

**SUBMISSION TO THE JURISDICTION**

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**A. INTRODUCTION**

1 This paper seeks to summarise some of the recent cases on submission to the jurisdiction and what to do when a client wants to make a jurisdiction challenge.

2 In terms of submission to the jurisdiction, I deal with two separate circumstances in which the Court comes to consider questions of submission:

(1) When a domestic Court is asked to enforce a money Judgment awarded by a foreign Court (“foreign judgment”).

(2) When the domestic Court on a defendant’s application to challenge the jurisdiction of the domestic Court is faced with an argument that the defendant’s application should be dismissed because he has submitted to the jurisdiction (“jurisdiction challenge”).

3 In this context detailed consideration will be given to the various and differing procedural rules which exist in England & Wales, the BVI and Cayman, and seek to explain what can/should be done when the client has submitted and how this can be ameliorated.

**B. ENFORCEMENT OF FOREIGN JUDGMENTS AT COMMON LAW**

***Overview: Enforcement of Foreign Judgments at Common Law***

4 At common law a foreign judgment *in personam* for a certain sum is enforceable provided that the foreign court had, in the eyes of the English courts, jurisdiction over the defendant. See Rubin v Eurofinance SA [2013] 1 AC 236 *per* Lord Collins at para. 9:

“The theoretical basis for the enforcement of foreign judgments at common law is that they are enforced on the basis of a principle that where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained.”

- 5 The foreign court will be a court of “*competent jurisdiction*” in the circumstances described in **Rule 43** of Dicey & Morris, *The Conflict of Laws*, 15th ed (2012) (“**the Dicey Rule**”) at **14R-054**:

“Rule 43

Subject to Rules 44 to 46, a court of a foreign country outside the United Kingdom has jurisdiction to give a judgment *in personam* capable of enforcement or recognition as against the person against whom it was given in the following cases:

*First Case*- If the person against whom the judgment was given was, at the time the proceedings were instituted, present in the foreign country.

*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 voluntarily appearing in the proceedings.

*Fourth Case* - If the person against whom the judgment was given had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of that country [not relevant]”<sup>1</sup>

### ***Submission by presence***

- 6 The foreign court will have jurisdiction over a defendant when he is voluntarily present (whether temporarily or permanently) in the foreign country at the time the action was commenced: Adams v Cape Industries [1990] Ch 433 (CA) at pp. 518-20 and 530.<sup>2</sup> The rationale for this rule is that a person who is present in the foreign country has the benefit/protection of the law applicable in that country, and must “*take the rough with the smooth, by accepting his amenability to the process of its courts*”: Adams v Cape at p. 519.

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<sup>1</sup> This aspect of submission will not be considered in this article.

<sup>2</sup> It is well established by Adams v Cape that (at least in the context of a corporate defendant) where a subsidiary is used as a “*mere façade concealing the true facts*” it will be treated as the parent company’s *alter ego* (see p. 539) and thus the subsidiary’s presence will be treated as the parent’s.

- 7 It remains an open question whether constructive presence of the defendant is sufficient to give the foreign court jurisdiction: Vogel v Kohnstamm [1973] QB 133 at p. 141 *per* Ashworth J (cited without disapproval by Slade LJ in Adams at p. 522).

### ***Submission by being a claiming party***

- 8 In respect of the Second Case, Dicey explains:

“14-068

It is obvious that a person who applies to a tribunal as claimant is bound to submit to its judgment, should that judgment go against him, if **for no other reason than that fairness to the defendant demands this**. It is no less obvious that a claimant exposes himself to acceptance of jurisdiction of a foreign court as regards any set-off, counterclaim or cross-action which may be brought against him by the defendant. By the same token, a defendant who resorts to a counterclaim or like cross-proceeding in a foreign court clearly submits to the jurisdiction thereof.” [emphasis supplied]

### ***Submission on the facts***

- 9 In respect of the Third Case *Dicey* says:

