BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV2009/0451

OBM LIMITED

Claimant

-and-

LSJ LLC

Defendant

Appearances:

Mr. Paul Webster QC and Ms. Nadine Whyte of O'Neal Webster for the Claimant
Mrs. Tana'ania Small-Davis and Ms. Akilah Anderson of Farara Kerins for the Defendant

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2010: November 29
2011: June 03

Practice – Civil Procedure Rules 2000, r 7.3, r 7.7, r 9.7(1) – Application to set aside service outside of the jurisdiction – BVI company bringing action in BVI against a US client alleging breach of contract for architectural services – failure to pay invoices due – subject of contract a property in the USVI – whether contract made in BVI – whether breach occurred in BVI – whether realistic prospect of success or good cause of action - whether case a proper one for service out of jurisdiction – whether stay should be granted on basis of *forum non conveniens*

The claimant claims from the defendant the sum of US$133,174 as unpaid fees for architectural services provided to the defendant in respect of property situated in the United States Virgin Islands ("the USVI") pursuant to the terms of a written agreement between the claimant and the defendant entered into on or about 26 April 2005. The services were alleged to have been performed substantially at the claimant's offices in the British Virgin Islands ("the BVI"). Invoices were sent from the BVI to the defendant in the United States of America ("the USA"). The claimant alleged that the defendant made several promises to honour the invoices but has failed to do so.

As a result, on 18 December 2009, the claimant instituted a claim in this court. On the same day, it made an ex parte application to serve Claim Form and Statement of Claim out of the jurisdiction. On 25 March 2010, a judge granted the order to serve the defendant out of the jurisdiction. The grounds of the application were that (1) the defendant was in breach of contract; (2) the claimant had submitted invoices under the contract which had not been settled. As such, the claimant had a

good and substantial case against the defendant; (3) the relevant work and drawings done by the claimant were prepared in the BVI and the claimant is a BVI company.

The present application is to set aside the order of the judge made on 25 March 2010 and subsequently varied by the Master, permitting service of a Claim Form and Statement of Claim out of the jurisdiction in Delaware, United States. The defendant also seeks a declaration that the court has no jurisdiction over it. Alternatively, an order that the claim be stayed on the ground of forum non conveniens.

Held:

(1) In light of the express terms of the contract, which deemed the agreement to be valid upon execution by both parties, there was an express wavier of the need to communicate acceptance, and the contract was executed in the BVI by the later signature of Tim Peck on behalf of the claimant: Shelson Investments Ltd. v Durkovich 1984 CanLII 1232 (AB QB), at para 20 – 22 followed.

(2) There is no evidence that any of the defendant's obligations under the contract were to have been performed within this jurisdiction. Therefore there is no evidence that a breach of contract by the defendant occurred within this jurisdiction. Malik v Narodni Banka Ceskoslovenska [1946] 2 All ER 663 (CA), Johnson v Taylors Bros. [1920] AC 144 followed.

(3) The court declined to make an order to set aside service under CPR 7.7(2)(a) on the ground that the service out of jurisdiction was not permitted by the rules. Service out was permissible under CPR 7.3 (3)(a)(i) on the basis that the contract was made in this jurisdiction, though not on the basis of CPR 7.3 (3)(b) that there was a breach of contract in this jurisdiction. The criteria are disjunctive and the claimant need only establish one for the court to grant permission.

(4) The court declined to make an order to set aside service under CPR 7.7(2)(b). The facts pleaded at paragraphs 5-8 of the Statement of Claim are sufficient, if proved, to establish a cause of action and these paragraphs are referred to in the supporting affidavit by OBM's principal that the claim has a realistic prospect of success. Thus, on the evidence before the court, there is clearly a serious issue to be tried: Seaconsar Far East Ltd. v Bank Markazi Jomhhouri Islami Iran [1994] 1 AC 438 per Lord Goff at 451-452; Chemische Fabric vormals Sandoz v Badische Anilin und Soda Fabricks (1904) 90 LT 733, per Lord Davey at 735 applied.

(5) The court ordered that service be set aside under CPR 7.7(3) on the basis that the case is not the proper one for the court's jurisdiction. The defendant has discharged the burden of showing that there is a more appropriate natural forum where the matter may be more suitably tried in the interests of justice. The defendant has no connecting factors to this jurisdiction. The Agreement declares the proper law of the contract to be USVI law. The court is of the view that the jurisdiction of USVI is by far the more appropriate jurisdiction within which to bring this claim. There is no issue of the USVI jurisdiction being in some way deficient in providing access to justice: Amazing Global Technologies v Prudential

Trustee Company Limited St Kitts and Nevis HCVAP2008/008 (Rawlins JA, Gordon JA [Ag], Joseph-Olivetti JA [Ag]) Judgment 4th May 2009 and Pacific Electric Wire & Cable Company Limited v Texan Management Limited and ors BVIHCV 2005/0140 (Hariprashad-Charles J) Judgment 12 May 2006 applied.

JUDGMENT

Introduction

[1] HARIPRASHAD-CHARLES J: This is an application by LSJ to set aside an ex parte order made by Redhead J [Ag.] on 25 March 2010 and varied by Master Lanns on 14 July 2010 ("the ex parte order"), permitting service of a Claim Form and Statement of Claim out of the jurisdiction. Additionally, LSJ seeks a declaration that the court has no jurisdiction over LSJ. Alternatively, an order that the claim be stayed on the ground of forum non conveniens.

The parties

[2] OBM is a limited liability company incorporated under the laws of the British Virgin Islands ("the BVI") and was at all material times engaged in the business of offering architectural services.

[3] LSJ is a limited liability company incorporated under the laws of Delaware, United States of America ("the USA").

Procedural history

[4] On 18 December 2009, OBM initiated a claim in this court against Little St. James LLC to recover the sum of $133,174.56 as unpaid fees for architectural and design services allegedly rendered to Little St. James in respect of property situated on Little St. James Island, one of the satellite cays of the USVI, pursuant to a written agreement entered into by the parties on or about 26 April 2005 ("the contract").

