

**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS.  
HOLDEN AT GEORGE TOWN, GRAND CAYMAN.**

**CIVIL APPEAL NO. 27 OF 1998  
GRAND COURT CAUSE NOS. 35 & 36 OF 1996**

**BETWEEN:**

**CHILE HOLDINGS (CAYMAN) LIMITED      RESPONDENT/PLAINTIFF**

**AND:**

**CONTADORA ENTERPRISES S.A. ET AL.      APPELLANT/DEFENDANT**

**AND BETWEEN:**

**ARGENTINE HOLDINGS (CAYMAN) LTD.      RESPONDENT/PLAINTIFF**

**AND:**

**RHONE DEVELOPMENTS S.A.  
LOIRE DEVELOPMENTS S.A. ET AL.      APPELLANT/DEFENDANTS**

-----

**BEFORE:              Rt. Hon. Edward Zacca, President.  
                            Hon. James Kerr, J. A., and  
                            Hon. Gerald Collett, J.A.**

Julian Malins Q.C. and Michael Scott instructed by Neville Levy of Messrs. Neville Levy and Associates for the Appellants/ Defendants and Lawrence Cohen Q.C., Ewan McQuater and Micki Jafa Bodden instructed by Messrs. Hunter and Hunter for the Respondents/ Plaintiffs.

Heard on the 25<sup>th</sup>, 26<sup>th</sup> and the 27<sup>th</sup> days of November 1998. Decision delivered on the 15<sup>th</sup> day of April 1999.

**JUDGEMENT****COLLETT J.A.**

This appeal is brought by certain of the defendants in (Grand Court) civil cases, nos. 35 and 36 of 1996 (consolidated), against the decision of Graham J., delivered on 20<sup>th</sup> March 1998. On that date he dismissed summonses taken out by the Appellants seeking to set aside orders already made permitting service upon them out of the jurisdiction of the Court. The Appellants are respectively Contadora Enterprises, S.A., Rhone Developments, S.A. and Loire Developments, S.A., all bodies corporate having been incorporated under the laws of the Republic of Panama. The Respondents are the Plaintiffs in those consolidated actions, namely Chile Holdings (Cayman) Limited and Argentine Holdings (Cayman) Limited, two limited companies incorporated in the Cayman Islands.

Other defendants in these two actions included Laith G. Pharon, John V. H. Whitbeck, and Farid Djouhri, erstwhile directors of the Respondents, who during their tenure of office were responsible for the transfer into the hands of the Appellants of the entire shareholding of three other Panamanian companies, namely Sgo de Chile Hotel Corporation S.A., Buenos Aires Hotel Corporation, S.A., and Argentina Trading Holdings Inc., formerly held by the Respondents. Those companies were also named as defendants in the consolidated actions.

Since this appeal is brought in respect of an interlocutory matter, necessary leave was applied for to bring the appeal before this Court, which on 7/8/98 ordered that the application be argued inter parties and, with the consent of the parties, that the hearing of that application be treated as the hearing of the substantive appeal.

Reference to the pleadings in the consolidated actions shows that the Respondents are claiming declarations that the transfers of shareholding mentioned above were

void and of no effect so that the shares remain vested in the Respondents; alternatively an order setting these transfers aside and/or declaring that they passed no beneficial title to the shares and an order that the defendant Directors do compensate the Respondents for alleged breaches of fiduciary duty on their part.

All the Defendants in both of the actions, with the exception of the International Credit and Investment Company (Overseas) Limited, are outside the jurisdiction of these Courts and no claim is now being pursued against that particular company. It is, however, common ground that the defendant Directors mentioned above have been properly served with the respective Writs out of the jurisdiction. The grounds of appeal are essentially that:

1. The claims do not fall within any of the paragraphs of Grand Court Rules, Order 11, Rule 1(1) and that the learned Judge was wrong to conclude that they did so;
2. In any event, he was wrong to exercise his discretion in favour of service out of the jurisdiction on the Appellants under Order 11 Rule 4(2);
3. Alternatively, the Cayman Islands is not the 'forum conveniens' for resolution of the claims against the Appellants bearing in mind that the Respondents are seeking restitution of shares in Panamanian companies, which were removed from their possession by acts performed out of the jurisdiction of the Cayman Islands Courts.

