

UPDATE

Economic Torts: Service out of the Jurisdiction

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Royal Park Investments v S&P Global et al (Unreported, 3 June 2024) concerns a claim brought against Standard & Poor for flaws in their ratings of various CDO's. The decision covers a range of issues, including the jurisdictional gateway for service out of tort claims, forum in the context of limitation and the Court's approach to whether there is a serious issue to be tried.

Background Facts

Royal Park Investments SA/NV (the **Plaintiff**) acquired collateralised debt obligations (**CDO's**) originally purchased by Fortis Bank together with a purported assignment of all and any causes of action. Of the eight CDO issuers, seven were Cayman Islands companies.

The Plaintiff alleges that Fortis, through its Cayman Islands branch, purchased the CDO's in reliance upon the AAA ratings issued by various Standard and Poor entities (the **Defendants**).

The Plaintiff further alleges that the Defendant knew the tools that they were using to evaluate the default risk of asset backed securities was seriously flawed and that the Defendants were guilty, *inter alia*, of making fraudulent misrepresentations.

Application for Leave to Serve Out

The Plaintiff made an *ex parte* application for leave to serve the Defendants out of the jurisdiction on the basis that "*the claim is founded on a tort, fraud or breach of duty whether statutory at law or in equity and the damage was sustained, or resulted from an act committed, within the jurisdiction.*" (the **Jurisdictional Gateway**).

The Plaintiff submitted that there was a good arguable case that the jurisdictional gateway was met in that:

- (i) Fortis Bank had a Cayman branch with a local office and was resident in Cayman.
- (ii) The issuers of the CDOs were Cayman companies.
- (iii) Fortis Bank through its Cayman branch purchased the Securities and became liable to pay the purchase monies in the Cayman Islands.
- (iv) The losses from the Securities were recorded in the books of the Cayman branch; and
- (v) The misrepresentations made by the Defendants were received in Cayman and were acted upon.

The Defendants applied to set leave aside. They argued that there was no tangible evidence that any wrong had been committed in Cayman and no tangible evidence that any damage had been sustained in Cayman. In any event, it was argued, leave should not have been granted because (a) there was no evidence that Cayman was the most appropriate forum and (b) there was no serious issue to be tried because the claim was time barred and/or the right to sue had not been properly assigned from Fortis to the Plaintiff.

Issue 1: The Jurisdictional Gateway

As a preliminary matter, The Court began by reminding itself that the test for service out should be applied strictly and that it was settled law that simply because damage was caused to a company incorporated in Cayman, that was not enough to found jurisdiction. The Court also reminded itself that the burden was on the Plaintiff to provide a plausible evidential basis for the application of the jurisdictional gateway.

The Court then went on to consider the parameters of the test for where damage was sustained. The Plaintiff, unsurprisingly, pushed for a broad test. It relied on a Supreme Court decision dealing with damage in a personal injury claim¹ which found that in the personal injury context, damage is on-going and the concept of where damage was sustained was to be broadly applied.

The Defendants pointed to dicta within the same judgment. The Supreme Court drew a distinction between damage in a personal injury context and cases of pure economic loss. With respect to pure economic loss, the Supreme Court favoured a narrower interpretation. The remote effects of economic damage, they found, could be complex and difficult to resolve. Accordingly, the more remote the economic repercussions of a tort, the less likely that damage would be to found jurisdiction.

The Court favoured the Defendants' interpretation and applied a narrow test.

Having determined these legal principles, the Court went on to examine whether any plausible evidence had been adduced at the *ex parte* stage. Upon a review of the five factors advanced, the Court found that the Plaintiff had failed to provide any evidence that a tort had been committed in the Cayman Islands or any evidence that damage had been sustained in the Cayman Islands.

