In The Supreme Court of Bermuda

CIVIL JURISDICTION

2010: No. 149

BETWEEN:

ELDON BINNS (1)

TYRONE SAMPSON (2)

COMPASS HOLDINGS LIMITED (3)

Plaintiffs

-v-

KYRIL BURROWS
(also trading as Human Nature)

Defendant

JUDGMENT
(In Court)

Date of Trial: November 28, 2011
Date of Judgment: December 15, 2011

Mr. Jeremy Garrood, Mello Jones & Martin, for the Plaintiffs
Mr. Richard Horseman, Wakefield Quin, for the Defendant

Introductory

1. The Third Defendant ("the Company") was the corporate vehicle established by the First and Second Plaintiff to ease their transition towards full retirement after a career in the

Public Service. The Defendant's rights as a director and/or shareholder of the Company are the subject of a separate legal dispute in pending section 111 of the Companies Act 1981 proceedings. For the purposes of the present action, the Defendant was at most material times employed by the Company as its General Manager. His employment commenced on or about August 1, 2008 and ended on or about July 1, 2009. The precipitous and non-consensual termination of that relationship lies at the heart of the controversies which fall to be determined here.

2. In the course of the trial, the issues truly in controversy were significantly narrowed. The Plaintiff's first claim in relation to monies received by the Company in relation to work done at T.N. Tatem Middle School was agreed, with credit being given for $34,000 taxed costs awarded to the Defendant pursuant to Orders dated January 21, 2010 and March 4, 2010. At the conclusion of the trial, Mr. Garrood sensibly abandoned the claim in relation to work done at Tudor Farm which was not supported by the evidence. The Defendant sensibly conceded that the Company had reimbursed him for $4250 in respect of "At Task" software which the Company in fact paid for.

3. This left the following disputes to be resolved by the Court:

    (a) the Company's claim for the payment of $315,418.68 in respect of work done at the Defendant's Turkey Hill property in St. George's;

    (b) the Company's claim for a further $4250 in respect of the "At Task" software on the grounds that the Company received no benefit from the purchase the Defendant caused it to make;

    (c) the Company's claim for $28,289.10 in respect of office equipment and supplies from which the Company did not benefit;

    (d) the Company's claim for $9,390 in respect of a 'reimbursement' made to the Defendant in respect of a false CAD Concepts invoice;

    (e) the Defendant's Counterclaim for three months wages in lieu of notice at $10,000 per month (the amount pleaded, although at trial it was conceded that the correct amount was $9500 per month).

Approach to the evidence

4. The animosity between the protagonists, particularly the First Plaintiff and the Defendant, was palpable as they gave their evidence. No independent witnesses whose testimony could comfortably be regarded as entirely credible were called. This is a case, moreover, where the evidence of the protagonists is not only laced with personal animosity; their business relationship, initially forged while all were in Government employment, seemed to the Court to have a slightly murky air about it. Some of the evidence created the distinct sense that straightforward honest work was, on occasion, interspersed with "dodgy dealings". The Court is accordingly bound to treat all of the oral evidence with care and to seek, wherever possible and safe to do so, support from contemporaneous documentation. The authenticity of some of the documentation was even called into question.

Turkey Hill

5. The Plaintiffs' claim in respect of a substantial amount of work allegedly done at Turkey Hill between March and June 2008 in respect of which the Defendant supposedly owes $315,418.68 was not supported by contemporaneous documentation. It was only supported by invoices generated over a year later in the immediate aftermath of the termination of the Defendant's employment.

6. The Defendant's case that he made cash payments for the work done was supported by emails he claims to have sent and received in which the First Plaintiff expressly agreed that the Defendant could join the Company now that "*all's paid up*" (June 28, 2008) and that "*Kyril's Turkey Hill project has no outstanding accounts receivables*" (May 7, 2009). The Plaintiffs suggested these emails must have been fabricated by the Defendant; however, on their face they appeared genuine. Moreover other documentation concerning the Company's financial position during the period 2008-2009 made it highly implausible that a debt of such magnitude properly due in the summer of 2008 would have been carried for over one year before the first documentary evidence of the work done was generated.

