TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCVAP 2011/012

BETWEEN:

[1] MARTY STEINBERG, RECEIVER
(In his capacity as Receiver of Lancer Offshore, Inc. and The Omnifund, Limited Appointed by the United States District Court for the Southern District of Florida)
[2] LANCER OFFSHORE, INC.
[3] THE OMNIFUND LIMITED

Appellants

and

[1] SWISSTOR & CO.
[2] WISE GLOBAL FUND LIMITED

Respondents

Before:

The Hon. Mde. Ola Mae Edwards	Justice of Appeal
The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mr. Don Mitchell	Justice of Appeal [Ag.]

Appearances:

Mr. Martin Mann QC, Ms. Susan V. Demers of Price Demers & Co with him, for the Appellants
Mr. Robert Nader of Forbes Hare for the First Respondent
Mr. Paul Girolami QC, for the Second Respondent

2011: September 29;
2012: March 12.

Interlocutory appeal - Whether claim statute barred under the Limitation Act – Qualification for applying for permission to serve proceedings out of the jurisdiction – Extension of time within which to serve a claim form – Limitation Act Cap. 43 of the Virgin Islands – CPR 7.3(3)(b) – CPR 8.13

The claim was essentially one for repayment of money mistakenly paid in respect of a contract. The respondents, Swisstor and Wise Global and others, had invested in funds held by Lancer and Omnifund, but which were operated as a Ponzi scheme. A fraudulent investment manager of both funds had for his own ends dishonestly calculated the net asset values for the purpose of paying out on redeemed shares. The last redemption by Swisstor had occurred on 1st August 2001, while that of Wise Global had been in July 2002. The directors of Lancer and Ominifund had become aware of the mistaken payments by August 2002 at the latest when they resigned. Subsequently, it became apparent that some 91% of the funds' portfolio would require write-downs of hundreds of millions of dollars. Swisstor and Wise Global had benefitted from the dishonestly calculated redemptions by several million dollars each. Swisstor was a Canadian company, while Wise Global was a BVI company with its principal place of business in Hong Kong.

On 10th July 2003, the Receiver of Lancer and Omnifund was appointed by a court in Florida. On 9th July 2004, he commenced proceedings in Florida against Swisstor and Wise Global and some 44 others for recovery. The Florida proceedings against Swisstor and Wise Global were dismissed for want of forum. On 9th July 2009, 6 years less one day after his appointment, the Receiver began proceedings in the BVI seeking restitution in essentially the same terms as the Florida proceedings. The claim form expired for the purpose of service on the respondents on 8th January 2010.

On 11th May 2010, the Receiver applied for an extension of the validity of the claim form and permission to serve the claim form on the respondents out of the jurisdiction. On 25th May 2010, the judge made the order sought, extending the validity of the claim form for service to 8th July 2010. On 9th June 2010, the appellants filed an amended claim form and on 10th June applied for a variation of the 25th May order so as to allow service by any permissible method in the jurisdiction in which a defendant was served and for a further 6 month extension of the validity of the claim form to 8th January 2011. On 16th June, the court ordered accordingly. Swisstor was served in Canada on 26th November and Wise Global in Hong Kong on 29th November 2010, both under the Hague Convention. Wise Global and Swisstor applied to set aside service on them and for other relief. They claimed, among other things, that the claim was statute barred; that no claim had been made under the subscription agreement and that rule 7.3(3) Civil Procedure Rules 2000 ("CPR") was not engaged; and that no special reason had been given why time for service should be extended. The judge found that the Funds could have discovered the wrongful over valuations even before the Receiver had been appointed, using no more than reasonable diligence. Any claims for recovery of money allegedly overpaid had become statute barred under section 4 of the Limitation Act 6 years after the payment. Section 25, which provides for the limitation period to run from the date when the claimant could with reasonable diligence have discovered any mistake, did not apply. He set aside service of the claims on both respondents. The appellants appealed.

Held: dismissing the appeal and affirming the decision of the trial judge, with prescribed costs to both respondents; and dismissing the respondent's notice with no order as to costs, that:

1. Section 25 of the Limitation Act is unavailable to the appellants because, in making his case, the Receiver's evidence does not identify any point in time when he says he first discovered the mistake. His evidence makes no attempt properly to grapple with the equally important and separate question when he could reasonably have discovered it. On 9th July 2004, within about a year after his appointment on 10th July 2003, he commenced proceedings against the respondents in the USA making the same claims as he now brings in the BVI. If the court were to be expected to act upon a case that the Receiver only discovered the mistake at some point after his appointment and prior to his US proceedings, then not only must that point in time be identified and explained, but a detailed account would perforce need to be given of the period between his appointment and that point in time, in order to show that he could not have reasonably discovered it before.

2. On the service out of the jurisdiction issue and CPR 7.3(3), with all respect to the learned trial judge, there is no good reason to give a narrower construction to the words in our Rules "otherwise to affect" than was given to the words "in respect of" in the UK Rules. It is difficult to follow the reasoning whereby the judge concluded that the claim in this case did not "affect" a contract. The claim is for restitution where a contractual term has not been performed. The primary allegation is that both respondents are withholding monies which they should not have received under the contract had the formula been correctly applied. This claim clearly affects a contract, the interpretation, the meaning, and the implications that arise from the contract.

   E.F. Hutton & Co (London) Ltd. v Mofarrij [1989] 1 W.L.R. 488 applied.

3. The power in CPR 8.13 to extend the validity of the claim form is only to be exercised for "good reason" for the failure to serve the claim during the period of its validity. In this case, the appellants had given no reason at all why they had failed to apply in good time to serve the respondents in the manner they had previously served the US proceedings, but had instead waited to apply for permission to serve out and for an extension of time until two months after the period for service had passed. The judge had therefore been entitled to set aside the extensions for service of the claim form.

   Hoddinott v Persimmon Homes [2008] 1 W.L.R. 806; [2007] EWCA Civ 1203 applied; Hashtroodi v Hancock [2004] EWCA Civ 652; [2004] 1 W.L.R. 3206; [2004] 3 All E.R. 530 cited.

4. The respondents had a right to be sued by means of a claim issued within the statutory period of limitation and served within the period of its validity. Once the respondents could show, as they have, that they might be deprived of a defence of limitation if time for service of the claim form was extended it was enough for the extension to have been set aside. The statutory limitation period should not be made elastic at the whim or sloppiness of a litigant. Public interest requires that claimants adhere strictly to the time limit for service or else provide a good reason for dispensation. That not having been done here, the learned trial judge was entitled to exercise his discretion to set aside the extension of time.

   Dagnell and Another v J.L. Freedman & Co. (a firm) and others [1993] 1 W.L.R. 388 cited; City & General (Holborn) Ltd. v Royal & Sun Alliance plc [2010] 131 ConLR; [2010] BLR 639; [2010] EWCA Civ 911 applied.

JUDGMENT

[1] MITCHELL, J.A. [AG.]: This is what used to be called a procedural appeal under the Civil Procedure Rules 2000 ("CPR") prior to their amendment on 1st October 2011. It is now an interlocutory appeal against an order of the High Court setting aside permission to serve the proceedings on the two respondents out of the jurisdiction and for an extension of time.

[2] The claim is one for repayment of money mistakenly believed to have been due in respect of a contract, with an additional claim in restitution coupled with another for an equitable remedy.

[3] There is also a respondent's Notice by Wise Global contending that the decision of the learned judge should be affirmed on grounds additional to those contained in the judgment.

Background

[4] Marty Steinberg is the Receiver of Lancer Offshore, Inc. and the Omnifund Limited. Lancer and Omnifund carried on the business of mutual funds in the United States ("the Funds"). Swisstor is a Canadian company with its principal place of business in Ontario. Wise Global is a BVI company with its principal

place of business in Hong Kong. Both Swisstor and Wise Global were investors in Lancer.

[5] The background to the claim is that the respondents and a number of other defendants to the action had entered into agreements by which they had acquired shares in the Funds. These agreements are the private placement memoranda of the Funds, investors' subscription agreements whereby the investors submitted to the jurisdiction of the BVI court and its processes, and the Funds' articles of association which contain formulae for the calculation of the respective shareholders net asset values ("NAV") together with provisions governing redemption and payment. From time to time the respondents and other defendants had redeemed their shares in the Funds on the basis of the NAV. It was the Receiver's contention that the redemption proceeds had been hugely excessive having been deliberately miscalculated by a dishonest investment manager for his own ends.

