ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.6 OF 2006

BETWEEN:

MICHAEL JAMES

Intended Appellant/Applicant

and

[1] TASMAN GAMING INC.
[2] BETCORP LIMITED

Respondents

Before:

The Hon. Mr. Hugh A. Rawlins — Justice of Appeal

Appearances: (On Written Submissions by)

Mr. Sydney P. Christian, QC, for the Appellant, with him Mr. Jason Martin for the Intended Appellant/Applicant
Mr. Clement E.M. Bird for the Respondents

2007: February 8.

JUDGMENT

[1] RAWLINS, J.A.: Tasman and Betcorp, the respondents in these appeal proceedings, filed a claim in the High Court which initiated proceedings against Mr. James, the intended appellant/applicant, and 6 other defendants. The gravamen of the claim is that Mr. James and another defendant colluded with the other 5 defendants to facilitate the alteration of their (Tasman and Betcorp's) information systems network, thereby causing them (Tasman and Betcorp) to transfer monies to the accounts of the 5 other defendants. According to the claim, the 7 defendants then received the monies and converted them to their own use, thereby causing Tasman and Betcorp to suffer loss.

[2] At the time when the claim form was filed Mr. James was residing outside of the jurisdiction of the Court. On 1st December 2005, Master Mathurin granted leave to Tasman and Betcorp to serve the claim form on Mr. James by publishing it in a daily newspaper in Antigua.[1] On 11th April 2006, the Master set aside her December 2005 order. However, she refused to set aside the service of the claim form which was served pursuant to the December 2005 order. She stated that the setting aside the order did not automatically invalidate any steps that were taken on the order before it was set aside. She said, in the second place, that the order succeeded in bringing the claim to the attention of Mr. James who subsequently acknowledged service and instructed counsel to challenge the validity of that service.

[3] The December 2005 order had directed Mr. James to file an acknowledgement of service of the claim form within 14 days and a defence within 28 days of 11th April 2006. He filed an acknowledgement of service on 17th January 2006 for the purpose of challenging service. In the acknowledgement, while he gave the name and address of the solicitors who entered the acknowledgement of service as the address for service, he stated that his own address was "out of the jurisdiction".

The applications

[4] On 26th April 2006, Mr. James applied for leave to appeal against the Master's order of 11th April 2006 and for a stay of that order. He did not file a defence and Tasman and Betcorp entered judgment in default of defence against him.[2] In his application, Mr. James agrees that the learned Master correctly set aside her order of December 2005 order. He contends, however, that she erred when she refused to set aside the actual service of the claim form.

[1] The claim form was advertised in The Daily Observer in Antigua on 20th December 2005.
[2] Mr. James has applied in the High Court to set aside the judgment in default. The application is pending.

[5] Tasman and Betcorp have also applied to this court, pursuant to rule 62.17, for an order that Mr. James be directed to give security for their costs in these appeal proceedings. In that application, they also prayed for a stay of the application for leave to appeal until Mr. James gives security for their costs. They further prayed that the application for leave to appeal should automatically stand dismissed if security is not entered within 14 days of the issue of the order for security for their costs.

[6] In their affidavit in support of this application, the applicants stated that the security is necessary because Mr. James is now out of the jurisdiction but has refused to inform their solicitors or the court of his whereabouts. They further deposed that Mr. James has had the opportunity to remove his assets from the jurisdiction, and, in the result, they would not be able to enforce any costs order which this court may make against him. They estimated the value of the claim, with interest and cost thereon to be $1,837,655. 93. Thereupon, they estimated the costs in the appeal proceedings to be about $47,000.00 and pray that this Court would order Mr. James to enter security for their costs in the sum of $20,000.00.

[7] Solicitors for Mr. James filed an affidavit in opposition to the application for security for costs. They state that even if the court were minded to make an order for security for costs at all, it should be for no more than $5,000.00.

Mr. James' application for leave to appeal

[8] I shall first state the applicable principles, briefly, and consider the submissions and circumstances of these applications in light of the principles.

The applicable principles

[9] It is trite principle, often repeated in this court, that leave to appeal will be granted if this court is of the view that the appeal has a realistic prospect of succeeding or

if there are other compelling reasons why the appeal should be heard. That, of course, is so providing that the delay has not been inordinate and there are good reasons for it.

[10] The order which is the subject of the application for leave to appeal was made on 11th April 2006 and the application was filed within 14 days on 26th April 2006. Delay is not an issue because this was quite timely. The critical issue then, on the basis of the affidavits and written submissions, is whether the appeal has a realistic prospect of succeeding or if there are other compelling reasons, a very important issue of law, for example, why the full court should entertain it.

