Judgment 38/2009 **Braun (as Insolvency Administrator of Walter Marketing GMBH &Co KG) v Brantridge Estates Ltd – Royal Court (Civil Action File 996) – 30 July 2009**

Royal Court Civil Rules, 2007 (Rules 10, 11 and 89) – Administrator's application for a declaration that certain payments by Walter were "gratuitous benefits" under German Law – Brantridge raised Exception de Fonds – whether Administrator's application time-barred under German law - held that it was Guernsey Law, rather than German Law, which governed whether the limitation period (set by German Law) had been interrupted by the commencement of these proceedings – applying the rules of the lex fori, under Rule 89 the action commenced when the summons was handed to HM Sergeant for service – held that the present proceedings had commenced within the limitation period (See also Judgments 40/2006 and 50/2006)

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Civil 996

The 30th day of July 2009 before Richard John Collas Esquire, Deputy Bailiff, alone

DR EBERHARD BRAUN **Plaintiff**
AS INSOLVENCY ADMINISTRATOR OF
WALTER MARKETING GMBH & CO KG

-and-

BRANTRIDGE ESTATES LIMITED **Defendant**

Whereas on the 30th June the Deputy Bailiff considered an Exception de Fond of the Defendant contending that the Plaintiff's claim is time- barred and heard thereon Advocates J M Wessels and K Le Cras counsel for the Plaintiff and Defendant respectively the Deputy Bailiff this day delivered judgment in the terms attached hereto and ruled that said proceedings were commenced within the relevant limitation period.

S M D ROSS
Her Majesty's Deputy Greffier

Approved Judgment
30 July 2009

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Between **DR EBERHARD BRAUN AS INSOLVENCY ADMINISTRATOR OF WALTER MARKETING GMBH & CO KG** **Plaintiff**

-and-

BRANTRIDGE ESTATES LIMITED **Defendant**

Date of hearing: 30th June 2009

Judgment handed down: 30th July 2009

Before: Richard John Collas Esq., Deputy-Bailiff

Advocates for Plaintiff: **J M Wessels**
Advocate for Defendant: **K Le Cras**

Cases & legislation referred to:

1) Rule 17 of Dicey, Morris and Collins on the Conflict of Laws, 14th edition
2) *John Pfeiffer Pty Ltd v Rogerson [2000] HCA 36*
3) Royal Court Civil Rules 2007, Rules 10, 11 and 89.

The Substantive Action

1. Dr Eberhaud Braun, the Insolvency Administrator of Walter Marketing GmbH & Co KG ("the Plaintiff") has instituted proceeding in the Royal Court against Brantridge Estates Ltd ("the Defendant") seeking a declaration that certain payments made by the Plaintiff company before it was placed in Insolvent Administration constituted gratuitous benefits for the purposes of section 134(1) of the German Insolvenenzordnung ("InsO").which states that

> *"A gratuitous benefit granted by the debtor may be contested unless it was made earlier than four years prior to the request to open insolvency proceedings."*

Exceptions de Fonds

2. In response, the Defendant has filed defences including three *Exceptions de Fonds*. I am required to rule on the first of those *Exceptions*, the other two having been withdrawn. It is:

> *"1. First Exception*
> *(a) The Plaintiff's cause of action arises under and is governed by German law. In particular the Plaintiff alleges that certain*

payments made to the Defendant by the Plaintiff are gratuitous benefits under the provisions of section 134 (1) of the German Insolvenenzordnung ("InsO").

(b) Section 146 InsO provides that the right to contest a transaction (under section 134 InsO) is subject to a limitation period of two years from the opening of insolvency proceedings.

(c) Suspension of the limitation period is governed by the German Civil Code (the "Code") and the German Civil Procedure Code (the "Civil Procedure Code").

(d) Section 204 of the Code provides that limitation shall be suspended by the bringing of an action for performance or for a declaration of the existence of a claim.

(e) The term "bringing of an action" is to be construed in accordance with section 253 (1) of the Civil Procedure Code which provides that the bringing of an action is effected by way of service of a writ.

(f) Service is defined in Section 166 (1) of the Civil Procedure Code as the act of bringing to a person's attention a document in the form prescribed by law.

(g) Section 189 of the Civil Procedure Code provides that if service is not effected or cannot be proven by means of proper documentation, service is assumed to take effect as of the date on which the person to be served acquires factual knowledge of the document.

(h) On 31 December 2003 insolvency proceedings were opened over the assets of Walter Marketing GmbH & Co. KG by virtue of a resolution of the Local Court of Karlsruhe. As a matter of German law the principle limitation period for the Plaintiff's claim expired on 31 December 2005.