[6] At all relevant times prior to February 2002, the directors of the Funds had been a Mr. Stocks, a Mr. Conroy and a Mr. Quilligan, officers or employees of a Netherlands Antilles management company, Citco Group (operating through a number of subsidiaries and related companies, hereinafter referred to as "Citco"). Citco had formed the Funds in the BVI and provided fund management services for them, though the investment manager was Lancer Management, a management company run by a Mr. Michael Lauer. In early 2002, a Mr. Geist and a Mr. Bendall had become two of the five directors of the Funds. At some point thereafter and before August 2002, Citco resigned from its position and Messrs. Conroy, Quilligan and Stocks resigned as directors of the Funds, leaving only Mr. Geist and Mr. Bendall. The reasons for the resignations appear to have been that the individuals had become "uneasy with Mr. Lauer's portfolio" and were concerned about "serious indications" that Lancer was "manipulating the market price" of its holdings.

[7] The first important complaint about the management of the funds had occurred in March 2003 when the University of Montreal Pension Fund filed a complaint with the Financial Services Commission in the Territory ("the BVI FSC"). The BVI FSC decided in April 2003 to revoke the Funds' certificate of recognition. In April 2003, the Funds' investment manager, Lancer Management, filed for bankruptcy in the USA. Subsequently, on 2nd May 2003, the BVI FSC applied to the court for an order winding up the Funds.

[8] On 21st May 2003, Deloitte & Touche ("Deloittes") presented a commissioned report to the FSC. The Report referred to negative publicity surfacing around September 2002 concerning the Funds and related parties, including Lauer. The judge accepted that by that date there were publicly acknowledged concerns which had led to Deloittes appointment by the FSC in May 2003. Deloittes gave their view that the current carrying value of some 91% of the Funds' portfolio would require write-downs of "hundreds of millions of dollars".

[9] On 8th July 2003, the US Securities and Exchange Commission (the "SEC") began proceedings against Michael Lauer and related companies in the United States District Court for the Southern District of Florida and for the appointment of a Receiver over the affairs of the Funds. The grounds for the appointment were the deliberate and fraudulent manipulation of the prices of the Funds' stocks and "outlandish" valuations "designed to attract investors to invest and induce actual investors to forego redemptions and continue investing". The objective of this manipulation was to attract additional prospective investors and/or induce investors to invest additional funds, and thereby result in increased management fees.

[10] On 10th July 2003, the District Court appointed Mr. Steinberg to be Receiver of the Funds. The Receiver's appointment was subsequently, on 12th September 2003, recognised in the Territory. The Order of appointment authorised Mr. Steinberg,

amongst other things, to take possession of all the Funds' property and assets; to investigate the manner in which the affairs of the Funds had been conducted; to institute such actions and legal proceedings for the benefit of the Funds' investors and creditors as the Receiver deemed necessary; and to present to the Court and the SEC within 60 days of his appointment a report reflecting the existence and value of the Funds' assets and the extent of their liabilities.

[11] On 9th July 2004, the Receiver commenced proceedings in Florida for the same relief as he now claims in the Territory of the BVI. These proceedings were served on the respondents among others. Wise Global was served by sending it a Notice of Lawsuit and Request to Execute Waiver of Service in that action by DHL Courier to its address in Hong Kong. Wise Global duly acknowledged receipt. On 27th September 2005, Wise Global applied to dismiss the US proceedings on the ground that the Florida Court had no jurisdiction to entertain them against Wise Global. Wise Global stated in the US proceedings that it was a "British Virgin Islands corporation with its principal place of business in Hong Kong." Swisstor made a similar application. On 25th March 2006, the US proceedings were dismissed as against Wise Global and as against Swisstor on or about 22nd September 2006[1] on jurisdictional grounds.

[12] In the meantime, on 22nd July 2005, the Receiver commenced proceedings in the Florida District Court against Citco as former administrator of the Funds and against Messrs. Conroy, Quilligan and Stocks as directors for damages for breach of fiduciary duty, gross negligence, assisting a breach of fiduciary duty by others, and breach of professional duty of care. In that complaint, the Receiver alleged that going back to at least 1999, and possibly even earlier, down to the resignations of the Citco directors in 2002, the directors were under a duty to the Funds to compute the monthly NAV of the Funds with reasonable care and in accordance with Citco's internal risk management controls, the Funds' Articles,

[1] There are various dates mentioned in the submissions.

and the Private Placement Memoranda. The allegation was that a reasonably prudent fund administrator would have been put on notice that Lauer was engaged in conduct to the extreme detriment of the Funds. The gains reported by Lauer in what is alleged to have been a declining market should have caused the defendants to scrutinise the sources of the gains and to recalculate the NAV. The claim was that the directors knowingly, recklessly or with gross negligence failed to monitor risk and to value the Funds' portfolios properly. From 1999 onwards they ignored numerous red flags which would have put a reasonably prudent director on notice and prompted him to investigate the inflated values of the Funds' securities. If the directors had performed even minimal due diligence or conducted proper valuation procedures they would have discovered that the Funds were grossly inflated as to value. The directors knowingly, wilfully, recklessly and/or with gross negligence breached their legal, professional, common law and statutory duties owed to the Funds in approving baseless valuations, which increased Citco's administrative fees which were directly linked to the Funds' inflated NAVs.

[13] On 23rd September 2008, summary judgment was given against Lauer by the Florida Court on the SEC's proceedings against him for a permanent injunction, disgorgement of his gains and civil penalties.

[14] On 9th July 2009, (six (6) years less one day after his appointment) the Receiver and the two Funds commenced these proceedings in the High Court of the Territory of the Virgin Islands. It named forty four (44) defendants including the respondents. The claim was in substantially the same terms as the previous US proceedings. The total value of the claim against all the defendants was approximately US$40,468,921.03, of which US$4,101,644.31 and US$3,500,000.68 represent respectively the value of the individual claims against the two respondents. The claim form was issued for service within the jurisdiction of the Territory of the Virgin Islands. That is, it was subject to CPR 5.4 which

states that, except as prescribed by CPR 7, a claim form must be served at a place within the jurisdiction in which the claim is issued.

[15] The basis of the Receiver's claim lay essentially in restitution. The two respondents had invested in Lancer, and both, having duly notified their desire to redeem their investments, had mistakenly been paid excessive redemption monies at various times before the Receiver's appointment. The mistake is alleged to have been due to the deliberate, systematic and clandestine misapplication of a contractually agreed formula for the calculation of redemption monies giving rise to inflated and incorrect NAV per share by the principal shareholder of the Fund's investment manager. The respondents and the other defendants to the suit had been the fortunate and innocent beneficiaries of a Ponzi scheme.

[16] The claim against Swisstor was in respect of shares in Lancer redeemed during a period prior to 1st August 2001. The date of the filing of the claim was nearly eight (8) years after the last redemption transaction between Lancer and Swisstor. The claim against Wise Global was in respect of shares in Lancer redeemed during the period January 2000 to July 2002.

[17] Service of the proceedings was duly effected on certain of the forty four (44) defendants which were BVI registered companies, but not on Swisstor or on Wise Global. The appellants have produced no evidence as to what steps if any they took to attempt to locate or to serve the proceedings on them. The claim form expired for the purpose of service on the respondents at the end of 8th January 2010. The appellants made no application prior to that date for an extension of time to serve the BVI claim form either in the Territory or out of it during the period for service provided for by CPR 8.12. They would have known by September 2005 at the latest that Wise Global was a BVI company.

[18] On 11th May 2010, the appellants applied for permission to serve the claim form on the respondents out of the jurisdiction and for an extension of time. The application relied on the contention that the subscription agreements pursuant to which these defendants had acquired their shares in the respective funds contained a non-exclusive jurisdiction clause in favour of the BVI for proceedings with respect to the subscription agreement and all transactions relating to it and provided that subscribers irrevocably consented to service of process in any such suit at the address of the subscriber contained in the Funds' records. By the original investment contracts between Lancer and Omnifund of the one part and Swisstor and Wise Global of the other part, service of proceedings on the defendants was required to be made at their addresses set out in the share register of Lancer. The agreed address for service on Wise Global was a Hong Kong address while that for Swisstor was in Canada. The Receiver took the view that he was required to serve the claim form on the two defendants at their registered places of business in Hong Kong and in Canada, and not at any other address, including in the Territory. Indeed, the appellants submitted, as Wise Global had previously in the US proceedings responded to documents sent to them at their address in Hong Kong, it would be reasonable for them to think that Wise Global could be served at that address in these proceedings. Next, it was said that the claim was brought to enforce, rescind, dissolve or otherwise affect a contract or to obtain a remedy in respect of a breach of contract and that the subscription agreements contained a term conferring jurisdiction on the courts of the BVI and were by their terms or by implication of law governed by BVI law.

