ANGUILLA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.4 OF 2007

BETWEEN:

[1] GIGI OSCO-BINGEMAN
[2] VADIM FRIDMAN

Appellant

and

BARCADI INTERNATIONAL LIMITED

Respondent

On written submissions before:
The Hon. Mr. Denys Barrow, SC — Justice of Appeal

Appearances:
Mr. Geoffrey Robertson QC, Mr. Mark Brantley and Ms. Jean M Dyer for the Appellants
Mr. Richard Millett QC, Mr. Mark Forte and Ms. Tameka Davis, for the Respondent

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2007: October 11

JUDGMENT

[1] This is a decision of a single Judge. This is a procedural appeal against the decision of George-Creque J dated 12th July 2007 debarring the appellants from making an application to the High Court asking that it should not exercise its jurisdiction on the ground that the court in Anguilla is not the appropriate court for the trial of the claim (the forum challenge) that the respondent (Bacardi) brought against the appellants.

[2] As appears from the background summary made by the judge in her judgment of 24th May 2007[1], the appellants are named in the High Court claim as the third and fourth named defendants. Neither the first nor second named defendant is directly

[1] On the hearing of whether to continue the injunction the judge had granted without notice.

affected by the decision that gives rise to this appeal and, hence, neither appeals. The first named defendant (CDC) is the owner of the "Patron" brand of Tequila, and is a very successful company. The second named defendant (Pendragon) owns half the shares in CDC. Both of these companies are incorporated in Anguilla and were served, as of right, by Bacardi. The appellants, both resident in the United States of America, are the executors of the estate of Martin Crowley, deceased, who owned all the shares in Pendragon and, indirectly, half the shares in CDC. The dispute between the parties concerns the sale of those shares.

[3] Bacardi and the appellants entered into a conditional agreement for the sale of the shares in CDC to Bacardi. In January 2007 Bacardi obtained a without notice injunction to stop the appellants from selling the shares to Mr. Crowley's former 'partner', Mr. John Paul De Joria, as Bacardi feared the appellants were proposing to do. The judge who granted the injunction also granted an order for service out of the jurisdiction of the claim form upon the appellants. The appellants have an earlier appeal against the judge's refusal to set aside that order. The appellants consider it relevant, for present purposes, to mention that one of the points they take against that order , among others, is that the judge's order, while providing that the appellants must file acknowledgment of service within 28 days after service of the statement of claim, did not state a time for the defendants to file their defence. The appellants argue that rule 7.5.2 (b) requires that a judge must specify a time for a defendant to file his defence. The appellant's contention that the judge set no date for the filing of defences is of considerable significance to their central point, to which I shall shortly come, that the time for making the forum challenge had not expired.

Dispute as to service and reservation of rights

[4] Service of the claim form was purportedly effected upon the third appellant in March 2007 and there was an attempt at service upon the fourth appellant in

February 2007.[2] The appellants disputed that there was proper service upon them. In consequence of that state of contention the legal representatives for the parties exchanged correspondence on the matter of service, including discussing the appellants making themselves available to be properly served and treating themselves as having been properly served. The appellants argue that throughout they expressly reserved their right to make the forum challenge. The appellants base that argument on the following correspondence and documents and the expressions set forth in them:

A. In a letter dated 6th February 2007, counsel for the appellants wrote to counsel for the respondent;

> " As previously stated, we are in principle prepared to agree to an extension of the return date for the injunction …We look forward to hearing from you and reserve all our clients' rights in the circumstances."

B. In another letter dated 21st March 2007, counsel for the appellants wrote to counsel for the respondent stating the following;

> " Please be advised that our clients are disclosing the said letter of Intent pursuant to the order of the court and our clients do not waive their rights to contest the jurisdiction of the Anguillan Court or to contest service on them or to mount any forum challenge."

