IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2009HCV06432

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|---|---|---|
| BETWEEN | OLINT TCI CORPORATION LIMITED (IN COMPULSORY LIQUIDATION) | CLAIMANT |
| AND | DAVID SMITH | 1ST DEFENDANT |
| AND | TRACEY-ANN SMITH | 2ND DEFENDANT |
| AND | GILBERT WAYNE SMITH | 3RD DEFENDANT |

Mr. Kevin O. Powell for the Claimant instructed by Michael Hylton & Associates.

Mr. Canute Brown for the Defendants instructed by Brown Godfrey & Morgan

January 13 and June 15, 2011

**Service out of the Jurisdiction – CPR Part 7**

**Forum non conveniens – CPR rule 9.6 – Principles to be applied**

**FRASER J.**

**THE APPLICATION**

1. By Notice of Application for Court Orders dated and filed October 14, 2010 the defendants sought *inter alia* the following Orders:

    a. That the time for filing a Defence in this Claim be further extended to the 11th day of February, 2011 or for such period of enlargement of time the Court may order.

    b. A Declaration that this Court will not exercise its jurisdiction to try the Claim herein.

c. Further or in the alternative that service of the Claim Form on the defendants be set aside and the Orders made before the Claim Form was served be discharged.

d. That there be a stay of proceeding[s] until this Application is heard and determined.

**BACKGROUND**

2. On December 7, 2009, the claimant Olint TCI Corporation Limited (In Compulsory Liquidation) ("Olint TCI"), incorporated in the Turks and Caicos Islands, filed a claim against the defendants seeking relief and orders including: the sum of US$214,716,854.24; damages for breach of fiduciary duty and for fraud; alternatively damages for conversion; restitution for and by reason of unjust enrichment and tracing orders. On that date, the claimant was granted without notice by G. Brown J. (Ag) (as he then was), a freezing order against the defendants restraining them from disposing of or dealing with any of their assets up to the value of US$214,716,854.24.

3. Each defendant has filed an Acknowledgement of Service of Claim Form in which there is acknowledgement of receipt of the Claim Form and Particulars of Claim. The Acknowledgment of Service filed on December 17, 2009 on behalf of the third defendant indicated that service occurred on December 10, 2009. The Acknowledgment of Service on behalf of the first and second defendants was filed on January 27, 2010. In his Affidavit of Service filed December 28, 2009, Lakish Brooks notes he actually served the first and second defendants on December 22, 2009.

4. On February 2, 2010 after a contested *inter partes* hearing Campbell J. extended the freezing order until trial.

5. On September 15, 2010 Hibbert J. granted an extension of time to the defendants to file a defence on or before the 15th day of October 2010.

6. The Notice of Application under consideration was filed on October 14, 2010.

7. On December 15, 2010, Brooks J. further extended time for the defendants to file a defence to January 28, 2011. I will return to the issue of the extension of time to file a defence, towards the end of the judgment.

**THE ISSUES**

8. The Application therefore proceeded in relation to only two issues:

    a. Should service of the claim form outside of the jurisdiction be set aside? Further or in the alternative;

    b. Should the court decline to exercise jurisdiction to hear the claim on the ground of *forum non conveniens*?

***Issue A — Service of the Claim Form outside of the Jurisdiction: Should it be set aside?***

9. In its application for leave to serve the Claim Form out of the jurisdiction, the claimant relied on rule 7.3(2) (b) of the Civil Procedure Rules 2002 (CPR). This rule provides:

> **A claim form may be served out of the jurisdiction with the permission of the court where –**
>
> **(a) ...**
>
> **(b) a claim is made for an injunction ordering the defendant to do or refrain from doing some act within**

**the jurisdiction;**
**(c) ...**

10. The defendants applied to have service set aside pursuant to rule 7.7(2) (b) of the CPR which provides:

> **The court may set aside service under this rule where –**
>
> **(a) ...**
> **(b) the case is not a proper one for the court's jurisdiction;**
> **(c) ...**

11. Counsel for the defendants submitted that the case was not a proper one for the court's jurisdiction as the claim does not seek substantive injunctive relief; the Freezing Orders and the *Mareva* injunction being ancillary to and not the substantive claim. The defendants' contention is that the claim sounds in tort, trust and for restitution.