[19] On 25th May 2010, the learned judge heard the application and duly made the order sought, with the proviso that postal service could occur if service by that method was permitted in the jurisdiction where the relevant defendant was to be served. The validity of the claim form was thereby extended for service out until 8th July 2010.

[20] Even then, the proceedings were not served on the respondents. Instead, on 9th June 2010, the appellants filed an amended claim form in these proceedings. And, on 10th June 2010, just within the extended twelve (12) month period for service of the claim form originally, the appellants applied to the High Court for a variation of the 25th May 2010 order so as to allow service of the amended claim form to be permitted by any permissible method in the jurisdiction in which a defendant was to be served; and for a further six (6) month extension (to 8th January 2011) to the validity of the claim form. The reason given for the application was that where proceedings were going to have to be served pursuant to the Hague Convention, the period of time between the grant of permission to serve out of the jurisdiction and the expiry of the claim form's original validity was too short to enable this to be effected. On 16th June 2010, the court ordered accordingly. In the result, Swisstor was served in Canada under the Hague Convention on 26th November 2010 and Wise Global in Hong Kong similarly on 29th November 2010.

[21] On 25th January 2011, Wise Global applied to set aside service and for other relief. Its essential grounds were that it is a BVI registered company and should have been served here; that no claim was made under the subscription agreement; that CPR 7.3(3) was not engaged; that the claim was statute barred; and that no special reason had been given why time for service of the claim form should be extended. On 26th November 2010, service of the claim form and other proceedings on Swisstor was effected. On 16th March 2011, Swisstor filed a similar application to set aside service of the claim form and other relief. It contended that the claim in mistake was time-barred and that the constructive trust claim was unsupported by any pleaded facts capable of giving rise to a constructive trust.

[22] It was common ground before the court below that both applications should be treated as re-hearings of the original applications.[2] The appellants' application for permission to serve out of the jurisdiction and their application for an extension of time were treated as before the court for decision *de novo*. In order to succeed below it was necessary for the appellants to demonstrate that they were entitled both to an extension of time (until at least 29th November 2010) for service on the respondents out of the jurisdiction and then to permission to serve Wise Global out of the jurisdiction in the first place. And to succeed on this appeal it is necessary for the appellants to show that the judge's exercise of discretion to refuse both applications is susceptible on familiar grounds to be disturbed by this Court; and moreover that the discretion to grant the applications should have been, and be, exercised in the appellants' favour.

[23] The respondents complained that no evidence had been given in support of the application as to what steps had been taken to try to serve the respondents. They urged that no steps appeared to have been taken at all. The evidence did not say that service could not be achieved without the variation and extension sought. The appellants did not claim that service by post on Wise Global in Hong Kong was not permitted under local law there. Nor did they assert that service on Wise Global in Hong Kong could not have been achieved by 8th July 2010. At most as concerns Wise Global in Hong Kong it was said to be unlikely, for unexplained reasons, that service in Hong Kong could be accomplished before 9th July 2010. The appellants would appear still not to have addressed their mind to what was required in order to serve the claim form on Wise Global in the most timeous manner.

[24] On 19th April 2011, the learned trial judge delivered his judgment on the two applications before him. At paragraph 27 he found that, assuming that all the directors of the Funds were honest but were being misled by Lauer, it could not be

[2] Collier v Williams [2006] EWCA Civ 20 at para. 83.

the case that they could not have discovered his overvaluations before the Receiver was appointed. It was within their power, using no more than reasonable diligence, to verify his figures for the purposes of carrying out the NAV valuations. In his judgment, therefore, any claims for recovery of money allegedly overpaid by the Funds to the respondents became statute barred after six (6) years following the making of each payment. Section 25 of the Limitation Act[3] was there to give latitude to the innocently mistaken or to those prejudiced by the mistake of a third party, not to the incompetent. It followed that the appellants had failed to establish that they had good causes of action for the purpose of CPR 7.7(2)(b), or alternatively, they had failed to ensure that there was a serious issue to be tried.

[25] At paragraphs 12 to 14 he held that it was plain that the proceedings did not involve any contractual claim under the subscription agreements. The provisions for service out of the jurisdiction in the agreements therefore had no application. He also held that CPR 7.3(3), which provides in effect for a claim form to be served out of the jurisdiction if the claim is made either in respect of a breach of contract committed within the jurisdiction or the 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 contains a term to the effect that the court shall have jurisdiction to determine any claim in respect of the contract, or is by its terms or by implication governed by the law of the Territory, was of no application since a claim to affect a contract carries the meaning that if the claim succeeds the contract in question will have been affected, either in one of the ways expressly mentioned, i.e., enforcement, rescission, or dissolution, or in some other way, e.g., by rectification or by the implication of some term. Since, if the appellants' restitution claim in the present proceedings succeeded, the subscription agreements would remain completely untouched, this gateway was not as a matter of law open to the appellants.

[3] Cap. 43, Revised Laws of the Law of the Virgin Islands 1991.

[26] At paragraphs 34 to 35 he found that the reason given by the appellants for an extension of time for service could not amount to a special reason as that term is used in CPR 8.13(4)(b). The term 'special reason' connotes some exceptional circumstance and that so far from there having been exceptional circumstances, the need for an extension arose from the fact that the Receiver had frittered away eleven months of the available year before applying for permission to serve out. On that ground also he set aside service on both respondents. He declined to strike out the statement of claim as the respondents requested, since in the absence of service there were no effective proceedings within which such an order might be made.

The Issues

[27] The appellants and the respondents have submitted their versions of the issues that arise in this appeal. They appear to me to be to be essentially three, namely:

(a) Are the appellants' claims statute barred under the Limitation Act?

(b) Did the appellants qualify for an application for permission to serve out of the jurisdiction in the sense of CPR 7.3(3) (b)?

(c) Were the appellants entitled under CPR 8.13 to an extension of time within which to serve the claim form?

(a) The Limitation Point

[28] There is no dispute that the primary limitation period for actions based on simple contract in the Territory is, by section 4 of the Limitation Act, a period of six (6) years. However, section 25(c) provides that where an action is for relief from the consequences of a mistake, the period does not begin to run until the claimant has discovered the mistake or could with reasonable diligence have discovered it. If

the appellants were to establish a constructive trust, a similar period would apply to that cause of action.[4]

[29] The respondents submit that this claim was time-barred. The primary limitation period for the last of the claims made against Wise Global expired as regards the earliest claim in January 2006 and as regards the latest in July 2008. This last date would be one year before issue of the claim form, and some five years after the Receiver's appointment. The limitation date argued for by Swisstor was August 2007. The Receiver had issued the claim form on 9th July 2009. This was six (6) years less one day after his appointment, and some two or three years after the respondents allege the claims against them had become statute barred.

[30] The respondents submit that for the purposes of the appellants' cause of action and the applicable limitation periods it is significant that members of the Boards of the Funds either knew that the NAVs were or might have been fraudulently prepared yet did nothing either at the time or subsequently; or being on notice that investigation was required as to whether the NAVs had been correctly prepared, failed in breach of duty to investigate or cause investigations to be made.

[31] The respondents submit that in making their applications to serve out of the jurisdiction and for an application to extend the validity of the claim form, both of which carried limitation implications, it was incumbent on the appellants to demonstrate to the court, if they could, that it was just to exercise its discretion in their favour and, in particular, to show: (a) that the limitation period had not already expired and (b) that it would not expire during the extension of the claim form; or (c) if they could not show both (a) and (b), that it was nevertheless for some reason just to grant the application and thereby make the respondents suffer the prejudice of losing an actual or potential limitation defence which had accrued to since issue of the claim form and which would be preserved if the claimants were

[4] Paragon Finance Plc v DB Thakerar & Co. [1999] 1 All E.R. 400.

made to issue a new claim form. The respondents submit that the appellants could not and did not show any of those things.

