14 pages

COURT OF APPEAL.

30th September, 1994 198.

Before: Sir David Calcutt, Q.C., (President),
J.M. Collins, Esq., Q.C., and
E.A. Machin Esq., Q.C.

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| 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 |

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Appeal of the Second and Fourth Defendants ("the Appellants") against the Order made by the Royal Court (Samedi Division) on 4th February, 1994:

(A) dismissing their applications:

(1) to set aside the Order made by the Judicial Greffier on 16th August, 1993, under the provisions of the Service of Process (Jersey) Rules, 1961, giving leave to serve proceedings on the Appellants out of the jurisdiction of the Royal Court;

(2) for an Order staying the proceedings on the ground that Thailand represents the proper forum for the adjudication of the dispute between the parties; and

(3) for an Order discharging the Defendants to these proceedings from the action; and

(B) directing the Appellants to pay forthwith to the Plaintiff's Advocate the costs of and incidental to the hearing before the Royal Court on 3rd and 4th February, 1994, on the undertaking of the Plaintiff's Advocate to hold such costs pending the determination of the appeal or until further Order of the Royal Court.

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Advocate N.F. Journeaux for the Second and Fourth Defendants.
Advocate J.C. Gollop for the Plaintiff.

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JUDGMENT

COLLINS, JA: The Plaintiff, Mr. Wright, who is a resident of New Zealand but who describes himself as a British qualified shipwright, suffered a serious accident on 29th September, 1990, while working on a Guernsey registered vessel in dry dock in

Bangkok, Thailand. Severe facial injuries and a consequent fall and further injury were caused, it is alleged, when a nail gun which he was using on board ship exploded in his face. The vessel, a substantial motor yacht, the "Michel Adam", was owned by the First Defendant, Rockway Limited, a Company registered in this Island.

Both Rockway and the Fourth Defendant, G. Garment and Company Ltd., joined by amendment, appear, from the evidence available at this stage, to have formed part of the Eden Group as it is called, of which the effective proprietor was and, so far as we are aware, remains Mr. Adam Lisowski, the Second Defendant.

The Master of the "Michel Adam" at the relevant time was the Third Defendant, Mr. Thorn.

By an Order of Justice dated 18th August, 1992, Mr. Wright commenced proceedings against Rockway, Mr. Lisowski and Mr. Thorn, as first to third Defendants respectively. The two individual Defendants were alleged to have been the agents of the corporate Defendant. Allegations of negligence were raised against all three Defendants and vicarious liability was alleged . The principal allegations of negligence centre upon an allegation that the Plaintiff was required to use the nail gun which had been recently purchased in Singapore with compressed oxygen as distinct from compressed air. Complaints in this regard are alleged to have been made before the accident.

A report was obtained, addressed to Mr. Lisowski, the Second Defendant, from a firm of Loss Adjusters blaming the suppliers of the gun, but without particularization and, so far as can be ascertained, without expertise in the field.

This approach was to form the basis of an attempt which was unsuccessful on the part of Rockway and the Eden Group, by their representatives, to obtain a signature to a release by Mr. Wright.

The Act of Court was served on Rockway in Jersey. Rockway being a Jersey Company, no order, of course, was required and no point was taken at any stage on behalf of Rockway as to this service. Nor, indeed, has any application been made on their part to stay the proceedings against them on the ground of *forum non conveniens*. They are not parties to this application or appeal.

By their Answer dated 6th November, 1992, Rockway advanced a case that the vessel was under charter to G. Garment and Company Ltd, the Fourth Defendant, and it was that Company which was alleged to have employed Mr. Thorn as its agent in order to carry out the refurbishment upon which the Plaintiff was engaged.

It was further alleged that the purchase of the gun in Singapore by the Plaintiff was made on behalf of Garment, it being

alleged that payment both in respect of the gun and of Mr. Wright's wages were made by the Eden Group.

However it is to be observed that since both Rockway and Garment, on the evidence at present available to us, were part of this Group, this would seem inconclusive to say the least.

Mr. Wright, the Plaintiff, in his affidavit of 21st December, 1993, describes the manner in which he says that he was appointed by means of a telephone call to Monaco where he was working at the time, followed by a subsequent meeting with Mr. Thorn, the Master (the Third Defendant). He states that the existence of Garment was at no time mentioned to him and that Mr. Thorn described himself as employed by Rockway, a member of the Eden Group, all owned by Mr. Lisowski.