“14-069

This case rests on the simple and universally admitted principle that **a litigant who has voluntarily submitted himself to the jurisdiction of a court by appearing before it cannot afterwards dispute its jurisdiction**. Where such a litigant, though a defendant rather than a claimant, appears and pleads to the merits without contesting the jurisdiction there is clearly a voluntary submission. The same is the case where he does indeed contest the jurisdiction but nevertheless proceeds further to plead to the merits, or agrees to a consent order dismissing the claims and crossclaims, or where he fails to appear in proceedings at first instance but appeals on the merits” [emphasis added]

- 10 In Golden Endurance Shipping SA v RMA Watanya SA [2016] EWHC 2110 at para. 28, Phillips J<sup>3</sup> described the theoretical basis for such a submission as being that:

“a party who voluntarily appears or participates in proceedings is considered by the common law to have accepted an offer from the opposing party who commenced the proceedings to accept the jurisdiction and be bound by its judgment. The touchstone of submission on this basis is therefore consent, although the question of whether consent has been given is to be judged objectively.”

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<sup>3</sup> Citing , *Briggs, Civil Jurisdiction and Judgments*, 6<sup>th</sup> Ed at para. 7.52, as authority for this proposition.

- 11 In Williams & Glyn's Bank Plc. v. Astro Dinamico Compania Naviera S.A. [1984] 1 W.L.R. 438 the House of Lords described the test for implying such consent as being:
- "in order to establish a waiver, you must show that the party alleged to have waived his objection has taken some step which is only necessary or only useful if the objection has been actually waived, or if the objection has never been entertained at all."
- 12 This is one of those tests which seem easy to understand when it is read, but harder to apply in practice. Of course there are the straightforward cases at either end of the spectrum: a party who takes no part at all in the foreign proceedings (plainly no submission) is at one extreme; a party who files a defence (plainly a submission) is at the other extreme. But there are very many cases which sit somewhere in between in the spectrum, and it is those which can cause difficulty.
- 13 Thus, at one end of the spectrum is Guiard v De Clermont [1914] 3 KB 145. There a defendant applied successfully to set aside default judgment and have judgment entered in his favour at first instance. The original judgment was restored by an appeal court and the defendant was held to have voluntarily submitted.
- 14 In Adams v Cape [1990] Ch 433 (at first instance), Scott J held that the filing of a consent order dismissing all the claims "with prejudice" amounted to a submission, but that other procedural steps (which included making an application for an adjournment, participating in various hearings, answering interrogatories and participating in settlement discussions at the behest of the foreign court) did not constitute a submission, because all of them, whilst not always stated so expressly, were carried out without prejudice to the defendant's challenge to jurisdiction.
- 15 Similarly, Metropolitan Tunnel and Public Works v London Electric Railway [1926] Ch 371 and The "Eastern Trader" [1996] 2 Lloyd's Law Rep 585 exemplify the principle that it will be difficult for the enforcing claimant to prove a submission to the jurisdiction in circumstances where the steps taken by the defendant in the foreign proceedings are prefaced by a letter stating that it is done without prejudice to the

objection that the Court has no jurisdiction over the defendant/should not exercise such jurisdiction as it does have.

- 16 In Akai v People's Insurance [1998] 1 Lloyd's Law Rep 90 at p. 97, Thomas J sought to give examples of submission by reference to the "necessary or useful" test:

"A step that is not consistent with or relevant to the challenge to the jurisdiction or obtaining a stay will usually be a submission to that jurisdiction."

- 17 In that case the defendant had filed a notice of appearance, which as a matter of the law of the foreign court, a submission to the jurisdiction. Nevertheless, Thomas J held that this technical step was, on the facts and in the context of the defendant making a jurisdiction challenge, not a submission under English law:

"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 the jurisdiction, but would not be regarded by that foreign court as a submission to its jurisdiction, an English court will take into account the position under foreign law"

- 18 Nonetheless there remains a wide spectrum of conduct/activity which will in fact give rise to a submission to the jurisdiction, as the Supreme Court has recently illustrated in Rubin. The question of whether or not there has been a voluntary submission is not to be simplistically answered by looking to see whether the defendant has participated by engaging with the merits of the claim upon which the judgment is given, but involves a wider investigation into the conduct of the defendant.

