THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

A.D. 2014

Claim No: ANUHCV 2011/0478

STANFORD INTERNATIONAL BANK (IN LIQUIDATION)
(Acting by and through its Joint Liquidators, Marcus A. Wide and Hugh Dickson)

Claimant

and

(1) ROBERT ALLEN STANFORD
(2) ANDREA STOELKER
(3) STANFORD DEVELOPMENT COMPANY LIMITED
(4) MAIDEN ISLAND HOLDINGS LIMITED
(5) GILBERTS RESORT DEVELOPMENT HOLDINGS UMITED
(6) STANFORD HOTEL PROPERTIES LIMITED

Defendants

ROBERT ALLEN STANFORD

(Being the Applicant in the Notice of Application filed 19 November 2012 disputing jurisdiction)

Applicant

and

STANFORD INTERNATIONAL BANK (IN LIQUIDATION)

Respondent

Appearances: Mr Hugh Marshall Jr., Counsel for the Applicant; Mr Malcolm Arthurs, Ms Nicolette Doherty and Mr Craig Christopher, Counsel for the Respondent

JUDGMENT
[2014: 20, 27 March and 3 April]

(CPR Part 8.12 and 8.13 – Application to serve claim form out of jurisdiction – Application for extension of time for service of claim form out of jurisdiction – Whether 12 month period of validity of claim form is conditional upon leave to serve out being obtained.)

Introduction

[1] **Wallbank J. (Ag):** These are the written reasons for the Court's decision to dismiss the application handed down orally on 27 March 2014.

[2] This matter raises an issue of apparent continuing controversy in this jurisdiction. It is whether permission to serve a claim form out of the jurisdiction must be obtained before a claim form can have a twelve month period of validity. The High Court appears to have adopted conflicting approaches to this issue, and the Court of Appeal appears not to have pronounced upon it, although the issue has been specifically raised.

[3] The English Court of Appeal has held that a claim form intended to be served out of the jurisdiction inherently has the longer period of validity attaching to it, and that this is not conditional upon a claimant obtaining permission to serve out.

[4] As the equivalent provisions in the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 ("CPR") are expressed in a materially similar manner to the English CPR, I am persuaded by the English Court of Appeal decision to adopt a similar construction of our own CPR.

[5] In England a claim form intended to be served within the jurisdiction has a period of validity of four months, and one intended for service out six months. In our jurisdiction the periods are six months and twelve months respectively.

[6] In the present case the Defendant/Applicant, Mr Stanford, argues that service of a claim form on him outside the jurisdiction should be set aside on grounds, *inter alia*, that the Claimant Stanford International Bank (In Liquidation) (”SIB") had applied out of time (after six months) to have its period of validity extended.

[7] SIB argues that it had applied for the extension within the claim form’s period of validity, because it was a claim form intended to be served outside of the jurisdiction and therefore with an inherent initial period of validity of twelve months, and they had filed their application for an extension some two weeks prior to expiry of the twelve months.

[8] There are other grounds on which Mr Stanford seeks to set aside service of the claim form which can be addressed with greater brevity.

Background and Chronology

[9] On 20 July 2011, SIB issued a claim form and Statement of Claim. The claim form set out on its face Mr Stanford’s address outside of the jurisdiction. On 28 July 2011 SIB obtained an order from Remy J. (“the Remy J. Order”) granting permission for service out on Mr Stanford. On 12 August 2011, SIB filed an amended claim form. On 19 September 2011, the amended claim form and statement of claim was served on Mr Stanford in the United States. On 31 October 2011 Mr Stanford applied to set aside the Remy J. Order for service out.

[10] If the claim form had an initial period of validity of 6 months, then, but for the Remy J Order, it would have been valid only until 22 January 2012. If the claim orm is to be treated as having an initial period of validity of 12 months, it would have remained valid until 22 July 2012.

[11] On 27January 2012 Michel J. heard the set aside application, and reserved his decision.

[12] On 6 July 2012 (the key date in dispute here), SIB filed an application to extend the life of the claim form.