This case

[11] The Master's reasons for refusing to set aside the service of the claim were stated as follows:

> "[6] Having set aside the ex parte order permitting the service, it is also necessary to consider the actual service affected pursuant to that order because when an order is set aside, it does not automatically result in the invalidation of steps that have been taken pursuant to such an order, see Ex Parte Jeyeantham [2000] 1 WLR 354. Part 26.9(3) is part of the court's general case management power to rectify matters where there has been a procedural error. This rule can be applied with or without an application by a party and it confers power on the court to put matters right. Part 26.9(2) states that an error of procedure does not invalidate any step taken in the proceedings unless the court so orders. This is clearly an indication of how the court may exercise its discretion. [7] There is no doubt in my mind that the method of service used managed to bring to the attention of Mr. James the proceedings at hand, the acknowledgement of service dated 17th January 2006, a mere 28 days after the publication in the Daily Observer on the 20th December 2005.There is no indication that the manner in which the proceedings were served caused any prejudice to Mr. James. In accordance therefore with Part 2[6].9 I decline to set aside the service that has been effected in compliance with the ex parte order that has been set aside and give leave to Mr. James to file a defence herein within 28 days."

The Master relied on Trans-World Metals SA (Bahamas) et al v Bluzwed Metals Limited (BVI) et al[3] to support her reasoning and decision.

[12] Rule 26.9 of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000[4] is under the rubric "General power of court to rectify matters where there has been a procedural error". It states as follows:

> "26.9(1) This rule applies only where the consequences of failure to comply with a rule, practice direction, court order or direction has not been specified by any rule, practice direction or court order.
>
> (2) An error of procedure or failure to comply with a rule, practice direction, court order or direction does not invalidate any step taken in the proceedings, unless the court so orders.
>
> (3) If there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put the matters right.
>
> (4) The court may make such an order on or without an application by a party.

Submissions

[13] Learned Counsel for Mr. James insisted that the appeal has a very good chance of success because in exercising her discretion to refuse to set aside service, the Master made a mistake of law; disregarded principle; misapprehended the facts, took into account irrelevant material and ignored relevant material. The gravamen of their contention is that service by advertisement in the local newspaper amounted to service by an alternative method, which was substituted service under Order 50(4) of the Rules of the Supreme Court 1970.[5] Such service, they said, is only available where the party to be served resides within the jurisdiction and is not merely evading service. According to counsel, Mr. James resided outside of the jurisdiction for some 5 months before the claim was issued and had not left the jurisdiction to avoid service. By their own admission Tasman was aware of this and they did not allege and state any facts in the affidavit in support of the application for substituted service in the local newspaper that he was

[3] Claim No. BVIHCV 2003/0179 [Barrow J (Ag.), as he then was, 22nd March 2005.].
[4] Hereinafter referred to as "CPR 2000".
[5] Which were repealed and replaced by CPR 2000.

evading service. Counsel noted that the notice of the claim as published pursuant to the Master's order of 1st December 2005 was addressed to Mr. James at Barnes Hill Main Road, St. John's, Antigua.

[14] Learned counsel for Mr. James submitted, further, that rule 26.9 is intended to apply where there is mere irregularity, whereas the Master's order of December 2005 was a serious irregularity which cannot be waived by the court. This, according to counsel, is because there are fundamental considerations where service of a claim is to be effected on a party who is not within the jurisdiction of the court in which the claim is brought which make mere notice of the claim in a local newspaper fundamentally insufficient and inappropriate and insufficient that it cannot be validated even if the proceedings are brought to the attention of a defendant.

Should leave be granted?

[15] Service of court process is the means by which a court commands a defendant to answer to a claim. Such service outside of the territorial jurisdiction of a court is an act of sovereignty. A court has no inherent right to serve its process in the exercise of extra-territorial jurisdiction. Because of this, special considerations apply[6] and Part 7 of CPR 2000 is cognizant of this. Thus rule 7.3 of CPR 2000 states that a claim form may be served out of the jurisdiction only if rule 7.3 allows and the court gives permission. Rule 7.3(1) permits a claim to be served out of the jurisdiction only if the claim falls under a subject that is listed in Part 7. Rules 7.3 and 7.4 set out the types of proceedings for which the court may permit a claim form to be issued against a defendant who is outside of the jurisdiction. Rules 7.5 and 7.8 of CPR 2000 set out the form in which an application for service should take. Rule 7.6 states that a claim form which is to be served out of the jurisdiction must be amended to state the period within which service is to acknowledge and a defence must be filed.

