BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.19 OF 2006

BETWEEN:

PACIFIC ELECTRIC WIRE & CABLE COMPANY LIMITED

Appellant

AND

(1) TEXAN MANAGEMENT LIMITED
(2) ALL DRAGON INTERNATIONAL LIMITED
(3) BLINCO ENTERPRISES LIMITED
(4) PATAGONIA LIMITED
(5) SHAREHOLDERS OF ALL DRAGON INTERNATIONAL LIMITED

Respondents

Before:

The Hon. Mr. Brian Alleyne, SC	Chief Justice [Ag.]
The Hon. Mr. Hugh A. Rawlins	Justice of Appeal
The Hon. Ms. Ola-Mae Edwards	Justice of Appeal (Ag.)

Appearances:

Mr. Gerard St. C. Farara, QC, with him Ms. Tan'ania Small-Davis for the Appellant
Mr. Samuel "Jack" Husbands, with him Ms. Jillian Gillham for the First and Second Respondents
Mr. Paul Webster, QC, with him Mr. Kerry Anderson for the Third and Fourth Respondents

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2007: June 6, 7
October 15.

JUDGMENT

[1] **RAWLINS, J.A.**: By applications dated 12th July 2005 and 21st September 2005, respectively, the first and second respondents, Texan and All Dragon, on the one hand, and the third and fourth respondents, Blinco and Patagonia, on the other,

applied for orders that the High Court of the British Virgin Islands ("BVI") should not exercise its jurisdiction to try the claim. Generally, the applications were made on the ground that the High Court of Hong Kong is the more convenient and natural forum for resolving the disputes between the parties (*forum non conveniens*).

[2] Specifically, the respondents asked the court to stay the proceedings which Pacific instituted against them in the BVI court because the BVI is not the appropriate forum for the trial of the Action in that:

(a) the claim made and relief sought in the BVI Action against them are similar to 2 claims that Pacific has made against them in proceedings which Pacific instituted in Hong Kong, to wit, Actions Nos. HCA 2763 of 2004 and HCA 2203 of 2004;
(b) the BVI claim is strongly connected with Hong Kong with very little connection with the BVI, and, additionally, the issues in the Hong Kong Actions are the same as those raised in the BVI Action;
(c) Hong Kong is the natural forum for the BVI claim; and
(d) it would be difficult to compel the attendance of witnesses in the BVI.

[3] Texan and All Dragon's application was made pursuant to rule 9.7(1)(b) of the Eastern Caribbean Supreme Court Civil Procedure Rules, 2000 ("the CPR 2000"), which states that a defendant who argues that the court should not exercise its jurisdiction may apply for a declaration to that effect. The application by Blinco and Patagonia was eventually made under the inherent jurisdiction of the court.

[4] When Hariprashad-Charles J heard the forum challenges, she granted the applications and made an order staying the BVI proceedings against the respondent companies. She also ordered Pacific to pay the respondents' costs. In arriving at this decision, the learned judge found that the claim does not have any real connection to the BVI, except that the defendants are domiciled here, while there are several strong connections to Hong Kong. In this regard she stated that

quite apart from the governing law of the issues in dispute, it is clear that the dispute concerns actions carried out in Hong Kong by Hong Kong or Taiwanese individuals. She also found that many witnesses are likely to be required for the trial in the BVI who are all resident in Hong Kong or Taiwan while none of the witnesses is resident in the BVI. The learned judge also stated that the essence of the disputes has already been the subject of two proceedings in Hong Kong. She did not think that Pacific had discharged the burden to show that it could not receive justice in the courts in Hong Kong.

The appeal

[5] Pacific appealed on 1 procedural ground and 2 substantive grounds. There are 2 aspects to the procedural challenge. One aspect challenges the failure of the judge to dismiss the application by Texan and All Dragon under rule 9.7 of CPR 2000 because they did not file the application and the evidence in support contemporaneously. The second procedural challenge was taken against Blinco and Patagonia. Pacific insisted that the judge erred when she failed to properly consider whether Blinco and Patagonia had waived their right to move the court to decline to exercise its jurisdiction because the parties had already submitted to the jurisdiction of the court. To support this contention, Mr. Farara, QC, learned counsel for Pacific, stated that Blinco and Patagonia (a) failed to apply for a stay of proceedings before the expiration of the time for filing their defence and (b) took a step in the proceedings by making an application for an order extending the time for filing their defence.

