

30-04-04

**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS**

**CIVIL APPEAL NO. 23/2003**  
**(Grand Court # 811/02)**

**BETWEEN        MICHAEL RYAN ET AL**

**APPELLANTS**

**AND                MERGERS AND ACQUISITIONS CORPORATION**

**RESPONDENT**

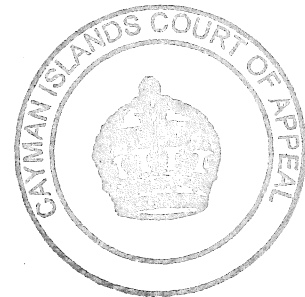
**BEFORE:                THE RT. HON. MR. E. ZACCA P.**  
**THE HON. MR. I. ROWE J.A.**  
**THE HON. MR. M. TAYLOR JA.**

In the presence of Mr. Andrew Jones Q.C. and Jeremy Walton of Hunter & Hunter for the Appellants, and Mr. Julian Malins Q.C. and Mr. Kyle Broadhurst of Broadhurst DaCosta for the Respondent.

**HEARD:                NOVEMBER 27, 2003,**  
**RELEASED:            APRIL 30<sup>TH</sup> 2004**

**ZACCA P.**

**REASONS FOR JUDGMENT**



On November 27, 2003 we dismissed this appeal and promised to put into writing the reasons for our decision. This we now do.

The appellants in a summons dated January 7, 2003 asked for the following relief:

1. A declaration that the proper and appropriate forum for the trial of this action is the province of Ontario, Canada, and that the Cayman Islands is not the proper or appropriate forum for any such trial.
2. An order that the proceedings against the first defendant/appellant be struck out or stayed as against him on the grounds that the proper and appropriate forum for the trial of this action is the province of Ontario, Canada, and that the Cayman Islands is not the proper or appropriate forum for any such trial.
3. An order that the plaintiff do pay the costs of occasioned by this application, to be taxed if not agreed and paid forthwith thereafter.
4. Such further or other relief as the Court thinks fit.

Levers J. dismissed the summons holding that the Cayman Islands was the proper and appropriate forum for the trial of the action and refused to stay the proceedings.

A short history of the matter shows that the respondent sued the appellants alleging that they breached a settlement agreement. The appellants deny that a settlement agreement was reached. The respondent applied for summary judgment and the appellants filed a summons dated January 22, 2003 for the dismissal of the respondent's claim and asked that summary judgment be entered for the appellants. Sanderson J. dismissed both summons.

The appellants had previously filed a summons dated November 15, 2002 asking that the writ be struck out or stayed and alternatively that the respondents give security for costs and further alternatively for an order that the respondent give further and better particulars of the Claim

It is subsequent to these summons that the appellants took out the summons for a stay on the grounds that Canada was the proper and more appropriate forum.

The facts briefly are that the agreement was an oral one reached in Toronto, Canada on May 1, 1998. The agreement relates to the construction of the Ritz Carlton Hotel in the Cayman Islands. The respondent is a Caymanian Company and the appellants is resident in the Cayman Islands.

Mr. Jones for the appellants submitted that Canada was the proper and more appropriate place for the trial of the action. He said that the agreement

was reached in Canada and is subject to Canadian Law, that the appellants intend to bring a counter claim, and that the witnesses for the appellants and the respondent are resident in Canada.

Mr. Malins for the respondent submitted that the defence is that there was no agreement reached and therefore the question of Canadian Law may not be an issue. It is a simple case of whether there was an agreement reached. The witnesses number about four, two for the respondent and two for the appellants. The witnesses for the respondent are available to testify in Cayman and there is no reason to believe that the witnesses for the appellants would not be similarly available. To the time of the hearing of the appeal no defence or counter claim had been filed.

He further submitted that the action concerns a development in the Cayman Islands and that the funds advanced to the appellants were paid and received in the Cayman Islands. Also that the appellants had no known assets in Ontario.

There is no dispute as to the principles to be established to persuade the Court to granting a stay on the grounds of forum.

