EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2015/0004
BVIHCVAP2015/0007

BETWEEN:

ALEXANDER KATUNIN
Appellant

SERGEY TARUTA
Second Defendant

and

JSC VTB BANK
Respondent

BEFORE:
The Hon. Mr. Davidson Kelvin Baptiste — Justice of Appeal
The Hon. Mde. Gertel Thom — Justice of Appeal
The Hon. Mr. Anthony Gonsalves — Justice of Appeal [Ag.]

Appearances:
Mr. Stephen Rubin, QC with him Mr. Niki Olympitis and
Ms. Sara-Jane Knock for the Appellant
Mr. Mark Forte with him Mr. Jerry Samuels for the Respondent

2015: May 21;
2016: June 20.

Civil appeal – Whether learned judge erred in refusing application to set aside alternative service –Submission to jurisdiction – Whether learned judge erred in finding that the appellant had submitted to the court's jurisdiction – Whether the learned judge erred in his interpretation of CPR 7.8A in making the order for alternative service – Whether the learned judge erred in refusing to grant a stay or decline to exercise jurisdiction pursuant to rule 9.7A of the Civil Procedure Rules 2000

JSC VTB Bank ("the Bank"), a bank conducting business in Russia, obtained judgment ("the Russian judgment") against the appellant, Alexander Katunin ("Mr. Katunin"), a Russian national resident in Moscow who owns certain companies incorporated in the

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Virgin Islands, in his absence. The Bank instituted proceedings in the Virgin Islands seeking enforcement of the Russian judgment under the common law. It was granted a freezing order. An order was also made that the proceedings be served on Mr. Katunin in Russia. The Bank subsequently applied pursuant to rule 7.8A of the Civil Procedure Rules 2000 ("CPR") to serve the proceedings on Mr. Katunin by an alternative method at an address in Russia. The judge ordered that the Bank serve Mr. Katunin by leaving the documents with the registered agent of Mr. Katunin's companies in the Virgin Islands. The Bank served the proceedings in accordance with this order.

On 28th August 2014 Mr. Katunin acknowledged service and indicated that he was reserving his right to challenge service and jurisdiction. On the same day, the Bank filed an application for summary judgment. In September 2014, Mr. Katunin applied for an extension of time to file his defence after the determination of the summary judgment application which was scheduled to be heard in October. One month later, an (application) affidavit opposing summary judgment was filed on behalf of Mr. Katunin. On 3rd November 2014, Mr. Katunin applied to set aside the alternative service order. Two days later he made an application challenging the jurisdiction of the court to hear the claim.

The learned judge dismissed the alternative service challenge application holding that Mr. Katunin had submitted to the jurisdiction of the court. He similarly dismissed the jurisdiction challenge application. However he permitted Mr. Katunin to treat the application as an application pursuant to rule 9.7A of the Civil Procedure Rules 2000 ("CPR"). Having done so, he refused to decline to exercise jurisdiction or grant a stay.

Mr. Katunin has appealed alleging among other things, that the Bank had waived its right and was estopped from making the submission to jurisdiction argument and that the learned judge erred in finding that he had submitted to the court's jurisdiction and in his interpretation of CPR 7.8A in making the order for alternative service.

Held: allowing the appeal; setting aside the judgment dated 28th January 2015 and the order dated 12th February 2015; and ordering that the respondent pay the costs of the appellant to be assessed, if not agreed within 21 days; that:

1. Where a party contends that the other party's conduct amounts to a waiver of his right, the test is an objective one. The court must consider whether a reasonable person would have understood the conduct as waiving the right. The Bank's failure to take the point that Mr. Katunin had submitted to the court's jurisdiction at the hearing of the application for an extension of time to file a defence or in their affidavits filed subsequently, in their original skeleton arguments and by their further conduct did not amount to a waiver. For conduct to amount to a waiver, the conduct must be inconsistent with the right. The conduct of the Bank was not inconsistent with the right to take the submission point. Accordingly, this did not give rise to waiver or estoppel in this case.

