

THE EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SKBHCV2014/0130

BETWEEN:

NANCY VASILE

Claimant

and

STEVEN ENGLANDER

First Defendant

FERN ROBERTSON

Second Defendant

Before:

Master Fidela Corbin-Lincoln (Ag.)

On Written Submissions:

Ms. Keisha Spence of Counsel for the Claimant
Mr. Dustin Delany of Counsel for the Defendants

2015: March, 31
June, 3

- [1] **Corbin -Lincoln M [Ag]:** The parties in this claim are litigating with respect to the issue of where is the best place to conduct the litigation.
- [2] Rosamond M. Schmidt (deceased) appears to have been a woman of some means who had assets in both the United States of America (USA) and Saint Christopher and Nevis (St. Kitts).

- [3] Some time prior to July 2010, Mrs. Schmidt became incapable of managing her affairs and thus on 10th July 2010 the 2nd defendant and Ann Pinciss Berman Esq. were appointed her permanent co-guardians by a New York court.
- [4] On 2nd June 2011 the defendants were appointed by this Court as Joint Receivers of all the assets of Mrs. Schmidt in this jurisdiction. The order gave the Receivers *"full power to control all bank accounts now held in the name or names of Rosamond Mary Schmidt"*. The order also directed the Receivers to report to the court in accordance with the Civil Procedure Rules 2000 ("CPR") Part 51 on a quarterly basis commencing on 31st August 2011.
- [5] Mrs. Schmidt left St. Kitts and returned to New York sometime after the defendants were appointed as Joint Receivers.
- [6] Between 2011 and 2012 the defendants, as Receivers, transferred US\$775,000.00 to the New York guardianship account.
- [7] Mrs. Schmidt died on 13th January 2013 in New York. She made two Wills, one in New York ("the New York will") and the other in St. Kitts dealing with her St. Kitts and Nevis assets ("the St. Kitts will"). Nancy Vasile, the claimant, was named as Executrix of the St. Kitts Will.
- [8] On 25th June 2014 the claimant commenced the instant claim seeking:
- (1) a declaration that the defendants hold US\$775,530.55 which was transferred from the St. Kitts accounts of the deceased to accounts in New York on trust for the St. Kitts Estate;
 - (2) an order for payment of US\$775,530.55; and
 - (3) an account of the sum of US\$775,530.55.

- (9) The claimant applied for and was granted permission to serve the claim on the defendants out of the jurisdiction.

The Defendants' Application

- (10) The defendants have applied to the court for an order setting aside service of the claim and statement of claim out of the jurisdiction or an order that the court decline jurisdiction and stay the proceedings.

- (11) The grounds in support of the application are, in summary, that:

(1) Following the commencement of these proceedings the claimant commenced parallel proceedings in Surrogate Court in the state of New York ("the New York claim") against the 1st defendant as Preliminary Executor of the New York Estate of Rosamond Schmidt, which seeks the same relief as that being sought in these proceedings;

(2) The multiplicity of proceedings involved serious consequences with regard to excessive costs and inconvenience and where both actions are allowed to proceed there is a real risk of contradictory results in different jurisdictions;

(3) The Surrogate Court of the State of New York is the forum which is the most suitable for the trial of the action in the interest of the parties.

The Claimant's Opposition to the Application

- (12) The claimant filed no evidence in opposition but filed submissions. The claimant submits that some portions of the defendants' affidavits are not admissible as they fail to state the source of the deponent's information. The claimant submits further that there is no basis for setting aside service out of the jurisdiction and that the claim is a proper one for the court's jurisdiction.

The Issues

- [13] The issues arising are:
- (1) Whether portions of the defendants' affidavits are inadmissible.
 - (2) Whether the court should decline jurisdiction and stay the proceedings or set aside the order for service out of the jurisdiction.
- [14] I propose to deal with issue two (2) first.

ISSUE 1 - Should the Court Decline Jurisdiction and Stay the Proceedings or Set Aside Service out of the Jurisdiction?

