SUPREME COURT OF QUEENSLAND

CITATION:	*Courtney v Chalfen* [2020] QSC 195
PARTIES:	**SIMON CHRISTOPHER COURTNEY** (applicant) **v** **ELEANOR SOPHIE CHALFEN** (respondent)
FILE NO/S:	BS No 2178 of 2020
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	26 June 2020
DELIVERED AT:	Brisbane
HEARING DATE:	24 April 2020
JUDGE:	Williams J
ORDER:	**1. The proceeding be permanently stayed.** **2. No order as to costs.** **3. Liberty to apply in respect of costs.**
CATCHWORDS:	PRIVATE INTERNATIONAL LAW – SERVICE OUT OF JURISDICTION – UNDER OTHER LEGISLATION AND RULES OF COURT – PROCEDURE – LEAVE TO ISSUE AND SERVICE PROCESS AND SETTING ASIDE ORDER FOR LEAVE – GENERALLY – where the defendant served an originating process outside the jurisdiction – where the defendant did not apply for leave of the Court to serve the originating process but relied on r 125 *Uniform Civil Procedure Rules* 1999 (Qld) – whether leave of the Court was required under r 126 *Uniform Civil Procedure Rules* 1999 (Qld) – whether leave would have been granted had the application been made PROCEDURE – STATE AND TERRITORY COURTS: JURISDICTION, POWERS AND GENERALLY – JURISDICTION – GENERALLY – where the applicant applied for the proceedings to be stayed under r 127 *Uniform Civil Procedure Rules* 1999 (Qld) - where the service of the

originating process was not authorised by the rules – whether the Court should exercise its discretion to assume jurisdiction

Uniform Civil Procedure Rules 1999 (Qld), r 16, r 124, r 125, r 126, r 127, r 128, r 129, r 129A, r 129B, r 129C, r 129D, r 129E, r 129F, r 129G, r 129H, r 371

Agar v Hyde (2000) 201 CLR 552, cited
Bendigo and Adelaide Bank Ltd v Quine [2018] VSC 272, cited
Borch & Others v Answer Products Inc & Ors [2000] QSC 379, distinguished
City of Swan v McGraw-Hill Companies Inc [2014] FCA 44, cited
Michael Wilson & Partner Ltd v Emmott [2019] NSWSC 218, cited
News Corporation Limited v Lenfest Communications Inc (1996) 21 ACSR 553, cited
Regie Nationale des Usines Renault SA v Zhang (2002) 210 CLR 491, cited
Voth v Manildra Flour Mills Pty Ltd (1990) 171 CLR 538, cited
Yearworth v North Bristol NHS Trust [2010] QB 1, cited

COUNSEL: N Ferrett QC for the applicant/defendant

SOLICITORS: HopgoodGanim Lawyers for the applicant/defendant
Self-represented respondent/plaintiff

[1] This is an application by the defendant for the following orders:

(a) An order pursuant to r 16(f) of the *Uniform Civil Procedure Rules* 1999 (Qld) (UCPR) or r 127 of the UCPR, setting aside service of the claim and statement of claim.

(b) Alternatively an order, pursuant to r 16(g) of the UCPR or r 127 of the UCPR, or pursuant to the inherent jurisdiction of the Court, permanently staying the proceeding.

(c) Costs.

(d) Such further or other orders as the Court deems fit.

[2] The application was heard on 24 April 2020 with the parties making oral submissions by telephone in addition to their written submissions.

[3] The applicant relied on the following affidavit material:

(a) First affidavit of Eleanor Sophie Chalfen affirmed on 7 April 2020 (first Chalfen affidavit);

(b) Affidavit of Laura Hatfield sworn on 7 April 2020;

(c) First affidavit of Robert Harrison Dickfos affirmed on 23 April 2020 (first Dickfos affidavit); and

(d) Second affidavit of Eleanor Sophie Chalfen affirmed on 21 April 2020 (filed by leave) (second Chalfen affidavit).

[4] The respondent filed an affidavit sworn on 23 April 2020 (first Courtney affidavit).

[5] At the conclusion of the hearing, the parties were directed to provide a further affidavit and submissions in relation to service. The applicant filed and served a second affidavit of Robert Harrison Dickfos affirmed on 27 April 2020 (second Dickfos affidavit). The respondent filed and served a second affidavit of Simon Christopher Courtney sworn on 30 April 2020 (second Courtney affidavit). Both filed brief further written submissions.

Issues in dispute

[6] The application concerns a claim and statement of claim filed by the plaintiff in the Queensland Supreme Court on 27 February 2020. The claim states as follows:

> "The plaintiff claims:
>
> 1. Damages reflecting loss suffered by the plaintiff as a result of the above named defendant's conversion of his goods and/or breach of bailment condition amounting to $145,817.44.
> 2. Legal fees amounting to $25,000.
> 3. Interest on any damages, pursuant to section 48 of the Civil Proceedings Act 2011 (Qld).
> 4. An order for injunctive relief preventing the defendant from dealing with the gold bullion until this matter can be heard by the court."

[7] The issues in dispute are:

(a) Is the claim within r 125 UCPR so that the claim and statement of claim was authorised to be served on the defendant in the Cayman Islands without the leave of the Court?

(b) If not, would leave have been granted pursuant to r 126 UCPR to serve the claim and statement of claim on the defendant in the Cayman Islands?

(c) In any event, should the claim be dismissed, stayed or service set aside pursuant to r 127 UCPR or the inherent jurisdiction of the Court?

Background facts

[8] The plaintiff, Mr Courtney, is an Australian who previously resided in the Cayman Islands, returning to Australia in May 2018. The plaintiff is a lawyer and was admitted as a solicitor in Queensland in 1999.

[9] The defendant, Ms Chalfen, is a resident of Grand Cayman in the Cayman Islands.

[10] The plaintiff and the defendant were married in July 2014 but are in the process of being divorced. In November 2016 the defendant informed the plaintiff that the "marriage was over" but did not file for divorce until February 2017.[1]

[11] The plaintiff and the defendant had lived in the defendant's apartment since before they were married and the plaintiff had stored some of his property in the guest bedroom.[2]

[12] In January 2015 the plaintiff was involved in a serious car accident which severely injured two people. The plaintiff was convicted in the Grand Court of the Cayman Islands on two counts of inflicting grievous bodily harm and one count of reckless driving. On 7 July 2016 the plaintiff received a three year custodial sentence.[3]

[13] In or about August 2016 certain of the plaintiff's property was removed from the defendant's apartment and placed in a rented storage unit. The rental on the storage unit was paid for by the defendant's mother.[4]

[14] On 10 December 2019, the plaintiff commenced proceedings in the Magistrates Court. The claim was effectively the same as the current Supreme Court claim[5] except it did not include the claim for interlocutory relief. The plaintiff sought to serve the claim and statement of claim by email on the defendant's Cayman Islands divorce lawyers but service was not accepted as they did not have instructions.[6]

[15] On 27 February 2020 the plaintiff commenced the current proceedings in the Supreme Court of Queensland.

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1 First Chalfen affidavit at [12], [13].

2 First Chalfen affidavit at [16].

3 First Chalfen affidavit at [14], [15].

4 First Chalfen affidavit at [17].

5 The claim was for liquidated damages and the wording was different but included a claim for conversion and breach of a bailment condition. See exhibit "ESC-01" of first Chalfen affidavit at 52.

6 First Courtney affidavit at [38] to [40] and exhibit "SCC-12" of first Courtney affidavit at 29.

[16] On 27 February 2020 the defendant was personally served with the Supreme Court claim and statement of claim by a process server at her home address in the Cayman Islands.[7]

[17] On or about 20 March 2020 the Magistrates Court proceedings were discontinued.[8]

[18] On 25 March 2020 the defendant filed a conditional notice of intention to defend.

[19] This application was filed on 8 April 2020.