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2. The conduct that is said to amount to submission to jurisdiction must be wholly unequivocal. The conduct must not simply be consistent with submission to jurisdiction but there must be no other explanation for it. In determining whether conduct is unequivocal, the court is required to look at the circumstances of the case. In Mr. Katunin's various applications before the court, he made it clear that he intended to challenge its jurisdiction. He followed up his reservation with the filing of the challenge to jurisdiction within the time prescribed by CPR 2000. While an application for an extension of time to file defence can be considered as submission to the court's jurisdiction, this application was also for the purpose of allowing Mr. Katunin to file his challenge to jurisdiction. Further, the filing of the affidavit was not in support of any application or step taken by Mr. Katunin, but rather it was in response to the Bank's application for summary judgment which was made and set down for hearing before the time for filling the challenge to jurisdiction had expired. Mr. Katunin's actions, therefore, could not amount to a wholly unequivocal submission to the jurisdiction of the court. The learned judge erred in so holding.

   SMAY Investments Ltd and another v Sachdev and others [2003] EWHC 474 applied.

3. Whether it is impracticable to effect service in accordance with CPR 7.8 is a matter of fact. It was incumbent on the Bank in making the application to adduce evidence to show that it was impracticable to serve the claim pursuant to CPR 7.8. There was no evidence to show that during that period Mr. Katunin was attempting to evade service. The Bank's and Mr. Katunin's evidence on the reason for Mr. Katunin's non-attendance at the District Court differed. This apparent conflict could not be resolved on paper and this was acknowledged by the judge. There was simply no proper evidential basis for the exercise of the judge's discretion to make an alternative service order under CPR 7.8A. Accordingly, this ground of the appeal succeeds.

JUDGMENT

[1] THOM JA: This is an appeal against two orders of Bannister J [Ag.]. In the first order, the learned judge dismissed the appellant's application to set aside the order for alternative service on him. In the second order, the learned judge dismissed the appellant's application in which he challenged the jurisdiction of the court to hear and determine the claim brought against him. The two appeals were consolidated.

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Background

[2] The facts relevant to the issues raised on this appeal are that the appellant, Alexander Katunin, ("Mr. Katunin") is a Russian national who resides in Moscow. He owns certain companies which were incorporated in the Virgin Islands. The respondent, JSC VTB Bank ("the Bank"), is a bank which conducts banking business in Russia.

[3] On 28th February 2014, the Bank obtained judgment ("the Russian judgment") against Mr. Katunin in his absence in the Meschansky District Court in Russia ("the District Court"). The Bank then instituted these proceedings in the Virgin Islands seeking enforcement of the Russian judgment under the common law. On 26th May 2014, the learned judge granted a freezing order against Mr. Katunin and ordered that the proceedings be served on Mr. Katunin in Russia. The Bank did not seek to effect service on Mr. Katunin in accordance with the provisions of the Hague Convention which, it is not disputed, was the appropriate process, but rather on 4th July 2014, the Bank applied pursuant to rule 7.8A of the Civil Procedure Rules 2000 ("CPR") to serve the proceedings on Mr. Katunin by an alternative method at an address in Russia. The learned judge did not grant the order sought, but instead made an order for the Bank to serve Mr. Katunin by leaving the documents with the registered agent of Mr. Katunin's companies in the Virgin Islands. The Bank served the proceedings in accordance with this order.

[4] On 28th August 2014, Mr. Katunin acknowledged service. In doing so, he specifically stated that he was reserving his right to challenge service and jurisdiction. On the said day, the Bank made an application for summary judgment. This application was scheduled to be heard on 21st October 2014.

[5] On 18th September 2014, Mr. Katunin applied for an extension of time to file his defence after the determination of the summary judgment application. Mr. Katunin's application was set down for hearing on 5th November 2015. One

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month later, on 17th October 2014, Ms. Lauren Peaty ("Ms. Peaty") filed an affidavit on behalf of Mr. Katunin in opposition to the summary judgment application and sought permission to adduce expert evidence on Russian law.

[6] On 3rd November 2014, Mr. Katunin applied to set aside the alternative service order and two days later on 5th November 2014, he made an application challenging the jurisdiction of the court to hear the claim. At the hearing on 5th November 2014, Mr. Katunin withdrew his application for extension to file his defence since it became apparent that there was a misunderstanding on Mr. Katunin's part as to when the time for filing the defence expired.

[7] Mr. Katunin's applications challenging service and jurisdiction were listed to be heard on 22nd January 2015. Both sides filed their skeleton submissions. On the afternoon before the hearing, the Bank filed a second skeleton argument in which it contended that Mr. Katunin had submitted to the jurisdiction of the court.

