IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW

SUIT NO. C.L. 1993/L174

BETWEEN	LANE PETTIGREW KARP (A Firm)	PLAINTIFF
AND	CLIFTON YAP ARCHITECTS (A Firm)	DEFENDANT

IN CHAMBERS

Dr. R. B. Manderson-Jones for Plaintiff.

Messers Michael Hylton and P. Fisher for Defendant.

Heard: April 28 and June 27, 1994

Reserved Ruling in Summons for Summary Judgment and Summons for Security for Costs.

HARRISON (K.) J. (Ag.)

Summons for Summary Judgment (made pursuant to sections 79, 81 and 307 of the Civil Procedure Code) dated 24th February, 1994 for amounts of $4,438,724.40 and US$113,157.39 respectively, Undated Summons for Security for Costs filed 13th January, 1994, and Summons to Amend Amended Further and Better Particulars dated 24th March, 1994 were heard by me on the 28th April, 1994.

I had reserved my ruling in this matter but unfortunately I was unable to deliver it before now. I apologise for the delay and any inconvenience which might have arisen.

The plaintiff's claim for professional fees against the defendant is in respect of breaches of contract and infringement of copyright. The defendant entered an appearance and filed his Defence on December 16, 1993. On February 24, 1994 the plaintiff took out a summons for summary judgment supported by an affidavit in which he deponed inter alia, that the Defence filed is not a bona fide defence and that the defendant has no genuine defence to this action and does not intend to defend it. The defendant filed affidavits in reply.

At the hearing, Mr. Hylton raised a preliminary objection regarding the application for Summary Judgment pursuant to section 79 of the Civil Procedure Code. Section 79(1) provides inter alia:

> "Where the defendant appears to a writ of summons specially indorsed with or accompanied by a statement of claim under section 14 of this Law, the plaintiff may on affidavit made by himself or by any other person ... and stating that in his belief there is no defence to the action except as to the amount of damages claimed if any, apply to a judge for liberty to enter judgment ..."

Mr. Hylton submitted that the writ of summons in this matter was neither specially endorsed with or accompanied with a statement of claim when it was served. An appearance was entered on the 6th December, 1993 and the statement of claim was served on the 8th December, 1993.

Mr. Manderson-Jones responded by informing the Court that he would not proceed with the application under section 79 and neither would he proceed to seek judgment in respect of the claim for U.S.$113,157.39. He would however, focus his attention on an "admission" by the defendant for the amount of $1,392,278.79 being part of the plaintiff's claim in respect of professional fees. He then applied to amend his summons to have the figure of $1,392,278.79 substituted in lieu of $4,438,724.40 as originally stated. Mr. Hylton made no objection to this application and the amendment was granted.

Mr. Manderson-Jones thereafter, referred to sections 81 and 307 respectively, of the Civil Procedure Code in support of his summons. Section 81 provides inter alia:

Judgments to portion of claim not contested

81. "If it appear that the defence set up by the defendant applies only to a part of the plaintiff's claim, or that any part of his claim is admitted, the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to or as is admitted..."

Section 307 states as follows:

Judgment on admissions

307. "Any party may, at any stage of a cause or matter where admissions of facts have been made, either on the pleadings or otherwise, apply to the Court or a Judge for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the Court or a Judge may, upon such application, make such order or give judgment as the Court or a Judge may think just."

Mr. Manderson-Jones submitted that pursuant to section 81 (supra), paragraph 12 of the defence filed and elaborated by the amended further and better particulars of the defence made it clear that the defence did not apply to the amount of $1,392.278.79 which was admitted to be due from the defendant to the plaintiff. Para. 12 of the defence states:

"The defendant denies paragraph 13 of the Statement of Claim and says that it has always been ready and willing to recommend the plaintiff's fees for payment as and when the plaintiff's said fees had been substantiated and the defendant further says that it has on numerous occasions requested the plaintiff to substantiate its said fees and to date the plaintiff has refused and/or neglected to substantiate the same."

The relevant portion of the Further and Better particulars cited by Mr. Manderson-Jones read as follows:

REQUEST

"5. As regards to paragraph 12 of the Defence

a) Who is responsible for payment of the plaintiff's fees?

b) From whom are the Plaintiff's fees due?

c) To whom and on what basis does the defendant recommend the plaintiff's fees for payment.

d) Specify the numerous occasions on which the defendant allegedly requested the plaintiff to substantiate its fees and state whether the requests were oral or in writing (and if in writing specify the nature of the document).

e) Specify precisely the manner in which the plaintiff is to substantiate his fee.

f) State whether the requirement that the plaintiff substantiate his fee is a term of his contract of employment and, if so, state the document in which it is contained.

ANSWER

a) The defendant.

b) The client.

c) To the client based on the contract.

d) In writing by letter from the defendant to the plaintiff dated June 12, 1993 and by letter from the defendant's Attorney at Law to both the plaintiff's Attorney at Law dated July 26, 1993.

e) (i) The plaintiff is to supply the ckeck set of blue prints of its work which was submitted to the defendant but was subsequently removed by the plaintiff without the defendant's consent before the same could be checked and presented to the client for approval.