Since several of these grounds of appeal relate to the exercise of discretions by the learned Grand Court Judge, it is important at the outset to restate the principles governing the review by the Appellate Court of discretions of this nature exercised by a Judge of first instance. In this Court the classic and most recent formulation is that of Georges J. A., in *Lhasa Investments Limited v International Credit and Investments Company (Overseas) Limited* (1994-1995) CILR 293 at p. 307, where he stated:

“It should be borne in mind that the Court of Appeal is only entitled to intervene and interfere in limited circumstances with the decision of a Judge of first instance based on the exercise of discretion. It must be shown that:

- a) The trial Judge had misdirected himself with regard to the principle in accordance with which the discretion had to be exercised;
- b) That he had taken into account matters which he ought not to have taken into account or failed to take account of matters which he ought to have taken into account; or
- c) The decision was plainly wrong.

The Appellate tribunal should not merely substitute its views for that of the trial Judge.”

That principle is not here in dispute.

Before any question of discretion arises in the present case however, it is necessary to consider whether the Plaintiff Respondents have established a foundation for its exercise by demonstrating that a basis exists for the assumption of jurisdiction by the Grand Court under one or more of the paragraphs of Grand Court Order 11 Rule 1(1). The test is admittedly a strict one – see *Metall and Rosthoff v Donaldson Inc.* (1990) 1 Q.B. 391, per Slade L. J. at p. 435 and any doubt should be resolved in favour of the foreign Defendant.

Graham J. accepted that these claims properly fell within each of paragraphs (c), (f), and (g) of the sub rule. Before us, however, Counsel for the Respondents conceded that his finding could not be supported under either paragraph (f) or paragraph (g). This somewhat surprising concession, which in effect invites us to disagree with the learned Judge’s conclusions on two key aspects of the case, does nevertheless upon examination appear to be both proper and well founded and does to some extent call into question his approach to the question of applicability of the sub-rule.

Paragraph (f) requires a Plaintiff to show both that the claim is founded on a tort, fraud or breach of duty and that the damage was sustained, or resulted from an act committed, within the jurisdiction. Leaving aside the question whether the claim here is so founded, it became obvious during the hearing of the appeal that no damage was either sustained or resulted from any act committed in the Cayman Islands. The acts of the defendant Directors were all committed either in Panama or France and the only basis relied upon for asserting that the damage was sustained by the Respondents in the Cayman Islands was that those companies are incorporated here. Since the test under the paragraph must apply alike to personal and to corporate plaintiffs, this amounts to an assertion that wherever in the World a person resident in these Islands suffers damage, he suffers it in Cayman, a conclusion that would render that part of paragraph (f) otiose. The contention is also directly contrary to authority – see *The Eras Eil Actions* (1992) 1 Lloyds rep. 570, a decision of the English Court of Appeal. It plainly cannot be supported.

Paragraph (g) requires that the claim is brought for any relief or remedy in respect of a trust, express, implied or constructive, that is governed or ought to be executed according to Cayman Islands Law. In the present case the allegation, made in the alternative in the Statements of Claim, appears to be that the acts of the three defendant Directors, if effective at all, have been effective only to pass a bare title to the shareholding in dispute impressed with a constructive trust in favour of the respective Respondents who previously owned it.

Counsel for the Appellants has pointed out that this claim is contrary to the findings of Smellie J. (as he then was), made in response to the summons for summary judgement against two of the defendant Directors on 14<sup>th</sup> November 1997. A more serious objection is that the wrong test was applied by the Court below to determine the governing law of any such alleged constructive trust. This is not to be determined by asking “where the location of the centre of gravity lies”

but rather by applying the rule formulated by Dicey and Morris on Conflict of Laws, 12<sup>th</sup> Ed. At p. 1471 (their Rule 201). This reads:-

- “Rule 201 – (1) The obligation to restore the benefit of an enrichment obtained at another person’s expense is governed by the proper Law of the obligation.
- (2) The proper law of the obligation is determined as follows:
- a) If the obligation arises in connection with a contract, its proper law is the law applicable to the contract;
  - b) If it arises in connection with a transaction concerning an immovable (land) its proper law is the law of the country where the immovable is situated (lex situs);
  - c) If it arises in any other circumstances; its proper law is the law of the country where the enrichment occurs.”

