IN THE CAYMAN ISLANDS COURT OF APPEAL

CIVIL APPEAL NO. 20 OF 1989

THE HONOURABLE MR. JUSTICE ZACCA - PRESIDENT

THE HONOURABLE MR. JUSTICE GEORGES - J.A.

THE HONOURABLE MR. JUSTICE KERR - J.A.

BETWEEN: ROBERT LAKE DEFENDANT/Appellant

- AND -

CORDOBA LIMITED PLAINTIFF/Respondent

Mr. Ramon Alberga, Q.C. and Mr. Nigel Clifford for Appellant

Mr. Norman Hill, Q.C. and Mr. Graham Hampson for Respondent

The 7th and 8th December, 1989

and 28th March, 1990

Kerr, J.A.

This was an Appeal from a decision of Harre, J, who on August 23, 1989, refused an application by the Appellant to discharge an Order of December 8, 1988, granting the Respondent leave to serve on the Appellant out of the jurisdiction an amended specially endorsed Writ.

On December 8, 1989, we dismissed the Appeal with the promise to put our reasons in writing.

The Plaintiff/Respondent is a Company registered and doing business in the Cayman Islands. The original Writ was against Rothschild Grand Cayman Limited (Rothschild) as First Defendant and the Appellant as Second Defendant. The Appellant at all material times was resident in Florida.

The action against the Appellant was as Guarantor of a debt owed by Rothschild to the Plaintiff under a Promissory Note. Surprisingly, although Rothschild, a Cayman Company, had been struck off the Register years before, nevertheless, it was included in the Writ. However, the Plaintiff before the filing of the Summons seeking leave for service abroad, amended the Writ by striking out Rothschild as a party to the proceedings. Before service was effected under the Order, the Plaintiff also commenced similar proceedings in Florida.

There is violent conflict between the Appellant and the Respondent as to the raison d'etre for the transaction between Plaintiff and Rothschild and which occasioned the Appellant's guarantee.

According to the Appellant in 1980, there was to the credit of Rothschild in a Bank in Jamaica, J$297,000. Apparently, because of restraints on transfers of currency there was little likelihood of Rothschild obtaining a transfer of the funds out of Jamaica. So, this amount of $297,000 was lent to Berben Limited, a Jamaican Company controlled by a Dr. Benjamin. It was then collaterally agreed between Benjamin and the Appellant [who, apparently, was to all intents and purpose Rothschild's man in Jamaica], that security for part of that loan would be in the form of a payment of US$100,000 from the Benjamin controlled Plaintiff to Rothschild. As an additional protective measure for Benjamin, a document was drawn up showing a loan of US$100,000 to Rothschild with the Appellant as Guarantor and that this was on the understanding that resort to the document would only be had in the event Berben repaying its loan to Rothschild. Berben having defaulted the $100,000 was considered forfeited.

The Cordoba's story as given by Dr. Benjamin contended in effect that the two transactions (the Jamaican and the Cayman) were independent and not inextricably bound as alleged by the Appellant, who needed the US Dollars for use in Florida and to whom the $100,000 was eventually sent.

As it is agreed on all sides that these contentious issues are properly for determination at the trial of the action and, as Mr. Alberga frankly stated, the vital question as to whether or not the Plaintiff has established that the Cayman Island Court is the more appropriate forum must be viewed from the standpoint of the Plaintiff's case, it is unnecessary to refer in any greater detail to these contentions.

In his opening outline, Mr. Alberga submitted that in finding that the Cayman Court is the more appropriate forum the Learned Judge was in error in that he held that the case did not fall within Order 11, Rule 1, of the English Rules of Court (to which Rule the Court in Cayman looks for guidance) nor did he correctly apply the principles in the local case of Rawson Trust Company Limited, Cause 355 of 1981 - Judgment on 27th October, 1982.

In considering whether the English Rule applied, Harre, J, accepted as correct the reasoning and conclusion of Sir John Summerfield, C.J., in the Rawson case. Therein, it was held that the English Rule (Order 11, Rule 1) did not apply "but that the court would take account of Order 11, Rule 1, for guidance without feeling bound by it". In coming to this conclusion Summerfield, C.J., held in effect that having regard to the definition of "practice" in Strouds Judicial Dictionary, Third Edition - Volume 3 - p. 2239, Section 62(2), which empowers the importation of the English practice and procedure where there is no provision here within the contemplation of paragraph (1) of Rule 62, did not apply to Order 11, Rule 1, because that Rule was jurisdictional in nature as it defined the cases in which process of a certain kind is permissible and, secondly, as regards jurisdiction in the light of Section 20 of the Grand Court Law and Rule 13 of the Grand Court Rules there is adequate provision to deal with the question of both jurisdiction and procedure. For easy reference, Section 20 reads:

"20. (1) Subject to the provision of this or any other Law, the jurisdiction of the Court shall be exercised in accordance with any Rules made under this Law.

