THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION
BRITISH VIRGIN ISLANDS

IN THE MATTER OF
CLAIM NO: BVIHCV 2009/0242

BETWEEN:

TIMOTHY PATRICK HORAN

Claimant

and

AHOLDINGS LIMITED

Defendant

Appearances: Mr Jack Husbands of Walkers for the Claimant/Applicant
Mr Kissock Laing of Harney Westwood & Riegels for the Defendant/Respondent

JUDGMENT

[2009: 25 November; 10 December]

(Summary judgment application by claimant – CPR Part 15.2 – agreement for services – whether consideration moving from claimant – whether conditional – whether parol evidence admissible to vary or add to written agreement - 'entire agreement' clause – whether sham – whether application to be dismissed only on condition of payment in)

[1] Bannister J [ag]: This is an application for summary judgment made by the Claimant ('Mr Horan') against the Defendant ('AHoldings'). Mr Horan specialises in the international distribution and acquisition of motion pictures. In March 2003 he took up employment with a Russian company called AMEDIA. His job description was Executive Vice President, International Relations and he says that his employment was subject to an unsigned contract of employment, a copy of which, in Russian and English, is in evidence. AHoldings, in an affidavit of Mr Akopov, its owner or controller ('Mr Akopov'), says (or at any rate implies) that the unsigned contract of employment never bound the parties. At around the same time as he took up employment with AMEDIA, Mr Horan was

appointed as General Director of an affiliated company called AMEDIA STUDIO. Mr Horan says that he was to receive 12% of the shares in each of these two companies as part of his remuneration. He points to clause 6.3 of the unsigned employment contract and to a document signed by Mr Akopov which appears to corroborate that such a promise was contained in the offer of employment made to Mr Horan. Sometime later Mr Akopov, the principal shareholder of AMEDIA, sold some of his stake and Mr Horan says that he was subsequently told by Mr Akopov that he would receive 6%, rather than the previously agreed 12% of AMEDIA shares. AHoldings denies that Mr Horan ever had any entitlement to any shares in either company.

[2] In December 2006 Mr Horan left AMEDIA. He had discussions with Mr Akopov in which, he says, he pointed out that he had foregone pay rises and two bonuses on account of his agreed entitlement to shares, which he had never received. Mr Horan says that after his employment had terminated, Mr Akopov offered him what he describes as a settlement figure of US$3 million, to be paid by an offshore company belonging to Mr Akopov. Mr Horan says he accepted this offer and that Mr Akopov told him that the money would be paid in three instalments: the first, of US$500,000; the second of US$1 million; and the third, at the discretion of Mr Akopov, of US$1.5 million. The understanding was therefore that Mr Akopov's company would pay Mr Horan US$1.5 million, with a further US$1.5 million if Mr Akopov felt like it. Mr Horan describes this arrangement as being by way of a thank you for the contribution which he had made to AMEDIA and the fact that he had foregone pay rises; and also in settlement of his claim to be given a shareholding, or shareholdings, as outlined above.

[3] Mr Horan says that in late February or early March of 2007, Mr Granov, a director of AHoldings, told him that 'they' (meaning, presumably, Mr Akopov and his associates) were ready to pay him the first instalment of US$500,000. He also told Mr Horan that Mr Akopov wished that there be a written contract and that Mr Granov wanted the contract to be in the form of a services agreement, or, as Mr Horan puts it, words to that effect. Mr Horan says that his wife, a lawyer, helped Mr Horan draw up such an agreement using a form of consultancy agreement which had previously been used by AMEDIA. The agreement was expressed to be made between AHoldings as the 'Company' and Mr Horan as the 'Consultant'. A copy of this agreement as signed by Mr Granov for AHoldings is in evidence. I need to set out the relevant parts of it.