[5] On the same date, OBM made an ex-parte application seeking leave to serve the Claim Form and Statement of Claim out of the jurisdiction pursuant to Rule 7.3 (3) of the Civil Procedure Rules (CPR 7.3 (3)). The grounds for the application were that:

1. OBM contends that LSJ stands in breach of a contract executed between the parties on 26 April 2005.

2. OBM duly submitted invoices under the contract which have not been settled. As such OBM has a good and substantial case against LSJ.

3. In the contract LSJ listed its address as 6100 Red Hook Qtr. Suite B3, St. Thomas, USVI 00802.

4. The relevant work and drawings done by OBM were prepared in the BVI and OBM is a BVI company. As such the matter is an appropriate matter for this court to deal with.

[6] The Notice of Application was supported by an affidavit deposed to by Willa Tavernier, an attorney and associate for the firm of O'Neal Webster.[1] The affidavit sought to justify service out of the jurisdiction on the basis that:

(a) The architectural services were all performed and completed in the BVI[2];

(b) The services offered by OBM were provided in the BVI and the contract was executed in the BVI, the most appropriate forum for the determination of the claim.[3]

[7] On 25 March 2010, Redhead J [Ag.] heard the application and granted the order sought.

[8] On 30 June 2010, OBM made an application to vary the order granting leave to serve out. The affidavit of Glenis Potts[4], in support of the application, deposed that attempts to serve Little St. James at the address given in the order had failed because Little St. James was not located at that address. It was the address of a shopping plaza. OBM caused company searches to be carried out to locate Little St. James. The searches revealed that Little St. James LLC was not registered to do business in the USVI. However, LSJ LLC, the name set out on the signature page of the contract, was a company registered in the State of Delaware, USA. Its registered agent was listed as the Corporation Trust Company and its

[1] See Tab. 10 of Hearing Bundle.
[2] Paragraph 5 of Tavernier's affidavit.
[3] See paragraph 6 of Tavernier's affidavit.
[4] Affidavit in support of ex-parte application to vary the order for leave to serve claim outside of jurisdiction (filed 30/6/10).

address as the Corporation Trust Center, 1209 Orange Street, Wilmington, Delaware, 19801.

[9] On 14 July 2010 Master Lanns granted the application to vary the ex parte order. This permitted service of the Claim Form and Statement of Claim, both of which had been amended to reflect LSJ's proper name, at the address in Delaware, USA.

[10] On 6 September 2010, LSJ acknowledged service. On 26 October 2010, LSJ made the present application. In the main, it seeks an order to set aside the exparte order and/or stay the proceedings on the ground of forum non conveniens.

Application to set aside ex parte order to serve out of jurisdiction

[11] LSJ claims that this is not a fit and proper case for the service of the proceedings out of the jurisdiction as OBM has not satisfied the requirements of CPR 7.3 (3) for the following reasons:

(a) The contract was not made in this jurisdiction;

(b) The claim is not in respect of a breach of contract committed in this jurisdiction;

(c) The claim relates to an alleged breach of an agreement which contains an express term in Article XIII that it is subject to the law of the USVI;

(d) The professional services to which the agreement relates are associated with real property in the USVI;

(e) Whereas OBM is company registered in the BVI, it also clearly offers its services within the USVI and has shown no justification for contradicting the clear intention of the parties to be subject to the laws of the USVI;

(f) LSJ has its registered office in the USA which clearly encompasses the USVI;

(g) Even if the court were to find that CPR 7.3(3) applies, the parties have made a choice of law and by their written contract, have agreed to submit any disputes to the laws of the USVI.

Applicable legal principles

[12] Permission to serve out of the jurisdiction is governed by CPR 7.3. Subsection (3) states:

Claims about contracts

"(3) A claim form may be served out of the jurisdiction if –

a) a claim is made in respect of a breach of contract committed within the jurisdiction;

b) a claim is made to enforce, rescind, dissolve or otherwise affect a contract or to obtain any other remedy in respect of a breach of contract and (in either case) the contract –

(i) contains a term to the effect that the court shall have jurisdiction to determine any claim in respect of the contract; or

(ii) is by its terms or by implication governed by the laws of any member State or Territory;

(iii) was made by or through an agent trading or residing within the jurisdiction;

(iv) was made within the jurisdiction;

c) the claim is for a declaration that no contract exists."

[13] CPR 7.5(1)(b) provides that an application for permission to serve out of the jurisdiction may be made without notice but must be supported by evidence on affidavit stating – that in the deponent's belief the claimant has a claim with a realistic prospect of success.

[14] CPR 7.7 (2) gives the court the discretionary power to set aside service of the claim form if-

(a) service out of the jurisdiction is not permitted by the rules; or

(b) the claimant does not have a good cause of action; or

(c) the case is not a proper one for the court's jurisdiction.

[15] The jurisdiction to subject a foreigner to the jurisdiction of the court has been described as extraordinary and should only be exercised with great care. In The Hagen[5] the court noted that:

"[I]f on the construction of any of the sub-heads … there was any doubt, it ought to be resolved in favour of the foreigner; and … in as much as the application is

[5] **The Hagen** [1908] P 189 at page 201 –per Farwell L.J.

made *ex parte*, full and fair disclosure is necessary, as in all *ex parte* applications, and a failure to make such full and fair disclosure would justify the court in discharging the order, even although the party might afterwards be in a position to make another application."

[16] The Caribbean Civil Court Practice[6] states that "permission is always required for service of a claim form out of the jurisdiction. The claim must satisfy the criteria set out in the rule. There is no general discretion reposed in the court to grant permission outside those grounds.[7] In addition, a party does not have an absolute right to permission.[8] The rule in each jurisdiction contains the words "… a claim form *may* be served out of the jurisdiction with the permission of the court…" (or words to that effect). The court is always master of its own procedure.

[17] The principles underlying the exercise of this discretion (subject to reinforcement by the overriding objective) reflect those formerly applied under the English Rules of the Supreme Court. Those principles are that:

1. it is a fit and proper case for the service of the proceedings out of the jurisdiction (for example, because of the strength and nature of the case disclosed);

2. the local courts are the appropriate place (the "forum conveniens") for the trial of the action.