7. The Plaintiffs have failed to prove this aspect of their claim.

At Task Software

8. Although it appears this software was only purchased and/or installed in the weeks preceding the precipitous termination of the Defendant's employment, there is credible support in the contemporaneous documentation that this software was purchased and used for the Company's benefit.

9. The Plaintiffs have failed to prove this limb of their claim.

Office supplies and equipment

10. The Defendant admits fitting out a mobile office for the Company at Tudor Farm which his wife leased to the Company. He denied keeping any of the equipment purchased, although he conceded an associate who also provided services to the Company may have retained a laptop. The Plaintiffs insisted that various items were never returned.

11. I am unable to make any positive finding about whether the office equipment and supplies which I am satisfied were initially purchased for the Company's benefit were retained by the Defendant or returned. The Plaintiffs have failed to prove this head of claim.

CAD Concepts Claim

12. It is common ground that the documents purporting to show that the Defendant used his American Express card to purchase a CAD Concepts software package for $9,300 do not reflect a genuine transaction. The Plaintiffs contend that these documents were presented to the Company by the Defendant in support of an expense claim for which he was reimbursed. The Defendant contends that the documents were fabricated by the Plaintiffs and that the $9,300 he received was in fact properly reimbursing him for services rendered in the summer of 2008 and evidenced by three invoices.

13. At first blush, the suggestion that the Plaintiffs had fabricated the expense claim seems just as improbable as the Plaintiffs' suggestion that the Defendant had fabricated unhelpful emails. This preliminary view is potentially fortified by an analysis of the apparently related documentation. It is not disputed that on February 13, 2009, the Company transferred $9,390 to the Defendant's bank account. The expense reimbursement form for the same amount reference the purchase on January 12, 2009 of CAD Concepts software is dated February 11, 2009 and stamped received on February 12, 2009. The credit card receipt and admittedly bogus CAD Concepts invoice purportedly evidence a purchase in the same amount made by the Defendant from CAD Concepts on January 12, 2009.

14. It seems somewhat improbable that the Plaintiffs would expend so much time and care to fabricate evidence in support of a comparatively minor claim, (a) when it would have been far easier to back-date their own invoices to lend credence to the larger Turkey Hill claim; and (b) when (if the Defendant's explanation for the payment was correct) the

Defendant could easily produce an alternative explanation for the sum he received. However, it is impossible to dismiss out of hand the possibility that the Plaintiffs, who have bandied about allegations of fabrication with gay abandon in respect any inconvenient email which the Defendant relies upon, have been engaged in fabrication of their own. And Mr. Horseman submitted that the Turkey Hill invoices were admittedly "made up" after the termination of the Defendant's employment.

15. Because the Defendant cannot refute the fact that he received the $9,390 on February 13, 2009, he posits an alternative justification for receiving that money: three invoices dated December 19, 2008 in the amount of $3,130 for services rendered in the summer of 2008 before he was even employed by the Company. Mr. Garrood for the Plaintiffs sought to cast doubt on the linkage between these invoices and the February 13, 2009 payment by pointing out that expense claims were generally paid promptly. Curiously, the Defendant himself states in his Witness Statement (paragraph 62): "*The invoices were paid in full totalling $9,390.00 for professional services rendered in January 2009.*" This was clearly a mistake as the central thrust of his evidence was that the money the Plaintiffs say he received for the CAD Concepts claim was in fact paid in settlement of the December, 19, 2008 invoices.

16. Nevertheless, the best evidence of the fact that the December 19, 2008 invoices were paid by or on behalf of the Company prior to the February 13, 2009 payment would be a banking record demonstrating that fact. The Plaintiffs adduced no such evidence and proffered no explanation as to why they were unable to do so. The documents supporting the Defendant's answer to this part of the Plaintiffs' case were exhibited to the Defendant's November 8, 2011 Witness Statement. Accordingly, the Plaintiffs had nearly three weeks to refute this explanation of why the February 13, 2009 payment was in fact made to the Defendant. They failed to deal with this straightforward issue in a convincing manner.