[32] The appellants urge that the day of the Receiver's appointment is the moment before which he could not reasonably have discovered the mistake which is the basis of his claim. They rely on section 25(c) of the Limitation Act which provides that where the claim is for relief from the consequences of a mistake, the running of time is postponed until the mistake is discovered or could with reasonable diligence have been discovered. The appellants contend that they could not have discovered the mistake until the Receiver had been appointed. The respondents respond that even assuming that the appellants are right in their contention that the limitation period did not begin to run until the Receiver was appointed, the action had in any case become time-barred during the currency of the unserved domestic claim form.

[33] At the time of the hearing before the learned trial judge, the US proceedings against Citco had not yet concluded. In argument before the learned trial judge, the respondents relied on the US proceedings as evidence that the directors knew or should have known of the existence of causes of action against the respondents and that this knowledge of the directors should date at the latest from 25th July 2002, the date on which Citco resigned as administrator on the basis of the valuation issues. Lancer, Mr. Girolami QC submits, is fixed with the knowledge of its directors and the Receiver now stands in the directors' shoes.[5] They could at least by that date with reasonable diligence have discovered it. This was well before a date six years before the date on which the claim was filed. The Receiver counters that the US proceedings are at best hearsay allegations and that in any event, the Receiver and the Funds cannot be invested with the guilty knowledge of the Funds' own negligent directors.

[5] Lebon v Aqua Salt Co. Ltd. [2009] UKPC 2.

[34] The learned trial judge held that the appellants could not rely on section 25(c) because in his judgment it was within their power, using no more than reasonable diligence to have discovered the mistakes in payment earlier than the Receiver did. The appellants submit that the learned judge's approach to the section 25(c) issue was wrong in law. The concept of reasonable diligence involves two considerations, to neither of which they submit the learned judge sufficiently applied his mind or took sufficiently into account. The first is whether and when the appellants were put on inquiry or had reasonable cause to take the steps which would have led to the discovery of the mistakes and the second is whether and when having been put on inquiry they acted sufficiently diligently in taking the necessary steps to ascertain the existence of the mistakes. The learned judge, they submit, did not, and, on the evidence in a summary proceeding could not, adjudicate either issue. He simply assumed without evidence to support his assumption that the second and third appellants could have done so.

[35] The appellants further submit that the learned judge's approach to the section 25(c) issue was wrong in principle in that at paragraph 27 of his judgment he deemed it right for the purposes of the application to assume that all of the directors of the second and third appellants were honest but were misled when he had materials before him which were equally consistent with some of them having dishonestly assisted the fraud by turning a blind eye to that which they must have known they would discover were they to inquire. The appellants had made out a serious issue to be tried that the directors had turned a “blind eye” to the fraud rendering it unjust to attribute the directors' “blind eye” knowledge to the second and third appellants.

[36] Finally, the appellants submit the learned judge wrongly rejected for the purposes of the limitation issue the appellants' contention that the Hampshire Land

principle,[6] that a corporation is not to be attributed the knowledge of an agent guilty of fraud on it or in breach of duty to it, applies to this case. The principle, the appellants submit, is applicable to the second and third appellants. Contrary to the learned judge's holding, the principle is not inadmissible by reason only that the second and third appellants are not in these proceedings suing for fraud. The appellants submit that the extension under section 25 should be calculated from the date on which the Receiver personally either had knowledge or should with reasonable diligence have had knowledge of the mistake and that date must be the date of or some date after his appointment.

[37] The respondents respond that section 25 is unavailable to the appellants for a number of reasons. The Deloittes Report of May 2003 indicated that those administering the Funds and the Boards of Directors should have been alerted well before the Receiver's appointment in July 2003 to doubts being raised about the Funds' reported NAV, and could have got to the bottom of the matter. The appellants' response is that the Funds were the victims of a fraud perpetrated on them by Lauer, and that until the appointment of the Receiver there was no independent party in a position to take action. Even upon the appointment of the Receiver, he found the Funds' books and papers incomplete and disorganised. Some third party service providers had declined to provide the Receiver with documents. Despite these difficulties, the Receiver was able to determine that Lauer had inflated the NAVs and he had commenced proceedings in the USA against allegedly overpaid redeemers. The evidence before the judge was that for the Receiver to reach the position where he could establish that viable claims lay against overpaid redeemers “took some time”.

[38] Before the learned trial judge, the respondents submitted that the appellants' case was time-barred and that accordingly they had no cause of action. They put it that way so as to enable themselves to rely on CPR 7.7(2) (b), which provides that the

[6] In Re Hampshire Land Company [1896] 2 Ch. 743.

court may set aside service of a claim form which has been served out of the jurisdiction on the grounds that the claimant "does not have a good cause of action". The learned trial judge found that the sub-rule is intended to cover cases where proceedings are never going to get anywhere, which will be the case if an obvious limitation point is available to a foreign defendant. Secondly, it is a long-established principle that a candidate for service out of the jurisdiction must show that there is a serious issue to be tried. This means that he must show that he could successfully oppose an application by the intended defendant for summary judgment.[7]

[39] The judge found[8] that the claims, if any, were vested in the Funds. It was the Funds which are alleged to have made mistaken overpayments to redeemers before the Receiver was appointed. The question the judge asked himself was whether the Funds could with reasonable diligence have discovered that they had been making overpayments at any date earlier than 10th [July][9] 2003, the date of the Receiver's appointment. The judge was satisfied, assuming the directors to have been honest but misled by Lauer, that it could not be that they could not have discovered Lauer's overvaluations before the Receiver was appointed. The question, said the judge, was not whether, given a plausible but fraudulent investment manager, the directors were likely to have challenged him before any particular point in time. The question was whether it was within their power, using no more than reasonable diligence, to verify his figures for the purposes of carrying out the NAV calculations. He found that the duty to calculate the NAVs was placed by the Funds' Articles of Association on the directors and they could not now be heard to say that they could not have calculated it correctly at the time without exercising more than reasonable diligence. The Funds would be in no better position. The Funds were attempting to rely upon facts which might have suspended the running of time if they were suing Lauer in fraud, but which could

[7] Seaconsar (Far East) Ltd v Bank Marcazi Jomhouri Islam Iran [1994] 1 A.C. 438.
[8] At para. 67.
[9] The judgment has "June" but that is clearly a typing error.

not suspend the running of time in relation to the recovery of payments which the Funds were obligated to calculate and which were allegedly miscalculated as a result of misinformation supplied by their own agent. He considered[10] that section 25 was there to give latitude to the innocently mistaken or to those prejudiced by the mistake of a third party, not to the incompetent. He concluded[11] that any claim for recovery of money allegedly overpaid by the Funds to the redeemers became statute barred after six years following the making of each payment. Section 25 had no part to play in cases where a paying party made a slip in calculating the amount of a payment. There was nothing unjust in that. There was, he found, no principle which required that the negligent should have more than six years to wake up to their errors. It followed that the appellants had failed to establish that they had a good cause of action for the purposes of CPR 7.7(2)(b) or, alternatively, that they had failed to establish that there was a serious issue to be tried. He found that the claims against the respondents were statute barred.

[40] The essence of Mr. Girolami QC's submission on the appeal is that the appeal should be dismissed because the appellants are time-barred and were time-barred even before they issued their claim. The judge was therefore right, he submitted, to uphold the respondents' applications to set aside service upon them. The respondents rely on dicta of Lord Browne-Wilkinson in Dagnell and Another v J.L. Freedman & Co. (a firm) and others,[12] that a defendant has a right to be sued, if at all, by means of a writ issued within the statutory period of limitation and served within the period of its initial validity. In that case, the Court had to decide whether, on the facts in evidence, the statutory time bar imposed by the English Limitation Act[13] should be put back to the extent allowed by English Rules of Court, where the Rules themselves offered no internal guidance whatsoever.

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[10] At para. 28.
[11] At para. 29.
[12] [1993] 1 W.L.R. 388 at 393C.
[13] Limitation Act, Chapter 58.

