

**IN THE SUPREME COURT OF BELIZE, A. D. 2015**

**CLAIM NO. 628 OF 2015**

**BETWEEN:**

**(IURI DAVYDOV**

**CLAIMANT**

**(AND**

**(VICTORIA BEREZKINA**

**1<sup>ST</sup> DEFENDANT**

**(MAKSYM BEREZKINA**

**2<sup>ND</sup> DEFENDANT**

**(SABCO (OFFSHORE FINANCIAL**

**INTERESTED PARTY**

**(SERVICES) LTD**

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***BEFORE THE HONOURABLE MADAM JUSTICE MICHELLE ARANA***

**Mrs. Ashanti Arthurs Martin for the First and Second Defendants/Applicants**

**Mr. Aldo Reyes for the Claimant/Respondent**

**Mr. Oscar Sabido, SC, for the Interested Party**

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**D E C I S I O N**

1. The substantive claim in this matter seeks declarations and orders regarding the ownership of shares in Quadra Commodities S.A. Ltd (“Quadra”), an International Business Company incorporated in Belize. The present preliminary application is an application by the Defendants to set aside an order granting the Claimant leave to serve notice of the claim out of the jurisdiction, that the purported service be set

aside and that the Claimant be required to effect personal service on the Defendants. The Claimant resists the application, stating that the order should be allowed to stand since the claim was personally served on the Defendants and such service is valid. The court now gives its decision.

### **Issues**

2. (i) Whether the Order for Service out of the jurisdiction was properly granted or is liable to be set aside?

(ii) Whether the service of the Claim Form and Statement of Claim was effected on the Defendants?

3. **Defendants/Applicants' Submissions on Application to Set Aside Order for Service out of the Jurisdiction**

Mrs. Arthurs Martin on behalf of the Defendants/Applicants argues that the Order for Service out of the jurisdiction was not properly granted. She states that for service out of the jurisdiction to be valid it is incumbent on an applicant to prove that the application meets the criteria under Rule 7.3 and Rule 7.4 of the Belize Civil Procedure Rules ("CPR").

*"A claim form may be served out of the jurisdiction only if*

*(a) Rule 7.3 or 7.4 allows; and*

*(b) The court gives permission."*

Learned Counsel relies on the case of ***Lauro Rezende v. Companhia Siderugica Nacional et. al.*** (Civil Appeal No. 23 of 2009) where Mottley P speaking of Rule

7.2(a) and (b) stated that *“These provisions are cumulative and both requirements must be fulfilled.”*

In **Rezende** the Claimant had obtained an Injunction against the Defendant prior to obtaining an order permitting service out of the jurisdiction; after reviewing the authorities including *In re Busfield Whaley v. Busfield* 32 CH.D, 123, *The Siskina* [1979] AC 210 and **Fourie v. Le Roux** [2007] 1UKHL 1, Mottley P held as follows:

*[16] “Leave to serve out of the jurisdiction is, in my view, a pre-requisite for the granting of an injunction over a defendant who is not within the jurisdiction of the court. As Lord Scott pointed out, that even if leave has been granted, but subsequently set aside, there would be no jurisdiction to continue an injunction which had been granted.*

*[17] Was the claim form valid? In my opinion the answer is no. A claim form may be served out of the jurisdiction only if Rule 7.3 and 7.4 allows and the Court gives permission (see Rule 7.2). The failure of the respondents to obtain the leave of the Court in accordance with Rule 7.2 makes the claim form invalid since, in my opinion, the in personam jurisdiction of the Court granted the injunction, there was no valid substantive claim before it on which the jurisdictional basis for the injunction could be founded.”*

Mottley P surmised at paragraph 26 that *“A defendant who is outside the Court’s jurisdiction is not subject to the in personam jurisdiction of the court”*. Mrs. Arthurs submits that in the case at bar, the starting premise should be that the Defendants,

who reside in the Ukraine, are not subject to the in personam jurisdiction of the Supreme Court of Belize. However, the Court may nonetheless grant permission for a claim form to be served on a Defendant outside the jurisdiction if permission may be granted pursuant to Rule 7.3 or 7.4 of the CPR.