[18] Accordingly, an order granting permission to serve proceedings on a party outside of the jurisdiction may be set-aside in three circumstances. First, an order granting permission to serve out must be set aside in any case where upon further consideration of the matter it becomes clear that none of the criteria in CPR 7.3(3) are met. If none of the conditions which entitle the court to exercise its discretion to permit service out exist the order must of necessity fall away: see Rybolovleva v Rybolovleva and ors[9] and Krassimir Petrov Guergov v Deyana Demitriova Marcheva and ors.[10]

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[6] Caribbean Civil Court Practice, Note 5.2.
[7] *ibid.*
[8] Caribbean Civil Practice, Note 5.4.
[9] Elena Rybolovleva v Dmitri Rybolovleva, Xitrans Finance, Ringham Investment Finance SA, Treehouse Capital Inc BVIHCV2008/0403 (Bannister J [Ag]), Judgment 9th June 2009.
[10] Krassimir Petrov Guergov v Deyana DemitriovaMarcheva, Equip Limited, Wissington Liminted and SMP Partners Limited BVIHC(COM) 2010/0047 (Bannister J[Ag]) Judgment 8th June 2010.

[19] The second and third grounds are discretionary. An order to serve out of the jurisdiction may be set aside where the court upon consideration of all the evidence at an inter-partes hearing determines either:

1. The case was not a fit and proper case for service of proceedings outside of jurisdiction for example, because of the strength and nature of the case disclosed. In Rybolovleva and Krassimir Petrov Guergov at the inter-partes hearings, it was disclosed that there was no real issue to be tried between the claimant and the defendants present within the jurisdiction, sufficient to warrant service of proceedings upon the defendant outside of the jurisdiction or;

2. The local courts are not the appropriate place (the "forum conveniens") for the trial of the action where the action could most suitably be tried in the interests of all the parties and for the ends of justice. See: David Hague and PWHC v Nam Tai Electronics Inc.,[11] and Amazing Global Technologies v Prudential Trustee Company Limited.[12]

[20] Even if the court sets aside the order granting permission to effect service out of jurisdiction, arguably, the court may retain a discretion whether or not to set aside any service effected under the now defunct order: Trans-World Metals SA (Bahamas) and ors v Bluzwed Metals Limited (BVI) and ors.[13]

[21] Again, the Caribbean Civil Court Practice[14] notes that in an application to set aside service, the burden of establishing that there is a more appropriate place for trial rests on the defendant but once he establishes that there is another place for trial which is apparently appropriate then the burden passes to the claimant to show that there are

[11] BVI Civ App No. 2004/0020, 2005/0010 (CA) Judgment 16 January 2006.
[12] St Kitts and Nevis HCVAP2008/008 (CA) Judgment 4th May 2009.
[13] BVIHCV2003/0179 (Barrow J [Ag]) Judgment 22 March 2005; *cf* **Michael James v Tasman Gaming Inc.,** Antigua & Barbuda Civil App No. 6 of 2006 (Rawlins JA), Judgment 8 February 2007.
[14] Note 5.4.

special circumstances by reason of which justice requires that the trial should nevertheless take place in this country: Spiliada Maritime Corp v Cansulex Ltd.[15]

The issues

[22] The issues which arises for determination are:

1. Whether the contract was made in this jurisdiction?
2. Whether OBM has a good cause of action?
3. Was a breach of contract committed within this jurisdiction?
4. If so, whether the claim is otherwise a proper one for jurisdiction under CPR 7.3?
5. If so, whether the claim ought to be stayed on the basis of forum non conveniens?

Was contract made in the BVI?

[23] Mrs. Small-Davis, who appeared as Counsel for LSJ, asserted that the contract which was sent by OBM constituted the offer and that acceptance was constituted by LSJ's execution of the contract in the USA. Thus, she says, the contract was made in the USA.

[24] On the other hand, Learned Queen's Counsel, Mr. Webster who appeared for OBM insisted that the contract was executed in the BVI.

[25] Mrs. Small-Davis submitted that the contract was signed in counterparts, with LSJ signing in the USA and OBM signing in the BVI. According to her, the common law principle is that where the parties are in different locations, the offer is accepted in the location from which the acceptance is dispatched; that is called "the postal rule." She submitted that in the present case, the acceptance is constituted by LSJ's execution of the contract, which was sent by OBM (the offer) in the USA.

[26] She further submitted that there is no clear evidence before the court in respect of exactly how the counter-parts of this contract were exchanged, whether by post, express courier, fax, or email.

[15] [1987] AC 460, per Lord Goff at p. 476.

[27] Generally, acceptance must be communicated to the offeror, and acceptance is communicated when it is brought to the notice of the offeror.[16] There are some well-known exceptions to the general rule. Among them, express waiver of the requirement to communicate acceptance, and the postal rule discussed by Denning LJ [as he then was] in Entores, Ltd. v Miles Far East Corporation[17]

> "When a contract is made by post it is clear law throughout the common law countries that the acceptance is complete as soon as the letter of acceptance is put into the post box, and that is the place where the contract is made. But there is no clear rule about contracts made by telephone or by Telex. Communications by these means are virtually instantaneous and stand on a different footing."

[28] At page 345, Denning LJ continued:

> "My conclusion is that the rule about instantaneous communications between the parties is different from the rule about the post. The contract is only complete when the acceptance is received by the offeror: and the contract is made at the place where the acceptance is received."

[29] Mr. Webster QC submitted that when OBM sent the offer to LSJ in the USA, LSJ made a number of substantial changes to the document which OBM provided. He said that these were of such significance that the document which LSJ signed, and, which was returned to OBM, constituted a counter-offer, which was accepted by OBM's signature in the BVI.

[30] Alternatively, submitted Mr. Webster, OBM has not disputed that the contract was signed in counter-parts. But more importantly, he said that Mr. Epstein signed on behalf of LSJ in New York on 22 April 2005 while Mr. Peck signed on behalf of OBM on 25 April 2005. Clause 4 of Article III states that the contract will be valid upon execution by both parties. It was at the time when Mr. Peck signed that the contract was made and this was in the BVI.