[8] At the hearing on 22nd January 2015, due to time constraint, the learned judge only heard the alternative service challenge application. He dismissed it on the basis that Mr. Katunin had submitted to the jurisdiction of the court. The learned judge subsequently, on 12th February 2014, dismissed the jurisdiction challenge application without hearing arguments on the merits, having found earlier that Mr. Katunin had submitted to jurisdiction. However, he permitted Mr. Katunin to treat the application as an application pursuant to CPR 9.7A. Having done so, he refused to decline to exercise jurisdiction or grant a stay.

[9] In his notice of appeal, Mr. Katunin outlined several grounds of appeal. However, on the hearing of the appeals, the arguments were based on the following issues:

(i) Whether the learned judge had erred in finding that Mr. Katunin had submitted to the court's jurisdiction;

(ii) Whether the learned judge erred in his interpretation of CPR 7.8A in making the order for alternative service; and

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(iii) Whether the learned judge erred in refusing to grant a stay or decline to exercise jurisdiction pursuant to CPR 9.7A.

Submission to the Jurisdiction

[10] Learned counsel, Mr. Rubin's, QC, argument on this point is three-fold. Firstly, he contends that the Bank had waived its right and was estopped from making the submission to jurisdiction argument. Secondly, the learned judge applied the wrong test in determining whether Mr. Katunin had submitted to the jurisdiction of the court and thirdly, the steps taken by Mr. Katunin were not unequivocal.

Waiver / Estoppel

[11] The learned judge found that waiver and or estoppel did not arise. He explained his reasons for so finding at paragraph 17 of the judgment as follows:

> "The second of the two matters which I mentioned above is the question whether it is open to VTB to take this point given its subsequent conduct in what I can now properly refer to as the litigation. After, as I have found, Mr Katunin had submitted to the jurisdiction, he issued his two applications challenging service and jurisdiction. Instead of pointing out to him that he had already submitted, VTB agreed to an order extending Mr. Katunin's time to serve a defence until after Mr. Katunin's applications had been determined. Although it would obviously have been preferable had VTB taken the point immediately, rather than on the afternoon before the hearing of Mr. Katunin's applications, I do not think that the fact that they did not do so alters the position. As I have already said, it is a fact that Mr. Katunin has submitted to the jurisdiction of this Court. It would only be if for some reason VTB was estopped by conduct from so submitting that any point could be taken against it. I do not think that any question of estoppel arises on these facts."

[12] Mr. Rubin, QC, contends that the learned judge's finding is wrong. He argues firstly, that the conduct of the Bank through its counsel on 5th November, at the hearing of the application for extension of time to file the defence, where counsel stated, "Well, the Rules are constructed such that he would make his jurisdictional challenge before the expiration of that time which he has done today. So I don't

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take issue with that",[1] was a clear indication that the Bank would not take the point that Mr. Katunin had submitted to the jurisdiction. Therefore, in those circumstances, the Bank waived its right to take the point. Mr. Rubin, QC, argued further that the conduct of the Bank in insisting that the applications challenging service and jurisdiction and the application for summary judgment run in tandem, there was an assumption that there had been no submission to jurisdiction. Mr. Rubin, QC, also relied on the following conduct of the Bank as amounting to waiver/estoppel, (a) in the affidavit of Murray Laing which was filed on 4th November **in opposition to Mr. Katunin's** application challenging jurisdiction and the affidavit of Ms. Rosalind Nicholson filed on 18th November 2014, the Bank did not state that Mr. Katunin had submitted to jurisdiction, (b) in the skeleton arguments of the Bank on the challenge applications, the submission point was not taken. The point was only taken on the afternoon before the hearing. Mr. Rubin, QC, argues that such conduct shows that there was an implicit agreement or understanding that no point would be taken on submission of jurisdiction.

[13] Learned counsel Mr. Forte for the Bank, in response, submitted that when the **statement is considered in its proper context, it only suggests that the Bank's** counsel did not take issue with the fact that Mr. Katunin on the same day when the deadline for filing a defence expired made a challenge to the jurisdiction of the court. Mr. Forte referred to **Halsbury's** Laws of England[2] and submitted that there was no informed voluntary decision, nor any decision at all by the Bank to waive the submission point. Mere silence, in his view, does not amount to a decision. There was no duty on the part of the Bank to raise the submission point at the 5th November hearing of the application for extension of time to file the defence. Further, there was no reliance or detrimental change of position occasioned by Mr. Katunin as a result of the Bank not taking the submission point on 5th November.

