

COMMONWEALTH OF THE BAHAMAS

2022

IN THE SUPREME COURT

CLE/gen/852

Common Law and Equity Division

BETWEEN

HERITAGE CRUISE HOLDINGS LTD.  
(formerly known as SILVERSEA CRUISES GROUP LTD.)

Applicant

AND

SILVERSEA CRUISE HOLDINGS LTD.

First Respondent

AND

FRANCESCO LEFEBVRE D'OVIDIO

Second Respondent

Before: Registrar Constance A. Delancy

Hearing Date: 30 August 2022

Appearances: Mrs. Sophia Rolle-Kapousouzoglou  
Mr. Ramonne Gardiner

## **RULING**

*Practice - Service of court process outside of the jurisdiction – Action in respect of declarations affecting companies within the jurisdiction – Test for grant of leave – Applications under Order 11(1)(1)(j) RSC*

1. The Applicant commenced an action by an Originating of Summons filed 31 May, 2022 seeking declaratory relief in relation to the acquisition of and transfer of shares of an International Business Company.

2. The Applicant's application by way of Summons filed 6 July, 2022 seeks leave to issue and serve a Notice of Originating Summons and Concurrent Originating Summons

and any further documents outside the jurisdiction on the Second Respondent, or alternatively, to serve the Second Respondent by way of substituted service.

3. The Applicant's application is supported by an Affidavit and Supplemental Affidavit of McFalloughn Bowleg, Jr. (Bowleg Affidavits) filed herein on 6 July, 2022 and 30 August, 2022 respectively.

4. The Bowleg Affidavits outlined the historical background and corporate structure of the Applicant and the First Respondent; the ongoing disputes involving the parties in Italy and the United States and the Second Respondent's familial disputes.

5. Permission to serve out of the jurisdiction is governed by Order 11 r. 1(1) of Rules of the Supreme Court (RSC) which provides:

**"1. (1) Subject to rule 3 and provided that the writ does not contain any such claim as is mentioned in Order 67, rule 2(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, that is to say —**

**(j) if in the action begun by the writ being properly brought against a person duly served within the jurisdiction, a person out of the jurisdiction is a necessary or proper party thereto."**

6. Order 11 r. 4 of RSC provides that:

**"(1) An application for the grant of leave under rule 1 or 2 must be supported by an affidavit stating the grounds on which the application is made and that, in the deponent's belief, the plaintiff has a good cause of action and showing in what place or country the defendant is, or probably to be found.**

**(2) No such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Order."**

7. Order r. 4 of RSC provides that:

**“(1) An application for the grant of leave under rule 1 or 2 must be supported by an affidavit stating the grounds on which the application is made and that, in the deponent’s belief, the plaintiff has a good cause of action and showing in what place or country the defendant is, or probably to be found.**

**(2) No such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Order.”**

8. Order 11, r. 8 of the RSC

**“8. (1) Subject to paragraph 2 and Order 66, rule 4, service out of the jurisdiction of an originating summons is permissible with the leave of the Court.**

**(2) Where the proceedings begun by an originating summons might have been begun by writ, service out of the jurisdiction of the originating summons is permissible as aforesaid if, but only if, service of the writ, or notice of the writ, out of the jurisdiction would be permissible had the proceedings been begun by writ.**

**(3) Where any proceedings are authorised by these Rules or (apart from these Rules) by or under any Act to be begun by originating motion or petition, service out of the jurisdiction of the notice of motion or of the petition is permissible with the leave of the Court.**

**(4) Subject to Order 66, rule 4, service out of the jurisdiction of any summons, notice or order issued, given or made in any proceedings is permissible with the leave of the Court.**

**(5) Rule 4(1), (2) and (3) shall, so far as applicable, apply in relation to an application for the grant of leave under this rule as they apply in relation to an application for the grant of leave under rule 1 or 2.**

**(6) An Order granting under this rule leave to serve out of the jurisdiction an originating summons to which an appearance is required to be entered must limit a time within which the defendant to be served with the summons must enter an appearance.**

**(7) Rules 5, 6 and 7 shall apply in relation to any document for the service of which out of the jurisdiction leave has been granted under this rule as they apply in relation to a writ.”**

9. Applications under Order 11 of RSC are interlocutory and are not determinative of the substantive issues between the parties are questions which should be decided at trial. The Applicant’s claim must nonetheless satisfy the criteria set out in Order 11 of the RSC in order for the Court to exercise its discretion to grant leave to allow service outside the jurisdiction. The Applicant has satisfied the three (3) requirements: it must show that it has a good case of action; that its claims are within the ambit of Order 11, r.1(1)(j) and that The Bahamas is the *forum conveniens*.

