

**IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION**

CAUSE NO G 136 OF 2016

BETWEEN:

**ERIC BRADLEY
JACQUELINE CHUANG**

Plaintiffs

AND:

LINDA FRYE-CHAIKIN

Defendant

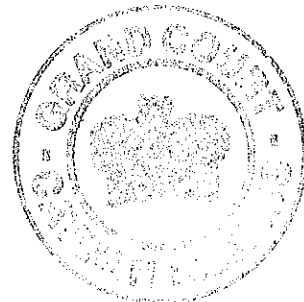
IN CHAMBERS

Appearances: For the Plaintiffs: Mr. Michael Wingrave of Dinner Martin
For the Defendant: Mr. Alex Davies of HSM Chambers

Before: **Hon. Justice Marlene I. Carter Actg.**

Date of Hearing: 29th August 2017

**Judgment
Delivered:** 25 April 2018



HEADNOTE

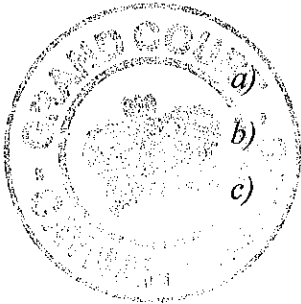
*Order 11 r. 1 (1) & r.4; proper case for service out of the jurisdiction;
more appropriate forum.*

JUDGMENT

1. It is not disputed that the parties entered into an agreement in writing on the 24th May 2014 for the Defendant to sell to the Plaintiffs her interest in a strata lot at the Villas of The Galleon in Grand Cayman. The Plaintiffs have made some payments in pursuance of the agreement. The Plaintiffs claim that they were willing to satisfy all of their obligations under the Agreement, but the Defendant has refused to complete the purchase and sale. The Plaintiffs filed a Writ of Summons accompanied by a Statement of Claim in the Grand Court of the Cayman Islands on the 22nd July 2016 seeking specific performance of the agreement or alternatively damages from the Defendant. On the 17th of August 2017 McMillan J. made an ex parte order granting the Plaintiffs leave to serve the Writ of Summons and Statement of Claim outside of the jurisdiction on the Defendant in Michigan in the United States. The Defendant acknowledged service on the 14th December 2016 and filed the instant summons on the 10th January 2017.
2. The Defendant's summons sought the following:
 1. *"The Writ and service of the Writ upon the Defendant be set aside.*
 2. *The Order for leave for service out of the jurisdiction be discharged.*
 3. *A declaration that, in the circumstances of the case, the court has no jurisdiction over the Defendant in respect of the subject matter of the claim, or the relief sought in the action.*
 4. *That time for filing a Defence in the present case be extended to a date not less than 21 days after the Judgment of this Honourable Court in the present application.*
 5. *The Plaintiffs shall pay the costs of the Defendant."*
3. The Defendant's primary challenge brought pursuant to Order 12, r. 8 (1) of the Grand Court Rules is to the jurisdiction of the Cayman Court.
Order 12, r. 8 (1) states:



"A defendant who wishes to dispute the jurisdiction of the Court in the proceedings by reason of any such irregularity as is mentioned in rule 7 or on any other ground shall give notice of intention to defend the proceedings and shall within the time limited for service of a defence, apply to the Court for –



- a) *An order setting aside the writ or service of the writ on him;*
- b) *An order declaring that the writ has not been duly served on him;*
- c) *The discharge of any order giving leave to serve the writ on him out of the jurisdiction."*

4. The Defendant asks this Court to discharge the order granting the Plaintiffs leave to serve the writ on her out of the jurisdiction and to set aside such service.
5. The Defendant submitted two grounds upon which she states that the Court should move to discharge the 17th of August 2017 Order. The first of these was concerned with the criteria for grant of leave under Order 11 r.1 (1) and the other attacked the court's finding of jurisdiction under Order 11 r.(4).
6. The Defendant's first challenge was that none of the conditions set out under Order 11 r.1 which would make the grant of leave permissible by the Court have been satisfied on the facts of the instant case.
7. Order 11 r. 1 sets out the criteria for grant of leave for service or a writ outside of the jurisdiction. Specifically, the Defendant contends that r.1(1)(a)-(ff) are inapplicable and that r. 1(1) (g) could not be invoked as the subject matter of the action is not land but the specific performance of a contract. The Defendant submitted that it was premature to say that the subject matter is land as there is this is as yet no right of possession or similar established. With regard to r.1 (1)(h) Counsel for the Defendant argued that the Court considering the application could not have found that the contract was one which affected land situate within the jurisdiction, this latter argument was, he submitted, further