He also refers to the Loss Adjusters' report and to the form of release proffered to him as indicating the involvement of Rockway as employers.

These are matters which will, of course, have to be considered and decided upon at the trial and it is not for this Court to reach any final conclusion upon them.

Nonetheless, an Answer having been delivered in these terms, those representing Mr. Wright, quite understandably, sought and obtained leave to join Garment as the Fourth Defendant and accordingly the Order of Justice was amended on 6th July, 1993, by the addition of the Fourth Defendant and the making of appropriate alternative amendments. There were now three of the Defendants who were not capable of service within the jurisdiction. Thus the Jersey solicitors for the Plaintiff sought and obtained leave under the Service of Process (Jersey) Rules, 1961, Rule 7(h) for service out of the jurisdiction upon the Second, Third and Fourth Defendants.

By an Act of Court dated 16th August, 1993, the Judicial Greffier, having read the affidavit of the advocate for the Plaintiff dated 13th August, 1993, ordered service on one of the partners in the firm of solicitors acting for the First Defendant, with a request for transmission and by sending a copy of the Order also to the registered office in Bangkok, Thailand, of the Eden Group. No point was pursued before the Bailiff on the subsequent application, to which I will refer, as to the satisfaction of the mechanics of this Order as to service.

Thereafter service was effected in accordance with the Order and no step having been taken by or on behalf of the Master (the Third Defendant) judgment was entered against him.

The Second and Fourth Defendants (Mr. Lisowski and G. Garment & Co. Ltd) however applied to the Royal Court to have the Order of

the Judicial Greffier set aside, or alternatively for the proceedings to be stayed and for an order that those Defendants should be discharged from the proceedings.

5 This application came before the Bailiff on 4th February, 1994, when he dismissed the summons. It is from this dismissal and Order that the Second and Fourth Defendants now appeal.

Article 2 of the Service of Process and Taking of Evidence (Jersey) Law, 1960, provides for service outside the island in civil or commercial matters ***"in such cases and in such manner as may be prescribed by Rules of Court."*** Those Rules are to be found in the Service of Process (Jersey) Rules, 1961, to which I will refer as the Jersey Rules. By Rule 5, ***"no summons shall be served outside the island without the leave of the Court or the Bailiff"***, and by Rule 6, provision is made for the form of summons and for service to be proved by affidavit. Then by Rule 7, provision is made as to the circumstances in which such service may be allowed. The relevant provision reads as follows:

> ***"Service out of the jurisdiction of a summons may be allowed by the Court or the Bailiff whenever -***
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> ... ...
>
> ***(h) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction."***

A further requirement is imposed by Rule 9, which provides as follows:

> ***"Every application for leave to serve such summons on a defendant out of the jurisdiction shall be supported by affidavit or other evidence, stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, and the grounds upon which the application is made; and no such leave shall be granted unless it shall be made sufficiently to appear to the Court or Bailiff that the case is a proper one for service out of the jurisdiction under this Part of these Rules."***

These provisions of the Jersey Rules in substance have a marked similarity to those contained in Order 11, Rules 1 & 4(2) of the Rules of the Supreme Court in England and Wales. Any difference is as to mode of expression rather than of effect with two exceptions; first by the Rules of the Supreme Court Order 11 Rule 4(1) there is no alternative provision for *"other evidence"* as an alternative to affidavit evidence. Secondly, by Order 11 Rule 4(1)(c) there is specific provision in the case of the

equivalent to Jersey Rule 7(h) that the affidavit must state the grounds upon which it is believed that there is between the plaintiff and the person on whom a writ has been served a real issue which the plaintiff may reasonably ask the Court to try whereas there is no such provision is the Jersey Rules.

The Royal Court in James Capel (C.I.) Ltd -v- Koppel & Anor [1989] J.L.R 51, and the Bailiff in the instant case have, in these circumstances, looked to the authorities which have developed on the mainland insofar as the construction and application of these provisions of the Jersey Rules are concerned. In the absence of any suggestion that local circumstances are such as to call for any distinction in this Island we are content in general terms at least to follow and confirm this practice and are further encouraged in so doing by the fact that the leading cases on this topic on the mainland are, for the most part, of the highest authority.