Claim and statement of claim

[20] The relief claimed in the statement of claim is as follows:

> "The plaintiff claims the following relief:
>
> 1. Damages for conversion, or a breach of a bailment condition of the Gold Bullion amounting to $128,292.70.
> 2. Damages for conversion of the vinyl records, or a breach of a bailment condition, amounting to $6,500.
> 3. Damages for conversion of the blu-ray discs, or a breach of a bailment condition, amounting to $278.84.
> 4. Damages for negligence, or a breach of bailment condition, resulting in damages to the plaintiff's sunglasses, remote controls and record cleaner cover amounting to $3,296.
> 5. Damages for conversion, or a breach of a bailment condition of the ring, suit, shoes, computer desk, chair, stereo rack and car trunk lid amounting to $6,750.
> 6. Interest on any damages..[sic]"

[21] The statement of claim alleges in respect of the gold that:

(a) The plaintiff purchased gold bullion in 2010 including a one kilogram bar and 20 x 1 ounce "Gold Eagle" coins. The gold was stored in a safe deposit box in the Cayman Islands by the plaintiff.

(b) In or about July 2016 the plaintiff was unable to locate the keys to the safe deposit box and as a result, the safe deposit box needed to be drilled to remove the gold. The gold was then placed in a safe deposit box belonging to the defendant for convenience.

(c) On 10 August 2019 (when the plaintiff was in Australia), a demand was made of the defendant for the production of the gold.

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7 First Chalfen affidavit at [3]-[4]. See also affidavit of service of Sheldon Williams sworn 28 February 2020 and filed 24 March 2020.

8 First Courtney affidavit at [43].

(d) On 11 August 2019 the defendant refused to give the plaintiff possession stating that it now belongs to a third party.

(e) The plaintiff did not agree to give possession of the gold to a third party.

[22] The statement of claim alleges in respect of the vinyl records and Blu-ray discs that:

(a) Certain property of the plaintiff was removed from the marital home and placed in a storage unit.

(b) The storage unit was under the exclusive possession and control of the defendant.

(c) The plaintiff undertook a limited inspection of the property in the storage unit.

(d) The plaintiff requested the key so he could undertake a further inspection of the storage unit. This was refused.

(e) A compromise agreement was reached whereby Ms Hatfield (the defendant's lawyer in the divorce proceedings) "undertook" to hold the key until the plaintiff and defendant had reached an agreement on "ancillary matters" in the on-going divorce proceedings.

(f) Ms Hatfield had possession of the key to the storage unit.

(g) On or about 30 November 2018 the key to the storage unit was returned to the owner of the storage unit.

(h) The plaintiff had to make his own arrangements to ship the items to Australia from the storage unit on short notice.

(i) The items were delivered to the plaintiff in Queensland on or about 16 April 2018.

(j) Upon inspection the plaintiff identified 22 vinyl records and "The Professionals Complete Collection" on Blu-Ray were not present.

[23] The statement of claim further alleges in respect of damage to certain chattels[9] that:

(a) Contrary to the plaintiff's wishes and without his consent, the defendant arranged for the packing and storage of the plaintiff's chattels.

(b) Two pairs of sunglasses were damaged and a number of remote control units needed to be replaced as they had been packed with the batteries in them and were damaged.

(c) A record cleaning machine had the top broken when an amplifier had been packed on top of it.

[24] The statement of claim also alleges certain items had not been packed and shipped including:

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[9] These chattels are sunglasses, remote controls and a record cleaner cover.

(a) a gold wedding band;

(b) an Armani evening suit;

(c) a pair of alligator leather dress shoes;

(d) a stereo rack;

(e) a computer desk and chair; and

(f) the trunk lid to the plaintiff's 2014 Shelby GT500.

[25] The statement of claim includes estimates of the loss in respect of each of the claims, with the totals claims set out in the relief sought.

Applicant's affidavit material

[26] Affidavit material has been filed and served by the applicant for the purposes of this application.

[27] The first affidavit of Ms Chalfen sets out the applicant's position in respect of a number of matters, including the following:

(a) In respect of the property of the plaintiff, Ms Chalfen recalls several conversations with the plaintiff in relation to the arrangements and packing process of the items stored in the guest bedroom. She is unable to recall all of the conversations but does recall that the plaintiff did provide some instructions as to how items should be packed including:

> "For example, I am able to recall that the Plaintiff instructed me that all of his model cars were to be packed in their original packaging and that his scale model dinosaurs were to be handled with extreme care."[10]

(b) In respect of the gold, Ms Chalfen outlines that she had never had any interest in or ownership of the gold bar or gold coins. However, as her mother paid for a number of expenses incurred by the plaintiff in relation to the criminal proceedings, there was an agreement on or about 6 July 2016 that the gold bar and gold coins, including the 10 ounce PAMP gold bar, would be transferred to Ms Chalfen "by the Plaintiff, for me to hold on my mother's behalf, as payment for the debt owed by the Plaintiff to my mother at that time and for the amounts that were to be paid by my mother on the Plaintiff's behalf in the future."[11]

(c) Further, Ms Chalfen states that her mother was required to sell the 10 ounce PAMP gold bar that was transferred to her by the plaintiff to pay strata fees (that had been agreed to be paid by the plaintiff previously).[12]

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[10] First Chalfen affidavit at [19].

[11] First Chalfen affidavit at [27].

[12] First Chalfen affidavit at [29].

(d) Ms Chalfen states that there is an outstanding debt of approximately US$68,410.01 owing to her mother.[13]

(e) Ms Chalfen, at paragraph 32, states as follows:

> "I am aware that the Plaintiff did not list the Gold Bar, Gold Coins or the 10 ounce PAMP Gold Bar as assets owned by him when completing and filing a list of all assets he possessed as part of the Divorce Proceedings. The Court's request for a list of assets from both myself and the Plaintiff was to include all assets, not just assets considered by either of the parties to be matrimonial assets."

[28] In respect of the 22 listed vinyl records:

(a) Ms Chalfen identifies one vinyl record (Prince's "Sign O' The Times") which was purchased by the plaintiff for her as a gift.

(b) Ms Chalfen states that the balance were purchased by her and are not and have never been owned by the plaintiff.

(c) Further, Ms Chalfen at paragraph 35 states as follows:

> "I have previously given evidence in the Divorce Proceedings that the Plaintiff's vinyl records were packed for shipping to Australia and the manner in which that packing occurred. I am uncertain how many vinyl records comprised the Plaintiff's collection, although I am aware that the number is in the hundreds."

[29] In respect of "The Professionals Complete Collection" on Blu-ray, Ms Chalfen states she is unaware of the location of the item.

[30] Ms Chalfen also outlines that she suffers from a debilitating medical condition and would not be able to travel to Australia to give evidence.[14]

[31] Ms Hatfield, a lawyer in the Cayman Islands acting on behalf of Ms Chalfen in the divorce proceedings, has also provided an affidavit for the purposes of the application and deposes to various matters including the following:

(a) In respect of the divorce proceedings in the Cayman Islands, only the first stage, approving the basis of the divorce, has been completed. The further steps include obtaining a court order about financial matters and any matters relating to children and then dissolving the marriage. At the time of swearing the affidavit, the second stage had been commenced but was on-going.

(b) In respect of how the plaintiff and defendant's property may be dealt with in the divorce proceedings, Ms Hatfield states:

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13 First Chalfen affidavit at [30].

14 First Chalfen affidavit at [41] to [47].

> "8. In the circumstances that the parties are still completing 6(b) above [the second stage] in the Divorce Proceedings, any asset of a party, regardless of whether it is a pre-marital asset, is subject to the jurisdiction of the Grand Court until that Court makes a final order dealing with financial matters relevant to the divorce which either specifies the treatment of the parties' assets or does not involve an asset of a party.
>
> 9. In the circumstances that the Plaintiff asserts that the Gold Bullion, as referred to in paragraphs 2 to 20 of the Statement of Claim, is his property, then that Gold Bullion is subject to the jurisdiction of the Grand Court for the reasons set out in paragraph 8 above."