C. On the 7th March 2007 the appellants filed an application to set aside the ex parte order of 30th January 2007 permitting service on the appellants outside of the jurisdiction. This order, by which the court assumed jurisdiction over the appellants, was therefore subject to a direct challenge from 7th March 2007. The judge in her judgment given on 24th May 2007 dismissed that challenge. But the appellants appealed against this decision. The challenge to jurisdiction therefore continued.

[2] Second affidavit of Roy Bartlett filed 27th March 2007

D. In skeleton arguments filed on behalf of Pendragon on 11th April 2007 in support of that defendant's forum challenge the appellants' solicitors stated "the [Appellants] have still not been served with the Bacardi Claim. Part 9 of the CPR is not operative until the Court is seised of jurisdiction over the [Appellants] … It is for that reason that the [Appellants] have not yet applied for a stay of these proceedings on the basis of forum non conveniens."

E. The appellants also submit that both the court and the respondent were fully aware that the appellants filed in a court in California a Petition for Instructions, which sought instructions from the court permitting the appellants to cease defending the Privy Council appeal that Mr. De Joria, the surviving partner of Mr. Crowley, has pending against the decision of this court that the executors were not bound to sell the shares in CDC to Mr. De Joria. If the executors were to cease defending the appeal it would defeat the enforceability of the appellants' agreement with Bacardi. This petition, therefore, sought to place performance of the agreement into the jurisdiction of a California court as opposed to the Anguilla court and was, accordingly, a clear attempt to oust the jurisdiction of the Anguilla court.

F. In her judgment on the 24th May 2007 in dealing with Pendragon's forum challenge the judge stated that the appellants, who were not resident in the jurisdiction, had not joined in the application then before her because at the time that application was made the appellants maintained they had not been served. The judge, therefore, was clearly aware of the prospect of the appellants' challenge, once served, to the jurisdiction of the Anguilla court.

G. In a letter on the 5th of June 2007 counsel for the appellants once again wrote to counsel for the respondent stating;

H. "We have slightly amended the said order as we wish to make it pellucid that our position is that to date the 3rd and 4th Defendants have not been served and accordingly reserve all their rights in relation to the jurisdiction of the Anguilla court over them."

The judge's decision

[5] It is against the third of the judgments, which the judge gave, that this appeal was filed. The first and second are relevant, however, because, as we shall see below, Bacardi claims that they caused the appellants to alter their stance on the forum challenge. The essence of those judgments, both pronounced on 24th May 2007, was that, in the one case, Pendragon had failed to show that California was clearly or distinctly a more appropriate forum than the court in Anguilla for the determination of the issues and the judge dismissed Pendragon's forum challenge. In the other case the judge exercised the discretion given to the court by rule 26.9 to put matters right and decided that she would not set aside the order that she had made for service out of the jurisdiction on the third and fourth defendants on account of Bacardi's failure to put certain information before the court when it made its application for service out of the jurisdiction.

[6] The third decision, pronounced on 12th July 2007 and the one that is currently being considered on this appeal, noted that proper service upon the appellants had occurred respectively on 26th March and 7th June 2007 and, therefore, stated the dates (in April and July, respectively) when the time for acknowledgement of service expired. The judge noted that the fourth appellant (D4) acknowledged that he was properly served and the judge found as a fact that the third defendant (D3) was properly served. The judge held D3 had not filed an acknowledgement of service and that Bacardi could therefore request judgment in default. Additionally, however, the judge stated, D4 relied on rule 9.3(4) which says that a defendant may file an acknowledgment of service at any time before a request for default judgment is received at the court office. In response, the judge stated, Bacardi

submitted that because of the defendants' conduct the court should dispense with the need to file a request for default judgment, exercising its power under rule 26.1(6).