In the circumstances of the present case, paragraph (c) of Dicey and Morris’ rule 201 (1) is clearly applicable. Its correctness was specifically approved by Millet J., in *El Ajow v Dollar Land Holdings* (1993) 3 A.E.R. 717 at p. 736, letter p. Wherever the alleged unjust enrichment of the Appellants may have occurred, it clearly was not the Cayman Islands and so it must follow that the claims do not fall within paragraph (j) of GCR Order 11 r 1 (1).

This leaves only paragraph (c) of that sub-rule for our further consideration. That paragraph requires a plaintiff to establish that the defendant who is sought to be served out of the jurisdiction is a “necessary” or “proper” party to the claims made against another defendant(s) in the action who has been properly served either within or without the jurisdiction. Here, the Respondents contend that the Appellants are “proper” parties to the claims made against the Defendant directors in the consolidated actions and I am satisfied that Graham J., so found. The reference at paragraph 7 of his Judgement to paragraph (c) of the sub-rule is

explicable upon no other basis. The approved test is whether, if the directors and the Appellants, had all been present in the Cayman Islands, they could have been made parties to the same proceedings: see *Qatar Petroleum v Shell* (1983) 2 *Lloyds Reps.* 35 at p. 41. In turn this depends upon whether a common question(s) of law and fact arises in respect of the claims against each of them.

I entertain no doubt that Graham J., was correct in his finding that the Appellants were "proper" parties in this sense. Although the actions may comprise in form claims for sundry declarations and for compensation, they are each in essence based upon an alleged conspiracy to defraud and the primary purpose is to recover the assets which the Respondents assert were wrongfully removed from them. 'Restitutio ad integrum' is the essential purpose of an action based upon such a tort and it is clearly the principal aim of these actions to recover the shareholding concerned. That purpose, as distinct from the secondary one of seeking compensation for loss of these assets from the delinquent Directors, can only be achieved if the Appellants are joined in the proceedings against them and a judgement obtained which can be executed in rem.

There is, however, one further barrier to the reliance by the Respondents upon this paragraph of 0.11 r 1(1). It arises out of the chronology of the litigation. The leave to serve the Appellants out of the jurisdiction was effectively obtained by the Respondents on 26<sup>th</sup> June 1996, more than four months before any of the defendant Directors were served with the Writs of Summons. In *Kuwait Oil Tanker Co. v Al Bader* (1997) 2 *AER* 855, the English Court of Appeal decided that the English rule equivalent to G.C.R. O. 11 r. (1) (c) required that at least one other defendant should be served before leave ought to be granted under the rule. Before Graham J., it was submitted by the Respondents that this interpretation, which had been the subject matter of some doubt before the Kuwait case was decided, ought not to be followed in the Cayman Islands; however, that contention

has been abandoned in this Court. Since the Grand Court Rules are consciously drafted upon the English model, it would in any case, be undesirable to depart from authoritative English decisions interpretative of that model, when construing the Cayman equivalent, unless the most cogent reasons could be advanced for doing so: none have been suggested here.

There is, nevertheless, a discretion vested in the Grand Court Judge under GCR Order 2 Rule 1(2) which was exercised in the instant case to retrospectively validate the leave given after the service of other defendants upon which it was based has been validly performed. That discretion may be exercised when 'good reason' or 'good cause' is shown for its exercise. Graham J., considered that good cause could be found in the circumstance that attorneys in the Cayman Islands had for many years followed the practice which was followed in this case, in ignorance of the change which adoption of the new Grand Court Rules in 1995 had brought about. No authoritative interpretation of the new O.11 r.1 (1)(c) was available prior to the Kuwait Oil Case decided in another jurisdiction and after the leave in question here had been already granted. I am not prepared in these circumstances to hold, as we have been invited to do, that this reason is a bad one or that the discretion of the learned Judge was improperly exercised by taking it into account. The weight he placed upon this reason is a matter for him. This is not to say that hereafter in the Cayman Islands, following the present decision of this Court, the same indulgence can be expected in regard to a future mistake of procedure as was here found to be excusable.