- [15] The Civil Procedure Rules 2000 ("CPR") Part 7.7 states that an applicant may apply to set aside service out of the jurisdiction. The court may set aside service out of the jurisdiction if service out of the jurisdiction is not permitted by the rules, the claimant does not have a good cause of action or the case is not a proper one for the court's jurisdiction.
- [16] An order granting permission for the service of the claim must be set aside if in any case upon further consideration of the matter it becomes clear that none of the criteria of CPR 7.3 has been met.¹ The court also has a discretion to set aside service having regard to the strength and nature of the case or on the basis that the local court is not the appropriate forum ("forum non conveniens").²
- [17] In *OBM Limited v LSJ LLC*³ the court set aside service out of the jurisdiction on the basis that the local court was not a proper one for the court's jurisdiction.

¹ *OBM Limited v LSJ LLC*, Claim No. BVIHCV2009/0451, paragraphs 18

² *Ibid* paragraph 19

³ BVIHCV2009/0451

[18] In this case the claimant's application to serve the claim out of the jurisdiction did not satisfy CPR 7.5 since the affidavit in support of the application did not state: (a) the grounds on which the application is made; (b) that in the deponent's belief the claimant has a claim with a realistic prospect of success; or, (c) if the application is made under rule 7.3 (2) (a), the grounds for the deponent's belief that the conditions are satisfied.

[19] Notwithstanding, the defendants have not asserted that service of the claim is not permitted by the Rules or that there is no good cause of action but rather that the appropriate forum is New York.

[20] CPR Part 9.7 A (1) states:

"A defendant who contends that the court should not exercise its jurisdiction in respect of any proceedings may apply to the court for a stay and a declaration to that effect."

[21] An application under CPR 9.7A, unlike CPR 9.7, is not disputing that the court has jurisdiction but is requesting the court to use its discretionary power to *decline jurisdiction* and stay the proceedings. While CPR 9.7A was inserted by way of an amendment to the CPR after the case of **Texan Management Ltd and others v Pacific Electric Wire & Cable Company Ltd**⁴ this case is in my view still good authority for the proposition that CPR 9.7A gives the court the power to stay proceedings on the ground of "forum non conveniens".

[22] Both CPR 7.7 and 9.7A therefore gives the court the power to consider whether the local court is the appropriate forum for the trial of the action. CPR 7.7 gives the court the power to set aside service while CPR 9.7A gives the court power to stay the proceedings.

[23] With respect to the power to stay proceedings under CPR 9.7A, in **Spiliada**

⁴ [2010] 4 LRC 1

Martime Corporation v Cansulex Ltd⁵ Lord Goff of Chieveley summarised the law as follows:⁶

(a) The basic principle is that a stay will only be granted on the ground of forum non-convenience where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action (i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.

(b) As Lord Kinneer's formulation of the principle indicates, in general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay. It is however of importance to remember that each party will seek to establish the existence of certain matters which will assist him in persuading the court to exercise its discretion in his favor, and that in respect of any such matter the evidential burden will rest on the party who asserts its existence. Furthermore, if the court is satisfied that there is another available forum which is prima facie the appropriate forum for the trial of the action, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country.

(c) ... It is significant that in all leading English cases where a stay has been granted, there has been another clearly more appropriate forum. In my opinion the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum. In this way, proper regard is paid to the fact that jurisdiction has been founded in England as of right. |

⁵ [1987] A.C.460

⁶ *ibid* pages 476-478

may add that if, in any case, the connection of the defendant with the English forum is a fragile one (for example, if he is served with proceedings during a short visit to this country) it should be all the easier for him to prove that there is another clearly more appropriate forum for the trial overseas.