- 19 The decision in Rubin is of course best known for its finding that lodging a proof in a liquidation is an act of submission because it was part of the process of judicial supervision which, in due course, could lead to the payment out of dividends, and thus is a submission sufficient to give the foreign court jurisdiction in respect of the preference claim subsequently brought. At para. 167 Lord Collins explained the rationale being that the defendants:

“should not be allowed to benefit from the insolvency proceeding without the burden of complying with the orders made in that proceeding.”

- 20 It is certainly more than arguable that this principle is of general application, and not limited to insolvency proceedings. This can be seen from *obiter* remarks of Lord Collins in his disposal of the other case under appeal in Rubin: In the *Eurofinance* appeal UK Supreme Court held that it was “*certainly arguable*” that Eurofinance had submitted to the jurisdiction of the New York Court because (inter alia) it had applied to the High Court for the appointment of the receivers specifically for the purpose of causing the trust to obtain Ch. 11 protection. Similarly, he indicated that it was arguable that Mr Roman “*who caused Eurofinance to make the application*” had also submitted. See *per* Lord Collins at paras. 168-9. Neither of those steps involved any direct action by Eurofinance or Mr Rubin in the New York proceedings; at most they were accessorial. Yet the Supreme Court considered them to be arguably sufficient to amount to a submission which might have led to the subsequent money judgment being enforceable in England.
- 21 Likewise, the Privy Council decision in Stichting Shell Pensioenfonds v Kryss [2014] UKPC 41 (PC) at para. 31 shows the Courts leaning towards a flexible approach to the test for submission.
- 22 Another important development is the Privy Council Judgment in Cambridge Gas v Navigator [2007] 1 AC 508 (PC). Although it has suffered a lot of criticism and the principle espoused by it does not survive Rubin, there has been relatively little commentary on Lord Hoffmann’s observations on submission. The relevant facts can be explained briefly: the New York bankruptcy court had asked the Manx Court to implement a plan for the reorganisation of an Isle of Man company called Navigator, the effect of which would vest the Navigator shares in the creditors committee’s representatives. Upon the petition of the creditors to the Manx Court for this relief, Cambridge Gas (the majority shareholder of Navigator) and Vela Energy (the ultimate parent company of Cambridge Gas) issued a cross-petition by Cambridge Gas, asking the Manx court not to recognise or enforce the terms of the plan. The basis of the cross-application was that Cambridge Gas, as a separate legal entity registered in the

Cayman Islands, had never submitted to the jurisdiction of the New York court. It was therefore argued that an order of the New York court could therefore not affect its rights of property in shares in the Isle of Man.

23 It is fair to say that Lord Hoffmann was less than impressed by this argument:

“8 This submission [by Counsel for Cambridge Gas] bore little relation to economic reality. The New York proceedings had been conducted on the basis that the contest was between rival plans put forward by the shareholders and the creditors. Vela, the parent company of Cambridge, participated in the Chapter 11 proceedings and arranged the finance which was to have been the cornerstone of the shareholders' plan. It is therefore not surprising that the New York court did not trouble to ask whether the voluntary petition presented by Navigator had the formal consent of its own stockholder company when that company was the creature of the real parties in interest who were actively participating in the proceedings. For Cambridge, which was no doubt administered by lawyers in Cayman on the instructions of Mr Mahler, the claim that it had not submitted to the jurisdiction was technical in the highest degree. Mr Mahler was, it appears, a director of Cambridge as well as Vela and the Navigator companies, although he himself was not entirely sure about the full extent of his directorships. Given the intricate corporate structure of the Vela interests, this is quite understandable. He was, as he explained in a deposition “not a person who goes into details”.....

10 Before the High Court, Cambridge's objection succeeded. The deemster found as a fact that although Vela had participated in the bankruptcy proceedings in New York, its subsidiary Cambridge had not submitted to the New York jurisdiction. This finding is somewhat surprising but was upheld by the Court of Appeal and the creditors' committee, faced with concurrent findings of fact, have not appealed against it. ....”