12. Further, counsel submitted that rule 7.3 (2) which deals with "Features which may arise in any type of claim" has to be read together with at least one of rules 7.3 (3) – (8) which address specific instances in which the court may permit service out of the jurisdiction.. The specific instances are rule 7.3 (3) – Claims about contracts; rule 7.3 (4) – Claims in tort; rule 7.3 (5) – Enforcement; rule 7.3 (6) – Claims about property within the jurisdiction; rule 7.3 (7) – Claims about trusts etc; and rule 7.3 (8) – Miscellaneous statutory proceedings. He maintained it was insufficient to come only within rule 7.3 (2), it being supplementary and incapable of standing on its own, and in any event as he earlier submitted, the claim did not satisfy the requirements of rule 7.3 (2) (b).

13. Therefore, the submission continued, for service out of the jurisdiction to be permissible, based on the nature of the claim it would have to satisfy the requirements of the CPR in relation to Claims in tort or Claims about trusts. Counsel for the defendants maintained that neither in relation to the allegations of tort nor those in relation to breach of trust, have these requirements been met.

14. Concerning Claims in tort rule 7.3 (4) provides:

> **A claim form may be served out of the jurisdiction with the permission of the court where a claim in tort is made and –**
> **(a) the damage was sustained within the jurisdiction; or**
> **(b) the damage sustained resulted from an act committed within the jurisdiction.**

15. In developing his submission that the requirements in relation to a claim in tort had not been established, counsel for the defendants relied on the evidence contained within the affidavit of Caydion Campbell, Senior Manager at Price Waterhouse Coopers and agent of the Official Liquidator of the claimant. This affidavit was filed in the claim on December 7, 2009 in support of the application for the Freezing Order.

16. Counsel for the defendants submitted that jurisdiction is founded on the locus of the tort. He maintained that the evidence of Mr. Campbell points to (i) the domicile of the claimant being in Turks and Caicos Islands; (ii) monies/investments being channelled from a number of countries to the claimant in the Turks and Caicos Islands; (iii) deposits being made to Hallmark bank in Turks and Caicos Islands; and (iv) the first and second defendants', principals of the claimant residing and domiciled in the Turks and Caicos Islands. Counsel submitted the only connection between Jamaica and the defendants was that the claimant or its agents wired

money to Jamaica for investors to redeem their investments. He however indicated that there was no evidence of the ultimate recipient of those funds.

17. In grounding his submission counsel relied on ***Cordova Land Co. v. Victor Brother Inc.*** [1966] 1 WLR 793. The relevant principle from the ***Cordova Land Co.*** case was decided under R S.C. Ord 11 r. 1 (h) which provides that:

> **"(1) … service of a writ, or notice of a writ, out of the jurisdiction is permissible with the leave of the court in the following cases…(h) if the action begun by the writ is founded on a tort committed within the jurisdiction …"**

18. In the ***Cordova Land Co.*** case it was held *inter alia* by Winn J. that if the relevant tortious act had been committed outside the jurisdiction, neither the place where the tort was completed, nor the place where the tort became actionable was sufficient to bring the action within R.S.C., Ord. 11, r. 1 (h).

19. It should be noted at this point, however, that rule 7.3 (4) is wider than R.S.C., Ord 11, r. (h), as it vests jurisdiction not only based on the tort being committed within the jurisdiction, but also on whether or not the damage was sustained within the jurisdiction. No doubt realising this, counsel for the defendants also relied by analogy on the case of ***Sunderland v Wiseman*** 2007 EWHC 1460.

20. In the ***Sunderland*** case the issue was whether the appropriate jurisdiction was England or Scotland. The claimants, an insurance company registered in Sunderland, England, alleged that the defendants conspired to and did scuttle a ship, as a result of which they paid out sums of money which they sought to recover. The vessel was mortgaged to a bank in Scotland. The conspiracy was hatched in Scotland. The fraudulent representations made by the defendants to the claimants that the vessel sank accidentally, were in written statements recorded in Scotland.