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[1] See skeleton argument of the first defendant/appellant filed 23rd February 2015 at para. 10, p. 3.
[2] 5th edn., Volume 47, LexisNexis 2014.

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[14] Where a party contends that the other party's conduct amounts to waiver of his right, the test is an objective one. The court must consider whether a reasonable person would have understood the conduct as waiving the right. In considering the effect of the statement, the statement must be put into its proper context. The relevant part of the transcript reads as follows:

> "THE COURT: I mean I don't see how, Mr. Samuel, I can go further than to say that on the hearing on the 15th of January or whatever the date is for the set aside application, if that is unsuccessful, I will give directions for the rest of the trial. There is no point in him putting in defences now, is there?
>
> MR. SAMUEL: Well, we have a different view, but Your Lordship has - -
>
> THE COURT: Why should somebody who has got a challenge to the jurisdiction plead?
>
> MR. SAMUEL: Well, our position is that the deadline expires today.
>
> THE COURT: What for?
>
> MR. SAMUEL: For his Defence.
>
> THE COURT: I can't believe the Rules are so constructed that even if he is claiming that he shouldn't be here, he has got to put in a defence.
>
> MR. SAMUEL: Well, the Rules are constructed such that he would make his jurisdictional challenge before the expiration of that time which he has done today. So I don't take issue with that."

[15] The hearing was in relation to Mr. Katunin's application for an extension of time to file his defence. The discussion surrounded whether it was necessary to file the defence in view of the fact that Mr. Katunin had filed a challenge to service and jurisdiction. Mr. Samuel was acknowledging that since Mr. Katunin had filed a challenge to the jurisdiction within the time permitted by CPR, he was not taking issue with the time the application was filed. In my view, this acknowledgment cannot be extended to mean that the Bank had waived its right to take the submission point. Also, while I agree that the Bank took the submission point at the eleventh hour, their failure to take the point on 5th November, or in their

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affidavits filed subsequently and in their original skeleton arguments and their insistence that the three applications be heard, does not amount to waiver. For conduct to amount to waiver, the conduct must be inconsistent with the right. The conduct of the Bank of which Mr. Katunin complains was not inconsistent with the right to take the submission point. I agree with the submission of the Bank and the finding of the learned judge that the conduct of the Bank did not give rise to waiver or estoppel in this case.

Test to Determine Submission

[16] The test applied by the learned judge in determining that Mr. Katunin had submitted to jurisdiction is whether the steps taken by Mr. Katunin were inconsistent with his contention that the court did not have jurisdiction. Mr. Rubin, QC, contends that this is the wrong test. He submits that the correct test is whether the step taken was wholly unequivocal. He relied on the following passage in SMAY Investments Ltd and another v Sachdev and others[3] at paragraph 41:

> "It seems to me that when a defendant has complied with CPR Pt 11 with a view to challenging the jurisdiction of the court, and the time for making his application under CPR r 11(4) has not yet expired, then any conduct on his part said to amount to a submission to jurisdiction, and therefore a waiver of that right of challenge, must be wholly unequivocal.
>
> ...Whether any particular matter, for example an application to the court, amounts to a voluntary submission to the jurisdiction must depend upon the circumstances of the particular case. In Sage V Double A Hydraulics Ltd The Times, 2 April 1992, Farquhason LJ said... 'A useful test was whether a disinterested bystander with knowledge of the case would have regarded the acts of the defendant, or his solicitors, as inconsistent with the making and maintaining of his challenge'. In arriving at the view to be imputed to the disinterested bystander, it seems to me that one has to bear in mind that there will be an effective waiver, or a submission to the jurisdiction, cannot be explained, except on the assumption that the party in question accepts that the court should be given jurisdiction. If the step relied upon, although consistent with the acceptance of jurisdiction, is a step which can be explained also because it was

[3] [2003] EWHC 474.

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> necessary or useful for some purpose other than acceptance of the jurisdiction, there will, on the authorities, be no submission ... If the well informed bystander had been left in doubt because what the defendants had done was equivocal, in the sense that it was explicable on other grounds in addition to agreement to accept the jurisdiction of the court, then the conclusion must be, on the authorities, that there would have been no submission to the jurisdiction. The representation derived from the conduct of the party said to have submitted must be capable o**f only one meaning."**

[17] Mr. Forte in response, submitted that the learned judge applied the correct test. However, if the Court is of a different view, he contended that the interpretation of the test in SMAY Investment, as outlined by Mr. Katunin is misconceived. Mr. Forte posits that the correct approach is to ask the following questions: (a) In light of the reservations, would a disinterested bystander regard the unequivocal steps as inconsistent with the making and maintaining of his challenge? (b) Can the step relied on as a waiver or submission be explained as necessary or useful for some other purpose than acceptance of jurisdiction? (c) If the answer to (a) is yes and (b) is no, then on the authorities, the representation derived from the appell**ant's** conduct is capable of only one meaning that the appellant submitted to this jurisdiction.