[13] On 15 August 2012 Michel J. granted Mr Stanford's application to set aside the permission given by Remy J to serve out. Michel J. set aside service of the claim form. On 7 September 2012, SIB filed a second application for service out, and for a further extension of the period of validity of the claim form. On 3 October 2012 SIB's second application was determined by Lanns J. (Ag), who granted permission to serve the claim form on Mr Stanford out of the jurisdiction. On 15 October 2012 Mr Stanford was again served outside the jurisdiction. On 30 November 2012, the Court of Appeal, by a judgment of Mitchell JA. (Ag), set aside the ruling of Michel J. on grounds of procedural unfairness due to circumstances concerning maintenance and availability of the Court's file outside Michel J.'s knowledge, and ordered Mr Stanford's application to set aside the Remy J. Order to be remitted to the Court below for re-hearing. The effect of the Court of Appeal's ruling was to restore the Remy J. Order.

[14] Mr Stanford filed the present application on 19 November 2012 to set aside the second attempt at service effected on 15 October 2012. In the alternative Mr Stanford asks this Court to decline to exercise jurisdiction, in favour of the United States of America Federal Court in the District of Houston, before which certain civil proceedings based broadly upon the same underlying matrix of facts are pending.

[15] At the hearing of the present application, Learned Counsel for Mr Stanford, Mr Hugh Marshall Jr., raised an argument which had not been

foreshadowed in his Notice of Application, that the judgment of Michel J. dated 15 August 2012 had the effect of rendering the claim form valid only for a period of six months from the date of issue, and therefore, so he argued, SIB are precluded from relying on the Order of Lanns J. (Ag) of 3 October 2012 because Lanns J. (Ag)'s Order had been made in respect of a claim form which had already by then expired.

[16] Mr Marshall argued that CPR 8.12 lays down a general rule that all claim forms must be served in the jurisdiction within six months of being issued and where a claimant intends to serve his claim form out of Antigua, he must seek permission to do so before the six month time limit expires. He submitted that a claimant who wishes to serve a defendant out of the jurisdiction has no automatic entitlement to the twelve month time period set out by the CPR 8.12, but he has to seek and obtain the court's permission to serve the defendant out of the jurisdiction within the six month time period set out in the general rule.

[17] Consequently, if SIB's claim form had already expired by the time SIB applied to Lanns J. on 7 September 2012, then the permission she had granted ought to be set aside.

[18] Mr Marshall submitted that when Michel J. set aside Remy J.'s order, the claim form reverted to having a 6 month period of initial validity. As that expired in January 2012, by the time SIB applied to extend its validity on 6 July 2012, SIB were then, in his submission, already out of time for seeking an extension.

[19] It is common ground that whereas the English CPR Part 7.6(3) permits a claimant to apply for an extension of the validity of a claim form after time has already expired in certain limited circumstances, our CPR does not have a provision permitting this. Mr Marshall advanced a secondary

argument, relying upon Tabor, M. (Ag)'s decision in ***Cynthia Samuel vs Mount St John's Medical Centre Board et al., Claim No. ANUHCV2011/0785***, that SIB should not be afforded an extension of time of a claim form that had already expired by the time they made their application. SIB's case however was that they had been in time, and that they were not belatedly seeking an extension. Therefore, if, as I have found, SIB were not out of time, I need not address this secondary argument.

[20] At the core of Mr Marshall's main argument is an assumption that it is the order for permission to serve out which converts a claim form into one which is to be served out of the jurisdiction, and changes its initial period of validity from 6 months to 12 months. As he put it, the character of a claim form is only determined by an order granting permission to serve out of the jurisdiction.

[21] As neither side had addressed their minds to authorities on this aspect, prior to the hearing, and SIB maintained their own assumption that any claim form intended to be served on a defendant outside the jurisdiction is automatically initially valid for 12 months, I directed the parties to file written submissions addressing the question.

Analysis

[22] CPR 8.12.provides in exact terms:

"8.12 (1) *The general rule* is *that a claim form must be served within 6 months after the date when the claim was issued.*
(2) The period for
(a) service of a claim form out of the jurisdiction; or
(b) service of an Admiralty claim form in rem;

is 12 months."

CPR 8.13 provides in exact terms

"8.13(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. ..."

[23] The equivalent provisions in the English CPR are found at rules 7.5(1) and 7.5(2). English CPR 7.5 (1) states that where the claim form is served within the jurisdiction it must be served within four months of the date of issue. English CPR 7.5(2) states that where the claim form "*is to be served out of the jurisdiction*" it must be served within 6 months of the date of issue.