[31] In Shelson Investments Ltd. v Durkovich[18] the offer contained the words, "…this document to constitute an agreement of purchase and sale forthwith upon being signed by both parties…" The plaintiff asserted that there was no contract between the parties

[16] Chitty on Contracts Vol. 1 (1983), para. 64.
[17] [1955] 2 QB 327, [1955] 2 All ER 493 at pages 493, 495.
[18] **Shelson Investments Ltd. v Durkovich** 1984 CanLII 1232 (AB QB), at para 20 - 22.

because the defendant failed to communicate his acceptance of the plaintiff's counter-offer. The Alberta Court of Queen's Bench noted that among the well-established exceptions to the general rule, are situations where the offeror by the terms of the offer expressly or impliedly waives the necessity for communication of acceptance. It was held that the use of such wording constitutes a waiver by the offeror of the necessity for communicating acceptance.

[32] Attractive though Mrs. Small-Davis' submissions are, I find Mr. Webster's arguments to be more persuasive specifically in light of the express terms of the contract which stipulated that the contract will be valid upon execution by both parties. I therefore find that there was an express wavier of the need to communicate acceptance, and the contract was executed in the BVI by the later signature of Mr. Peck on 26 April 2005.

Good cause of action

[33] CPR 7.3 merely provides the circumstances under which the court can grant leave to serve process outside of the jurisdiction. But a claimant is not entitled to leave simply because the claim falls within the rules. The jurisdiction is discretionary and must be exercised upon proper grounds.[19]

[34] Mr. Webster QC submitted that OBM provided the architectural and design services as contemplated by the contract and LSJ has refused, neglected or refused to pay the sum of $133,174.56 due and owing under the invoices that were issued by OBM. This, he says, is a clear breach of contract. He said that the invoices that the claim is grounded on were not exhibited to the Statement of Claim but they were sent to LSJ in the normal course of business, and to Farara Kerrins, the legal practitioner for LSJ on 5 October 2010. Copies were handed to the court during the hearing.

[35] Learned Queen's Counsel pointed out that LSJ has the invoices in its possession but has not demonstrated that it has any possible defence to the claim. Notwithstanding demand, LSJ has failed, neglected or refused to pay OBM for work done under the contract and for

[19] **Société Générale de Paris v Dreyfus Brothers** (1887) 37 Ch D 215; [1886 - 90] All ER Rep 206, per Lindley LJ.

those invoices which LSJ did not challenge. According to Mr. Webster QC, LSJ's representatives and agents at all material times made several promises and representations that payment would be forthcoming.[20]

[36] Mrs. Small-Davis submitted[21] that OBM made no effort to establish the basis for the bald statement at paragraph 9 of Ms. Tavernier's affidavit that "I also verily believe that the claim has a realistic prospect of success…." Learned Counsel further submitted that even though the application was made ex parte, there was no effort to meet any of the standard and appropriate disclosure to the court, including what is known of LSJ's position in defence.

[37] Learned Counsel next submitted that as set out in Mr. Indyke's affidavit, LSJ disputes the invoices and challenges whether (a) OBM has performed the contract at all, in that no progress was made on the schematic design, which by the contract was to be in collaboration with LSJ or (b) the agreed milestones have been achieved which would give rise to invoices being issued. She also said that OBM has not produced any evidence of approvals given by LSJ for any of the work that it claimed was performed and billing milestones being reached. LSJ asserts that there is none. That evidence cannot be contradicted.

[38] According to Mrs. Small-Davis, OBM's attempts to sue and collect on its invoices are entirely without merit, in that the work for which OBM was engaged has not been performed at the appropriate level of professional standards, if at all. The contract provided for payment only upon reaching certain milestones. None of the milestones required for the payments to be due was ever reached. In fact, none of the project materials submitted to LSJ had been approved, and the milestone for each aspect of the project was an "iterative process" which required LSJ's acceptance and approval.[22]

[20] Amended Statement of Claim, June 30, 2010, para. 8.
[21] Respondent's submission bundle, Tab 1, at para.17 – 20.
[22] Affidavit of Darren K Indyke (general counsel to the respondent), 12/4/10, para. 11.

[39] Learned Counsel maintained that OBM has no realistic prospect of success given that the whole of the process and relationship between the parties was fundamentally grounded on a process of consultation and successive plans and drawings, each building on the last to fine-tune and progress towards an expression of LSJ's vision for the design and construction of the works.

[40] Looking at the exhibits which are attached to the Amended Statement of Claim, OBM has submitted invoices numbered 000020051709 in the sum of $11,340.07 for office extension work, 00020051637 in the sum of $121,834.49 for guest house work and invoice numbered 000020051638 in the sum of $23,027.09 for arrivals area work. These invoices were all submitted once the relevant billing milestones had been reached. Mr. Epstein had an issue with invoice 000020051638 for $23,027.09 for arrivals area work and OBM withdrew this invoice. There were no other complaints or issues raised with any of the other invoices during the contractually agreed period whether orally or in writing and the invoices all remain due and owing at this time.

[41] Then, Article IV of the contact[23] states 'Owner shall notify OBM in writing on any disputed amount within 30 calendar days after receipt of invoice, otherwise all invoice charges will be considered acceptable and correct. ... In the event of a disputed or contested billing, only that portion so contested may be withheld from payment, and undisputed portion will be paid.'

[42] Mr. Webster submitted that OBM has set out a good cause of action – the question for trial is if LSJ can extricate itself from the clear meaning of Article IV of the contract. I agree with this submission.