(d) Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the action, the court will look first to see what factors there are which point in the direction of another forum... I respectfully consider that maybe more desirable to adopt the expression used by my noble and learned friend Lord Keith of Kinkel, in *The Abidin Daver*... when he referred to the "natural forum" as being "that with which the action that had the most real and substantial connection." So it is for connecting factors in this sense that the court must first look, and these will include not only factors affecting convenience or expense (such as availability of witnesses) but also other factors such as the law governing the relevant transaction... and the places where the parties respectively reside or carry on business.

(e) If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay.

(f) If however the court concludes at that stage that there is some other available forum which *prima facie* is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry, the court will consider all circumstances of the case, including circumstances which go beyond those taken into account when the considering connecting factors with other jurisdictions. One such factor can be the fact, if established objectively by cogent evidence, that

the plaintiff will not obtain justice in the foreign jurisdiction."

- [24] The burden is therefore on the defendant to persuade the court that it should exercise its discretion and grant a stay

The Natural Forum

- [25] In determining whether there is some other forum which is clearly more appropriate for the trial of the action, the court is required to consider which forum the action has its most real and substantial connection

- [26] The instant claim seeks a declaration that the US\$775,530.55 transferred by the defendants to the New York guardianship account is held on trust for the St. Kitts Estate, a return of the sum to the St. Kitts Estate and also an accounting of the said sum.

- [27] Counsel for the defendants submits that the claim has its most real and substantial connection with New York, having regard to the subject matter of the claim, the availability of witnesses, the costs and expense and the cost implication of multiple proceedings.

- [28] Counsel for the claimant submits that the claim has its most real and closest connection with St. Kitts. Counsel submits that *"the subject matter of this claim is a breach of the fiduciary duties of the defendants, breach of a (St. Kitts) Court Order by the Defendants and the removal of the money by the Defendants from St. Kitts. The removal of the said money from St. Kitts is not denied by the Defendants. The Defendants have admitted that they were appointed Guardians of the deceased Rosamond M. Schmidt, deceased by virtue of the Application made by the defendants to the St. Kitts Court and it is this Order that the Claimant contend that they have breached. It is submitted that the St. Kitts Court is the most suitable forum to hear this matter and to enforce its Order."* Counsel submits further that the funds were transferred from St. Kitts and the parties acted in breach of the

order of the St. Kitts Court.

- [29] I am unable to agree with Counsel for the claimant that the subject matter of this claim is *"a breach of the fiduciary duties of the defendants, breach of a (St. Kitts) Court Order by the Defendants and the removal of the money by the Defendants from St. Kitts"*
- [30] While paragraph 17 of the statement of claim avers that the defendants had no power or authority under the receivership order granted by this Court to transfer funds to New York, at the hearing of this application Counsel acknowledged that the order appointing the defendants Receivers, gave them *"full power to control all bank accounts now held in the name or names of Rosamond Mary Schmidt"*. Consequently, there is nothing on the face of the order which prevented the defendants from transferring funds to the New York guardianship account or anywhere. There is therefore no breach of the order of this Court with respect to the transfer of the funds to New York.
- [31] The defendants were required by the order to provide reports to the court in accordance with CPR 51 on a quarterly basis. The claimant's statement of claim avers that the defendants provided reports to the court on 31st August 2011 and 22nd December 2011, one of which disclosed the transfer of US\$700,000 to the guardianship account of the deceased in New York *"to help pay for the support of Mrs. Schmidt"* but the defendants did not provide any other reports. The claimant avers further that the defendants did not provide the court with any details of the needs of the deceased in New York or of her assets there.
- [32] The defendants on the other hand state that reports were provided to the court as ordered.
- [33] Based on the pleadings and evidence before me, it appears that the only breach of this Court's order that is in issue is whether the defendants complied with the

order to provide reports in accordance with CPR 51.9. I note that in the event that the court were to find that the defendants did not provide accounts as required, the court's powers include ordering the defendants to provide the accounts.

[34] Apart from requesting an account, the main relief sought in this claim is the return of the money transferred to the New York guardianship account. In my view the real subject matter of this claim is the sum of US\$775,530.55 which the defendants transferred to the US guardianship account of the deceased.