[7] The judge's order continued:

> "(5) The court was pointed to correspondence between the parties, relating to the issue of service in respect of the Third Defendant and Fourth Defendant where they appeared to be prepared to concede service upon them provided they were given until 31st July 2007 for filing and serving their Defences (see letter 22nd June 2007 – p.398 – Hearing Bundle).
>
> "(6) The time so sought for filing their Defences was not accepted by the Claimant – who preferred a shorter period (i.e. 9th July 2007) (see letters of 27th June 2007 – pgs 408 and 410 Hearing Bundle).
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> "(7) In this correspondence it becomes clear that the only issues was as to time of service of their Defences. No reservation was then being made or even hinted at regarding the Third Defendant's and the Fourth Defendant's right to challenge the Court's jurisdiction. This has now been raised for the first time today as a condition for conceding service.
>
> "(8) On 10th July 2007 – The issue of service on the Third Defendant was once again raised, along with the fact that the Order of 30th January 2007 had not been (sic) specified a period for the filing of a Defence, leaving this period to be now fixed by the Court, in respect of both the Third Defendant and the Fourth Defendant.
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> "(9) There is also the indication now that the Third Defendant and the Fourth Defendant reserves (sic) their right to challenge the jurisdiction of the court, although no mention whatsoever was made of this in their correspondence. All indications were that their Defences would be filed and Case Management Conference be undertaken albeit at a date later than those fixed previously by consent.

"(10) It is apparent to this Court that the Third Defendant and the Fourth Defendant by their conduct are seeking to utilize the Rules in a way which is contrary to the overriding objectives particularly having regard to the fact that they must be taken to be well aware of the Claim in these proceedings from its inception, in as much as they are the controlling minds of the Second Defendant (who was served from February 2007) and the part Third Defendant and Fourth Defendant have clearly played in these proceedings.

"(11) I also point to Part 1.3 of CPR 2000 which also says that it is the duty of the parties to help the Court in furthering the overriding objective.

"(12) The Court strongly deprecates the conduct of the Third Defendant and Fourth Defendant in not assisting the Court in furthering the overriding objective.

"(13) I am of the view that it is no longer open to the Third Defendant and Fourth Defendant in light of the correspondence coupled with their failure to acknowledge service, within the period specified to now seek to rely on Rule 9.3(4) and still further, seek to reserve the right to challenge the Court's jurisdiction.

"(14) The Court has been left with no other impression of the Defendants' conduct, other than that every advantage is being taken, by the use of the Rules to delay these proceedings. Such will not be conducted."

The judge thereafter proceeded to set dates by which the appellants should file their defences, to declare that it was not open to the appellants to seek to challenge the court's jurisdiction and to award costs regarding the issue of service to be assessed if not agreed.

Time for making the forum challenge

[8] As appears from the judgment, D4 relied on rule 9.3 (4) which says

"(4) A defendant may file an acknowledgment of service at any time before a request for default judgment is received at the court office out of which the claim form was issued."

[9] Both appellants now rely on this rule, D3 having on 16th July 2007 (after the judgment) filed an acknowledgment of service. The appellants submit, in effect, that the judge misdirected herself in concluding that the 28 days limited by her order for filing acknowledgment for service had expired and it was no longer open to the appellants to rely on rule 9.3 (4). The significance to the appellants of filing an acknowledgment of service is that a defendant who wishes to challenge the forum is required by rule 9.7 to first file an acknowledgment of service and then he may make the forum challenge. The relevant parts of rule 9 provide:

"Procedure for disputing court's jurisdiction, etc.

9.7 (1) A defendant who –
(a) disputes the court's jurisdiction to try the claim; or
(b) argues that the court should not exercise its jurisdiction;
may apply to the court for a declaration to that effect.
(2) A defendant who wishes to make an application under paragraph (1) must first file an acknowledgment of service.
(3) An application under this rule must be made within the period for filing a defence.
• Rule 10.3 sets out the period for filing a defence."[3]

[10] In their written submissions on this appeal, into which have been incorporated by reference their submissions on the leave application, counsel for Bacardi argued that the judge correctly found that time for filing acknowledgment of service had expired and "it was too late for [the appellants] to make an application to challenge the jurisdiction, which under CPR 9.7(2) had to be done after an acknowledgment of service had been filed." It is a puzzling argument. The reference to filing an acknowledgment of service contains no allusion to any time after acknowledgment when the forum challenge must be made. So far as rule 9.7 (2) is concerned the

