

BRITISH VIRGIN ISLANDS COURT OF APPEAL

Alexander Katunin and Jsc Vtb Bank **BVIHCMAP 2015/0004 and BVIHCVAP** **2015/0007**

WHETHER JUDGE ERRED IN REFUSING APPLICATION TO SET ASIDE ALTERNATIVE SERVICE - SUBMISSION TO JURISDICTION - WHETHER JUDGE ERRED IN FINDING THAT THE APPELLANT HAD SUBMITTED TO THE COURT'S JURISDICTION - WHETHER THE LEARNED JUDGE ERRED IN HIS INTERPRETATION OF CIVIL PROCEDURE RULES ("CPR") 7.8A IN MAKING THE ORDER FOR ALTERNATIVE SERVICE

This was an Appeal by Alexander Katunin (the "Appellant") against the refusal by the First Instance Judge to set aside alternative service on him, his finding that the Appellant had submitted to the jurisdiction by applying for an extension of time in which to file his defence (the "jurisdiction point"), and the Learned Judge's refusal to grant a stay of the BVI proceedings alternatively to decline to exercise the Court's jurisdiction under Rule 9.7A of the ECSC CPR. The Appellant also contended that the Respondent, JSC VTB Bank (the "Respondent") waived the right to raise the jurisdiction point by not doing so earlier in the proceedings and particularly at the time when the Appellant made its application for an extension of time to file its defence.

In allowing the Appeal, the Court of Appeal held that for conduct to amount to a waiver, the conduct must be inconsistent with the right which is said to be waived. The failure on the part of the Respondent to raise the jurisdiction point earlier in the proceedings, did not amount to waiver or estoppel on those facts since that conduct of the Bank was not inconsistent with the right to take the submission point.

On submission to the jurisdiction point, the Court of Appeal applying *SMAY Investments Ltd and another -v- Sachdev and others* [2003] EWHC 274, held that the conduct that is said to amount to submission to jurisdiction must be wholly unequivocal and not simply consistent with submission to jurisdiction. In

determining whether conduct is unequivocal, the Court was required to look at the circumstances of the case. Here, notwithstanding, the Appellant's application for extension of time, which could be considered as submission to the Court's jurisdiction, the fact that, *inter alia*, he had indicated that he intended to challenge the Court's jurisdiction and did so meant that his conduct could not be considered to be "unequivocal".

On the issue of alternative service, the Court confirmed whether it was impracticable to effect service of a claim in the usual manner determined by the rules and that it was the burden of the Applicant to show that such service was impractical in the circumstances. The Court found that the Respondent had not demonstrated that service under the Hague Convention was impractical despite the delays in service because there was no evidence that Mr. Katunin was attempting to evade service. And while the evidence differed, this could not be resolved on paper.

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