CJ.

Noted.

IN THE GRAND COURT OF THE CAYMAN ISLANDS

14-08-98

BETWEEN:	David Connelly	**[INTENDED] PLAINTIFF**
AND:	(1) South Pointe Capital Corporation (2) A. Robert Robertson	**[INTENDED] DEFENDANTS**

APPEARANCE:

D. McCahill for [Intended] Plaintiff

BEFORE MURPHY, J

REASONS FOR DECISION

This is an ex parte application (1) for leave to serve the second defendant outside the jurisdiction pursuant to Order 11 rule 1 (1)(c); (2) for substituted service on the second defendant; and (3) for a mareva injunction in respect of both defendants' assets within the jurisdiction.

I undertook to counsel that I would issue brief written reasons, and I now do that.

I expressed a preliminary concern that this application was supported entirely by three unsworn affidavits. While that may be necessary in certain cases (and indeed the practice seems to be reflected to a degree in the precedents of the English Commercial Court), I would not want to see it become the rule rather than the exception on applications for such drastic injunctive remedies as mareva orders. Proceeding on the basis of unsworn affidavits might be acceptable in matters of real urgency (imminent destruction of property, child abduction, or the clearest cases of asset dissipation in progress, as examples) but such cases must be relatively rare.

One thing that has troubled me about this application generally is that the information upon which the applicant chiefly relies, the report of his investigator (whatever one may conclude as to its weight), was available to the applicant as early as March or April of this year. The fact that this application is brought on in August does not suggest the sort of concern or urgency one would associate with mareva relief. Nor would it lead to a conclusion that proceeding on the basis of unsworn affidavits was appropriate here. Nevertheless I allowed the application to proceed.

In brief the claim is based on a written guarantee provided by the defendants, among others, to the plaintiff in July 1997. The three separate obligations said to be guaranteed amount to US$575,000. I was prepared to assume for purposes of argument on the Order 11 and mareva issues that a good arguable case on the merits had been shown. That was not my concern on this application.

ORDER 11

The applicant's basic submission was that once he sued the first defendant, a Cayman company, in this jurisdiction he could then serve the second defendant, said to be a principal of the company, outside the jurisdiction as "a necessary or proper party" by virtue of the provisions of Order 11 rule 1 (1)(c).

Applicant's counsel properly conceded, however, that (quite apart from whether the applicant can bring himself within Order 11 rule 1) in the context of an Order 11 application I may consider in the exercise of my discretion whether the Cayman Islands is the forum conveniens in the first place (cf. the annotation and authorities cited at para. 11/1/7 of The Supreme Court Practice 1997). In other words, is it proper for the proposed action to be commenced in this jurisdiction at all? I indicated that I had very great reservations as to this.

It is clear from the material before me that this guarantee action has no connection whatever with the Cayman Islands except that one of the guarantors is a Cayman company. There is no evidence that any of the individual actors involved, including the second defendant, has ever set foot in this jurisdiction. The contract documents involved in the claim will be construed according to the law of some U.S. jurisdiction, quite possibly the State of Georgia, though this is not clear. All relevant events relating to the claim seem to have occurred in U.S. jurisdictions. There may be a tangential connection with British Columbia. Nothing relevant to the claim occurred in the Cayman Islands. It would appear that all potential witnesses for the plaintiff, and the plaintiff's main advisers, are located in the United States.

Applicant's counsel argues that I cannot conclude that the Cayman Islands is not the forum conveniens, unless I can identify a specific jurisdiction that is. I regard this as too restrictive an approach; but in any case, if his submission is correct, on the evidence I would identify the State of Georgia as the jurisdiction with which the claim is probably most closely connected. In particular I rely upon the fact that on 29 May, 1998 the plaintiff's Georgia attorneys commenced parallel proceedings against the same defendant in the State of Georgia. In his Complaint in those proceedings, the plaintiff himself represented that "jurisdiction and venue are proper in this Honorable Court", that is, the Georgia court. The plaintiff's attorney's evidence before me was that "the main reason for issuing those proceedings was to have a local court of competent jurisdiction to enforce a settlement agreement which it was hoped could be reached" at a meeting in that state in early June. The second defendant then "went to ground" before he could be served, and the plaintiff voluntarily dismissed the Georgia action "without prejudice" on 15 July, 1998. The decision was then taken by the plaintiff's U.S. advisers to sue in the Cayman Islands. "Part of the reason for such a decision", the plaintiff's U.S. attorney deposes, "was due to the knowledge that Mr. Robertson has or may well have assets in the Cayman Islands which could be the subject of an enforcement process, as indeed may South Pointe Capital Corporation, being a Cayman Islands company" (my emphasis). I do not think the plaintiff can so easily resile from his own initial choice of jurisdiction. In any case, on my review of the evidence the conclusion is inescapable that, as an afterthought, this action was contemplated for the Cayman Islands solely because it is hoped the defendants may have assets here and for no other strategic reason. Clearly the Georgia action was discontinued to facilitate this. I mean no criticism of plaintiff's advisers when I say that in my view this proposed action reflects merely an exercise in "forum-shopping" for the sole purpose of an attempt to take advantage of the mareva weapon. (See criticism of this practice in similar circumstances in a somewhat similar jurisdiction in <u>Chase Bank International v. Abadi</u> [1986] HKLR 1104 (Hong Kong Court of Appeal). This is an insufficient basis upon which to found an assertion (the burden being on the applicant to so establish) that the Cayman Islands is the most convenient forum. In my view the mere hope that a defendant's assets may be available in a particular jurisdiction to satisfy a judgment carries little or no weight in the determination of forum conveniens. The traditional indicia of forum conveniens relate to the claim, the participants, and the litigation itself, not recovery after judgment.

