

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. G. 007/2002

BETWEEN      RICCO GARTMAN      PLAINTIFF  
AND            PETER HARGITAY      DEFENDANT

Ms. Maliaca Wong instructed by Myers Fletcher Gordon for the Plaintiff/Respondent

Mr. Ian Wilkinson and Ms. Shawn Steadman for the Defendant/Applicant.

Heard: 20.9.03, 26.11.03 & 16.12.03

Straw, J. (Ag.)

Mr. Ricco Gartman, the plaintiff, is suing the defendant, Mr. Peter Hargitay to recover the amount of \$2,623,942.25 Swiss Francs as being the balance owing as of 31<sup>st</sup> December, 2001 on money loaned to the defendant.

The statement of claim is yet to be filed and there is nothing on the writ of summons to indicate when and where this transaction took place or the circumstances surrounding it.

The defendant's attorney was served with the writ of summons as a result of an order on summons for substituted service which was granted by the Master in Chambers. A conditional appearance was entered and

subsequently, this present application filed requesting an order that the action be struck out on the ground that the court has no jurisdiction.

The application is made pursuant to the Civil Procedure Rules, section 9.6 and is supported by two affidavits of the defendant.

**Submission by Attorney for the Defendant/Applicant**

Mr. Wilkinson submits that the affidavits filed by Mr. Hargitay reveal that he resides in Budapest, Hungary, that he is a Swiss citizen and is not a citizen or resident of Jamaica and that to the best of his knowledge or belief, the plaintiff is a national or citizen of Switzerland. He submitted also that the affidavit states that the instant action is not based on any transaction which took place in Jamaica nor did the parties agree that the Jamaican Courts should have jurisdiction to try the instant matter and that there has been no affidavit in response filed by the plaintiff.

He cited two cases in support of his contention that the relevant court to try the action is the *lex loci*, i.e. wherever the contract was made. These cases are as follows:

*JACOBS, Marcus et al v The Credit Lyonnais 1884 Vol. XII, QBD page 589.*

*Keiner v Keiner 1952 1 AER, page 643.*

In *Jacobs Credit Lyonnais*, Manisty J. stated at page 597:

*“The general rule is, that the law of the country where a contract is made governs as to the nature, the obligation and the interpretation of it”*

In **Keiner v Keiner**, Donovan J. upheld the principle (per page 644. paragraph g) that there is a presumption that a contract is governed by the lex locus contractus unless this presumption is rebutted by evidence of some contrary intention by the parties.

Mr. Wilkinson argues that in the present case, the issue involves a claim for Swiss francs, that this involves an overseas transaction and that the writ does not indicate when the cause of action accrued, which could be statute barred, and that the absence of material in this case affects the plaintiff adversely as he must show to this court why the case should be done here and he has failed to do so.

**Submission by Counsel for the Plaintiff/Respondent**

Ms. Wong, on behalf of the plaintiff submits that this Court has jurisdiction to try the claim and has cited the following authorities:

*Halsbury's Laws of England, Vol. 8(1),*

*Halsbury's Laws of England, Vol. 37,*

*Colt Industries and Sarlie 1966, Vol. 1 AER page 673.*

*Maharanee of Baroda v Wildenstein, 1972. Vol. 12 ALL ER page 689.*

She stated that jurisdiction is conferred once the defendant has been served with process irrespective of whether he resides here or not.

In Halsbury's Law of England, Vol. 8 (1) page 464 at paragraph 615 under the heading 'Jurisdiction,' it states as follows:

*"The jurisdiction of an English Court in any action in personam broadly depends upon the service of the writ of summons, or other originating process upon the defendant. If the writ may be served (and any challenge to the legality or irregularity of such service overcome) the court will have jurisdiction"*

Also at paragraph 649 (supra) under the heading "Defendant present within the jurisdiction," it states as follows:

*"If the defendant is present within the jurisdiction of the Court he is liable to be served with the writ in an action in personam. In relation to the existence of jurisdiction, it is irrelevant that his presence is fleeting, or that the dispute in question has no real or substantial connection with England, the principle question which arises in such a case, therefore, is as to the manner in which service must be made in order for it to be effective service within the jurisdiction."*

Both cases cited by Counsel (supra.) support the principle as outlined in Halsbury's Laws of England. In Colt Industries and Sarlie (supra.), it was held that as long as there is no fraud inducing the defendant to enter the country for the real purpose of serving him with the writ, jurisdiction was well founded by the service of the writ, although the defendant was a

foreigner who was in England casually and the subject matter of the dispute was not connected with England.