24 In other words, Lord Hoffmann’s approach was to look at the economic reality of who was behind the foreign proceedings in deciding whether there had been a submission. Vela Energy had actively participated in the New York proceedings. Indeed, the main dispute in those proceedings was between the shareholders of Navigator (i.e. Cambridge Gas and Vela Energy) on the one hand, and the creditors on the other. The shareholders were those who had the economic interest in the proceedings, with the named party (Navigator) being “*the creature of the real parties in interest...*” Having expressed his “*surprise*” about the Manx decision that there had been no submission, it can be inferred that Lord Hoffmann considered that the Court should look at the economic realities of who is behind the proceedings and in whose interests they are being fought and that the factual investigation by the court should accordingly be expanded before deciding whether there has been a submission.

- 25 This approach has been recently endorsed by the English High Court in Swiss Life v Kraus [2015] EWHC 2133 (QB). Swiss Life sought to enforce a default judgment it had obtained against Mr Kraus in third party proceedings in New York. The main action, to which the third party proceedings were ancillary, was brought in the name of a number of individuals based in New York who made claims against Swiss Life under various endowment policies. It was Swiss Life's belief that these named plaintiffs were not true plaintiffs at all, and that in reality they were mere stooges of Mr Kraus (a broker of the endowment policies) for whose benefit the main action was being prosecuted; i.e. he would be the one who received the damages. The evidence showed Mr Kraus to have been the one controlling the main action, giving instructions to the lawyers on the record, as well as paying their bills. The named plaintiffs appeared to know nothing about the litigation at all for most of the time that it was ongoing. Swiss Life accordingly brought a third party action against Kraus alleging, amongst other things, that his prosecution of the main action using the named plaintiffs as his *alter ego* was part of an elaborate fraud to extort Swiss Life.
- 26 Mr Kraus unsuccessfully attempted to challenge the foreign court's jurisdiction in the third party claim, and never personally filed any evidence or pleading in the third party action. However, he did, Swiss Life contended, continue to prosecute the main action for his own benefit, and it was argued that he had submitted to the jurisdiction of the New York court by virtue (*inter alia*) of having done that.
- 27 Mr Kraus applied for summary judgment to strike out Swiss Life's claim. On appeal, the matter came before Green J who held that Swiss Life's allegation that Mr Kraus had submitted, by virtue of being the "real plaintiff" in the main action was sufficiently arguable to go to trial. In the course of his judgment he drew heavily from the observations in Rubin set out above. In other words, looking at the economic reality, Mr Kraus was the party of interest in the main action, and thus rendered himself exposed to cross-claims by the third party action.

## ***Conclusion***

28 The observations of Lords Hoffmann and Collins in Cambridge Gas and Rubin (respectively) suggest a much more flexible and broad approach to submission than had historically been adopted. The “economic reality” test, which allows the Court to view the question of submission through what is essentially a merits based approach (i.e. is it fair for the defendant to deny he submitted?), has much to commend it although it remains to be seen whether the Courts will embrace it fully.

### **C. SUBMISSION IN THE CONTEXT OF CHALLENGING JURISDICTION**

29 As a matter of English law, there are two types of submission to the domestic court’s jurisdiction which operate to bar to the defendant from subsequently challenging the court’s jurisdiction:

- (1) Statutory submission under the court rules;
- (2) Common law/voluntary submission.

30 Statutory submission is deemed to have occurred when the defendant fails, after filing an acknowledgement of service, to issue an application challenging jurisdiction within the time provided for by applicable Court’s rules.

31 Common law submission occurs when the defendant voluntarily takes some step in the proceedings which amounts to a submission to the domestic court’s jurisdiction.

### ***Statutory Submission***

#### England & Wales

32 In England & Wales the procedure for disputing the jurisdiction of the court is contained in **CPR Part 11**. This provides that a defendant who wishes to make an application for this purpose must first file an acknowledgement of service in accordance with CPR Part 10; and the application must itself be made within 14 days

thereafter. If the defendant files an acknowledgement of service but does not make an application within the relevant period, he is to be treated as having accepted that the court has jurisdiction to try the claim.