[6] The first substantive ground of Pacific's appeal states that the judge erred in holding that the main issue in the BVI claim is the ultimate beneficial ownership of PacMos, rather than the beneficial ownership of the respondent companies. The second substantive ground of appeal states that the judge erred by misapplying the legal principles which govern *forum non conveniens*.

[7] A brief background to the case will present a helpful perspective from which to consider these grounds of appeal. First, however, I think that it is necessary to record that at the commencement of the hearing of this appeal, this court made an order that granted leave to Pacific to adduce further evidence. The order permitted Pacific to adduce a signed statement made by one Wellen Sham to the Taiwan Prosecution Authority on 16 August 2004, which states that Blinco and Patagonia were incorporated by KPMG for Pacific and that these two companies are wholly beneficially owned by Pacific. According to the statement, Wellen Sham was formerly a member of KPMG who was subsequently recruited by Hu Hung Chiu (Pacific's former Chief Financial Officer) to work for Pacific in Hong Kong. KPMG later sold its secretarial practice to KCS.

[8] The order which this court made also permitted Pacific to adduce further papers from KCS, complementing the series of papers already disclosed, showing that Blinco and Patagonia were incorporated for Pacific. One paper is a fee note addressed to Pacific for the incorporation of Blinco. The order of this court also permitted Pacific to adduce the defences filed by various defendants in the Hong Kong Actions dealing with the PacMos shares (Action No. HCA 2203 of 2004) and the South Horizons Commercial Centre (Action No. HCA 2763 of 2004). Mr. Farara stated that he believes that the evidence contained in the newly admitted documents is sufficiently strong to make a good basis for a case for summary judgment against the respondents in the BVI proceedings. He said that Pacific intends to apply for summary judgment if this appeal is allowed, an intention that he intimated to the learned judge during the hearing in the High Court.

The background

[9] The respondents are all International Business Companies registered under the laws of the BVI. Pacific was incorporated in Taiwan. It engaged mainly in the manufacture and sale of wire and cable products, as well as in telecommunications, electronics, engineering, financial services and infrastructure

works. The company was listed on the Taiwan Stock Exchange, but was de-listed in early 2004. In its claim, Pacific alleges that its current management discovered that certain past officers had perpetrated a fraud on it [Pacific] and used those funds for their own benefit.

[10] More specifically, Pacific alleges that, between 1990 and 1997, its senior executive directors, Hung Chiu Hu, Yu Jeh Tung and Tao Tsun Sun, who are apparently known in Hong Kong as "the Iron Triumvirate", used Pacific's funds to make various unauthorized investments in Hong Kong. In particular, Pacific alleges that, fraudulently and without the necessary authorization or ratification, the Iron Triumvirate used its funds to acquire 155,610,000 shares in a listed company in Hong Kong, which is currently known as Pacmos Technologies Holdings Limited ("PacMos").[1] Pacific says that they did this with the assistance of Kam Fook Robert Ma, a Hong Kong resident, and through the four respondent companies. Pacific also alleges that, fraudulently and without the necessary authorization or ratification, these persons also acquired the South Horizon Commercial Centre ("the Hong Kong Assets"). According to the claim, these investments were never reported to Pacific's board or in its financial statements. This rendered the financial statements incomplete and/or false. According to Pacific, this discovery caused its published financial statements to be questioned and it was thereupon de-listed by Taiwanese regulatory authorities.

