The Court of Appeal for Bermuda

CIVIL APPEAL No 13 of 2013

Between:

KADER HOLDINGS COMPANY LIMITED

Appellant

-v-

DESARROLLO INMOBILIARIO NEGOCIOS INDUSTRIALES DE ALTA TECHNOLOGIA DE HERMOSILIO, S.A. De CV

Respondent

Before: **Evans, J.A.**
Ward, J.A.
Bell, A.J.A

Appearances: Robert Howe, QC, and Henry Tucker, Appleby (Bermuda) Limited, for the Appellant
Jonathan Nash, QC and Scott Pearman, Conyers Dill & Pearman Limited, for the Respondent

Date of Hearing: **20 & 21 November 2013**
Date of Judgment: **10 March 2014**

JUDGMENT

Bell, Acting J.A.

Introduction

1. The Appellant in this case, Kader Holdings Company Limited ("Kader") appeals from a ruling of the Chief Justice dated 9 July 2013, in which he granted the Respondent, the Plaintiff at first instance ("Desarrollo"), summary judgment in respect of its claim to enforce a judgment given by the Honorable James A

Soto, a judge of the Superior Court of the State of Arizona, on 8 June 2011. That judgment had been the subject of an appeal to the Court of Appeals for the State of Arizona, which affirmed the first instance judgment on 16 April 2012. A petition for a review to the Supreme Court of the State of Arizona was denied on 25 September 2012.

2. Desarrollo is a Mexican real estate company, and Kader is a company incorporated in Bermuda with its principal place of business in Hong Kong; its business is in the toy industry. The Chief Justice's judgment was for the sum of US$10,757,280.82, with interest accruing at the statutory rate.

3. The background to the dispute between the parties concerns the construction of a toy factory in the Mexican state of Sonora. Desarrollo agreed to undertake the construction, and entered into a lease with a company which was at one time a subsidiary of Kader's, known by the abbreviation Sinomex, and as part of the overall contractual arrangements Kader entered into a guarantee of Sinomex's performance under the lease. Suffice to say that there are various issues between the parties in relation to both the lease agreement and the guarantee, but resolution of those disputes is of course not necessary for the purpose of this appeal.

4. I will review the various steps taken in the Arizona proceedings in due course, but would at this stage simply make the comment that the issues on this appeal come down to one relatively narrow issue; did Kader submit to the Arizona proceedings by making a voluntary appearance, and counterclaiming in those proceedings, such that the Second and Third Cases of Rule 43, as set out in the 15th edition of *The Conflict of Laws* by *Dicey, Morris & Collins*, apply in this case. These are in the following terms:-

> "Second Case – If the person against whom the judgment was given was claimant, or counterclaimed, in the proceedings in the foreign court.

> Third Case – If the person against whom the judgment was given, submitted to the jurisdiction of that court by voluntary appearing in the proceedings."

The Fourth Case was considered briefly by the Chief Justice, and I have dealt with this with similar brevity in paragraph 25 below.

5. There is in fact very little between the parties either in relation to the facts or the law, and perhaps the critical area of dispute between the parties turns on the content and effect of the verified affidavit and declaration of the Honorable Thomas A Zlaket, who was the Chief Justice of the Arizona Supreme Court from 1997 until 2002. That affidavit was prepared for the purposes of proceedings in Hong Kong (to which I will come) but was, as I understand it, put before the Bermuda Court by agreement, and was relied upon by Kader in support of its contention that it had not waived its jurisdictional challenge under Arizona law, and had not submitted to the jurisdiction of the Arizona Superior Court.

Enforcement Proceedings Elsewhere

6. Desarrollo commenced proceedings against Kader in Hong Kong on 9 May 2012, seeking to enforce the Arizona judgment there. On 14 November 2012, Desarrollo applied to the Hong Kong court for summary judgment; directions were given for the filing and service of evidence, and a hearing date set for 16 April 2013. On 20 March 2013, Desarrollo indicated its intention not to proceed with its application for summary judgment in Hong Kong and to seek directions for a speedy trial, having concluded that, taking into account factors such as an inevitable appeal, the likelihood was that the matter would not be resolved more speedily by a summary judgment application in any event. The Hong Kong proceedings are now set for trial in July 2014.