Learned Counsel goes on to state Rule 7.5 as follows:

*“An application for permission to serve out of the jurisdiction may be made without notice but must be supported by evidence on affidavit stating -*

*(a) The grounds on which the application is made;*

*(b) That in the deponent’s belief the claimant has a claim with a realistic prospect of success;*

*(c) In what place, within what country, the defendant may probably be found; and*

*(d) Where the application is made under Rule 7.3(2) (c), the grounds for the deponent’s belief that the conditions are satisfied.”*

It is incumbent for the Claimant to set out the grounds why the Application qualifies under Rule 7.3 or 7.4. The submission of the Defendant is that the Claimant’s application does not meet the requirements of the CPR as it is not clear under which ground the application was sought. The submission is that there is no valid subsisting claim before the court therefore the service out order is liable to be set aside, As the Claimant failed to obtain leave in accordance with Rule 7.2 and therefore the *in personam* jurisdiction of the court over the Defendants was not properly invoked.

Citing Rule 7.3(2)(c) of the CPR, Mrs. Arthurs Martin for the Applicants/Defendants says that in order for a party to rely on this rule, he must first establish that a party has already been served with the claim, secondly, that there is a real issue to be tried between the Claimant and the party that has been served and thirdly, that it is now necessary to serve the foreign party who is a necessary and proper party to the claim.

4. Rule 7.3(2) (c ) reads as follows:

*“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 the claim.”*

Mrs. Arthurs Martin argues that the application could not have been properly made pursuant to Rule 7.3(2)(c ) because:

- 1) An Interested Party is not a Defendant and so service on SABCO (Offshore Financial Services) Ltd(“SABCO”) as the Interested Party does not meet the requirement of Rule 7.3(2)(c ); and

2) SABCO is not a proper party to the claim. As such there is no *lis* and no issue to be tried between the Claimant and SABCO.

The submission is that the CPR makes no provision for an Interested Party otherwise than in administrative claims. In that event, pursuant to CPR 56.11(c) and 56.13(1) persons may be heard and make submissions at hearings where they have “sufficient interest” in the claim. The right is therefore limited to attend the hearing and make submissions, not to file a defence and defend the claim on the merits. It is argued that no similar provision is made in respect of private law claims which entitle a party to be joined as an “Interested Party”. An Interested Party cannot defend a claim on the merits as that party is not a Defendant in the matter. SABCO is therefore improperly joined as a party to these proceedings. There is no *lis* between the Claimant and SABCO which would have enabled the court to grant permission for the claim to be served outside the jurisdiction pursuant to Rule 7.3(2)(c). SABCO as registered agent of the Claimant is merely a repository of records and documents executed by the officers of the Company. SABCO is therefore unable to rectify any register of members and the order for rectification can only be directed against the Company, not SABCO. Learned Counsel then cites Section 31 of the IBC Act as follows:

*“(1) A company incorporated under this Act shall cause to be kept one or more registers to be known as share registers containing...*

*(2) The share register may be kept in any such form as the directors may approve but if it is in magnetic, electronic or other data storage form, the company must be able to produce legible evidence of its contents*

*(3) A copy of the register, commencing from the date of registration of the company, shall be kept at the registered office of the company referred to in section 42 or at the office of the registered agent referred to in section 43.”*

5. Mrs. Arthurs therefore submits that it is the company and its directors, and not the registered agent, who exercises control over the register and its contents. It is the directors and not the registered agent under section 33 of the IBC Act who accepts transfers of shares. It is further argued that section 32 of the IBC Act makes provision for a party to apply to the court for an order for rectification of the share register. There is no reference to the liability of a registered agent. SABCO cannot amend the company’s register as it is merely a record keeper and is therefore not a proper party to this claim. Learned Counsel submits that SABCO is wrongly named as an “*Interested Party*” as there can be no real issues which it is reasonable for the court to try between the Claimant and SABCO. The Application for leave could therefore not have been brought pursuant to CPR 7.3(2)(c). In ***Dunkeld International Investment Ltd. v. The Attorney General*** (Civil Appeal No. 24 of 2011) the Court of Appeal set aside leave that had been granted for service out of the jurisdiction where the Affidavit failed to meet the mandatory requirements of the CPR. The Court of Appeal concluded that there was no real dispute between the party served