(i) By letter dated 22 December 2005 the Defendant agreed to extend the limitation period until 30 January 2006.

(j) By Summons dated 30 January 2006 the Plaintiff issued proceedings against the Defendant in the Royal Court of Guernsey. Purported service of the Summons on the Defendant was effected by HM Sergeant on 31 January 2006 and the cause was placed on the Rôle de Causes á Plaider on 3 February 2006. By Act of Court dated 17 March 2006 the purported service of the Summons on 31 January 2006 was deemed to be defective.

(k) The purported service of the Summons came to the Defendant's attention on 3 February 2006. The Defendant therefore acquired factual knowledge of the Plaintiff's summons on 3 February 2006, 3 days after the principle limitation period had expired as a matter of German law.

(l) The Plaintiff's claim is time-barred under German law for failure to bring an action in time in accordance with the provisions of the Code and Civil Procedure Code and this action should be struck out and dismissed."

Chronology

3. The parties agree that the limitation period for the Plaintiff's claim was extended until 30 January 2006. It is also now accepted that on 30 January 2006, a Summons in the Guernsey action was handed to Her Majesty's Sergeant by the Plaintiff's Advocates to be served on the Defendant.

4. That Summons was returnable in the Royal Court on 3 February 2006 when the Defendant failed to appear and so judgment was given against the Defendant in default of appearance. That judgment was later set aside following a successful *Requête Civile*. The reason for setting aside the judgment was that the Defendant did not become aware of the Summons until some time on 3 February, after the Court had sat and had entered judgment against it. As I remember, there were several reasons for the delay, including that on the 30 January, the Register of Companies was amended to show a new Registered office for the Defendant so that when H M Sergeant purported to effect service on 31 January at the address he had been given by the Plaintiff's Advocate, that address was no longer correct and the person who received the Summons was not aware, or had forgotten, that the address had changed. The end result, and this is agreed by the parties, is that the Summons first came to the attention of officers of the Defendant on 3 February.

5. When allowing the *Requête Civile*, I set aside the default judgment and ordered that the matter be placed on the *Rôle des Causes à Plaider.*

6. What I now have to decide is whether the Plaintiff had done what was required as at 30th January 2006 to interrupt the limitation period or whether it only did so on the 3rd February 2006, by which time the imitation period had expired and hence it would have been too late.

Lex Causi* or *Lex Fori

7. The parties are agreed that it is German law, rather than Guernsey law, that governs the Plaintiff's claim and that it is the substantive German law of limitation that determines whether the Plaintiff is entitled to pursue the remedy it seeks. What they have not agreed is whether it is German law, or Guernsey law, that governs whether the limitation period has been interrupted by the commencement of these proceedings.

The Defendant's Submissions

8. The parties were agreed that Section 146 of InsO applies:

> *"Section 146 – Limitation of the Right to Contest*
> *(1) The right to contest a transaction shall be subject to limitation after two years from the opening of the insolvency proceedings.*
>
> *(2) Even if the right to contest has become subject to limitation, the insolvency administrator may refuse performance of an obligation in consideration of a benefit under a transaction subject to contest."*

9. There was also agreement that the effect of S. 146 (and S. 214 of the German Civil Code "BGB") is that a plaintiff's right to bring a claim is extinguished; it does not merely bar the remedy.

10. Advocate Le Cras, for the Defendant, submitted that all matters pertaining to the limitation period applicable to the Plaintiff's claim, and the method by which the limitation period is interrupted or suspended are governed by German law. She relied upon affidavit evidence form Dr Matthias Haas, a partner in the Frankfurt office of the law firm, Salans LLP, who said that the terms of German civil law are highly interrelated within the framework of legal terms in the various statutes and in the context of statutory interpretation. He submitted that the terms are normally to be understood and construed in the way they are generally defined and construed unless there is a specific definition or provision to the contrary.

11. By reference to provisions of the BGB and the German Civil Procedure Code ("ZPO"), he submitted that in order to suspend the limitation period (as extended by agreement) the plaintiff had to bring the action before 30 January 2006 in accordance with the following rules:

> *"(a) § 204(1)(1) of the BGB provides that limitation shall be suspended by "the <u>bringing of an action</u> for performance or for a declaration of the existence of a claim …" (emphasis added).*
> *(b) § 253 (1) of the ZPO provides that the bringing of an action is effected by way of service of a writ.*
> *(c) § 166 (1) of the ZPO defines service as the act of bringing to a person's attention a document in the form prescribed by law.*
> *(d) § 189 of the ZPO provides that if service is not effected or cannot be proven by means of proper documentation, service is assumed to take effect as of the date on which the person to be served acquires factual knowledge of the document."*

12. He then concluded that the Plaintiff had failed to bring the action in time because the proceedings did not come to the actual attention of the Defendant until 3 February 2006. He added that the meaning of "bringing an action" must be determined by German law and hence I am to determine the date of service under German law: that date would be 3 February 2006 being the date the claim came to the attention of the Defendant.

