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ROYAL COURT
(Samedi Division)

21.

4th February, 1994

Before: The Bailiff, Single Judge.

Between:	Rex Robert Wright	Plaintiff
And:	Rockway, Limited	First Defendant
	Adam Lisowski	Second Defendant
	Brian Thorn	Third Defendant
	G. Garment and Company, Ltd.	Fourth Defendant

Order made by the Judicial Greffier on 16th August, 1993, under provisions of Service of Process (Jersey) Rules, 1961.

Applications by the Second and Fourth Defendants for declarations that:

(1) they had not been served with a copy of the pleadings in this action in accordance with the Order of the Judicial Greffier of 16th August, 1993; and

(2) that this action is not a proper one in which to subject the Defendants to proceedings within this jurisdiction.

Advocate R.J. Michel for the Plaintiff.
Advocate N.F. Journeaux for the Second and Fourth Defendants.

JUDGMENT

THE BAILIFF: I have before me an appeal by the Second and Fourth Defendants against an Order of the Judicial Greffier of 16th August, 1993, giving leave to the Plaintiff to serve a summons out of the jurisdiction on the Second, Third and Fourth Defendants.

The pleadings, together with copies of that Order, were served on the Second, Third and Fourth Defendants in accordance with the Judicial Greffier's Orders. Subsequently, so I was informed, a default judgment was taken against the Third Defendant so that today I am only concerned with the Second and Fourth Defendants.

Objections were raised by the Second and Fourth Defendants to the procedure adopted by the Viscount, but I rule that on the record of the Viscount all necessary undertakings and proper procedure have been followed.

The Second and Fourth Defendants did not pursue a further objection in relation to service by registered post at an address in Thailand where, according to the Plaintiff's belief, letters would find their way to the Second, Third and Fourth Defendants.

The background to the appeal is that: the Plaintiff was employed to carry out work on a yacht, named "Michel Adam", which was owned by the First Defendant, a Jersey registered company, but registered in Guernsey in the Registry of British Shipping. At that time in 1990, he was in Monaco and received a telephone call from the Third Defendant, either from Singapore or Thailand. That Defendant was the captain of the yacht.

The Plaintiff joined the yacht as a member of the crew - he was a shipwright - for one or more voyages and attempted to carry out the work he had been contracted to do at sea, but advised that the ship should be "slipped".

When she was in dry dock in Bangkok the Plaintiff, whilst using a nail gun on board the yacht, was injured when the gun exploded. This accident happened on 29th September, 1990. According to the affidavit of Mr. Harnprawen, a Thai lawyer, actions in Thailand for damages from a wrongful act which I interpret to mean a tort, are covered by the civil and criminal code of Thailand and lapse after one year. There appears to be a different prescriptive period of four years for contract, but that is not entirely clear. However, prescription cannot be waived by agreement.

On 25th July, 1991, a New Zealand firm of barristers and solicitors wrote to the Second Defendant claiming damages. That letter described the Plaintiff as being in the employ of the "Eden Group". Previously, according to the Plaintiff's affidavit, Captain Thorn had told him that he (Captain Thorn) was employed by the First Defendant, a branch of that group, and all were owned by the Second Defendant. There had also been an attempt at settlement by someone purporting to act on behalf of the First Defendant who offered certain terms to the Plaintiff whilst he was in hospital in Thailand.

Eden Group and the First, Second and Third Defendants were named in a document of release together with the shipyard which I infer to mean the owner of the shipyard where the accident happened.

The Order of Justice did not originally include the Fourth Defendant. That company's name was added as a result of the

answer of the First Defendant, in which it was pleaded that at the time of the accident the yacht was on charter to the Fourth Defendant. The first Order of Justice was dated 18th August, 1992. It was amended twice and I gave leave by consent for a further minor amendment.

The Plaintiff has brought his action against the Defendants in contract and tort. Mr. Journeaux for the Second and Fourth Defendants has conceded that they are proper parties to the action and that the Order of Justice discloses a sufficient cause of action.

For the Plaintiff, Mr. Michel, has conceded that Jersey is not the natural forum for the trial, but has invited me not to follow the Scottish case of McKinnon -v- Iberia Shipping Company (1955) S.C. 20, referred to in Dicey and Morris: "The Conflict of Laws" (2nd Ed'n) at pages 1539 - 40, and for other reasons to hold that the trial should in fact be held in Jersey.

Mr. Journeaux has submitted that this was not a proper case for leave to be given to serve outside the jurisdiction, but even if it were, I should nevertheless exercise my discretion against doing so.