(c) In respect of the assertion in the statement of claim that the Grand Court of the Cayman Islands did not have jurisdiction to consider the claim for gold "as it was a pre-marital asset", Ms Hatfield states:

> "11. I have reviewed Bedell Cristin's[15] file in relation to the Divorce Proceedings, including the notes of His Honour Judge Williams from some of the hearings before the Grand Court of the Cayman Islands and I am unable to identify any instance where the Grand Court:
>
> > *'indicated that it did not have jurisdiction to consider the claim for the gold as it was a pre-marital asset',*
>
> as asserted by the Plaintiff in paragraph 12 of the Statement of Claim. The Plaintiff wrote to the Court on 20 March 2018 asking for a ruling that the gold bullion cannot be the subject of the proceedings and the Court responded that it had given a preliminary indication only as to how it might approach the treatment of the gold bullion upon divorce.
>
> 12. Judge Williams, the judge presiding in the Divorce Proceedings, has previously informed the Plaintiff and the Defendant as a preliminary indication in respect of the Divorce Proceedings that if the Defendant did not make a claim to the gold (which I understand to include the Gold Bullion as defined in the Statement of Claim), on the basis that the gold did not belong to the Plaintiff, but to her mother as the Plaintiff had agreed to give the Defendant's mother the gold in return for her mother paying legal expenses incurred by the Plaintiff in unsuccessfully defending criminal proceedings against him in the Cayman Islands, then the gold would not be an asset which was relevant to the divorce. He

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[15] The law firm at which Ms Hatfield is a partner.

> further commented that any dispute as to ownership of the gold between the Plaintiff and the Defendant's mother would not be a matter that he could determine in the divorce and it would have to form part of a separate civil claim."

(d) In respect of the inspections by the plaintiff (whilst still serving a prison sentence) at the defendant's apartment and the storage unit (on two occasions[16]), the circumstances of the inspection and the plaintiff's removal of select items from storage.

Respondent's affidavit

[32] Mr Courtney's first affidavit:

(a) States that the claim and statement of claim seeks damages "in respect of negligence, tortious breaches of a bailment condition and the tort of conversion of goods."

(b) Exhibits the "Petitioner's Skeleton Argument" dated 30 July 2018 as evidence that the assets the subject of the Supreme Court proceedings are not the subject of the divorce proceedings.[17]

(c) Refers to some interactions between the plaintiff and Ms Hatfield, specifically in respect to the key to the storage unit. It is alleged that Ms Hatfield "undertook to take custody of the key and not allow the defendant to have the key." Mr Courtney refers to a "dispute as to the exact terms of her undertaking" but concludes there is no doubt that Ms Hatfield "agreed to hold the key to the storage unit until the defendant and [he] had reached agreement on ancillary matters."

(d) Refers to undertakings by lawyers being regulated by the Code of Conduct for Cayman Islands' Attorney at Law which incorporates the IBA International Principles on Conduct for the Legal Profession. Mr Courtney outlines some background facts in relation to the storage unit key and the termination of the lease to the storage unit.

(e) Deposes to an email from Ms Hatfield dated 7 March 2020 which he relies upon as submission by the defendant to the jurisdiction. The email states:

> "we will arrange to have that Hearing recorded as Elle's cross examination of you will go to matters relevant to the Court Case you have commenced against her in Australia."[18]

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16 Once attended by Ms Hatfield personally, and a later occasion attended by Ms Hatfield's assistant, Ms Karen Williams. See Hatfield affidavit at [17] to [18].

17 See Exhibit "SCC-1". The submission is that "each party shall retain those assets that they acquired prior to the marriage". The submission does not deal with the specific items identified in the statement of claim. As evidenced by the affidavit material filed in this application, there is a dispute about ownership of the gold and also the 22 vinyl records.

18 Exhibit "SCC-13" to first Courtney affidavit.

Service outside of Australia

[33] Proceedings commenced in the Supreme Court of Queensland may be served outside of Australia in certain circumstances. Rule 125 UCPR sets out the circumstances when an originating process may be served outside Australia without leave. Rule 126 UCPR sets out the circumstances when service outside Australia of an originating process may be allowed where a court grants leave (harmonised rules).

[34] These sections were amended in April 2019 to give effect to the harmonised rules approved by the Council of Chief Justices with respect to service of an originating process and other documents outside of Australia.

[35] Rule 125 of the UCPR states as follows:

> "**125 When service allowed without leave**
>
> An originating process may be served outside Australia without leave in the following circumstances—
>
> (a) if the claim is founded on a tortious act or omission—
>
> (i) that was done or that happened wholly or partly in Australia; or
>
> (ii) in respect of which the damage was sustained wholly or partly in Australia;
>
> (b) if the claim is for the enforcement, rescission, dissolution, annulment, cancellation, rectification, interpretation or other treatment of, or for damages or other relief in respect of a breach of, a contract that—
>
> (i) was made or entered into in Australia; or
>
> (ii) was made by or through an agent trading or residing within Australia; or
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> (iii) was to be wholly or in part performed in Australia; or
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> (iv) was by its terms or by implication to be governed by Australian law or to be enforceable or cognisable in an Australian court;
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> (c) if the claim is in respect of a breach in Australia of a contract, wherever made, whether or not the breach was preceded or accompanied by a breach outside Australia that rendered impossible the performance of that part of the contract that ought to have been performed in Australia;
>
> (d) if the claim—

(i) is for an injunction to compel or restrain the performance of an act in Australia; or

(ii) is for interim or ancillary relief in respect of a matter or thing in or connected with Australia, and the relief is sought in relation to a judicial or arbitral proceeding started or to be started, or an arbitration agreement made, in or outside Australia (including, without limitation, interim or ancillary relief in relation to a proceeding under the *International Arbitration Act 1974* (Cwlth) or the *Commercial Arbitration Act 2013*); or

(iii) without limiting subparagraph (ii), is an application for a freezing order or ancillary order under chapter 8, part 2, division 2 in respect of a matter or thing in or connected with Australia;

(e) if the subject matter of the claim is land or other property situated in Australia, or an act, deed, will, instrument or thing affecting land or property situated in Australia, or the proceeding is for the perpetuation of testimony relating to land or property situated in Australia;

(f) if the claim relates to the carrying out or discharge of the trusts of a written instrument of which the person to be served is a trustee and that ought to be carried out or discharged according to Australian law;

(g) if relief is sought against a person domiciled or ordinarily or habitually resident in Australia (whether present in Australia or not);

(h) if a person outside Australia is—

(i) a necessary or proper party to a proceeding properly brought against another person served or to be served (whether within Australia or outside Australia) under any other provision of these rules; or

(ii) a defendant to a claim for contribution or indemnity in respect of a liability enforceable by a proceeding in the court;

(i) if the claim is for—

(i) the administration of the estate of a deceased person who at the time of the person’s death was domiciled in Australia; or

(ii) relief or a remedy that might be obtained in a proceeding mentioned in subparagraph (i);

(j) if the claim arises under an Australian enactment and 1 or more of the following applies—

(i) an act or omission to which the claim relates was done or happened in Australia;

(ii) any loss or damage to which the claim relates was sustained in Australia;

(iii) the enactment applies expressly or by implication to an act or omission that was done or happened outside Australia in the circumstances alleged;

(iv) the enactment expressly or by implication confers jurisdiction on the court over persons outside Australia (in which case any requirements of the enactment relating to service must be complied with);

(k) if the person to be served has submitted to the jurisdiction of the court;

(l) if a claim is made for restitution or for the remedy of constructive trust and the alleged liability of the person to be served arises out of an act or omission that was done or happened wholly or partly in Australia;

(m) if it is sought to recognise or enforce a judgment;

(n) if the claim is founded on a cause of action arising in Australia;

(o) if the claim affects the person to be served in respect of the person's membership of a corporation incorporated in Australia, or of a partnership or an association formed or carrying on any part of its affairs in Australia;

(p) if the claim concerns the construction, effect or enforcement of an Australian enactment;

(q) if the claim—

(i) relates to an arbitration held in Australia or governed by Australian law; or

(ii) is to enforce in Australia an arbitral award wherever made; or

(iii) is for orders necessary or convenient for carrying into effect in Australia the whole or any part of an arbitral award wherever made;

(r) if the claim is for relief relating to the custody, guardianship, protection or welfare of a child present in Australia or who is domiciled or ordinarily or habitually resident in Australia (whether present in Australia or not);

(s) if the claim, so far as it concerns the person to be served, falls partly within 1 or more of paragraphs (a) to (r) and, as to the residue, within 1 or more of the others of paragraphs (a) to (r)."