7. After the issue of the Hong Kong proceedings, Desarrollo issued proceedings in England on 26 October 2012, said to be in nearly identical form to the Hong Kong proceedings. The English proceedings required permission for service to be effected on Kader in Hong Kong, and such permission was given by Master Leslie on 22 November 2012. On 21 January 2013, Kader applied to set aside that order on forum grounds. Desarrollo then filed a summary judgment application on 21 March 2013, and the jurisdictional challenge and summary judgment application were heard before Master Leslie, who issued his judgment on 19 April 2013, declining to set aside the permission to serve out of the jurisdiction and granting summary judgment to Desarrollo. That judgment was also the subject of an appeal, to Carr J, who delivered her judgment on 29 July 2013. In it she concluded that Kader's defence had a real prospect of success, and that there were issues which as a matter of justice merited ventilation at a full hearing. Consequently, she granted permission to appeal and allowed the appeal on summary judgment. The English action is now scheduled for trial in March 2014.

8. Desarrollo has also taken proceedings to enforce the Arizona judgment elsewhere in the United States of America, though this Court has relatively little detail of such proceedings, and apparently they are not relevant to this appeal.

The Arizona Proceedings

9. Desarrollo took the proceedings which ultimately led to judgment against Sinomex and Kader, in February 2003. In January 2004 Kader moved to dismiss the proceedings, arguing that the Arizona trial court lacked personal jurisdiction. A year later the Arizona court denied the motion, finding that the forum selection clause in the amendment to the lease was binding on Kader.

10. In March 2005, Kader filed a cross-claim against Sinomex and a counterclaim against Desarrollo. In May 2005, Desarrollo filed a motion for partial summary judgment on the issue of Kader's liability for the lease payments as guarantor, Sinomex having failed to fulfil its obligations under the lease. Kader filed a cross-motion for summary judgment on the same issue. Desarrollo filed a separate motion to dismiss Kader's counterclaim, and the trial court granted that motion in December 2005. The court then granted Desarrollo's motion for partial summary judgment in August 2007, and denied Kader's two motions for reconsideration of that decision.

11. The matter then proceeded to a bench trial solely on the issue of damages, in April 2010. The Arizona trial court issued what was described as an "under-advisement ruling" on 4 March 2011, awarding Desarrollo damages in a sum of approximately US$3.5 million, together with interest and taxes. Final judgment was dated 8 June 2011 and was entered on 11 June 2011. This judgment, according to Desarrollo's skeleton argument, was in a total amount of approximately US$10.5 million. Following final judgment, Kader appealed to the Court of Appeals for the State of Arizona.

12. Before the appellate court, Kader argued that the trial court lacked personal jurisdiction over it, on the ground that the forum selection clause contained in the lease amendment did not apply to Kader as guarantor, and that even if it did, the clause was unreasonable and therefore unenforceable. It is to be noted that Desarrollo argued before the appellate court that Kader had waived the issue of jurisdiction on appeal by filing the cross-claim against Sinomex and the counterclaim against Desarrollo. The Arizona appellate court held that a personal jurisdictional defence could be waived only where the defendant filed a permissive pleading before the trial court ruled on the jurisdictional issue. Since Kader had filed its cross-claim and counterclaim after the trial court denied its motion to dismiss, the Arizona appellate court held that the issue of jurisdiction had not been waived. The appellate court carried on to find that

Kader was subject to the forum selection clause of the lease amendment. Kader made any number of other arguments on non-jurisdictional grounds. It submitted that the trial court had erred in granting summary judgment because Desarrollo and Sinomex had improperly modified the lease without Kader's consent, thereby extinguishing the guarantee. Kader further argued that Desarrollo and Sinomex had failed to comply with the terms of the lease in relation to the exercise of certain options, and argued that it was not bound by a lease extension because Desarrollo had violated the implied covenant of good faith and fair dealing inherent in every contract. Kader argued that the implied covenant encompassed a duty to mitigate, that the issue was accordingly relevant to the question of damages, and presented evidence on that issue. But the appellate court rejected those arguments on the merits, as it did the jurisdictional objections, and affirmed the trial court's grant of summary judgment. The Supreme Court for the State of Arizona simply denied the petition for review which Kader had made.