However, it is to be noted that since the decision of the Royal Court in the James Capel case, the construction and application of Order 11, Rules 1 and 4 have once again been considered by the House of Lords and that decision of the Royal Court and the quotations from the Annual Practice 1993 cited in the course of his Judgment by the Deputy Bailiff must be read subject to the further principles expressed in the speech of Lord Goff with whom all other members of the appellate Committee sitting with him agreed in Seaconsar -v- Bank Markazis [1993] 3 WLR 756. Extensive quotation from that speech would not be in point in the present instance and for present purposes we consider it sufficient to set out the following passage from the speech of Lord Goff at p.767:

> *"Accordingly, a judge faced with a question of leave to serve proceedings out of the jurisdiction under Order 11 will in practice have to consider both (1) whether jurisdiction has been sufficiently established, on the criterion of the good arguable case laid down in Korner's case, under one of the paragraphs of rule 1(1), and (2) whether there is a serious issue to be tried, so as to enable him to exercise his discretion to grant leave, before he goes on to consider the exercise of that discretion, with particular reference to the issue of forum conveniens."*

The exercise of discretion and in particular the determination of the issue as to *forum conveniens* is not itself affected by that most recent authority and remains to be governed by the earlier decision of the House of Lords in Spiliada Maritime Corp. -v- Cansulex [1986] 3 All ER 843; [1987] A.C. 460. It is not proposed to burden this Judgment with extensive references to the many other authorities which have marked the development of the Law with regard to the application of Order 11 on the

mainland. We do, however, observe that the application of the equivalent to Rule 7(h) of the Jersey Rules was considered by the Court of Appeal in England as it affected Defendants as long ago as 1888 in Massey -v- Haines (1888) 21 QBD 330, a decision referred to with apparent approval by Lord du Parcq in The Brabo [1949] 1 All ER 294; [1949] A.C. 326 @ 353. This was a case where there were alternative defendants and the Court granted leave with the effect that both of the alternative defendants would be before the same Court. Lord Esher spoke as follows:

> ***"The question whether a person out of the jurisdiction is a proper party to an action against a person who has been served within the jurisdiction may depend on this: supposing both parties had been within the jurisdiction would they both have been proper parties to the action?"***

In fact in the instant case it has been accepted before this Court, and I apprehend before the learned Bailiff as well, that this was a case in which the First Defendant was properly sued within the jurisdiction and further that within the meaning of the rule the other Defendants were proper parties for the purpose of satisfying the first test to be applied in connection with the Rules.

The nature of the issue as argued before the learned Bailiff and before us is one of equal importance; namely as to whether the Plaintiff had succeeded in establishing that the Royal Court of Jersey is the most appropriate forum for the adjudication of the dispute between the Plaintiff and these Defendants, and moreover whether it is clearly the most appropriate forum. Those are all matters upon which a Court is required to exercise its discretion once it has reached its conclusion as to whether the case is one which falls within the more specific requirements of the rule.

The Appellants by their advocate submitted that this Court should interfere with the discretion of the learned Bailiff on a number of grounds. First it was contended that the learned Bailiff misdirected himself on the choice of law applicable to the Plaintiff's claim insofar as it was based on contract.

Secondly, it was submitted that the learned Bailiff confused the tests to be applied in contract and in tort and having referred to the choice of law in relation to contract went on, it was argued, to refer to authorities which related to tort.

Thirdly, that the learned Bailiff misdirected himself as to the application of the test as to the choice of law in tort itself, having regard to the circumstances of this claim in particular.

Fourthly, it was contended that the learned Bailiff was plainly wrong in holding that *"the witnesses could also be here without undue difficulty"*.

5 In addition, leave was given by this Court to the Appellants to introduce further evidence from Mr. Harnpraween, a lawyer in Bangkok, and the author of affidavits which had been before the learned Bailiff to the effect that under the Thai commercial code *"when prescription has not been set up as a defence the court*
10 *cannot dismiss the claim on the ground of prescription."*

The learned Bailiff had, quite understandably, construed a passage in a letter of 14th October, 1993, from Vickery & Worachai Ltd, lawyers in Bangkok exhibited to the second affidavit of Mr.
15 Journeaux as meaning that prescription cannot be waived in that jurisdiction.