[3] In the case of service of a claim form out of the jurisdiction this provision is displaced by the provision in rule 7.6 that the claim form must be amended to state the period of time for filing acknowledgment of service and defence.

forum challenge may be made at any time after an acknowledgement of service is filed. The requirement to acknowledge service is not to set a time reference but to require an intending challenger to disclose to the court the basic information that the form for acknowledgment of service requires to be provided, including the date when the defendant was served, whether the defendant admits any part of the claim, the defendant's personal address and the defendant's address for service. The clear and only reference to a time limit for making a forum challenge is contained in rule 9.7(3).

[11] I am satisfied that the appellants are correct in their submission that, so far as the rules provide, it remained open to them to make the application under rule 9.7 (1). Rule 9.7 (3) limits the time for making the forum challenge to the period within which a defence must be filed. It follows that until the time for filing a defence has expired or otherwise ceases to exist it remains open to the appellants to file their forum challenge. As noted at the outset, the judge's order for service out of the jurisdiction specified no time for filing a defence. That was Bacardi's problem; it should have ensured that the order it obtained and the draft order it put up contained such provision. Having failed to do so initially, it was open to Bacardi to make a further application to supply that provision but the application it made did not come on for hearing until the date of the order now being appealed. Further, as the judge stated, proper service had by the date of the hearing been effected and Bacardi could have requested judgment in default of acknowledgment of service against D3. That would have foreclosed any possibility of, at least D3, making any forum challenge. As was just stated, the judge expressly adverted to that step. Bacardi did not request judgment in default.

[12] Bacardi did not request judgment in default, one gathers from its submissions, because it says rule 9.3 (4) "has no application at all because this is not a case in which Bacardi is entitled to enter a default judgment. The appellants cannot therefore rely on it." In fact Bacardi's counsel say this is a knockout blow to the appellants' argument. This, too, is a puzzling submission. It flies in the face of the

judge's clear statement that Bacardi was entitled to request default judgment. The submission relies on rule 12.4 (d), which states:

> Conditions to be satisfied – judgment for failure to file acknowledgment of service
>
> 12.4 The court office at the request of the claimant must enter judgment for failure to file an acknowledgment of service if –
> (a) the claimant proves service of the claim form and statement of claim;
> (b) the defendant has not filed –
> (i) an acknowledgment of service; or
> (ii) a defence to the claim or any part of it;
> (c) the defendant has not satisfied in full the claim on which the claimant seeks judgment;
> (d) the only claim is for a specified sum of money, apart from costs and interest, and the defendant has not filed an admission of liability to pay all of the money claimed together with a request for time to pay it;
> (e) the period for filing an acknowledgment of service under rule 9.3 has expired; and
> (f) (if necessary) the claimant has the permission of the court to enter judgment.

[13] Bacardi's submission is in these terms: "It is common ground that Bacardi has never made a request for default judgement. That is because Bacardi cannot do so. Under CPR 12.4(d), it is one of the conditions of being able to enter judgment in default of acknowledgement of service that the only claim is for a specified sum of money (apart from interest and costs). Bacardi's claim is for a permanent injunction, plus (in the alternative) unliquidated damages. Accordingly, Bacardi has always been forced, in default of acknowledgement of service, to press for service of a Defence. Otherwise, it would have applied for default judgment long ago."

[14] That view stems from failing to understand the ambit of Part 12 as revealed in rule 12.10, which provides:

> Nature of default judgment
>
> 12.10(1) Default judgment on a claim for –

(a) a specified sum of money – must be judgment for payment of that amount or, a part has been paid, the amount certified by the claimant as outstanding –

(i) if the defendant has applied for time to pay under Part 14 – at the time and rate ordered by the court; or

(ii) in all other cases – at the time and rate specified in the request for judgment;

- Rule 2.4 defines "a claim for a specified sum of money' and sets out the circumstances under which a claim for the cost of repairing property damaged in a road accident can be treated as such a claim.
- Part 65 deals with the quantification of costs.