The Zlaket Affidavit

13. Against that background, which comes largely from the judgment of the Arizona Court of Appeals, it is necessary to consider the expert evidence of Justice Zlaket.

14. Justice Zlaket identified the areas on which he had been asked to offer his opinions and comments as follows:-

    i. whether Kader submitted to the jurisdiction of the Arizona court;
    ii. whether commencing proceedings in Arizona was contrary to the agreement between Desarrollo and Kader; and
    iii. whether jurisdiction was properly exercised over Kader by the Arizona Superior Court and thereafter by the Arizona Court of Appeals.

15. None of these issues is dispositive of matters so far as this Court is concerned, and arguably the second of them is not relevant at all. I will come in due course to the law and the application of it, but will first deal with those parts of Justice Zlaket's expert evidence upon which Kader relied.

16. The key matter is that, according to Justice Zlaket, Kader did not waive its jurisdictional challenge under Arizona law by defending itself and asserting affirmative claims against Desarrollo and Sinomex after its motion had been denied. Justice Zlaket indicated that under the American system of civil justice, if a defendant has a claim against the plaintiff arising from the same transaction as the complaint, the defendant is required to counterclaim *or otherwise waive those causes of action* (emphasis added). I stress those last words because this is the nub of Desarrollo's criticism of the conclusions which Kader seeks to draw from Justice Zlaket's expert evidence. As Mr. Nash for Desarrollo put it, Justice Zlaket does not say that Kader was bound to litigate on the merits; rather that if it did not counterclaim, those causes of action would be waived. Self-evidently, that waiver would only arise in the context of a trial on the merits. But the difficulty with this argument is Justice Zlaket's conclusion, appearing later in his affidavit, that Kader did not submit to the jurisdiction of the Arizona courts.

17. Justice Zlaket repeated his evidence in relation to the requirement to assert defences and pursue claims in the following terms:-

> "Again, litigating the merits after a motion to dismiss for lack of jurisdiction is denied does not amount to a submission to jurisdiction or a waiver of the jurisdictional objection. For a number of reasons, including judicial economy, litigants are required to assert all defenses and pursue all claims even though jurisdiction may be a reserved issue. By vigorously litigating in the Arizona Superior Court, the Arizona Court of Appeals, and seeking review by the Arizona Supreme Court, Kader did not, under

Arizona law, submit to the jurisdiction of the Arizona Courts."

18. Justice Zlaket's evidence that as a matter of Arizona law Kader did not submit to the jurisdiction of the Arizona courts obviously must be accepted. But his evidence in relation to the so called compulsory counterclaim must be read in its entirety.

English Law

19. I start by expressing the view that neither section 32 nor 33 of the Civil Jurisdiction and Judgments Act 1982 of England ("the CJJA") has any relevance for the purposes of this appeal. Nevertheless, I will set them out since they are referred to in some of the authorities and will therefore put the English cases in context. So far as is material, section 32 provides as follows:-

> "(1) Subject to the following provisions of this section, a judgment given by a court of an overseas country in any proceedings shall not be recognised or enforced in the United Kingdom if –
>
> (a) The bringing of those proceedings in that court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of that country."

20. It is common ground that the guarantee contained no jurisdiction clause. Hence section 32 has no relevance for the purpose of this appeal.