[24] The English CPR does not provide how one can know if or when a claim form "*is to be served out of the jurisdiction*". Our CPR does not explain how the general rule in CPR part 8.12 (1) is displaced to give a claim form a 12 month period of initial validity for service out. Both are the same in that they are silent on how the intention to serve a claim form out of the jurisdiction is determined. This silence does not necessarily entail that there is a *lacuna* which requires to be filled by some kind of implied term. The workings of the provisions may be so basic that no additional explanation was thought to be needed by those who drafted them.

[25] In support of his submission Mr Marshall relied upon ***Kenneth Williams v Leslie Chang et al, Claim No: NEVHCV 2010/0153***, delivered on 8 October 2012. In that case, Wallace J. (Ag) stated at paragraph [15]:

"*CPR 8.12 (1) provides a general rule that the claim form 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 months.*"

[26] At paragraph [18] Wallace J. (Ag) applied this proposition, stating: "*The claim form in this case was issued on 8th October 2010. Therefore, given that permission to serve it out of the jurisdiction was granted (29th March 2011), it became a claim under 8.12(2) and so the period for service expired on 10th October 2011*."

[27] Wallace J. (Ag) did not cite any authorities, nor offered any analysis for her interpretation.

[28] It should also be noted that Wallace J. (Ag) set out a list of the central issues for determination in that case, but no issue was included whether or not this interpretation accurately reflects the law.

[29] Furthermore, it is noteworthy that the only appearances before the Court in that case were for the Claimant/Applicant.

[30] These factors suggest that the interpretation of CPR Part 8.12 (1) and (2) adopted by Wallace J. (Ag) was not tested by argument before her.

[31] Mr Marshall further relied upon ***Cummins v Shell International Manning Services, 2002 WL 1311090***, in which Gray J. in the Queen's Bench Division of the English High Court held that "*it is incumbent on the claimant*

either to serve the …defendant within that period [the initial period of validity for service within the jurisdiction] *or, failing that, to apply for permission to serve out within the four month period.*"

[32] Learned Counsel for SIB, Mr Malcolm Arthurs, disagreed. He argued that in two cases in the Commercial Court in the British Virgin Islands Bannister J. proceeded on the basis that a claim form intended to be served out of the jurisdiction inherently and automatically has a twelve month period of validity. He further submitted that in one of those cases the Court of Appeal had heard specific argument on the point, but did not correct Bannister J.'s interpretation, which the Court of Appeal could have done if Bannister J.'s thinking was considered to be wrong.

[33] Mr Arthurs then took the Court to English Court of Appeal authority, which overturned ***Cummins***, and decided that a claim form intended to be served out of the jurisdiction automatically has the longer period of validity.

[34] The net result appears to be that there is no binding authority on this Court either way.

[35] Mr Arthurs submitted that the language in CPR Part 8.12 is clear, and that if it had been the intention of the framers that a claimant wishing to serve a defendant out of the jurisdiction must apply for permission within 6 months, they would – and could easily - have drafted the rules in those terms.

[36] CPR part 8.12 does not express a condition that *"[I]f 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 months."*

[37] Rather, the scheme appears to be the other way round, that a claim form intended to be served out of the jurisdiction has an initial period of validity

of 12 months, but before service can validly be effected the Court's permission is needed, because the Court needs to be satisfied that there is a sufficient nexus with this jurisdiction and that this jurisdiction is the appropriate forum before it will take jurisdiction over a defendant who is outside of the jurisdiction. Had the initial length of time for service out been expressed in the CPR as flexible, depending upon the location where service is intended, then it could more readily be seen that the period for service out is conditional upon permission being granted. The initial period is however fixed at twelve months. The CPR does not show any correlation between the initial period for service and the factors which determine whether or not permission ought to be granted.

[38] In ***Marty Steinberg et al v Banque De Patrimoines Prives Geneve et al, Claim No: BVIHCV 2009/0253***, delivered 19 April 2011, Bannister J. (Ag) at paragraph [8] did not question that where a claimant intends to serve a defendant out of the jurisdiction he has an inherent and automatic period of 12 months to do so. At paragraph [3] he uncritically recounted that: "*Some ten months later* [after issuance of the claim form on 9 July 2009], *on 11 May 2010, the claimants applied for permission to serve the proceedings out of the jurisdiction on the remainder* [of the defendants]."

[39] No point appears to have been taken before Bannister J. (Ag) on that occasion that such application for permission to serve out had been made out of time. Bannister J. (Ag) elsewhere in his judgment (paragraphs [33] and [34]) similarly assumed that a full year was available to a claimant within which to apply for permission to serve out.

