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

CLAIM NO: BVIHCV 2010/0069

BETWEEN:

RONDEX FINANCE INC.

Claimants/Applicant

And

(1) MINISTRY OF FINANCE OF THE CZECH REPUBLIC
(2) CESKOSLOVENSKA OBSCHODNI BANKA A.S.

Defendants

Appearance: Ms Claire Robey for the Applicant/Claimant

JUDGMENT

[2011: 12, 13 May]

(Application for extension of time within which to serve claim form – CPR 8.13 – claim form issued on 1 April 2010 naming foreign prospective defendants – application to extend time made on 29 March 2011 – no application made for permission to serve out - whether claim form to be treated as having twelve month validity – whether claim statute barred when claim issued – whether claim statute barred when application to extend time made – whether special reason for extending time - CPR 8.13(4) considered – circumstances in which extension to be granted under CPR 8.13(4)(b) considered – **Bayat v Cecil** [2011] EWCA Civ 135 considered - whether good arguable case test to be applied on application under CPR 8.13)

[1] **Bannister J [ag]:** This is an application under CPR 8.13 for an extension of time for service of a claim form issued by the Claimant ('Rondex') on 1 April 2010. The claim is against the Ministry of Finance of the Czech Republic and a Czech bank, which is said to have acted as agent for the Czech Republic in the transaction complained of ('the Defendants'). The claim form is supported by a statement of claim, which pleads (put very shortly) that the Defendants are in breach of various warranties and representations given and made by them in an assignment in writing dated 7 April 2000 and purporting to assign to Rodex a debt of some US$13 million said to have been

due from the former Socialist Federal Republic of Yugoslavia to the former Socialist Federal Republic of Czechoslovakia ('the assignment'). The claim is for the full principal sum of US$13 million and some US$20 million of accrued interest.

[2] The assignment is expressed to be subject to Swiss law and the parties submitted irrevocably and unconditionally to the exclusive jurisdiction of the Swiss courts. Indeed, Rodex issued proceedings against the Defendants in Switzerland on 31 March 2010, the day before its claim form was issued here.

[3] The Swiss proceedings have, I am told, reached the point where a challenge by the Defendants to the jurisdiction of the Swiss Courts has been raised but, as I understand it, not yet determined. The evidence in support of this application to extend time for service is that the claim form was issued here, I quote, 'protectively, due to limitation issues.' Miss Robey, who has appeared for Rondex on this application, has told me on instructions that the relevant Swiss limitation period for the purposes of Rondex' claim is ten years. But in the absence in this jurisdiction (so far as I am aware) of an enactment equivalent to the UK Foreign Limitation Periods Act 1984, it would appear, subject to any question of fraud, concealment or mistake, that for the purposes of proceedings here Rondex' claims would be treated as having become statute barred in April 2006.[1] For the purposes of the present application, however, I am going to proceed on the footing that the ten year Swiss limitation period would be applied in any proceedings in the BVI.

[4] I am also going to proceed on the footing that the claim form in the present case had a 12 month life span, although it is by no means clear to me that, in the absence of any application for permission to serve out having been made within that period, it is properly to be so treated. This, however, was the approach taken by the English Court of Appeal on substantially identical provisions of the English CPR in **Bayat v Cecil**[2], to which Ms Robey very properly referred me in the course of her excellent submissions, and I propose to follow it in deciding the present application. On that basis, the application to extend the period within which the claim form may be served was made within time[3].

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[1] Dicey, Morris & Collins, The Conflict of Laws, 14th Ed at paragraph 7-047
[2] [2011] EWCA Civ 135 at paragraph [40]
[3] on 29 March 2011

[5] The relevant parts of CPR 8.13 provide as follows:

'Extension of time for serving a claim form

8.13(1) The claimant may apply for an order extending the period within which a claim form may be serve.

(2) The period by which the time for serving a claim form is extended may not be longer than 6 months on any one application.

(3) An application under paragraph (1) –

(a) must be made within the period

(i) for serving a claim form specified by rule 8.12; or
(ii) of any subsequent extension permitted by the court, and

(b) may be made without notice but must be supported by evidence on affidavit.

(4) The court may make an order under paragraph (1) only if it is satisfied that –

(a) the claimant has taken all reasonable steps to –

(i) trace the defendant; and
(ii) serve the claim form;

but has been unable to do so; or

(b) there is some other special reason for extending the period.

....

(6) No more than one extension may be allowed unless the court is satisfied that –

(a) the defendant is deliberately avoiding service; or
(b) there is some other compelling reason for so doing.'

[6] Ms Robey accepts she cannot rely upon CPR 8.13(4)(a), for the very obvious reason that Rondex has yet to obtain permission to serve the Defendants outside the jurisdiction. But she submits that she can rely upon CPR 8.13(4)(b), on the grounds that there is 'some other special reason for extending the period.' I pause to say that the words 'the period' in sub-rule (4)(b) must refer back to sub-rule (1) and be read as meaning 'the period within which the claim form may be served.'

[7] In making this submission Ms Robey relies upon her evidence that Rondex' primary position is that Switzerland is the appropriate forum for the resolution of the dispute and that (as I have mentioned above) the claim form was issued here protectively due to what are described as potential limitation issues. She further relies upon her evidence that in order to save time and costs Rondex does not intend to serve these proceedings upon the Defendants until the Swiss courts resolve the jurisdiction question. In the course of her submissions Ms Robey expanded upon this and explained that Rondex wished to avoid expenditure of time (including Court time) and costs upon (a) the making of an application for permission to serve out and (b) defending a possible challenge to such an order if granted, unless and until it has become clear that the Swiss courts (including, presumably, any appellate courts) decline to accept jurisdiction. As I understand it, therefore, Rondex' preferred outcome is that it will never be in a position where it needs to seek the permission of the Court to serve these proceedings on the Defendants and that it intends to do so only if the Defendants' jurisdictional challenges succeed in bringing an end to the Swiss proceedings. There is no evidence before me as to when that might happen, but I think it reasonable to assume that finality may very well not be reached on the Defendants' Swiss jurisdictional challenges until after the expiry of any initial six month extension, which would mean that Rondex would have to seek one or more further extensions, with the attendant need on each occasion to satisfy the provisions of CPR 8.13(6).

