

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim No: BVIHCV2019/0264

BETWEEN

CADMAN CAPITAL LIMITED

Claimant

and

(1) ERIC KLEIN

(2) EVAN KLEIN

Defendants

APPEARANCES: Mr. Oliver Green of Counsel for the Claimant
Defendants unrepresented and not before the Court

2020: March, 6 & 30

JUDGMENT

[1] **Sandcroft, M (Ag):** This is an application by the claimant for permission to serve the claim form out of the jurisdiction. The request was that the application be determined on paper without a hearing.

Background

[2] The claimant has issued proceedings against the defendants for defamation and seeks an injunction and damages (the "Claim").

[3] The Claim arises out of a number of statements written and published by the defendants on two fundraising websites, www.kickstarter.com and www.gofundme.com, in September 2019 (the "Statements").

- [4] The claimant alleges that notwithstanding correspondence with the defendants' Canadian counsel requesting removal of the Statements, and that informal notice of the claim has been given to the defendants via Facebook and email, the Statements have not been removed by the defendants, and continue to be accessible by any user of the World Wide Web.
- [5] The defendants also continue to publish further defamatory material which continues to seriously injure the claimant's reputation and causes damage to its business.

Claimant's/Applicant's Submissions

- [6] Mr. Oliver Green, counsel for the claimant, submitted that, by reason of the publication of the Statements, the claimant's reputation has been seriously injured. The Statements have substantially affected, in an adverse manner, the attitude of other people towards the claimant and have a tendency to so affect.
- [7] Mr. Green posited that the classic definition of a defamatory statement was provided by Lord Wensleydale in **Parmiter v Coupland**¹, who defined it as "a publication without justification or lawful excuse, which is calculated to injure the reputation of another by exposing him to hatred, contempt or ridicule."
- [8] Mr. Green also submitted that in the more recent case of **Thornton v Telegraph Media Group Ltd**², it was said that in order for a statement to be classified as prima facie defamatory "there must be some tendency or likelihood of adverse consequences for the claimant".
- [9] Mr. Green stated that the words in the Statements are capable of a defamatory meaning, and cited the case of **Jeynes v News Magazines Ltd**³ where the principles to be applied in deciding what meaning the words complained of were capable of bearing were summarised by Sir Anthony Clarke MR-

"The governing principles relevant to meaning ... may be summarised in this way: (1) The governing principle is reasonableness. (2) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available. (3) Over-elaborate analysis is best avoided. (4) The intention of the publisher is irrelevant. (5) The article must be read as a whole, and any "bane and antidote" taken together. (6) The hypothetical reader is taken to be representative of those who would read the publication in question. (7) In delimiting

¹ (1840) 6 M & W 105 at paragraph [108]

² [2011] 1 WLR 1985 at paragraph [52] per Tugendhat J

³ [2008] EWCA Civ 130

the range of permissible defamatory meanings, the court should rule out any meaning which, "can only emerge as the produce of some strained, or forced, or utterly unreasonable interpretation..." (8) It follows that "it is not enough to say that by some person or another the words might be understood in a defamatory sense."

[10] Mr. Green further submitted that the Statements reasonably bear the meaning, plainly or by innuendo, that the claimant had systematically targeted and defrauded, on a large-scale, investors in its fine wine business; is otherwise illegitimate; and had previously been part of illegal wrongdoing.

[11] Mr. Green also contended that where the allegedly defamatory words are on the internet, then publication took place when and where it was downloaded. This is so even though it may be downloaded in a number of jurisdictions and uploaded in yet another. The Courts in Australia and in England and Wales have rejected arguments that there should be a special regime for the internet.

[12] Mr. Green cited the case of **Metropolitan International Schools Ltd v Designtecnica Corp**⁴, where Eady J summarised the legal framework with regard to defamation on the internet as follows:

[31] The legal submissions in this case were made against the background of well-established principles in relation to the court's jurisdiction in respect of tortious publications, including via the internet. It has long been established that publication takes place, for the purposes of a defamation claim, where the relevant words are heard or read: see e.g. King v Lewis [2005] EMLR 45. As to publication on the internet, it has been held that:

'If a publisher publishes in a multiplicity of jurisdictions it should understand, and must accept, that it runs the risk of liability in those jurisdictions in which the publication is not lawful and inflicts damage.' (See *Dow Jones & Co Inc v Gutnick* (2002) 194 ALR 433, (2002) 210 CLR 575 (para 192), quoted and followed in *King v Lewis*.)