The Court concluded that the Cayman Islands branch of Fortis was nothing more than a licence to carry on banking business outside the jurisdiction with no physical presence and with all business being carried on abroad. The fact the losses were booked in Cayman was of no relevance and, in any event, there was no proof that the books were ever in Cayman. Further, the fact that issuers were Cayman companies was of no relevance, given no wrongdoing was alleged against them. Accordingly, the idea that the CDO's were purchased in the Cayman Islands, that any misrepresentations took place in the Caymans Islands or that financial loss was suffered in the Cayman Islands was nothing more than '*wishful thinking*'.

Issue 2: Forum Non Conveniens

Although the application for service out failed at the first hurdle, the Court went on to deal with arguments with respect to forum.

The Court found that it was for the Plaintiff to establish that Cayman was the most appropriate forum. Given the Court had found that the tort was not committed in Cayman, it is unsurprising that the Court found there were no connecting factors with Cayman such as the location of witnesses or documents which made Cayman the appropriate forum over Belgium (where the Plaintiff is incorporated) or New York (whose law governed many of the agreements).

However, that was not the end of the story. An interesting point of more general application was raised, namely whether the Cayman Court should accept jurisdiction on a fall-back basis if no other forum were available. In this case, it was conceded that the Plaintiff was likely time barred in all jurisdictions other than Cayman and hence Cayman represented the only forum.

The Court, looking to English appeal court authority², concluded that this was a point of "practical justice". Accordingly, where a Plaintiff had not acted unreasonably in failing to commence proceedings within the limitation period of a jurisdiction that may represent the natural forum, the Court could accept jurisdiction. Having heard evidence as to why proceedings were not launched elsewhere, the Court found that had the Plaintiff met the jurisdictional gateway, the Court would likely have accepted jurisdiction, even though Cayman was not the appropriate forum, to achieve justice.

¹ *FS Cairo (Nile Plaza) LLC v Lady Brownlie* [2021] 3 WLR 1011

² *Spiliada Maritime Corp v Cansulex Ltd* [1987] 1 AC 460, House of Lords

Issue 3: Serious Issue to be Tried

Issue 3 concerned detailed arguments as to whether there was a serious issue to be tried, i.e. whether the claims had a real prospect of success.

Two questions were at issue, first whether the claims were time barred and second whether, as a matter of New York and/or Belgian Law, title to sue had been transferred. With respect to the first issue, the Court found that limitation could not be determined on a summary basis as a determination required oral evidence and cross examination. With respect to the second issue the Court was in two minds as to whether to determine the point, but decided it too was inappropriate for summary consideration.

The Court's decision not to determine these issues was said by the Court to be in accordance with the appellate court's injunction against turning jurisdictional applications into mini trials³. The Court also added that it was the policy of the Court to encourage a proportionate approach to jurisdiction applications. The Court doubled down in this policy approach by finding that the Defendants, in seeking summary determination of these issues, had acted unreasonably and accordingly reduced their entitlement to costs by 25%.

Conclusion

The decision provides some useful guidance on service out applications and in particular that:

1. In economic tort claims, to found jurisdiction under the tort gateway, a plaintiff will need to establish a good arguable case that there is plausible evidence it suffered damage, in the Cayman Islands - it is insufficient to simply establish that damage was caused to a company incorporated in the Cayman Islands.
2. If no other forum is available due to the expiry of limitation periods, the Court would accept jurisdiction on a fall-back basis in order to achieve 'practical justice' where a Plaintiff had not acted unreasonably in failing to commence proceedings within the limitation period of a jurisdiction that may represent the natural forum.
3. In considering whether there is a 'serious issue to be tried' the Court will only allow clear cut cases which can be dealt with summarily.

The jurisdictional requirements proved too difficult to establish for the Plaintiff who was found to have sailed very close to the wind in bringing its application. However, as stated by the Court a party who wishes to anchor commercial transactions to a particular jurisdiction can very easily take overt action designed to achieve that end, including by conducting business through substantive local offices and financing transactions through banks in the desired forum.

³ *Okpabi v Shell* [2021] 1 WLR 1294 at [22]; *Lungrove v Vedanta Resources Plc* [2020] AC 1045 at [9], [45]

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