[43] Now, CPR 7.5 requires the applicant for leave to serve out to establish on affidavit that the claim has a realistic prospect of success. CPR 7.7(2)(b) provides that the court may set aside service under this rule if - the claimant does not have a good cause of action. In my view, this simply requires the court to ascertain whether there is a serious question to be

[23] Hearing Bundle, Tab 3.

tried between the parties. In other words, that the claim is not merely frivolous or vexatious.[24]

[44] Where a party is required to show a "realistic prospect of success" or what was once called having "a good arguable case" or is also referred to as a "serious issue to be tried between the parties",[25] it means more than simply stating that the party believes they have a realistic prospect of success. The deponent's affidavit must state facts, which if proved would be sufficient to establish the cause of action.[26] The affidavit should refer to the particulars of the injury pleaded in the statement of claim. The duty of the court at this stage is not to try the issue on the merits but to "look into the circumstances of the case to see whether or not there is any sufficient justification to authorize the court to allow service out of jurisdiction.[27]

[45] In my considered opinion, the facts pleaded at paragraphs 5 - 8 of the Statement of Claim are sufficient, if proved, to establish a cause of action – entitle OBM to obtain a remedy. These paragraphs are referred to by OBM when stating in its affidavit that it has a realistic prospect of success. Therefore, on the affidavit evidence, there is clearly a serious issue to be tried. The court is not called upon to try the merits of the claim and LSJ's assertions challenging whether the requisite milestones were reached do not, in any way, take away from the fact that if OBM can establish the facts alleged within the contractual background it would be entitled to the remedy sought from LSJ. Further LSJ has not provided any evidence that payment on those invoices is wrongfully sought by exhibiting any correspondence disputing the payment of those invoices within the contractually stipulated time.

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[24] **Société Générale de Paris v Dreyfus Brothers** (1885) S 385; **Seaconsar Far East Ltd v Bank Markazi Jonhouri Islami Iran** ("Seaconsar") [1994] 1 AC 438.
[25] **Seaconsar Far East Ltd. v Bank Markazi Jomhhouri Islami Iran** [1993] 3 WLR 756.
[26] **Seaconsar** [1994] 1 AC 438 per Lord Goff at 451-452. **Chemische Fabric vormals Sandoz v Badische Anilin und Soda Fabricks** (1904) 90 LT 733, per Lord Davey at 735; "A cause of action is the group of facts, or a 'factual situation' which if proven, will entitle a claimant to obtain a remedy from the Court against another person" **Letang v Cooper** [1965] 1 QB 232, per Lord Diplock 242-3.
[27] **Société Générale de Paris v Dreyfus Brothers** [1885] S. 385, per Pearson J at 387.

[46] In the words of Pearson J, there is "so much of substance apparent on the face of it that this court cannot say that it is either frivolous or vexatious."[28]

[47] I therefore find that OBM has a good cause of action for breach of contract.

Was there a breach of contract within the jurisdiction?

[48] OBM's case is that the services contemplated by the contract were substantially performed in the BVI. Mr. Webster explained that the architectural and design services involved doing drawings and designs in the BVI for the property in the USVI. A representative from OBM visited the property in the USVI on a few occasions but most, if not all, of the architectural work and designs were done in the offices of OBM in the BVI. In his affidavit, Mr. Steve Fox estimated that 80% of the work was done at OBM's Office in Tortola. Invoices were prepared in the BVI and sent to LSJ. LSJ has not paid the invoices notwithstanding several requests by OBM and promises to pay by Mr. Epstein.

[49] LSJ submitted[29] that this claim is not in respect of a breach of contract committed within this jurisdiction. The breach relied upon is the failure to pay the invoices. These invoices were sent to LSJ at an address in the USA.

[50] Where the breach consists of a failure to perform a contractual obligation, in this case, asserted to be payment for services rendered, it is necessary to find the place where performance should have taken place. LSJ's performance of its side of the contract would clearly not take place within the BVI. Payment would have been effected in the USA; therefore any failure to honour payment of the invoices would have originated in the USA: Johnson v Taylors Bros.[30]

[51] It is well established that the court may grant permission to serve a claim form out of the jurisdiction where the claim is brought in respect of a breach committed within the jurisdiction wherever the contract was made. A common breach of contract within the jurisdiction is the failure to pay money due to a creditor who resides or carries on business

[28] Société Générale de Paris v. Dreyfus Brothers [1885] S. 385.
[29] See Respondent's Submissions Bundle at TAB 1, para. 16(b).
[30] [1920] AC 144.

within the jurisdiction, since the general rule is, subject to an express or implied provision in the contract as to the place of payment, that it is the duty of the debtor to seek out the creditor at his residence or place of business and there to pay him the debt due: Malik v Narodni Banka Ceskoslovenska.[31]

[52] Where however, there is no obligation which has to be performed within the jurisdiction, there can be no breach within the jurisdiction for the purposes of this rule."[32]

[53] Article IV of the contract - Method of Payment – notes that OBM will invoice for all services rendered and full payment shall be made within 21 calendar days after receipt of the invoice. The invoice will provide wire transfer information.

[54] Thus, the contract itself does not stipulate where payment is to be made. Neither do the copies of the invoices provided to the court include any information on where payment is to be made. Nor, as LSJ correctly pointed out, has OBM sought to assert that there was a breach of contract in this jurisdiction by LSJ's failure to make payment within this jurisdiction. OBM merely argued that a substantial part of its performance took place within the BVI.

[55] According to Mr. Webster QC, the sole question which arises is whether there was a breach of contract by LSJ in failing, neglecting or refusing to pay the invoices sent to it by OBM for work done under the contract. However, that goes to whether there is a good cause of action, not whether there were criteria to enable the court to grant an order for service out.

[56] OBM has not shown that any of LSJ's obligations under the contract were to be performed within this jurisdiction. In particular, there is no evidence that OBM had previously or in the future expected to receive payments from LSJ into any BVI bank account.

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[31] [1946] 2 All ER 663, CA; See cases cited at Caribbean Civil Court Practice, Note 5.14.

[32] See: **Rein v Stein** [1892] 1QB 753, CA; **Cuban Atlantic Sugar Sales Corpn v Compania de Vapores San Elefterio Ltda** [1960] 1 All ER 141, CA.

[57] Accordingly, I find that service out was permissible under CPR 7.3(3)(a)(i) on the basis that the contract was made in this jurisdiction although not on the basis of CPR7.3(3)(b) that there was a breach of contract in this jurisdiction. The criteria are disjunctive, however. OBM need only establish one for the court to grant permission. Since, service out of jurisdiction was permitted by the rules, an order to set aside service cannot be made under CPR 7.7(2)(a). Nor, since OBM has a good cause of action, can it be made under CPR 7.7(2)(b).