Accordingly, in the exercise of my discretion, I decline to grant the Order 11 relief.

While that effectively disposes of the other heads of relief sought, I will make some brief comments about them.

<u>SUBSTITUTED SERVICE</u>

My overall impression of the evidence, quite frankly, is that neither the plaintiff nor his advisers know where the second defendant is. It was argued that he was probably in British Columbia, but the evidence amounted to little more than that he "may be located on the west coast of Canada, possibly in Vancouver."

The applicant proposes a "scattergun" approach, serving the second defendant by sending the process to his three last known addresses in the USA, to the Cayman company at its registered address, and by advertising in British Columbian newspapers. I have a very uneasy feeling that the applicant proposes to do this to circumvent the problem of actually finding the second defendant. It is not this Court's function to facilitate a quick default judgment. In my view substituted service orders are not made for this purpose, but rather to facilitate service upon a defendant whose whereabouts can be established by sufficient proof but where he is evasive or service cannot be easily effected by normal means. I must be satisfied that the alternatives proposed would probably draw the process to the defendant's attention. Order 65, rule 4 (3) requires at least that. I am not sufficiently comfortable that that would be so here, on the material before me.

<u>MAREVA INJUNCTION</u>

As indicated I was prepared to accept for purposes of argument that there exists a good arguable case. My concern is that the evidence, in my view, falls short of establishing "a real risk of dissipation of assets".

In his written submissions, the applicant's counsel says at para. 8 (c):

> "It is likely that the First Defendant, being a Caymanian company, has assets within the jurisdiction. The Second Defendant has an account with ATC (Trustees) Ltd within the jurisdiction. The Plaintiff cannot say what if any assets are in that account."
> (My emphasis).

That is the applicant's case at its very highest. There is some evidence of the second defendant's generally evasive activities and financial troubles in the USA.

The applicant's private investigator's report indicates that:

> "On 3/18/98 we conducted an asset search on the subject at the ATC Trustees Ltd, Cayman Islands. We learned that the subject has several accounts with this investment firm. We also learned that he has a security code on the account to prevent unwanted access."

This brief report entry seems to enlarge somewhat upon (and arguably does not jibe with) the investigator's own affidavit evidence to the effect that:

> "On March 18, 1998, as part of my investigations, I contacted ATC (Trustees) Bank in the Cayman Islands by telephone. I was connected with an account representative who greeted me as "Mr. Robertson", and asked "What can we do for you today?" When I attempted to gain additional information, I was requested to provide a code and, of course, had no information to this effect."

There is no evidence of any kind, merely surmise, about the corporate defendant's assets in the Cayman Islands.

I regard the foregoing as a very thin basis upon which to found an ex parte mareva application. I also reiterate, and take into account, the fact that the information, such as it is, on purported Cayman accounts was available in March while this ex parte application was not brought on until August. This suggests to me that any purported risk of dissipation was not perceived by the plaintiff's side as being of the greatest urgency.

In the exercise of my discretion, on the material before me, I would not have granted mareva relief.

Accordingly, notwithstanding the able submissions of Mr. McCahill, I would dismiss this application.

In the foregoing, I have essentially opined that it requires more than the mere existence of a Cayman corporate defendant in an intended action, for this Court to take jurisdiction, make orders for service out, and grant mareva relief against foreign defendants. I recognise that this is an important issue for foreign litigants.

I direct that (in case this matter should go further) the material used in this application be sealed, and these Reasons for Decision not be publicised outside this Court until further direction.

14 August, 1998

J.D. Murphy
Judge