimanded or given any warning in regard to this conduct.

10. In regard to his termination on 4 November 2003, Mr. Simons said that he had been approached by Mrs. Darrell in regard to a client account which had been in arrears, to which he had responded that it was not his responsibility to ensure that this client had paid her fees. He maintained that he had remained respectful towards Mrs. Darrell, said that she had become enraged at his response and had told him to get out, and that he had accepted that as being a termination without notice. Finally, in relation to the ownership of the Business, Mr. Simons stated that the correspondence that he had received from Mr. and Mrs. Darrell had indicated that they were the owners of the Business.

11. In terms of his oral evidence, I will try to deal with this as briefly as possible, and without repeating what was said in the witness statement. In relation to the critical area of the responsibilities of the trainers to ensure that clients were properly paid up, Mr. Simons said that he had never been given any warnings in this regard, and the matter only arose during the confrontation which led to his termination on 4 November 2003. During the course of cross-examination, Mr. Simons was referred to the diary which he kept of his own clients' appointments, and the sign in sheets for the Business during the same period, which covered the week of 20 October 2003. Only a very small proportion of the client names from Mr. Simons' diary had been signed in, something which Mr. Simons accepted at the conclusion of that exercise. For the first day there were two or three names out of eleven, and this pattern was repeated in broad terms for the rest of the week. Mr. Simons agreed that the issue of trainers' awareness of the membership status of their clients was the subject of discussion on the day of his termination.

12. In relation to the ownership of the Business, Mr. Simons conceded that he had heard of SeaView Holdings Ltd., but said that he understood that Mr. and Mrs. Darrell owned the Business, and further said they had stated that they owned it, and that he had dealt with them on a day to day basis. That latter fact is of course not inconsistent with the Business being owned by the Company.

13. Next, in relation to the position following his termination, Mr. Simons said that approximately three weeks after his contract had been terminated he had found alternative premises at the Olympic Club. Although he said that he would help out and tidy up there, and that he could not solicit business from existing clients within that Gym, he carried on to say that he had transferred "six maybe eight" of his clients to the Olympic Club initially, and eventually had had about a dozen, although he said that this compared with about thirty that he had had at the Business. Strangely, in cross-examination, Mr. Simons had given different evidence. He said that he had not been employed by the Olympic Club just three weeks after the termination, although he did say that they had allowed him to work with his clients from the Business. But he then said that he had "a couple of clients who left at the same time", as opposed to the greater number previously mentioned.

14. Mr. Simons was then taken through his payroll tax returns in detail. These covered the period from the second quarter of 2003 through to the last quarter of 2004. Throughout this period, Mr. Simons had entered a notional remuneration figure, something which he was entitled to do under the provisions of the Payroll Taxes Act 1995 ("the Act") as a self-employed person. However, the figures which appeared in the tax returns were substantially less than the amount which Mr. Simons said he was earning at the time, which he put at a figure of approximately $2,000 per week at the time he left the Business, with a variation of $200 or so either way. The tax returns showed notional remuneration of $4,178.77 for the first quarterly period, $9,054 for the next three quarters and $9,343 for the remaining three quarters. These figures, according to Mr. Simons, were inserted by the tax officer on the basis of Mr. Simons' discussion with her. Mr. Simons said that he did not read the form through before signing it, and said that he believed that it was legitimate to put down a figure which represented approximately one third of his actual earnings, and he said the reason for the use

of the notional earnings figure was because of the fluctuation in his earnings of $200 or $300 per month.

15. The other fact which appears from the figures contained in the tax returns, as referred to above, is that there was no reduction to reflect the reduced income which Mr. Simons said he suffered after his termination, and indeed neither did it take account of the one month's holiday which he took in February 2004. And while Mr. Simons may have believed his use of a notional remuneration figure much lower than his actual earnings was legitimate, it appears from section 14(2) of the Act that a self-employed person's deemed remuneration is the greater of his actual remuneration and notional remuneration.

16. In relation to the form of personal trainer agreement, Mr. Simons said that he had not signed this, that he did not recall reading it, and did not agree that all trainers had been asked to sign it, on the basis that he had not been so asked.