Exercise of the discretion under CPR 7.3

[58] Mr. Webster QC asserted that OBM needs only to satisfy one of the requirements under CPR 7.3 to establish a valid claim for service out of jurisdiction. On the other hand, Mrs. Small Davis submitted that regardless of the existence of any one of the stipulated grounds, the court's jurisdiction is discretionary, not mandatory. She further submitted that even if facts exist which entitle the court to exercise jurisdiction, it is incumbent upon OBM to show why extra-territorial jurisdiction is required.

[59] OBM maintained that the BVI is the appropriate place for the trial of this claim. OBM asserted that: (i) the contract was executed in the BVI; (ii) the architectural work done by OBM was done in the BVI; and (iii) OBM submitted invoices to LSJ that remained unpaid. In addition, OBM's witnesses live and work in the BVI and LSJ cannot be located at the address given in the contract.

[60] To reiterate, CPR 7.3 governs service of process out of the jurisdiction in specified proceedings and is in permissive not mandatory terms. As stated in The Caribbean Civil Court Practice at page 95:

> "The principles underlying the exercise of this discretion (subject to reinforcement by the overriding objective) reflect those formerly applied under the ENG RSC. Those principles are that:
>
> (1) it is a fit and proper case for service of the proceedings out of the jurisdiction (for example, because of the strength and nature of the case disclosed);

(2) the local courts are the appropriate place (the "forum conveniens") for the trial of the action."

[61] In Amazing Global [supra], Gordon J.A. [Ag.] stated the following (at para. 24 of the judgment):

> "Any discussion of forum conveniens inevitably starts with a consideration of Spiliada Maritime Corporation v Cansulex Ltd[6], the locus classicus on forum issues. Lord Goff of Chieveley, who delivered the principal opinion, said the following in respect of what he described as the fundamental principle:
>
> > "It is proper therefore to regard the classic statement of Lord Kinnear in *Sim v Robinow (1892) 19 R. 665* as expressing the principle now applicable in both jurisdictions [English and Scots]. He said at page 668: 'the plea can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice.'"

[62] At paragraph 25, Gordon J.A. [Ag.] continued:

> In Cherney v Deripaska[8], a case deriving from the English High Court, Christopher Clarke J said the following, in like vein:
>
> > "…I return to the central question: whether Mr. Cherney has shown that *England* [read Nevis] *is the proper place in which to bring the claim*. In the *Spiliada* [1987] AC 460 Lord Goff approved and applied Lord Kinnear's famous dictum in *Sim v Robinow* [1892] 19 R 665, that the task of the court, both in an application for permission to serve out and in a stay application, is to identify the forum in which the case can suitably be tried for the interests of all the parties and the ends of justice. In a service out case the first stage is for the claimant to show that England [read Nevis] is clearly the more appropriate forum for the trial than any other available foreign forum and, hence, the "natural" forum. Even if England is not the natural forum, the claimant may establish – the second stage – that substantial justice will or may not be done in the natural forum so that justice requires that the case be tried in England."

[63] Then, Lord Templeman in The Spiliada had this to say (at page 465):

> "Where the plaintiff can only commence his action with leave, the court, applying the doctrine of forum conveniens will only grant leave if the plaintiff satisfies the

> court that England is the most appropriate forum to try the action. But whatever reasons may be advanced in favour of a foreign forum, the plaintiff will be allowed to pursue an action which the English court has jurisdiction to entertain if it would be unjust to the plaintiff to confine him to remedies elsewhere."

[64] Now, one of the basic principles derived from The Spiliada is that in an application for permission to serve out, the court must identify the forum in which the case can be suitably tried in the interests of all the parties and the ends of justice, that is, it must determine whether the local court is the more appropriate or "natural" forum for the trial than any other available foreign forum. If however the court is of the view that substantial justice will not, or may not, be done in the natural forum, it may hold that justice requires that the case be tried in the foreign forum.

[65] In the present case, the issue of forum non conveniens arises both under the service out application under CPR 7.7 and on LSJ's dispute to the court's jurisdiction under CPR 9.7(1) (a) and (b). In this regard, on the service out of jurisdiction challenge, it is for OBM to show that the BVI is clearly the more appropriate forum for the trial than any other available forum. On the forum challenge, it is for LSJ to show that there is some other clearly more appropriate forum.

[66] The criteria which govern the application of forum conveniens in service out applications are set out in the speech of Lord Goff in The Spiliada at pages 478 – 482. They can be summarized as follows:

1. The burden is upon the claimant to persuade the court that England is clearly the appropriate forum for the trial of the action.

2. The appropriate forum is that forum where the action could most suitably be tried in the interests of all parties and for the ends of justice.

3. One must consider first what is the "natural forum" that with which the action has the most real and substantial connection. In this regard, the court will be mindful of the availability of witnesses, the law governing the transactions and the places where the parties reside and carry on business. The list of factors is by no means meant to be exhaustive but rather indicative of the kinds of consideration a court should have in exercising its discretion.

4. In considering where the case could most suitably be tried in the interest of all parties and for the ends of justice, the test includes consideration of matters such as (a) the efficiency, expedition and economy of bringing the action; (b) the availability of legal aid; (c) the level of damages recoverable in different jurisdictions; (d) the availability and level of interest on damages and (e) the fact that an action may be statute-barred in this or another jurisdiction. See: The Spiliada, Lord Goff at p. 474.

5. If the court determines at this stage that there is some other available and prima facie more appropriate forum than England then ordinarily it will refuse permission unless there are circumstances by reason of which justice requires that permission should nevertheless not be granted. In this inquiry, the court will consider all the circumstances of the case including whether the claimant will not obtain justice in the foreign jurisdiction. Lord Diplock in The Abidin Daver[33] made it clear that the burden of proof to establish such a circumstance was on the claimant and that cogent and objective evidence is a requirement.

6. Where a party seeking to establish the existence of a matter that will assist him in persuading the court to exercise its discretion in his favour, the evidential burden in respect of that matter will rest upon the party asserting it.