(b) an unspecified sum of money – must be judgment for the payment of an amount to be decided by the court;

- Rule 16.2 deals with the procedure for assessment of damages where judgment is entered under this paragraph.

(c) goods – must be –

(i) judgment requiring the defendant either to deliver the goods or pay their value as assessed by the court;

(ii) judgment requiring the defendant to pay the value of the goods as assessed by the court; or

(iii) (if the court gives permission) a judgment requiring the defendant to deliver the goods without giving the defendant the alternative of paying their assessed value.

(2) An application for permission to enter a default judgment under paragraph (1) (c) (iii) must be supported by evidence on affidavit.

(3) A copy of the application and the evidence under paragraph (2) must be served on the defendant against whom judgment has been sought even though that defendant has failed to file an acknowledgment of service or a defence.

(4) Default judgment where the claim is for some other remedy shall be in such form as the court considers the claimant to be entitled to on the statement of claim.

(5) An application for the court to determine the terms of the judgment under paragraph (4) need not be on notice but must be supported by evidence on affidavit and rule 11.15 does not apply.

[15] Rule 12.10, as seen above, indicates that default judgment may be obtained for a specified sum of money (paragraph (1)(a)), an unspecified sum of money

(paragraph (1)(b)), goods (paragraph (1)(c)) and, as per paragraph (4), "some other remedy … in such form as the court considers the claimant to be entitled to on the statement of claim." Rule 12.2 specifies the three types of claims in which default judgment may not be granted – probate, fixed date and in rem admiralty claims. Default judgment, it therefore appears, may be granted in all other cases, subject to the various conditions and procedures that are specified. Rule 12.4, on which counsel for Bacardi focused, is confined to cases in which the court office must enter default judgment once the specified conditions are met. Rule 12.4 has no application to this claim; the court office cannot enter default judgment in this type of claim that Bacardi brought. This is a claim for "some other remedy". Default judgment on Bacardi's claim for an injunction and for damages is not available under rule 12.4. To obtain default judgment in such a claim the claimant needs to apply to the court under rule 12.10 (4). That course was open to Bacardi. Its failure to take that course because of its misunderstanding of the rule about default judgments left open the time for the appellants to make their forum application. It is a consequence that Bacardi must bear.

Reservation of appellant's right to make the forum challenge

[16] A principal reason why the judge debarred the appellants or regarded the appellants as being debarred from making a forum challenge was because the judge found that the appellants had failed to reserve their right to make such a challenge and had conveyed the sense that they would be proceeding to file a defence. It was unfortunate that the judge took the view based, as she said, on the correspondence that was brought to her attention, that the only issue the appellants raised was time for service of their defence and "no reservation was then being made or even hinted at regarding the [appellants'] right to challenge the Court's jurisdiction. This has now been raised for the first time today as a condition for conceding service."[4] The judge apparently took umbrage at the appellants' raising the point for the first time as a condition for conceding service. With

[4] See paragraph (7) of the order, reproduced at paragraph [7], above

respect, the wrong impression was conveyed to the judge. It cannot be disputed that the appellants had expressly reserved their right to make the forum challenge in earlier correspondence. This appears clearly from the extracts of correspondence and documents that have been set out above, at paragraph [4]. In fairness to the judge it is to be noted that the judge was confining her remarks to the later correspondence. But that is precisely the problem: it was simply not brought to the judge's attention that the appellants had reserved their rights earlier, in two very relevant pieces of correspondence: the letters of 21st March and 5th June 2007 quoted above, in paragraph [4].