- 33 An important case to note in relation to CPR Part 11 is Hoddinott v Persimmon Homes (Wessex) Limited [2008] 1 WLR 806, in which the Court of Appeal gave a very extended meaning to “*jurisdiction*”:

“22 ...The definition of “*jurisdiction*” is not exhaustive. The word “*jurisdiction*” is used in two different senses in the CPR. One meaning is territorial jurisdiction. This is the sense in which the word is used in the definition in CPR r 2.3 and in the provisions which govern service of the claim form out of the jurisdiction: see CPR r 6.20 et seq.

23 But in CPR r 11(1) the word does not denote territorial jurisdiction. Here it is a reference to the court's power or authority to try a claim. There may be a number of reasons why it is said that a court has no jurisdiction to try a claim (CPR r 11(1)(a)) or that the court should not exercise its jurisdiction to try a claim: CPR r 11(1)(b) . Even if Mr Exall is right in submitting that the court has jurisdiction to try a claim where the claim form has not been served in time, it is undoubtedly open to a defendant to argue that the court should not exercise its jurisdiction to do so in such circumstances. In our judgment, CPR r 11(1)(b) is engaged in such a case.”

- 34 Thus, a domestic defendant who alleges that the claim form was served out of time is not challenging the Court’s territorial jurisdiction over him. Nonetheless he is challenging the Court’s jurisdiction to try the claim. If he fails to bring an application challenging jurisdiction, he will be deemed to have accepted that the Court has such jurisdiction.

- 35 Another important decision is Texan Management v Pacific Electric Wire & Cable [2009] UKPC 46 at para. 66, which holds that CPR r. 11 is a complete code for all jurisdiction applications, both those which dispute the existence of the Court’s jurisdiction, and those which ask the court not to exercise its jurisdiction and stay the action<sup>4</sup>. Thus, *forum non conveniens* stay applications must in English cases be brought within the strict time limit, failing which the defendant will be deemed to have submitted.<sup>5</sup>

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<sup>4</sup> For a description of the distinction see Texan Management at para. 61.

<sup>5</sup> This represented a substantial change in English procedure. Prior to the CPR challenges to the jurisdiction were regulated by RSC Ord 12, r. 8, whereas applications to stay on *forum conveniens* grounds were generally made under the inherent jurisdiction of the Court.

36 Finally under this heading, mention should be made of the recent decision in IMS SA v Capital Oil [2016] EWHC 1956 (Comm), which concerned sequential jurisdiction challenges – the first challenged service of the claim form (which application failed), and the second (after the 2<sup>nd</sup> acknowledgement of service had been filed) was a *forum non conveniens* challenge. Popplewell J held that both applications should have been brought at the same time in circumstances where the grounds for making the forum challenge existed at the outset.

### The BVI

37 In the BVI the position is slightly different. The relevant rules are **EC CPR rule 9.7** and **9.7A**. EC CPR rule 9.7 has been the subject of recent Privy Council scrutiny in Texan Management and rule 9.7A was subsequently brought in to reverse its effect.

38 EC CPR rule 9.7 deals with disputes about the Court's jurisdiction "*to try the claim*" (rule 9.7(1)). It provides that an application for a declaration that the court has no jurisdiction must be filed within the period for filing a defence (rule 9.7(3)), and that in addition to declaratory relief the Court may also make orders discharging orders made before the claim was commenced or the claim form served (rule 9.7(6)(a)). To this extent the rule appears to reflect the principle in Hoddinott.

39 If an application is not made in time the defendant is "*treated as having accepted that the court has jurisdiction to try the claim.*" (rule 9.7(5)). To that extent it is materially identical to the English CPR.

40 The substantive difference between the BVI position and that in England & Wales, is that EC CPR 9.7A allows defendants to make stay applications (e.g. on *forum non conveniens* grounds) at any time (rule 9.7A(3)). Thus, unlike in England & Wales where a *forum non conveniens* stay application must be made within the strict time limits set out in CPR r. 11, in the BVI such an application can in theory be made at any time up to judgment. By means of this amendment to the rules, EC CPR 9.7A reversed the finding in Texan Management, in which the Privy Council had held that position under

EC CPR 9.7 was the same as in England and that such stay applications needed to be made within the strict time limit.