[41] In Dagnell, the plaintiffs, the trustees of a will, claimed that a firm of solicitors had been negligent in their advice concerning the exercise of an option to renew a lease. The plaintiffs' claim would become time-barred at latest by 6th April 1989. On 29th September 1988, the plaintiffs issued a writ against, *inter alia*, the former partners in the solicitor's firm, which had been dissolved, but the writ was not immediately served. The plaintiffs were advised that they should make an application to the court (a "Beddoe application") for an order authorising the bringing of proceedings in order to safeguard their position as to costs. The summons in that application was issued on 21st March 1989. On 11th August 1989, the plaintiffs applied for and were granted ex parte an extension of the validity of the writ until 28th December 1989. A further extension to 31st January 1990 was granted. The writ was finally served on all parties by 4th January 1990. Several of the defendants applied for the extensions of the validity of the writ to be set aside. The Court of Appeal by a majority allowed the appeals of the defendants and set aside the extensions. On appeal to the House of Lords dismissing the appeal it was held that the power in Rules of the Supreme Court Order (RSC Ord.) 6, r. 8 to extend the validity of a writ was only to be exercised for good reason for the failure to serve the writ during the period of its validity; that a plaintiff's desire to complete collateral litigation against third parties did not ordinarily constitute good reason for such failure and there was no reason to treat a Beddoe application differently from other collateral litigation; and that the Court of Appeal had been entitled to set aside the extensions of the writ. The power to extend the validity of a writ was only to be exercised for 'good reason', which would normally involve showing good reason for the failure to serve the writ during the period of its validity.

[42] In City & General (Holborn) Ltd. v Royal & Sun Alliance plc,[14] in January 2009, the appellants brought a claim against both their contractor and their insurer in respect of damage alleged suffered as a result of damage done between 2002

[14] [2010] 131 ConLR; [2010] BLR 639; [2010] EWCA Civ 911.

and 2004. It will be seen at once that the claims had potential limitation problems. The claim not having been served within the time limited by the Rules for service an application was made shortly before expiry for an extension of time. The extension was granted, and the defendants applied to set aside the service. They obtained an order. The claimants obtained leave to appeal. One of the arguments on the appeal was that there were new causes of action every time one of the events of damage occurred and that the judge had been wrong to rule that the claim was time-barred based on the original event of damage. Longmore L.J. held[15] that:

> "It is well-settled that when debatable issues of limitation arise, it is inappropriate to attempt to decide them on an interlocutory application for an extension of time for service of a claim form. If the claimants' argument that the claims are not time-barred is correct, they can always begin a fresh action in which, if a time-bar is asserted, it can be adjudicated upon. It is enough for a defendant to show that he might be deprived of a defence of limitation if time for service of a claim form is extended; if he can show that, an extension should not be granted or, if granted without notice, such extension should be set aside".[16]

[43] The respondents rely on the English Court of Appeal case of Aktas v Adepta.[17] There, the court looked again at the issue whether a claim form which had been issued towards the very end of a limitation period and had then been struck out owing to a failure to serve it in time could be resurrected in a second action which invoked the discretionary provisions in section 33 of the English limitation statute relating to claims for personal injury. The judge had said no, and, without reaching the limitation issue, had struck out the second action as an abuse of process. The case involved challenges to applications in two succeeding actions for the exercise of a statutory discretion to disapply a limitation period applicable to personal injury claims where claim forms in two preceding actions (in one of which there had been an extension of time) had been respectively set aside for failure to serve within

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[15] At para. 7.

[16] Relying on Hashtroodi v Hancock [2004] 1 W.L.R. 3206 at para. 18; Hoddinott v Persimmon Homes (Wessex Ltd [2008] 1 W.L.R. 806.

[17] [2011] 2 All E.R. 536; [2011] C.P. Rep. 9; [2011] P.I.Q.R. P4; [2010] EWCA Civ 1170; [2011] 2 W.L.R. 945.

time or had expired by the passage of time. The issue was whether the succeeding actions were abusive. The court held they were not. Rix L.J. said:[18]

> "15. Thus where the time for service has not yet passed, the rule provides an open discretion to extend time. Where, however, the time for service has passed, the rule is tightly and strictly drawn: there can be no extension unless either the court or the claimant has been unable to serve the claim form. Therefore, the fact that not only the claim form in question but the cause of action which it reflects may be lost (for reasons of limitation) is no excuse or mitigation. The jurisprudence … demonstrates the strictness with which both CPR r. 7.6(2), as a matter of discretion, and CPR r. 7.6(3), as a matter of the effect of the rule itself, has been applied. Thus an extension requested within time cannot be granted merely to save against incompetence. An extension requested out of time cannot be granted unless it falls within the exceptional cases stated in the rule itself"[19]

And, at paragraph 91:

> "91. The reason why failure to serve in time has always been dealt with strictly … is in my judgment bound up with the fact that in England, unlike (all or most) civil law jurisdictions, proceedings are commenced when issued and not when served. However, it is not until service that a defendant has been given proper notice of the proceedings in question. Therefore, the additional time between issue and service is, in a way, an extension of the limitation period. A claimant can issue proceedings on the last day of the limitation period and can still, whatever risks he takes in doing so, enjoy a further four month period until service, and his proceedings will still be in time. In such a system, it is important therefore that the courts strictly regulate the period granted for service. If it were otherwise, the statutory limitation period could be made elastic at the whim or sloppiness of the claimant or his solicitors. For the same reason, the argument that if late service were not permitted, the claimant would lose his claim, because it would become time barred, becomes a barren excuse. But even where the claimant is well within the limitation period despite his delay in serving, there is a clear public interest in the rules and the courts curtailing the efficacy of a claim form which, because it has not been served, is not very different from an unposted letter. Therefore, the strictness with which the time for service is supervised has entirely valid public interest underpinnings which are quite separate from the doctrine of abuse of process. It is sufficient for the rules to provide for service within a specified time and for the courts to require claimants to adhere strictly to

[18] At para. 15.

[19] Relying on Vinos v Marks & Spencer plc [2001] 3 All E.R. 784, (CA); Hashtroodi v Hancock [2004] EWCA Civ 652, [2004] 1 W.L.R. 3206.

> that time limit or else timeously provide a good reason for some dispensation. There is no need for that procedure to be muddled up with the different doctrine of abuse of process."

[44] I shall reserve my finding on the limitation issue until the conclusion and shall proceed to deal with the other issues as they were all fully argued.

(b) The Service out of the Jurisdiction Point

[45] CPR 5.4 provides that, except as permitted by CPR 7, a claim form must be served at a place within the jurisdiction. CPR 5.7 sets out the manner in which service within the jurisdiction on a limited company may be effected. Paragraph (a) provides that service may be effected on a company by leaving the claim form at its registered office. Paragraph (c) provides that service on a limited company may also be effected by serving the claim form personally on an officer or manager of the company at any place of business of the company which has a real connection with the claim. CPR 5.16 governs service of a claim form by a contractually agreed method of service. Sub-rule (2) provides that a claim form containing a claim in respect of a contract may be served by any method permitted by that contract. Sub-rule (3) provides that if the claim form is served within the jurisdiction in accordance with the contract, it is to be treated as having been served on the defendant. Sub-rule (4) provides that if the claim form is served out of the jurisdiction in accordance with the contract, it is not to be treated as having been served on the defendant unless service is permitted under CPR 7.

[46] CPR 7 provides for service of court process outside of the jurisdiction. CPR 7.3 contains the applicable provisions concerning the circumstances in which court process might be served out of the jurisdiction in claims about contracts and for the procedure to be followed for serving court process out of the jurisdiction. Paragraph (3) contains the provisions relating to claims in contract. It provides that:

"*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;" ...

CPR 7.7 governs applications to set aside service outside of the jurisdiction permission for which was granted under Rule 7.3. It provides:

"(1) Any person on whom a claim form has been served out of the jurisdiction under rule 7.3 may apply to set aside service of the claim form.

(2) The court may set aside service under this rule if -

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

(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." ...

[47] The learned trial judge found[20] that the claim did not affect a contract within the meaning of CPR 7.3(3)(b). Mr. Girolami QC, submitted that the claim was one in restitution for payment of money made under a mistake, and such a restitutionary claim is not a claim under any of the limbs of CPR 7.3, i.e., in particular, not affecting a contract. He submitted that the appellants were not entitled to permission to serve the claim form out of the jurisdiction since the cause of action relied on was not a cause of action in breach of contract, nor to obtain a remedy for a breach of contract. Nor was it a claim to rectify, rescind or dissolve a contract. Nor was it a claim to construe a contract, which would be a claim to

[20] At para. 14.

"affect" a contract. The mere fact that the context in which the mistaken payments were made was the existence of a contractual relationship between the parties was not enough.