17. Mr. Horseman submitted that an allegation of serious misconduct amounting to fraud, as submitting a forged reimbursement claim undoubtedly is, can only be proved by the clearest of evidence. I agree. As Bell J observed in *Nitin Aggarwal –v- Dundee Management Services Ltd. et al* [2005] Bda LR 82:

> "*52.Mr. Marshall then submitted that the standard of proof, while remaining the civil standard, is required to reflect the seriousness of the allegation, and in this regard he relied upon the well-known words of Ungoed-Thomas J. in Re Dellow's Will Trust [1964] 1 WLR 451 at 455 to the effect that 'the more serious the allegation, the more cogent the evidence required to overcome the unlikelihood of what is alleged and to prove it'. The same principle is*

variously expressed in other cases, but the principle is not in dispute, and the Defendants did not seek to argue otherwise."

18. The Plaintiffs have failed to satisfy me that the $9,390 the Company paid to the Defendant on February 13, 2009 was made in support of a non-existent expense and not paid in proper settlement of the Defendant's December, 19, 2008 invoices.

The Defendant's Counterclaim

19. The Defendant admits that he was customarily paid by other staff members and did not ordinarily pay himself. However, he contends that he was wrongfully dismissed for withdrawing $10,000-which he subsequently repaid- to pay himself from an account in respect of which he was a signatory because he believed that he was not going to be paid in a timely fashion. The relevant bank statement shows that the Defendant was paid the agreed $9500 on the same date that he withdrew the $10,000 (i.e. on June 30, 2011, but apparently after the time of his own cash withdrawal). It is denied that this conduct constituted serious misconduct and contended that the real reason for his termination was the fact that he was raising awkward questions about the Company's affairs.

20. In considering whether the conduct complained of by the Plaintiffs constituted grounds for summary dismissal, the following test laid out by the Court of Appeal for Bermuda in *Dundee Leeds Management Services –v- Aggarwal* [2007] Bda LR 47 (Evans JA):

> "***Justification for Summary Dismissal***
> *27. In Wheatley v Control Techniques plc (30 September 1999) [1999] All ER (D) 1044, Ebsworth J. summarised the principles which, she said, were common ground in that case-*
>
> > *'(1) It is for the Defendants, on the ordinary civil burden of proof, to justify the dismissal.*
> > *(2) Whether the misconduct justifies summary dismissal is a question of fact in each case; although there is no fixed standard defining the degree of misconduct which will justify instant dismissal the conduct must be of a sufficient degree of gravity to justify it. I must decide first whether there has been misconduct and secondly whether it was serious or gross. There is no need for the employer to establish dishonest conduct, and that is not a feature of this case, the key question is whether the employee's conduct is inconsistent with the relationship of trust and confidence 10 which must exist between employer and employee. In Laws v London Chronicle (Indicator Newspapers) Ltd. [1959] 1 WLR 698 Lord Evershed MR said:*
> > *"The question must be – if summary dismissal is claimed to be justified – whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service'*

(p.700).

28. Ebsworth J. also referred to the report and award made by Lord Jauncey in Neary v Dean of Westminster [1999] IRLR 288. In that case there was no allegation of dishonesty. The Abbey (employer)`s case was based on impropriety, not dishonesty, and the issue was whether that amounted to gross misconduct sufficient to justify dismissal in the circumstances of that case (paragraph 15). In the course of a detailed consideration of the correct approach, Lord Jauncey observed that 'It has long been recognised that there exists between master and servant a fiduciary relationship of trust and confidence' (paragraph 18); that the extent of the duty is dependent on the facts of each case (paragraph 19); that 'whether misconduct justifies summary dismissal is a question of fact' (paragraph 20); and he rejected a submission that 'gross misconduct justifying summary dismissal almost invariably involved dishonesty in some form or other' (ibid.). Asking the question 'What degree of misconduct justifies summary dismissal?' he answered it 'conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment' (paragraph 22).