### Cayman Islands

- 41 In Cayman the procedure is different. **GCR Ord.12, r.8** broadly mirrors **RSC Ord. 12, r. 8**. It provides that an application to dispute the jurisdiction shall be made within the time limited for service of a defence. The deemed submission is contained in r. 8(6):

“Except where the defendant makes an application in accordance with paragraph (1) the acknowledgement by a defendant of service of a writ shall, unless the acknowledgement is withdrawn by leave of the Court under Order 21, rule 1, be treated as a submission by the defendant to the jurisdiction of the Court in the proceedings.”

- 42 There are, therefore, some major differences between the Cayman and English rules. First, the Cayman rules are much clearer in codifying the principle set out in Hoddinott. Thus, the combined effect of GCR Ord. 12, r. 7 and r. 8 make it clear that a “*dispute about jurisdiction*” includes not merely challenges to territorial jurisdiction, but also extends to irregularities in the writ or service thereof and expressly to challenges of orders made to extend the validity of the writ. The latter was precisely what happened in Hoddinott, where the defendant complained about service of the claim form; it had been served outside the period for service (4 months), but the claimant had obtained an order extending time for service of the claim form. The defendant issued an application asking to set aside the order extending time, and he filed an acknowledgment of service, but did not then issue a jurisdiction challenge under CPR r. 11. The Court of Appeal held that the defendant had submitted to the jurisdiction. The same would be true in Cayman (subject to the caveats set out below).

- 43 The second major difference is that in Cayman, if defendants miss the deadline for making the application, they have three options:

- (1) If he has filed an acknowledgement of service, but failed to issue the application in time: file the application late and ask for an extension of time for service of the Defence for that purpose. The notes to the 1999 White Book at 12/8/4 (p. 133) state that whilst a defendant is well advised to serve the

application within the required period, “A defendant can so apply when that time for defence has been extended, either by consent (Ord. 3, r. 5(3)) or by the court (Ord. 3, r. 5(1)), even if the application is made and granted or the consent given after the “time limited” has expired (Ord. 3, r. 5(2)).”

- (2) If he has filed an acknowledgement of service, he can apply under **GCR Ord 21, r. 1** to withdraw it and put in a new acknowledgement, thus get time to start running afresh (see Section D below).
- (3) If he has failed to file an acknowledgement of service and judgment of default of notice of intention to defend has been entered against him, he can obtain leave under r. 6(1) to give late notice of intention to defend.

#### ***Extension of time to make a jurisdiction application***

44 It is well established that the Court can, in the exercise of its case management powers, make an order extending the time for making a jurisdiction application; Sawyer v Atari Interactive Inc [2005] EWHC 2351 (Ch); American Leisure Group v Wright [2015] WL 3953014 (where an extension of nearly 1 year was granted retrospectively).

45 However, there are two points to note about the exercise of this power:

- (1) It will not be exercised if, in the meantime, the defendant has voluntarily submitted to the jurisdiction (see next marginal heading): “*there is no point in granting an extension of time to make an application for that purpose which is bound to fail.*” Global Multimedia International Ltd [2006] EWHC 3612 (Ch) at para 26.
- (2) In England & Wales the making of an application after the time has expired will be treated in the same way as would an application for relief from sanctions: Salford Estates (No 2) Ltd v Altomart Ltd [2015] 1 WLR 1825, Zumax Nigeria Ltd

v First City Monument Bank plc [2016] EWCA Civ 567 at para. 27. It does not necessarily follow that the same principles will apply in Cayman, and they will not apply in the BVI in light of the decision in Texan Management. There Lord Collins said that an application for an extension of time would not be an application for relief from sanctions (see para. 80).

### ***Common law/voluntary submission***

46 Quite apart from statutory deemed submission the defendant may lose his right to challenge jurisdiction if he voluntarily submits. In Astro Exito Navegacion SA v Hsu [1984] 1 Lloyds Rep 266 at p. 270, Robert Goff LJ described the applicable principle in these terms:

“Now a person voluntarily submits to the jurisdiction of the court if he voluntarily recognises, or has voluntarily recognised, that the court has jurisdiction to hear and determine the claim which is the subject matter of the relevant proceedings. In particular, he makes a voluntary submission to the jurisdiction if he takes a step in proceedings which in all the circumstances amounts to a recognition of the court's jurisdiction in respect of the claim which is the subject matter of those proceedings. The effect of a party's submission to the jurisdiction is that he is precluded thereafter from objecting to the court exercising its jurisdiction in respect of such claim.”