[8] There appears to be no reported authority in this jurisdiction on the true construction of CPR 8.13 and I therefore have to approach the question without any direct guidance. I think the first thing that strikes the reader is that the policy of the rule is that the Court should be frugal, if I may so put it, in the grant of extensions for time within which to serve claim forms. This is demonstrated, in my judgment, by the following matters:

(1) Unlike the corresponding English rule, CPR 8.13 permits applications for extensions to be made only within the time provided for by the rules (or by any previously granted extension);

(2) Unlike the corresponding English rule, no single extension may be granted for a period exceeding six months;

(3) Unlike the corresponding English rule, no more than one extension may be granted unless the Court is satisfied that the defendant is evading service or there is 'some other compelling reason for doing so';

(4) Unlike the corresponding English rule, which attaches no specific conditions or thresholds for the grant of an extension made within the currency of an existing period, CPR 8.13 restricts the grant of all initial extensions to cases falling within 8.13(4) (and the grant of any further extension to cases satisfying 8.13(6)).

[9] Against that background I go on to consider the construction of the particular provision in play on this application, sub-rule 8.13(4)(b), which must, of course, be read in the context of 8.13 as a whole. I start by observing that I have no power to make an order under 8.13(4) unless I am satisfied that the case falls within the sub-rule. I have, in other words, no general discretion of the sort conferred (in the case of 'within time' applications) upon the English courts by the English CPR.

[10] Ms Robey submits that sub-rule 8.13(4)(b) (which has no counterpart in the corresponding English rule) shows that our CPR envisage extensions being granted other than in the circumstances identified in sub-rule 4(a) which, she submits, are concerned with service difficulties. She is plainly right in submitting that sub-rule 4(a) is dealing with service difficulties and plainly right, also, in submitting that sub-rule 4(b) contemplates an extension being granted in cases other than cases of inability to effect service following the taking of reasonable steps to trace the defendant and serve him. The language of sub-rule 4(b) is perfectly general, but in context the special reason must, in my judgment, be a special reason for extending the time *within which the claim form may be served*. In other words, sub rule 4(b) is designed to permit the Court, where there is a special reason for doing so, to extend time *in order to enable the claimant to effect service*. In my judgment, the Court will only have a special reason for doing that if the claimant has previously

been precluded or refrained from effecting service in circumstances which make it unjust that he should not be granted an extension of time within which to effect service. It is not necessary for the purposes of this judgment to attempt to provide a list of potential 'other special reasons', but they might include, for example, a previous standstill agreement which the prospective defendant has repudiated at the last moment or the fact that what had been thought to have been good service within the initial period turns out, without fault on the part of the claimant, not to have been, so that the process needs to be repeated.

[11] What cannot, in my judgment, be a special reason for extending the time within which a claim form may be served is, as here, a unilateral decision on the part of a claimant not to comply with the rules, however admirable might be his motives. There can be no injustice in refusing an extension in such a case. If the Defendants had been unwilling to agree, following service, to defer the hearing of any challenge to the grant of permission to serve out until after the jurisdiction point had been resolved in the Swiss courts, then I accept that it might turn out that costs would have been wasted, but that is in the nature of the beast. What Rondex is really asking for in this application is not in truth an extension of time within which to effect service, but a prospectively indeterminate extension of the validity of the claim form. In my judgment, I have no power to grant such a thing and even if I had I would not regard the reason given by Rondex as a good - let alone special - reason for doing so.

[12] As I mentioned earlier, I was referred by Ms Robey to the English Court of Appeal authority of **Bayat v Cecil**[4]. That case establishes, or rather confirms, in the context of differently drafted rules, (a) that the good reason required for an extension of time under the English rules must (generally) be a difficulty in effecting service within time[5]; (b) that lack of funds are not a good reason for the grant of an extension of time[6]; (c) that it is not for a claimant unilaterally to decide to postpone service[7]; and (d) that if the grant of an extension would (in reality and effect) deprive the prospective defendant of a limitation defence which had accrued in the interval between issue and service of the claim form, no extension should be granted save in exceptional circumstances[8]. My

[4] (supra)
[5] paragraph [49]
[6] paragraph [51]
[7] paragraph [42]
[8] paragraph [55]

reasons given above are, I think, consistent with principles (a) and (b) and (c) which I have just summarized from **Bayat v Cecil**[9]. As for principle (d), if Swiss limitation law is as Ms Robey (on instructions) says it is and if it would be applied were the present proceedings to go to trial here (as I am prepared to assume), then permitting the proceedings to be served now would deprive the Defendants of (for practical purposes) a limitation defence which accrued within the twelve month period within which the claim form should have been served..

[13] Were this application being decided in England and under the English CPR, therefore, it would have failed. Although I draw comfort from the decision in **Bayat v Cecil**[10], I prefer to rest my conclusion on an analysis of our own CPR, which leads me for the reasons which I have given to the conclusion that this application must be dismissed.

[14] This application is accordingly dismissed.

Commercial Court Judge
13 May 2011

[9] (supra)
[10] (supra)