[36] Rule 126 of the UCPR states as follows:

"**126 When service allowed with leave**

(1) The court may, by leave, allow service outside Australia of an originating process if service is not allowed under rule 125.

(2) An application for leave under this rule must be made on notice to every party other than the person intended to be served.

(3) Also, an application for leave under this rule must be supported by an affidavit stating any facts or matters related to the desirability of the court assuming jurisdiction, including—

(a) the place or country in which the person to be served is or possibly may be found; and

(b) whether or not the person to be served is an Australian citizen.

(4) The court may grant leave under this rule if satisfied—

(a) the claim has a real and substantial connection with Australia; and

(b) Australia is an appropriate forum for the trial; and

(c) in all the circumstances the court should assume jurisdiction.

(5) A sealed copy of an order made under this rule must be served with the document to which it relates."

[37] The respondent proceeded to serve the claim and statement of claim on the applicant in the Cayman Islands without leave on the basis that the claim is founded on a tortious act or omission in respect of which the damage was sustained wholly or partly in Australia.[19]

[38] The applicant disputes that the respondent's claim is wholly within r 125 UCPR and submits that leave to serve outside the jurisdiction was required pursuant to r 126 UCPR.

[39] The applicant seeks to set aside the originating process or a stay of the proceedings on two bases: under r 16 or, alternatively, under r 127 UCPR.

[40] Rule 16 of the UCPR states as follows:

> "**16 Setting aside originating process**
>
> The court may—
>
> (a) declare that a proceeding for which an originating process has been issued has not, for want of jurisdiction, been properly started; or
>
> (b) declare that an originating process has not been properly served; or
>
> (c) set aside an order for service of an originating process; or
>
> (d) set aside an order extending the period for service of an originating process; or
>
> (e) set aside an originating process; or
>
> (f) set aside service of an originating process; or
>
> (g) stay a proceeding; or
>
> (h) set aside or amend an order made under rule 126(1) or 129G(1); or
>
> (i) make another order the court considers appropriate."

[41] Rule 127 of the UCPR states as follows:

> "**127 Court's discretion whether to assume jurisdiction**
>
> (1) On application by a person on whom an originating process has been served outside Australia, the court may dismiss or stay the proceeding or set aside service of the originating process.

[19] See r 125(a)(ii) UCPR.

(2) Without limiting subrule (1), the court may make an order under this rule if satisfied—

(a) service of the originating process is not authorised by these rules; or

(b) the court is an inappropriate forum for the trial of the proceeding; or

(c) the claim has insufficient prospects of success to warrant putting the person served outside Australia to the time, expense and trouble of defending the claim."

[42] There are several other rules in the UCPR that are also relevant.

[43] Rule 128 provides that a notice in the approved form must be served on the person to be served outside of Australia. This includes information as follows:

(a) The scope of the jurisdiction of the Court in respect of claims against persons who are served outside of Australia;

(b) The grounds alleged by the plaintiff to found jurisdiction; and

(c) The person's right to challenge service of the originating process or the jurisdiction of the Court or to file a conditional notice of intention to defend.

[44] If the service of the originating process is by leave of the Court, the notice must list the affidavits relied on to obtain the Court's leave.

[45] Rule 129D states:

> "A document to be served outside Australia need not be personally served on a person as long as it is served on the person in accordance with the law of the country in which service is effected."

[46] Rules 129E to 129H mirror rr 124 to 129D of the UCPR but apply in respect of the District Court and Magistrates Court. The rules differ to the extent that the jurisdictional requirement is a connection to Queensland, rather than a connection to Australia as required in respect of the Supreme Court of Queensland.

Court's discretion whether to assume jurisdiction

[47] The statutory rules operate on the basis that service may be undertaken pursuant to r 125 UCPR where the claim is within one or more of the identified circumstances. If the claim is outside the identified circumstances in whole or part, then an application for leave to serve outside Australia under r 126 UCPR needs to be made prior to service. The Court may grant leave if it is satisfied of the three conditions outlined in r 126(4) UCPR.

[48] Rule 127 UCPR provides a mechanism for the party upon whom an originating process has been served outside of Australia to bring the matter before the Court to consider whether the Supreme Court of Queensland will assume jurisdiction.

[49] Under r 127(1) UCPR, the Court has a discretion and may dismiss or stay the proceeding or set aside service of the originating process. This includes, if the Court is satisfied of one or more of the conditions outlined in r 127(2) UCPR.

[50] The three circumstances set out in r 127(2) UCPR reflect the harmonised rules of court which have incorporated aspects of the decision in *Agar v Hyde.*[20]

[51] The majority of the High Court[21] in *Agar v Hyde* stated at 575:

> "Central to the inquiry on an application for leave to proceed is whether the originating process makes claims of a kind which one or more of the paragraphs in Pt 10 r 1A mention. If the originating process makes such a claim, r 1A provides that the process may be served outside Australia and, on proof of service of the process, the Court's jurisdiction is, prima facie, properly invoked over the party who has been served. In the absence of some countervailing consideration, leave to proceed should then be given.
>
> On an application to set aside service, or to have the Court decline to exercise jurisdiction, attention might be directed to any of a number of features of the proceeding, the claims made in it, or the parties to it, in aid of the proposition that the Court should not exercise jurisdiction. Part 10 r 6A is cast in general terms and it would be wrong to attempt some exhaustive description of the grounds upon which the rule might be invoked. Nevertheless, it may be expected that three common bases for doing so are first, that the claims made are not claims of a kind which are described in Pt 10 r 1A, secondly, that the Court is an inappropriate forum for the trial of the proceeding and thirdly, that the claims made have insufficient prospects of success to warrant putting an overseas defendant to the time, expense and trouble of defending the claims. Whether the Rules prescribe a different test for determining questions of inappropriate forum from that developed at common law is a question which we need not stay to consider." (footnotes omitted)

[52] In that case, ultimately the High Court refused leave to proceed as the absence of a duty of care necessarily meant that the plaintiff had insufficient (possibly no) prospects of success. The Court recognised that the test in relation to prospects of success was the same as to be applied in proceedings for summary judgment.

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20 (2000) 201 CLR 552.

21 Gaudron, McHugh, Gummow and Hayne JJ.

Thereby, a high degree of certainty about the ultimate outcome of the proceedings was required.

[53] In "Private International Law in Australia",[22] the authors discuss the issue of the onus of proof:[23]

> "Although the question of onus of proof was not raised in *Agar v Hyde*, and is not mentioned in the harmonised rules, while in practice the defendant will probably raise these issues in an application to contest jurisdiction, the plaintiff bears the onus of establishing that they are *not* made out. This is, for example, the principle applicable in these applications under the doctrine of *forum non conveniens*, in which the plaintiff must show that the court is not a clearly inappropriate forum for the determination of the proceedings. Ultimately the party on whom the onus rests would depend on the construction of the relevant rules." (footnotes omitted)

[54] *Agar v Hyde* is also authority for the proposition that the Court should start with consideration of the claim, and statement of claim. The High Court identified the appropriate question as follows: "[I]s the claim a claim in which the plaintiff *alleges* that he has a cause of action which, *according to those allegations*" is within one of the grounds of jurisdiction set out in the rules?[24]

[55] The strength of the plaintiff's claim is not relevant at that point. Consideration is to be given to the nature of the allegations. The statement of claim may be enough in some cases to show whether the plaintiff has addressed that issue or not. In some circumstances, it may be necessary to look at further evidence.

[56] In *Borch & Others v Answer Products Inc & Ors,*[25] Holmes J (as her Honour the Chief Justice then was) considered the version of r 124 prior to the introduction of the harmonised rules. In that case, her Honour stated:

> "As I observed in the course of argument, the question of onus really becomes a somewhat sterile argument when what has to be decided is whether on the material before me the plaintiffs' proceeding falls within Rule 124. Given, however, that under the scheme of the Rules the plaintiff at no time is required to obtain leave, either to serve or to proceed, and that Rule 126 is couched in the negative ('if service … is *not* authorised') I conclude that the onus lies on the defendant whose application it is to set aside service. But, as I have

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[22] R Mortensen, R Garnett and M Keyes, *Private International Law in Australia* (LexisNexis Butterworths (Aus), 4th ed, 2019) (Private International Law in Australia).

