

## Not in your backyard! Taking steps in proceedings ruled not to be a barrier to 'forum non...

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Jersey's Court of Appeal has recently upheld the Royal Court's decision to stay an action on the ground of *forum non conveniens* even though the defendants had already taken steps in the proceedings, including filing a defence.

The underlying dispute concerned a business relationship between Leeds United Football Club Limited (**Leeds United**) and a Jersey company known as Admatch. Admatch was owned by Mr Weston and was operated with the assistance of Mr Levi (together **the Defendants**). When the business relationship terminated, Admatch owed Leeds United around £190,000. Leeds United subsequently issued proceedings against Admatch in Jersey (**Admatch Proceedings**). Admatch admitted that the money was owing, but asserted that it was entitled to set-off this liability against a debt that it claimed Leeds United owed to it.

With chances of recovering any money from Admatch waning, Leeds United brought a separate action against the Defendants personally, (**Personal Proceedings**), alleging that Admatch held the money owed on trust, which it had breached when Admatch paid the money away. The Defendants duly filed a defence in the Personal Proceedings. The defence stated that while the proper venue for the Personal Proceedings was England, the Defendants did not challenge the jurisdiction of the Jersey Court because the Admatch Proceedings were still ongoing in Jersey and it was convenient for the same Court to determine both proceedings.

Default judgment was later given in the Admatch Proceedings without the merits of the dispute being heard. This caused the Defendants' basis for not opposing forum in the Personal Proceedings to fall away. The Defendants subsequently applied to stay the Personal Proceedings on the ground of *forum non conveniens*. Leeds United argued that the application was too late, as by filing a

defence and taking other steps in the Admatch Proceedings, the Defendants had irrevocably submitted to the jurisdiction of the Jersey Court.

The Court of Appeal reviewed seemingly conflicting judicial authorities on whether a defendant was precluded from seeking a stay on the ground of *forum non conveniens* once it had participated substantively in proceedings. In particular, the Jersey Court of Appeal had previously allowed defendants to pursue an appeal of their application for such a stay, even though they had filed a defence in the substantive proceedings. In contrast, the Privy Council had mentioned in passing that a failure by defendants to apply to set aside orders for service out of jurisdiction did not disentitle them from applying for a stay on the ground of *forum non conveniens*, but only where they had not taken further active steps in the proceedings.

The Court of Appeal considered that the key factor in resolving the issue was that challenges to forum fall to be decided within the exercise of the Court's equitable jurisdiction. In exercising such jurisdiction, the Court is required to decide how the ends of justice can be best achieved and is not bound by the strict application of legal rules. The Court held that it would be inconsistent with the purpose of its equitable jurisdiction if a party's participation in proceedings prevented the Court from being able to consider what the ends of justice required in the particular circumstances. While the degree of a party's participation in proceedings and the timing of any application for a stay on the ground of *forum non conveniens* may be relevant in determining how the ends of justice may be best served, they do not operate as an absolute bar to applying for a stay. The ends of justice may still favour another jurisdiction, even though a defence has been filed. Thus, the Court held that the Defendants were not barred from applying for a stay.

In deciding whether to grant the stay, the Court noted that the Defendants had given notice that they considered England to be the most appropriate forum within a week of default judgment being given in the Admatch Proceedings and had applied for a stay less than two weeks later. Moreover, the Personal Proceedings were at an early stage. The Court of Appeal held that the Royal Court had been correct in granting a stay in such circumstances.

## Comment

Whilst participating in proceedings may not necessarily prevent a defendant from applying for a stay on the ground of *forum non conveniens*, it is clearly risky to do so. The longer a defendant leaves its application, the less likely the Court will be to grant it. While not specifically addressed by the Court of Appeal in its decision, the Royal Court had earlier warned that any delay in applying for a stay was an extremely significant factor in deciding whether a stay should be granted and that the more a defendant participates in proceedings without challenge and the greater the expense already incurred, the less inclined the Court will be to grant a stay. The Royal Court said that there comes a point in time when it simply becomes too late to allow a defendant to switch jurisdictions. Just where this point lies is not clear, but is best avoided.

Defendants that wish for proceedings to be heard in another jurisdiction should therefore apply for a stay at the outset and, in normal circumstances, they should be careful to avoid taking substantive steps in the proceedings. Alternatively, if a change in circumstances necessitates a stay being sought after substantive steps have already been taken (as in the present case), the application should be made as soon as practicable once the change of circumstances becomes known.

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