Furthermore, if the proper place for the trial of the action were Thailand then the fact that the action is prescribed and prescription cannot be waived there, is not *per se* a reason for allowing service abroad.

The question is did the Plaintiff act unreasonably or reasonably? See Spiliada Maritime Corp. -v- Cansulex [1986] 3 All E.R. 843 HL; [1987] A.C. 460 a well-known House of Lords case followed in this jurisdiction.

Mr. Journeaux submitted that the Plaintiff should have brought a protective action in Thailand because that was the place where the accident happened and it was the most convenient place for all the witnesses.

As against these arguments Mr. Michel submitted that as the yacht was a British yacht registered in Guernsey and owned by a Jersey company, the proper law was not that of Thailand but that of the British Merchant Shipping Laws. Certainly that of the Island of Guernsey. Moreover the nail gun was a portable object and since no one saw the accident it could easily be brought to Jersey and the circumstances clearly explained.

As regards the question of the witnesses and their convenience, the Second Defendant swore an affidavit in which he deposed, *interalia*, that his home was in Thailand where he spent most of his time. On the other hand, the Plaintiff deposed that the Second Defendant owns homes in the United States of America

and in Belgium and travels abroad frequently and therefore it would be no hardship for him to come to Jersey.

The First Defendant is clearly justiciable here; the Third Defendant has been dealt with as I have said; that leaves the Fourth Defendant. As it seems that the defence will be the same on the question of liability and the quantum of damages I can see no hardship in the Fourth Defendant's appearing here. It appears to be part of the Eden Group which was quite prepared, through its lawyer at the time, to offer a settlement to the Plaintiff.

I find, therefore, that the fact that the Plaintiff did not start a protective action in Thailand is no bar to my making the order sought by him, subject to what I have to say in a moment. There remains the question of whether the case falls within Rule 7(h) of the Service of Process (Jersey) Rules, 1961, which permits the Court or the Bailiff to authorise service outside the jurisdiction on any person out of the jurisdiction if such a person is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction.

As I have said, Mr. Journeaux has conceded that the Second and Fourth Defendants are proper parties and certainly the action was properly brought against the First Defendant in Jersey.

That leaves me to decide, first, does the Plaintiff have a good arguable case?

Secondly, if so, should leave be given because Jersey is in fact the *'forum conveniens'* ?

Since Rule 7(h) bears a very close resemblance R.S.C. (1993 Ed'n) O 11, r.1., it is proper to see how the matter is dealt with in England. The Spiliada case has already been used and accepted by this Court in James Capel (C.I.) Ltd. -v- Koppel [1989] J.L.R. 51, and I read from p.57, where the Court said this:

> ***"....the court has to consider whether (a) Jersey is the appropriate forum for the hearing of these actions and (b) whether the Judicial Greffier was right to make orders for service out of the jurisdiction, always remembering that the burden is upon the plaintiff to show that leave should be granted".***

That I concede to be a proper and succinct statement of the Law which I have to apply in this particular case.

The requirements, I may also add, of Rule 9 of the Service of Process (Jersey) Rules, 1961, for affidavits have been satisfied by the filing of a number of affidavits, not least by the advocates acting for the respective parties and their clients.

The Court must also be satisfied that the Plaintiff, as I have said, has a good arguable case. At p.63 of the James Capel (C.I.) Ltd. -v- Koppel case, the Court dealt with this aspect of the matter citing the R.S.C. (1988 Ed'n), but the principles have not changed. At line 30 on that page, the Court said this:

> ***"The applicant must show that he has 'a good arguable case' on the merits. This is one of the consequences of r.4(2) that the case must be shown to be 'a proper one for service out of the jurisdiction'. The degree of proof required was discussed in the Brabo and Vitkovice Horni -v- Korner."*** The White Book then continues: ***"The expression 'good arguable case' is probably the best way of summarising the effect of these authorities; it indicates that, although the Court will not, at this stage, require proof of the plaintiff's case to its satisfaction, it will expect something better than a mere prima facie case. The practice, where questions of fact are concerned, is to look primarily at the plaintiff's case and not to attempt to try disputes of fact on affidavit; it is, of course, open to the defendant to show that the evidence of the plaintiff is incomplete or plainly wrong".***

