

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: OF ²³¹ 2018

BETWEEN:



JOHN McDOW

AND:



DOLPHIN DISCOVERY (CAYMAN) LIMITED



PLAINTIFF

DEFENDANT

WRIT OF SUMMONS

TO: DOLPHIN DISCOVERY (CAYMAN) LTD of P.O. Box 10335, Caribbean Plaza, 878 West Bay Road, 2nd Floor, Grand Cayman, KY1-1003, Cayman Islands

THIS WRIT OF SUMMONS has been issued against you by the above named Plaintiff, of PO Box 755, West Bay, Grand Cayman KY1-1303 Cayman Islands in respect of the claims set out on the next page.

Within 14 days after service of this Writ on you counting the day of service, you must either satisfy the claim or return to the Courts Office, P.O. Box 495, George Town, Grand Cayman, KY1-1106, Cayman Islands the accompanying Acknowledgement of Service stating therein whether you intend to contest these proceedings.

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

Issued this 28th day of November 2018.

NOTE this Writ may not be served later than 4 calendar months beginning with the date of original issuance unless renewed by order of the Court

IMPORTANT

Directions for the Acknowledgement of service are given with the accompanying form.

STATEMENT OF CLAIM

Parties

1. The Plaintiff is a citizen of the United States of America. He lives and works in the Cayman Islands, and resides at 4 Bergman Lane, Newlands, Grand Cayman, with his family. His mailing address is P.O. Box 755 West Bay, KY1-1303.
2. The Plaintiff is employed at the Kirk Homes Centre as a Contractor Sales Manager, and has worked there for four years. In addition to a salary, he earns a monthly commission on his sales.
3. The Defendant is a company registered in the Cayman Islands, whose registered office is at P.O. Box 10335, Caribbean Plaza, 878 West Bay Road, 2nd Floor, Grand Cayman, KY1-1003, Cayman Islands.
4. At all material times the Defendant was the leaseholder and occupier of the property at Registration Section West Bay North West Block 1D, Parcel 657 (**The Premises**). The Defendant commercially operates a recreational dolphin experience resort on the Premises.

The Lease, Occupation and Control of the Premises

5. By lease agreement dated 11 January 2013, the Defendant leased the Premises from the owner, The Cayman Turtle Farm (1983) Limited. The term of the lease was five years.
6. The lease agreement contained, *inter alia*, the following covenants on the part of the Defendant, as the tenant

3.2 *Throughout the term to keep the Demised Premises and any building constructed thereon by the Tenant or any building already located on the Demised Premises*

and the appurtenances thereof, including floors, walls, ceilings, the outside doors, entrances and corridors, the glass windows and all the fixtures and fittings and painting or finishing therein well and sufficiently clean and in good and substantial repair and condition.

...

3.11 *To be fully responsible for all maintenance and / or repairs and / or replacements of all buildings, structures, equipment, appliances and fittings belonging to the Tenant in or upon the Demised Premises for so long as the Tenant shall remain a Tenant under the Lease or any option exercise thereunder but not thereafter.*

...

3.16 *To be responsible for and indemnify and hold harmless the Landlord against all damage, loss or injury on the Demised Premises or damage therein and thereto caused by any act, default or negligence of the Tenant, their servants agents, licencees or invitees and to pay and make good to the Landlord all and every loss or damage whatsoever incurred or sustained by the Landlord as a consequence of each and every breach or non-observance of the Tenant's covenants herein contained and to indemnify and hold harmless the Landlord against all actions, claims, liability, costs and expenses thereby arising.*

The lease also imposed upon the Defendant an obligation to obtain public liability and property insurance cover.

7. At all material times pursuant to the lease agreement, the Defendant enjoyed and exercised exclusive occupation and control over the Premises.

The Accident

8. At all material times, the Defendant wrongfully allowed an uncut piece of rusty rebar to jut dangerously out of an exterior wall of the resort adjoining a walkway on the sea side at the western elevation within the boundary of the Premises, and the same thereby constituted a nuisance.