In *Spiliada Maritime Corp. v Cansulex Ltd.* [1986] 3 ALL E.R.843, Lord Goff of Chieveley said at page 854:

“In my opinion, having regard to the authorities (including in particular the Scottish authorities), the law can at present be summarized as follows:

- (a) The basic principle is that a stay will only be granted on the ground of *forum non conveniens* 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 Kinnear’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”.

“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”.

At page 856:

- (d) Since the question is whether there exists some 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. These are the factors which Lord Diplock described, in MacShannon’s case [1978] 1 ALL ER 652 at 630, [1978] AC 795 at 812, as indicating that justice can be done in the other forum at ‘substantially less inconvenience or expense’. Having regard to the anxiety expressed in your Lordships’ House in the *Societe’ du Gaz* case 1926 SC (HL) 13 concerning the use of the

word 'convenience' in this context, I respectfully consider that it may be more desirable, now that the English and Scottish principles are regarded as being the same, to adopt the expression used by Lord Keith in *The Abidin Daver* [1984] 1 ALL ER 470 at 479, [1984] AC 398 at 415 when he referred to the 'natural forum' as being 'that with which the action has 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 (as to which see *Credit Chimique v James Scott Engineering Group Ltd.* 1982 SLT 131), and the places where the parties respectively reside or carry on business".

Lord Templeman, in concurring with the reasons delivered by Lord

Goff, states at p. 846 :

"In the result, it seems to me that the solution of disputes about the relative merits of trial in England and trial abroad is pre-eminently a matter for the trial judge. Commercial Court judges are very experienced in these matters. In nearly every case evidence is on affidavit by witnesses of acknowledged probity. I hope that in future the judge will be allowed to study the evidence and refresh his memory of the speech of my noble and learned friend Lord Goff in this case in the quiet of his room without expense to the parties, that he will not be referred to other decisions on other facts; and that submissions will be measured in hours and not days. An appeal should be rare and the appellate court shall be slow to interfere"

In refusing the stay, Levers J. said at p.6 of her judgment:

“The burden of proof rests on the defendant to show that there is some other clearly more appropriate forum. Whilst I agree with Mr. Andrew Jones, Q.C. that if there is a defence and counter claim filed the case will certainly be a more complex one, I am not entirely convinced that the witnesses being in Canada or the fact that the written agreement is governed by Ontario Law is of necessity a ground for asking for this action in Cayman to be stayed and shifted to the Canadian Courts. Weighing that in the balance with the applications for summary judgment, the plaintiff being a resident registered company in Cayman, the defendant being a resident in Cayman with substantial business interest and the action being commenced as of right in these islands, I am of the view, that the first defendant has not persuaded this court that Cayman is not the natural or appropriate forum for the trial. There may be another forum which although available is not necessarily clearly or distinctly more appropriate than the Caymanian one.

I find merit in the argument that this is a simple breach of oral agreement which could be defended in the Cayman Islands and should the first defendant wish to commence action against some members of the plaintiffs corporation and others who need to be identified as yet, then he can do so by commencing another action in the Canadian Court. The stay is refused”.

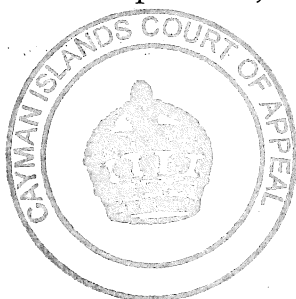
The appellants, in moving for summary judgment and in the alternative asking for further and better particulars of the plaintiffs case, accepted the jurisdiction of the Cayman Court at that stage. It was only

subsequent to these proceedings that the summons for a stay was filed. As yet there is no action filed in Canada. The agreement relates to the construction of the Ritz Carlton Hotel and condominium in the Cayman Islands.

In our opinion the discretion exercised by Levers J. in refusing the stay should not be interfered with.

It was for these reasons we dismissed the appeal and ordered the appellants to pay the costs of the respondent, to be taxed if not agreed.

E. Zacca, P.



M.R. Taylor, J.A.

[The late Mr. Justice I.D. Rowe participated in the hearing and concurred in the decision on this appeal but passed away before completion of the above reasons. ]