[18] In my view, the correct test is the test outlined at paragraph 41 in SMAY Investment. The conduct that is said to amount to submission to jurisdiction must be wholly unequivocal. The conduct must not simply be consistent with submission to jurisdiction, but there must be no other explanation for it. In determining whether conduct is unequivocal the court is required to look at the circumstances of the case. While the learned judge did not use the same words as in SMAY Investment, the language of the learned judge had the same effect. Indeed the language used by the learned judge is quite similar to the language used in **Blackstone's Civil Practice** 2013 The Commentary[4] where the learned authors stated, **"In the absence of any express agreement to submit to the**

[44] Oxford University Press, para. 16.3.

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jurisdiction, **it is a question of whether the defendant's conduct**, when viewed objectively in the context of all the circumstances of the case, is inconsistent with maintaining an objection to the jurisdiction of the court". In my view, when paragraphs 15 and 16 of the judgment are read conjointly, the learned judge did not apply the wrong test.

Whether the Steps Taken Amounted to Submission

[19] This brings me to the next question - whether the learned judge was correct in finding that Mr. Katunin had submitted to the jurisdiction of the court. The learned judge found that by taking the following steps Mr. Katunin submitted to jurisdiction. The steps are (a) the application for an extension of time to file the defence and (b) the second affidavit of Ms. Peaty in opposition to the summary judgment application and the application to file expert evidence in support of his contentions. The learned judge found **that in Ms. Peaty's affidavit,** Mr. Katunin asked the court to exercise its jurisdiction to make decisions in its favour on the merits of the substantive claim and to dismiss the summary judgment application. In so doing, Mr. Katunin waived or abandoned any right which he may have had to challenge **the court's jurisdiction** and therefore, the reservations made were of no effect.

[20] Mr. Rubin, QC, submits that the learned judge, having applied the wrong test, erred in so finding. He argues that in order for there to be submission to the jurisdiction of the court the steps taken must be unequivocal, indicating that jurisdiction is accepted. The steps taken by Mr. Katunin were not wholly unequivocal. Mr. Katunin made no application where the merits of the claim were engaged. The application for extension of time to file the defence was not such an application. In making the application, Mr. Katunin expressly reserved his right to challenge jurisdiction and the time for doing so had not expired. Similarly, the application to adduce expert evidence was not unequivocal. The issues of jurisdiction and merits overlapped. It was necessary for the jurisdiction challenge to show that Mr. Katunin could not evade service in Russia. In relation to Ms

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Peaty's affidavit, Mr. Rubin contends that while the affidavit was filed in response to the summary judgment application, the affidavit was never deployed in evidence. Also, the affidavit contained in paragraph 9, an expressed challenge to service and a reservation to challenge jurisdiction. Further, although the affidavit was filed 16 days prior to the jurisdictional challenge, nothing happened in relation to the case during that period. He emphasized that the Bank's application for summary judgment was made before the period for filing the jurisdictional challenge had expired. The applications challenging service and jurisdiction were filed within the time stipulated in CPR 9.7. Mr. Rubin, QC relied on the following passage in Prudential Insurance Co Ltd v Prudential Insurance Co. of America:[5]

> "One of the objectives of the CPR is to allow the courts to enforce procedural economy. That must entail allowing the parties to put applications before the court in a way which enables the court to secure that objective. I can see no reason why, in the new environment of the CPR, a defendant cannot put before the court both a challenge to jurisdiction and a challenge to the proceedings on other grounds. It would be a pity if we adopted an approach which suggested that either the court or the defendant could not walk and chew gum at the same time."

[21] Mr. Rubin, QC, further submitted that the reservations made in the acknowledgment of service, the application for extension of time to file defence, Ms. Peaty's affidavit and the various correspondence between counsel on both sides prior to the filing of the affidavit, clearly show that Mr. Katunin did not submit to the jurisdiction of the court. He relied on the following statement in Dicey, Morris and Collins on the Conflict of Laws,[6] "The clear trend of the modern authorities is that the defendant will not be regarded as having submitted by making an application in the proceedings provided that he has specifically reserved his objection to the jurisdiction".

