

IN THE SUPREME COURT OF BELIZE, A.D. 2015

CLAIM NO: 629 of 2015

BETWEEN

VOLODYMYR SPILNICHENKO

CLAIMANT/RESPONDENT

AND

MAKSYM BEREZKIN

DEFENDANT/APPLICANT

SABCO (OFFSHORE FINANCIAL SERVICES) LIMITED

INTERESTED PARTY

Keywords: Practice & Procedure – Civil Procedure Rules - Service of Court Process Out of the Jurisdiction; Part 7.3(2)(c) of the RSC; Claim against an Interested Party and Person out of Jurisdiction; Conditions of Application for Service Out of Jurisdiction; Whether there is a real issue to be tried? Whether Party is a necessary and Proper Party? Whether Grounds for Deponent's Belief that Conditions are satisfied?

Claim involving Interested Party engaged in Management of International Business Company (IBC); Provision of Nominee Director; Bearer Shares; Allegation of Fraud (Forgery) in relation to Transfer of Shares.

Before the Honourable Mr. Justice Courtney A. Abel

Hearing Dates: 19th April 2016
3rd May 2016
31st May 2016.

Appearances:

Mr. Aldo G. Reyes for the Claimant/Respondent

Mrs. Ashanti Arthurs Martin for the Defendant/Applicant.

DECISION
Delivered on the 31st day of May 2016

Introduction

- [1] This decision concerns an application to set aside an order of this court.
- [2] The order of this court in question was made on the 18th January 2016¹. It granted the Claimant/Respondent (“the Claimant”) permission for the service on the Defendant/Applicant (“the Defendant”) of the Claim Form and associated processes herein at an address in Ukraine (“the Order”).
- [3] The Defendant is arguing that the Order should now be set aside by this court in view of the alleged defective capacity of the Interested Party in the present claim²; and also because of alleged defects in the pleaded case against the Defendant/Applicant, as well as of the Application to serve out of the jurisdiction³.
- [4] The Claimant is strenuously resisting the application and is arguing that the conditions of the applicable rules of court were met in its application for the Order and that there were no defects in the Claim and Application.

Procedural History

- [5] On the 17th November 2015 the Claimant filed a Claim Form and Statement of Claim against the Defendant and Interested Party.
- [6] The Interested Party, is in the business of company management, and provided such service to a Belize IBC, Titan Ltd (“Titan”), specifically a nominee director.
- [7] The Statement of Claim contained the following general allegations against the Defendant:

¹ Under Part 7.3(2) (c) of the Rules of the Supreme Court,

² Not being a party to the claim.

³ Lack of specificity in the cause of action of the claim and of the rule under which application is brought.

- (a) That he was the sole beneficial owner and shareholder of Titan, by way of a bearer share certificate in respect of some 50,000 ordinary shares in Titan.
- (b) The share certificate in Titan was transferred to the Defendant as a result of a forged Instrument of Transfer of Shares dated 21st January 2014 purportedly signed by the Claimant thereby transferring the shares in Titan.
- (c) The nominee Director of Titan, on the 21st January 2014, approved the transfer of the shares in Titan from the Claimant to the Defendant.
- (c) The Defendant was thereby fraudulently registered, by an agent of the Interested Party, acting as nominee director of Titan, as the sole shareholder of Titan.
- (d) The Defendant then cancelled the bearer share certificate held by the Claimant and registered the Defendant as the holder of the shares in Titan.
- (e) That the Claimant is now seeking rectification of Titan's share register.
- (f) The Interested Party has refused to undertake the rectification sought and now seeks certain orders of this court.

[8] The Claimant therefore claimed the following relief in the Claim Form:

1. A Declaration that the Instrument of Transfer of Shares to the Defendant is a forgery and as such is null and void.
2. A Declaration that certain Resolution of Titan's director, purporting to approve the transfer of the shares in Titan from the Claimant to the Defendant, is a nullity as it is based on a fraudulent share transfer instrument.
3. An Order that share certificate no. 005/817(B) representing 50,000 shares in the name of the Defendant be immediately cancelled and returned to Titan's director at its registered address.
4. An Order that the director of Titan rectify Titan's share register by deleting the Defendant as shareholder and recording the Claimant as the sole shareholder of the entire 50,000 shares in Titan.
5. An Order that the director of Titan issue a share certificate to the Claimant to reflect that he is the sole shareholder of the registered shares in Titan.