Mr. Journeaux has not attempted to do that in the instant case. The point made above in the White Book was enlarged upon in the most recent case dealing with service outside the jurisdiction: Seaconsar -v- Bank Markazi [1993] 3 W.L.R. 756, a House of Lords case reported on 29th October, 1993. At p.763 of that Judgment, Lord Goff of Chieveley, who also gave the principal Judgment in the Spiliada case, said this:

> ***"This is no doubt what a number of judges have referred to when they have used the expression "prima facie case" in this context. The problem arises from the fact that the court will consider, on an application to set aside leave so given, affidavit evidence on the part of the defendant, and will take such evidence into account when deciding whether or not to exercise its discretion in favour of the plaintiff. But the court cannot resolve disputed questions of fact on affidavit evidence; and it is consistent with the statement of the law by Lord Davey that if, at the end of the day, there remains a substantial question of fact or law or both, arising on the facts disclosed by the affidavits, which the plaintiff bona fide desires to try, the court should, as a rule, allow the service of the writ. If this approach is correct, the standard of proof in respect of the cause of action can broadly be stated to be whether, on the affidavit evidence before the court, there is a serious question to be tried".***

I am quite satisfied that on the affidavit evidence which has been put before me there is indeed a serious question to be tried.

Dealing with the *'forum conveniens'* this was discussed in the James Capel judgment at p.67,and I read:

> ***"The principle of forum non conveniens does have application in the instant case. As Lord Goff said in The Spiliada [1986] 3 All E.R. at 853)- "the question is not one of convenience, but of the suitability or appropriateness of the relevant jurisdiction." Lord Cowan in Clements v. Macaulay said (4 Macph. at 594)- "more convenient and preferable for securing the ends of justice." In our judgment, it is the ends of justice that are paramount in a case of this kind. And, of course, it is a discretionary power that the court exercises under r.7. Dicey & Morris, The Conflict of Laws, 11th Ed'n., Rule 180, at 1161 (1987), says this:***
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> > ***"The term 'proper law of a contract' means the system of law by which the parties intended the contract to be governed, or, where their intention is neither expressed nor to be inferred from the circumstances, the system of law with which the transaction has its closest and most real connection."***
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> ***In their comment on Rule 180 the learned editors of Dicey & Morris say this (op. cit., at 1162-1163):***
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> > ***"In theory, in the absence of an express choice as the first test,...."*** (I interpose here to say that there was no express choice here) ***" the court should consider as a second test whether there are any other indications of the parties' intention, and only if there is no such indication go on to consider the third stage, namely with what system of law the contract has its closest and most real connection. But in practice the same result can be reached by the application of the second or third tests, and frequently the court moves straight from the first stage to the third stage. This is largely because the tests of inferred intention and close connection merge into each other ...."."***

Now in this connection Mr. Michel, in his affidavit and in his address, drew my attention to the case of The Electric Furnace Co. -v- Selas Corp. of America [1987] R.P.C. 23, where consideration is given to what is a necessary or proper party. This case is referred to in R.S.C. (1993 Ed'n) 11/1/12 at p.88, and I quote from 0.11/1/12:

> ***"Where the proposed joinder would confer no real additional advantage on the plaintiff, e.g., where the proposed defendant outside the jurisdiction has merely induced the tort of the internal defendant and the total damages will not***

be increased by the joinder, leave may not be given; but where the plaintiff has a cause of action for damages against two possible defendants and where it may be valuable to have the ability to choose against which of them to enforce judgment, or a fortiori, where the relief claimed is an account of profits, leave will be granted".

It seems to me that given the registration in Guernsey of the ship and given the Scottish case, to which I shall refer in a moment it could well be argued that there might be two places where remedies could be obtained by way of damages after a judgment had been obtained.

According to Mr. Harnprawen, judgment obtained in Jersey could not be enforced in Thailand. Moreover the Court there appears to sit only for two hours a month to hear evidence.

The Judgment, however, in Jersey would enable the Plaintiff to attach the yacht wherever it is, even if it is not in this jurisdiction.

As I have said, the burden is on the Plaintiff to show that Jersey is the appropriate forum in the sense of being clearly the proper forum where the substantive action should be tried. In this connection there are a number of matters which I have had to consider:

First, the nature of the dispute; secondly the legal and practical issues and that includes which Law would be applied; thirdly local knowledge; and fourthly the availability of the witnesses and the expenses.

These matters were mentioned by Lord Goff in Spiliada Maritime Corp. -v- Cansulex [1986] 3 All E.R. 843 HL; [1987] A.C. 460, approving Lord Wilberforce's Judgment in Amin Rasheed Shipping Corp. -v- Kuwait Insurance Co, The Al Wahab [1983] 2 All E.R. 884.