The learned Judge was further satisfied that no real prejudice would be caused to the Appellants by the retrospective validation of leave. In response to a direct question, none was suggested to him by Counsel for the Appellants at the hearing before him. Before us, Counsel has only been able to put forward as possible prejudice the loss of certain tactical arguments. There is nothing in those

contentions to indicate that the learned Judge was wrong in his approach to that specific issue.

Finally, it was urged upon us that leave should have been refused because the Respondents were essentially seeking in the consolidated actions to obtain declarations of the Grand Court which could be used subsequently as evidence in parallel proceedings in the Panamanian Courts. Such a purpose is, it was submitted, contrary to the decision of the English Court of Appeal in *Guaranty Trust of N. York v Hannay (1915) 2KB.536*. A close examination of the facts of that authority and analysis of the relevant dicta of the Lords Justices who decided it does not lead one to the conclusion that the declarations sought by the Appellants here would have been refused upon the basis of the ratio of that case. What was refused there was a negative rather than a positive declaration. Moreover, the respondents here seek to use any declaration which they may obtain from the Grand Court, not as evidence in Panamanian proceedings, but as a positive judgement which they can then enforce in rem in Panama by the process known as *exaquatatur*. There is no real merit in this submission, therefore.

The Appellants have, however, strongly submitted that the learned Judge ought to have exercised his discretion to refuse permission for service out of the jurisdiction, upon the separate ground of 'forum non conveniens', that is to say that the Cayman Islands Courts are not the most appropriate forum for the determination of the issues between the Respondents and themselves in the consolidated actions. It was for the Respondents to satisfy him that they clearly were: see *Spilada Maritime Corporation v Cansulex (1987) A.C. 460*. Further they point to the existence of parallel proceedings which the Respondents have commenced against them in Panama and contend that it is only in very unusual circumstances that a Plaintiff should be permitted to pursue the same defendant in

two sets of simultaneous proceedings in different jurisdictions – ‘lis alibi pendens’.

The principal basis upon which Appellants say that the Cayman Islands Courts are not, and the Panamanian Courts by contrast are, the most appropriate forum for determination of these issues is that the assets in question are all shares in Panamanian corporations and that any rectification of the relevant registers can only be ordered by the Panamanian Courts. At first sight this argument appears attractive. It is said to be supported by dicta of Georges J. A., in the Lhasa Investments case at pages 308/309 of the report. I have carefully read these passages but they do not appear to me to lay down any such general principle – if anything, the reverse. No other authority was cited in support: accordingly, such a rule cannot be regarded as established.

When one comes to consider the facts of the matter and the issues raised in the consolidated actions, it soon becomes apparent that the proper ownership of the disputed shareholding is a matter for resolution according to Cayman Islands rather than Panamanian law. The issue turns upon whether the actions of the defendant Directors were or were not unlawful under the company law of the Cayman Islands. If unlawful, then they were ineffective to pass title to the shares to the Appellants. Graham J., correctly appreciated that this was the crux of these proceedings and correctly identified factors which point and point strongly to the desirability of having that issue determined by the Grand Court. Among those factors were:

- (a) that the appropriate law is the system known to and administered by that Court, which does not, therefore, need to be proved as a fact by expert evidence as would be the case in Panama;
- (b) summary judgement has already been entered here against two of the defendant Directors; and

- (c) the evidence and relevant documents are all in English and do not need to be interpreted or translated into Spanish as would be necessary in Panama.

The view advanced before Graham, J., by the expert in Panamanian law called by the Appellants, to the effect that any declaration granted by the Grand Court in the consolidated actions would not or might not be enforced by the competent Panamanian Courts, was rejected by him for reasons set out in his judgement with which I see no grounds to disagree: he did not find that expert's testimony to be credible. Upon general principles of international comity there does not appear to be any good reason why, subject to the necessary formalities being complied with, enforcement should not be accomplished, so as to secure the re-transfer of title to the disputed shares.