[40] The Court of Appeal considered the decision of Bannister J. (Ag) in ***Marty Steinberg et al v Swisstor & Co et al, HCVAP 2011/012***, and delivered its judgment on 12 March 2012.

[41] Mitchell JA. (Ag), delivering the judgment of the Court of Appeal, recounted at paragraphs [57] to [58] that precisely the same point that has arisen in this case was argued before the Court of Appeal then. The Appellants there argued that the initial validity of the claim form must have been for a period of twelve months. The Respondents argued that a claim form "has a life" of six months, and that 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 months.

[42] In spite of setting out these arguments in detail, Mitchell JA. (Ag) did not comment on this issue. The Court of Appeal determined the appeal on other grounds.

[43] Mr Arthurs suggested that an inference can be drawn from this that Mitchell JA. (Ag) agreed with Bannister J. (Ag)'s assumption that the claim form had an interest initial period of validity of 12 months.

[44] Whilst it is noteworthy that Mitchell JA. (Ag) recited the competing arguments but clearly did not consider it necessary to rule on these, no such inference as suggested by SIB's Learned Counsel can in my view be drawn.

[45] In ***Rondex Finance Inc v Ministry of Finance of the Czech Republic et al, Claim No: BVIHCV 2010/0069***, delivered 13 May 2011, Bannister J. (Ag) adopted the same assumptions as he had made in ***Marty Steinberg et al v Swisstor & Co et al****,* (supra), although without certainty. At paragraph 4 of his judgment the Learned Judge remarked:

> *"I am also going to proceed on the footing that the claim form in the present case had a 12 month life span, although it is by no means clear to me that in the absence of any application for*

permission to serve out having been made within that period, it is properly to be so treated."

[46] Bannister J. (Ag) explained further at paragraph [4] that this had been the approach of the English Court of Appeal in ***Bayat vs Cecil [2011] EWCA Civ 135***, at paragraph 40, on substantially identical provisions of the English CPR and that he would follow that for the purpose of deciding the application before him.

[47] Bannister J. (Ag) makes no mention that he had been referred to further authority on which SIB now relies.

[48] In ***Anderton v Clwyd County Council (No.2), [2002] 1 W.L.R. 3174***, the English Court of Appeal heard an appeal on the issue, including the appeal from the decision by Gray J. in ***Cummins***.

[49] ***Anderton*** appears to have been a consolidation of numerous cases raising different issues of interpretation on the English CPR, offering broader guidance in relation to procedure concerning claim forms following the Woolf reforms. Our own CPR 2000 was of course closely modelled upon the English CPR which replaced the Rules of the Supreme Court.

[50] At paragraph 88 of their judgment the English Court of Appeal noted that CPR 7.5 did not expressly set out any time period within which an application for permission to serve the claim form out of the jurisdiction must be made. Our equivalent, CPR Part 8.12, does not do so either.

[51] At paragraph 97 of the judgment the English Court of Appeal stated:

"*Our conclusion on the construction of the relevant provisions of the Civil Procedure Rules is that, on their natural and ordinary meaning, the*

discretion to grant permission to serve a claim form out of the jurisdiction is not subject to any express or implied requirement or condition (1) that the application must be made before the end of the period of four months from the issue of a claim form marked "not for service out of the jurisdiction"…

[52] At paragraph 98 the Court of Appeal observed that the historical context of the old Rules of the Supreme Court throws little light on the construction of the language of the CPR, for the reason that the CPR on this point are modelled upon the previous English County Court Rules rather than the Rules of the Supreme Court.

[53] The Court of Appeal overturned Gray J.'s decision in ***Cummins***.

[54] In ***St Shipping & Transport Inc v Vyzontio Shipping Limited, the "BYZANTIO", [2004] EWHC 3067 (Comm)***, the English Commercial Court applied the Court of Appeal's decision in ***Anderton***. At paragraph 17 of the judgment the Court said:

> *"The rationale in the Cummins decision is that the character of* a *claim form is determined by whether it is intended to be served out of the jurisdiction. It does not depend on whether permission* to *serve it out has been granted. Thus a claim form addressed to* a *defendant resident abroad is potentially valid for 6 months under CPR* 7.5 *even if it is marked 'Not for service out of the jurisdiction'"*

[55] It appears clear therefore, that at least as far as English civil procedure is concerned, the operative interpretation is as was assumed by Bannister J. (Ag) in ***Marty Steinberg*** and in ***Rondex***, and not as adopted by Wallace J. (Ag) in ***Kenneth Williams v Leslie Chang et al.***

[56] This analysis begs the question how it is to be known whether or not a claim form is to be served out of the jurisdiction.