21. Section 33 so far as material, provides as follows:-

> "(1) For the purposes of determining whether a judgment given by a court of an overseas country should be recognised or enforced in England and Wales or Northern Ireland, the person against whom the judgment was given shall not be regarded as having submitted to the jurisdiction of the court by reason only of the fact that he

appeared (conditionally or otherwise) in the proceedings for all or any one or more of the following purposes, namely –

(a) to contest the jurisdiction of the court;

(b) to ask the court to dismiss or stay the proceedings on the ground that the dispute in question should be submitted to arbitration or to the determination of the courts of another country;

(c) to protect, or obtain the release of, property seized or threatened with seizure in the proceedings."

This of course is the section which was enacted to reverse the effect of the case of *Henry v Geoprosco* [1976] QB 726. But in that case there was no hearing on the merits, because having failed to set aside the service out of the jurisdiction, and a stay of proceedings having been refused, the defendant took no further part in the action. The factual background was very different from that in this case, where there was considerable argument on the merits. Of the three alternatives set out in the subsection above, neither the second nor third is relevant, and the issue is whether by arguing the merits as it did, Kader went beyond contesting the jurisdiction of the Arizona court.

The Position in Bermuda

22. It is common ground that the bases upon which the Bermuda Court has jurisdiction to enforce a foreign judgment are those set out in Rule 43 of *Dicey, Morris & Collins*, as referred to in paragraph 4 above. In his Ruling, the Chief Justice took the view (paragraph 32) that as a matter of Bermudian common law the question of whether a defendant had voluntarily submitted to the jurisdiction of the foreign court was subject to "far more fluid legal policy considerations than under English law". He then set out certain circumstance where the bar might be higher or lower in Bermuda than under English law.

23. Counsel for Kader submitted that the Chief Justice had erred in his approach to the question of submission to the jurisdiction of the Arizona courts, by not applying the correct test, formulating his own (incorrect) test, and erring in principle on the application of that test to the facts. For my part, I see no grounds for holding that the common law in Bermuda has diverged from that in England, in circumstances where the English statutory provision, which Bermuda does not have, does not come into play. Indeed, in paragraph 27 of his Ruling, the Chief Justice recognised the assistance which could be obtained from the English decisions when considering what forms of participation on the merits of the foreign claim would constitute a voluntary submission to the foreign court's jurisdiction.

24. I respectfully agree with the sentiment expressed in that paragraph by the Chief Justice, and note that in the case of *Star Reefers Pool Inc v JFC Group* [2012] 4 JBVIC 0201, the Commercial Court judge of the British Virgin Islands, Bannister J, took a similar view, referring to the earlier English cases in the following terms:-

> "I have come to the conclusion that I should not follow these decisions here. The reason is they have now become dead letters in the jurisdiction in which they previously applied and that for me to apply them here, where they are not binding, would be to introduce into the law in this jurisdiction an archaic rule which would throw English and BVI practice and procedure out of alignment."

It seems to me sensible that the position in Bermuda should mirror that in England, as well as that in other common law jurisdictions, and for my part I do not understand the rationale for applying any different test. I therefore turn to consider the different cases as set out in *Dicey, Morris & Collins.*

The Fourth Case - Agreement to Submit to the Jurisdiction

25. In his Ruling, the Chief Justice held at paragraph 13 that it was clear that the Fourth Case could not apply to Kader as a freestanding basis of jurisdiction,

unless the Court itself determined that the jurisdiction clause in the lease also formed part of the guarantee, and he proceeded thereafter to address the Second and Third Cases. In the English proceedings, Carr J took the view that Kader had a real prospect of arguing successfully that it ought to be permitted to reopen the issue of jurisdiction decided against it by the Arizona Court, and that no issue estoppel arose. There was an issue before this Court as to whether the issue on the Fourth Case could be pursued in the absence of a Respondent's Notice. For my part, I find the point academic, since I concur with the view expressed both by the Chief Justice and Carr J that summary judgment should not be granted on this ground.