[23] At [2.45] page 50.

[24] (2000) 201 CLR 552 at 573.

[25] [2000] QSC 379.

> said, given the limited nature of the exercise involved, it seems unlikely that that conclusion is of much moment."[26]

[57] Further, her Honour stated:

> "It is, however, in my view, consistent with the approach which the majority in *Agar v Hyde* described as appropriate in deciding whether provisions permitting service outside Australia … applied. Their Honours said that attention must be focussed 'upon the nature of the claim which is made. That is, is the claim a claim in which the plaintiff *alleges* that he has a cause of action which *according to those allegations*, is a cause of action arising in the State?' They continued:
>
> > 'The inquiry just described neither requires nor permits an assessment of the strength (in the sense of the likelihood of success) of the plaintiff's claim.'
>
> The statement of claim might suffice, they said, to assess whether the plaintiff's claim fell within the provisions enabling service outside Australia, although it was conceivable that further evidence might be required to establish matters not appearing from the pleading.
>
> Wherever one concludes that the onus falls, the nature of the process is similar: an examination of the pleadings and any additional material relied on by the plaintiffs to ascertain whether Rule 124 is engaged."[27] (footnotes omitted)

[58] In that case, it was argued that the pleading was inadequate to establish a prima facie case and, further, that the pleading did not plead specific issues as required by the UCPR. The question was then whether the inadequately particularised allegation of negligence was sufficient to meet the requirements of the rule.

[59] Her Honour concluded:

> "I have come to the conclusion that it is not necessary that a plaintiff's causes of action be properly pleaded for the purposes of other rules, in order to come within Rule 124(1). It is sufficient that the elements of the cause of action are pleaded. If an allegation is made in the pleadings that damage was suffered in Queensland and was caused by a tortious act, an allegation falling within Rule 124(l) has been made for the purposes of the inquiry prescribed in *Agar v*

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26 At [8].

27 At [9] and [10].

Hyde. I am fortified in that view by Lindgren J's analysis in *Cell Tech v Nokia* …"[28] (footnotes omitted)

[60] In *Borch*, her Honour was concerned with r 124(1)(x) of the UCPR, which stated:

"**Service outside Australia**

124 (1) An originating process for any of the following may be served on a person outside Australia without the court's leave –

…

(x) a proceeding, so far as it concerns the person, falling partly within 1 or more of the paragraphs (a) to (w)."

[61] On the particular wording of that section, her Honour concluded that a proceeding may be served outside the jurisdiction providing that it falls, at least in part, within one of the paragraphs of the rule. This is to be contrasted with the current r 125(s) UCPR which states:

"(s) if the claim, so far as it concerns the person to be served, falls partly within 1 or more of paragraphs (a) to (r) and, as to the residue, within 1 or more of the others of paragraphs (a) to (r)."

[62] Rule 125(s) was adopted as part of the harmonised rules process and is in the same terms as the wording used in Supreme Court Rules of New South Wales, Part 10 Rule 1A(x). In *Borch,* Holmes J was taken to decisions referring to Part 10 Rule 1A(x), but her Honour did not place weight on them, stating, "The difficulty is that none of those cases considered a provision in the terms of paragraph [124](x)."[29]

[63] One of those cases referred to in *Borch* was *News Corporation Limited v Lenfest Communications Inc,*[30] which supports the proposition that the current wording of r 125 UCPR requires that each of the claims come within one or more of the paragraphs and a plaintiff cannot proceed against a foreign defendant on claims not falling within a paragraph. Although *News Corporation Limited v Lenfest Communications Inc* is a decision of the NSW Supreme Court, I consider it persuasive as, unlike *Borch*, it considered the procedural rule in identical terms to that being considered here.

[64] In submissions before me, the effect of the decision in *News Corporation Limited v Lenfest Communications Inc* and r 125 UCPR was not agreed. The applicant's position is that the effect of r 125(s) UCPR is that leave is required to serve the claim and statement of claim outside of Australia unless all of the claims come

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[28] At [18].

[29] *Borch* at [25].

[30] (1996) 21 ACSR 553 at page 557.

within one or more of the exceptions set out in r 125. The respondent's position is that the effect is only that those parts of the claim and statement of claim not falling within one of the listed categories in r 125 can be stayed. The correct position is that identified by the applicant.

[65] It is then necessary to consider the matters set out in r 127(2)(a), (b) and (c) in turn.

Rule 127(2)(a) – 'Service of the originating process is not authorised by these rules'

[66] Consideration of whether service of the originating process is not authorised by the UCPR requires a consideration of whether the claims in the statement of claim are wholly within one of the identified circumstances in r 125 UCPR.

[67] The parties agree that r 125(a)(i) is not engaged. It is not alleged that the claim is found on a tortious act or omission that happened wholly or partly in Australia. The parties agree that the various torts (if they were committed) were committed in the Cayman Islands.

[68] The respondent relies on r 125(a)(ii) as the basis for serving the claim outside Australia without leave. That is, that the claim is founded on a tortious act or omission in respect of which the damage was sustained wholly or partly in Australia.

[69] The parties disagree as to whether:

(a) all of the claims are founded on a "tortious act or omission." For example, the claim refers to "conversion and/or breach of bailment condition". Whilst conversion is a tortious claim, there is disagreement as to whether bailment is properly described as a tort, a contract claim or is an independent cause of action.

(b) the mere fact that the respondent was in Australia when he discovered the alleged losses means that the alleged "damage was sustained wholly or partly in Australia." In particular, that the respondent was present in Australia at the time that he is alleged to have made the demand for the return of the gold, identified certain property was not returned to him, or he identified that certain property had been damaged.

[70] The authors of "Private International Law in Australia"[31] discuss a claim under r 125(a)(ii) as follows:

> "Accordingly, it is possible to serve process outside Australia even if much of the damage is suffered outside the forum, and some only is suffered inside the forum's borders once the plaintiff moves there. This rule applies to 'any compensable damage caused by the tort, including economic loss'.[32] For example, it is sufficient if the

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[31] R Mortensen, R Garnett and M Keyes (n 22).

[32] Sigma Coachair Group Pty Ltd v Bock Australia Pty Ltd [2009] NSWSC 684 at [124].

> plaintiff incurred medical expenses in the forum;[33] lost property in the forum that was offered as a security to finance an overseas purchase;[34] or suffer economic loss in the forum.[35] This ground has become the most popular means of establishing international jurisdiction in personal injury cases, but it is also available in other tort claims.[36] Even where only part of the damage is suffered in the forum, if the plaintiff is allowed to proceed against the defendant on this ground the plaintiff is then entitled to claim for recovery of all the damaged suffered – whether sustained inside the forum or outside.[37] A defendant served on this ground may join a third party for contribution – even before judgment is entered against the defendant – on the basis that, by the adverse judgment, the defendant has suffered damage in the forum.[38]
>
> This ground arguably allows the most exorbitant international jurisdiction exercised by Australian courts. In effect, it allows service outside Australia merely because of the plaintiff's personal connection – usually by reason of residence – with the forum, despite the complete absence of any connection between the events or the defendant on one hand, and the forum on the other[39]."[40]

[71] The respondent is currently residing in Australia and the statement of claim identifies that he has been within the jurisdiction of Queensland since May 2018. It is at least arguable that loss sustained as a result of the alleged negligence and conversion was at least partly "sustained" in Australia for the purpose of s 125(a)(ii) UCPR.

[72] In respect of bailment, submissions were made as to whether it was properly described as a "tortious act or omission" in the circumstances alleged in the statement of claim.

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33 *Flaherty v Girgis* (1987) 162 CLR 574.

34 *Baxter v RMC Group plc* [2003] 1 NZLR 304.