6. An Order that the Interested Party rectify its records for Titan to reflect that the Claimant is the sole registered shareholder of the entire shares in Titan.
7. Damages
8. Interest
9. Costs
10. Such further or other relief as the Court sees fit.

[9] On the 17th December 2015 the Claimant applied to the court for an Ex Parte Injunction against the Defendant and Interested Party; and also for an order for permission to serve on the Defendant this application, the Claim Form and associated court Process, out of the jurisdiction by way of registered mail in Ukraine.

[10] It is to be noted that, somewhat unhelpfully, but not fatally, nowhere in the Application, nor within the Affidavit, is it stated under which rule the application for permission to serve the Application was made. But it is generally accepted that the relevant rule is part 7.3(2) (c) of the Rules of the Supreme Court which does provide for conditions permitting service out of the jurisdiction.

[11] As required by rules of court the Application was supported by an Affidavit of the Claimant sworn to on the 7th December 2015 and also filed on the 17th December 2015.

[12] The stated grounds of the Application, as required by the rules of court, included that the Defendant fraudulently acquired the shares in Titan.

[13] In the Affidavit the Claimant testified to further grounds including the facts alleged in the Statement of Claim, and some of which included that:

- (a) The Interested Party provided Titan with a nominee director.
- (b) The Claimant was, until 21st January 2014 the sole beneficial owner and shareholder of Titan, holding its entire share capital by way of a bearer share certificate.
- (c) In early November 2014 the Claimant discovered that the Defendant had unlawfully acquired shares in Titan without his knowledge or consent, by way of a forged share transfer instrument (detailing the documents and process by which it was alleged the forgery and fraud was effected).

- (d) Acting on the alleged fraud the nominee director then, on the basis of the document by which it was alleged the fraud was perpetrated, cancelled the bearer share certificate and registered the Defendant as the holder of the shares in Titan.
- (e) Rectification is now being sought, by the present claim, to reflect the Claimant as the sole shareholder of Titan; but that the Interested Party has refused to do so in the absence of an order of the court.
- (f) The Defendant, on information and belief, provided an address of the Defendant/Applicant in Ukraine.
- (g) A request was made of the court for permission to serve all documents on the Defendant on the stipulated address.
- (h) He has been advised by his Attorney, and verily believes, he has a realistic prospect of success (as required by rules of court).
- (i) The jurisdiction of the court is also grounded by the fact alleged that the shares are located in Belize and that Titan is a Belizean Company.

[14] On the 9th March 2016 the Interested Party gave an undertaking to the court that that it would not deal with any assets of Titan until disposal of the trial in this matter; raising at the very least the implication that it acknowledges that there is an issue to be tried between the Claimant and the Interested party.

[15] The Interested Party has not, however, applied to this court, either to strike out the claim against it; whether on the basis that there is no issue to be tried between the Claimant and it; nor has the Defendant made an application to this court for an order that there is no issue to be tried as between the Claimant and the Interested Party.

[16] On the 18th March 2016 the Claimant was granted an ex parte injunction against the Defendant which was scheduled for further consideration on the 15th February 2016.

[17] The injunction expired on the 15th February 2016 as the Claimant failed to take the necessary steps to continue the injunction.

[18] A further application for an injunction was then made, with Notice to the Defendant's Attorney, by the Claimant on the 23rd March 2016; and this was heard and granted on the 19th April 2016.

- [19] On the 22nd March 2016 the Defendant, by his Attorney-at-Law, filed an Acknowledgement of Service in which it was stated:
- (a) that he had not been served;
 - (b) indicated that he intended to defend the claim;
 - (c) gave an address for service in Ukraine; and,
 - (d) indicated that service for the Claim Form is disputed with the attorney only appearing to dispute the court's in personam jurisdiction to hear the claim.
- [20] On the 5th April 2016 the Defendant filed a Notice of Application against the Claimant supported by an Affidavit of the Defendant.
- [21] This Application was then amended by an Amended Notice of Application filed on the 18th April 2016.
- [22] In the amended Notice of Application the Defendant applied to the Court pursuant to rule 9.7(1) and 7.7 of the CPR 2005, and the inherent jurisdiction of the court, for the following:
- (1) An Order setting aside the Order dated the 18th day of January 2016 granting leave for the Claim Form, Application and associated Court Process on the Defendant outside the jurisdiction, per in personam.
 - (2) An Order setting aside the purported service of the Claim Form on the Defendant which purportedly occurred on the 23rd day of February 2016 at 1:20 p.m. at Gagarina Street in Kirovograd, Ukraine.
 - (3) An Order that the Claimant be required to effect personal service of the Claim Form on the Defendant in Ukraine.
 - (4) In the Alternative, an Order pursuant to rule 10.3(8) of the Supreme Court (civil Procedure) Rules extending the time for the filing of the Defendant's Defence to a date after the determination of this Application.
 - (5) That the costs of this application should be awarded to the Defendant.