The Second and Third Cases – Counterclaim or Voluntary Appearance

26. The Chief Justice held that on the facts of the present case, there was no meaningful delineation between the Second and Third Cases, and I agree with him that in practical terms it is convenient to deal with the two together. In the English proceedings, Carr J dealt with the Third Case first, and in relation to the filing of the counterclaim, held that there was an overlap between this ground, and the Third Case.

The Relevant Law in Bermuda

27. There is relatively little Bermuda case law dealing with the effect, if any, of section 33 of the CJJA on the common law position as it pertains in Bermuda. The only relevant authority appears to be the ruling of Ground J (as he then was) in the case of *Arabian American Insurance Company (Bahrain) E.C. v Al Amana Insurance and Reinsurance Company Limited (Civil Jurisdiction No. 38 of 1993, Ruling dated 4 January 1994).* In that case, Ground J referred to the case of *Henry v Geoprosco.* As mentioned above, and as referenced by the Chief Justice, it is generally accepted that section 33 was enacted to reverse the effect of much criticised common law decisions, culminating in *Henry v*

Geoprosco. The Chief Justice said as much in his Ruling, referring also to Ground J's ruling in *Arabian American*, in which the latter said:-

> "That decision left open the question whether an appearance to contest the existence of a jurisdiction constituted submission. That decision has been much criticised, and I frankly have doubts as to whether it would, or should, now be followed. Certainly I consider that, if it is to be followed, it should be limited to its strict ratio decidendi."

28. The Chief Justice also referred to the case of *Muhl v Ardra* [1997] Bda LR 36. However, that case was not concerned with jurisdiction under Rule 43, but rather with the application of Rules 51 and 52, and has no relevance for the purpose of this appeal. I therefore turn to consider the recent English authorities.

The Modern English Cases

29. I start with the case of *Harada v Turner* [2003] EWCA Civ 1695. This was a case concerning appeals against decisions of employment tribunals in England. Harada made a jurisdictional objection, but having failed to persuade the employment tribunal to postpone the hearing, took no further part in the proceedings on the basis that it did not wish to submit to the jurisdiction, based on a fear that argument on the merits would contravene the provisions of the governing article. Of particular interest in that case is a reference to the judgment of Denning LJ (as he then was) in the case of *Re Dulles Settlement Trusts* [1951] 2 All ER 69, where he said:-

> "I quite agree, of course, that if he fights the case, not only on the jurisdiction, but also on the merits, he must then be taken to have submitted to the jurisdiction, because he is then inviting the court to decide in his favour on the merits, and he cannot be allowed, at one and the same time, to say that he will accept the decision on the merits if it is favourable to him and will not submit to it if it is

> unfavourable. But when he only appears with the sole object of protesting against the jurisdiction, I do not think he can be said to submit to the jurisdiction..."

30. Having cited that extract, Simon Brown LJ said:

> "The difficulty with Harada's reliance on that dictum, however, is that the common law position there exemplified has not survived Article 18, the whole rationale of which is to allow the merits to be contested without prejudice to the question of jurisdiction provided only and always that the jurisdictional objection has not been delayed until after, under national procedural law, there has already been a submission to the jurisdiction."

31. Simon Brown LJ then carried on at paragraph 35 to say:-

> "It seems to me nothing short of absurd to suggest that, having failed to stop the merits hearing being listed, and then failed again, once it was listed, to have it adjourned, Harada could conceivably have been held to have submitted to the jurisdiction and thereby abandoned its outstanding appeal against the earlier jurisdictional ruling had it, under continued protest, participated in the merits hearing."

32. I recognise that Simon Brown LJ's comments were made in the context of Article 18 of the Brussels Convention, but it does seem clear that the common law had by this time moved on from the position as it was when Lord Denning gave his judgment in *Dulles*, more than sixty years ago. This also seems clear from the judgment of Lord Collins in *Rubin,* to which I will come.