The vessel sank 60 miles west of Shetland, Scotland and outside of territorial waters. The only connection with England was that it was the country in which the decision was taken to pay the claim and from which Langley J. assumed it was made.

21. Schedule 4 to the Civil Jurisdiction and Judgments Act 1982 (the 1982 Act) which determines the jurisdiction of the courts of the constituent parts of the United Kingdom fell to be interpreted. The relevant rules of Schedule 4 were Rules 1, 2 and 3c. They provide as follows:

> **Rule 1**
> **Subject to the Rules of this Schedule, persons domiciled in a part of the United Kingdom shall be sued in the courts of that part.**
>
> **Rule 2**
> **Persons domiciled in a part of the United Kingdom may be sued in the courts of another part of the United Kingdom only by virtue of Rules 3 -13 of this Schedule**
>
> **Rule 3c**
> **A person domiciled in a part of the United Kingdom may, in another part of the United Kingdom, be sued...in matters relating to tort...in the courts <u>for the place where the harmful event occurred</u>. (emphasis added)**

22. In his judgment Langley J. discussed the fact that by virtue of the importation of jurisprudence from the European Court of Justice, mandated by sections 16(3) and (4) of the 1982 Act, the words “the place where the harmful event occurs” encompass both the place where the damage occurs and the place of the event giving rise to that damage. Langley J. in applying the principles, preferred the view that in a case of economic loss the place where the damage occurs should not be

equated with the place from which payment is made, or where the decision to pay is made, or where the loss is incurred. Such an approach he opined would emasculate the basic rule *(which per Rule 1 of Schedule 4 of the 1982 Act looks to the domicile of the defendant not the claimant),* provide a charter for claimants to select a jurisdiction of their choice and ignore the statutory test that the court is to seek the place where "the harmful event occurs". Counsel for the defendants therefore relied on ***Sunderland*** by analogy, to suggest that in the instant case there was not sufficient evidence of the commission of a tort in Jamaica for permission for service to be grounded on CPR rule 7.3 (4).

23. Counsel for the defendants made similar arguments in relation to claims about trusts. Concerning Claims about trusts CPR rule 7.3 (7) provides:

> **A claim form may be served out of the jurisdiction with the permission of the court where –**
> **(a) ...**
> **(b) ...**
> **(c) a claim is made for a remedy against the defendants as constructive trustee where the defendant's alleged liability arises out of acts committed within the jurisdiction; or**
> **(d) a claim is made for restitution where the defendant's alleged liability arises out of acts committed within the jurisdiction.**

24. The defendant's submission was that the affidavit evidence of Caydion Campbell revealed that, the alleged breaches of trust were based on acts committed by the defendants in the Turks and Caicos Islands and the receipt of "trust" property in that country and hence do not meet the test of having been "committed within the jurisdiction".

25. In treating with the submissions of counsel for the defendants on the issue of service out of the jurisdiction one important fact should be established at the outset. As submitted by counsel for the claimant, this aspect of the application must necessarily be only in relation to the first and second defendants, the third defendant having been served within the jurisdiction

26. In relation to the submission that the substantive claim is not for an injunction, I accept the response of counsel for the claimant that it is contemplated in the relief sought — "Such further or other relief as the court may consider necessary or appropriate including tracing orders". A *Mareva* injunction was sought and obtained on the same day as the claim was filed. It was subsequently extended on February 2, 2010 until trial. The nature of the claim which seeks recovery of funds allegedly misappropriated through breach of fiduciary duty, unjust enrichment and fraud, would entitle the claimant to a final injunction if successful. The claimant has in fact filed an application for court orders dated August 24, 2010 seeking judgment against the defendants in default of Defence, or in the alternative, summary judgment against the defendants, and for the Freezing Order obtained on February 2, 2010 to be extended post judgment until the payment of the judgment debt.