35 Colosseum Investment Holdings Pty Ltd v Vanguard Logistic Services Pty Ltd [2005] NSWSC 803; PCH Offshore Pty Ltd v Dunn (No 2) (2010) 273 ALR 167.

36 Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc [1990] 1 QB 391 at 437; Darrell Lea Chocolate Shops Pty Ltd v Spanish-Polish Shipping Co Inc (1990) 25 NSWLR 568; Dow Jones & Co Inc v Gutnick (2002) 210 CLR 575; [2002] HCA 56; Baxter v RMC Group plc [2003] 1 NZLR 304.

37 *Flaherty v Girgis* (1985) 4 NSWLR 248 at 266-7.

38 Australian Mutual Provident Society v GEC Diesels Australia Limited [1989] VR 407.

39 For example, *Flaherty v Girgis* (1987) 162 CLR 574; *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491; [2002] HCA 10.

40 See paragraphs [2.77] and [2.78] at pages 63-64.

[73] Counsel for the applicant referred to the 3rd edition of "Palmer on Bailment"[41] at paragraph [1-097], as well as the case of *Yearworth v North Bristol NHS Trust*,[42] in support of the proposition that bailment is an independent cause of action: independent from both contract and tort.

[74] In Chapter 42 of "Palmer on Bailment", the authors further discuss bailment in the context of conflict of laws. It is recognised that rules used to determine the system of law governing claims in contract and in tort make no specific reference to bailment in general.

[75] At 42-017 the authors summarise the position as follows:

> "The fact that bailment is a legally distinct form of relationship, independent from both contract and tort, has traditionally raised questions about its place in the conflict of laws. One question is whether a claim in bailment must necessarily be fitted into one of the limited categories of obligation recognised by the relevant statutory regime and is debarred from attracting a rule drawn from outside that regime. A second question, contingent on an affirmative answer to the first, concerns the head of obligation to which the claim in bailment must then be allocated."

[76] Further, the authors state at 42-022:

> "The allocation of bailment claims within exclusive statutory regimes is likely to depend on the form of liability asserted. Many of the duties of a contractual bailee can be expressed, at least at a pinch, as implied terms of the bailment. A claim by the bailor under a contractual bailment for a breach by his bailee of one of the inherent obligations under the bailment will probably be classed as a claim in contract, even though such a claim might in theory be actionable in tort. But other claims are less readily identified.
>
> Where the bailee deliberately converts the chattel entrusted to him, there appears no reason why the resultant claim by the bailor should not be categorised as a claim in tort for statutory purposes, notwithstanding Salmon L.J's famous remark that the duty not to convert is one of the essential obligations of the bailee. The wrong asserted is a wrong outside the field of the implied undertakings under the bailment and is, moreover, not peculiar to bailment. The same is likely to be true of a claim against the bailee in trespass for deliberate injury to the chattel." (footnotes omitted)

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41 N Palmer CBE, *Palmer on Bailment* (Thomson Reuters, 3rd ed, 2009).

42 [2010] QB 1; [2009] EWCA Civ 37.

[77] Conversely, at 42-023, the authors state:

> "Non-contractual bailments raise more daunting challenges. Those that are consensual and directly negotiated by the parties, such as the standard gratuitous bailment by way of unrewarded deposit or loan, may well qualify for treatment as contracts under the statutory regimes despite the absence of consideration … [A]n aggregation to contract would appear justified in cases of consensual but non-contractual bailment such as *depositum* or *commodatum*. The transaction is closer to contracts than to an ordinary relationship of proximity in tort, and the law applicable to contracts would seem to provide a clearer and more convenient selection then the competing rule in tort." (footnotes omitted)

[78] The respondent submits[43] that the claim is based on a "tortious breach of a bailment condition" and does not allege a bailment contract. Further, the respondent states:

> "There is only one condition imposed by law arising from the defendant's actions. That is the strict duty of care in respect of the plaintiff's goods. The breach of the bailment condition argued is tortious since it flows from the result of a breach of a duty of care. The same facts could just as equally be pursued in a claim in negligence. But in each case, it would be predicated on a tortious act or omission arising from the duty of care owed to the plaintiff when the defendant refused to give the plaintiff possession of his goods."[44]

[79] The statement of claim in this proceeding is deficient in a number of material respects and on its face it is almost impossible to properly understand the legal basis of the claims made. In respect of the claim for "breach of bailment condition", the statement of claim does not plead a contract, nor does it plead a duty of care and breach. The claim and statement of claim at best includes a claim based on some form of gratuitous bailment.

[80] On balance, I consider that the claim in respect of bailment is not within r 125(a)(ii) UCPR as it is not founded on "a tortious act or omission".

[81] Accordingly, leave to serve the claim and statement of claim outside of Australia was required. As a result, pursuant to r 127(2)(a) UCPR I am satisfied that service of the originating process was not authorised by these rules.

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[43] See Plaintiff's Supplemental Written Submissions Responding to Application to Set Aside Service & for Stay of Proceedings.

[44] Ibid. at [7].

Non-compliance with r 128 – notice

[82] There is also a non-compliance with r 128 UCPR as it appears that no notice was served setting out certain required information, including the grounds alleged by the plaintiff to found the jurisdiction.

[83] On the Court file is an affidavit of service of Mr Sheldon Williams of the Cayman Islands who deposes to being a security officer with the Special Service Department of The Security Centre. Mr Williams deposes to serving two copies of the claim and statement of claim for matter 2178/2020 on the defendant. No notice is referred to in the affidavit.

[84] This is consistent with the affidavit of Ms Chalfen who also swears to being purportedly served with a copy of the claim and statement of claim.

[85] Pursuant to r 371 UCPR, the effect of failure to comply with the rules is as follows:

> "(1) A failure to comply with these rules is an irregularity and does not render a proceeding, a document, step taken or order made in a proceeding, a nullity.
>
> (2) Subject to rules 372 and 373, if there has been a failure to comply with these rules, the court may—
>
> (a) set aside all or part of the proceeding; or
>
> (b) set aside a step taken in the proceeding or order made in the proceeding; or
>
> (c) declare a document or step taken to be ineffectual; or
>
> (d) declare a document or step taken to be effectual; or
>
> (e) make another order that could be made under these rules (including an order dealing with the proceeding generally as the court considers appropriate); or
>
> (f) make such other order dealing with the proceeding generally as the court considers appropriate."

[86] No submissions by the parties were made in respect of this non-compliance with the rule. As I have found that service without leave was not authorised it is not strictly necessary for me to consider this further. However, if my analysis of bailment not being within r 125(a)(ii) UCPR is incorrect, as an alternative I would set aside service in any event for failure to comply with the requirement to give the required notice. The requirement to specify the grounds alleged by the plaintiff to found the jurisdiction assists the recipient of the claim and statement of claim to understand the circumstances in which the claim is made and served. The discipline involved

in articulating the grounds also assists in the early identification of the issues which enable applications such as this one to be avoided or to be dealt with efficiently.[45]

Rule 127(2)(b) – 'the Court is an inappropriate forum for the trial of the proceeding'

[87] The applicant further submits that the Court can also be satisfied that the Supreme Court of Queensland is an inappropriate forum for the trial of the proceeding pursuant to r 127(2)(b) UCPR.

[88] The applicant submits it is relevant consideration to the exercise of the discretion under r 16 or r 127(2)(b) UCPR to consider whether leave would have been granted had an application been made under r 126 UCPR.[46]

[89] This argument proceeds on the basis that if the respondent had sought leave pursuant to r 126 UCPR leave would not have been granted as the respondent would have been unable to establish the three conditions in r 126(4), namely:

(a) The claim has a real and substantial connection with Australia;

(b) Australia is an appropriate forum for the trial; and

(c) In all the circumstances the Court should assume jurisdiction.

[90] If an application for leave had been made, the respondent would have had the onus of satisfying the Court of the three conditions.

[91] Further, and alternatively, the applicant submits that, pursuant to r 127(2)(b) UCPR, the Supreme Court of Queensland is an inappropriate forum for the trial of the proceeding. In this alternative submission, the onus is on the applicant to show that the Supreme Court of Queensland is an inappropriate forum. The reality is that many of the same factors are considered under r 126(4) and r 127(2)(b) UCPR in the balancing exercise to be undertaken by the Court.