10. Learned Counsel for the Applicant cited on the decision of Sawyer, J. in the Bahamian case of **Michael Wilson & Partners Limited v Thomas Ian Sinclair SCCiv.App. No. 40 of 2007**. Sawyer, P. examined what the court ought to consider in exercising its discretion to grant permission to allow service outside the jurisdiction under Order 11 of the RSC:

**“[23] Order 11 rule 1 (1)(j) of the Bahamian Rules is identical to Order 11 rule 1 (1) (j) of the Supreme Court Rules, 1965 of England ("the English Rules") as well as Rule xi 1 (g) of the 1883 Rules of the Supreme Court of that country- ("the 1883 Rules"). Rule 2 of the Rules of the Supreme Court, 1961 (S.I. No. 55 of 1961) (Bahamas) provided: “2. (1) Insofar as the same can or may be made applicable or may be adapted to the constitution, practice and procedure of the Supreme Court, and where they do not conflict with any other rules of the Supreme Court for the time being in force or the law of the Colony,**

**and subject to Rule 9 thereof all rules for the time being and from time to time in force, regulating the practice and procedure of the Supreme Court of Judicature in England (hereinafter called “the English Rules”) shall govern all proceedings in the Supreme Court of the Colony, subject to such changes, alterations and modifications as the local circumstances of the case or otherwise may render necessary, and shall also apply, so far as may be practicable to all proceedings taken hereafter in all causes and matters now pending.”**

**[24] Rule 9 of the 1961 Rules excepted a number of the English Rules from application by the Supreme Court of the Colony but neither Order 10 (which dealt with service of process) nor Order 11 (which dealt with service out) of the English Rules were excepted from application by that Court. It therefore follows that the procedural law for service of process and service out of the jurisdiction was the same in The Bahamas as in England – at least up until 1983 when the English Order 11 was recast by Rules of the Supreme Court (Amendment No.2 1983) S.I. 1983 No.1181; however, no similar change was effected in the Bahamian Rules.**

**[25] In light of that legal historical background to the present Order, it is my view that Order 11 rule 1 (1) (j) and rule 4 [i.e. rule 4 of the RSC] may properly be interpreted (as they previously have been) in the same manner as the English rules were interpreted by the higher courts of England before the 1983 amendment to the English Rules.**

**[48] According to the learned authors of The Supreme Court Practice 1979 Edition (Volume 1) at page 81, the principles on which leave to serve process of the court of the jurisdiction under Order 11 are as follows:**

**“1. The applicant for leave must show that his case falls clearly within one or other of the subparagraphs of rule 1 or rule 2**

**2. The applicant must show that he has a good arguable case on the merits**

**3. The applicant must satisfy the court that it is proper to exercise its discretion to grant leave...”**

**[49] I think those principles are equally applicable to applications to the Supreme Court of The Bahamas for leave to serve process or notice of process out of the jurisdiction and have usually been followed by that court.”**

11. Learned Counsel for the Applicant also relied the decision of Mustill, LJ in the English case of **Metall und Rostoff AG v. Donaldson Lufkin & Jenrette Inc [1990] 1 QB 391 Order 11, Rule 4** held at pages 434 and 435 as that,