strengthened by the fact that the contract was incomplete and not a binding or valid agreement to purchase land within the laws of the Cayman Islands.

8. In answer to this submission the Plaintiffs say that the Defendant has confused the subject matter of the contract with the remedy sought by the Plaintiffs. The Plaintiffs submit that: "The subject matter is land, whatever the status of the contract. The remedy requested is specific performance. If the contract is valid the remedy will be granted. But invalidity does not change the subject matter."
9. The entire basis of the Plaintiffs' claim is with regard to an agreement for the purchase of land. This the Defendant accepts as set out in the factual summary at paragraph 1 of the filed skeleton submissions and also in the grounds of the application as set out in the summons at paragraph b) where the Defendant states:

"The subject matter of the claim, being the contract for the sale of land dated 24 May 2014 ("the Contract") is expressly governed by the laws of the State of Michigan, USA. Further the Arbitration Clause envisages arbitration with Michigan."

10. The Defendant appears to be asking this Court to find that the subject matter of the contract changes if the contract is found to be enforceable. The matters and issues raised by the Defence to counter the Plaintiffs' claim for specific performance of the contract for the purchase of the land cannot, without a determination on same being made, take away from the fact that the Plaintiffs' claim has been brought to 'construe, rectify, set-aside or enforce an act, deed, will, contract, obligation or liability affecting land situate within the jurisdiction'.¹ I find that the Defendant's argument on this point is entirely misconceived. There was ample evidence before the Court from which the Learned Judge could have found as he did, that the provisions of Order 11 r.1 (1) were satisfied upon the application for leave.

¹ See Order 11, r1 (1) (g) and (h)
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11. An application for leave to serve outside the jurisdiction is governed by Order 11 r.4 which states as follows at r.4 (1) and (2):

(1) *"An application for the grant of leave under rule 1(1) must be supported by an affidavit stating:*

- a) *The grounds on which the application is made;*
- b) *That in the deponent's belief the plaintiff has a good cause of action;*
- c) *In what place or country the defendant is, or probably may 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."*

12. The Plaintiffs must demonstrate that they have a good cause of action and that there is a serious issue to be tried.
13. The Defendant's second challenge concentrated on the issue of whether the Court can find that the case is *a proper one for service out of the jurisdiction*. The Defendant submits that this claim is not a proper case for service outside of the jurisdiction because Michigan is the more appropriate forum for resolution of the Plaintiffs' claim. The Defendant therefore contends that the Plaintiffs should be required to advance their claim in Michigan in all the circumstances of the case. Counsel for the Defendant referred this court to the case of *Spiliada*² and noted that the relevant considerations should include the following:

- a) *"Whether justice can be done in the other forum at substantially less inconvenience or expense;*
- b) *The law governing the relevant transaction;*
- c) *The place where the parties reside or carry on business."*³

² *Spiliada Maritime Corp. v Cansulex* [1986] UKHL 10

³ See Defendant's submissions filed on the 10th of August 2017 at page 4

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14. The Defendant states that if the proceedings are heard in the Cayman Islands that the costs involved are likely to be disproportionate. In her affidavit filed in support of the instant application the Defendant states:



"In all the circumstances, the Cayman Islands appears to be an inappropriate jurisdiction in which to bring proceedings to enforce the Agreement. The present litigation concerns a contract executed in the State of Michigan, explicitly governed by agreement between the parties by the laws of the State of Michigan, and involving parties who are all resident in the State of Michigan. Conducting such litigation through the Courts of the Cayman Islands will serve to do nothing other than run up very significant costs in service of Orders outside of the jurisdiction. Any remedies sought, injunctive or otherwise, would have to be subject to further application through the County Court of the State of Michigan to bring them into effect, increasing costs further."