Issues

- [23] Ought the Service Out of the jurisdiction Order to have been granted by this court? This is in view of the alleged defective capacity of the Interested Party in the present claim (The Interested Party not being a party to the claim) and any defect in the

pleading and of the Application to serve out of jurisdiction (lack of specificity in the cause of action of the claim and of the rule under which application is brought).

[24] Specifically

- (a) Is the Interested Party “someone” within the jurisdiction on whom the claim form has been or will be served within the meaning of Part 7.3(2) (c) of RSC?
- (b) Is there a real issue to be tried between the Claimant and the Interested Party which it is reasonable for the court to try within the meaning of Part 7.3(2) (c) of RSC?
- (c) Is the Defendant a necessary and proper party to the claim between the Claimant and the Interested Party within the meaning of Part 7.3(2) (c) (ii) of RSC?
- (d) Did the Claimant state in his service out application grounds for belief that conditions under rule 7.3(2) (c) are satisfied?

The Law

[25] Part 7.3(2)(c) of the RSC states as follows:

“Features which may arise in any type of claim

7.3 (1) the court may permit a claim form to be served out of the jurisdiction if the proceedings are listed in this Rule.

(2) A claim form may be served out of the jurisdiction where –

- (a)*
- (b)*
- (c) a claim is made 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.”*

[26] Part 7.3(3) of RSC state as follows:

“Claims about contracts

- (3) *A claim form may be served out of the jurisdiction where –*
- (a) *a claim is made to enforce, rescind, dissolve or otherwise affect a contract or to obtain any other remedy in respect of a breach of contract and (in either case) the contract –*
 - (i) *was made within the jurisdiction;*
 - (ii) *was made by or through an agent trading or residing within the jurisdiction;*
 - (iii) *is by its terms or by implication governed by the laws of Belize; or*
 - (iv) *contains a term to the effect that the court shall have jurisdiction to determine any claim in respect of the contract.*
 - (b) *a claim is made in respect of a breach of contract committed within the jurisdiction;*
 - (c) *the claim is for a declaration that no contract exists.*

Claims in Tort

- (4) *A claim form may be served out of the jurisdiction where a claim in tort is made and –*
- i. *the damage was sustained within the jurisdiction; or*
 - ii. *the damage sustained resulted from an act committed within the jurisdiction*

[27] Part 7.5(1) of RSC state as follows:

“An application for permission to serve out of the jurisdiction may be made without notice but must be supported by evidence on affidavit stating –

- (a) *the ground on which the application is made;*
- (b) *that in the deponent’s belief the claimant has a claim with a realistic prospect of success;*
- (c) *in what place, within what country, the defendant may*

probably be found; and
(d) where the application is made under rule 7.3(2)(c), the
grounds for the deponent's belief that the conditions are
satisfied."

[28] Part 7.7(2)(a) of RSC state as follows:

“ The court may set aside service under this Rule where –

(a) service out of the jurisdiction is not permitted by these rules;”

Is the Interested Party “someone” within the jurisdiction on whom the claim form has been or will be served within the meaning of Part 7.3(2) (c) of RSC?

[29] Counsel for the Defendant submits that the Interested Party ought not to have been joined in the present proceedings as such, as this claim is not an application for an administrative order under Part 53 under which provision allows for persons being joined in a claim as an Interested Party.

[30] Further Counsel for the Defendant submits that “someone” in Part 7.3(2) (c) of RSC refers to a party of which the Interested Party is not. Therefore, it is argued, the court ought not to have permitted the Claimant to be served out of the jurisdiction as she was not “*someone on whom the claim form has been or will be served*”.

[31] Counsel for the Claimant on the contrary submits that there is no merit in the submission made by Counsel for the Defendant as the Defendant clearly falls within the rule which does not expressly exclude an Interested Party who is clearly “someone” within the expressed terms of the Rule.

