THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

CLAIM NO: ANUHCV 2010/0432

BETWEEN:

DENFIELD MATTHEW

Claimant

and

(1) CARIBBEAN GOLF LIFESTYLE LTD.

~~**(2) INNOTECH SERVICES (Antigua) LTD.**~~

Defendants

Appearances:
Ms. Andrea Roberts-Nicholas for the Claimant
Mr. Hugh Marshall Jr. for the Defendant

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2012: March 23

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RULING

[1] **MICHEL, J.:** A review of the documents filed, applications made and orders rendered in this matter is necessary to enable the Court to arrive at a ruling on the application before it.

[2] On 27th August 2010, Denfield Matthew (the Claimant) filed a Claim Form and Statement of Claim claiming against Caribbean Golf Lifestyle Ltd (the First Named Defendant) and Innotech Services

(Antigua) Ltd (the Second Named Defendant) an order that the Defendants do pay the Claimant US$100,000 by way of specific performance of a purchase agreement, damages in lieu of or in addition to specific performance, interest, costs and further or other relief.

[3] On 14th October 2010, Marshall & Co. filed an Acknowledgement of Service on behalf of the Second Named Defendant, acknowledging receipt by the Second Named Defendant of the Claim Form and Statement of Claim and indicating an intention to defend the claim.

[4] On 20th October 2010, the Second Named Defendant filed a Defence, seeking a dismissal of the claim against it and costs - on the basis that it was not a party to the purchase agreement, that the claim is for specific performance of an agreement it was not a party to, that it cannot be compelled to perform obligations it never agreed to perform, and that there is no real cause of action against it. The Second Named Defendant also filed an application at the same time (with affidavit in support) seeking an order that the Statement of Claim be struck out with costs or, alternatively, that summary judgment be entered for the Second Named Defendant with costs.

[5] On 15th November 2010, the Claimant filed an affidavit in opposition to the Second Named Defendant's application.

[6] On 16th November 2010, the Claimant filed a Reply to the Defence of the Second Named Defendant, joining issue with the Second Named Defendant upon its Defence.

[7] On 18th November 2010, Master Mathurin made an order striking out the Second Named Defendant as a party to the suit, with costs to the Claimant (which was probably intended to be costs to be paid by the Claimant) in the sum of $1,500.

[8] On 19th November 2010, the Claimant filed a Notice of Application (with affidavit in support) seeking an order that permission be granted to serve the Claim Form on the First Named Defendant out of the jurisdiction. A supplementary affidavit was filed by the Claimant in support of his application, which supplementary affidavit sought an order to serve the Claim Form personally on an officer or manager of the Defendant at its principal office in Barbados. In the supplementary affidavit, Caribbean Golf Lifestyle Ltd was named as the only defendant in the suit, which is in keeping with the Order of the Master striking out the Second Named Defendant as a party to the suit.

[9] On 24th February 2011, Master Mathurin made an order that leave be granted to the Claimant to serve the Claim Form on the Defendant out of the jurisdiction, and giving consequential directions.

[10] On 16th August 2011, Marshall & Co. filed an Acknowledgement of Service on behalf of Caribbean Golf Lifestyle Ltd (described as the First Named Defendant) acknowledging receipt of service of the Claim Form and Statement of Claim and indicating an intention to defend the claim.

[11] On 24th October 2011, application was made by the First Named Defendant (with affidavit in support) seeking an order that service of the Claim Form be set aside and costs of the application be paid by the Claimant.

[12] On 2nd December 2011, the Claimant filed an affidavit in opposition to the application to set aside the service of the Claim Form and seeking an order dismissing the application with costs to the Claimant.

[13] When the application came up for hearing in Chambers on 27th January 2012, Counsel for the parties agreed that the application would be determined by the Court, based on the affidavits filed in support of and in opposition to the application, without any oral submissions by Counsel.

[14] The application to set aside the service of the Claim Form set out seven grounds on the basis of which the application was made. These are:

1. Part 7 of the Civil Procedure Rules;
2. Rule 8.12 of the Civil Procedure Rules;
3. The Claim Form was served not in accordance with the rules of service out of the jurisdiction;
4. The claim is defective;
5. There is no good cause of action;
6. The claim is an abuse of the process of the Court;
7. It is just and equitable.

[15] Part 7 of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 (CPR) deals with the service of court process out of the jurisdiction.

[16] The rules under Part 7 which are of relevance to this case are the following:

1. Rule 7.1 which delimits the scope of Part 7 and the meaning of certain terms used in Part 7;
2. Rule 7.2 which provides that a claim form may be served out of the jurisdiction if Rule 7.3 allows and if the court gives permission;
3. Rule 7.3 which enumerates the types of proceedings in which a court may permit a claim form to be served out of the jurisdiction, among which are proceedings in which a claim is made in respect of a breach of contract committed within the jurisdiction;
4. Rule 7.5 which stipulates what must be included in an application for permission and in an order granting permission;
5. Rule 7.7 which addresses applications to set aside service of a claim form; and
6. Rule 7.8 which deals with the mode of service of a claim form.

[17] The facts of this case appear to bring it within the circumstances in which court process may be served out of the jurisdiction, in that it concerns a claim made in respect of a breach of contract committed within the jurisdiction. The application for permission to serve the claim form out of the jurisdiction was made in accordance with Rule 7.5 (1) and the order granting permission was made in accordance with Rule 7.5 (2) of the CPR. The procedure for serving court process out of the jurisdiction was in accordance with Rule 7.8 (1) in that the claim form was served personally on a director of the company by the Claimant's agent. Rule 5.7 (c) of the CPR does make it clear that personal service in the context of a limited company (such as the Defendant in this case) includes service on any director of the company.