[67] Considerations in favour of granting permission include the unavailability of the remedy sought in the defendant's home court: Petroleo Brasiliero SA v Mellitus Shipping Inc.[34]

[68] The burden is on OBM to establish by cogent evidence that the BVI is the appropriate forum or that another forum is not available. There was no such evidence before the court when OBM made the ex parte application seeking permission to serve out of the jurisdiction. There is no transcript of the proceedings of what took place before Redhead J. [Ag.] on 25 March 2010 so I am unable to say whether the learned judge gave oral reasons for his decision. What I can say is that there are no written reasons for doing so. Before me, OBM had adduced no more evidence.

[69] In his submissions, Learned Queen's Counsel Mr. Webster was very compelling in his attempt to persuade me that the BVI is the appropriate forum to try this action as (1) OBM is a BVI Company and LSJ would suffer no prejudice by defending the claim here as it is not domiciled in the USVI; (2) LSJ does not have a place of business in the USVI; (3) even though Article XIII of the contract states that the contract shall be governed by the laws of

[33] [1984] A.C. 398.
[34] [2001] 1 All ER (Comm) 993.

the USVI, this is a choice of law clause and not an exclusive jurisdiction clause; (4) OBM has a good cause of action in the BVI.

[70] I agree with Mrs. Small-Davis that the burden was on OBM to persuade the court that the BVI is the more appropriate or "natural" forum for the trial of this action than the USVI. I am afraid that it has no discharged that burden. It is well established that in an application to serve out, the court must identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice.

[71] Having made this finding that OBM has not satisfied the court that the BVI was a more appropriate forum for the trial of this action, this is sufficient for me to dispose of the application, however, in the event that this matter goes further and because the parties have fully argued the forum non conveniens challenge, I shall press on.

Forum non conveniens

[72] LSJ maintained that the matter ought not to be heard in the BVI for the following reasons namely that: (a) there is another forum that is more appropriate and available that also has competent jurisdiction in which the case may be more suitably tried; and (b) it is desirable to do so in the interest of justice.

[73] LSJ contended that the USVI is the appropriate place to try this claim because there are more connecting factors with that jurisdiction under the principles set out in The Spiliada and reiterated by our Court of Appeal in IPOC International Growth Fund Limited v LV Finance Group Limited and others.[35] The starting point is that a stay on the grounds of forum non conveniens will only be granted where the court is satisfied that there is some other available forum, having competent jurisdiction, in which the case may be tried more suitably for the interests of all of the parties and for the ends of justice.

[74] Thus, the burden of proof is on LSJ to persuade the court to exercise its jurisdiction in favour of a stay. LSJ is not merely to show that this court is not the natural forum for the

[35] BVI Civil Appeals Nos. 20 of 2003 and 1of 2004 –unreported –Judgment delivered on 19 September 2005. See also Privy Council Appeal No. 0018 of 2009 –**Texan Management Limited et al v Pacific Electric Wire & Cable Company Limited** (British Virgin Islands), per Lord Collins of Mapesbury.

trial of the action. It must also establish that the USVI is clearly or distinctly more appropriate than this forum. In considering that question, the court will look first to see what factors there are which point in the direction of another forum, i.e. connecting factors which indicate that it is with the other forum that the action has its most real and substantial connection. In this regard, the court will be mindful of the availability of witnesses, the likely languages that they speak, the law governing the transactions and the place where the parties reside and carry on business. This is the first stage.

[75] Even at this stage, if the court concludes that the other forum is clearly more appropriate for the trial of the action, the court may nevertheless decline to grant a stay if persuaded by the claimant, on whom the burden of proof then lies, that justice requires that a stay should not be granted. This is the second stage.

[76] If the court determines that there is some other available and prima facie more appropriate forum then ordinarily, it will grant a stay unless there are circumstances by reason of which justice requires that a stay should not be granted. In that inquiry, the court will consider all the circumstances of the case, including circumstances which transcend those taken into account when considering connecting factors with other jurisdictions.

[77] A stay will not be refused simply because a claimant will be deprived of "a legitimate personal or juridical advantage" provided the court is satisfied that substantive justice will be done in the available forum.

Connecting Factors

The Governing Law of the contract

[78] Mr. Webster QC submitted that although Article XIII of the contract provides that "Unless otherwise stated, this Agreement shall be governed by the laws of the United States Virgin Islands," this is a choice of law clause and not an exclusive jurisdiction clause.

[79] In any event, he submitted, that where there are competing fora and the legal issues are simple, as in this case, then the governing law will be a factor of little significance in the

context of the case as a whole.[36] He further submitted that in this case, the importance of USVI law has no real significance. Learned Queen's Counsel referred to Imanagement v Cukurova Holdings[37] and Marconi Communications International Ltd. V PT Indonesian Bank Ltd TBK[38]. In the later case, Potter LJ stated:

> "In deciding issues raised before the court which are asserted to be governed by foreign law, the court proceeds upon the basis that such law is to the same effect as English law unless material is provided which demonstrates the contrary. Mere assertion is insufficient unless it is supported by credible evidence as to foreign law. This is a necessary rule if proceedings are not stultified or unduly delayed, particularly in the interlocutory stages, in any case where the answer to a claim with a foreign element is clear so far as English law is concerned."

[80] Mr. Webster QC submitted that this is a debt collection case and the legal issues raised in the claim are straightforward. The sole issue is whether there was a breach of contract by LSJ in failing, neglecting or refusing to pay invoices sent to it by OBM for works done in the contract.

[81] Learned Queen's Counsel submitted that in The Spiliada, Lord Goff said that the governing law may be of little importance as seen in the context of the case as a whole. He submitted that the governing law is therefore not decisive as the court had to conduct a balancing exercise by considering all the factors and give to each factor the weight it deserves.

[82] Notwithstanding the very powerful arguments advanced by Mr. Webster QC, when pressed for an interpretation of Article XIII and under what circumstances that Article will arise for consideration, he was unable to assist the court on the purpose of that Article.