17. Mr. Simons then referred to his obligation to pay rent, and said that he had never failed to do so, and that he had not been five months in arrears at the time of his termination. In relation to the question of complaints about the quality of management, having said that he did not make complaints about management, he did say that he did not agree with everything that they did and that he had made those feelings known to those of his friends who were his clients, describing these statements to friends as "venting". Mr. Simons did not accept that such comments were unprofessional, but he did concede that they were not conducive to the promotion of the Business.

18. Finally, in relation to the termination of his agreement with the Business, Mr. Simons' evidence was very much in conflict with that of Mrs. Darrell. He said that she may have approached him and asked him the name of the client he had been training, but that he could not remember exactly. He did not agree that he did not give the name because the particular client had not signed in, and said that

he did not "see himself" refusing to give a name to Mrs. Darrell. He did not feel that he had ever become disrespectful to Mrs. Darrell, and said that it was she who had raised her voice to him and he who had asked that they go into a back room to continue the conversation. He denied having blocked her exit from the office or Mrs. Darrell having asked him to move. In terms of the dismissal itself, he said that Mrs. Darrell had told him that she was getting tired of him, that if he wasn't happy, he should get out, and in fact that he should get out now, terms which he acknowledged amounted to the termination of his agreement.

19. In relation to Mrs. Darrell's evidence, her witness statement is a comprehensive document, and there is no point in duplicating that at this point. In terms of her oral evidence, Mrs. Darrell felt that clause 7 of the personal trainer agreement imposed an obligation on the trainers to ensure that their clients were in good standing. As to the conversation immediately prior to Mr. Simons' dismissal, Mrs. Darrell agreed that this centred on the issue of his responsibility for ensuring that his clients were members in good standing. She said that they had a fundamental disagreement as to his responsibility in this regard, and that he would not accept this contract, saying that it meant nothing to him and that he did not work for them. Mrs. Darrell said there had been one signed copy of the agreement which had disappeared, and in this regard said that she had received a signed copy from Mr. Simons, that it had been in the files in her office, and had then disappeared.

20. In relation to the termination, Mrs. Darrell said in her oral evidence that a lady had been training with Mr. Simons whom she did not recognise. She said that she had not interrupted training, but had said to Mr. Simons afterwards that the lady was not in good financial standing. She said that Mr. Simons "went off the deep end" and would not give her the lady's name when she requested it, and said that because there were other members in the Gym she had asked him to come to the office. She said that his response was that he would do so when he had finished with a client, and this was what had happened. During the ensuing conversation,

Mrs. Darrell said that Mr. Simons had raised his voice and "really carried on", and she described him as having verbally attacked her. This led to Mrs. Darrell say that she would not tolerate Mr. Simons' behavior and that he could no longer work in the Gym. She said that Mr. Simons had told her that she could not do that, and that she had insisted that he leave the premises, and that he had blocked her way out of the room, and had only moved after she had asked him to do so a second time.

21. Mr. Darrell also gave evidence, and his witness statement covered the issue of the contract between the parties. He said that when Mr. Simons had been engaged as a personal trainer he had signed trainer agreements which had been updated from time to time, and said that he was aware that Mr. Simons had signed at least two of those, and that he himself was responsible for the paper work for the Business. He also referred to Mr. Simons' attendance at directors' meetings of the Company.

22. In his oral evidence, Mr. Darrell had expressed the view that it was the obligation of a trainer to ensure that his client were in good financial standing, but again, this was based on clause 7 of the personal trainer agreement, which clause is not to that effect. Mr. Darrell said that his understanding of the obligation has also been verbally told to Mr. Simons, and that he had heard Mr. Simons say to Mrs. Darrell that it was not his responsibility to check whether clients had paid in.

23. The last two witnesses for the defendants were other trainers who had worked at the Business at different times. Dennis Wainwright had worked for the Business for a period of about six months in 2000. Mr. Wainwright's witness statement supported the case of Mr. and Mrs. Darrell in relation to complaints to members of the Gym concerning Mr. and Mrs. Darrell, and also that Mr. Simons had sought the telephone numbers of female clients of the Business. Mr. Wainwright's witness statement did also refer to comments said to have been made to him by clients of the Business, but since there is no question of such statements being

made in Mr. Simons' presence or being repeated to him, I will ignore that part of the witness statement. Mr. Wainwright's evidence was not seriously challenged in cross-examination.