[6] See Dicey and Morris on the Conflict of Laws, 13th Edition 2000, Vol. 1, at paragraph 8-035 and following.

[16] In Trans-World Metals, the claimants were granted leave, on an application without notice, to serve a claim form on 3 defendants out of the jurisdiction by post. The defendants applied to set aside the service on the ground that CPR 2000 did not permit service out of the jurisdiction by an alternative method or by substituted service. They also sought a declaration that the service was of no effect. Having considered Parts 5 and 7 of CPR 2000,[7] the learned judge agreed that our rules do not permit service out of the jurisdiction by an alternative method.[8] He therefore set aside the *ex parte* order under which service was effected.[9] However, he did not set aside the actual service under the order.

[17] In seeking to move the court to set aside the actual service of the claim in Trans-World Metals, counsel for the defendants had contended that the claimant did not deserve to have that service validated because the claimants had led the court into the error by relying on a rule that was not applicable for the service which they required. The claimants had contended, on the other hand, that service should have been validated because it succeeded in bringing the claim to the attention of the defendants. They relied on rule 26.9(3) of CPR 2000.[10]

[18] The learned judge noted that rule 26.9 is comparable to rule 3.10 of the English CPR 1998. He stated that, under these rules, a procedural error or non-compliance or any step taken on an order obtained in error are only nullified when the court makes an invalidating order and rule 26.9(3) empowers the court to make a validating order.[11] The judge considered a number of post CPR 1998 authorities on ambit of rule 3.10 of the English CPR. He opined that Anderson v Clwyd County Council No. 2[12] provided authority that supported the proposition that a claimant who served process under a defective order should receive the

[7] Which deals with service within the jurisdiction and service out of the jurisdiction, respectively
[8] See paragraph 78 of the judgment.
[9] See paragraph 34 of the judgment..
[10] Reproduced in paragraph 13 of this judgment.
[11] See paragraph 39 of the judgment.
[12] [2002] 1WLR 3174.

benefit of an order validating service under rule 3.10 if re-service of the process will be a mere formality and the defendant would suffer no prejudice.[13] The judge also noted the approach which Lawrence Collins J took in Bas Capital Funding Corporation v Medefinco Ltd.[14]

[19] In Bas Capital Funding Corporation, although Lawrence Collins J found that no valid service of English proceedings was effected in Malta, either under English of Maltese law,[15] and accepted that the defendant was fully entitled to insist on proper service. This, he said, was particularly because it was an international case in which service is necessary as the basis of jurisdiction. He however recommended counsel for the claimant to have mature reflection rather than to insist on the pure technicality of proper service.[16]

[20] In Trans-World Metals, Barrow J also reflected on note 3.10.3 in the English White Book 2000,[17] and noted that it states that rule 3.10 gives the court "… the widest possible discretion and the court can look at all the circumstances …" in determining whether to validate service, for example, that was effected under a defective order.[18] He concluded that it is not apparent from the cases which he had reviewed or from this commentary that there is a general proposition that service under a defective order will usually be fatal because it is within the discretion of the court to determine. He was confirmed in this view by reference to R. v Immigration Appeals Tribunal, ex parte Jeyeantham.[19] He also cited this case as authority for the principle that the setting aside of an order does not automatically result in the invalidation of steps that were taken pursuant to the order.[20]

---

[13] See paragraph 46 and 47 of the judgment.
[14] (2004) Lloyd's Rep. 652.
[15] See paragraph 48 of the judgment.
[16] At paragraph 216 of the judgment.
[17] Which is written as a commentary on rule 3.10 of English CPR 1998, which is in turn similar to rule 26.9 of CPR 2000.
[18] See paragraph 54 of the judgment.
[19] [1999] 3 All E.R. 231.
[20] See paragraph 73 of the judgment.