9. At about 2pm on 25 March 2017, the Plaintiff was walking along the walkway with his friends. He stopped and bent down to observe fish in the rockpools. As the Plaintiff stood up, he leaned towards the wall with his hand for balance. Before the Plaintiff's hand could make contact with the wall, the uncut piece of rusty rebar jutting out of the wall broke through the right lens of The Plaintiff's sunglasses, and penetrated deeply into the area of his right eye.
10. The accident caused the Plaintiff to fall to the ground, whereupon he also suffered injuries to his face and bleeding to his nose and right ear.
11. The matters complained of were caused by the negligence of the Defendant, their servants or agents

Particulars

- 11.1 Causing or permitting the uncut piece of rusty rebar to jut dangerously out of the wall adjacent to the walkway;
 - 11.2 Failing to properly maintain the exterior wall of the resort to ensure that it was free of hazards and that the walkway was safe to use; and
 - 11.3 Failing to fence off the dangerous section of the wall, or to give any warning by notice or otherwise that there was a hazard on the wall adjacent to the walkway.
12. Following the accident, the Defendant, or others acting on its instructions, caused a sign to be erected on the wall leading to the walkway where the accident took place. The sign states: "Danger Keep Out".

Particulars of General Damages

13. By reason of the matters aforesaid, the Plaintiff, who was born on 28 February 1983, suffered pain and injury, loss and damage to include:
 - 13.1 Immediate excruciating pain;
 - 13.2 Fracture of the orbital floor to the right eye (blow out);
 - 13.3 Contusion of the right eyelid and periocular area; and
 - 13.4 Laceration of the skin of eyelid and periocular area;
 - 13.5 Diminished sensation to the right lower eyelid;
 - 13.6 Double vision (diplopia) when looking up or down or to the sides;
 - 13.7 Soft tissue injuries to the nose and right ear;
 - 13.8 Numbness to the face;
 - 13.9 Nerve damage to the face; and
 - 13.10 Visible scarring.

14. The Plaintiff was immediately driven by a friend to Chrissie Tomlinson Hospital where he was treated. The treatment included a complex repair of his eyelid sutured in layers and surgical reconstruction of the infraorbital plate.

15. Following the initial treatment, the Plaintiff continued to experience shooting pain in the area of the infraorbital nerve, and a dryness, irritation and burning to the right eye.

16. As a result of the incident, the Plaintiff continues to suffer a defect to the medial aspect of the orbital wall of his right eye. He also suffers from double vision (diplopia) on a lateral gaze and looking upwards and downwards. The Plaintiff has further suffered from severe occipital headaches and cerebrospinal fluid leakage from the right eye, in respect of which he has been in the care of a neurosurgeon.

17. The Plaintiff has been taking prescribed medication for his symptoms and has been in the care of an ophthalmologist and neurosurgeon. Full and further particulars may be provided by way of medico-legal reports to be obtained.
18. The Plaintiff is a passionate scuba diver which was a significant reason why he decided to relocate to the Cayman Islands from Canada. Before the accident the Plaintiff would partake in this activity on a weekly basis. Following the accident, the Plaintiff was advised by his ophthalmologist and neurosurgeon that he should not dive at all during his recovery. It has only been in June 2018 (15 months since the accident) that the Plaintiff has been advised by his neurosurgeon that he may tentatively recommence this activity, but that he should exercise caution. The Plaintiff also enjoys fishing, but for many months after the accident he has been unable to partake in this activity as much as he would have wished because of the headaches.
19. The Plaintiff's injuries and treatment are ongoing. Further particulars of the Plaintiff's injuries will be provided prior to trial.

Particulars of Special Damage

20. The Plaintiff will file and serve a full Schedule of Loss as and when all items of loss have been quantified.

The heads of special loss include,

- i) Loss of earnings. In respect of the Plaintiff's salary, his employer generously gave the Plaintiff paid leave for the month he was off work, however the Plaintiff earned considerably less commission payments than would otherwise have been the case but for the accident, his injuries, the time off and recovery. Lost commission is claimed in the sum of CI\$4,944.51.