47 An example of such a voluntary submission is Global Multimedia in which the defendant obtained an extension of time for service of his defence. He filed an acknowledgment of service indicating that he intended to defend the claim but not that he intended to dispute the jurisdiction. After the expiry of time allowed by CPR r.11 for challenging jurisdiction the defendant wrote to the claimant stating that he intended to apply for the service to be set aside. His application was refused. Sir Andrew Morritt explained that the defendant had submitted because:

“A defendant who intends to challenge the jurisdiction of the court does not seek an extension of time for his defence, he does not advance a defence on the merits in the form of the settlement agreements, nor does he threaten to strike-out the claim if the claimant refuses to discontinue it.”

48 Similarly, in Anderson Owen Ltd (in liquidation) [2010] B.P.I.R. 37 a defendant had indicated a wish to make an application to challenge service upon her, and the Court made directions as to the conduct of the case in the event that no such challenge was

mounted. The Judge held that whilst mere agreement upon directions in default of an application challenging service plainly did not amount to a waiver of the right to make the jurisdiction application, her subsequent conduct did. Having missed out on the timetable for her to pursue her application her solicitors applied for an extension of time to serve her Defence. They then agreed further consequential variations to the timetable, and then agreed that the liquidator's solicitors could attend at the listing office on behalf of both parties to set the matter down for trial. This conduct (when coupled with her failure to exercise her right to challenge service) was, in the Court's view, consistent only with an intention to have the case proceed to trial and was accordingly a voluntary submission.

- 49 The test that the Court should apply is that of a reasonable bystander. It is an objective test: SMAY Investments Ltd. v Sachdev [2003] 1 WLR 1973 at p.1976 (quoting with approval Colman J in Spargos Mining NL v Atlantic Capital Corporation [1995]):

“In Sage v. Double A Hydraulics Ltd, [1992] Times Law Reports, 165, Lord Justice Farquharson said (and this is a report of the judgment which is not reported *in oratio recta*):

‘A useful test was whether a disinterested bystander with knowledge of the case would have regarded the acts of the Defendant, or his solicitors, as inconsistent with the making and maintaining of his challenge.’

In arriving at the view to be imputed to the disinterested bystander, it seems to me that one has to bear in mind that there will be an effective waiver, or a submission to the jurisdiction, only where the step relied upon as a waiver, or a submission to the jurisdiction, cannot be explained, except on the assumption that the party in question accepts that the court should be given jurisdiction. If the step relied upon, although consistent with the acceptance of jurisdiction, is a step which can be explained also because it was necessary or useful for some purpose other than acceptance of the jurisdiction, there will, on the authorities, be no submission.

If the well-informed bystander had been left in doubt because what the defendants had done was equivocal, in the sense that it was explicable on other grounds in addition to agreement to accept the jurisdiction of the court, then the conclusion must be, on the authorities, that there would have been no submission to the jurisdiction. The representation derived from the conduct of the party said to have submitted must be capable of only one meaning.”

- 50 The requirement of an unequivocal submission is evident in Global Media at para. 28:

“Thus the test to be applied is an objective one and what must be determined is whether the only possible explanation for the conduct relied on is an intention on the part of the defendant to have the case tried in England.”

See also Deutsche Bank AG London v Petromena AS [2015] EWCA Civ 226 at para. 32:

“The doing of an act inconsistent with maintaining a challenge to the jurisdiction. Such a waiver must clearly convey to the claimant and the court that the defendant is unequivocally renouncing his right to challenge the jurisdiction, and the application of a bystander test is plainly apt.”

- 51 The Court of Appeal has recently approved this approach to voluntary submission in Zumax Nigeria. In that case it held that there had not been a voluntary submission by the defendant’s making of an application striking out the claim, and applying for disclosure of documents. The reason it was not a submission is that these steps were taken against the backdrop of the defendant’s pre-existing jurisdiction application; its strike out application was made without prejudice to the application challenging jurisdiction, and the disclosure was just as relevant to the jurisdiction application as it was to the strike out. It was thus not unequivocal conduct.