“Order 11, rule 4(2) provides that leave to serve a defendant out of the jurisdiction shall not be granted ‘unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under the Order. This imposes a three-fold burden on a Plaintiff seeking leave. **First he must show that the claim he wishes to pursue is a good arguable claim on the merits.** While the Court cannot at this stage determine whether the plaintiff, if given leave, will succeed, it must be satisfied that the plaintiff has a good chance of doing so. **Secondly, the plaintiff must show a strong probability that the claim falls within the letter and the spirit of the sub-head or sub-heads of O.11, r.1(1) relied upon.** This requirement is treated strictly, since if leave is given (and if challenged, upheld) it will never thereafter be investigated: Viktovice Horni A Hutni Tezirsto v Korner [1051] AC 869, 889, per Lord Tucker. It is, furthermore, an established principle that a foreigner resident abroad will not be lightly subjected to what is, to him, a foreign jurisdiction. **Thirdly, the plaintiff must persuade the court that England is the forum in which the case can most suitably be tried in the interests of all the parties and for the ends of justice.** This calls for the making of a judgment, the nature of which has recently been comprehensively reviewed in Spiliada Maritime Corporation v Cansulex Ltd [1987] AC 460...”

12. The Bowleg Affidavit sets out the information in relation to the registration and shareholders of the corporate entities (the Applicant and First Respondent) as being Bahamian registered International Business Companies; as well as the chronological background of the acquisition and transfer of shares in relative to the same (see paragraphs 48-57 thereof).

13. Learned Counsel for the Applicant submitted that the action is properly brought against the First Respondent, a party served within the jurisdiction, and the Second Respondent, a person out of the jurisdiction is a necessary or proper party to these proceedings for the reasons as set out in the Bowleg Affidavits. Further, that the First Respondent has been served and entered a Memorandum and Notice of Appearance. Further that action against the First Respondent, and has been made *bona fide* and not merely for the purpose of bringing the Second Respondent before the Court a party who is out the jurisdiction. Further that the relief sought in the Originating Summons with respect to the share transfers, including whether the First Respondent was legally entitled to recognise the Applicant as the sole legal owner of 100% of the issued shares of the First Respondent as at 13<sup>th</sup> June, 2018 and therefore should be a respondent to these proceedings.

14. The Court accepts the argument that the First Respondent is a proper party to the proceedings within the jurisdiction. The hurdle which the Applicant must overcome is whether the application to serve the Second Respondent outside the jurisdiction fits within the confines of Order 11 r.1(1)(j), that is, is the Second Respondent a “proper or necessary party” to the proceedings before the Bahamian Court. The case of **Williams v Cartwright** is instructive wherein Lopes L.J. held at pages 146-147:

**“The matter with which we are dealing depends upon Order XI., r.1 (g). That rule provides that service out of the jurisdiction may be allowed whenever "any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction". The first question that arises is whether Guild is a proper party to the action. The true test of that**

**appears to me to be whether, if he had been within the jurisdiction, he would have been a proper party to the action. Nobody can deny that, if he had been within the jurisdiction, he would have been properly sued with the two other defendants.”**

[Emphasis mine]

15. According to the Bowleg Affidavit filed 6 July 2022 at paragraph 62 thereof a declaration of the Court is necessary to confirm whether the share transfers were *inter alia* proper and valid, specifically, at paragraph 62 of the Bowleg Affidavit it is averred that:

**“Given FL’s [Second Respondent] multiplicity of legal proceedings in numerous jurisdictions, a declaration is necessary by this Honourable Court in order to confirm that the First and Second Transfers were *inter alia* proper and valid. In the circumstances, it is proper for this Honourable Court to exercise its discretion to grant leave as FL [Second Respondent] is a necessary and proper party to these proceedings and FL [Second Respondent] should be bound by any determination that this Honourable Court makes relative to the relief sought in the Originating Summons filed herein.”**

[Emphasis mine]

16. The Court having considered the arguments advanced on behalf of the Applicant and the information disclosed in the Bowleg Affidavits hereby exercises its discretion under Order 11 r.1(1)(j) of RSC and grants the Applicant leave to serve the Second Respondent at Via Donatello N.71 /Stairway: UN-Interior: 19, Rome, Italy being the usual or last known residence of Second Respondent. Costs of the Application to costs in the cause.

Dated: this 14 September 2022

  
Constance A. Delancy  
Registrar