[11] Pacific alleges that Texan is the immediate holding company of the 155,610,000 shares in PacMos. By their actions, the Iron Triumvirate, with the assistance of Ma, caused the ultimate beneficial ownership of the PacMos shares to be stated in the public beneficial ownership reporting documents to be variously held by PCL Holdings Limited ("PCHL") a Hong Kong company, Clipper Investment Limited ("Clipper"), Prima Pacific (Holdings) Limited ("Prima Pacific Holdings"), Larry D. Horner and, finally, by All Dragon. The corporate vehicles that the Iron Triumvirate

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[1] This company was previously variously known as Win Win International Holdings Limited and PCL Enterprises Holdings Limited.

used for the acquisition of the PacMos shares were Blinco, Patagonia, PCHL, Clipper, Prima Pacific Holdings and Texan. They also used Horner to hold all the shares in Prima Pacific Holdings, and, ultimately, they used All Dragon, which is wholly held by Blinco and Patagonia, to hide the Hong Kong Assets from Pacific.

[12] In summary, Pacific alleges that (i) the PacMos Shares were purchased by Texan with funds belonging to it (Pacific); (ii) 51% of the shares in Texan are held by PCI; (iii) the shares in PCI are held by PCHL;(iv) the shares in PCHL are held by Blinco and Patagonia; (v) it (Pacific) is the beneficial owner of Blinco and Patagonia; and (vi) it (Pacific) is the ultimate beneficial owner of the shares in Texan through its beneficial ownership of the shares in Blinco and Patagonia, PCHL and PCI.

[13] Pacific instituted its 2 actions in Hong Kong against the respondents and other persons, before it filed the BVI claim. All Dragon, Blinco and Patagonia are the 17th, 18th and 19th defendants in Action No. 2763 of 2004. Texan is not named as a defendant. In Action 2203 of 2004, All Dragon and Texan are the 1st and 4th defendants. Blinco and Patagonia are not named as defendants in this Action. Pacific is the claimant in both of these Hong Kong Actions and in the BVI claim. Pacific further states that actions have been initiated in Hong Kong to recover the properties traced as a result of investigations, and investigations are continuing with a view to tracing all its assets that the former officers contrived to acquire with its (Pacific's) funds. Pacific says that it is necessary for it to obtain control over the respondent companies if it is to be able to trace all the assets acquired by the said officers with its funds and to enable it to re-state its financial statements for the purpose of regaining its listing.

The procedural ground

[14] I shall first consider the procedural challenge relating to the failure by Texan and All Dragon to file the evidence in support of their application in a timely manner.

The procedural challenge against Texan and All Dragon

[15] This challenge will be better appreciated by setting out the relevant aspect of rule 9.7 of CPR 2000. The section states as follows:

> "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.
> (4) An application under this rule must be supported by evidence on affidavit.
> (5) A defendant who -
> (a) files an acknowledgment of service; and
> (b) does not make such an application within the period for filing a defence;
> is treated as having accepted that the court has jurisdiction to try the claim."

[16] The judge noted[2] that the application by Texan and All Dragon was filed on the last day for filing their defence. She also noted that no supporting evidence was filed and served until 23rd September 2005. The application was filed on 12th July 2005. She further noted[3] Mr. Farara's submission that rule 11.11(4) of CPR 2000, which is in mandatory terms, requires that any evidence in support of a notice of application, as well as a draft order, must accompany the application and must therefore be filed contemporaneously with the application. The judge stated that rule 11.7(2) of CPR 2000 permits an applicant to file a draft order sought either with the application, or not less than 3 days before the application is heard. There is however no similar rule that relates to the filing of the evidence in support.

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[2] In paragraph 5 of her judgment.
[3] In paragraph 6 of her judgment.

[17] Learned Queen's Counsel, Mr. Farara submitted before the judge she should have dismissed the application on the ground of non-compliance with rule 9.7(4) of CPR 2000 because the evidence in support was not filed and served contemporaneously with the application. He insisted that this meant that Texan and All Dragon essentially did what the rule is designed not to permit a party to do: to create a holding pattern by filing its application in an attempt to preserve their rights to challenge the jurisdiction, while not apprising the other parties of the evidence on which the application was based. He urged the court not to tolerate such bad procedural practices.