In *Maharanee of Baroda* (supra.), it was held that where a foreign defendant had been properly served with the writ whilst in England, albeit only on a short visit, the plaintiff was prima facie entitled to continue the proceedings until the end unless the defendant could satisfy the court that continuance of the plaintiff's action in England would work an injustice because it would be oppressive or vexatious to the defendant, or would be an abuse of process of the court in some way and that a stay of the action would not cause injustice to the plaintiff.

In the *Maharanee* case, both parties lived in France and had entered into a contract for the purchase and sale of a painting in Paris.

Ms. Wong also argued that the two cases cited by counsel for the defendant were distinguishable from the present case as they dealt with the issue of conflict of laws rather than the issue of jurisdiction.

#### **Response by Counsel for the Defendant**

Mr. Wilkinson stated that service of the process in the two cases cited by counsel for the plaintiff was by way of personal service and that the two defendants were under the jurisdiction of the particular court. In this case Mr. Hargitay was not served personally in the jurisdiction.

Secondly, since the plaintiff has brought the action, the plaintiff must show why Jamaica should have jurisdiction. There was nothing before the court to assist as to why it should hear the case and it is for the plaintiff to satisfy the court.

### **Reasons for Judgment**

In examining the cases of **Jacobs, and Keiner v Keiner** (supra), I am of the opinion that Counsel for the plaintiff is right in her assessment. In the Jacobs' case, the issue was not, as contended by Mr. Wilkinson, the relevant court to try the action but what law was to be used to interpret a contract made in one country and to be performed wholly or partly in another. Manisty J. stated as follows at page 597;

*"The general rule is, that the law of the country where a contract is made governs as to the nature, the obligation, and the interpretation of it.... and a foreign country interpreting it or enforcing it on any contrary rule defeats the intention of the parties, as well as neglects to observe the recognised comity of nations."*

In **Keiner v Keiner**, a wife sued her husband in the English Courts in relation to a deed drawn up in New Jersey, U.S.A. The husband was ordinarily resident in the U.K. The court held that the deed was to be governed by the law of New Jersey and therefore, the husband could not deduct income tax under English law by which they had not agreed to abide.

These cases did not deal with the issue of jurisdiction. The present case is for an action in personam as it involves money loaned and owing. The defendant contends that neither himself nor the plaintiff lives in Jamaica, but the authorities cited above supports Ms. Wong's contention that it does not matter. The issue is whether service was effected on the defendant.

**THE ISSUE OF SERVICE OF THE WRIT**

Although Mr. Wilkinson contends that the defendant was not personally served, it is quite clear that by an order of the court for substituted service, he has been properly served.

In Halsbury's Laws of England, 4<sup>th</sup> edition Vol. 37, page 117, paragraph 149 under the heading: 'Personal Service', it states as follows:

*"Originating process must be served personally on each defendant by the plaintiff or applicant or his agent, unless some alternative method is or has been authorized for that particular case."*

Mr. Wilkinson has not sought to challenge the legality of the service of the writ or sought to have the service set aside, he has asked the court to say that it has no jurisdiction.

**IS THERE A BURDEN ON THE PLAINTIFF TO SHOW THE COURT THAT IT HAS JURISDICTION?**

There are no details in relation to the transaction that has grounded this action at this stage. Should a determination be made on this basis that there is no jurisdiction? The authorities do not support such a determination. In Halsbury's Laws of England, vol. 8 (1) 4<sup>th</sup> edition, page 779, paragraph 1085 under the heading "Stay of Proceedings: Forum non conveniens," it states as follows:

*"The court has power at any stage of the proceedings to order a stay on the ground of forum non conveniens where to do so is not inconsistent with the Brussels or Lugano Convention. As a general rule, the party seeking the stay (usually the defendant) must establish that there exists another forum to whose jurisdiction he is amenable, and which is clearly or distinctly more appropriate than England for the trial of the action. If the defendant fails to establish this, a stay on this ground will not be granted."*

This is what the defendant in the Maharanee case sought to do and failed. The defendant in this case has not sought for a stay of execution. Mr. Wilkinson has argued that this would only be done if jurisdiction has been accepted but it has not been accepted.

However, the authorities suggest that there is a burden on the defendant to satisfy the Court that another jurisdiction would be more convenient for the trial of the action. Once the writ is served on the

defendant in the jurisdiction in an action in personam, and there has been no successful challenge to the legality or regularity of the service of the writ, jurisdiction appears to be grounded. There is nothing in the authorities to suggest that the plaintiff has to satisfy the court as to why it should have jurisdiction in the matter. The defendant has a course of action he can take in order for the court to decline jurisdiction. He has not done so.

The application to strike out the action is therefore dismissed. No order as to costs made in the particular circumstances of this case.