(ii) The plaintiff is to supply to the defendant invoices and receipts for all advances made to it.

(iii) There was no agreement for time charges and the plaintiff's statement includes significant amounts for time charges. As such, there is no basis for substantiating these time charges as the basis for charging the client for architectural fees was a percentage fee basis of which the plaintiff was to get 50% of the architectural fees.

(iv) The reimbursable expenses need to be substantiated and justified by way of a discussion with the client and the defendant.

f) There is no written contract, but it was an implied term of the plaintiff's contract with the defendant."

In relation to section 307 (supra), Mr. Manderson-Jones further submitted that:

a) the further and better particulars of defence,

b) Affidavit d/d 1/3/94 of Clinton Yap,

c) Supplemental Affidavit d/d 22/3/94 of Clifton Yap

d) Supplemental Affidavit d/d 22/3/94 of S. Shelton all admit that there is an outstanding amount of $1,392,278.79 due and payable from the defendant to the plaintiff.

In respect of the further and better particulars, I have already adverted to this submission above.

Paragraph 5 of the Affidavit of Clifton Yap d/d 1/3/94 states inter alia:"... to date the plaintiff has been paid the sum of $3,121,223.50 towards its fees and all that remains outstanding to the plaintiff is the sum of $1,317.497.90 which the defendant is ready willing and able to pay provided the plaintiff does the following in accordance with my numerous requests:-

a) Provides the defendant with invoices to cover the amounts which have been advanced to it to date,

b) Provides the defendant with an indemnity for the income tax which the defendant is required to withhold from the payments which were made to the plaintiff and pay over to the Commissioner of Income Tax;

c) Submit copies of the drawings to substantiate and justify the payment of the fee."

Paragraph 2 of the Supplemental Affidavit of Yap d/d 22/3/94 states that after research it was discovered that there was an outstanding balance of $1,392,278.79 outstanding to the plaintiff instead of $1,317,497.90 as previously deposed.

The suppelemental affidavit of S. Shelton dated 22/3/94 states inter alia:-

> "...I am informed by Mr. Clifton Yap, Principal of the defendant and verily believe that the total amount which has been paid to the plaintiff is $3,046,445.61 and that the balance which is outstanding is JA$1,392,278.79 which is payable on condition that certain documents are supplied to the defendant by the plaintiff."

Mr. Manderson-Jones finally submitted that based on the above-mentioned "admissions" by the defendant, the plaintiff is entitled to an order for immediate payment of that amount without waiting for determination of any

other question between the parties. Furthermore, he submitted that the defendant was not entitled to insist upon any conditions such as the provision of invoices to cover previous advances, indemnity for income tax and to submit drawings. For the sake of co-operation however, the plaintiff had submitted through its Attorney at Law, the drawings, and this has been referred to in the Affidavit of R. Manderson-Jones dated 12/4/94.

For the defendant, Mr. Hylton submitted that there are two bases on which this application ought not to succeed. They are:

i) The admission is qualified;

ii) Even if it were not so, the admission is not an admission that the defendant is liable and indeed it is clear from the pleadings that it is the defendant's case that it is not liable and will never be liable.

In dealing firstly with submission No. (ii), Mr. Hylton referred to the amended further and better particulars, statement of claim and defence. He submitted that it has been the defendant's case that the plaintiff had an independent contractual relationship with the client developer as did the defendant. Further, that it was denied that there was a joint venture relationship between the plaintiff and defendant. He further submitted that on the pleadings the defendant had not admitted any personal liability to the plaintiff and denied any contractual relationship with the plaintiff.

Now paragraph 12 of the Defence states inter alia:

> "The defendant denies paragraph 13 of the Statement of Claim and says that it has always been ready and willing to recommend the plaintiff's fees for payment as and when the plaintiff's said fees had been substantiated ..."

Mr. Hylton submitted that request No. 5(f) in the Amended Further and Better Particulars sought an answer as to whether the requirement that the plaintiff substantiate his fee is a term of his contract. He submitted that although the answer to 5(f) stated that there was no written contract, but it was an implied term of the plaintiff's contract with the defendant, the issue as to whether it was an implied term is one for the trial judge and ought to go to trial.

He referred to and relied upon the authorities of Technistudy Ltd. v. Kelland (1976) 3 All E.R. 632; Blundell v. Rimmer (1971) 1 All E.R. 1072; and Murphy v.

Culhane (1976) 3 All E.R. 593 in respect of these submissions.

He finally submitted that the defendant had not admitted owing this sum of money in any of the Affidavits referred to by the defence. Mr. Manderson-Jones argued otherwise,and submitted that this admission arises at paragraph 5 of Yap's affidavit of the 1st March, 1994 where it states that the defendant was ready willing and able to pay.

Both sections 81 and 307 respectively, provide for a party, at any stage of a cause or matter where admissions of fact have been made, either on the pleadings or otherwise, to apply for judgment upon such admissions. Such admissions may be express or implied, but the authorities require that they must be clear. See **Ellis v. Allen** (1914)1 Ch. 904, **Ash v. Hutchinson & Co. (Publishers)** (1936) Ch. 489, and **Technistudy v. Kelland** (1976) 1 W.L.R. 1042, (1976) 3 All E.R. 632.