[35] I find that New York is, prima facie, the most appropriate forum for the trial of this action. The factors I have taken into consideration in reaching this finding includes:

The Subject Matter of the Claim

(1) The claimant is seeking an order that the defendants provide an account of the US\$775,530.55 transferred from the St. Kitts account of the deceased to the New York guardianship account, a declaration that the said sum is held in trust for the St. Kitts Estate and an order that the defendants return the sum to the St. Kitts Estate.

(2) The funds in dispute were transferred to the New York guardianship account by the defendants while the deceased was alive. The evidence of the 2nd defendant is that during the course of the guardianship it was discovered that the deceased had failed to make certain required disclosures about her assets in St. Kitts and, as a result, incurred and was liable to continue to incur significant delinquent tax liability due to her failure to fulfill her U.S. tax obligations. Over US\$200,000.00 was paid towards the deceased's tax obligations during the course of the guardianship. The defendants decided to transfer US\$775,000.00 to the New York guardianship account and applied it to the care and maintenance of the deceased who, prior to her death, was residing in New York. This evidence is not disputed.

- (3) The New York guardianship funds now form part of the Estate of the deceased which is presently under the control and supervision of the Surrogate Court of the State of New York. This is not disputed. The main subject matter of the claim is therefore in New York under the jurisdiction of the New York Court.
- (4) Even if this Court were to try this matter and it was found that the defendants should return the funds to the St. Kitts Estate, the evidence is that these funds are under the jurisdiction and control of the New York Court and therefore any payment to be made from the funds would still need to be sanctioned by the New York Court.
- (5) While it cannot be disputed that the defendants were appointed by a St. Kitts court as guardians of the deceased during her lifetime and that there is an Estate in St. Kitts to be administered in accordance with St. Kitts law, the subject matter of this claim appears to me to have its most real connection with New York.

The Domicile of the Parties, Availability of Witnesses, Convenience and Expense

- (6) The claimant's claim form states that she spends substantial period of time in St. Kitts but she is a citizen of the USA and resides in Staten Island, New York.
- (7) Save for being appointed as guardians of the deceased during her lifetime, the defendants have no other real or substantial connection to St. Kitts and do not maintain a home in St. Kitts.
- (8) All of the defendants' potential witnesses to resolve the issues in contention reside in the USA, including the accountants of the deceased who managed

her financial affairs. Should this matter proceed to trial, unless their attendance is dispensed with by the court, these witnesses would be required to attend the hearing to give evidence.

- (9) The issues raised by the claimant in both proceedings can in my view, be dealt with less expense and inconvenience in New York rather than in St. Kitts.

Multiplicity of Proceedings

- (10) In **The Abidin Daver** Lord Brandon stated:⁷

" Similarly, the mere disadvantage of multiplicity of suits cannot of itself be decisive in tilting the scales, but multiplicity of suits involving serious consequences with regard to expense or other matters, may well do so. In this connection it is right to point out that, if concurrent actions in respect of the same subject matter proceed together in two different countries, as seems likely if a stay is refused in the present case, one or the other of two undesirable consequences may follow: first, there may be two conflicting judgments of two courts concerned; or secondly, there may be an ugly rush to get one action decided ahead of the other, in order to create a situation of res judicata or issue estoppels in the latter."

- (11) In **Texan Management Ltd. and Ors v Pacific Electric Wire and Cable Company Ltd**⁸ the Privy Council set aside the decision of the Court of Appeal and restored the decision of Hariprashad-Charles J to stay the proceedings. The Privy Council, applying the dicta of Lord Brandon in **The Abidin Daver**, held that:

"[A]lthough there was no direct overlap between the formal relief

⁷ [1984] A.C. 398 at 423-424

⁸ [2010] 4 L.R.C. 1

*sought in the prayers in the Hong Kong and BVI actions, it was plain that the ownership of the shares ... was effectively in dispute in the Hong Kong proceedings. Further, it was clear that if both actions went further, and if the principal allegations were contested, there would be many common issues...*⁹