29. We were also referred to a particularly clear and helpful analysis of the decided cases in Bartholomew v L K Group Ltd. [2003] All ER (D) 340 by John Slater QC sitting as a Deputy High Court Judge. He noted that in the decided cases 'there is something of a thread running through them and [they] do typically involve either actual or near dishonesty, disobedience or incompetence…typically though not exclusively one is looking for something that could be called dishonesty or similar however that is further defined' (paragraph 32). However, it was common ground between the parties that 'the ordinary law of contract applies, although in the context of employment a repudiatory breach is often referred to as gross misconduct" (paragraph 31), and he concluded, correctly in our view, that "there is no real distinction to be drawn between gross misconduct and the wider label of repudiatory breach", the test being that stated by Lord Jauncey in Neary (above) (paragraph 36).

30. That test, in our respectful view, restates rather than answers the question, but it emphasises the basic importance of the relationship of trust and confidence between the two parties in the particular case. The Court asks itself whether the misconduct relied upon was sufficiently serious to be regarded as repudiatory of that relationship; if it was, the employee was justified in bringing it to an end."

21. The Plaintiffs' evidence clearly establishes that the Defendant made an unauthorised use of the Company's assets at a time when the relations between himself and his employer were strained. There is no or no credible suggestion that he believed that he had implied authority to make the withdrawal. Not only was he in fact paid on the last day of the month; he withdrew more than he was entitled to in any event. Believing that his employer had decided (in his view unjustly) not to pay him because of the simmering

dispute, the Defendant, by his own account, simply decided to pay himself. This bordered on dishonesty and in any event constituted an admission by the Defendant that by June 30, 2009 he had lost confidence in his employer to an almost irretrievable extent.

22. Despite the seniority of the Defendant's position and assuming for present purposes that he was a director and shareholder as well, the Company had a payroll system in place pursuant to which he did not use his bank signing authority to pay his own salary (nor indeed, seemingly, any other salaries). If relations were souring and he suspected the controllers of the Company were contemplating severing the employment relationship and challenging his right to further remuneration, he had no legal right to self-help in the form of self-payment. The position might have been otherwise if relations were good and the Defendant plausibly felt that he had implied authority to correct a mere administrative oversight.

23. In my judgment the unauthorised withdrawal clearly constituted serious misconduct justifying summary dismissal, and there is no room for doubt that this misconduct formed the predominant basis for the termination decision. The Defendant did not return to work after being confronted about this issue and repaying the money on July 1, 2009. This is cogent evidence that the relationship of trust and confidence which should exist between a senior manager and his employer had been damaged beyond repair by the unauthorised withdrawal of funds incident on June 30, 2009.

24. On July 22, 2009, the First and Second Plaintiffs in their capacity as directors of the Company wrote the Defendant as follows:

> "*This letter is to confirm your employment with Compass Holdings Ltd. and its subsidiaries is terminated due to gross misconduct, effective July 1, 2009.*"

25. Accordingly, the Counterclaim is dismissed. The Court declines the Defendant's counsel's invitation to formally determine in this action whether or not the Defendant was a director shareholder. It was common ground that the Defendant was at all material times employed as General Manager; his status as a director and/or shareholder is irrelevant to his wrongful dismissal claim.

Conclusion

26. The Company/Third Plaintiff is entitled to judgment for the following amounts:

(a) $171,755.72 to be paid out of funds held in trust by Conyers Dill & Pearman Limited less the sum of $34,000 payable to the Defendant in respect of taxed costs, as agreed at the beginning of the trial;
(b) $4250 in respect of an overpayment in respect of "At Task" software, as agreed at the beginning of the trial.

27. I will hear counsel as to costs. Although it is difficult to see why the Plaintiffs should not be awarded the costs of the action, including preparing for trial, it seems necessary to consider what order is just as regards the costs of the trial as the time spent on the Plaintiffs' contested claims which failed was possibly 80% of the total trial time, compared with only 20% for the Defendant's unsuccessful Counterclaim.

Dated this 15th day of December, 2011 _____
KAWALEY J