[17] While Bacardi concedes that the appellants had earlier reserved their right to make the forum challenge Bacardi contends that the position changed after 24th May 2007 when the judge rejected Pendragon's forum challenge. This change in position was strengthened, Bacardi argues, by the fact that the court in California dismissed the appellants' Petition for Instructions, by which they sought to establish California as the forum that should exercise jurisdiction over issues arising from the share purchase agreement, in favour of Anguilla. At that point, Bacardi submits, the appellants had, and still have, nowhere else to go but Anguilla. Counsel for the appellants argue that this is not so; that the appellants have appealed the decision of the California court. In addition, while it would be entirely speculative for me to form a view as to whether or not the appellants can still litigate the issues in California, it was shown in Astian Group Inc v Alfa Petroleum Holdings Ltd[5] that it does not follow that because a foreign forum declines to exercise jurisdiction that the local court will therefore be impelled to exercise jurisdiction. In that case this court upheld the judge's decision to stay proceedings on the ground of *forum non conveniens* even after, the stay having been granted, the claimant had sought to commence proceedings in the foreign forum, the foreign court had declined to exercise jurisdiction and the claimant came a second time to invoke the local court's jurisdiction..

[5] British Virgin Islands Civil Appeal Nos. 11 and 17 of 2004 (judgment delivered 25th April 2005

[18] Bacardi further contends that the only issue that the appellants stated they were contesting was service. In response to the appellants' argument that the judge overlooked, in particular, the letter dated 5th June 2007 reserving the appellants' rights (a full five weeks before the 12th July 2007 hearing date), Bacardi concedes that the judge may not have seen this letter but argues that this letter did not reserve the appellants' right to make the forum challenge. The only issue raised by that letter, Bacardi argues, was service, not jurisdiction or *forum conveniens*. Bacardi's interpretation of that letter is untenable, I think, especially in view of the appellants' historical, repeated reservation of rights. There can be little justification for giving such an interpretation to the following words of the letter: "…our position is that to date the 3rd and 4th Defendants have not been served and accordingly reserve all their rights in relation to the jurisdiction of the Anguilla court over them." (Emphasis added). Contrary to Bacardi's submission that "the only issue was one of service, not jurisdiction or *forum conveniens*", it is the fact that the appellants' Anguilla solicitors on 21st March 2007 had expressly stated, in the language reproduced in paragraph [4] B of this judgment, that the appellants did not waive "their rights to contest [1] the jurisdiction of the Anguillian Court or [2] to contest service on them or [3] to mount any forum challenge." I reject Bacardi's argument that by the date of the hearing the only issue was that of service.

[19] But even if the letter of 5th June had failed to convey the appellants' reservation of right to make the forum challenge, and I am firmly of the view it did not, the principle is that the letter should not be treated as a submission to jurisdiction[6] unless it was unequivocal. In SMAY Investments Ltd and another v Sachdev and others[7] Patten J expressed the view that if a defendant wishes to challenge the jurisdiction of the court, and he is compliant with the Civil Procedure Rules then any conduct on his part which is said to amount to a submission to jurisdiction and a waiver of that right of challenge must be wholly unequivocal. This view was

[6] I leave undecided whether a party may be taken to submit to jurisdiction by what he says in a letter to the other party.
[7] [2003] 1 WLR 1973

also expressed in Spargos Mining NL v Atlantic Capital Corpn.[8] where Colman J stated:

> " The representation derived from the conduct of the party said to have submitted must be capable of only one meaning."

[20] It seems quite clear to me that the words of the appellants' letter of 5th June quoted above are at least highly equivocal and by explicitly reserving all the appellants' rights in relation to the jurisdiction of the Anguilla court that letter recorded an intention to give up none of their rights. I find the judge misdirected herself on the facts because the letter of 5th June was not brought to her attention and, it follows, the judge was in no position to appreciate the true fact of the appellants' position in relation to jurisdiction. Therefore, the judge exercised her discretion to debar the appellants from challenging the jurisdiction of the Anguilla court, or concluded that the appellants had lost the right to make that challenge, on a wholly erroneous basis. I am satisfied that if the judge had properly appreciated the appellants' position she would not have made the order that she made and, accordingly, I allow the appeal and set aside the judge's order. I award the costs of this appeal to the appellants to be assessed, if not agreed. The costs of the hearing below shall be costs in the claim.

[8] The times 11 December 1995