[32] Each case must be determined in the light of its own circumstances, but there is a principle that the jurisdiction in which the tort was committed is to be regarded as prima facie the natural forum for the dispute: see e.g. *Berezovsky v Michaels*, *Giouchkov v Michaels* [2000] 2 All ER 986 at 993-994, [2000] 1 WLR 1004 at 1012, per Lord Steyn"

[13] Mr. Green further argued that the publication of the Statements, being the act causing the damage, took place within the British Virgin Islands (the "BVI").

The Applicable Law

⁴ [2011] 1 WLR 1743

[14] This application to serve the defendants out of the jurisdiction is being made pursuant to the **Eastern Caribbean Supreme Court Civil Procedure Rules 2000** (the “CPR”), rule 7.2 which requires the Court’s permission to serve a claim form outside the jurisdiction, so far as allowed by rule 7.3., Rule 7.3(2)(a) provides as follows:

“(2) A claim form may be served out of the jurisdiction if a claim is made - (a) against someone on whom the claim form has been or will be served, and –

- (i) there is between the claimant and that person a real issue which it is reasonable for the court to try; and
- (ii) the claimant now wishes to serve the claim form on another person who is outside the jurisdiction and who is a necessary and proper party to that claim.”

[15] The applicable principles relating to service out of the jurisdiction were set out, with reference to prior authorities, in **AK Investment CJSC v Kyrgyz Mobil Tel Ltd**⁵. On an application for service out of the jurisdiction, three requirements have to be satisfied. First, the claimant must satisfy the court that in relation to the foreign defendant there is a serious issue to be tried on the merits, that is, there is a substantial question of fact or law, or both.

[16] Second, the claimant must satisfy the court that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given. The classes of case in which permission may be given are set out at CPR 7.3. In this context “good arguable case” connotes that one side has a much better argument than the other.

[17] Third, the claimant must satisfy the court that, in all the circumstances, the forum being seised is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.

[18] In the search for the appropriate forum the question of the location of witnesses will be an important factor and has been described as a core factor.⁶

[19] The *locus classicus* in relation to issues of appropriate forum at common law is **Spiliada Maritime Corporation v Cansulex Ltd**⁷, where Lord Goff of Chieveley delivered the leading speech. He

⁵ [2011] UKPC 7, [2012] 1 WLR 1804, at para 71, per Lord Collins

⁶ *VTB Capital Plc v Nutritek International Corporation* [2013] UKSC 5, [2013] AC 337, at para 62, per Lord Mance

⁷ [1987] AC 460

characterised the underlying aim in all cases of disputed forum as being “to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice”⁸. But he also identified the important distinction in the starting point and onus of proof between cases where permission is required to serve proceedings out of the jurisdiction, and situations where service is possible without permission.⁹ The present case falls into the former category. In cases within that category, permission was not to be granted under the former rules of court “unless it shall be made sufficiently to appear to the court that the case is a proper one for service out”. As Goff L.J. noted, the jurisdiction being exercised “may be ‘exorbitant’”¹⁰. On this basis, Goff L.J. concluded that:

“The effect is, not merely that the burden of proof rests on the plaintiff to persuade the court that England is the appropriate forum for the trial of the action, but that he has to show that this is clearly so”.¹¹

[20] Goff L.J. further explained that caution was necessary in respect of the word “exorbitant”. He noted that the circumstances in which permission to serve out may be granted:

“are of great variety, ranging from cases where, one would have thought, the discretion would normally be exercised in favour of granting leave (e.g., where the relief sought is an injunction ordering the defendant to do or refrain from doing something within the jurisdiction) to cases where the grant of leave is far more problematical. In addition, the importance to be attached to any particular ground invoked by the plaintiff may vary from case to case. For example, the fact that English law is the putative proper law of the contract may be of very great importance; or it may be of little importance as seen in the context of the whole case. In these circumstances, it is, in my judgment, necessary to include both the residence or place of business of the defendant and the relevant ground invoked by the plaintiff as factors to be considered by the court when deciding whether to exercise its discretion to grant leave; but, in so doing, the court should give to such factors the weight which, in all the circumstances of the case, it considers to be appropriate.”¹²

The modern rules reflect more precisely Goff L.J.’s statement of general principle, in providing that permission is not to be given unless the court is satisfied that the forum being seized is the proper place in which to bring the claim.

⁸ At p 480G

⁹ At p 480G-H

¹⁰ At p 481A-D

¹¹ At p 481E

¹² At p 481F-482B

[21] In **Berezovsky v Michaels**¹³, a challenge to the consistency between the approach taken in **Spiliada** and the approach taken in **The Cordoba Shipping Co Ltd v National State Bank, Elizabeth, New Jersey (The Albaforth)**¹⁴ was rejected by the majority. Steyn L.J. enunciated:

“The express or implied supposition in all these decided cases is that the substance of the tort arose within the jurisdiction. In other words, the test of substantiality as required by **Kroch v Rossell** [1937] 1 All ER 725 was in each case satisfied. Counsel for Forbes argued that a prima facie rule that the appropriate jurisdiction is where the tort was committed is inconsistent with the **Spiliada** case [1987] AC 460. He said that **Spiliada** admits of no presumptions. The context of the two lines of authority must be borne in mind. In **Spiliada** the House examined the relevant questions at a high level of generality. The leading judgment of Lord Goff of Chieveley is an essay in synthesis; he explored and explained the coherence of legal principles and provided guidance. Lord Goff of Chieveley did not attempt to examine exhaustively the classes of cases which may arise in practice, notably he did not consider the practical problems associated with libels which cross national borders. On the other hand, the line of authority of which **The Albaforth** is an example was concerned with practical problems at a much lower level of generality. Those decisions were concerned with the bread and butter issue of the weight of evidence. There is therefore no conflict. Counsel accepted that he could not object to a proposition that the place where in substance the tort arises is a weighty factor pointing to that jurisdiction being the appropriate one. This illustrates the weakness of the argument. The distinction between a prima facie position and treating the same factor as a weighty circumstance pointing in the same direction is a rather fine one. For my part the **Albaforth** line of authority is well established, tried and tested, and unobjectionable in principle.”¹⁵

[22] In **The Albaforth** Goff LJ deduced from earlier case law that:

“where it is held that a Court has jurisdiction on the basis that an alleged tort has been committed within the jurisdiction of the Court, the test which has been satisfied in order to reach that conclusion is one founded on the basis that the Court, so having jurisdiction, is the most appropriate Court to try the claim, where it is manifestly just and reasonable that the defendant should answer for his wrongdoing. This being so, it must usually be difficult in any particular case to resist the conclusion that a Court which has jurisdiction on that basis must also be the natural forum for the trial of the action. If the substance of an alleged tort is committed within a certain jurisdiction, it is not easy to imagine what other facts could displace the conclusion that the Courts

¹³ [2000] 1 WLR 1004

¹⁴ [1984] 2 Lloyd's Rep 91

¹⁵ (p 1014A-F)

of that jurisdiction are the natural forum. Certainly, in the present case, I can see no factors which could displace that conclusion.”¹⁶

[23] **Kroch v Rossell**¹⁷ was a case in which a foreigner describing himself as “a gentlemen of no occupation” claimed that he had been libeled in *Le Soir*, a publication with a daily circulation in Paris of about a million and a half, and in London of well under 50 million. He failed to establish any English reputation or connection, save temporary presence there to start the proceedings. Not surprisingly, the Court of Appeal thought that any breach there was technical and of no substance. It described the principles governing permission as requiring an examination of the circumstances to identify where the action should be better tried, in terms which foreshadowed Lord Goff’s approach in **Spiliada**.