[18] In dismissing this procedural challenge, the learned judge stated:[4]

> "In this case, unquestionably, there was non-compliance and/or late compliance with CPR 9.7(4). First, there was no evidence filed contemporaneous with the application. Second, they did not file and serve the application with evidence in support. But are these procedural inadequacies so fatal that they ought to lead to a dismissal of the application? I think not. I agree with Mr. Husbands that in looking at these matters under the CPR, the Court must look at the case as a whole and should not be precluded from exercising its discretionary powers in the circumstances even if the application is not specifically made under the inherent jurisdiction of the Court. If I were to dismiss this application because of late compliance with the CPR, I think that would amount to a draconian act especially when the application is still pending before the Court. In circumstances such as the present, a costs sanction may be appropriate. To my mind, the procedural objection raised by the claimant is unsustainable and must fail."

[19] Mr. Farara submitted before this court that the learned judge was wrong to come to the conclusion that the procedural defects which he complained of did not render the application dismissible. He insisted that the judge failed to pay proper regard to the fact that the terms of rule 9.7 of CPR 2000 are mandatory and that a judge has no discretion to waive such mandatory requirements. He submitted, further, that the judge was wrong to permit the application to be heard in the face of non compliance with the CPR in circumstances where Texan and All Dragon elected to make their application under rule 9.7. He insisted that the failure to

[4] At paragraph 10 of her judgment.

comply with the rules was calculated to create a holding pattern to evade the express period of limitation for such applications, as provided by the CPR. He therefore felt that the judge's reasoning that it was inappropriate to hold them to the strict requirements of the CPR because it would be draconian to do so, was clearly wrong.

[20] It will be recalled that, in the High Court proceedings, Mr. Farara had also referred the learned judge to 11.11 of CPR 2000, which makes provisions for the service of applications generally. He contended that rule 11.11(4)(b) of CPR 2000, which is in mandatory terms, requires any evidence in support of a notice of application to accompany the application. He insisted that this must mean that in any application, including an application disputing the jurisdiction of the court, the affidavit must be filed contemporaneously with the application. Before this court, Mr. Husbands submitted that this rule does not state that the affidavit must be filed at the same time as the notice of application.

[21] Mr. Husbands submitted, additionally, that in any event the rules do not specify any consequences or sanctions for non-compliance with rule 11.11(4)(b) and, therefore, the non-compliance with this rule or with rule 9.7(4) of CPR 2000 did not invalidate the subsequent steps taken in the proceedings. This, he said, was because, pursuant to rule 26.9(2), such steps are not invalidated unless the court so orders. Rule 26.9 of CPR 2000 expressly applies only where the consequences of failure to comply with a rule are not stipulated. Rule 26.9(2) states that failure to comply with a rule does not invalidate any steps taken in the proceedings unless the court so orders. Mr. Husbands is correct in his assertion that no sanction is provided for non-compliance with rule 11.11(4)(b).

[22] Mr. Husbands further contended that a judge has discretion under rule 26.9(3) of CPR 2000 to put matters right where there is such non-compliance. This sub-rule states that if there is non-compliance with a rule, the court may make an order to

put matters right, while rule 26.9(4) states that the court may make such an order on or without an application by a party.

[23] I do not think that the interpretation of rule 9.7(4) of CPR 2000 is referable to rule 11.11(4). Rather, I think that it should be interpreted in the context of rule 9.7 of CPR 2000, and, in particular, by looking at rules 9.7(3), 9.7(4) and 9.7(5). When rule 9.7(4) requires that an application disputing jurisdiction must be supported by evidence, it means, in my view, that the statutory requirement is not satisfied unless there is affidavit evidence that accompanies the notice of application. In effect, there is no application disputing the jurisdiction of the court if the evidence is not filed contemporaneously with the notice of application.

[24] I am confirmed in this finding because it is my view that the framers of the rules expected stringent compliance with the rules for disputing the jurisdiction of the court in order to ensure that the process is not used by defendants as a vehicle to delay in filing their defences, thereby frustrating claimants in cross-border cases. I agree with the thrust of Mr. Farara's submission, which was to the effect that neither the framers of the rules nor the court would permit defendants who wish to dispute the jurisdiction of the court to use rule 9.7(4) to create a holding pattern to evade the express period of limitation for such applications, as provided by the CPR.