(2) In any matter of practice or procedure for which no provision is made by this or any other law or by any Rules, the practice and procedure in similar matters in the High Court in England shall apply so far as local circumstances permit and subject to any direction which the court may give in any particular case."

and Rule 13 -

"13. (1) Except where the defendant, in person or by his legal representative, undertakes to accept service or enters an appearance, originating process shall wherever practicable, be served by delivering to the defendant a copy thereof sealed with the seal of the court, but if the court is satisfied, on application made by the plaintiff, that service cannot conveniently be so effected, it may make an order for substituted or other service, or for service of any notice by advertisement or otherwise as may seem just.

(2) Substituted service may be ordered to be effected by delivery of the document -

(a) to some adult at the defendant's or respondent's known place of residence;

or

(b) to some agent within the Islands of the person to be served, or to some other person through whom it appears to the Court that there is a probability that the document will come to the knowledge of the person to be served.

(3) No such process shall be served outside the jurisdiction without the leave of the court, and no sub-process shall be issued without such leave, if it is apparent from the document that service outside the jurisdiction will be required. When leave to serve outside the jurisdiction is granted a copy of the order for such service shall be served therewith:

Provided that when leave is given for service of process outside the jurisdiction upon a person who is not a British subject nor within Her Majesty's dominions, notice thereof and not the process itself shall be served."

I am in agreement that these provisions are sufficient to exclude the importation or incorporation of the English Rule. However, the simplicity and generality of these provisions render the guiding principles as enunciated in the English cases and comprehensively reviewed and enunciated in easily comprehensible language in the Spiliada case (1986) 3 ALL ER 843, all the more helpful in determining whether the Cayman Court was the more appropriate forum and leave for service abroad was properly granted in the instant case.

In view of my conclusion that there is no importation of the English Rule, I consider it unnecessary to refer to the categories of the cases for which service abroad is permissible under the English Rule. Were it necessary, I would be prepared to hold that the instant case would be within one or more of the categories defined in Order 11, Rule 1. In that regard Mr. Alberga conceded that this case, depending on the Court's view, could fall within Rule (1)(e) of the Order.

Be that as it may, he concentrated his submissions on whether in the light of the principles in the Spiliada case the Trial Judge correctly applied those principles in reaching the conclusion he in fact did.

The following principles, which are extracted from the Judgment in the Spiliada case and set out in the head-note at p. 844, are relevant to the questions raised in the instant Appeal -

> (2) "In the case of an application for a stay of English proceedings the burden of proof lay on the defendant to show that the court should exercise its discretion to grant a stay. Moreover the defendant was required to show not merely that England was not the natural or appropriate forum for the trial but that there was another available forum which was clearly or distinctly more appropriate than the English forum. In considering whether there was another forum which was more appropriate the court would look for that forum with which the action had the most real and substantial connection, e.g. in terms of convenience or expense, availability of witnesses, the law governing the relevant transaction, and the places where the parties resided or carried on business. If the court concluded that there was no other available forum which was more appropriate than the English court it would normally refuse a stay. If, however, the court concluded that there was another forum which was prima facie more appropriate the court would normally grant a stay unless there were circumstances militating against a stay, e.g. if the plaintiff would not obtain justice in the foreign jurisdiction.
>
> (3) Applications under RSC Ord 11, r 1(1) for leave to serve proceedings out of the jurisdiction were to be determined according to the same principles applicable to the stay of English proceedings subject, however, to the burden being on the plaintiff to show that leave should be granted and to the court being required to consider both the residence or place of business of the defendant and the relevant ground invoked by the plaintiff when deciding whether to exercise the discretion to grant leave. Accordingly, the plaintiff was required to show not merely that England was the appropriate forum for the trial of the action but that it was clearly the appropriate forum. However, in discharging the

burden lying on him the plaintiff was not confined to showing that justice could not be obtained in an alternative forum or if so, only at excessive cost, delay or inconvenience, but was entitled to rely on the nature of the dispute, the legal and practical issues involved and such questions as local knowledge, availability of witnesses and their evidence and expense".