[4] ‘AGREEMENT

THIS AGREEMENT is made as of 24th of March 2007, by and between AHoldings Ltd (the “Company”), a company registered in accordance with the laws of the British Virgin Islands, duly represented herein by Dmitry Granov, and Mr. Horan Timothy Patrick (the “Consultant”), acting on his own behalf, ensuring the following:

Background

Pursuant to provisions of this Agreement the company engages consultant in the international distribution and sales of the motion pictures (series). Consultant has expertise and experience in areas beneficial to the Company and desires to consult with the Company in his area of expertise. Based on Consultant’s experience, the Company desires to retain the services of Consultant and Consultant desires to render such services on the terms and conditions set forth below.

IN CONSIDERATION of the foregoing and of the mutual covenants set forth below, the parties, intending to be legally bound, agree as follows:

1. Retention as consultant. The Company hereby retains consultant, and Consultant hereby agrees to render services to the Company, upon the terms and conditions set forth herein.

2. Duties. The consultant covenants and agrees that, as an independent contractor, he will perform all services requested of him by the Company, i.e.:

– making and maintaining contracts with customers (programmed buyers).
- generating and following up interest in product from customers.

3. Independent Contractor Status. The parties recognize that the consultant is an independent contractor and not an employee, agent, or representative of the Company and that the Company will not incur any liability as the result of the Consultant’s actions. The Consultant shall at all times disclose that it is an independent contractor of the Company and shall not represent to any third party that he is an employee, agent, or representative of the Company other than as expressly authorized by the Company.

4. Compensation. The Company shall pay to the Consultant, as compensation for the services to be rendered under this Agreement during the Term (as defined below), initially a fee of US$500,000 (Five

Hundred Thousand US Dollars) payable not later than 10 business days following receipt by the Company of this Agreement signed by the Consultant and the remaining part of $2.5 million (Two Million Five Hundred Thousand US Dollars) payable as follows: (i) $1 million (One Million US Dollars) to be paid on or before 31 December 2008, and (ii) the remaining amount not to exceed $1.5 million (One Million Five Hundred Thousand US Dollars) payable at the discretion of the Company upon the performance by the Consultant.

5. Term. The Term of the Consultant's services to be rendered shall commence on the first date written above and shall continue within 2 years (the "Term").

6. Covenant of Nondisclosure. The Consultant shall not, at any time during the term of this Agreement and within 1 year after, in any manner, either directly or indirectly, divulge, disclose, or communicate to any person, firm, corporation or other entity, our use for his own benefit or for the benefit of any other person, firm, corporation or other entity, and not for the benefit of the Company, and confidential information acquired from the Company or its affiliates, without the express prior written consent of an authorized executive officer of the Company.

……

9.2 Amendments. This Agreement replaces and supersedes all prior agreements, and any other agreements relating to the subject matter hereof, between the parties to this Agreement. No alteration, modification, amendment or other change of this Agreement shall be binding on the parties unless in writing, approved and executed by the Consultant and an authorized executive officer of the Company whether by operation of law or otherwise.

9.3 Governing Law. This Agreement shall be governed by and interpreted, construed and enforced in accordance with the laws of the United Kingdom.

……

IN WITNESS WHEREOF, the parties have executed this Agreement in two copies, one for each party, both copies having equal legal force, effective the date first written above. Delivery of an executed signature page of this Agreement by facsimile transmission or scanned signature copy sent by email shall be as effective as delivery of a manually executed copy.'

[5] Mr Horan was paid the initial US$500,000 at the end of March 2007, but has not received the US$1 million payable at the end of December 2008. Mr Horan sent an e-mail to Mr Akopov enquiring about this payment on 22 January 2009 and English Solicitors wrote on his behalf on 24 February

2009 and 19 March 2009. After some stalling e-mails and further prompts a firm of English Solicitors called Gates and Partners came onto the scene, but produced no response of substance until 1 May 2009. The material parts of the letter which they then sent are as follows:

> 'Dear Sirs
>
> Re Mr Tim Horan and AHoldings Limited
>
> We refer to our recent email correspondence in relation to the above matter.
> Our client has confirmed its instructions that Mr Horan has failed to perform the duties and services required of him under the Consultancy Agreement ("Agreement") dated 24 march 2007, namely that he:
>
> 1. Failed to make or maintain contracts with customers.
> 2. Failed to generate or follow up interest in products from customers.
> 3. Failed to provide and reports, financials, accounts and/or statements as would reasonably be expected under a consultancy arrangement of this nature.
>
> As a consequence, your client is in breach of his contractual obligations under the Agreement. Our client considers itself discharged from any further liability under the Agreement with regards to payment or otherwise. If your client intends to issue proceedings, our client reserves their right to counterclaim in respect of the initial payment already made to your client under the Agreement and any other damages they see fit.
>
> Your client has failed to provide any evidence to support the contention that the services/duties have been performed, which surely he must expect to have to do in order to seek payment of the substantial sum claimed? If appropriate evidence is provided, our client will consider it.
>
> Should your client wish to issue proceedings against AHoldings. Please note that we are not authorized to accept service on their behalf.'

[6] On 15 June 2009 Mr Horan's English Solicitors responded setting out a list of services supposedly provided by Mr Horan pursuant to the agreement. They are substantially repeated in Mr Horan's affidavit in support of this application. Since none of them is alleged to have been performed at the request of AHoldings, they seem to me to have no bearing on the issues which I have to decide

and I do not propose to set them out here. On 6 July 2009 Mr Horan issued these proceedings. Mr Horan's application for summary judgment was issued on 26 October 2009.

[7] As I have already said, Mr Akopov denies that any agreement was ever reached with Mr Horan about an entitlement to shares and relies upon the fact that the written contract of employment upon which Mr Horan relies was never executed. He accepts that he felt a personal obligation, at his own discretion, to reward Mr Horan after he had left AMEDIA, but subject only to the availability of funds to do so. He says that he was willing to accommodate Mr Horan because he was concerned for the good name of AMEDIA and wished to avoid the risk of Mr Horan spreading (unspecified) rumours and jeopardizing any possible sale of that company.

[8] Mr Akopov accepts that the consultancy agreement was entered into by AHoldings, but he says that it was 'as reminder' and that it had been agreed to have what he calls a simple one page 'consultancy' contract, which Mr Akopov says he felt was flexible enough. He says that Mr Horan understood that payments were tied to sales by Mr Akopov of his shares in AMEDIA. He says that the US$500,000 payment made in March 2007 was made possible from the sale by Mr Akopov of 10% of his holding, but that a hoped for disposal of the remainder has never happened. Mr Akopov says that this means that AHoldings never came under an obligation to make the second instalment of US$1.5 million and that so far from that Mr Horan is obliged to repay the US$500,000 paid to him in March 2007. So far as Mr Horan's 'services' are concerned, Mr Akopov says that Mr Horan knew perfectly well that that was a mere device (he does not use that word, but that I take to be the sense of what he says) and in any event AHoldings never asked Mr Horan to provide any services, which he dismisses as valueless.

The parties' contentions

[9] Mr Husbands, for Mr Horan, says that the agreement was clearly intended to be of legal effect and that Mr Horan's promise to provide the type of consultancy services mentioned in the agreement on request was good consideration for AHoldings promise to pay. He says that the Court is not required to assess the value of the promise, provided that it is satisfied that it is capable of estimation in terms of economic or monetary value. He says that it does not matter if no services were actually provided, although, as I have earlier indicated, he says that it is part of Mr Horan's case that substantial services were in fact provided, and he refers in that context to the evidence

which I have alluded to in paragraph 6 above. Alternatively, Mr Husbands submits that other consideration was provided under the agreement by Mr Horan – the agreement not to disclose confidential information contained in clause 6, for example.

[10] As for the suggestion that payments were conditional upon sales off of Mr Akopov's shares in AMEDIA, Mr Husbands relies upon the first part of clause 9.2 of the agreement. He says that that is an 'entire agreement' clause and that its effect is to preclude either party from adducing evidence to add to or vary the written terms. Alternatively, he says that such a clause is so critical to the nature of AHoldings' obligation under the contract that it is inconceivable that it would not have been reduced to writing if it was part of what had been agreed between the parties.