[24] **Berezovsky** was also concerned with an alleged libel of a Russian businessman in a magazine with sales of 785,000 in the USA, 1,900 in England and 13 in Russia. In that case, Lord Hoffmann stated inter alia:

“But the notion that Mr. Berezovsky, a man of enormous wealth, wants to sue in England in order to secure the most precise determination of the damages appropriate to compensate him for being lowered in the esteem of persons in this country who have heard of him is something which would be taken seriously only by a lawyer. An English award of damages would probably not even be enforceable against the defendants in the United States: see *The Interaction Between American and Foreign Libel Law* by Kyu Ho Youm in (2000) 49 I.C.L.Q. 131. The common sense of the matter is that he wants the verdict of an English court that he has been acquitted of the allegations in the article, for use wherever in the world his business may take him. He does not want to sue in the United States because he considers that *New York Times Co. v. Sullivan* 376 U.S. 254, (1964) makes it too likely that he will lose. He does not want to sue in Russia for the unusual reason that other people might think it was too likely that he would win. He says that success in the Russian courts would not be adequate to vindicate his reputation because it might be attributed to his corrupt influence over the Russian judiciary.”

Nonetheless, in contrast to the position in **Kroch**, the claimant in **Berezovsky** was held to have had significant connections with, and reputation to protect in England. Following the approach taken in **The Albaforth**, on the basis that the English tort was a separate one, for the pursuit of which England was prima facie the appropriate forum, the majority in the House upheld the Court of Appeal’s conclusion that England was the appropriate forum.

¹⁶ At p 96

¹⁷ [1937] 1 All ER 725

[25] **The Albaforth** line of authority is no doubt a useful rule of thumb or prima facie starting point, which may, in many cases, also give a final answer on the question whether jurisdiction should appropriately be exercised. However, the variety of circumstances is infinite, and **The Albaforth** principle cannot obviate the need to have regard to all the circumstances in any particular case. The ultimate over-arching principle is that stated in **Spiliada**, where if a court is not satisfied at the end of the day that its jurisdiction is clearly the appropriate forum, then permission to serve out must be refused or set aside.

[26] It would thus be appropriate to have in mind in the principle expounded by the Court of Justice of the European Union in **Shevill v Presse Alliance**¹⁸ that where a libel is published in several jurisdictions, a litigant is given the choice of suing where the defendant is domiciled and where he can recover all relevant remedies, or suing in each of the countries where harm is said to have been incurred. Thus, such a policy required that the claimant in **Shevill** choose between Scotland (where the defendant was domiciled or conducted its affairs) and the courts of Italy, France, Brazil and England (where the other offending publications were said to have occurred and where at least some harm was alleged to have been incurred). The Court however, noted that the claimant had in fact chosen to sue only in England, yet had not confined his claim to the harm incurred in that jurisdiction.

Issue

[27] The issue is whether the claimant has satisfied the court that the BVI is clearly or distinctly the appropriate forum for the trial of the dispute; and that in all the circumstances, the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction on the basis that the BVI is the proper place in which to bring the claim.

Discussions & Findings

[28] When a court is called upon to decide whether an action should proceed in its jurisdiction, as opposed to another, it is being asked to decide a procedural issue at a very early stage. Where, as is the position in this case, it is common ground that the parties would have a fair trial in the competing jurisdiction, the exercise will normally involve the court weighing up a number of different factors and deciding where the balance lies.