On the main judgment which was delivered by Lord Goff, Lord Templeman approvingly observed:

> "The principles which the courts of this country should apply are comprehensibly reviewed and closely analysed in the speech of my noble and learned friend Lord Goff."

and implicit in his further observations is that this Judgment furnishes "all one ought to ask" in relation to the guiding principles.

Of the Spiliada case, Harre, J, in his Judgment said:

> "Those principles are, in my view, entirely harmonious with what Summerfield CJ said in the Rawson Trust case. The Court will choose that forum in which the case can be tried most suitably for the interests of all the parties and for the ends of justice. In considering whether there is another forum which is more appropriate the court will look for that forum with which the action has the most real substantial connection .....
> .....
> The plaintiff is required to show not merely that the court to which he is applying is the appropriate forum for a trial of the action, but that it is clearly the appropriate forum."

It is clear from the excerpts set out above as well as an express statement in his Judgment that the Learned Trial Judge was not only aware of the principles propounded in Spiliada but was prepared to respect them by faithful and careful application to the circumstances in the instant case. To that end he proceeded to identify the relevant factors thus:

> "On any view of the transaction underlying the guarantee, it purported to be an agreement between two companies incorporated in the Cayman Islands. They were used as the vehicles for an arrangement which was expressed as being a loan from the one to the other of a sum in United States Dollars, repayable with interest on demand, or in the event of no demand being made, on 30th October 1982. The loan instrument was signed for the borrower, Rothschild Grand Cayman Ltd "per authorised director" by Robert Lake .....
> .....

> The money was drawn from a Cayman Bank and paid over to Lake in Florida. There is no indication that repayment was to be made anywhere but in the Cayman Islands .....
> .....
> I do not doubt that the underlying transaction between the two Cayman Islands companies is by implication governed by the law of the Cayman Islands. People from outside the Islands who form companies here and enter into transactions with other Cayman Islands companies should be assumed in default of evidence to the contrary, to be doing so in accordance with the law of the Cayman Island. There is no sufficient evidence of another intention in this case. Moreover, the guarantee was entered into on the same day by the same individual who entered into the underlying transaction on behalf of Rothschild Grand Cayman Ltd. The money was sent to him in Florida on the day following by Cayman Islands attorneys. We are not looking at two transactions governed by two different systems of law, but two aspects of a transaction which has the closest and most real connection with the Cayman Islands. .....
> .....
> I find that the claim is brought to enforce a contract which by implication is governed by the law of the Cayman Islands and also that it is brought in respect of a breach alleged to have been committed within the jurisdiction - namely the failure by the defendant to pay on demand to the plaintiff all moneys owing and payable by Rothschild under the loan instrument."

In support of his challenge to the correctness of the Learned Judge's conclusion that the Grand Court is "the forum with which the action has the most real substantial connection and is clearly the most appropriate and convenient forum", Mr. Alberga relied in the main on the following factors:

First - The Appellant was resident in Florida at all material times.

This is of little weight since he elected to be a party to a transaction in the Cayman Islands between two companies there and which transaction was governed by the laws of Cayman. It could, therefore, be said that constructively he came to the jurisdiction and ought to have in contemplation that in the event of litgation, action would be taken by the Plaintiff in Cayman.

Secondly - The demand for payment was made of the Appellant in Florida.

This is merely incidental and would have been made to the Appellant wherever he might have been at the relevant time.

Thirdly - The action is in personam and if the Plaintiff suceeded, the most effective relief would be enforcement of the Judgment in Florida where the Appellant resides.

That a Judgment in Florida would facilitate enforcement against the Appellant may be a convenience more to the Plaintiff/ Respondent than to the Appellant. In any event this rests upon the unhappy assumption that if Judgment went against the appellant process for enforcement would be necessary.

Fourthly - The Plaintiff has not shown any real disadvantage in the matter being tried in Florida.

The advantages to the Plaintiff proceeding in Cayman for the recovery of a debt contracted in Cayman primarly between Cayman personae and subject to Cayman Law are self-evident.

In my view the factors adverted to by Appellant's Counsel "pale into insignificance" against those identified by the Learned Trial Judge in his judgment in support of his conclusion that Cayman is clearly the more appropriate forum. The Judge dealt with the questions arising justly, fairly and lucidly. I see no grounds for interfering with the decision and Order of Harre, J.

For these reasons I concur in the dismissal of the Appeal with attendant costs to the Respondent.