[25] The result, in my view, is that while rule 9.7(3) requires the application to dispute jurisdiction to be made within the period for filing a defence, and rule 9.7(4) mandates that the application must be supported by affidavit, rule 9.7(5) stipulates, as a sanction for the failure to make such an application within the period for filing a defence, that the defendant is to be treated as having accepted that the court has jurisdiction to try the claim. In any event, I do not think that rule 11.11(4)(b) of CPR 2000, which requires any evidence in support of a notice of application to accompany the application, would have aided Mr. Husbands because "accompanied" in that rule means that the evidence must be filed

contemporaneously with the application. It is common ground that affidavit evidence upon which Texan and All Dragon sought to rely was filed some time after the filing of the notice of application.

[26] In the foregoing premises, the learned judge did not have the discretion which she purported to exercise when she dismissed the procedural challenge by Pacific against Texan and All Dragon. She therefore erred in that she did not dismiss the forum challenge application by Texan and All Dragon because they did not serve their evidence in support with the notice of application. I would therefore allow Pacific's appeal on this ground.

The procedural challenge against Blinco and Patagonia

[27] Blinco and Patagonia filed their forum challenge application on 21st September 2005. In her judgment, the judge observed[5] that this was long after the time that the CPR 2000 permits applications asking the court not to exercise jurisdiction. She further observed that Blinco and Patagonia chose to pursue their application under the inherent jurisdiction of the court and not pursuant to CPR 9.7.

[28] The judge also referred to Pacific's assertion that the forum challenge application must fail because Blinco and Patagonia had already submitted to the court's jurisdiction by taking a step in the proceedings towards the filing of their defences, and, therefore, could not challenge the court's jurisdiction to hear the claim. Pacific had informed the court[6] that by letter dated 12th July 2005, Blinco and Patagonia sought Pacific's consent to extend the time for filing their defence. In that letter, the solicitors for Blinco and Patagonia wrote: "*We anticipate that we will be in a position to file a defence within 21 days.*" On the same day, Blinco and Patagonia filed an application for an order extending the time to file their defence. According to Pacific, the time for filing the defence would have expired on that day.

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[5] At paragraph 11 of the judgment.
[6] See paragraph 12 of the judgment.

[29] The court heard the application to extend the time for filing their defence on 21st July 2005 and granted the application. It extended the time for filing the defence by 21 days. This meant that the defence was to be filed on or about the 27th September 2005 given the intervening long recess. The defence is a statement of case under rule 2.4 of CPR 2000 and rule 3.5 provides that the time prescribed for serving a statement of case, other than a statement of claim, does not run during the long vacation. The long vacation began on 1st August 2005 and ended on 15th September 2005.[7]

[30] Mr. Farara submitted before the High Court that the period of time for challenging the court's exercise of its jurisdiction cannot be extended because it is strictly confined to the period of time for filing a defence. He said that this was the rationale for the express cross reference of rule 9.7(3) which states that an application under rule 9.7 must be made within the period for filing the defence, which is provided for in rule 10.3. Mr. Farara contended that the period stipulated in rule 10.3 must be strictly adhered to and not extended beyond that period. He insisted that were it intended that the extension of time for filing a defence would result in an extension of time for challenging the court's jurisdiction, the rules would have expressly so provided.[8]

[31] Mr. Farara asked the judge to note that Blinco and Patagonia filed acknowledgment of service; sought extension of time for filing their defence without any reservation of their right to challenge the jurisdiction; applied to the court for the extension; and obtained the extension but did not make the application to challenge within the time allowed under the rules. He said that Blinco and Patagonia need not have sought an extension of time for filing their defence if they had no intention of submitting to the court's jurisdiction and could simply have made their arguments for a stay of the proceedings on 12th July 2005.

[7] See rule 3.3(c) of CPR 2000.
[8] See paragraph 13 of the judgment.