[11] Mr Laing, for AHoldings, says first that the agreement is too vague. Next, he says that the agreement does not represent what the parties actually agreed. He says that the real agreement is to be found spelt out in paragraphs 11 and 12 of Mr Horan's first affidavit (the substance of which I have set out in paragraph [2] of this judgment) and that that did not amount to a contract, since it was no more than an agreement by Mr Akopov to give Mr Horan an ex gratia payment in recognition of his past services. In those circumstances, he says that the written contract is mere window dressing or, as he finally put it, a sham and as such unenforceable.

[12] Mr Laing says, next, that if there was any obligation to make the first two payments listed in the agreement, it was conditional upon Mr Akopov realizing the funds to enable the payments to be made from sales off of his holding of AMEDIA shares. He relies upon the terms of an e-mail sent by Mr Horan to Mr Akopov on 22 January 2009. I had better set it out:

> 'Dear Alexander,
>
> I hope that you are doing well and that 2009 will be a successful and adventurous year for you and your extended family. I am settling into life here in Paris and the DTT platform project offering PVR, VOD, Time Shift and Catch-Up is challenging, similar in some ways to Len Blavatnik's investment in Top Up TV in the UK. We will be meeting the Majors at Natpe next week.
>
> I heard that you had sold some further shares in AMEDIA and was wondering if you had any news on the second tranche of my settlement with AHoldings signed in March 2007, which was due at the end of last year. My new mobile number here in Paris is +33 6 17 87 72 48.

Looking forward to hearing from you.

Best regards
Tim'

[13] Mr Laing says that the consideration for the agreement is illusory. In the alternative he says that any consideration is past consideration. He says that the true consideration was Mr Horan's performance as an employee. Finally, Mr Laing says that if the agreement was binding at all, Mr Horan was in repudiatory breach by failing to provide any services thereunder.

Analysis and conclusion

[14] In my judgment and on the assumption that the agreement is not a sham, arguments on the sufficiency of the consideration given by Mr Horan cannot succeed. The promise to provide specified services on request cannot be described as illusory and, no doubt, if push came to shove an expert on the industry could place some value on AHoldings retention of Mr Horan's services (even if non-exclusive) in this way. The promise not to divulge confidential information is, I think (given that the agreement is subject to 'UK law' – which must, in context, mean English law) illusory, since Mr Horan would have been under such an obligation in any event. Such (if any) other promises as are contained on Mr Horan's part in the agreement are, I think, merely subsidiary to the obligation to provide the specified services on request and add nothing to it.

[15] Although strictly speaking a question of fact, the argument that the agreement was conditional upon the realization by Mr Akopov of funds sufficient to pay the amounts due under the agreement is, in my judgment, devoid of any real prospect of success. First, because of the provisions of clause 9.2 of the agreement, which I have already set out. Clause 9.2 provides that the agreement replaces and supersedes all prior agreements *and any other agreement*, relating to its subject matter, between the parties (emphasis added). This wording is not identical to that in Inntrepreneur Pub Co Ltd v East Crown Ltd[1], which concerned a 'pure' entire agreement clause which was held to preclude reliance upon an alleged collateral warranty. It seems to me, however, that the wording of the first sentence of clause 9.2 of the present agreement does two things: first, it provides that all prior agreements between the parties are superseded; secondly, it provides that all *other* agreements relating to the subject matter between the parties are superseded. In my

[1] [2000] 2 Lloyd's Rep 611

judgment, if there ever was an understanding between the parties, reached prior to the execution of the agreement itself, that payments due under it were to be made only when funds became available to Mr Akopov from the sale of AMEDIA shares, that would be covered by the 'other agreement' limb of clause 9.2, which is clearly intended to sweep up any agreement which would have otherwise affected the obligations of the parties under the agreement itself. That covers any alleged condition.