[48] E.F. Hutton & Co (London) Ltd. v Mofarrij[21] was a case under the old rules of the Supreme Court, which were essentially similar to our pre-CPR 2000 Rules. It involved a determination of the meaning of the phrase 'affect a contract'. In that case, by a commodity brokerage contract, to be performed in London and governed by English law, the plaintiffs opened a brokerage account in favour of the defendant, a foreigner resident abroad. The defendant agreed to give security, in the form of a cheque pending a bank guarantee, payable in the event of the account falling into a state of deficit below a certain amount. The cheque, delivered to the plaintiff's agents in Greece and drawn on the Athens branch of a foreign bank, was payable in Greece. The Greek cheque was dishonoured on presentation by the plaintiffs, the defendant's account having fallen into the specified state of deficit. The plaintiffs' original claim was based solely upon the English brokerage contract and the plaintiffs obtained leave pursuant to RSC Ord. 11, r. 1(1) to serve the writ out of the jurisdiction. They later applied to amend and re-serve the writ to include a claim under the contract contained in and evidenced by the cheque. The judge granted leave. The defendant sought leave to appeal on the ground that a claim on the cheque contract, being distinct from the brokerage contract and manifestly governed by Greek law, could not properly be brought within Order 11. There could be no leave to amend a writ which had been served out of the jurisdiction by the addition of a cause of action which did not qualify under Order 11. The applicant for leave was required to show that his cause fell clearly within one or other of the sub-paragraphs of Rule 1(1) or (2). Order 11, r. 1(1)(d)(iii) refers to contracts which are by their terms, or by implication, governed by English law. The plaintiffs submitted that the case

[21] [1989] 1 W.L.R. 488.

relating to the Greek cheque fell within paragraph (d)(iii). They relied on the words:

> "service of a writ out of the jurisdiction is permissible with the leave of the court if in the action begun by the writ - … (d) the claim is brought to enforce, rescind, dissolve, annul or otherwise affect a contract, or to … obtain other relief in respect of the breach of a contract, being … a contract which - … (iii) is by its terms, or by implication, governed by English law ..."

The defendants argued that the cheque contract was separate and distinct from the English brokerage contract. Kerr L.J. in the Court of Appeal was satisfied that the obligations under the English contract were directly affected by the performance or breach of the Greek cheque contract. On that basis he considered that the case could be brought within the words "otherwise affect a contract … governed by English law ..." He accordingly held, granting leave and dismissing the appeal, that since the sum claimed by the plaintiffs under the brokerage contract would have been reduced pro tanto if their claim succeeded under the cheque contract, and since it was an inference of the brokerage contract that the cheque if duly presented would be honoured, there was a sufficiently direct link between the two contracts to entitle the court to hold that the cheque contract did "affect" the brokerage contract within the meaning of RSC Ord. 11, r. 1(1)(d)(iii). Further, in the circumstances, the dishonour of the cheque was itself a breach of the brokerage contract, and accordingly it was appropriate to grant leave to re-serve the amended writ out of the jurisdiction.

[49] It follows that in my opinion, the learned trial judge's conclusion that the proceedings did not involve any contractual claim under the subscription agreements was in error. His conclusion that since a claim to affect a contract carries the meaning that if the claim succeeds the contract in question will have been affected, either in one of the ways expressly mentioned, i.e., enforcement, rescission, or dissolution, or in some other way, e.g., by rectification or by the implication of some term is not supported by the authorities. This led inescapably

to the erroneous finding that the provisions for service out of the jurisdiction in the agreements had no application. I am satisfied for the reasons given above and further elaborated at paragraphs 70 et seq. below, that the claims sufficiently "affected" a contract governed by BVI law to entitle the appellants to make an application under CPR 7.3(3)(b) for permission to serve the respondents out of the jurisdiction.

[50] Two questions remain: (1) could the claim form have been validly served on Wise Global's registered office address in the Territory in contravention of the contractually agreed address for service in Hong Kong as contended for by Wise Global; and, (2) were the appellants entitled to the second extension of time in order to effect service overseas? As for the first, no legal authority has been produced by any party to the appeal on this point. Every registered company is required by law to have an address with a registered agent. One of the reasons is so that there is a local address for service of legal process issued in the Territory. It would appear to me that if service of process had been effected on Wise Global at its registered address in the Territory, despite the contractual provision, then such service would have been valid. Compliance with the contractual provision however would have made it impossible for Wise Global to have disputed the validity of service on it in Hong Kong. In my view, the Receiver was not obliged to serve Wise Global in the Territory, and was entitled to serve it in Hong Kong, provided that he complied with the rule for obtaining the necessary permission of the court to effect service in this manner. As for the second question, I reserve my answer to the conclusion, as it is necessary now to consider the related CPR 8.13 issue which was fully argued.

(c) The Extension of Time Point

[51] The court granted the appellants two extensions of time. The first was 25th May 2010, order made on the 11th May application to serve the respondents out of the

jurisdiction and extending time. The second was the 16th June order made on the 10th June application for an extension. It is this second application that is questioned.

[52] The learned trial judge concluded that the court should not have extended time for service of the proceedings by its order of 16th June 2010. His reasoning was, firstly: that Wise Global was a BVI company and could have been served in the BVI within six (6) months of the issue of the proceedings. Secondly, that, in any event, no application for an extension of time within which to serve a claim form should have been granted unless the applicant had complied with CPR 8.13(4). This requires the Court to be satisfied either (a) that the claimant has taken all reasonable steps to trace the defendant and serve the claim form but has failed to do so (which was not alleged in the present case); or (b) that there was some other special reason for extending the period. The Receiver's reason on making the application was that when the original order giving permission to serve out was made, only a few days of the twelve (12) month period for service of the claim form remained outstanding. Since, the Receiver urged, it was anticipated that there would be a need to take advantage of the Hague Convention to effect service, that left insufficient time, and it was on that basis that the extension had been granted. However, the judge found, quite apart from the fact that the claim could have been served in the BVI, it could just as easily have been served personally in Hong Kong, without the need to resort to the Hague Convention, since Hong Kong was for this purpose a common law jurisdiction within which the authorities would have taken no objection to personal service of BVI proceedings. The term “special reason” connotes some exceptional circumstance. So far from there having been exceptional circumstances, the need for an extension arose (to the extent that it arose at all) from the fact that the Receiver frittered away eleven months of the available year before applying for permission to serve out. That could not amount to a good reason.

[53] The proceedings had similarly been served on Swisstor in Canada under the extension of time order. The judge found that the extending of time for service on Swisstor must similarly be set aside for the reasons that applied to Wise Global.

[54] CPR 8.12 provides (1) that a claim form that is to be served within the jurisdiction must be served within six (6) months of the filing of a claim, and (2) a claim form that is to be served outside the jurisdiction must be served within twelve (12) months, provided however that where a claim form is to be served outside the jurisdiction, permission must be obtained from the court, pursuant to CPR 7.

[55] CPR 8.13 governs applications for an extension of time for serving a claim form. This provides, so far as is relevant to this case:

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

[56] Wise Global contends that it is a BVI company which could have been served within the jurisdiction within six (6) months. It had been within the Receiver's knowledge that Wise Global was a BVI company at least four (4) years before he brought the BVI proceedings (i.e., as a result of the address he used for service in the US proceedings). Mr. Nader submitted on its behalf that permission to serve out had not been required to serve Wise Global, and the practical effect of granting

permission to serve out had been to give a largely retrospective extension of the claim form. The appellants had failed to take any steps at all to serve the claim form within six (6) months, or at any time before the application for permission to serve out was made. They had given no explanation as to why they had failed to do so.

[57] The appellants respond that it is incorrect that the initial validity of the claim form was six (6) months. The respondents were contractually bound to accept service in Hong Kong and in Canada as those were the addresses listed on the share register of Lancer. The implication of this submission is that the initial validity of the claim form must have been for a period of twelve (12) months.

[58] The respondents respond that a claim form "has a life" of six (6) months. The more traditional[22] wording is that a claim "ceases to be valid" unless it is served within the period provided for its service. CPR 8.12(1) provides a general rule that it must be served within six (6) months. If permission is given for it to be served out of the jurisdiction, then by CPR 8.12(2) the period for service is extended to twelve (12) months. The claim form in this case filed on 9th July 2009 therefore was as a general rule required to be served by 8th January 2010. If an application was successfully to be made for permission to serve it out of the jurisdiction, then the period for service would expire on 8th July 2010.