As to the parallel proceedings in Panama which have been commenced by the Respondents against the Appellants, a sufficient reason for their existence was advanced and supported in evidence by expert witnesses in the Grand Court. It seems that Panamanian law does not provide any facility for the obtaining of interim relief from its Courts in aid of proceedings pending in a foreign jurisdiction. Thus, in order to forestall any further attempt by the defendant Directors, who control the Appellant companies also, to alienate the disputed shareholding in favour of yet further Third Parties, it was necessary for the Respondents to launch a substantive proceeding in Panama claiming the shares there in order to obtain interim injunctive relief. Other than this it does not seem that those proceedings have advanced to any considerable degree whereas the Cayman Islands actions are nearing some finality. Graham J. considered the existence of these proceedings to be only one of several factors to be taken into account in the exercise of his discretion and cited in support the well known observations of Lord Diplock in *The Abadin Daver* (1984) A.C. 398 at pp. 411/412.

In my view, *Australian Commercial Research and Development Ltd. v ANZ McLaughlin Merchant Bank Ltd.* (1989) 3 AER. 65 upon which the Appellants placed reliance can be readily distinguished upon its facts from the present proceedings. The realities are that, if these Cayman proceedings prove successful as they bear every appearance of doing, the Panamanian actions will not be further pursued. And because of the evident necessity of keeping the injunctive relief obtained there alive until any Caymanian Judgement can be effectively enforced, it would be quite impracticable to require the Respondents to discontinue those actions, as the Appellant's Counsel has invited them to do. The basis of the rule that a plaintiff will not usually be permitted to pursue the same defendant in concurrent actions in different jurisdictions must lie in the fact that quite often such a procedure is likely to amount to abuse of process of the Court. When considered against its factual background I cannot perceive any such likelihood here. Should it occur in future there are adequate powers available to the Grand Court to halt and correct it.

In his reply to the Respondents' submissions, leading Counsel for the Appellants advanced the further argument that on account of the Respondents' abandonment of reliance upon 0.11, r 1.(1) paragraphs (f) and (g), which had been accepted and relied upon by the Judge in Grand Court, this Court ought to proceed upon the basis that the exercise of his discretion to order service out of the jurisdiction was flawed in any event and should not be supported. I had some difficulty in appreciating the rationale of that particular line of argument. If it is based on the view that any action which qualifies under several rather than only one of the paragraphs of 0.11 r (1) is inherently stronger and more worthy of the exercise of judicial discretion, this surely is an altogether unreliable test of its inherent strength. The better view logically is that, once a claim has qualified under the sub-rule, whether under one or more than one of its various distinct paragraphs,

then the exercise of judicial discretion one way or the other depends upon quite a different series of factors, of which the inherent strength of the action may well be one. The present claims against the Appellants must by any standard be rated as strong ones.

There is one further factor not specifically mentioned by the learned Judge but which by reason of the somewhat robust language of his judgement must, I think, have been well to the forefront of his mind when considering the exercise of his discretions. Here is a case of the alleged fraudulent mismanagement of a Cayman Islands international company. The reputation of Cayman Islands international business is to some extent at issue in these proceedings. Furthermore, a judicial system which perceived itself as powerless to intervene to effectively prevent the proceeds of such a fraud from disappearing overseas would inevitably invite disparagement from the international financial community. There are, therefore, strong public policy considerations here which in my judgement were and were rightly taken into account by the learned Judge.

On a consideration of the case as a whole, therefore, I can find no sufficient ground for interfering with the decision reached by the Grand Court that this was a proper case for permitting service of the proceedings out of the jurisdiction upon these Appellants to stand. I would, therefore, refuse leave to appeal against the relevant orders. Because the Appellants have succeeded upon two important issues, I would, however, propose that the Respondents recover only 60% of their costs of this application.

**ZACCA, P**

I agree.

**KERR, J.A.**

I agree.

