

IN THE GRAND COURT OF THE CAYMAN ISLANDS  
CIVIL DIVISION

CAUSE NO. G93 OF 2016

**BETWEEN:**

**ANTHONY RICHARDS**

**Plaintiff**

**AND**

**H.E.B. ENTERPRISES LTD.**

**1<sup>st</sup> Defendant**

**AND**

**HENRY E. BODDEN JR.**

**2<sup>nd</sup> Defendant**

**Appearance:** Mr. James Kennedy of Samson & McGrath for the Plaintiff

**Before:** Hon. Justice Richard Williams

**Heard:** 27 July 2016

**Transcript provided:** 27 July 2016



*HEADNOTE*

*Ex parte application to serve out of the jurisdiction.*

**TRANSCRIPT OF EX TEMPORE JUDGMENT**

**Introduction**

1. A perfected transcript of this extempore Judgment will be provided to the parties.

**The Applications**

2. The matter firstly comes before me on the Plaintiff's ex parte application for leave to serve the Originating Summons on Henry E. Bodden Jr., the 2<sup>nd</sup> Defendant, out of the jurisdiction. The application is brought by a Summons filed on 28 June

2016 and is supported by an affidavit sworn by Kim Grandage on 28 June 2016.

The Originating Summons was served on 1<sup>st</sup> Defendant on 25 May 2016.

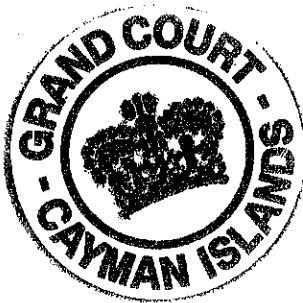


### **Background**

3. The Plaintiff issued his Originating Summons on 24 May 2016.
  
4. The Plaintiff's claim is that on 28 December 1994 he entered into an Agreement for Sale ("the First Agreement") with the 1<sup>st</sup> Defendant for an uncompleted strata lot within a commercial strata development. It is contended that the 1<sup>st</sup> Defendant acted at all times through the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant signed the First Agreement "*for H.E.B Enterprises*" and he sent the email communication that grounds the Plaintiff's claim. The land which the First Agreement, and the agreement referred to in paragraph 6 below ("the Second Agreement"), relate to are both held in the name of the 2<sup>nd</sup> Defendant.
  
5. Pursuant to the First Agreement the total price for the strata lot was CI\$120,000 with \$3,000 to be paid on the execution of the First Agreement and the balance over 20 years with interest at 12% per annum by monthly instalments of CI\$1,270.
  
6. The Plaintiff entered the Second Agreement in July 1997 for a second property within the same strata from the 1<sup>st</sup> Defendant, this time for the sum of CI\$150,000 with CI\$7,500 be paid on execution of the Second Agreement and the balance

over 20 years with interest at 12% per annum by monthly instalments of CI\$1,321.

7. Clause 6 of the First Agreement provided that the Defendant may rescind the First Agreement by written notice to the Plaintiff if the Plaintiff failed to complete the First Agreement at the specified times. It went on to say that the Defendant may then:



*"...forfeit and keep absolutely as liquidated damages the deposit hereof and all or any interest accrued thereon and may in addition keep absolutely out of any further sum paid by the (Plaintiff) such amount as is sufficient to compensate the (Defendant) for any work done to the Strata Lot by the (Defendant) at the request of the (Plaintiff) which involves a deviation from or amendment to that basic plan for the Strata Lots or any substitution requested by the (Plaintiff) in respect of the fixtures and fittings installed in the Strata Lot and no further right of action shall arise in respect thereof nor shall any party hereto have any further rights, demands, actions, claims for damages the one against the other and the (Defendant) maybe sell the Strata Lot and keep the full price absolutely."*

8. In April 2016 the Plaintiff was behind payment in relation to both properties and sent a cheque to the Defendants in the sum of CI\$1,321. On 28 April 2016 an email was sent by the 2<sup>nd</sup> Defendant highlighting that the Plaintiff was in breach of both Agreements and that he was returning the cheque and "they" would not be accepting any further payments in relation to either properties.

9. The Plaintiff's case is that the Defendants, by this email and conduct thereafter, have rescinded the two Agreements, as they are empowered to do under Clause 6. Accordingly, on 28 April 2016, the Plaintiff's attorney wrote to the Defendants stating that the Defendants had rescinded the Agreements and claiming sums due under the agreements totaling approximately CI\$594,067.80. It was contended in the letter that, although Clause 6 permitted the Defendants to rescind the First Agreement, it did not entitle them to keep all the principal sums paid by the Plaintiff under the Agreements. No reply to this letter has been received by the Plaintiff or his attorney from the Defendants.

10. By the Originating Summons the Plaintiff seeks a declaration that the 1<sup>st</sup> Defendant or his servant, agent or assignee, the 2<sup>nd</sup> Defendant has rescinded the two Agreements by way of his email of 18 April 2016. By these proceedings the Plaintiff also seeks an account of all sums due and owing pursuant to Clause 6 of the Agreements as a consequence of the recession and seeks interest on all sums found due and owing from the date of the said email. The Plaintiff seeks an order, following the taking of the account, for the payment by the Defendants of the sums found due.

11. Having regard to the duty to give full and frank disclosure at an ex parte hearing, I have asked Counsel whether he is aware of certain matters that the Defendant may have raised at this hearing if in attendance. Nothing was raised.