[59] The appellants submit that the learned judge's finding that the appellants had not satisfied the court in the sense of CPR 8.13(4)(b) that there was "some other special reason for extending the period" within which the claim form might be served on Wise Global and Swisstor because he found that the term "special reason" connotes some exceptional circumstance and found that the need for an extension of time arose from the fact that the first appellant had "frittered away" eleven months of the available year before applying for permission to serve out

[22] See for example, Lord Templeman in Dagnell v Freedman & Co [1993] 1 W.L.R. 388 at 390.

was both wrong in law as a matter of construction and inconsistent with the evidence. The appellants submit that on a true construction of CPR 8.13(4)(b) a "special reason" does not connote that some special circumstance has to be shown by an applicant for an extension, but rather that the applicant has taken reasonable steps under the circumstances to serve the claim form or conversely that there were special reasons for a failure to do so. The power to extend time under CPR 8.13(4)(b) involves the exercise of a discretion. In the exercise of that discretion, they submit, the learned judge should have taken into account the balance of hardship between the parties, which, contrary to principle, he omitted to do. He omitted to give effect to the overriding objective. He should have taken into account that the respondents had contractually agreed to submit in the widest possible terms to the jurisdiction of the courts of the British Virgin Islands; they had contractually agreed to a method of service by mail, whether or not such service was permitted under the laws of the jurisdiction where they were to be found and served; the appellants might have served the respondents under CPR 7.3(2)(a) or CPR 7.3(2)(c); and in any event no hardship would flow from a refusal to set aside service as the limitation defence would remain open to the respondents.

[60] The respondents reply that the learned trial judge was correct in his finding that the way the appellants formulated their claim in unjust enrichment for recovery of money paid under a mistake is not a claim made "to affect a contract" within the meaning of CPR 7.3(3)(b), and consequently the appellants were not entitled to permission to serve the claim form out of the jurisdiction.

[61] The appellants rely for the validity of their application under CPR 7.3 on a decision of Lightman J. in Albon (trading as NA Carriage Co.) v Naza Motor Trading Sdn Bhd and another,[23] in which he held that there was a good arguable case that the words "claim made in respect of a contract" where they occur in the equivalent part of the English CPR were wide enough to cover a claim in

[23] [2007] EWHC 9 (Ch).

restitution arising out of an overpayment made under a qualifying contract. Thus, the words in our CPR 7.3 “claim made to otherwise affect” a qualifying contract will cover the claimants' claim to repayment of the allegedly excessive redemptions in the present case. The judge rejected this argument because he found that the difficulty with it was that a claim to affect a contract carries the meaning that if the claim succeeds the contract in question will have been affected, whether in one of the ways expressly mentioned (enforcement, rescission, dissolution) or in some other way (e.g., by rectification or by the implication of some other term). If the appellants' claim for restitution succeeded the subscription agreements would remain completely untouched. If there were any ambiguity about this construction of CPR 7.3(3), which he did not think there was, he would resolve it in favour of the respondents.

[62] The appellants submit that the claim is about a contract comprised in several associated documents, all of which bind the respondents to their terms. Had there not been a misapplication of the formula and the resulting miscalculation, there would have been no claim. The claim not only involves enforcing the terms of the contract; it also affects them in the sense that it relates in each case to the existing contract, which contract touched and concerned the claim. The respondents had entered into agreements to subscribe to and to comply with the Articles. The subscription agreements were the gateway for all the investors. If they had not signed them this case would not have begun. The claim is for restitution at common law and on the basis of an unjust enrichment arising out of a mistake made on the application of the subscription agreements. The Receiver is not seeking from the respondents any amount which is not in excess of the entitlement under the subscription agreements. What the investor is to be allowed to keep is the original investment, but not an amount it could not properly have received. In the meantime, the respondents are holding on to monies they are not entitled to. This depletes the funds in the general assets that the Receiver will be able to distribute pari passu to the creditors. It is difficult, the appellants submit, to

understand why the learned judge found that the proceedings did not involve any claim in contract under the subscription agreements.

[63] The respondents rely on the English Court of Appeal case of Hoddinott v Persimmon Homes[24] in support of the learned trial judge's decision. In that case, the English CPR 7.6, which provides for an extension of time for serving a claim form, was under consideration. English CPR 7.6 provides:

> "(1) The claimant may apply for an order extending the period within which the claim form may be served.
> (2) The general rule is that an application to extend the time for service must be made –
> (a) within the period for serving the claim form specified by rule 7.5; or
> (b) where an order has been made under this rule, within the period for service specified by that order.
> (3) If the claimant applies for an order to extend time for service of the claim form after the end of the period specified by rule 7.5 or by an order made under this rule, the court may make an order only if –
> (a) the court has been unable to serve the claim form; or
> (b) the claimant has taken all reasonable steps to serve the claim form but has been unable to do so; and
> (c) in either case, the claimant has acted promptly in making the application.
> (4) An application for an order extending the time for service –
> (a) must be supported by evidence; and
> (b) may be made without notice."

[64] In Hoddinott, the Court of Appeal explained the power of the court under English CPR 7.6 to grant an extension where there was no good reason for having failed to serve within the period of the validity of the claim form. Dyson L.J. in handing down the judgment of the court said:

> "52. It is clear beyond doubt that the claim for breach of contract is not yet time-barred and will not be time-barred for several years. There is no basis for a contrary argument and the contrary does not seem to have been argued. Where there is doubt as to whether a claim has become time-barred since the date on which the claim form was issued, it is not appropriate to seek to resolve the issue on an application to extend the

[24] [2008] 1 W.L.R. 806; [2007] EWCA Civ 1203.

time for service or an application to set aside an extension of time for service. In such a case, the approach of the court should be to regard the fact that an extension of time might "disturb a defendant who is by now entitled to assume that his rights can no longer be disputed" as a matter of "considerable importance" when deciding whether or not to grant an extension of time for service: see Hashtroodi's case,[25] para 18.

53. But where it is clear that an extension of time beyond the four months' period will not extend the time to a date when the claim has become time-barred, the considerations are quite different. In such a case, an extension of time does not deprive the defendant of any limitation advantage. Nevertheless, in our view the fact that a claim is clearly not time-barred is a relevant consideration to be taken into account in favour of the claimant when the court decides whether to grant an extension of time. But it is not determinative.

54. It is tempting to ask: what is the point in refusing to extend the time for service if the claimant can issue fresh proceedings. But service of the claim form serves three purposes. The first is to notify the defendant that the claimant has embarked on the formal process of litigation and to inform him of the nature of the claim. The second is to enable the defendant to participate in the process and to have some say in the way in which the claim is prosecuted: until he has been served, the defendant may know that proceedings are likely to be issued, but he does not know for certain and he can do nothing to move things along. The third is to enable the court to control the litigation process. If extensions of time for serving pleadings or taking other steps are justified, they will be granted by the court. But until the claim form is served, the court has no part to play in the proceedings. A key element of the Woolf reforms was to entrust the court with far more control over proceedings than it had exercised under the previous regime. The rules must be applied so as to give effect to the overriding objective: this includes dealing with a case so as to ensure so far as is practicable that cases are dealt with expeditiously and fairly: CPR r 1.1(2)(d). That is why the court is unlikely to grant an extension of time for service of the claim form under CPR r 7.6(2) if no good reason has been shown for the failure to serve within the [period for service]."

In the Hoddinott case, even though no good reason had been shown for failing to serve within the period of validity, the court exceptionally exercised its discretion to grant an extension. But, the rule remains that in England the court will be unlikely

[25] Hashtroodi v Hancock [2004] EWCA Civ 652; [2004] 1 W.L.R. 3206; [2004] 3 All E.R. 530.

to grant an extension of time if no good reason has been shown for the failure to serve within the six month period. In our case CPR 8.13(4)(b) is in terms quite different to English CPR 7. Our rule specifically requires that some other special reason for extending the period must be shown by the applicant.

[65] In Hashtroodi's case,[26] there was a claim for personal injuries. The claim form was issued on 13th January 2003. On 9th May 2003, one clear working day before the expiry of the validity of the claim form, the claimant applied without notice under rule 7.6(2) of the English CPR for the time for the service of the claim form to be extended, and the application was granted. The defendant applied to set aside the order extending time on the ground that the claimant had no good ground for extending the time for service of the claim form, but the application was dismissed. The defendant appealed on the ground, inter alia, that the master had erred in law in failing to find that the earlier case law, which required there to be a "good reason" for the claimant's failure to serve within the original period of validity and for the extension of validity of proceedings, was still good law, consistent with the overriding objective of rule 1.1 of the CPR and relevant to an application under rule 7.6(2) of the CPR; and that none of the reasons advanced by the claimant amounted to such a good reason. Dyson L.J. delivered the judgment of the court and said:

> "19. Whereas, under the previous law, a plaintiff who was unable to show a good reason for not serving in time failed at the threshold, under the CPR a more calibrated approach is to be adopted. If there is a very good reason for the failure to serve the claim form within the specified period, then an extension of time will usually be granted. Thus, where the court has been unable to serve the claim form or the claimant has taken all reasonable steps to serve the claim form, but has been unable to do so (the CPR r 7.6(3) conditions), the court will have no difficulty in deciding that there is a very good reason for the failure to serve. The weaker the reason, the more likely the court will be to refuse to grant the extension.
>
> 20. If the reason why the claimant has not served the claim form within the specified period is that he (or his legal representative) simply

[26] Supra, para. 63.