#### **D. MISTAKEN SUBMISSION TO THE JURISDICTION**

- 52 Just as there is a provision in Cayman to withdraw an acknowledgment of service, there is a similar provision in the English CPR, albeit hidden away in a Practice Direction: **PD10.5 para. 5.4**. This provides:

“An acknowledgment of service may be amended or withdrawn only with the permission of the court.”

- 53 Sometimes (and it happened in one of my cases, ALG v Wright) a defendant chooses, for his own reasons, to act in person (at least at the outset of proceedings), and as such is often not familiar with the law or legal procedure. He might not know that he has a limitation defence, or that the claim form/writ was not validly served (in ALG v Wright it was served late and in breach of Swiss law and he had a limitation defence). He might not know that he has any grounds to dispute jurisdiction, still less that he must make his application within a certain timetable. He might not know that he should not be serving his Defence with his acknowledgement of service because that will be a voluntary submission to the jurisdiction.

54 The permutations are many and varied. In the Deutsche Bank case a late application was made under PD10, para. 5.4 to amend a second acknowledgement of service. This second acknowledgement was served in circumstances where the defendant had filed an initial acknowledgment of service, issued an application to challenge jurisdiction, failed in that application and then (as provided for by CPR r. 11(7)<sup>6</sup>) had to file a further acknowledgement within 14 days. It wanted to appeal the dismissal of its jurisdiction application, but the claimant argued that the appeal was impossible because the second acknowledgment represented a submission to the jurisdiction. The Court of Appeal agreed holding that, on a true construction of CPR r 11(8)<sup>7</sup>, where a defendant who had unsuccessfully applied for a declaration that the court had no jurisdiction filed a second acknowledgement of service pursuant to CPR r 11(7)(b), he was to be treated as having submitted to the jurisdiction of the court (this was a statutory submission), Floyd LJ explaining at para. 36 that:

“The rigour of such a construction is mitigated by the fact that it remains possible to withdraw an acknowledgement of service with the permission of the court: see paragraph 5.4 of the Practice Direction supplementing CPR Pt 10. The effect of the withdrawal, if permitted, would no doubt be that there is no longer a submission to the jurisdiction.”

55 During the course of the defendant’s submissions a late application was made under PD10, para. 5.4 to withdraw the second acknowledgement. It was dismissed on the simple ground that it was not supported by any evidence.

56 The Court explained that the correct course for a defendant who wished to appeal against a court's decision refusing to grant a declaration that it did not have jurisdiction was to ask for an extension of time for filing a second acknowledgement of service sufficient to enable his application for permission to appeal, or the actual appeal, to be determined.

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<sup>6</sup> A broadly equivalent provision is in **GCR Ord. 12, r. 8(5)**, but **EC CPR rule 9.7(7)** does not provide specifically for the filing of another acknowledgement.

<sup>7</sup> It seems probable that Cayman would apply a similar interpretation to in **GCR Ord. 12, r. 8(6)**.

57 There are relatively few English cases on the circumstances in which the Court will exercise the power to allow a party to withdraw; although the Deutsche Bank case suggests that the mistaken filing of a second acknowledgement might be enough. The authorities under the RSC provision explain that the Court has an “*unfettered discretion*” although it will be exercised “*sparingly*”: Firth v John Mowlem [1978] 1 WLR 1184 (CA). Where the defendant has made a mistake in entering the unconditional appearance, such as having not realised that there was a limitation defence (as in Firth) or that the court might have no jurisdiction (as in Rothmans v Saudi Arabian Airlines [1981] QB 368 (CA)), the Court will be readier to allow that party to withdraw / amend.

#### **E. CONCLUSION**

58 The law in England is strict, in keeping with the CPR’s policy of having rules and timetables which must be kept to. The BVI appears to be following suit, albeit it seems readier to introduce new rules which provide greater flexibility. Cayman remains in the glory days of the RSC, which (the author believes) are much clearer and allow much more flexibility (and some might say fairness) than the CPR.

**Clare Stanley Q.C.**  
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