In view of the most recent affidavit of Mr. Harnpraween, it would appear that the learned Bailiff might have, quite
20 understandably, overstated the position as it pertained in the law of Thailand. This is not, however, the end of the matter as appears later in this Judgment.

The test as to the prime matters in issue is, as the learned
25 Bailiff correctly observed, to be found in the speech of Lord Goff in the Spiliada case to which I have just referred.

In the course of his speech in that case Lord Goff preferred and adopted the following words taken from a speech of Lord
30 Wilberforce in the case of Amin Rasheed Shipping Corp. -v- Kuwait Insurance Co, The Al Wahab [1983] 2 All E.R. 884, p.50:

> ***"In considering this question the court must take into account the nature of the dispute, the legal and practical***
> 35 ***issues involved, such questions as local knowledge, availability of witnesses and their evidence and expense."***

That statement of principle had been prefaced by the statement to the effect that the intention was to impose on the
40 plaintiff the burden of establishing these matters.

No criticism is raised of the learned Bailiff in his acceptance of the burden of proof as described by Lord Goff in the following passage where he said:

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> ***"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 he has to show that this is clearly so."***

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In other words the burden is quite simply the obverse of that applicable where a stay is sought of proceedings started in this

country of right. It is asserted that the learned Bailiff failed to apply the test correctly in that, according to the Appellants, on the facts of this case, that burden had not been satisfied as it had not been shown clearly that Jersey was the appropriate forum for the trial of the action.

Much argument has been addressed to us as to the choice of law which the Royal Court will be required to elect and apply when the action comes before them. In the circumstances of this case I do not consider this to be the cardinal consideration in determining this appeal, although clearly it has to be borne in mind as one but only one element in the "legal and practical issues involved" to which I have referred from the speech of Lord Wilberforce as quoted by Lord Goff.

Any legal problems which the choice of law element in this action may throw up and indeed any expense and inconvenience which may be occasioned by the calling of evidence as to Thai Law in the Royal Court of Jersey, is, in my view, overshadowed by the importance, in the interests of justice, of having all of these alternative Defendants before one court. The Plaintiff having properly commenced his action in Jersey against a Jersey Company is then met with an answer which raises the defence that he was employed not by that company but by a company registered in Thailand. When to this is added the fact that on the evidence available at this stage and to this Court, namely the Plaintiff's affidavit - which was not challenged by any opposing evidence - the two companies in question are part of the same group, the legal catastrophe of having one claim litigated in Jersey and the other in Bangkok is, in my view, self-evident.

I would add not only that it would seem far too late for Rockway to seek to stay the action against them on the ground of *forum non conveniens* and if they were to seek to do so they would face the insurmountable difficulty that they have already served an Answer and thus accepted the jurisdiction of the Court.

To this factor there is to be added the fact that it is clear on the evidence that the Plaintiff's claim in Thailand may very well be statute barred, to put it at its lowest. This is a legitimate matter for the Courts in Jersey to take into account, provided, in the words of Lord Goff in the Spiliada case, that the Plaintiff did not ***"act unreasonably in failing to commence proceedings, for example a protective writ, in that jurisdiction within the limitation period applicable there." (pp.483-4).***

I am satisfied that the Plaintiff did not act unreasonably in this regard. In his affidavit, indeed, he stated that he had never heard of Garment until he received the First Defendant's Answer. Further it is notable that by the time he received that answer any action in Thailand may well have been statute barred.

It is true that before receiving the Answer the Plaintiff had already joined Mr. Lisowski and the ship's Master as Defendants, but it is further to be observed that no attempt had been made to serve those Defendants out of the jurisdiction until after the Answer had been delivered.

It is difficult to see how in the circumstances of this case, in any event, the Plaintiff could be criticised for not having commenced proceedings against Mr. Lisowski alone, or against Mr. Thorn, the Master, alone, in Bangkok.

On this basis also we are satisfied that the learned Bailiff was amply justified in ignoring the Courts of Thailand as an appropriate forum.