> overlooked the matter, that will be a strong reason for the court refusing to grant an extension of time for service. One of the important aims of the Woolf reforms was to introduce more discipline into the conduct of civil litigation. One of the ways of achieving this is to insist that time limits be adhered to unless there is good reason for a departure…."

[66] The respondents submit that the Receiver makes no attempt to explain why he did not commence his BVI proceedings sooner. He makes no attempt to explain what, having issued the claim form, he was doing within the six (6) months of the validity of the claim form. He makes no attempt to explain what he was doing between the initial six (6) month period of validity of the claim form and his subsequent application for permission to serve out of the jurisdiction. There was thus no good reason before the court as to why the Receiver could not have served Wise Global or Swisstor within twelve (12) months. One ground upon which it might be just to grant an extension of the validity of the claim form is that which is expressly contemplated by the Rules at CPR 8.13(a). That is that, despite using all reasonable endeavours, the appellants had been unable to trace and serve the respondents in time. In other words, that through no reasonable fault of the appellants the claim form had expired without his having been able to serve it. In light of the earlier successful service of the US proceedings on the respondents, that ground, they submit, is not available to the appellants in this case. They have no other.

[67] The appellants submit that the respondents contend for an astonishingly narrow construction of CPR 8.13(4) which, they argue, is not only plainly fallacious but which also has obliged them to rewrite the rule to read that CPR 8.13(4)(b) is conditioned upon a claimant not having taken all reasonable steps to serve a claim form in time. That is an impossible construction given that all that a claimant need do in order to invoke the rule is to satisfy the court that "there is some other special reason for extending the period." There is no requirement that the claimant has taken all reasonable steps to serve but been unable to do so. CPR 8.13(4)(a) and 8.13(4)(b) are plainly and obviously true alternatives. A claimant qualifying for the

exercise of the discretion on the ground that he or she has satisfied the court that there is a special reason for it will necessarily have satisfied it that the special reason given is a good one.

[68] The appellants rely on the English case of Green Wood & McLean LLP v Templeton Insurance Ltd.[27] The claimants were solicitors acting in group litigation under a conditional fee agreement. The defendants had insured the litigants under after event insurance. The litigants had incurred a costs order and the defendants had refused to pay. The claimants had paid the litigants' costs and now sought indemnity from the defendant. The claimant applied to serve the defendant out of the jurisdiction. The judge made an order restricting permission to serve out of the jurisdiction to one claim only, the contribution claim, and not another claim, a claim for civil contribution under the UK Civil Liability (Contribution) Act 1978, on the basis that the latter was not an arguable case on contract. The judge upheld the defendant's arguments that there was no arguable case of a contract made between the claimant and itself and that it was not sufficient for the purposes of English CPR 6.20(5)(c) that relief was sought in connection with a contract other than a contract made between the parties to the proposed litigation, which the insurance policy was not. Both parties appealed. In the Court of Appeal the appeal was allowed and the cross-appeal dismissed. The court held that in all the circumstances there was a serious issue to be tried on the claimant's claim in contract and, at this stage, it could not be said that that claim had no reasonable prospect of success. The claim for contribution or indemnity had a connection with a contract governed by English law. That had made it a claim in respect of that contract even if it was not a claim brought under a contract. Some connections with contracts were more remote than others, but the instant claim had a very close connection with the defendant's contract with the miners to pay their costs and own disbursements if they had lost.

[27] [2009] All ER (D) 109 Feb; [2009] EWCA Civ 65.

Conclusion

[69] Section 25 of the Limitation Act is unavailable to the appellants because, in making his case, the Receiver's evidence does not identify any point in time when he says he first discovered the mistake. His evidence makes no attempt properly to grapple with the equally important and separate question when he could reasonably have discovered it. On 9th July 2004, within about a year after his appointment on 10th July 2003, he commenced proceedings against the respondents in the USA making the same claims as he now brings in the BVI. If the court were to be expected to act upon a case that the Receiver only discovered the mistake at some point after his appointment and prior to his US proceedings, then not only must that point in time be identified and explained but a detailed account would perforce need to be given of the period between his appointment and that point in time, in order to show that he could not have reasonably discovered it before.

[70] On the service out of the jurisdiction issue and the applicability of CPR 7.3(3), with all respect to the learned trial judge, there is no good reason to give a narrower construction to the words in our Rules "otherwise to affect" than was given to the words "in respect of" in the UK 1970 Rules. It is difficult to follow the reasoning whereby the judge concluded that the claim in this case did not "affect" a contract. The claim is for restitution where a contractual term (concerning the application of the "formula" referred to at paragraph 5 above) has not been performed. The primary allegation is that both respondents are withholding monies which they should not have received under the contract had the formula been correctly applied. This claim clearly affects a contract, the interpretation, the meaning, and the implications that arise from the contract. Doubtless, whether the NAV formula was or was not correctly or fraudulently applied would have been an issue at the trial of the action. And, there would be an issue of whether the appellants may or may not rely on section 25(c) of the Limitation Act. But, these are matters for determination at the trial, not on these interlocutory proceedings.

[71] I am satisfied that the judge was right to have found that the power in CPR 8.13 to extend the validity of the claim form was only to be exercised for “good reason” for the failure to serve the claim during the period of its validity. The failure of the appellants to show that they had taken any steps at all to serve the claim form in Hong Kong within the initial twelve (12) month period, or to give any explanation as to why they had failed to do so or what they had been doing, entitled the learned trial judge to set aside his earlier order extending time for service out of the jurisdiction by a further six (6) months and to set aside the subsequent service on the respondents as a matter of discretion. The power to extend the validity of a claim is only to be exercised for 'good reason', which would normally involve showing good reason for the failure to serve the writ during the period of its validity. In this case, the appellants had given no reason at all why they had failed to apply in good time to serve the respondents in the manner they had previously served the US proceedings, but had instead waited to apply for permission to serve out and for an extension of time until two months after the period for service had passed. The judge had therefore been entitled to set aside the extensions for service of the claim form.

[72] On the extension of time entitlement under CPR 8.13 issue, the learned trial judge was justified in holding that the respondents were entitled to a refusal of an extension of time for service of the claim form on them. In the case of Wise Global, the appellants had failed to take any steps at all to serve the claim form before the time of their application for an extension. They had no explanation as to why they had failed to do so or what they had been doing. They could not even show that they needed an extension of time in order to be able to serve the claim form on Wise Global. The claim was in any event statute barred. Even assuming that the appellants were right in their contentions as to the limitation period not beginning to run until the Receiver was appointed, the action had in any case already become time-barred during the currency of the unserved claim form.

[73] The respondents had a right to be sued by means of a claim issued within the statutory period of limitation and served within the period of its validity. From the authorities cited above, once the respondents could show, as they have, that they might be deprived of a defence of limitation if time for service of the claim form was extended it was enough for the extension to have been set aside. The statutory limitation period should not be made elastic at the whim or sloppiness of a litigant. Public interest requires that claimants adhere strictly to the time limit for service or else provide a good reason for dispensation. That not having been done here, the learned trial judge was entitled to exercise his discretion to set aside the extension of time.

[74] I would dismiss the appeal of the appellants, affirm the orders of Bannister J. made on 19th April 2011, with costs in the appeal to the respondent Wise Global being two thirds of summarily assessed costs of $75,615.00, and costs in the appeal to the respondent Swisstor & Co being two thirds of the assessed if not agreed costs in the court below. In view of the outcome of the appeal, I would make no order on the respondent's Notice.

Don Mitchell
Justice of Appeal [Ag]

I concur.

Ola Mae Edwards
Justice of Appeal

I concur.

Davidson Kelvin Baptiste
Justice of Appeal