- ii) The Plaintiff's ophthalmologist, neurosurgeon treatment and other medical expenses through the Health Services Authority and other medical facilities and providers, to include pharmaceutical supplies, which as at 10 September 2018 are in the sum of USD60,122.61 (CI\$50,502.99) and are continuing to accrue;
- iii) An overtime payment to the Plaintiff's employed helper, Ms Diany Rosales, for providing domestic and childcare services to the Plaintiff at weekends. This was approximately an extra 20 hours per week for three weeks, for which the Plaintiff paid Ms Rosales CI\$500;
- iv) Out of pocket expenses for medication to date (to be confirmed and continuing) and travel /accommodation expenses to attend medical appointments (to be confirmed); and
- v) The costs of a replacement pair of sunglasses in the sum of CI\$65.

21. The Plaintiff claims interest pursuant to section 34 of the Judicature Law (2007 Revision) on the amount found to be due to the Plaintiff at such rate and for such periods as the Court thinks fit.

AND THE PLAINTIFF CLAIMS

- (i) General and Special Damages;
- (ii) Pre-Judgment interest upon the general and special damages with effect from 25 March 2017 to the date of trial at the rate of $2\frac{3}{8}$ % per annum or at such other rate then prevailing and/or determined by the Court in

accordance with s.34 of the Judicature Law (2007 Revision) and the Judgment Debts (Rates of Interest) Rules 2012 as amended from time to time;

(iii) Post-Judgment interest upon the principal amount of the Judgment with effect from the date of service of Judgment at the rate of $2\frac{3}{8}$ % per annum and/or such other rate then prevailing and/or determined by the Court in accordance with s.34 of the Judicature Law (2007 Revision) and the Judgment Debts (Rates of Interest) Rules 2012, as amended from time to time;

(iv) Costs; and

(v) Such further or other relief as this Honourable Court deems just.

DATED at Grand Cayman this 28th day of November 2018



Nelson & Co.

Attorneys for the Plaintiff

TO: The Clerk of the Grand Court

AND TO: Dolphin Discovery (Cayman) Ltd.

THIS STATEMENT OF CLAIM is issued by Nelson & Co., Attorneys-at-Law, attorney for the Plaintiff, whose address for service is that of his said attorneys at 31 The Strand, P.O. Box 2075, Grand Cayman KY1-1105

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CAUSE NO: OF 2018

BETWEEN:

JOHN McDOW

PLAINTIFF

AND:

DOLPHIN DISCOVERY (CAYMAN) 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 is being acknowledged.

2. State whether the Defendant intend to contest 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 is acknowledged accordingly

Signed

Attorney for the Defendant

Address for service:

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 or principal office.

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

Nelson & Company Attorneys at Law PO Box 2075 31 The Strand 46 Canal Point Drive Grand Cayman KY1-1105 Attn: N Dixey / C Flanagan

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

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DIRECTIONS FOR ACKNOWLEDGMENT OF SERVICE
OF 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, P.O. 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 a Statement of Claim is indorsed on the Writ (i.e. the words "Statement of Claim" appear on 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 Statement of Claim is not indorsed on the Writ, the Defence need not be served until 14 days after a Statement of Claim has been served on the Defendant.

If the Defendant fails to serve his defence within the appropriate time, the Plaintiff may enter 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

Notes for Guidance

1. Each Defendant (if there are more than one) is required to complete an Acknowledgment of Service and return it to the Courts Office.
2. 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.
3. 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 name stated on the Writ of Summons*)".
4. 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.
5. 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.
6. 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.
7. Where the Defendant is a MINOR or a MENTAL PATIENT, the form must be completed by an Attorney acting for a guardian *ad litem*.
8. A Defendant acting in person may obtain help in completing the form at the Courts Office.