33. I next turn to the case of *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant* JSC [2012] 1 WLR 920. The facts are relatively complex and concern proceedings in the Republic of Kazakhstan when there was an arbitration agreement, which led to the grant of an anti-suit injunction in England. At issue was whether the claimant in the English proceedings, AES UK, had submitted to the jurisdiction of the Kazakhstan court by putting in a defence on the merits under protest. It was common ground that as a matter of Kazakhstan law, there was no such thing as a protest to the jurisdiction. On

the submission issue, as defined, the test which AES UK had to meet was to show that it had a good arguable case. When the matter reached the Court of Appeal, Rix LJ held as follows, at paragraph 186:-

> "In these circumstances, I have ultimately come to the conclusion that it would not be right for this court to reverse the careful decision of the judge that there was at least a good arguable case that what occurred in the Kazakhstan Economic Court between 28 July and 5 August (the judge refers to 4 August at one point) did not amount to a submission to its jurisdiction. It was obvious from beginning to end that the operator was presenting and preserving its challenge to the court's jurisdiction on the ground of the parties' arbitration agreement, if necessary by way of appeal."

I recognise that both of the parties in that case were companies incorporated and carrying on business in the Republic of Kazakhstan, which puts them in a different position from Kader, but it seems to me that the principle to be derived from this case is helpful.

34. I now turn to the position in relation to voluntary appearance, as now set out in *Dicey, Morris & Collins*. At Paragraph 14-073, the learned authors state:-

> "The general thrust of the authorities, which were all examined in *AES Ust-Kamenogorsk Hydropwer Plant LLP v AES Ust-Kamenogorsk Hydropower JSC* is that for so long as the defendant asserted, and is obviously still asserting, as his primary defence that the court has no jurisdiction over him in relation to the merits of the claim, then even if he also takes steps which are purposeful in relation to the merits of the claim, his doing so should not be taken to mean that he has submitted to the jurisdiction for the purposes of the common law of submission and has abandoned his challenge for the purpose of s.33. The real question for the English court should not be whether the defendant has taken a step in proceedings which prepare for the trial of the merits, but whether he has chosen to abandon his challenge to the jurisdiction. In answering this, the English court is not bound to follow the law of the foreign court on whether a defendant has succumbed to its jurisdiction; and if the defendant had "no real option but to act as it did", as it was put in *AES Ust-Kamenogorsk*

Hydropower Plant LLP v AES Ust-Kamenogorsk Hydropower Plant JSC, the court may be reluctant to find that it has submitted to the jurisdiction."

The sentence which follows the reference to s. 33 clearly places emphasis on whether a defendant "has chosen to abandon his challenge to the jurisdiction".This suggests that any step taken in regard to the merits must, at least arguably, be subject to consideration as to whether the jurisdictional challenge remains while steps relating to the merits of the action are pursued.

35. Next, I would refer to the most recent English authority, which is *Rubin v Eurofinance SA* [2013]1 AC 236. In that case, Lord Collins set out the state of the law in the following terms:-

> "159 The general rule in the ordinary case in England is that the party alleged to have submitted to the jurisdiction of the English court must have "taken some step which is only necessary or only useful if" an objection to jurisdiction "has been actually waived, or if the objection had never been entertained at all": *Williams & Glyn's Bank plc v Astro Dinamico Cia Naviera SA* [1984] 1 WLR 438, 444 (HL) approving *Rein v* Stein (1892) 66 LT 469, 471 (Cave J).
>
> 160 The same general rule has been adopted to determine whether there has been a submission to the jurisdiction of a foreign court for the purposes of the rule that a foreign judgment will be enforced on the basis that the judgment debtor has submitted to the jurisdiction of the foreign court: (references omitted).
>
> 161 The characterisation of whether there has been a submission for the purposes of the enforcement of foreign judgments in England depends on English law. The court will not simply consider whether the steps taken abroad would have amounted to a submission in English proceedings. The international context requires a broader approach. Nor does it follow from the fact that the foreign court would have regarded steps taken in the foreign proceedings as a submission that the English court will so regard them. Conversely, it does not necessarily follow that because the foreign court would not regard the steps as a submission that they will not be so regarded by the

English court as a submission for the purposes of the enforcement of a judgment of the foreign court. The question whether there has been a submission is to be inferred from all the facts.