(12) On 17th July 2014, subsequent to commencing this claim, the claimant commenced a claim in New York against the 2nd defendant as Preliminary Executor of the New York Will. The evidence of Mr. Garbuz, which is not disputed, is that the allegations made in this claim are substantially the same as those made by the claimant in the New York claim, the only difference being that: (a) in the New York claim she is seeking the recovery of US\$790,278.05 while in this claim she is seeking the recovery of US\$775,530.55 (b) in this claim there is a prayer for an account and (c) the New York claim is against the 2nd defendant as the Preliminary Executor of the New York Estate.

(13) Mr. Garbuz states further that the relief being sought in both claims is essentially the same i.e. the return of the said sum to the St. Kitts estate. Further, there is an overlap of the issues to be tried in both cases and the principal issue for determination in both claims is whether the sums transferred by the defendants to the New York guardianship account were used for the care and maintenance of the deceased or whether it was transferred to enhance the New York residuary estate. Counsel submits further that although an accounting is not prayed for in the New York claim an accounting would be required to resolve the dispute.

(14) I find that there are common issues to be tried in both claims. It also appears to me that the defendants in the New York claim would have to provide an account which would in my view include an account of the funds transferred to the New York guardianship account.

(15) I have also taken into consideration the cost implications of the dual proceedings commenced by the claimant in New York and in this jurisdiction seeking essentially the same relief and concerning issues that overlap. The claimant has commenced both proceedings in her capacity as Executor of the St. Kitts Estate. While there is no evidence as to who is bearing and will bear the costs of the dual proceedings there is a risk that these costs would have to borne by the St. Kitts Estate in the event that the proceedings are unsuccessful. I note that these proceedings raise questions regarding the defendants' actions as guardians and the 2nd defendant has been sued in the New York proceedings as the Preliminary Executor of the estate of the deceased. Again, while there is no evidence as to who will bear the cost of defending these dual claims, there is a real risk that these costs could ultimately be the cost of Estate of the deceased. The cost implications of multiple proceedings cannot in my view be in the interest of either the New York or St. Kitts Estate

(16) I accept that there is also a risk that if both actions are allowed to proceed there is a real risk of contradictory results in different jurisdictions.

Are there Circumstances Which Weigh Against the Grant of a Stay?

[36] Having found that New York is the most appropriate forum for the trial of the action, I am required to consider whether there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. I find none.

[37] Having considered all the circumstances and the overriding objective of dealing with cases justly, I find that New York is the forum in which the matter can suitably be tried for the interests of all parties and the ends of justice and accordingly I exercise my discretion in favour of granting a stay of these proceedings.

ISSUE 2- Are portions of the Defendants' Affidavits Inadmissible?

[38] Counsel for the claimant submits that paragraphs 12-15 of Mr. Garbuz's affidavit and paragraphs 9 and 31 of the affidavit of Fern Robertson are: (a) inadmissible because they do not comply with **CPR 30.3 (2)** which requires a deponent to state the source of statements of information and belief; and (b) contain inadmissible hearsay.

[39] A consideration of and determination on these issues is not in my view necessary for the following reasons.

(1) The evidence of Mr. Garbuz contained in paragraphs 12 -15 of his affidavit is, for the most part, also contained in the affidavit evidence of Ms. Robertson. Thus even if his evidence contained in paragraphs 12-15 is inadmissible, the evidence contained therein is still evidence properly before the court.

(2) The paragraphs of the affidavit of Ms. Robertson complained of do not contain any evidence relevant to the determination of whether the claim should be stayed.

[40] It is therefore ordered as follows:

(1) The court declines to exercise its jurisdiction to try this claim and the proceedings are hereby stayed.

(2) Costs of \$1,500.00 are awarded to the defendants.



Fidela Corbin Lincoln
Master (Ag.)