[5] [2002] EWHC 2809.

[6] 14th edn., Sweet & Maxwell, 2006, para. 11-1345.

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[22] Mr. Forte in response submits that the learned judge came to the correct conclusion in finding that the steps taken by Mr. Katunin were unequivocal. The intent of Mr. Katunin in filing the affidavit was to get a favourable decision on the summary judgement application. Thus, he also sought an extension of time to file a defence. He submitted further that the steps taken were also inconsistent with the reservations made by Mr. Katunin. The repetition of the reservations, whilst contesting the claim on merit through the affidavit evidence opposing the summary judgment application, was wholly inconsistent with the putative reservation and amounted to an unequivocal submission to the jurisdiction of the court.

[23] While I agree that an application for an extension of time to file a defence is per se consistent with submission to the jurisdiction, having regard to the circumstances of this case, I am of the view that it was not. The purpose for making the application was not solely for the extension of time to file a defence, but it was also for the purpose of allowing Mr. Katunin to file his challenge to jurisdiction.

[24] This was clearly stated in the application and Mr. Katunin reserved the right to challenge jurisdiction. Under CPR 9.7(3), an application challenging jurisdiction must be filed within the time allowed for filing a defence or within any period of extension agreed by the parties or ordered by the Court. At the hearing on 5th November 2014, it became clear that when the application was made on 18th September, **there was a misunderstanding on Mr. Katunin's part** that the time for filing the defence would expire on 28th September rather than on 5th November. The application was therefore wholly unnecessary. The disinterested bystander considering all of the facts would find that this conduct was not unequivocal. In my opinion, having regard to the circumstances of this case, the learned judge erred in concluding that the application for extension of time amounted to submission to the court**'s jurisdiction.**

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[25] In relation to the application to adduce expert evidence, no formal application was made by Mr. Katunin; rather he sought to make the application in paragraph 22 of Ms. Peaty's affidavit. I will therefore deal with both issues together. The relevant paragraphs are 3, 9, 22 and 26. In her affidavit, Ms. Peaty made a reservation of Mr. Katunin's right to challenge jurisdiction and service. She deposed in effect, that the Russian judgment was not capable of being enforced in the Virgin Islands. The proceedings being common law enforcement proceedings, it is a principle of common law enforcement that the judgment sought to be enforced must be a final and binding judgment even though it is subject to appeal. She sought to adduce expert evidence on Russian law from one Professor Yarkov to show that the Russian judgment was not final and binding and was obtained contrary to public policy. She relied on the report of Professor Yarkov in which he opined that the Russian court, having granted an extension of time to appeal and an appeal having been filed, the Russian judgment has not come into legal effect, and is not final and binding. The judgment is subject to reversal since consideration of the case without due notification of Mr. Katunin is a violation of the fundamental principles for conducting civil proceedings and of public policy, the decision having been made in breach of the rules of natural justice. For those reasons, she deposed in paragraph 26, that the Bank's application should be dismissed.

[26] While the filing of the affidavit in response to the summary judgment application could be considered a submission to jurisdiction, the legal authorities such as SMAY Investment and Sage v Double A Hydraulics Ltd,[7] emphasize that in determining whether a party has submitted to jurisdiction, the court must look at all of the circumstances of the case. In this case, from the very first step of filing the acknowledgement of service, Mr. Katunin made it clear that he intended to challenge the jurisdiction of the court. Mr. Katunin maintained this position in the various correspondence from his counsel. He included a reservation in the application for extension of time and in the affidavit. Further, the filing of the

[7] [1992] Times Law Reports 165.

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affidavit was not in support of any application or step taken by Mr. Katunin, but **rather it was in response to the Bank's application for summary judgment which** was made and set down for hearing before the time for filling the challenge to jurisdiction had expired. It cannot be said that the only possible explanation for the filing of the affidavit was the intention of Mr. Katunin to have the claim tried by the court, when in the very affidavit Mr. Katunin made it clear that he intended to challenge the jurisdiction of the court, and he followed up his reservation with the filing of the challenge to jurisdiction within the time prescribed by CPR 2000. In my view, when all of the circumstances are taken into account, the steps taken by Mr. Katunin did not amount to a wholly unequivocal submission to the jurisdiction of the court.