¹⁸ [1995] 2 AC 18

- [29] As aforesaid, on the basis of Goff L.J.'s classic speech in **Spiliada**, the underlying principle is that the task of the court is to identify the forum in which the case can most suitably be tried for the interests of all the parties and for the ends of justice.¹⁹
- [30] The court finds that there is between the claimant and the defendants a "real issue which it is reasonable for the Court to try" in accordance with CPR 7.3(2) (a) (i), there being substantial questions of fact and law.
- [31] However, the Court must also grapple with the question of whether the BVI is the proper jurisdiction for the matter to be tried, in light of the Statements having not been removed by the defendants, and continuing to be accessible by any user of the World Wide Web.
- [32] Mr. Green posited that the claimant claims two types of damage: damage to reputation and special damage, being financial loss, which has been and will continue to be sustained by the claimant in the BVI. He further submitted that the relevant act in defamation is publication. Where defamatory words are published on the internet, publication takes place when, and in the location, the defamatory material is downloaded. Publication of the defamatory material by the defendants has taken place in the BVI as the material has been downloaded in the BVI.
- [33] The place of commission is a relevant starting point when considering the appropriate forum for a tort claim, however, references to a presumption are, in my view, unhelpful. The preferable analysis is that the place of commission will normally establish a prima facie basis for treating that place as the appropriate jurisdiction. However, especially in the context of an international transaction like the present, it is likely to be over-simplistic to view the place of commission in isolation when considering the appropriate forum for the resolution of the dispute. The significance attached to the place of commission may be dwarfed by countervailing factors.
- [34] There are a number of points that seem to me to be relevant. First, it appears that it is important for the court to know what issues are likely to arise at the trial of the action on the merits. Only when the issues are identified will it be possible to compare the two jurisdictions. This principle is stated in the text **Dicey, Morris & Collins on The Conflict of Laws**²⁰, in which, having stated the general principles

¹⁹ See also *Sim v Robinow* (1892) 19 R 665, 668.

²⁰ 15th ed (2012), para 11-143

much as above, the editors say that in practice, the defendant should identify the issues which are appropriate to be tried in the foreign court.²¹

[35] There is certainly general attraction in a conclusion that persons committing defamation should answer in the jurisdiction which is not merely that where their defamation manifested itself, but that formulation, by omitting the word “allegedly”, begs the question where the issue whether any such defamation occurred and caused damage to the claimant, should most appropriately be determined. All that has been established at this stage is that there is a serious issue to be tried - in other words, that the claimant has a reasonable prospect of succeeding on the claim - in respect of the claimant's defamation claims.

[36] The question where such defamation claims are appropriately to be tried has to be answered in the light of all the circumstances, including the nature of the issues to be tried and the evidence which would be involved. The alleged torts were committed in the BVI under BVI law, but the fundamental matters in dispute - whether there was any such defamation, whether the defendants were party to it, and what, if any, impact any defamatory remarks had on the claimant are, as I have shown, heavily focused in Canada.

[37] Here the alleged defamatory remarks on which the defendants' tortious responsibility is based were also published in Canada. In my opinion, the Canadian connection is of such strength and importance in this case that, despite the existence of some factors favouring the BVI, the claimant is quite unable to discharge the onus of showing that the BVI is clearly or distinctly the appropriate forum for determination of the issues in this case. The claimant has failed to establish any significant BVI reputation or connection, save temporary presence here to start the proceedings.

[38] I disagree with Mr. Green that the BVI is clearly or distinctly the appropriate forum for the trial of the dispute and that there is no other jurisdiction which could credibly hear this claim and apply English common law defamation principles.

[39] The ultimate over-arching principle is that stated in **Spiliada**, where if a court is not satisfied at the end of the day that the BVI, is clearly the appropriate forum, then permission to serve out must be

²¹ In the footnote to that sentence the editors referred to *Limit (No 3) Ltd v PDV Insurance Co* [2005] EWCA Civ 383, at para 73 and *Sawyer v Atari Interactive Inc* [2005] EWHC 2351 (Ch), [2006] ILPr 129, at para 54. See also *Islamic Republic of Pakistan v Zadari* [2006] EWHC 2411 (Comm), at para 138 and *Novus Aviation Ltd v Onur Air Tasimacilik AS* [2009] EWCA Civ 122. Lawrence Collins J or Lawrence Collins LJ is the author of the relevant passage.

refused or set aside. In light of the aforementioned I would refuse the application to serve the claim form and statement of claim outside of the jurisdiction based on the forum non conveniens doctrine.

[40] Orders

In view of the foregoing, I hereby order as follows:

1. The application is refused.
2. The claimant shall file and serve this order.
3. No Order as to costs.

Ricardo Sandcroft
High Court Master [Ag.]

By the Court

Registrar