27. The submission of counsel for the defendants that sub-rule 7.3 (2) has to be read together with at least one of the other sub-rules between 7.3 (3) – (8) also cannot stand. It is manifest that the effect of rule 7.3 is that the circumstances outlined in sub-rules 7.3 (2) through to 7.3 (8) are to be read disjunctively. That is made clear from sub-rule 7.3 (1) which reads, "The court may permit a claim form to be served out of the jurisdiction in the circumstances listed in this rule." Nowhere in rule 7.3 is it

stated that the exercise of the court's discretion under one sub-rule is subject to the satisfaction of another sub-rule. If it were correct that sub-rule 7.3 (2) cannot on its own ground service outside the jurisdiction, then it would be superfluous adding nothing to rule 7.3. Sub-rule 7.3 (2) is however not superfluous. It is the broadest sub-rule which allows service outside of the jurisdiction based not on specific causes of action, but on features which may arise in any type or cause of action, for example, as in this case the need for an injunction. It is important to point out as well, that not all possible causes of action have been specifically provided for in the other sub-rules. Here again sub-rule 7.3 (2) is critical. While there are no specific provisions for actions related to the law of succession or applications for judicial review, to name two areas of law not specifically addressed in rule 7.3, a claimant in such an action could, if any of the broad criteria outlined in sub-rule 7.3 (2) is satisfied, thus be able to obtain leave from the court to serve his or her claim out of the jurisdiction.

28. I therefore find that permission was appropriately granted for service out of the jurisdiction on the basis that a claim was made for an injunction. While that disposes of the challenge to service, even if I am wrong in that finding, there are other bases on which service out of the jurisdiction could be grounded.

29. Rule 7.3 (2) (c) provides

> **A claim form may be served out of the jurisdiction with permission of the court 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;…**

30. The claim is, in any event, also against the third defendant who was served with the Claim Form in this jurisdiction and with whom the claimant has a real issue which it is reasonable for the court to try. Counsel for the defendants submitted that the "real claim" was against the first and second defendants as the third defendant was neither a principal nor a director of the claimant. The Particulars of Claim aver that the first and second defendants were the only shareholders and directors of the claimant. Further that the first defendant was the President and Chief Executive Officer of the claimant while the second defendant is the wife of the first defendant as well as the Vice President of the claimant. The Particulars of Claim also reveal that the third defendant is the brother of the first defendant and was a Senior Manager of the claimant. In paragraph 6 of the Particulars of Claim it is pleaded that, *"At all material times prior to and up to the date of appointment of the Official Liquidator, the Claimant was primarily under the control of the Defendants who controlled the movement of funds, directed transactions and oversaw the operations and financial activities of the Claimant"*. This averment is supported by the evidence of Caydion Campbell, at paragraph 6 of his affidavit in support of the application for the Freezing Order.

31. It is also not without significance, that the first and second defendants are shareholders and directors of Olint Corp Limited, a company incorporated under the laws of Jamaica, and that the third defendant was at all material times the Chief

Executive Officer of Olint Corp Limited. The significance is that Olint Corp Limited was one of the main recipients of funds transferred from the claimant to Jamaica, which funds the claimant seeks by this action to trace and recover.

32. The claimant hitherto being placed in compulsory liquidation, was a small family run enterprise with the third defendant holding a senior management position in the claimant. The third defendant was at the same time the Chief Executive Officer of Olint Corp Limited. Consequently it cannot be successfully challenged that the claimant has a real issue with the third defendant concerning the allegations of breach of fiduciary duty, fraud and unjust enrichment which are at the heart of the claim. I therefore find that pursuant to rule 7.3 (2) (c) there existed another basis on which permission to serve the first and second defendants out of the jurisdiction could have been granted. Under the umbrella of the overriding objective of enabling the court to deal with cases justly, had it been necessary, I would have accordingly substituted this basis for the grant of leave.