The Plaintiff's Submissions

13. Advocate Wessels began by reminding me that the English common law approach to foreign limitation periods was to ask whether the limitation period was substantive or procedural. If the former, then the English court applied the foreign rule but if it was the latter, then English rules were applied. That was altered in England following the Law Commission Report on Classification of Limitation in Private International Law which led to the enactment of the Foreign Limitation Periods Act 1984. Fortunately, I do not need to look back at all of the old common law rules as the parties have agreed that the substantive German law on limitation is applicable.

14. However, Advocate Wessels submitted that where the old rules remain applicable is in relation to the question of when proceedings were commenced or issued. He relied upon rule 17 of Dicey, Morris and Collins on the Conflict of Laws, 14th edition:

> *"RULE 17 – All matters of procedure are governed by the domestic law of the country to which the court wherein any legal proceedings are taken belongs (lex fori)."*

15. Unfortunately, the commentary on the Rule states that the Rule is not always easy to apply because of the difficulty *"in discriminating between rules of procedure and rules of substance".* Advocate Wessels referred me to the decision of the High Court of Australia in *John Pfeiffer Pty Ltd v Rogerson [2000] HCA 36*, concerning what effect the courts of one jurisdiction in Australia in which proceedings were brought should give to the legislation of another jurisdiction in Australia in which a tort had been committed. The High Court approved, at paragraph 99 of the judgment, *"the formulation put forward by Mason CJ in McKain, 'rules which are directed to governing or regulating the mode or conduct of court proceedings' are procedural and all other provisions or rules are to be classified as substantive".* Or, as Advocate Wessels summarised it, how you get into a Court is a procedural matter and what you may then recover in that Court is a substantive matter.

16. Advocate Wessels relied upon the Law Commission's statement of the common law at paragraphs 4.18 and 4.19 of its Report as to the *terminus ad quem* of a period of limitation. *"The step required by a plaintiff to stop time from running against him is, in general, the institution of proceedings."* The 21st Report of the Law Reform Committee had considered the suggestion of replacing that rule with *"the principle that the terminus ad quem should be the service, rather than the issue, of process"* but concluded that the balance of convenience lay in favour of retaining the existing rule. One of the reasons cited was that the *terminus ad quem* of the foreign jurisdiction may not be capable of being translated into the procedural rules of the jurisdiction where the proceedings are to be issued.

Conclusion

17. With that reason in my mind, I have looked at what is the Guernsey *terminus ad quem.* Rule 10 of the Royal Court Civil Rules 2007 requires that "In every action a cause shall be tabled before the Court" and rule 11 that "a plaintiff intending to table a

cause shall give notice of the fact to the defendant by serving a summons on him". The rules governing service are in part II of the 2007 Rules. They provide that, except where service is permitted by substituted service, or in some other manner, service is effected by H M Sergeant. Rule 89 states that where service is effected by H M Sergeant, *"for the purposes of these Rules, an action commences when the summons is handed by the plaintiff to the Sergeant"*. There were similar provisions in the Royal Court Civil Rules 1989 that were in force when these proceedings commenced, so the position has not changed under the new rules.

18. I therefore conclude that in Guernsey, the *terminus ad quem* is when a summons is handed to H M Sergeant to be served on the defendant. That is a procedural step that may not be capable of being translated into the rules of a foreign jurisdiction. It makes sense that the *terminus ad quem* should be governed by the rules of the jurisdiction where proceedings are instituted.

19. In my view, the decision as to whether the *terminus ad quem* is governed by the Guernsey rule or the rules of the foreign jurisdiction must not depend upon what the particular rule of the jurisdiction of the *lex causi* happens to be in any particular case. There could be instances where the rule of the foreign jurisdiction does not translate into a procedure that is, or could be, followed in Guernsey. It is irrelevant that, in the present case, the Guernsey court could give effect to the German rule that requires the proceedings to come to the attention of the defendant.

20. I conclude that, in all cases, the *terminus ad quem* must be determined by the rules of the *lex fori*. Accordingly, what was required to interrupt the limitation period was to commence proceedings, which, in Guernsey, is achieved when the plaintiff hands the summons to H M Sergeant for service. Consequently, these proceedings were commenced within the limitation period.

21. Having reached the conclusion I do not need to address the other arguments put forward by Advocate Wessels.