[57] In ***Cummins***, at first instance, Gray J. recounted on page 3 of his judgment that the case for the Claimant was that the claim form had to be served out of the jurisdiction because the address of the defendant was set out on the face of the claim form, and it is this that displaced the shorter initial period for the longer period for service out.

[58] Gray J. was not persuaded by this submission. In overturning Gray J.'s decision the Court of Appeal did not specifically comment on this, although it mentioned this aspect at paragraph 92 as a factor which Gray J. had considered.

[59] It seems evident that the Defendants' address which is required under our CPR Part 8.1 (4), Form 1, and for a Fixed Date claim form, CPR Part 8.1(5), Form 2 to be inserted on the face of the claim form is one indicator that it is to be served out of the jurisdiction.

[60] In the present case the claim form showed Mr Stanford's address as being out of the jurisdiction, in a United States governmental institution, and there could have been no uncertainty that it was intended for service out.

[61] As I am persuaded that the analysis adopted by the English Court of Appeal in ***Anderton*** is similarly applicable here, and that our own Commercial Court has applied the same reasoning in two cases, I adopt it here also.

[62] Consequently this Court holds that SIB had made their application of 6 July 2012 for an extension of the period of validity in time, and that they had twelve months to do so.

Other grounds for the Application

[63] Mr Stanford submits that this Court should decline jurisdiction in favour of the Courts of Houston, Texas, United States of America. Mr Stanford maintains that

- the Texas proceedings were commenced earlier in time than this claim; and
- both concern stewardship of SIB by Mr Stanford; and
- the case Mr Stanford is facing is the same in both jurisdictions; and
- he will have to use the same resources to defend both; and
- a United States judgment would be representative of the claims made against him in Antigua; and
- both concern the same parties.

[64] Mr Arthurs, for SIB, demonstrated to this Court's satisfaction that while the Texas proceedings had been commenced earlier than this claim, the claims are different and concern different parties. The claims in the United States are primarily based upon statute and seek statutory reliefs, whereas the claim in Antigua is based upon common law and Antigua law causes of action. In Texas SIB is a defendant, whereas here in Antigua it is the claimant.

[65] Mr Stanford argues that the present claim should not be permitted to proceed because an Order of the Texas Court dated 12 March 2009, by Judge Godbey in civil action no. 3:09-cv-00298, ruled that no further proceedings may be brought against Mr Stanford without the permission of the Houston, Texas, Court, and that SIB has not obtained such permission.

[66] Mr Arthurs reminded this Court that with the greatest respect to the Courts of Texas, orders of the Texas Courts do not apply in Antigua. Consequently SIB is not precluded from commencing this claim here in Antigua.

[67] Mr Stanford argues that SIB had failed to make full and frank disclosure of the alleged duplication of proceedings between Antigua and Houston, Texas and of the alleged requirement for SIB to have obtained the Houston Court's prior permission.

[68] Mr Arthurs demonstrated to the satisfaction of this Court, with reference to affidavit evidence, that no such failure had taken place.

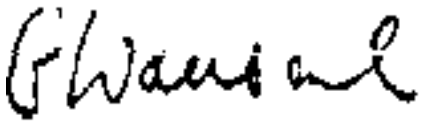
[69] In any event, had there been any non-disclosure of the alleged requirement for SIB to obtain the Texas Court's permission, this would not have been a material non-disclosure as the order of the Texas Court that Mr Stanford relies upon does not apply in Antigua.

[70] Mr Stanford also argued that the claim should not be permitted to proceed because SIB has applied for summary judgment in these proceedings and has not afforded Mr Stanford due notice of such application.

[71] Mr Arthurs stated that he did not understand how such an allegation relates to the present application and he submitted that it does not. I respectfully confess I do not understand this purported ground either. As Mr Marshall did not pursue this submission further it appears to be of no moment.

[72] For the reasons set out above I therefore dismissed the application, with costs to SIB to be assessed if not agreed within twenty one days, and gave directions for Mr Stanford to file a Defence.

[73] Finally the Court expresses its gratitude to both sides' Counsel, as well as the Court Staff, for their assistance in this matter.



Gerhard Wallbank
High Court Judge (Acting)

3 April 2014