162 It is in that context that Scott J said at first instance in *Adams v Cape Industries plc* [1990] Ch 433, 461 (a case in which the submission issue was not before the Court of Appeal):

> "If the steps would not have been regarded by the domestic law of the foreign court as a submission to the jurisdiction, they ought not...to be so regarded here, notwithstanding that if they had been steps taken in an English court they might have constituted a submission. The implication of procedural steps taken in foreign proceedings must...be assessed in the context of the foreign proceedings."

163 I agree with the way it was put by Thomas J in *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90,97:

> "The court must consider the matter objectively; it must have regard to the general framework of its own procedural rules, but also to the domestic law of the court where the steps were taken. This is because the significance of those steps can only be understood by reference to that law. If a step taken by a person in a foreign jurisdiction, such as making a counterclaim, might well be regarded by English law as amounting to a submission to its jurisdiction, an English court will take into account the position under foreign law."

Given the absence of any Bermuda case law to suggest that some other test is applicable, it does seem to me appropriate to have regard to this latest English authority, and to consider the issue of voluntary submission with Lord Collins' words in mind. However, before seeking to apply the appropriate test as enunciated by Lord Collins, I would first refer to the judgment of Carr J, made in what I might describe as equivalent English proceedings.

The Judgment of Carr J

36. Although this judgment was not referred to in detail by counsel, I have found it to be of assistance, not least because Carr J was dealing with the same broad issue on the basis of the same underlying facts. At paragraph 28 of her judgment, Carr J dealt with the test for summary judgment, indicating that it was common ground that in order to succeed, Desarrollo had to demonstrate that Kader had no real prospect of successfully defending the claim or the issue before the court, and that there was no other compelling reason why the matter should proceed to trial. According, she took the view that the standard of proof required of Kader was not high, since it needed to show that it had some real prospect of success, meaning that its case was better than arguable. In his written submissions, Mr. Howe for Kader said that the Court needed to be satisfied that one or other of the relevant cases was "unarguably made out". I prefer to look at matters as Carr J did, in terms of Kader's prospects of successfully defending the claim.

37. Carr J noted in paragraph 30 of her judgment that having been taken to some 20 or so authorities in total, on a purely impressionistic basis, it was fair to say that that indicated at the very least that there might be serious arguments to be had or issues to be tried. She also noted that in none of the cases to which she had been taken was a successful summary judgment the outcome, and indeed all but one had involved a full trial of the issues. Carr J made one other comment, in paragraph 31, with which I would respectfully disagree, which is in relation to the Hong Kong proceedings, where she referred to Desarrollo's "admission" that it could not there obtain summary judgment, which she said was not without significance. In fact, Desarrollo's Hong Kong solicitors had by letter dated 20 March 2013 indicated no more than that, taking into account factors like an inevitable appeal if an order for summary judgment were to be made, and the high likelihood of the matter having to be adjourned part heard, it appeared to Desarrollo that in practice the matter might not be resolved

"summarily" in any event. Desarrollo therefore chose not to proceed with the summary judgment application. Even if that were to be correctly characterised as an abandonment of the summary judgment application, that is not the same as an admission that summary judgment could not be obtained there. One can see the practical considerations which came into play, and for my part, I would not attach any weight to such abandonment. That said, it could of course also be said that if there were practical considerations, such as yet further appeals, which led to Desarrollo pressing on to trial in Hong Kong, those same arguments could be said to arise in respect of the Bermuda proceedings.