Again, in Spiliada, Lord Goff advanced the possibility that an undertaking could be accepted by defendants in such circumstances not to raise a limitation defence in the other jurisdiction in question. (p.484 D).

The information which Mr. Journeaux, on behalf of the Appellants, has very properly both obtained and communicated to this Court, indicates that no such undertaking would be enforceable before the Courts of Thailand. I do not therefore consider that this would be a suitable case in which this Court could look to the Appellants' advocate for an undertaking of the kind described by Lord Goff. Furthermore I do not consider that there is any practical alternative to the giving of an enforceable undertaking and accordingly I give effect to the situation that there is most probably a limitation defence in Thailand which any defendants there would remain free to raise.

Turning briefly to the criticisms of the learned Bailiff's Judgment in connection with the choice of law, I wish to make it clear that this is a matter which will essentially be one for the Royal Court to determine when it comes to try the action. While it is true that the learned Bailiff gave no clear decision as to the proper law of the contract of employment, I do not consider this to be of any real significance having regard to the fact that, on the information at present before the Court, no contractual limitation or exclusion of liability by way of contract can be envisaged. Indeed it is difficult to see how such limitation or exclusion of liability could have been embodied in an oral contract made partly by telephone.

In these circumstances the Royal Court is likely (and it is of course a matter for them) to follow the decision of Hodgson J and the Court of Appeal in Coupland -v- Arabian Gulf Oil Co. [1983] 1 W.L.R. 1136; [1983] 2 All ER 434; [1983] 3 All ER 226 CA., in examining a defendant's liability in an employer's liability case by reference to tort rather than contract where

there is no such exclusion or limitation in the terms of the contract of employment.

In connection with a claim in tort the learned Bailiff refused to follow Mackinnon -v- Iberia Shipping Co Ltd (1954) 2 Ll.L.R. 372, a decision of the Court of Session which has been criticised by textbook writers and most notably by Dicey & Morris in their work on "Conflict of Laws" (11th Ed'n) at p.1541.

In this regard - and of course it will essentially be a question for the Royal Court to determine all these matters - Mr. Journeaux has submitted that even if the Courts apply a test which ignores the law of the country in whose territorial waters the tortious act occurs and prefers the law of the flag where the tort is committed on board ship, and is totally unconnected with the littoral state, even though you apply such a test, the facts of this case would be such as to establish a connection from ship to shore.

I have considered Mr. Journeaux's detailed arguments in this respect and have concluded that this is essentially a matter for determination by the Royal Court at the trial. The existence of this issue is something to be taken into account in favour of the Appellants in balancing the various matters to be considered in relation to the exercise of the discretion by the learned Bailiff, but in my view it is far outweighed by the other considerations to which I have referred.

Finally, I have considered Mr. Journeaux's submissions with regard to the witnesses who are likely to be brought from abroad to give evidence in Jersey. Some of these can be expected in any event to give evidence in support of the defence raised by Rockway in relation to the alleged charter party and the identity of the Plaintiff's employer. Other classes of witness to which reference has been made are, for the most part, at present speculative. Accordingly not merely do I consider that the learned Bailiff was not plainly wrong in expressing himself as he did, but I consider that he was right.

There are two final matters; first it must be borne in mind that an appeal of this nature is an appeal against the exercise of a judicial discretion. The circumstances in which this Court will interfere with such a discretion are limited and have been expressed in this Island in Rahman -v- Chase Bank (CI) Trust (1984) JJ 127 C.of.A., by reference in part to the House of Lords authority in England of The "Abidin Daver" (1984) 1 All ER 470 HL. For the reasons which I have given I, for my part, decline to interfere with the discretion of the learned Bailiff.

Secondly, and I would preface these remarks by saying that they are not intended to be in any way a criticism of the Appellants or their advocate in pursuing this particular appeal, I

would draw attention to a passage from the speech of Lord Templeman in The Spiliada Appeal (p.465). He expressed himself in these terms:

5 *"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*
10 *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*
15 *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 should be slow to interfere."*

20 Those are matters which I am sure will be borne in mind by those responsible for the conduct of litigation in this field. Accordingly, I would dismiss this appeal.

25 **THE PRESIDENT:** I agree. Mr. Machin who has been unable to remain in Court for the giving of this Judgment has asked me to say that he, too, agrees with the Judgment.

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