33. My conclusions in relation to the grant of leave based on the claim containing applications for injunctive relief and the claim also being against the third defendant who was served with the Claim Form in this jurisdiction and with whom the claimant has a real issue which it is reasonable for the court to try, fully address the challenge raised on the issue of service. However before passing to the next issue, in deference to the full submissions of counsel I will now deal with whether service out of the jurisdiction could have been granted based on there being a claim in tort or a claim about trusts.

34. To respond to the submissions of counsel for the defendants it is necessary to set out *in extenso* paragraphs 10 – 16 of the affidavit of Caydion Campbell.

> 10. Our investigations indicate that the Smiths represented to the public that:
>
> a. Olint TCI was carrying on the business of trading on the foreign exchange market and was doing so successfully, making profits of approximately 10% per month;
> b. Funds invested with Olint TCI would be used in trading on the foreign exchange market;
> c. Funds invested with Overseas Locket and Olint Corp Limited prior to April 2006 had been transferred to Olint TCI;
> d. Sums being paid out to investors as "gains" represented profits earned by Olint TCI from successfully trading on the foreign exchange market.
>
> 11. Our investigations have shown these representations to be false. The Smiths were in fact, causing Olint TCI to operate a "Ponzi" scheme in which the funds invested with Olint TCI were either used to pay sums due to earlier investors or were transferred to other persons or accounts.
>
> 12. We have also found that various amounts, including the sums of US$45,824,814.00 and US$3,290,000.00 were transferred from Olint TCI to accounts held by Olint Corp Limited by way of the transactions described in paragraphs 13 to 16 below.
>
> 13. Between June 14, 2006 and December 5, 2006 at least US$26,300,000.00 was transferred from funds held by Hallmark Trust Limited on Olint TCI's behalf to account # 584-144-076 National Commercial Bank's Ocho Rios Branch. That account was held by MZ Holdings Limited. Exhibit **"CC-1"** includes a table which lists the various

transfers that make up that sum, and copies of the relevant bank documents evidencing the transfers.

14. In almost all cases, within days of each of those transfers, MZ Holdings Limited transferred an identical sum from its account # 584-144-076 to account # 581-014-384, another account which it held at the same bank. A total of at least US$24,800,000.00 was transferred by this means. Exhibit **"CC-1"** includes a table which lists the various transfers that make up that sum and copies of the relevant instructions to the bank.

15. MZ Holdings Limited then transferred at least US$3,290,000.00 from account # 581-014-384 to two accounts held by Olint Corp Limited at the National Commercial Bank's Hagley Park Road branch, accounts # 174-079-587 and 171-011-647, respectively. In many cases, these transfers took place on the same day or the day after the transfers referred to in paragraph 13 above. Exhibit **"CC-1"** includes a table which lists the various transfers that make up those sums and copies of the relevant instructions to the bank.

16. Between December, 2007 and June, 2008 (that is, during the last few months before Olint TCI ceased operations completely), a further sum of US$45,824,814.00 of Olint TCI's funds was transferred to Olint Corp Limited's said account #171-017-866.

35. It should also be noted that at paragraph 21 of Caydion Campbell's affidavit it is averred that an estimated US$250 Million was received by Olint Corp from the public between April 2006 and August 2008.

36. In the case of ***Sunderland*** relied on by counsel by the defendants it will be recalled there was an insufficient connection with England, there being only a

decision to pay and payment apparently being made in England, to establish jurisdiction.

37. There is a wholly different situation in the instant case. There is first evidence of fraudulent representations made to the public (which would include the public in Jamaica) which it is alleged were acted upon by investors in Jamaica. There are allegations that funds paid from this jurisdiction to the claimant based on the alleged fraudulent representations have not been repaid.

38. The case of ***Domicrest Ltd v. Swiss Bank Corporation*** [1999] 1 Lloyd's Rep 80 is instructive. It was reviewed by Langley J. in ***Sunderland.*** In ***Domicrest*** Rix J. held that in a case of negligent misstatement the place where the harmful event which sets the tort in motion occurred was where the misstatement originated and not where it was received and acted upon. He added however at page 92 that ***"the place where the damage occurs...is quite likely to be at the place of receipt and reliance."*** Adopting that reasoning in relation to the tort of fraudulent misrepresentation alleged to have been committed in the instant case, Jamaica is a jurisdiction where the alleged fraudulent misrepresentation would have been received and relied upon and where damage would have occurred or in the words of rule 7.3 (4) "was sustained".