38. Having set out in some detail the evidence of Justice Zlaket, Carr J referred to the absence of counterveiling expert evidence, and concluded in paragraph 62 of her judgment that Kader's position on the issue of voluntary submission (or submission by voluntary appearance) was arguable. She took into account those paragraphs from *Rubin* which I have quoted above, saying that they made it clear that foreign law offered an important context against which to judge the question of submission. She then concluded in paragraph 69 of her judgment:-

> "But the test in my judgment is not whether Kader went beyond contesting jurisdiction. The correct test in law was, at least arguably, whether, in all the circumstances on the facts, Kader had waived its jurisdictional objection."

Taking Justice Zlaket's evidence into account, and on the facts, she held that at least arguably Kader had not so waived its jurisdictional objection.

Conclusion

39. I should at this point refer again to what Lord Denning said in *Dulles*, which, when paraphrased, formed part of Mr Nash's submission to Carr J, when he said that the English courts would not allow a party to fight a case for the chance of success, lose it, and then submit that one is not bound. This is of

course an attractive proposition at first blush, and is no doubt the reason that Carr J said (paragraph 77) that she could readily understand an instinct to grant summary judgment in a case like this if at all possible. But as I have said, it is clear that the common law has moved on since *Dulles*, and the issue of submission can no longer be considered without a view being taken as to the issue of waiver of the jurisdictional objection.

40. So one is therefore left with the test laid out by Lord Collins in *Rubin*, which requires a broader approach than simply looking at whether the steps taken by Kader in the Arizona proceedings would have amounted to a submission in English or Bermuda proceedings. The difficulty which then arises for this Court, in the context of a summary judgment application, is that the question of whether there has been a submission is left to be inferred from all the facts. In this regard, no doubt one of the critical issues is whether it can be maintained that Kader's arguments on the merits before the Arizona courts did amount to a submission by voluntarily appearance, in the absence of any waiver of the jurisdictional objection. In this regard, Justice Zlaket's evidence, set out in paragraph 17 above, leading to his conclusion that under Arizona law, Kader did not submit to the jurisdiction of the Arizona courts, is also significant. And despite Mr. Nash's submissions regarding the meaning of what Justice Zlaket said, the fact is that Justice Zlaket's conclusion is quite clear.

41. In these circumstances, it does seem to me to be impossible to conclude that Kader's defence has no real prospect of success. I do therefore find myself bound, looking at the facts of this case in the context of the development of the law in recent years, to take the same view as Carr J did in the English proceedings, and to hold that Kader's defence on the issue of submission by voluntary appearance has a sufficiently real prospect of success that it merits ventilation at a full hearing. One is conscious that this Court has been taken through all the authorities which a court would need to review at trial. But at a full hearing, the court would be considering matters on the basis of a different

burden of proof, and possibly on the basis of further expert evidence as to the effect of Kader's participation in the Arizona proceedings.

42. I would therefore allow Kader's appeal and set aside the order for summary judgment made by the Chief Justice.

Costs

43. I would expect costs to follow the event, and in the absence of an application to be heard on the issue, to be made within twenty-eight days, would order that Kader be entitled to its costs of this appeal and the application for summary judgment in the court below.

Bell, Acting J.A.

Ward, J.A.

Evans, J.A.

I agree, but with some reluctance because, as Bell AJA has observed, the primary facts are not in dispute; but there is a lack of clarity as to the correct legal test to be applied and it is unfortunate that this cannot be resolved at this stage. That is the position under English law, as Carr J has held, and in Bermuda there is the added complication that the common law is not subject to sections 32 and 33 of the Civil Jurisdiction and Judgments Act 1982. With regard to the third of Dicey & Morris`s four cases, both the jurisdiction and the merits issues in fact were "submitted" to, and ruled upon by, the Arizona Courts, and the submission was "voluntary" in the limited sense that the Appellants elected to raise them in the Arizona proceedings. But that may not be enough to constitute the "waiver" or "voluntary submission" that the third case is said to require. Moreover, the jurisdiction issue has been referred to trial in both England and Hong Kong, and it would be inappropriate, in my view, to allow summary judgment here.

Anthony Evans

Evans, J.A.