I have sketched the nature of the dispute and, as I have already said, the nail gun can be available in Jersey. The witnesses can also be here without undue difficulty. That leaves the question of the proper law of the contract.

Mr. Journeaux has suggested that it would be that of Thailand and he has cited the opinion of Mr. Harnprawen. Thai Law, Mr. Journeaux has pointed out, would most certainly govern the question of the measure of damages.

At p.1539 of Dicey and Morris "The Conflict of Laws (12th Ed'n), Vol.2, the learned authors deal with the question of acts done in territorial waters, that is to say acts done in a ship.

I am prepared to hold that the ship was, for the purposes of private international law, in Thai territorial waters, even though it was in dry dock.

Regarding torts, Dicey and Morris again have this to say at p.1539, discussing Rule 203:

> ***"In order that an action in tort may be brought in England in respect of an act arising within the territorial or national waters of a foreign country, it is necessary that the requirements of this Rule should be satisfied. That is to say, the act must normally be actionable as a tort in England and actionable under the law of the country in whose territorial or national waters it occurs".*** (But they qualify this statement by saying): ***"Special considerations may however apply where the tort is committed on board a ship or structure and entirely unconnected with the littoral State".***

I find it difficult to say that the explosion which occurred when Mr. Wright was trying to effect repairs on board the yacht was really connected in any way with a littoral State. The only reason he went ashore was that he could not do the work at sea.

I now come to look in slightly more detail at the Scottish case of McKinnon -v- Iberia Shipping Co referred to in Dicey and Morris and which I mentioned earlier. In that action a Scottish engineer was employed on a Scottish ship and injured in the course of his employment. At the time the ship was in the territorial waters of the Republic of San Domingo. The Scottish Court held that he could not recover damages in accordance with Scottish Law unless he could show that he would have recovered according to the Law of the Republic of San Domingo.

That Court rejected a distinction which the learned authors say is sometimes made in American decisions between (and I quote from the Judgment, cited in Dicey and Morris at p.1540): ***"some act done by those in charge of the vessel which affects the Government of the littoral State or its subjects, or indeed any person external to the vessel" and cases in which, as in the case before the court, "everything takes place within the ship itself".*** The authors acknowledge that the Court itself recognised that their decision involved an ***"element of absurdity".*** The learned authors hoped that the English Courts would not follow that Scottish Judgment but would rather adhere to the American practice.

I decline, having examined that case and the facts of this case, to follow it. Of course the matter is not entirely free from doubt (see Sayers -v- International Drilling [1971] 1 W.L.R. 1176). In any case, whichever of the laws might be applied eventually in this trial, Thai Law should not be difficult to obtain.

Mr. Harnprawen has furnished very complete affidavits and I can foresee no difficulty in his doing so again in this Court if it were necessary.

Lastly, I refer to p.57 again of the James Capel case where the Court referred to the fundamental principle:

> ***"In that case*** (The Spiliada), ***the House of Lords held that the fundamental principle applicable to both the stay of English proceedings on the ground that some other forum was the appropriate forum and also the grant of leave to serve proceedings out of the jurisdiction was that the court would choose that forum in which the case could be tried more suitably for the interests of all the parties and for the ends of justice".***

I am satisfied, from what I have heard and read, that the Plaintiff has a good arguable case; that the most convenient forum for the trial should be in this Court and that substantial justice will be done to all parties in this Court.

Accordingly I dismiss the remaining part of the Second and Fourth Defendants' summons with costs.

Authorities

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Service of Process (Jersey) Rules, 1961.

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Metall Und Rohstaff -v- Donaldson Lufkin & Jenrette [1989] 3 All E.R. 14; [1989] 3 W.L.R. 563; [1990] 1 Q.B. 391.

James Capel (C.I.) Ltd. -v- Koppel [1989] J.L.R. 51.

Matthews -v- Kuwait Bechtel Corp. [1959] 2 All E.R. 345; [1959] 2 Q.B. 57.

The Brabo [1949] 1 All E.R. 294; [1949] A.C. 326.

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The Electric Furnace Co. -v- Selas Corp. of America [1987] R.P.C. 23.

Spiliada Maritime Corp. -v- Cansulex [1986] 3 All E.R. 843; [1987] A.C. 460.

Amin Rasheed Shipping -v- Kuwait Insurance [1983] 2 All E.R. 884.

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