39. There are also further averments that funds paid by the claimant to entities in this jurisdiction have been redistributed to other than their rightful owners including Olint Corp Limited. This suggests that Olint Corp Limited registered and operating in Jamaica, was used as an instrument of fraud in layering transactions involving funds that originated from the claimant, which were eventually deposited in accounts

owned by Olint Corp Limited. It is therefore arguable that the defendants used the vehicle of Olint Corp Limited as a means to breach their fiduciary duty to the claimant and hence the claim would also fall within rule 7.3 (7), Claims about trusts etc.

40. However, beyond the use of Olint Corp Limited, it could be argued and in fact was submitted by counsel for the claimant, that any acts of the defendants in Jamaica that led to redistribution of invested funds that originated from the claimant to other than the rightful owners of the funds, represented a breach of fiduciary duty bringing the Claim within rule 7.3 (7). This is however not the strongest basis on which to proceed, as a breach of fiduciary duty would have occurred from there was the transfer of the funds from the claimant in circumstances where it was not for the intention of satisfying its legitimate liabilities. Any acts in Jamaica thereafter would be in “continuing breach”.

41. There is however no need to resolve the issue on this ground. There have already been established three clear bases on which service out of the jurisdiction is warranted. The claim for injunctive relief, the fact that the third defendant against whom the claimant has a real issue that is reasonable for the court to try has been served within the jurisdiction, and the existence of claims in tort where damage has been sustained in the jurisdiction. The challenge of the defendants to the grant of leave to serve the Claim Form and Particulars of Claim out of the jurisdiction therefore fails.

***Issue B — Should the Court decline to exercise jurisdiction to hear the claim on the ground of forum non conveniens?***

42. Lord Goff of Chieveley in a classic judgment in the leading case of ***Spiliada Maritime Corp. v. Cansulex Ltd.*** 1987 1 A.C. 460 at page 476 - 478 summarised the law governing the issue of *forum non conveniens* as follows:

a. **The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.**
b. **...in general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay...It is however of importance to remember that each party will seek to establish the existence of certain matters which will assist him in persuading the court to exercise its discretion in his favour, and that in respect of any such matter the evidential burden will rest on the party who asserts its existence. Furthermore, if the court is satisfied that there is another available forum which is prima facie the appropriate forum for the trial of the action, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country.**
c. **The question being whether there is some other forum which is the appropriate forum for the trial of the action, it is pertinent to ask whether the fact that the plaintiff has, ex hypothesi, founded jurisdiction as of right in accordance with the law of this country, of itself gives the plaintiff an advantage in the sense that the English court will not lightly disturb jurisdiction so established...**
d. **Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the**

**action, the court will look first to see what factors there are which point in the direction of another forum...it is for connecting factors...that the court must first look; and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction... and the places where the parties respectively reside or carry on business.**

e. **If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay...It is difficult to imagine circumstances where, in such a case, a stay may be granted.**
f. **If however the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted...**

43. Counsel for the defendants invoked the provisions of rule 9.6 and sought a declaration that the court should not exercise its jurisdiction to try this Claim. The case of ***Texan Management Limited and others v Pacific Electric Wire & Cable Company Limited*** 2009 UKPC 46 was relied on as support for the proposition that such a declaration could be sought even though the time for filing a Defence to the Claim had passed.