[18] As to the issue raised with respect to Rule 8.12 of the CPR to the effect that a claim form served more than six months after the date of its issue is invalid, there can hardly be a statutory provision

clearer than sub-rule 8.12 (2) (a) which states: "The period for service of a claim form out of the jurisdiction is 12 months." The claim form was issued on 27th August 2010 and was served out of the jurisdiction on 22nd July 2011. It was therefore served out of the jurisdiction within a year of its issue, as provided by Rule 8.12 (2) (a).

[19] Grounds 1, 2 and 3 of the First Named Defendant's application are therefore without merit.

[20] As to the fourth ground of the First Defendant's application, it is unclear whether the allegation of the claim being defective is based on form or content. If it is based on form, then it would be covered by the Court's ruling with respect to grounds 1, 2 and 3. If however it is based on content then it will be addressed when grounds 5 and 6 are being considered. It is possible too that this ground relates to the averments in paragraph 7 of the affidavit in support of the application to the effect that, the Court having made an order dismissing the claim against the Second Named Defendant, the Claimant has chosen to ignore that Order and to serve the Claim Form in its present erroneous form on the Second Named Defendant anyway.

[21] On this, the following are to be noted:

1, The Court did not make an order dismissing the claim against the Second Named Defendant; the order made was that the Second Named Defendant be struck out as a party to the suit. This ruling does not require or even entitle the Claimant to alter or excise anything in the Claim Form; it only means that all documents should, as of the date of the Court's order, not include the Second Named Defendant as a party to the suit, which would best be achieved by running a red line over the words "AND INNOTECH SERVICES

(ANTIGUA) LTD" and over the letter "S" in the word "DEFENDANTS" in the heading of all documents subsequently filed in the matter.

2. The aforesaid averment referred to in paragraph [20] rings hollow coming from a party which has continued to file all documents – including the very affidavit containing that averment – with the Second Named Defendant still being shown as a party to the suit and continuing to describe itself as the First Named Defendant (and not the Defendant) despite the Order of the Master.

[22] The Court is also not persuaded that there is any merit in the fifth and sixth grounds of the application made on behalf of the First Named Defendant, because – (1) the averments made in the affidavit in support of the application raise issues which are more appropriate for determination at a trial of the case than on an application to strike out the case and (2) these same averments were made in an application by the same legal practitioner to strike out the same case against the other named defendant in the matter, which application was granted by the Master. The difference on this occasion, however, is that the First Named Defendant – unlike the Second Named Defendant – was a party to the purchase agreement with the Claimant.

[23] In the affidavit sworn to on behalf of the First Named Defendant in support of its application to set aside the service of the Claim Form, the deponent states that the First Named Defendant does not submit to the jurisdiction of the Court by reason of the invalid service of an invalid Claim Form. In the affidavit sworn to by the Claimant in opposition to the First Named Defendant's application, the Claimant deposed that the Defendant unconditionally acknowledged service (of the Claim Form) and thereby submitted to the jurisdiction of the court. This however is not a correct statement of the law, because Rule 9.6 of the CPR specifically states that "A defendant who files an

acknowledgement of service does not by doing so lose any right to dispute the court's jurisdiction." But Rule 9.7 of the CPR sets out the procedure to be followed by a defendant who wishes to dispute the Court's jurisdiction, which procedure the First Named Defendant has not followed. Moreover, Rule 9.7 (5) states that "A defendant who – (a) files an acknowledgement of service; and (b) does not make an application under this rule within the period for filing a defence; is treated as having accepted that the court has jurisdiction to try the claim." The period for filing a defence in this case, having bet set by the Master in her Order of 24th February 2011 at 42 days after the date of service of the claim form, the Claim Form having been served on the First Named Defendant on 21st or 22nd July 2011; as of 3rd September 2011 the First Named Defendant is treated as having accepted the Court's jurisdiction in the matter. No issue can therefore be taken at this stage about the First Defendant's submission to the jurisdiction of the Court.

[24] It is also averred in the affidavit sworn to on behalf of the First Named Defendant that Rule 8.7 of the CPR mandates that every document relied upon must be annexed to the claim form; that section 21 of the Stamp Duty Act, Cap. 410 of the Law of Antigua and Barbuda Revised Edition 1992 (the Act) prohibits the use of any document in any proceedings within the State which are not stamped; that the document exhibited (presumably the purchase agreement, since there is more than one document exhibited) is not stamped; and that it is accordingly not lawfully annexed and cannot be relied upon by the Claimant.

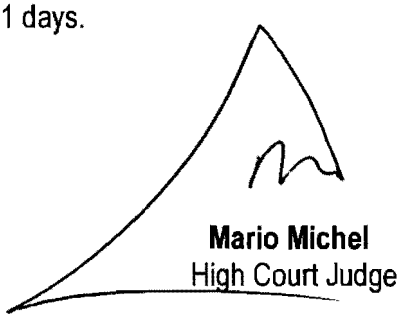
[25] The provision made by section 21 of the Act is however susceptible of different interpretations, including as to the definition of the word "instrument" in the section, as to the requirement for registration of the particular document in issue in this case, or even as to whether the prohibition in the section is effective or applicable to an instrument between the very parties to the instrument.

[26] In any event, this issue ought properly to be addressed by the Court when reliance is sought to be placed on the document at the trial of the case.

[27] The Court does not therefore consider that a case has been made out to set aside the service of the Claim Form on Caribbean Golf Lifestyle Limited and/or that it is just and equitable to do so.

[28] The Defendant's application is dismissed with costs to the Claimant in the sum of $1,000.

[29] The Defendant shall file and serve a defence to the claim within 21 days.



Mario Michel
High Court Judge