- in Belize and that the service had been effected merely as a pretext to allow the claim to be heard in Belize. Morrison JA highlighted the need for evidence on which the judge could rely to satisfy himself that:
- a. There was a real issue which it was reasonable for the court to try as between Claimant and persons served within the jurisdiction; and
  - b. That the Defendant was in fact a necessary and proper party to the claim.
6. The Claimant in the case at bar has failed to say in his affidavit what issue is to be tried between the Claimant and SABCO, and the evidence that would enable the Court to conclude that the issue is a reasonable one for the Court to try. Permission to serve out should therefore be set aside, as the reference in the Affidavit to injunctive relief is not born out in the claim form and the location of shares in Belize is irrelevant to the question of jurisdiction. In ***Nigg, Christinger & Partner et.al. v Nina Somkhihvili*** Civil Appeal No. 3 of 2012 Mendes J A confirmed that an application for leave to serve a claim outside of the jurisdiction only satisfied the criteria set out in rule 7.3 (2)(b) *“where the claim is for final injunctive relief. An ancillary application for injunctive relief pending the hearing of the claim, does not constitute the making of a claim for injunctive relief.”*
7. In the case at bar, there is no claim for injunctive relief endorsed on the Claim Form and consequently permission to serve the Claim on the Defendants outside the jurisdiction could not have been premised on rule 7.3(2)(b). Leave to serve out should therefore be set aside.



**Claimant/Respondent's Submissions Resisting Application to Set Aside Leave**

8. The Claimant opposes the Defendant's application to set aside the leave granted by the court to serve the Defendants outside of the jurisdiction under Rule 7.3 or 7.4. Mr. Reyes, on behalf of the Claimants, submits that the Claimant's case satisfies several categories of the CPR, namely, Rule 7.3(2)(c), Rule 7.3(4)(a) and Rule 7.3(4)(b). He argues that the Application for leave was supported by the Affidavit of the Claimant Iurii Davydov dated November 5<sup>th</sup>, 2015. The salient points of the affidavit are summarized by Mr. Reyes as follows:
- a) The Interested Party provided the Claimant with a nominee director for Quadra Commodities S.A. Ltd ("Quadra").
  - b) The Defendants acquired shares in Quadra by way of a forged share transfer instrument.
  - c) The Interested Party acting on this fraudulent document cancelled the Claimant's bearer share certificates and registered the Defendants as the holder of shares in Quadra.
  - d) The Interested Party has refused to rectify Quadra's share register.
9. Mr. Reyes submits that the Interested Party meets the requirement of Rule 7.3(2)(c) because the Interested Party is "someone" on whom the claim form has been served.

Rule 7.3(2) (c) reads as follows:

*“A claim form may be served out of the jurisdiction where -*

*A claim is made against someone on whom the claim form has been or will be served, and -*

*There is between the claimant and that person a real issue which it is reasonable for the court to try; and 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.”*

In addition, Learned Counsel contends that there is between the Claimant and the Interested Party a “real issue” which it is reasonable for the Court to try. He says that the Interested Party was served not only because it is the registered agent of Quadra but also because Quadra provided the Claimant with a nominee director; the director of Quadra is directly responsible for maintaining the shareholders register and entering the particulars of shareholders. In this case it was the Interested Party’s nominee director who entered the Defendants as shareholders of Quadra, and it is the Interested Party that is vested with the power to rectify the shareholder’s register. Reference is made to paragraphs 5 and 13 of the affidavit of Iuri Davydov as follows:

*“The Interested Party is a company formed under the Companies Act, Chapter 250, Laws of Belize and licensed by the International Financial Services Commission to form and manage international business companies. The Interested Party serves as Quadra’s registered agent. The Interested Party*