[83] Article XIII of the contract is significant. The parties agreed that "this Agreement shall be governed by the laws of the United States Virgin Islands." This is a choice of law clause. Undoubtedly, the parties gave consideration to the choice of law that would govern the

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[36] **Imanagement v Cukurova Holdings** HCVAP 2007 / 0025, Judgment 6th October 2008; **Marconi Communications International Ltd v PT Pan Indonesian Bank Ltd TBK** [2005] EWCA Civ 422, para. 70; **Spiliada v Cansulex** [1987] AC 460.
[37] HCVAP2007/025 –Judgment delivered on 6 October 2008.
[38] [2005] EWCA Civ 422 at paragraph 70.

contract and agreed that it would be the laws of the USVI. As Mrs. Small-Davis correctly submitted, the fundamental principle of conflict of laws is that the intention of the parties is the general test as to what is the proper law of the contract. The court's duty is to ascertain what that intention is and give effect to it.

[84] It is well established that if the governing law is not that of the court hearing the forum challenge, then it has to determine whether it can decide questions of foreign law on receiving expert evidence or whether it is best for the foreign court to hear the claim. Brandon J [as he then was] in the The Eleftheria.[39] at page 246 had this to say:

> "I recognize that an English Court can, and often does, decide questions of foreign law on the basis of expert evidence from foreign lawyers. Nor do I regard such legal concepts as contractual good faith and morality as being so strange as to be beyond the capacity of an English Court to grasp and apply. It seems to be clear, however that, in general, and other things being equal, it is more satisfactory for the law of a foreign country to be decided by the Courts of that country. That would be my view, as a matter of common sense, apart from authority. "

[85] In my opinion, the governing law of the contract is the USVI. The clear intention of the parties was that the contract shall be governed by USVI law unless otherwise stated.

Witnesses

[86] Mr. Webster QC submitted that the potential witnesses for OBM are Mr. Peck and Mr. Fox. Both reside and work in the BVI. Mr. Epstein is the potential witness for LSJ. Mrs. Small-Davis submitted that LSJ witnesses are all resident outside of the BVI and that OBM's witnesses have travelled to the USVI and the United States in connection with this matter and therefore this factor cannot point to any prejudice in resolving the dispute in the USVI.

[87] In my opinion, whether the witnesses have to travel to the BVI or the USVI is of no moment. These two islands are sister islands and form part of the same archipelago. Nothing of substance turns on this factor.

[39] [1969] 1 Lloyd's Rep 237.

Residence and place of business / Convenience and expense

[88] Mr. Webster QC submitted that no prejudice will be suffered by LSJ in defending the case in the BVI as LSJ does not have a place of business in USVI. And that it is a short ferry ride for witnesses to come from St. Thomas to the BVI.

[89] Mrs. Small-Davis submitted that OBM has failed to demonstrate that LSJ is not resident in the USVI. According to her, OBM deposed that "Little St. James" was not registered to do business in the USVI but did not depose that it had done a search for LSJ within the USVI. Mrs. Small-Davis asserted that LSJ is indeed present within the USVI. Further, she submits that OBM has offices, does business, or offers services outside of the BVI in the USVI and the mainland US, whereas LSJ has absolutely no connection to the BVI. Finally, she submitted that OBM's two witnesses could as easily travel to the USVI by ferry.

[90] In my opinion, as I just stated, whether the witnesses have to travel to the BVI or USVI is immaterial but I am more inclined to accept Mrs. Small-Davis' submissions.

Subject matter of claim

[91] OBM submitted that the services contemplated by the contract were substantially performed in the BVI. A representative from OBM visited the property on a few occasions but most, approximately 80%, if not all of the architectural works and designs were done in the BVI. Those invoices were prepared in the BVI and sent to LSJ.

[92] Mrs. Small-Davis trenchantly argued that the subject matter of the contract related to a property in the USVI, and having reference to the scope of the work as set out on pages 7 and 8 of the contract, it is not true that 80% of the work done in the BVI. A number of deliverables could not take place in the BVI. The court notes that the deliverables included site assessment and meetings with the client (an estimated 13 meetings, none of which took place in the BVI). Pursuant to the obligation to prepare detailed construction documents, OBM was required to consult with statutory agencies in the USVI to seek the necessary approvals. Also site inspections to review that construction were in accordance with the construction documents.

[93] This is a factual issue. In the absence of cross-examination of witnesses, I should refrain to making a determination. However, what is plain is that the subject matter of the claim relates to a property in the USVI.

[94] As I see it, the issues may well be more intricate that a simple breach of contract. It appeared to me that LSJ might be arguing at a trial that OBM's work was not up to the requisite standard. Thus, determination of the claim may well involve the application of foreign building law which has no relevance to the BVI.

[95] That said, the court appreciates that OBM may have undertaken to do the actual drawing of architectural plans in its offices here in the BVI. However, it appears that the scope of the work extended beyond the mere drawing of plans. The court also accepts that issues regarding the deliverables and the requisite meeting of standards would arise against the context of USVI planning/development/building law. In light of these considerations, USVI law may be the governing law. The court also takes judicial notice that USVI law is different from BVI law; notwithstanding that the legal system in each jurisdiction is derived from English common law. But, it seems that the subject-matter of this claim has more real connection with the USVI as the property is located there.

Special circumstances

[96] As I see it, the sole connecting factor between this claim and the BVI is the fact of OBM's domicile. To my mind, this is not a sufficient ground for bringing the claim here.

[97] Even though I have just concluded that the USVI is clearly the more appropriate forum for the trial of the action, I may nevertheless decline to grant a stay if persuaded by OBM, on whom the burden of proof lies, that justice requires that a stay should not be granted. I was not so convinced.

[98] For all of these reasons, I find that this case has strong connections with the USVI. There was no evidence to show that the USVI is not an available forum.

Conclusion

[99] In the premises, it is hereby ordered and declared that:

1. The permission granted to OBM to serve Claim Form and Statement of Claim out of the jurisdiction on LSJ on 25 March 2010 is set aside.
2. The court has no jurisdiction over LSJ.
3. The court declines to exercise its jurisdiction to try the claim.
4. OBM shall pay LSJ's costs to be assessed if not agreed.

[100] Last but not least, I am truly grateful to all Counsel for their forbearance in the protracted delay of the delivery of this judgment.

Indra Hariprashad-Charles
High Court Judge