[32] Having carefully considered the above submissions I consider there is much merit in the submission of the Counsel for the Claimant.

[33] This court notes that there has been no application to remove the Interested Party from the proceedings; and if there is any irregularity with the capacity in which she has been added as a party, which for the purpose of the present application this court considers may be possible, unless and until the Interested Party is removed and/or an order is made on application deeming her improperly joined, the Interested Party remains ‘someone’ on whom the claim form has been served, as referred to in Part 7.3(2) (c) of RSC.

[34] As a result of the above this court considers that the submissions of Counsel for the Defendant in relation to this issue is without merit.

Is there a real issue to be tried between the Claimant and the Interested Party which it is reasonable for the court to try?

[35] It is accepted by this Court that on the pleadings there does not appear to be an allegation against the Interested Party that it was involved in any allegation of fraud and/or was anything other than being innocently involved in the transmission of the subject shares to the Defendant/Applicant.

[36] This court notes and accepts that there is the allegation that the Interested Party, after being notified of the alleged fraud, refused to rectify the share register for Titan to reflect the Claimant as the sole shareholder of Titan, in the absence of a Belize Court order.

[37] Counsel for the Defendant submits that there is no real issue to be tried between the Claimant and the Interested Party as there is no allegation of wrong doing against the Interested Party by the Claimant.

[38] In this court's view there is an allegation against the Interested Party in that it is alleged that there is implied, if not expressed, that there is a contractual and/or relationship of trust arising or between the Claimant and the Interested Party (as nominee director) by virtue of the bearer shares which has been violated; and by the provision of a nominee director to Titan.

[39] There has been no application by the Interested Party to be removed from the claim and indeed it has given an Undertaking to the court that it will not deal with any assets of Titan until after disposal of the trial in this matter.

[40] A Defence has not yet been served by the Defendant and/or the Interested Party. So it is not clear whether and to what extent an issue arises to be tried between the Claimant and the Defendant.

[41] In this regard this court therefore considers that the present application may be somewhat premature and perhaps ought to have waited until such Defences had been filed.

[42] This court does not wish at this stage to speculate on the nature of the Defence and therefore determine whether a real issue to be tried arises between such parties.

[43] As a result of the above this court considers that the submissions of Counsel for the Defendant in relation to this issue is also without merit.

Is the Defendant a necessary and proper party to the claim between the Claimant and the Interested Party within the meaning of Part 7.3(2) (c) (ii) of RSC?

[44] There is no question raised by Counsel for the Defendant to the effect that the Defendant is not a necessary and proper party to the claim as there are clear allegations of fraud made and particularized against them.

Did the Claimant state in his service out application grounds for belief that conditions under rule 7.3(2) (c) are satisfied?

[45] Counsel for the Defendant submits that there is no evidence in the Affidavit in support of the service out application of any grounds of her belief: (i) there is between the claimant and the Interested Party a real issue which it is reasonable for the court to try; and (ii) the Defendant is outside the jurisdiction and is a necessary and proper party to that claim.

[46] The Claimant contests the submission of Counsel for the Defendant and points to specific facts and matters which it submits amounts to grounds contained in the Affidavit in support of the service out application amounting to such grounds of the Claimant's belief.

[47] It seems to this court that for the purpose of the rule satisfying the requirement that there be grounds, that the rule simply alludes to a basis, reason or explanation for the Claimant's belief without the need for assessing the quality of any such ground. If therefore it is established that there is a basis, reason or explanation for the Claimant's belief it is not necessary for this court to further consider its quality i.e. whether such is for example plausible, credible, good or otherwise.

[48] It will readily be apparent from what has been already stated and indicated above that this court has noted or observed that there are grounds (in the sense of a basis, reason or explanation) for the Claimant's belief that there is between the claimant and the Interested Party a real issue which it is reasonable for the court to try; and

that the Defendant is outside the jurisdiction; and, why he is a necessary and proper party to the present claim.

[49] Such grounds for the Claimant's belief is sufficient to dispose of the Defendant's application.

Disposition

[50] For the reasons given above, this court considers that there is no merit to the Defendant's application and therefore the order of this court will not be set aside. The Defendant will have to pay the Claimant's costs in the sum of \$2,000.00.

Hon. Mr. Justice Courtney A. Abel