*also provided Quadra with nominee directors in the person of Margaret Flowers. To the best of my knowledge, Margaret Flowers is an employee of the Interested Party.”*

*“I have advised the Interested Party that the Directive is a fraudulent document and that the share register for Quadra ought to be rectified to reflect myself as the sole shareholder of Quadra but the Interested Party has refused to do so in the absence of a Belize Court order.”*

Mr. Reyes submits that there is definitely an issue to be tried between the Claimant and the Interested Party and it is reasonable for the Court to determine this issue between them. The Defendants are necessary and proper parties to the claim because they are both entered as the new shareholders of Quadra and their shareholding may be affected by the claim. It is also clear from the First Defendant’s affidavit that she intends to challenge the substance of the claim.

10. Mr. Reyes also draws the court’s attention to a parallel case brought against the Second Defendant and the Interested Party ***Spilichenko v Berezkin, Sabco (Official Financial Service) Ltd.*** Claim 269 of 2015 before Abel J. The facts of that case are almost identical to that in this case and the cause of action is the same. The Claimant obtained leave to serve the Defendant outside of the jurisdiction and an identical challenge was mounted by the Defendant to set aside that order and to set aside the actual service of the court documents on the Defendant. Abel J found that the order

granting leave for service outside the jurisdiction was proper and that service on the Defendant was actually effected.

11. Mr. Reyes also submits that the cause of action is a tort and as such falls within the ambit of both limbs of Rule 7.3(4):

*“A claim form may be served out of the jurisdiction where a claim in tort is made and- the damage was sustained within the jurisdiction; or the damage sustained resulted from an act committed within the jurisdiction.”*

It is submitted by Learned Counsel that the forgery of the share transfer instrument may have taken place outside the jurisdiction; however the Claimant and the Interested Party were defrauded when this forged instrument was dispatched to Belize for the Interested Party to act upon it. The Claimant’s shares in this Belize Company were cancelled by the Interested Party in Belize and as such the actual fraud took place in Belize. The shares in Quadra are that of a Belize company and as such the damage to the Claimant was sustained in Belize. A cause of action therefore lies against the Defendants under the torts of conversion and unlawful interference. Under section 29 of the International Business Companies Act shares in a Belize IBC are considered personal property:

*“Shares of a company incorporated under this act are personal property and are not of the nature of real property.”*

12. Mr. Reyes cites Clerk & Lindsell on Torts (19<sup>TH</sup> ed) definition of the tort of conversion:

*“Anyone who without authority receives or takes possession of another’s goods with the intention of asserting some right or dominion over them or deals with them in a manner inconsistent with the right of the true owner is prima facie guilty of conversion.”*

Learned Counsel further cites Clerk & Lindsell on Torts to explain what can be the subject matter of the tort of conversion:

*“Cheques, negotiable instruments and other securities, such as guarantees, insurance policies and bonds, considered as corporeal property, are simple pieces of paper. The sole value is as choses in action, which cannot as such be converted. This principle extends to any document which is specially prepared in the ordinary course of business as evidence of a debt or obligation, this including for example share certificates and trading stamps.*

In this case, Mr. Reyes submits that the Defendants unlawfully acquired the Claimant’s personal property in Quadra by fraudulent means and have assumed ownership of Quadra. The Defendants have been entered in Quadra’s share register as shareholders by Quadra’s director. It therefore cannot be doubted that a cause of action in the tort of conversion has been initiated against the Defendants by the Claimant.