[92] The applicant submits that the r 126(4)(a) condition of "a real and substantial connection" is not satisfied as follows:

(a) The only connection with Queensland and Australia is that the plaintiff currently resides here and as a result it is alleged that damage was sustained in the jurisdiction.

(b) The issue does not require a comparative consideration like in *forum non conveniens* cases.

(c) A proper construction of the rule requires a substantial connection, as distinguished from "the trivial".

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45 And consistently with the obligation in r 5 of the UCPR.

46 Applicant's Written Submissions at [44].

(d) The mere fact that a party lives in Australia does not establish "a real connection" between a claim and Australia, nor a "substantial one."[47]

(e) This condition is distinct from the condition in r 126(4)(b) which arguably supports a requirement of more than mere residence of the plaintiff.

(f) Residence of the plaintiff in Australia is not an element of the cause of action. It is only relevant to an attempt to fall within r 125(a)(ii) UCPR.

(g) Other relevant matters points to a "real and substantial" connection with the Cayman Islands, including but not limited to the following:

(i) No part of any tort occurred in Australia.

(ii) The chattels alleged to have been detained, were detained in the Cayman Islands.

(iii) Other than the plaintiff, no witnesses are in Australia. The witnesses are located in the Cayman Islands, or possibly the United Kingdom in respect of the defendant's mother.

[93] The applicant further submits that the r 126(4)(b) condition, that "Australia is an appropriate forum for the trial", is not satisfied. The applicant submits that Australia is a clearly inappropriate forum as:

(a) The defendant is unable to travel to Australia due to serious health problems;[48]

(b) The causes of action and the loss suffered arose in the Cayman Islands;

(c) Any witnesses other than the plaintiff will be in the Cayman Islands;[49]

(d) The law of the Cayman Islands applies to the causes of action;[50]

(e) Any incapacity of the plaintiff to travel to the Cayman Islands is as a result of his own criminal conduct.[51]

[94] Further, the applicant submits that the r 126(4)(c) condition, that "in all the circumstances the court should assume jurisdiction", is not satisfied. The applicant points to the following factors in support of this position:

(a) This condition requires consideration of the relative positions of the parties and the interests of justice in respect of the two jurisdictions.

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47 Citing Michael Wilson & Partner Ltd v Emmott [2019] NSWSC 218 at [65].

48 See first Chalfen affidavit at [45].

49 I note that the defendant's mother is in the United Kingdom but has previously travelled to the Cayman Islands.

50 Although it is recognised that the law is reasonably similar to Australian law.

51 There is no evidence before the Court as to whether the plaintiff is unable to return to the Cayman Islands but this was referred to in the applicant's submissions at [34] and [39]. Paragraph [64] of the respondent's written submissions adopts the applicant's submission in this regard.

(b) In the divorce proceedings in the Cayman Islands the parties are already litigating various property issues. While there is not necessarily an overlap, there is the potential for one.

(c) The plaintiff's inconvenience in not being able to attend personally in the Cayman Islands is already occurring in respect of the divorce proceedings and this is a factor in the balancing exercise.

(d) To require the defendant to litigate in Australia to accommodate the plaintiff's convenience is oppressive. This is particularly so when it is the result of the plaintiff's criminal conduct that would prevent him from returning to the Cayman Islands.

(e) The defendant will have to engage lawyers. The plaintiff is a lawyer who has previously practised in the Cayman Islands. On balance the plaintiff is "better placed to litigate in a foreign jurisdiction" than the defendant.

(f) Some of the circumstances suggest attempts by the plaintiff to "oppress and vex". The defendant points to the following matters in support of this submission:

(i) The proceedings in the Magistrates Court and the Supreme Court are essentially the same claim. The Magistrates Court proceedings were only discontinued after the Supreme Court proceedings had been filed and served.

(ii) The interlocutory injunction sought in the Supreme Court proceedings has not been prosecuted. This relief would not have been granted on the ground of delay in any event as the alleged conversion occurred in August 2019. Further, this was known when the Supreme Court proceedings were commenced in February 2020.

[95] For these reasons, the applicant submits leave to serve the proceedings in the Cayman Islands would not have been granted under r 126.

[96] Alternatively, the applicant submits that even if leave had been granted to serve the claim and statement of claim under r 126 UCPR, it should be stayed in any event under r 127 UCPR.

[97] In response the respondent makes various submissions including relevantly:

(a) The defendant could participate in the proceedings in Queensland by video link and could have her service dog with her.[52]

(b) The defendant has "the means to run the case in Australia" as evidenced by her retaining counsel and local lawyers in respect of this application.[53]

52 Plaintiff's Written Submissions at [66] and [67].

53 Plaintiff's Written Submissions at [70].

(c) The Magistrates Court proceedings were never served and the defendant was aware of this. Additionally, the Magistrates Court proceedings have been discontinued.[54]

(d) None of the property issues in the divorce proceedings are the same as the property issues in this matter.[55]

(e) The affidavit of Ms Hatfield is "internally inconsistent … and the purported facts set out in this paragraph of her affidavit are also disputed".[56]

[98] I consider that, on the basis of the matters identified in paragraphs [92], [93] and [94] above, leave to serve the proceedings would not have been granted as the respondent would not have established the three conditions in r 126 UCPR.

[99] Further, r 127(2)(b) UCPR provides that "the court is an inappropriate forum for the trial of the proceeding."

[100] It was recognised by the High Court[57] in *Regie Nationale des Usines Renault SA v Zhang*[58] that:

> "The expression 'inappropriate forum' in par (b) of Pt 10, r 6A(2) is less emphatic than the expression 'clearly inappropriate forum', the latter being the term adopted in *Voth* to determine whether an Australian court should decline to exercise its jurisdiction. The formulation in *Voth*, as Spigelman CJ pointed out in *James Hardie Industries Pty Ltd v Grigor*, was adopted in preference to the 'clearly more appropriate forum' test favoured in the United Kingdom. Thus, it should at once be noted that a court is not an inappropriate forum merely because another is more appropriate.
>
> Because a court's power to stay proceedings is an aspect of its inherent or implied power to prevent its own processes being used to bring about injustice, the same concepts and considerations necessarily inform the test of 'inappropriate forum' in par (b) of Pt 10, r 6A(2) as inform the 'clearly inappropriate forum' test adopted in *Voth*. And because the ultimate consideration is the prevention of injustice, they inform it in the same way. Thus, it is appropriate to note what was said by Dawson, Gaudron, McHugh and Gummow JJ in *Henry v Henry*. Their Honours said:
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> > 'In [*Voth*], this Court confirmed its rejection, in [*Oceanic Sun*], of the forum non conveniens principle as stated by the

54 Plaintiff's Written Submissions at [71] and [72].

55 Plaintiff's Written Submissions at [60].

56 Plaintiff's Written Submissions at [63].

57 Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

58 (2002) 210 CLR 491.

> House of Lords in *Spiliada Maritime Corporation v Cansulex Ltd*. The *Spiliada* principle allows that a court may stay proceedings which are pending before it if that court is not the natural forum and there is another available forum which is clearly or distinctly more appropriate. The result is that, in the United Kingdom, a stay will be granted in favour of a clearly more appropriate forum or, which is much the same thing in practice, the natural forum, that being the forum 'with which the action [has]the most real and substantial connection' …
>
> In *Voth*, this Court adopted for Australia the test propounded by Deane J in *Oceanic Sun*, namely, that a stay should be granted if the local court is a clearly inappropriate forum, which will be the case if continuation of the proceedings in that court would be oppressive, in the sense of 'seriously and unfairly burdensome, prejudicial or damaging', or, vexatious, in the sense of 'productive of serious and unjustified trouble and harassment'. It was also held in *Voth* that, in determining whether the local court is a clearly inappropriate forum, 'the discussion by Lord Goff in *Spiliada* of relevant 'connecting factors' and 'a legitimate personal or juridical advantage' provides valuable assistance'. In this last regard, Lord Goff of Chieveley expressed the view that legitimate personal or juridical advantage is a relevant but not decisive consideration, the fundamental question being where the case may be tried 'suitably for the interests of all the parties and for the ends of justice'.'"