[21] In Trans-World Metals, the judge declined to set aside the actual service of the claim form, thereby, in effect, validating the service effected under the defective order that gave leave to serve. He found that actual service was not fatal in the circumstances in that case because, in the first place, the claimants effected service by a method that was specified in a court order. They had acted in compliance with that order. They thought that the order was a proper one. The judge who granted the *ex parte* order thought, on a *prima facie* view, that the claimant's application was correct and this was a reasonable view of the law.[21]

[22] Now, in Trans-World Metals the *ex parte* order by which service was effected was made on an application for service by an alternative method out of the jurisdiction. In the present case, however, the order by which service was effected was made in an application to serve Mr. James who resides outside of the jurisdiction by an alternative method of service within the jurisdiction. The learned Master quite rightly found that the order was defective and set it aside. The critical question that arises in the present case, however, is whether the principles as to the validation is also applicable in the present case given the purpose and significance of the rules and principles as to service out of the jurisdiction. Are these rules and principles so fundamental that service on an order for alternative service within the jurisdiction cannot be validated when it is used as a means to serve a person who resides outside of the jurisdiction?

[23] I have seen no case which has definitively determined this question. I think it is a question of sufficient importance to be determined by the full Court of Appeal in the light of the particular provisions that an applicant for service out of the jurisdiction is required to satisfy under Part 7 of CPR 2000. In the premises, therefore, I shall grant leave to the applicant to appeal against the refusal of the Master to set aside the service of the claim form on Mr. James in her order of 11th April 2006.

[21] See paragraph 50 of the judgment.

Tasman and Betcorp's application to stay the order

[24] As far as a stay is concerned, it is also trite principle that the court will grant a stay where it is just and convenient to do so, in order to prevent prejudice to the parties and an abuse of the process of the court. Significantly, the court is likely to grant a stay pending an appeal if the appeal would otherwise be rendered nugatory or the appellant would suffer loss which could not be compensated in damages. The jurisdiction is discretionary.[22]

[25] Mr. James did not file his defence within the time that the Master directed because he was appealing the order. In the meantime, however, Tasman and Betcorp obtained judgment in default which Mr. James has applied in the High Court to set aside. It would be a waste of the court's resources and inimical to the overriding objectives of the rules to permit any further proceedings because if Mr. James prevails on his appeal any further proceedings against him on the judgment in default proceedings would be rendered nugatory. I shall therefore stay any further proceedings against Mr. James pending the determination of the appeal.

Security for costs

[26] The Civil Procedure Rules are intended to facilitate service to permit claimants to have their claims adjudicated before the court. While Mr. James is within his legal right to challenge service which he thinks was not properly effected, it is noteworthy that he has not given an his address outside of the jurisdiction. It is apparent that his solicitors are retained only for the purpose of challenging jurisdiction.

[22] See Wilson v Church (No. 2) [1879] 12 Ch. 454, at page 459.

[27] In the affidavit which supports the application for security for costs, Desiree Irish deposed that Tasman and Betcorp have been placed at a considerable disadvantage by the failure of Mr. James to advise them or the court of his whereabouts.

[28] The affidavit in opposition to the application for security for costs was deposed by Adelka Spencer, a Legal Secretary in the office of Mr. James' solicitors. It contains no information to suggest that Mr. James has any assets within the jurisdiction. In fact, it suggested, erroneously, in my view, that the burden is on Tasman and Betcorp to provide information that Mr. James does not have assets within the jurisdiction. In the circumstances, I think that Mr. James should be required to enter security for their costs for the prosecution of this appeal.

[29] It was seen[23] that Tasman and Betcorp have asked for an order that the security should be entered in the sum of $20,000.00. The claim is for the sum of $1,477,957.20. Interest is claimed in the sum of $155,805.97, making a total of $1,633,763.17. Mr. James thinks that if this Court orders security it should not exceed $5,000.00. In my view, it is reasonable to require Mr. James to enter security in the sum of $12,000.00 for the prosecution of this appeal. He shall enter this sum as security within 21 days of today's date either by the payment into the Registry of the High Court, or by way of one surety before the Registrar of the High Court. The appeal proceedings shall stand dismissed if security is not entered accordingly. The costs occasioned by this application shall be in these appeal proceedings.

The order in summary

[30] The application by Mr. James for leave to appeal against the decision which the Master gave on 11th April 2006 refusing to set aside the service of the claim form under her order of 1st December 2005 is granted. Solicitors for Mr. James shall

[23] In paragraph 6 of this judgment.

file and serve the Notice of Appeal within 14 days of today's date. The application by Tasman and Betcorp for an order that Mr. James should enter security for their costs for the prosecution of this appeal is granted. Mr. James shall enter security in the sum of $12,000.00 within 21 days of today's date either by the payment of that sum into the Registry of the High Court, or by way of guarantee on a Bank in Antigua. The costs occasioned by this application shall be in these appeal proceedings.

Hugh A. Rawlins
Justice of Appeal