15. The Defendant further reiterated in her Skeleton Argument:

"If proceedings heard in Cayman, costs likely to be disproportionate:

- a) All parties reside and work in Michigan;*
- b) Therefore necessary for parties to travel to/from Michigan to give evidence, and for accommodation while on the Islands;*
- c) Michigan legal experts required to interpret contracts in light of law of State of Michigan, significantly increasing legal costs and significantly lengthening court time;*
- d) If judgment given in Cayman, would need to transfer it back to Michigan for enforcement in any event, including service out of the*

jurisdiction, further application to enforce through the Michigan Courts required.”⁴

16. The Defence argues that, *on a costs and convenience basis*, the courts of the Cayman Islands are not the appropriate jurisdiction for either the Plaintiffs or the Defendant.
17. On the issue of the law governing the relevant transaction, the Defendant referenced the Agreement itself to support her argument on the more appropriate forum for resolution of the issues between the parties. The “CONTROLLING AGREEMENT” clause of the Agreement is set out in its entirety here:



“CONTROLLING AGREEMENT: This contract represents the official agreement between Purchaser and Seller. This contract is subject to the laws of the State of Michigan, in the U.S.A. However, in order to satisfy this contract, the Parties hereby agree to hire legal counsel on the island of Grand Cayman to draft a real estate purchase contract that is legally binding in the jurisdiction of the Cayman Islands. Such contract shall be drafted in a manner to replicate the terms and intent of this purchase contract. In the event that certain clauses are illegal, impractical or not-applicable under Cayman law the Parties hereby agree to resolve those differences by unanimous written joint consent and document that joint consent in the form of an addendum to this contract. All expenses of legal expenses shall be paid for by the Purchasers.”

18. The Defendant submits that the express agreement between the parties was that the Agreement be governed by the state of Michigan in the U.S.A. and asks this court to find that this evidence of the parties’ agreement as to jurisdiction should be conclusive especially as there were no other terms or any other implication or agreement that the Courts of Cayman were to have jurisdiction. Counsel for the Defendant also pointed to the Dispute

⁴ Filed Skeleton Argument at page 4

Resolution clause in the Agreement which refers to the Michigan Association of Realtors and the American Arbitration Association's arbitration service for resolving disputes arising from real estate transactions to supports his argument of the parties' intention.

19. The Defendant further submitted that the contract may be void and or unenforceable under the laws of the Cayman Islands as the Controlling Agreement Clause set out that another agreement, a real estate purchase contract, was within the contemplation of the parties.
20. Finally, the Defendant states, all of the parties are resident in Michigan, that the execution of the agreement took place in Michigan, that all payments under the agreement had been made in Michigan and therefore Michigan was the obvious and natural place for resolution of all issues.
21. For the Plaintiffs, on the issue of enforcement, Counsel argued that there is no question that the Court should lean toward finding that Cayman was the more appropriate forum. The Plaintiffs' argument was that:



"No Michigan Court can grant an order for the specific performance of a real estate purchase agreement regarding land in the Cayman Islands. That must be self-evident. The most that a Michigan Court can do is grant a declaratory order that the Plaintiffs are entitled to the land. If the trial is held in Michigan the Plaintiffs will have to suffer the additional expense and delay of a second trial in the Cayman Islands to obtain specific performance. As suggested above, that is a severe juridical disadvantage that should not be visited upon the Plaintiffs without a compelling reason.

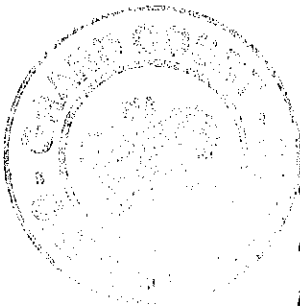
The Defendant seeks to turn this argument on its head by asserting that any Judgment granted here would have to be enforced in Michigan by a second action, presumably because the Defendant resides there (DS, para. 18.1.4). That is a misconception. If the Grant Court grants an

Order for specific performance and the Defendant chooses not to comply, the Court would simply direct the Clerk of the Court to execute the required documentation. This is a well-recognized and long-standing mechanism by which the Court enforces Orders of a mandatory nature.”