24. Finally, Percy Paynter gave evidence. He had been a personal trainer throughout the material time, and had been a full time trainer since 2000. Mr. Paynter's evidence was that all personal trainers had had to sign a personal trainer agreement. He said that it was a strict rule of the Gym that every customer sign in upon entry. In relationship to the ownership of the Business, Mr. Paynter said that it was common knowledge that the Business was owned by the Company and run by its directors, and he referred to the truck owned by the Business which had the Company name clearly printed on it. Mr. Paynter said that he had heard conversations between Mr. Simons and Mrs. Darrell during which Mr. Simons had said words to the effect of "I do not work for you, I am not front desk". In his oral evidence, Mr. Paynter confirmed that he regarded it as his responsibility to ensure that his clients signed the membership list or guestbook, and said that he was not aware of any of his clients having failed to sign in. He said that he had worked about sixty hours a week, but felt that this was unusual and did not agree that Mr. Simons had worked a similar schedule.

Findings of Fact

25. The first issue is to identify the party on the other side of the contract with Mr. Simons. It is apparent that matters have been confused by the use of the Company's trading name, SeaView Health and Fitness Centre, and this name was frequently used in correspondence without any reference to the name of the limited liability company. However there was one document which contains both the trading name and the name of the Company, and this was the employment contract between the Company and Mr. Simons, when he worked in the capacity of manager. The document produced was not signed because, as Mr. Darrell indicated in his evidence, the signed version had disappeared from the files, and the form of document produced had been retained in the computer. So at least

one of the documents made reference to the name of the Company, as well as its trading name. Indeed, the employment contract is expressed to have been made by the Company in its capacity as "owners and operators of SeaView Health and Fitness Centre".

26. As I understand it, there is nothing improper about a company conducting its business by using a trading name. In Britain, there are controls pursuant to the Business Names Act 1985, which has no Bermuda equivalent. In Bermuda, the position is governed only by section 63 of the Companies Act 1981, which requires every company to have its name in all business letters, notices and so on, but the consequence of failure seems to be simply that the company is liable to a fine.

27. In this case, I accept Mr. Darrell's evidence that there was a contract between the Company and Mr. Simons when he was manager which made reference to the proper name of the Company as well as to its trading name. I also do not accept that Mr. Simons had merely "heard of" SeaView Holdings Ltd. While he was employed as manager, Mr. Simons attended one or two directors' meetings at the Gym, according to Mr. Darrell's witness statement. This evidence was not challenged in cross-examination, and I accept it. Further, Mr. Simons must have seen the vehicle referred to by Mr. Paynter, which Mr. Paynter had described as being regularly parked in full view of the Gym. According to Mrs. Darrell, Mr. Simons parked his car in the same place.

28. I do, therefore, find that the Business was operated by the Company, and that Mr. Simons knew this. It follows from my finding that Mr. Simons was aware that the Business was owned and operated by the Company, and that the Company should have been the defendant on the basis that Mr. Simons' contractual relationship was with the Company, not with Mr. and Mrs. Darrell. On that basis, the claim against Mr. and Mrs. Darrell must fail, and I so find. There is no question of piercing the corporate veil in this case; the fact is that Mr. Simons had no

contractual relationship with Mr. and Mrs. Darrell, and cannot therefore maintain a cause of action against them arising from the termination of his agreement, when I have held that to be an agreement between him and the Company.

29. Obviously, the finding that I have made above is sufficient to dispose of these proceedings, but it is nevertheless necessary for me to make further findings in case I am wrong on the question of the contracting parties. These further findings are therefore made on the basis that the contracting party could be either the Company or Mr. and Mrs. Darrell. On that basis, I turn next to the issue of whether Mr. Simons had signed the form of personal trainer agreement said by Mr. and Mrs. Darrell to have been provided for signature on behalf of the Business. My finding is that he did. I accept the evidence given by both Mr. and Mrs. Darrell that Mr. Simons had indeed signed the form of agreement, and that this had subsequently disappeared. The contemporaneous correspondence shows that they had the signature of the agreement in mind – see, for instance, the letter of 14 April 2000 which Mr. Darrell wrote to Mr. Simons, in which he indicated that the agreement would be ready for signature soon. It follows from my finding above that I reject Mr. Simons' evidence that he had not signed the form of personal trainer agreement, and that he had no knowledge of any such agreement or familiarity with it.