Service out of the Jurisdiction

[27] At the hearing of the appeal Mr. Rubin, QC submitted that should the Court find that Mr. Katunin did not submit to the jurisdiction of the court, this Court should remit the application to set aside the alternative service order to be determined by the lower court. Alternatively, the Court should set aside the order. Mr. Forte, on the other hand, submitted that the Court should determine the issue. In my view, the learned judge, having expressed his view on the issue and this Court having heard submissions from both sides on the issue, there is no good reason to remit the matter to the lower court.

[28] The learned judge having heard submissions on the issue, expressed the view that the order for alternative service was properly made. He outlined his reasons for so finding at paragraph 22 of the judgment as follows:

> **"The principal evidence upon which the alternative service order** was made was that, 'based upon [**Mr. Katunin's**] conduct' being, specifically his failure to attend the hearing at the District Court at which the judgment was obtained, he would not voluntarily attend before the Court tasked under the Convention with serving process on him and that service would thus be ineffective. The District Court documents record (in transalation) that Mr Katunin was 'notified' of the hearing **–** although not 'duly notified'

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as other parties are recorded to have been. There was no evidence directed to the significance (if any) of this distinction. The delays alleged to be inherent in the process were also relied upon, but the most important submission was based upon the alleged probability that Mr Katunin would not submit to the service procedure under the Hague Convention. Mr Rubin says that that evidence was of no consequence, because, according to Mr Katunin, the reason he did not attend civil case was because he was never served. That, of course, is not a matter which I could resolve on the present application, but it seems to me that when I made the alternative service order I had sufficient evidence before me to enable me to reach a conclusion that it was more probable than not that Mr Katunin would not submit to service under the Hague Convention in Russia and that it was accordingly impracticableto serve him by that route. The fact that Mr Katunin has gone to such trouble in an attempt to set aside the alternative service order on this application does nothing to encourage me in a view that my reliance upon the unlikelihood of Mr Katunin accepting service in Moscow under the Hague Convention was in way misplaced."

[29] Mr. Rubin, QC, submitted that the learned judge erred in so finding for the following reasons:

(a) His conclusion of the reasons for non-attendance of Mr. Katunin at the Moscow trial was against the weight of the evidence;

(b) The service order being an ex parte order should have been set aside on the basis of non-disclosure, the Bank having failed to disclose to the court that Mr. Katunin was granted an extension of time to appeal on the issue of non-notification of the trial;

(c) The Bank had failed to satisfy the impracticability requirement under CPR 7.8, therefore CPR.7.8A was not properly engaged;

(d) Alternatively, the alternative method of service procedure cannot be used to serve a person within the jurisdiction when the person is in fact out of the jurisdiction.

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[30] I will deal with grounds (a) and (c) together since they are interrelated. The applicable rules are CPR 7.8 and 7.8A. They read as follows:

> "**7.8** (1) Subject to the following paragraphs of this rule, and Rule 7.8A if a claim form is to be served out of the jurisdiction, it may be served –
>
> (a) by a method provided for by
> (i) rule 7.9 (service through foreign governments, etc.); or
> (ii) rule 7.11 (service on a State);
> (b) In accordance with the law of the country in which it is to be served; or
> (c) personally by the claimant **or the claimant's agent.**
>
> (2) Nothing in this Part or in any court order may authorise or require any person to do anything in the country where the claim form is to be served which is against the law of that country.
>
> 7.8A (1) Where service under Rule 7.8 is impracticable, the claimant may apply for an order under this Rule that the claim form be served by a method specified by the court.
>
> (2) An order made under this Rule shall specify the date on which service of the claim form shall be deemed to have been effected.
>
> (3) Where an order is made under this Rule, service by the method **specified in the court's order shall be deemed to be** good service.
>
> (4) An application for an order under this Rule may be made without notice but must be supported by evidence on affidavit –
>
> (a) specifying the method of service proposed;
> (b) providing full details as to why service under Rule 7.8 is impracticable;
> (c) showing that such method of service is likely to enable the person to be served to ascertain the contents of the claim form and statement of claim; and
> (d) certifying that the method of service proposed is not contrary to the law of the country in which the claim form is to be served.
>
> (5) Where any method of service specified in an order made under this Rule is subsequently shown to be contrary to the law of the country in which the claim was purportedly served, such service shall be invalid."