22. The Plaintiffs also invited the Court to consider that “ the following are additional factors in favour of Cayman as the most convenient forum:

- a) *Most of the Plaintiffs’ documents are here;*
- b) *At least one witness – the Strata Manager – is here; and*
- c) *It is at least arguable that, despite the choice of law clause, the law of the Cayman Islands and not that of Michigan will govern...”*

23. In response to the Defendant’s argument that the Agreement expressly states that it is to be governed by the law of the state of Michigan, the Plaintiffs agreed that all aspects of the contract including questions concerning its formation and validity are to be given the construction they would bear under Michigan law. However, they argue that:



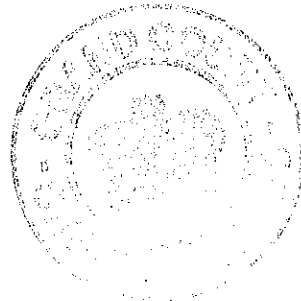
“The state of foreign law is a question of fact, to be proved by credible evidence given by, in this case, a Michigan attorney. There is no such expert evidence adduced by either party. The result is that questions of Michigan law are to be resolved on this application as if Michigan law is identical to the law of the Cayman Islands: Dicey, op. cit., Rule 185(2), p. 1110.”

Court’s Analysis and Order

24. The overriding principle applicable on consideration of this application is that the Court must determine “the forum in which the case could be tried more suitably for the interest of all the parties and for the ends of justice.” A Court must consider all the circumstances of the case including matters of costs, delay and inconvenience as well factors such as the

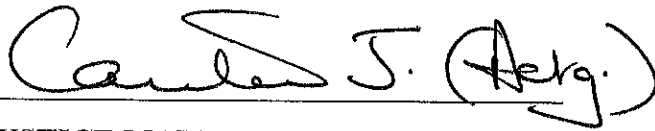
nature of the dispute, legal and practical issues involved and, where relevant, questions of local knowledge, availability of witnesses and their evidence and expense.

25. The Plaintiffs' claim is for specific performance under the Agreement. The Plaintiffs argue forcefully, and this Court accepts that it is clearly arguable that the agreement contains all of the element of an enforceable contract and may indicate an intention to be legally bound. Any Court considering the main issues in contention between the parties on the instant claim will therefore need to consider what was said and agreed between the parties at the time that the Agreement was made. It is not in issue that all discussions between the parties took place in Michigan. There were no discussions in the Cayman Islands.
26. The parties expressly agreed that the governing law of the Agreement would be Michigan. The Plaintiffs have advanced no proper reason to go against what is essentially the parties' stated preference for the governing law relating to the Agreement. The alleged breach of the agreement and the factual circumstances surrounding same all occurred in Michigan. The fact that the subject of the Agreement is land situated in the Cayman Islands is not a determinative factor in all the circumstances of this case.
27. I accept the Defendant's arguments that there could be the significant cost implications which may arise from the claim being heard in the Cayman Islands. The Plaintiffs' argument that most of their documents are in Cayman does not advance their argument much further nor is the fact that one of the Plaintiffs' witnesses resides in the Cayman Islands. The parties involved in the claim are all residents in Michigan. I find that the Defendant has established that Michigan is clearly the more appropriate forum for the resolution of the instant dispute.



28. The Court's Order:

- (i) This action is stayed and the Writ and service of the Writ upon the Defendant is set aside on the ground that the proper and appropriate forum for the trial of this action is not the Cayman Islands.
- (ii) The Order for leave for service out of the jurisdiction is discharged.
- (iii) The Plaintiffs shall pay costs to the Defendant.



A handwritten signature in black ink, appearing to read 'Carter J. (Actg.)', written over a horizontal line.

**HON. JUSTICE MARLENE I. CARTER
JUDGE OF THE GRAND COURT (ACTG.)**