He concluded that since Blinco and Patagonia (a) failed to apply for a stay of proceedings before the expiration of the time for filing the defence and (b) took a step in the proceedings by making an application for an order extending the time to file their defence, the challenge to jurisdiction was no longer available to them because they had waived their right to do so. The consequence, he said, was that the judge should have dismissed their forum challenge application.[9] He relied on a number of authorities including **Smay Investments Limited and Another v Sachdev and Others**[10] and **Robert Conrich v Ann Van Der Elst et al**.[11]

[32] In her judgment, the learned judge held that Mr. Farara's submissions did not merit any consideration because the forum challenge application by Blinco and Patagonia was made under the inherent jurisdiction of the court, which jurisdiction is discretionary. She stated that since the court has discretion to grant the stay, the only question was how the court would exercise that jurisdiction after considering the connecting factors, not the question of submission to the jurisdiction. The judge cited **Enzo Addari v Edy Gay Addari**[12] in which this court stated[13] that an application under the inherent jurisdiction of the court would usually require the Judge to consider the connecting factors and make a determination whether the forum court or another court provide an available and competent forum in which a case may be tried more suitably for the interest of all the parties and for the ends of justice.

[33] Mr. Farara basically repeated the submissions that he made in the High Court before this court. He said, in particular, that at the commencement of the hearing in the High Court, counsel for Blinco and Patagonia abandoned the application under rule 9.7 of CPR 2000 and indicated that he intended to proceed strictly under the inherent jurisdiction of the court, citing section 18 of the West Indies Associated States Supreme Court (Virgin Islands) Act. He contended that in doing

[9] See paragraphs 13-16 of the judgment.
[10] [2003] 1 WLR 1973.
[11] AXAHCV2001/002 –judgment of the High Court of Anguilla [unreported] delivered on 13 February 2003.
[12] British Virgin Islands Civil Appeal No. 21 of 2005 (Unreported) delivered on 23rd September 2005.
[13] At paragraph 16 of the judgment.

this counsel had admitted that Blinco and Patagonia had indeed submitted to the jurisdiction of the court prior to making their stay application. He submitted, further, that the learned judge erred in allowing their application to be heard when they had clearly submitted to the court's jurisdiction. Thereby, he said, the learned judge failed to consider whether they had waived their right to seek an order to stay the BVI claim and misapplied the principles as set out in **Addari v Addari**.

[34] According to Mr. Farara, notwithstanding that these respondents elected to proceed with their application under the inherent jurisdiction of the court, for which they invoked section 18 of the Supreme Court Act, the administration of the court's process in civil proceedings has been set out in the rules. They expressly provide the court's jurisdiction to stay or dismiss proceedings. Hence, he said, the court's inherent jurisdiction to stay proceedings where the forum is deemed inappropriate is circumscribed by the rules, which were made to regulate its procedure and the proper administration of justice. According to Mr. Farara, rule 9.7 of CPR 2000, which governs the procedure for disputing the court's exercise of jurisdiction, sets a limited period within which such a challenge may be raised. He contended that where a defendant does not make a stay application within the period for filing a defence, the defendant has submitted to the court's jurisdiction to try the claim and his right to challenge is waived. He referred to rule 9.7(5) of CPR 2000.

[35] In rationalizing the foregoing submissions, Mr. Farara stated that disputing the court's jurisdiction is such a serious challenge that it must be made at the earliest opportunity and not in circumstances where an applicant has already submitted to the jurisdiction of the court. He submitted that, moreover, Blinco and Patagonia had already completely and unreservedly submitted to the court's jurisdiction by applying for an extension of time to file their defence, by which they are presumed to have waived their right to challenge the jurisdiction. In addition to **Smay Investments** and **Robert Conrich**, he relied on **The Burns-Anderson Independent Network plc v Francis Henry Wheeler**;[14] **Brighton Marine Palace**

[14] [2005] 1 Lloyd's Law Rep. 580.

and Pier Limited v Woodhouse;[15] **Ives & Barker v Willians**[16] and **Chappel v North**.[17]

[36] I do not think that the critical question is whether Blinco and Patagonia had completely submitted to the court's jurisdiction by applying for an extension of time to file their defence or whether they are presumed to have waived their right to challenge the jurisdiction. Rather, I think that the question was whether they made the application to dispute jurisdiction out of time, and were thereby, in the words of rule 9.7(5)(b), to be treated as having accepted that the court has jurisdiction to try the claim.