**Application - Service out of the Jurisdiction – The law and conclusions**

12. Having regard to GCR O.11, r.4(1) the Plaintiff has, as required, filed an affidavit in which Ms. Grandage discloses where the 2<sup>nd</sup> Defendant can be found. The 2<sup>nd</sup> Defendant's residential address in Owasso, Oklahoma, United States is set out at paragraph 17 of Ms. Grandage's affidavit sworn in support of the application.

13. The first question for me at this stage is whether the action is within Grand Court Rules ("GCR") O.11, r.1(1)(d)(i)(iii), (e) and (f). That rule provides that service of a writ out of the jurisdiction is permissible with leave of the Court if in the action begun by the writ:



*"(d) The claim is brought to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or obtain other relief in respect of the breach of a contract, being (in either case) a contract which –*

- (i) was made within the jurisdiction*
- (ii) ...*
- (iii) is by its terms, or by implication, governed by the law of the Islands; or*
- (iv) ...*

*(e) the claim is brought in respect of a breach committed within the jurisdiction of a contract made within or out of the jurisdiction, irrespective of the fact, if such be the case, that the breach was preceded or accompanied by a breach committed out of the jurisdiction that rendered impossible the performance of so much of the contract as ought to have been performed within the jurisdiction;*



*(f) the claim is founded on a tort, fraud or breach of duty whether statutory at law or in equity and the damage was sustained, or resulted from an act committed, within the jurisdiction;*

14. It is up to the Plaintiff to demonstrate that its cause of action falls within the rule, and to do that the standard which it must meet is that of a good arguable case that the matter is within the rule: *Seaconsar Far East Bank Ltd. v Bank Markazi Jomhuri Islami Iran* [1993] 4 All ER 456 (HL).

15. The assumption of jurisdiction over a foreign person is not something which the Court undertakes lightly. There is no presumption in favour of the applicant, and indeed the rule provides to the contrary:

*"No such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Order." (GCR O.4, r.3)*

16. This provision is in similar terms to the English RSC Ord.11, r.4(2) and it is directed:

*"...not to the existence of the cause of action but to the question whether the plaintiff has sufficiently established that the case falls within one of the heads of jurisdiction specified in r.1" (Seaconsar (supra) at p.462E).*

17. The proper approach is set out by Lord Goff in *Seaconsar* (supra), at p. 467 G-H:

*"....A judge faced with a question of leave to serve proceedings out of the jurisdiction under Ord. 11 will in practice have to consider*



*both (1) whether jurisdiction has been sufficiently established, on the criterion of good arguable case laid down in Korner's case, under one of the paragraphs of r.1(1), and (2) whether there is a serious issue to be tried, so as to enable him to exercise his discretion to grant leave, before he goes on to consider the exercise of that discretion, with particular reference to the issue of forum conveniens."*

18. The question whether the Plaintiff crosses the first hurdle is not, therefore, one of discretion. A discretion only arises once he has shown a good arguable case that the matter is within the rule.

19. I have carefully considered the content of the two Agreements, and in particular noted Clause 6 and the signatures therein. I have noted the content of the email sent by 2<sup>nd</sup> Defendant to the Plaintiff's Attorney on 28 April 2016 as well as the extracts from the Land Registry which show that the properties are, and were all relevant times were, registered in the 2<sup>nd</sup> Defendant's name.

15. The two Agreements were clearly made within the Cayman Islands, they were signed in Grand Cayman. Clause 18 in the Agreements specifies that they are to *"be governed and construed according to the Laws of the Cayman Islands."* The Agreements clearly relate to the sale of land situated within the Cayman Islands and the proceedings are brought to construe a term of the said Agreements. Accordingly, I find that the GCR O.11, r.1(1)(d)(ii)(iii) and (e) gateways have been met. For completeness sake, I am also satisfied that the dispute about these

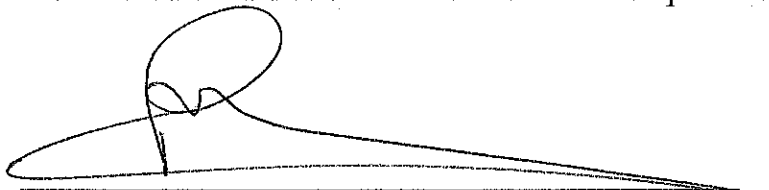
contracts entered into in the Cayman Islands and which contain express agreement that they would be governed by the Laws of the Cayman Islands means that the Cayman Islands is the convenient and appropriate forum to deal with the issues concerning the contract.

16. I am satisfied, having regard to the evidence mentioned in paragraph 16, that on the information before me, the 2<sup>nd</sup> Defendant is a suitable party.

17. Having reviewed the contents of the affidavit and exhibits and having carried out the more limited exercise required at this time, I am satisfied that the facts, if proved, provide a sufficient basis for the alleged cause of action and that there is a serious issue to be tried.

18. I order that the Plaintiff has leave to serve the Originating Summons and any further applications, pleadings or orders on the 2<sup>nd</sup> Defendant out of the jurisdiction. The service is to be served by way of personal service on the 2<sup>nd</sup> Defendant.

19. Costs should be the normal order for these proceedings, namely costs reserved.



**THE HON. MR. JUSTICE RICHARD WILLIAMS  
JUDGE OF THE GRAND COURT**