Now, paragraph 10 of the Statement of Claim states:

> "Further, it was an essential term of the agreement express and implied that so long as the defendant was engaged as architect on the project it would retain the professional services of the plaintiff as consultant on the project and that neither the plaintiff, on the one hand, nor the defendant on the other would terminate their contracts or that of the other without the prior consent of the other, their relationship being that of an association in a professional joint venture."

The Defence at paragraph 9, denied the above paragraph and went on to state "... any professional could be terminated on the project by or on behalf of the client/developer without any other professional necessarily having to be terminated in that each professional has an independent contractual relationship with the client/developer." It was also denied in paragraph 12 of the Defence that the defendant had breached any agreement with the plaintiff. He contended nevertheless, that he was always ready and willing to recommend the plaintiff's fees for payment as and when those fees were substantiated. He further alleged that on numerous occasions he had requested the plaintiff to substantiate the fees but this was to no avail.

As I have already indicated. the admission which is being sought to be acted upon must be clear and unequivocal. It would seem to me and I so hold that the allegation that the defendant is ready willing and able to pay must be read subject to the proviso that the plaintiff substantiates his claim and the allegation that there is an independent contractual relationship between the plaintiff and client. In my view, this is not an admission regarding personal liability to pay. It is further my view that it is a qualified admission and does not fall within the ambit of sections 81 and 307 of the Civil Procedure Code for a judgment on admissions.

I also hold that on the state of the pleadings there are triable issues and they ought to be determined by trial. I would therefore dismiss the summons for summary judgemnt.

In so far as the Summons to amend the Amended Further and Better Particulars was concerned, Mr. Manderson-Jones offered no resistance and an order was made in terms.

I turn to the Summons for Security for Costs. In the case of **Gottlieb v. Geiger** Bucknill, J. held that the pendency of a Summons under order 14 does not in any way affect the right of a defendant to an order for security for costs against a foreign plaintiff. This decision was confirmed by the Court of Appeal on July 3, 1905 (un-reported).

The plaintiff's address as stated in the Writ of Summons is, 1321 Alton Road, Miami Beach, Florida, U.S.A. Section 663 of the Civil Procedure Code provides that:

> "The Court may, if in any case it deems fit, require a plaintiff who may be out of the Island, either at the commencement of any suit or at any time during the progress thereof, to give security for costs to the satisfaction of the Court, by deposit or otherwise; and may stay proceedings until such security be given."

On the basis of the authority of **Watersports Enterprises v. Errol Frank** S.C.C.A. 87/90 (un-reported) delivered on the 22nd March, 1991, a plaintiff who resides outside the jurisdiction, ought to be ordered to give security for costs. An order may be refused however, if special circumstances are highlighted by the

plaintiff to suggest that it would be unjust for the Court to make such an order. Paragraph 10 of the affidavit of Ronald Brandis Manderson-Jones deposes that there is a sum of $1,317,497.90 owing to the plaintiff and also that the defendant has no chance of succeeding in the action. Although a major matter for consideration is the likelihood of the plaintiff to succeed, the authorities seem to indicate that "parties should be discouraged from embarking upon a too detailed examination of the merits of the case unless it can be clearly demonstrated one way or another that there is a high degree of probability of success or failure" (per Rowe, P. in **Watersports Enterprises** - supra.) Security will not be required from a person who resides permanently out of the jurisidiction if he has substantial property, whether real or personal, within it. See **Redondo v. Chaytor** (1879) 4 Q.B.D. 457. A fortiori, security may not be required in the Jamaican context, where a plaintiff has real or personal property within the jursidiction, but who may be out of the jurisdiction at the commencement of the suit or during the progress thereof.

There is evidence disclosed in the Affidavit before me that the sum of $1,317,497.90, subject to being substantiated, is outstanding to the plaintiff for professional fees in respect of work done in Jamaica. The defendant has contended that the liability for income tax could likely exceed this sum. The plaintiff on the other hand is contending otherwise. I am of the view however, that security for costs ought to be ordered.

This summons is seeking an order in the sum of $250,000.00 in a form acceptable to the Registrar of the Supreme Court within a period of thirty (30) days. No skeleton bill has been prepared and submitted before this Court in order to justify this sum of money.

The order however, on the summons for directions provide for the trial lasting three (3) days. Based upon my calculations, after taking into account fees for taking instructions, court fees, interlocutory applications, attendances, correspondences, Counsel's fees and instructing Attorneys fees, a sum of $50,000.00 which would be roughly about two-thirds of the estimated party and party costs up to the trial of the action, would be reasonable in all the circumstances. It

is therefore ordered that the plaintiff do provide security for costs in a money sum of Fifty Thousand Dollars ($50,000.00) to be deposited in an income bearing account in the joint names of the attorneys for the plaintiff and the defendant within thirty (30) days hereof.

There shall be costs to the defendnat in these applications to be taxed if not agreed.