44. Rule 9.6 so far as relevant to this application states as follows:

**9.6 (1)** **A defendant who-**
**(a)...**
**(b) argues that the court should not exercise its jurisdiction may apply to the court for a declaration to that effect**
**(2)** **...**

**(3) An application under this rule must be made within the period for filing a defence.**

**(4) ...**

**(7) Where on application under this rule the court does not make a declaration, it –**

**(a) must make an order as to the period for the filing a defence...**

45. Counsel for the defendants submitted that the appropriate jurisdiction is the Turks and Caicos Islands and that the court should exercise its discretion to stay the proceedings on the ground of *forum non conveniens.*

46. The basis of the submission was that the evidence of Caydion Campbell pointed to Turks and Caicos as the natural forum for the trial of the claim for reasons including the following:

a. The claimant is incorporated and domiciled in the Turks and Caicos Islands.

b. The claimant carries on business in the Turks and Caicos Islands.

c. The first and second defendants are the only shareholders and Directors of the claimant and are domiciled in the Turks and Caicos Islands.

d. The claimant is in compulsory liquidation by order of the Supreme Court of Turks and Caicos Islands and is subject to the supervisory jurisdiction of the court.

e. There are parallel proceedings involving the claimant and defendants in the Supreme Court of the Turks and Caicos Islands.

f. Witnesses including the Liquidator, financial institutions and investigators are located in the Turks and Caicos Islands.

g. Where the harm ensued as constituting the *locus delecti* or the damage suffered is in the Turks and Caicos Islands.

47. Counsel for the defendants also relied on the case of ***Lord Michael Cecil and others v. Ehsanollah Bayat and others*** 2010 EWHC 641 as support for the proposition that the defendants must have been shown to have committed "substantial and efficacious" acts within the jurisdiction for Jamaica to be regarded as the appropriate forum to try the Claim.

48. In responding to the submissions of counsel for the defendants counsel for the claimant undertook to file an affidavit exhibiting the Order of the Supreme Court of the Turks and Caicos Islands winding up the claimant under the provisions of Part V of the Companies Ordinance (Cap 122) of the Turks and Caicos Islands. This affidavit was filed on January 14, 2011, the day after the hearing in Chambers.

49. That affidavit exhibiting the Winding up Order granted on June 2, 2009, revealed that by virtue of the winding up of the claimant in the Turks and Caicos Islands, it no longer carries on business there.

50. Among the Orders made in the Winding up Order were:

a. the appointment of Joseph Phillip Connolly of PricewaterhouseCoopers Ltd. as Liquidator of the Company (paragraph 2);

b. the fact that the powers of the Liquidator under section 107 of the Companies Ordinance were to be exercisable without the sanction or intervention of the Court, save that, at the time the Court appointed the Liquidator, the power under section 107 (b) was varied to permit the Liquidator to carry on the business or a part of it as a going concern should the Liquidator consider it advisable (paragraph 3);

c. the conferring of powers on the Liquidator expressly stated to include the power "to bring, defend or intervene in any action or other legal proceedings in any jurisdiction in the name of and on behalf of the Company..."(paragraph 4 (20)). It is pursuant to this power that the Liquidator brought the Claim in the name of the claimant and Caydion Campbell as agent of the Liquidator swore an affidavit in support of the application for the Freezing Order.

51. Applying the principles outlined by Lord Goff of Chieveley in the ***Spiliada*** case the court notes the following factors:

a. based on the analysis and conclusions arrived at in relation to the first issue, the application to set aside service –

i. the claimant has established jurisdiction as of right under the laws of Jamaica; and

ii. it has been established that damage was sustained within Jamaica;

b. pursuant to the winding-up Order the claimant no longer conducts business in the Turks and Caicos Islands;

c. the terms of the Winding up Order are such that the claimant is not subject to the sanction or intervention of the Court in the Turks and Caicos Islands and there is no Court action in being connected to this matter concerning the claimant in the Turks and Caicos Islands;

d. in any event the defendants were not parties to the Winding up action in the Turks and Caicos Islands;

e. the first defendant is no longer residing in the Turks and Caicos Islands. The court was not advised of any change in the residence of the second defendant.

f. though the Liquidator and some of the financial institutions involved are in the Turks and Caicos Islands, the Second Interim Report of the Liquidator annexed to the affidavit of Caydion Campbell notes that at that time (November 2009) the total number of claims against the claimant for refunds of investments stood at 598 with 333 or 56% of the persons claiming refunds being from Jamaica. This is more than twice

the number of claimants from the jurisdiction with the next highest number, which is the United States of America with 155.