13. Learned Counsel further argues that the claim against the Defendants can also fall within the ambit of the economic tort of unlawful interference, examples of which are discussed in Clerk & Lindsell on Tort as follows:

*“So, where the defendant commits an actionable wrong, such as inducing a breach of contract, or authorizing or procuring a breach of copyright, deliberately to harm the claimant, he commits the tort. So too, where A perpetrates deceit upon B, intending to cause damage to C, he is liable to C whether or not the damage is also suffered by B.”*

Mr. Reyes submits that the Defendants in this case deceived the Interested Party thus causing damage to the Claimant. It is therefore clear that the Defendants’ action in the instant case, also falls within the tort of unlawful interference. He also draws the court’s attention to section 140 of the IBC Act which states that:

*“For the purposes of determining matters relating to title and jurisdiction but not for purposes of taxation, the situs of ownership of shares, debt obligations, or other securities of a company incorporated under this Act is in Belize.”*

Mr. Reyes argues that both limbs of Rule 7.3(4) were satisfied and that the Court’s order of February 17<sup>th</sup>, 2016 was well grounded and the Defendant’s application to set aside should be dismissed.

14. On the challenge to personal service on the Defendants, Mr. Reyes says that he concedes that service was not effected on the Defendants in the manner prescribed

by the court's order i.e. registered mail. Service was effected by personal service on the Defendants. He argues that in light of Rule 26.9(2) of the CPR, service was valid and will remain valid unless the court orders otherwise:

*“An error of procedure or failure to comply with a Rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders.”*

He submits that personal service is the most sound and certain method of service. No prejudice has been visited upon the Defendants. Commenting on the case of ***Nigg, Christinger & Partner v. Somkishvili*** cited by Mrs. Arthurs Martin for the Claimant, Mr. Reyes says the challenge to the order granting leave to serve out of the jurisdiction was dismissed. Mendes JA stated as follows:

*“All a claimant is required to do is to obtain the court's permission to serve the claim form out of the jurisdiction, The precise method by which service is to be effected is a matter of her choice, as long as it conforms to the method of service and procedure provided for in Part VII.”*

Mr. Reyes then sets out the affidavit of the process server Roman Andreev as follows:

“IN THE SUPREME COURT OF BELIZE, A. D. 2015

CLAIM NO. 569 OF 2015

BETWEEN:

IURI DAVYDOV

CLAIMANT

AND

VICTORIIA BEREZKINA  
MAKSYM BEREZKIN  
SABCO (OFFSHORE FINANCIAL  
(SERVICES) LIMITED

1<sup>ST</sup> DEFENDANT  
2<sup>ND</sup> DEFENDANT  
  
INTERESTED PARTY

AFFIDAVIT OF SERVICE

I, ROMAN ANDREEV, Process Server of Zaporozhye, Novgorodska str no 10, Ukraine  
MAKE OATH AND SAY as follows:

1. I did on the 4<sup>th</sup> of March, 2016 at approximately 11:05 a.m. in Kirovograd, Ukraine personally served the 1<sup>st</sup> Defendant Victoriia Berezkina with a true copy of the LS Claim Form & Statement of Claim, dated the 21<sup>st</sup> October, 2015 prepared and issued by Messrs. Reyes Retreage LLP for and on behalf of the Claimant.
2. At the time of the said service, the LS Claim Form & Statement of Claim and the copies thereof were subscribed in the manner and form subscribed by the Rules of the Supreme Court.
3. The LS Claim Form & Statement of Claim was hand delivered to Ms. Victoriia Berezkina who identified herself as Victoriia Berezkina at Yatran supermarket, situate at Kirovograd, st. Shevchenko 26, Ukraine.

SWORN by the above-named  
ROMAN ANDREEV on the  
12 day of March 2016

\_\_\_\_\_  
ROMAN ANDREEV

BEFORE ME  
Oksana Subko

\_\_\_\_\_  
NOTARY PUBLIC

FILED AND DELIVERED this 12 day of March 2016

This Affidavit is filed on behalf of the Claimant  
REYES RETREAGE LLP  
Attorneys-at-Law for the Claimant  
#122 Eve Street, Belize City, Belize Phones (501) 223-2030/31 Fax: (501) 223-2032  
Email: info@laywerbelize.com"



Mr. Reyes submits that it is very unlikely that the process server made up the details of his evidence. In addition there is no prejudice to the Defendants as they are not caught by surprise, since they instructed counsel in Belize to anticipate these proceedings even before they were filed. He therefore asks the court to dismiss the Defendants' application.