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[31] It is common ground that in this case, the order for service out of the jurisdiction having been made, service was to be effected in accordance with the Hague Convention, the Convention being applicable to both Russia and the Virgin Islands (a British Dependent Territory). In such circumstances, an alternative service order would only be made where it was impracticable to effect service under CPR 7.8.

[32] Mr. Rubin, QC, submitted that the Bank had not satisfied the impracticability requirement, which he argues presents a higher hurdle that the good reason requirement contained in the English CPR 6.15 which was considered in cases such as Knauf UK Gmbh v British Gypsum Ltd And Another,[8] Cecil v Bayat[9] and Deutsche Bank AG v Sebastian Holdings Inc. et al.[10] These authorities also illustrate that the fact that service in accordance with the Hague Convention might lead to delay or be less convenient does not **of itself amount to "good reason" and** Mr. Rubin, QC, submitted that those factors therefore cannot amount to being impracticable.

[33] Mr. Rubin, QC, further submitted that there was no evidence to show that Mr. Katunin would evade service. There was evidence before the learned judge that Mr. Katunin was not notified of the hearing before the District Court and therefore he could not attend and Mr. Katunin was granted an extension of time for filing an appeal on the basis of lack of notification of the proceedings.

[34] Mr. Forte in response, argued that the Bank led sufficient evidence upon which the learned judge could have found that the impracticability requirement was satisfied. He referred to the expert evidence of the respondent which showed (i) the length of time it takes (approximately six months) to successfully effect service under the

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[8] [2002] 1 WLR 907.
[9] [2011] 1 WLR 3086.
[10] [2014] EWHC 112.

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Hague Convention; (ii) the significant risk that Hague Convention service would be ineffective; and (iii) an intended defendant who is in the Russian Federation cannot be compelled to accept service of foreign process. Also, since the freezing order was still outstanding there was a significant risk of prejudice to the action for enforcement and the efficacy of the freezing order. Mr. Forte submitted that the **dismissal of Mr. Katunin's complaint of lack of notification** by the Russian Court of appeal confirms that the fact that Mr. Katunin alleges that he was absent from Russia when the notification was given to his address is irrelevant. Having regard to the expert evidence, his further appeal on this issue is also very likely to be dismissed.

[35] While by operation of Russian law Mr. Katunin may be deemed to have been notified of the proceedings when the notice was left at his address in Russia, his evidence that he was not aware of the proceedings because he was absent from Russia at the relevant time was not contradicted.

[36] Whether it is impracticable to effect service in accordance with CPR 7.8 is a matter of fact. It was incumbent on the Bank in making the application to adduce evidence to show that it was impracticable to serve the claim pursuant to CPR 7.8. The order for service outside of the jurisdiction was made on 26th May 2014. The application for alternative service was made on 4th July 2014. There was no evidence to show that during that period Mr. Katunin was attempting to evade service. The evidence on which the learned judge based his finding as he stated in paragraph 22 of the judgment, was the conduct of Mr. Katunin, being his failure to attend the hearing at the District Court at which judgment was obtained. The learned judge then made the assumption that Mr. Katunin, not having attended that hearing would not voluntarily attend before the court tasked under the Convention with serving process on him and thus service would be ineffective. The learned judge made this assumption in circumstances where he found that the evidence from the Bank and Mr. Katunin on the reason for Mr. K**atunin's non-**

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attendance at the District Court differed, a conflict which he acknowledged could not be resolved on the application. In those circumstances, I am of the view that the learned judge erred when he adopted one version of the evidence as the basis on which to make a finding that service by the Hague Convention procedure would be ineffective as Mr. Katunin would not attend court. There was no proper evidential basis for the exercise of the discretion to make an alternative service order under CPR 7.8A. Accordingly, this ground of the appeal succeeds. It is therefore not necessary to address the other issues raised by Mr. Rubin, QC.

[37] In view of the finding that Mr. Katunin did not submit to the jurisdiction of the court and the alternative service order should be set aside, the question whether the learned judge erred in not granting a stay or declining jurisdiction under CPR 9.7A is now otiose.

[38] For the reason given above, the appeal is allowed. The judgment dated 28th January 2015 and the order of the learned judge dated 12th February 2015 are hereby set aside. The respondent shall pay the costs of the appellant to be assessed if not agreed within 21 days.

Gertel Thom
Justice of Appeal

I concur.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Anthony Gonsalves
Justice of Appeal [Ag.]

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