30. The next question is whether the agreement between Mr. Simons and the Company could be brought to an end on a summary basis. Clause 16 of the personal trainer agreement provides that "SeaView reserves the right to discontinue use of any trainer by notifying that trainer, in writing, the reason for such a decision." No notice period is provided for. The question which then arises is whether a reasonable period should be implied. In my view it should, and my reason for so finding is that although this was a contract between the Company and a trainer who was an independent contractor, the fact remains that the contract in question provided the trainer with his livelihood, and can therefore be said to be akin to (although not the same as) a contract of employment. The

effect of termination would necessarily be that the trainer would have to find alternative premises in which to train his clients. Necessarily, the likelihood is that he would lose clients, since clients would be unlikely to move to a new gym which would represent a duplicated expense. In those circumstances, the view that I take is that for a termination of the contract without cause, as provided for in clause 16, a reasonable period of notice should be implied, and I hold that in the circumstances such reasonable period of notice would be one month. I do not believe that the appropriate notice period for termination of this agreement should be as long as for a contract of employment.

31. The next issue which I will deal with is the subject of Mr. Simons' conduct, with reference to the complaints made by Mr. and Mrs. Darrell. The first of these in terms of the importance attached to it by the parties is whether trainers such as Mr. Simons had an obligation pursuant to their agreements with the Business to ensure that their clients were in good financial standing. Both Mr. and Mrs. Darrell relied upon clause 7 of the personal trainer agreement, but the terms of that clause impose an obligation on the clients, not upon the trainers. Neither is there any other clause in the written agreement which imposes such an obligation on the trainers.

32. However, the pleading is that the contract was partially in writing and partially oral, so that it is necessary to consider the position further. While Mr. and Mrs. Darrell both took the view that there was such an obligation, that view was, as I have already indicated, based on a misunderstanding as to the effect of clause 7 of the personal trainer agreement. In relation to the evidence of the other witnesses, both Mr. Wainwright and Mr. Paynter referred to the requirement that all members of the Gym must sign in, but neither indicated that there was an obligation on trainers to ensure the good financial standing of their clients. In those circumstances, I find that there was no such obligation. I do, however, accept Mrs. Darrell's evidence that the subject had been raised many times previously, and reject Mr. Simons' evidence that it was raised for the first time in

the conversation which resulted in his termination. But I do not regard those conversations as changing the contractual position.

33. There are then the complaints in regard to Mr. Simons' conduct toward female members of the Gym, abuse of the complimentary ticket system, and failure to pay the monthly rental fee. However, none of these matters came into play in relation to the termination of the agreement with Mr. Simons. They had not been the subject of any prior action, and were not part of the discussion on the day of termination. I therefore do not find it necessary to make any findings in respect of those matters.

34. I have already referred to the fact that there was no obligation on the trainers to ensure that the clients of the Business were in good financial standing, and obviously that was the principal issue between Mr. Simons and Mrs. Darrell on the day of termination. However, it is clearly the case, and I find, that Mr. Simons knew full well that Mrs. Darrell both believed it to be an obligation on Mr. Simons' part, and expressed that view to him on many occasions. In relation to the conversation at the time of termination, there is a conflict between Mr. Simons and Mrs. Darrell, with each saying that he or she had remained calm, while the other had become loud and aggressive. In this regard, I prefer Mrs. Darrell's version of events, and I accept that and reject Mr. Simons' version.

35. The next question to be considered is whether Mr. Simons' conduct on the day of termination would have constituted a breach of the agreement sufficient to allow the other contracting party (whether it be the Company or Mr. and Mrs. Darrell) to treat the contract as discharged by breach. In my judgment it was. Given the finding that I have made in relation to the conversation which took place between Mr. Simons and Mrs. Darrell, it seems to me that it would be quite unrealistic to expect either the Company or the Darrells to continue in a relationship in which mutual trust and confidence played an important part, given Mr. Simons' behaviour. I take the view that the contracting party, either the Company or the

Darrells, was entitled to treat the contract as having been discharged by reason of Mr. Simons' conduct immediately prior to the termination of the contract.

Damages

36. Damages only fall to be considered if I am wrong in regard to my finding as to the identity of the contracting party, and wrong in my finding that the contracting party was entitled to treat the contract as having been discharged by Mr. Simons' breach. In those circumstances, a claim for damages would follow. On the basis of my finding that a reasonable period of notice would be one month, that would be the relevant period, but given that Mr. Simons claims for a period of three months, I will also consider the position in relation to such a period.