15. In brief submissions filed on behalf of the Interested Party, Mr. Sabido SC says that the Claimant's case is contradictory. On one hand Mr. Reyes argues that SABCO was deceived by the Defendants. At the same time, he has named SABCO as an Interested Party and is seeking relief against SABCO for refusing to rectify the register. Section 32 and 33 of the IBC Act precludes SABCO from rectifying the register because those sections state clearly that where the Court so orders it is the company that is to rectify the register, not the registered agent. Mr. Sabido SC reasons that there are no facts in the pleadings to support that there is a *lis* between SABCO and the Claimant, and that SABCO is a non-party in this claim.

16. Mrs. Arthurs-Martin in her Submissions in Reply to Mr. Reyes' Submissions argues that the Claimant fails to distinguish between SABCO as registered agent and Margaret Flowers, the director who as agent of the company is responsible for any breach of fiduciary duty. It is the director of the company (as separate legal person from the company) who is responsible for accepting transfers of shares and who would update the register of members. The Claimant also failed to identify what is the issue to be tried between SABCO and the Claimant. Learned Counsel also

submits that while the Claimant claims to rely on the torts of conversion and unlawful interference, nowhere in the claim form is either of these torts mentioned. No particulars are set out in the claim and neither allegation of tort can be sustained. In order to succeed, the Claimant has to amend his claim form to include these torts. The damage to the Claimant was not sustained in Belize and the damage was not a result of acts committed within Belize. As set out in the Claimant's affidavit, the loss suffered is not the loss of his shares in Quadra, but the loss of his assets held by Quadra in the Ukraine. The real wrongdoing complained of is the alleged fraudulent transfer of the Claimant's shares in Quadra to the Defendants. That act, the execution of the transfer was not committed within Belize. In relation to persona service, the court has no jurisdiction under Rule 26(9) to exercise extra-territorial jurisdiction over the Defendants. The mode of service violated the Order of the court and is bad. Since the court ordered service of the claim at specific addresses it was incumbent on the Claimant to serve the Defendants in accordance with that order. The statement from Mendes JA cited by the Claimant deals with method of service as opposed to place of service. In **Nigg**, Mendes JA confirmed at paragraph 32 that where the court specifies place of service *"if the respondent chose to effect personal service in accordance with CPR 6.8(1) (a) such service had to be done at the specified address."* As the Defendants were not served at the addresses specified in the order, the Defendant may seek to set aside service on that ground.

## **Ruling**

17. I am grateful to both parties for their extensive and helpful submissions on this application.

On the first issue as to whether the order for service out was properly granted, I find in favor of the Claimant. I am convinced that SABCO is “someone” who comes within the ambit of Rule 7.3(2) (c). It is very clear that there is a “*lis*” to be tried by the court in determining to what extent (if any) the Director of SABCO was involved in the fraudulent transfer of shares to the Defendants. In addition, it is to be ascertained by the court whether fiduciary duty was owed by the registered agent to the Claimant in its role as keeper of the register of the shares owned by the Claimant. I also find that while the claim does not explicitly spell out that the cause of action is conversion, it is quite clear from the facts recited in the supporting affidavit of Mr. Davydov that the claim is based on that tort. The Defendants therefore are quite aware of, and therefore not at a disadvantage as to the case that they have to meet. I therefore find that the order was properly granted and should stand.

On the second issue as to whether the service was properly effected, I again find in favor of the Claimants. The purpose of the rules as to service is to ensure that the proper parties are brought before the court so that they may defend against the claim if they so choose. As Mr. Reyes has rightly pointed out, the Defendants are not caught by surprise by this claim and retained counsel to defend even before the

substantive claim was filed. I also agree that personal service is the best form of service. I therefore rule that proper service was effected on the Defendants.

Costs of this application are awarded to the Claimants to be paid by the Defendants in the sum of \$2000.

*Dated this 12<sup>th</sup> day of May, 2017*

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**Michelle Arana**  
**Supreme Court Judge**