[16] Even if I am wrong about that, it seems to me that the very fact that the agreement itself does not embody such a crucial condition, taken together with the fact that no such condition was even hinted at in Gates and Partners' letter of 1 May 2009, written just over three months after the initial letter from Mr Horan's solicitors enquiring about the payment due on 31 December 2008, means that AHoldings has no real prospect of establishing at trial that payment was conditional on funding. Mr Horan's e-mail of 22 January 2009 takes the matter no-where, since it says in terms that the payment was due at the end of 2008, without any qualification. The reference to disposals of shares in AMEDIA by Mr Akopov may have been intended as a gentle hint, but the e-mail gives no support to a contention that the payment due at the end of 2008 was in any sense conditional. Although, as I have said, this is strictly speaking a question of fact, it seems to me that AHoldings has no prospect *at all* of establishing conditionality at trial in the light of (a) the absence of any reference to it in the agreement and (b) the absence of any reference to it in Gates and Partners' letter of 1 May 2009, said to have been written after instructions had been taken.

[17] The argument that, if binding, the agreement was broken by Mr Horan for failure to provide services is clearly hopeless. Mr Horan was to provide services only on request. AHoldings leads no evidence of non-compliance by Mr Horan with any relevant request.

[18] That leaves the argument that the agreement is a sham, which is linked to the argument that any consideration for AHoldings' promise was past. AHoldings does not deny entering into the written agreement or that the written agreement was executed at its request. The agreement itself is expressed to be intended to create legal relations. Even if AHoldings in executing the agreement intended that it should be nothing more than a device to give illusory contractual force to what was in fact a gift, it will be bound unless it can prove that Mr Horan had the same intention when he signed it: see per Diplock and Russell LJJ in Snook v London and West Riding Investments

Ltd[2]. That, of course, is a question of fact. On this point, however, in distinction to the conditionality point, it does not seem to me possible to say that AHoldings has no real prospect of succeeding. Given the history of the matter as set out in Mr Horan's own evidence it does not seem to me to be fanciful that Mr Horan should have had such an intention: after all, the agreement, on his account, was not executed until some three weeks or so after Mr Granov had told Mr Horan that 'they' were 'ready' to pay over the first US$500,000, something which even on Mr Horan's account had been originally intended by way of gift.

[19] I bear in mind that at trial the Court is unlikely to be predisposed actively to help AHoldings to escape what, on its face, is a binding obligation. Questions may also arise whether the purpose for which AHoldings desired to have in its possession what (on this hypothesis) was a bogus contractual document means that it cannot lie in its mouth to contradict its plain effect. But those matters have nothing to do with the question whether AHoldings has a real prospect of successfully defending the claim. The first is irrelevant to the exercise of the discretion and the second is for the trial.

[20] Since reserving my decision, I have received written submissions from those representing Mr Horan on the question whether, if I am minded to dismiss the application, I should do so only on condition that AHoldings makes a payment into court. Mr Husbands has referred me to an English decision on the proper procedural approach to be adopted when a judge is contemplating such a course (Anglo-Eastern Trust Ltd and Anor v Kermanshahchi[3], where the Court of Appeal said that the judge should give the prospective paying party an opportunity to address the question of its ability to make the payment in). In the event, I do not have to consider the authority, because I have come to the conclusion that I should not make it a condition of my dismissing this application that AHoldings should make a payment into court. Unappealing as AHoldings' surviving defence is, it seems to me that such a condition should be imposed (if at all, and I am not making any decision on the point) only in cases where a defence, although 'real', is regarded as shadowy or improbable – although it may be asked whether a shadowy or improbable defence could ever rationally be said to have a real prospect of success. In the present case, I cannot decide that AHoldings' chances of establishing the question of fact upon which it wishes to rely are more or

[2] [1967] 2 QB 786
[3] [2002] EWCA Civ 198

less improbable or that, if it establishes it, it may not defeat the claim. However ungentlemanly AHoldings' stance may appear, it is entitled to attempt to establish facts that may (I say no more) give it a complete defence to this claim and in those circumstances I do not think that its resulting right to a trial should be made subject to any condition.

[21] This application is accordingly dismissed.

Commercial Court Judge

10 December 2009