37. The first matter to be considered is the level of Mr. Simons' earnings. This is a matter on which Mr. and Mrs. Darrell would have no knowledge, the source of those earnings being the clients of the Business, not the Business itself, so that the Court essentially has to reach a conclusion from Mr. Simons' evidence, albeit with reference to the documentary evidence. It is true that Mr. Paynter in his evidence made the comment that he did not believe that Mr. Simons worked the sixty hours per week which he did, but even accepting that evidence, as I do, that gives me no guidance to the number of hours which Mr. Simons in fact worked.

38. Neither do I think that the payroll tax returns give any such guidance, at least when compared with Mr. Simons' diary for the week of 20 October 2003, which seems to me to be the most useful basis by which to measure Mr. Simons' own evidence. That was of course that he earned an average of $2,000 per week, with a slight fluctuation either up or down, which can be discounted for the purpose of this exercise. That weekly wage would give a quarterly figure of approximately $26,000, although it has to be remembered that such a figure would be produced by working for fifty-two weeks per year, and Mr. Simons did of course take a vacation for a month in February 2004. But obviously this figure is approaching three times the amount of the figure which appeared in the payroll tax return. Mr.

Simons' evidence was of course that the payroll tax returns were completed by the Government tax officer on the basis of his conversations with her, and it seems to me quite unrealistic to think that such officer would not have been well aware of the provisions of the Act. Nevertheless, it also seems to me that this is not a figure which remotely resembles Mr. Simons' real earnings for the relevant period, so that I do not think that reliance should be placed on the tax returns. It seems more sensible to rely upon Mr. Simons' diary, which showed that for the week of 20 October 2003, he had a total of fifty-three appointments. His evidence was that he was paid $45 per session of forty-five minutes to an hour. That would give a figure above $2,000 per week, but on that basis it does seem reasonable to accept a figure of $2,000 per week, or $8,666 per month as representative of Mr. Simons' earnings at this time, and I so find.

39. The next question is whether such a figure should be reduced by virtue of the alternative employment which Mr. Simons secured during the relevant period. This appears to have been nominal at best, and operative only in the fourth week following termination, in respect of some six to eight clients compared with the thirty clients Mr. Simons worked with at the Gym. It is clear from the diary and these numbers that some clients had more than one training session during the week. Given the number of clients in the relatively short period, I would reduce the figure of $8,666 to a figure of $8,000, and hold that in the event that Mr. Simons is entitled to damages for the one month period, his loss would be in the amount of $8,000.

40. For the second and third months, the degree of mitigation would be greater. Having said that he transferred to the Olympic Club with "six maybe eight" clients initially, Mr. Simons said that eventually this rose to about a dozen. I would propose to put the figure at ten, compare that with Mr. Simons' pre-termination thirty clients, and reduce his income in consequence of the mitigation of damages by one third. That would yield a figure of $11,500 per month for the second and third months, to be applied in the event that damages need to be

assessed, and the relevant notice period is held to be three months. In those circumstances Mr. Simons' damages for the three month period would total $31,000.

Summary

41. By way of summary, therefore, my findings are as follows: -

(i) Mr. Simons' agreement was with the Company, not Mr. and Mrs. Darrell, and his claim against Mr. and Mrs. Darrell fails on that basis.

(ii) Mr. Simons did execute a written contract, in the same terms as the personal trainer agreement disclosed in discovery and produced to the Court. The provisions of that document therefore applied to the contract between Mr. Simons and the Company.

(iii) There being no notice period in the said contract, a reasonable period of notice should be implied. Such a period should be one month.

(iv) The Company was nevertheless entitled to dismiss any of its trainers, including Mr. Simons, on a summary basis for cause.

(v) The Company was entitled to dismiss Mr. Simons on 4 November 2003 for cause, on the basis of his conduct towards Mrs. Darrell, who was at the material time a director of the Company and one of the managers of the Business.

(vi) In the event of my above findings being wrong, and Mr. Simons being entitled to compensation for one month's loss of earnings, the award of damages would be $8,000.

(vii) In the event of my being wrong on the period of reasonable notice, and that being three months, the award of damages would be $31,000.

Costs

42. I see no reason why costs should not follow the event, but will hear counsel in regard to costs should they so wish.

Dated the 11th of June 2008.

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Hon. Geoffrey R. Bell
Puisne Judge