Did Blinco and Patagonia accept jurisdiction?

[37] In order to determine this question, it is necessary to interpret the words "within the period for filing a defence" in the context of rule 9.7(5) of CPR 2000. Mr. Farara contended that the words mean that Blinco and Patagonia were required to file the forum challenge strictly within the time limited in rule 10.3 of CPR 2000. This rule states as follows:

"(1) The general rule is that the period for filing a defence is the period of 28 days after the date of service of the claim form.
(2) If a claim form is issued in one Member State, Territory or circuit and served in another, the period is 42 days after the date of service of the claim form.
(3) If permission has been given under rule 8.2 for a claim form to be served without a statement of claim, the period for filing a defence is the period of 28 days after the service of the statement of claim.
(4) If the defendant within the period set out in paragraph (1) (2) or (3) makes an application under any relevant legislation relating to arbitration to stay the claim on the grounds that there is a binding agreement to arbitrate, the period for filing a defence is extended to 14 days after the determination of that application.
(5) The parties may agree to extend the period for filing a defence specified in paragraph (1), (2), (3) or (4).
(6) The parties may not make more than two agreements under paragraph (5).
(7) The maximum total extension of time that may be agreed is 56 days.

[15] [1893] 2 Ch. 486.
[16] [1894] 1 Ch. 68.
[17] [1891] 2 QB 252, per Denman J at page 256.

(8) The defendant must file details of such an agreement.
(9) A defendant may apply for an order extending the time for filing a defence.
(10) The general rule is subject to -
(a) rule 5.17(4) (service of claim form on agent of overseas principal);
(b) rule 7.5(2) (service of claim form outside jurisdiction);
(c) rule 9.7 (procedure for disputing court's jurisdiction); and
(d) rule 59.4 (claims against the Crown)."

[38] The judge's order extended the time for filing the defence effectively to 27th September 2005. She held, in effect, that because her order had so extended the period for filing the defence, it enabled the filing of the forum challenge on 12th September 2005 to fall "within the period for filing a defence".

[39] In **Montrose Investments Ltd. v Orion Nominees and Another**[18] Sir Donald Rattee considered the same question in the context of the provisions of the rule 11(4)(a) of the English CPR, which was in almost identical terms to rule 9.7(3) of CPR 2000. Rule 11(4)(a) provided that an application to dispute the jurisdiction of the court must be made within the period for filing a defence as specified in rule 15.4 of the English CPR. Rule 15.4 of the English CPR was in similar terms to rule 10.3 of CPR 2000. In our own CPR 2000, after rule 9.7(3) states that the challenge must be made within the period for filing a defence it refers to rule 10.3 of CPR 2000 as the provision that sets out the period for filing the defence.

[40] In interpreting rule 11(4)(a) of the English CPR in the context of the English provisions, as they were then, Sir Donald affirmed that rule 15.4 conferred the right on parties, by agreement, to extend the time within which their defence should be filed under the general rules, and also permitted the court, on the application of a defendant, to extend that time within which the defence should be filed under the general rules. This is also the position, in my view, under rules 10.3(5)-(9) of our CPR 2000.

[18] [2001] C.P. Rep. 109; [2002] I.L.Pr. 21.

[41] Sir Donald then reasoned that the makers of the rules meant by their reference to the period for filing the defence under rule 11.4(a), "the relevant period ascertained in accordance with rule 15.4, which of course makes no reference to any possibility of extension." Sir Donald concluded that rule 11(4), with its reference to rule 15.4, did not contemplate an extension of the period ascertained in rule 15.4 for filing a defence as it related to the period within which a defendant must file an application to dispute the jurisdiction of the court. As he stated it, the effect of rule 11(4) was that an application to challenge jurisdiction had to be made within the period stipulated for serving a defence under rule 15.4. This, he said, must be done without regard to any extension of that period by agreement between the parties or by order of the court.[19]