52. Based on the above factors it is clear that the balance of convenience points to Jamaica being the appropriate forum for this action. In Jamaica rather than the Turks and Caicos Islands, the case may be tried more suitably for the interests of all the parties and the ends of justice.

**THE FILING OF A DEFENCE**

53. It will be recalled that earlier in the judgment it was noted that on December 15, 2010, prior to the hearing of this application, leave was granted by Brooks J. for a Defence to be filed by January 28, 2011. The court therefore initially took the view that, though the declaration sought has been refused, given the prior order of Brooks J. it was not necessary at this stage for the court pursuant to sub-rule 9.6 (7) (a), to make an order specifying a time within which a defence should be filed.

54. However at the time judgment was being handed down, but before its perfection, it was indicated by counsel for the defendants that no defence had yet been filed. Counsel therefore invited the court pursuant to rule 9.6 (7) (a) to specify a date for the Defence to be filed and requested fifty-six days from the date of the judgment, given that the first defendant is outside of the jurisdiction and incarcerated. Counsel for the claimant resisted the granting of further time to file the Defence noting that the defendants had already obtained two extensions of time to file their

Defence and had not so far complied. Counsel for the claimant submitted that in effect this would be tantamount to the defendants obtaining a third extension of time within which to file their Defence. Counsel for the claimant also submitted that if the court was minded to grant further time to file the Defence, a much shorter time than fifty-six days should be allowed.

55. It should be noted that the scheme of rule 9.6 is that a defendant who wishes to challenge or invite the court not to exercise its jurisdiction should first file an acknowledgment of service and then apply to the court for the appropriate declaration, within the period for filing a defence (rule 9.6 (1), (2) and (3)). The effect of such an application would necessarily be that the time for the filing of a Defence would effectively "stop running" until the determination of the application. If the application were successful no defence would need to be filed. If unsuccessful, time would begin to run again, and expire, based on a time table established by the court.

56. The procedure followed in this matter was however not strictly in accordance with rule 9.6. The application inviting the court to decline to exercise its jurisdiction was made after the initial period for filing the defence had expired. The ***Texan Management Limited*** case relied on by counsel for the defendants, which construed The Eastern Caribbean Supreme Court Civil Procedure Rules 2000 (EC CPR) rule 9.7, that is the equivalent of CPR rule 9.6, does however recognise that the court can extend time to facilitate such an application, after the expiry of the period

for filing the defence. The hearing of the application in this case was in fact due to such an extension.

57. The initial extension of time was up to October 15, 2010. This application was made (filed) on October 14, 2010, within the period allowed for the filing of the Defence, pursuant to the extension of time granted by the court. By virtue of the making of the application within the initially extended period of time for filing a defence, the time for such filing then "stopped running", as envisioned by the scheme of rule 9.6. That being the case, on reflection, this court is of the view that it was actually the further extension of time sought and obtained before Brooks J. that was unnecessary.

58. The declaration sought in the application having been refused, rule 9.6 (7) (a) has been engaged, requiring specification by the court of the time period within which the Defence should be filed.

**CONCLUSION**

59. The defendants have failed to show that the service of the Claim Form and Particulars of Claim outside of the jurisdiction should be set aside. The court has concluded there are three or possibly four bases on which permission for service out of the jurisdiction could be grounded.

60. The court has also concluded that based on all the circumstances of this case, as revealed by the affidavit evidence, Jamaica is the appropriate jurisdiction for the claim to be heard.

61. The court accordingly makes the following orders:

a. Application for a Declaration that this Court will not exercise its jurisdiction to try the Claim herein and that service of the Claim Form on the defendants be set aside and the Orders made before the Claim Form was served be discharged, refused.

b. Defence to be filed and served by the defendants on or before the 6th day of July 2011.

c. Costs to the claimant to be agreed or taxed.

d. Leave to appeal refused.