[42] It is my view that the reasoning in **Montrose** is sound and that it is a reasonable interpretation of a provision that was not clear. It is not therefore surprising that in 2002, rule 11 of the English CPR was amended. As far as it is relevant, the English rule 11 now requires a defendant to file an acknowledgement of service within 14 days after the service of the claim form or within 14 days after the service of the statement of claim, if it is served after the service of the claim form. The defendant must state an intention to contest jurisdiction in the acknowledgement of service. The defendant is also required to file the application to dispute jurisdiction within 14 days after the filing of the acknowledgement of service. A defendant who does not apply to dispute jurisdiction within that time is taken to have submitted to the jurisdiction of the court.[20] In short, the revised English rule 11 now lends the measure of clarity from which our rule 9.7 could benefit.

[43] However, I am confirmed in the view that rule 9.7(3) of CPR 2000 must mean, by interpretation of the words "within the period for filing a defence", that the application by Blinco and Patagonia to dispute the jurisdiction of the BVI court to try the claim had to be made within the time limited under rule 10.3 for filing the

[19] See pages 8 and 9 of the West Law Report of the judgment.
[20] See in particular rules 11(2); 11(4)(a); 11(5)(b) and 11(9) of the English CPR.

defence when I note the provisions of rule 12.5(b) of CPR 2000. This rule, which relates to the conditions that are to be satisfied for the entry of default judgment for failure to defend, states that, at the request of a claimant, the court office must enter judgment for the claimant for failure to defend where "the period for filing a defence or any extension agreed by the parties or ordered by the court has expired".

[44] Noteworthily, rule 12.5(b) refers expressly to the period agreed between the parties for extension and that ordered by the court in addition to the period for filing the defence, while rule 9.7(3) refers only to the period for filing the defence. It makes it clear, in my view, that the framers intended the period for filing the application under rule 9.7(3) to be referable only to the period for filing the defence. On the other hand, they intended the period for entering judgment in default of defence to be referable not only to the period for filing the defence but also to any extension agreed by the parties or ordered by the court. *Expressio unius est exclusio alterius*.

[45] I therefore find that the words "within the period for filing a defence" in rule 9.7(3) required Blinco and Patagonia to file their forum application within the time stipulated under the general provision of rule 10.3 for filing their defence. It did not permit them to file the application, as they did, within the extended time within which the court ordered for filing the defence. The learned judge therefore erred when she held that their forum challenge application was properly filed within that extended period. Accordingly, I would allow Pacific's appeal on the procedural ground that the judge erred when she refused to dismiss the forum challenge application by Blinco and Patagonia because they made the application out of time. They were therefore, pursuant to rule 9.7(5)(b), to be treated as having accepted that the BVI court has jurisdiction to try the claim.

[46] In summary, Pacific's appeal against Texan and All Dragon is allowed because the learned judge erred in that she did not dismiss the application by which Texan and

All Dragon disputed the jurisdiction of the BVI court to try the claim, although they did not serve their affidavit in support with the notice of application. Pacific's appeal against Blinco and Patagonia is allowed on the ground that the judge erred when she refused to dismiss their application to dispute the jurisdiction of the BVI court to try the claim notwithstanding that the application was not made within the stipulated time. The result is that, pursuant to rule 9.7(5)(b), Texan, All Dragon, Blinco and Patagonia are to be treated as having accepted that the BVI court has jurisdiction to try Pacific's claim against them.

Order

[47] In the foregoing premises, I would allow the appeal by Pacific Electric Wire & Cable Company Limited against the decision of the High Court Judge which stayed the claim against the respondents, Texan Management Limited, All Dragon International Limited, Blinco Enterprises Limited and Patagonia Limited. I would therefore lift the stay, reinstate the claim and schedule the case for a directions hearing before a judge of the High Court as a matter of urgency. I would also order the respondents, Texan Management Limited, All Dragon International Limited, Blinco Enterprises Limited and Patagonia Limited, to pay the costs of the appellant in this court and in the court below, to be assessed if not agreed.

Hugh A. Rawlins
Justice of Appeal

I concur.

Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Ola-Mae Edwards
Justice of Appeal [Ag.]