In *Voth*, the majority joint judgment also identified as a material consideration whether it is fairly arguable that the substantive law of the forum is the lex causae."[59] (footnotes omitted)

[101] The respondent relies on the above decision and submits:

(a) The applicant has to demonstrate that the proceedings are oppressive, vexatious or an abuse of process and to continue the proceeding will result in an injustice between the parties.[60]

(b) The mere fact that "the balance of convenience favours one jurisdiction over the other or that some other jurisdiction would provide a more appropriate forum" does not justify the dismissal of the action or the grant of a stay.[61]

(c) The jurisdiction to grant a stay is to be exercised with great caution.

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59 (2002) 210 CLR 491, 503 to 504.

60 Submissions at [56].

61 Submissions at [57].

[102] The applicant submits that the same factors identified in paragraphs [92] to [94] above establish that the Supreme Court of Queensland is an inappropriate forum and it is appropriate for the Court to stay the proceeding under:

(a) r 127 UCPR;

(b) r 16 UCPR; or

(c) in exercise of the Court's inherent jurisdiction.

[103] The comments of Bernard Cairns in "Australian Civil Procedure"[62] provide some helpful guidance on the practical application of the test recognised by the High Court in *Voth v Manildra Flour Mills Pty Ltd*:[63]

> "A difference between the traditional test and the High Court's reformulation of it is in the definition of the terms 'oppressive', 'vexatious' and 'abuse of process'. Previously, they were rigidly defined. The term 'oppressive' meant moral, but not necessarily legal, delinquency; 'vexatious' referred to the irresponsible pursuit of litigation. These terms were more broadly defined. In the High Court's reformulation of the test:
>
> - 'oppressive' means seriously and unfairly prejudicial or damaging;
> - 'vexatious' means unjustifiable trouble or harassment.
>
> Oppressive and vexatious refer to the effect of continuing the litigation in the plaintiff's selected forum: at 555.
>
> Whether the continuance of the litigation would be oppressive or vexatious in this sense must be judged by the court on any application for a stay. On this basis, the majority thought that a stay could be granted if the defendant could show the selected forum to be clearly inappropriate: at 557. The test was expressed as the clearly inappropriate forum test, to be distinguished from the clearly more appropriate forum test embraced by the House of Lords in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460. The clearly inappropriate forum test was distinguished from the traditional test. On the clearly inappropriate forum test a regularly commenced proceeding that was not vexatious could be stayed if it was unjust to continue it and the proceeding could be brought in another forum without inconvenience to the plaintiff. A stay in the same circumstances would not be allowed under the traditional test: at 556-557. The traditional approach gives the court little control

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62 B C Cairns, *Australian Civil Procedure* (2020, Thomson Reuters, 12th ed) (Australian Civil Procedure).

63 (1990) 171 CLR 538.

> over forum shopping and conduct unfair to the defendant. However, the court was not prepared to accept the House of Lords' forum non conveniens concept, which it described as the clearly more appropriate forum test: at 559.
>
> While the two tests are capable of yielding the same results, they differ in emphasis. The clearly inappropriate forum test emphasises the effect on the defendant of continuing the proceeding in the selected forum. The clearly more appropriate forum test looks to whether the most appropriate forum was selected. This difference in emphasis is likely to be important only where another forum is the natural or more appropriate forum, but the plaintiff's selected forum is not clearly inappropriate. Outside this probably rare occurrence, it seems unnecessary to compare the two tests: at 558." [64] (footnotes omitted)

[104] Before reaching a conclusion in respect of this issue it is necessary to consider a further argument raised by the respondent.

Voluntary submission to jurisdiction

[105] The respondent raises an additional argument that the applicant has voluntarily submitted to the jurisdiction of the Supreme Court of Queensland by:

(a) Filing evidence and making arguments that go beyond merely setting aside service but attack the merits of the claim; and

(b) Taking steps in the proceeding which recognise the jurisdiction of the Supreme Court of Queensland.

[106] The respondent relies on an email dated 7 March 2020 from Ms Hatfield to the applicant in relation to re-listing the "financial ancillary matters hearing" in the divorce proceedings which states:

> "Please see attached a Listing Form. I would be grateful if you would let me have your dates to avoid within 7 days. I assume you will attend the hearing by VC and we will arrange to have the Hearing recorded as Elle's cross examination of you will go to matters relevant to the Court Case you have commenced against her in Australia."[65]

[107] The respondent's submissions in relation to the email are as follows:

> "Not only did Ms Hatfield indicate that she recognised the jurisdiction of the Queensland Court but she initiated steps that

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[64] Australian Civil Procedure (above n 62) [5.140] page 249-250.

[65] First Courtney affidavit at exhibit "SCC-13", page 32.

would have resulted in obtaining evidence to be used in the Court proceedings."[66]

[108] Further, the respondent also relies on the affidavits of the applicant and Ms Hatfield as going to the merits of the case. The respondent states:

> "The defendant and Laura Hatfield have both filed affidavits which go into the merits of the case, the strength of the plaintiff's claim and its likelihood of success.
>
> The solicitors for the defendant have indicated in correspondence that these affidavits will support arguments made as to whether the court should assume jurisdiction. In the case of the defendant she has argued the existence of a third party claim as well as asserting arguments regarding the ownership of the vinyl records. The arguments go beyond challenging the jurisdiction and are arguments based on the merits of the claim."[67]

[109] The respondent refers to and relies on the decision of Rares J in *City of Swan v McGraw-Hill Companies Inc*[68] where his Honour stated at [117] to [119]:

> "If a defendant seeks relief from the Court wider than relief setting aside service or associated with such relief, such as relief on the merits of a claim, ordinarily, he, she or it will have waived the objection to jurisdiction: *Laurie v Carroll* (1958) 98 CLR 310 at 335-336 per Dixon CJ, Williams and Webb JJ; *National Commercial Bank v Wimborne* (1979) 11 NSWLR 156 at 176E-F, 177D-E, 182D-F per Holland J; *Walker v Newmont Australia Ltd* [2010] FCA 298 at [27] per Gordon J. In *In re Dulles' Settlement (No. 2). Dulles v Vidler* [1951] Ch 842 at 847, Evershed MR put the issue pithily as follows:
>
> > 'It is, of course, plain that where a question of jurisdiction arises **a man cannot both have his cake and eat it. He cannot fight the issue on the merits, and at the same time preserve the right to say, if the worst comes to the worst, that the court has no jurisdiction to decide against him**. And he cannot, consistently with that principle, take any step unequivocally referable to the issue on the merits.' (emphasis added)
>
> I am of opinion that, here, S & P has tried to have its cake and eat it. It has attacked the merits of the originating application and

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66 Respondent's Written Submissions at [77].

67 Respondent's Written Submissions at [80] and [81].

68 [2014] FCA 442.

> statement of claim at a fundamental level in the course of its seeking to have service on it set aside. Were S & P to have succeeded on its merits-based attack in having the proceedings dismissed or the originating application set aside, an issue estoppel would have been created as explained in *The Messiniaki Tolmi* [1984] 1 Lloyd's Rep at 271.
>
> For these reasons, I would also refuse to set aside service because S & P submitted to the jurisdiction."

[110] The applicant submits that there has been no submission to the jurisdiction. In respect of the email, the applicant says that the mere fact that it would be useful to the proceedings in Australia to have the evidence recorded does not amount to conduct unequivocally inconsistent with contesting the Court's jurisdiction.

[111] In respect of the email, I note that the affidavit of the respondent also exhibits a follow up email dated 13 March 2020 from a lawyer acting on his behalf which states as follows:

> "I also note your intention to cross examine my client in regards to matters which will be heard by the Australian court.
>
> Please note that none of the matters, the subject of the Australian proceedings, are matters currently before the Cayman Islands courts.
>
> Please explain how you feel the Cayman Islands' court has jurisdiction over matters before an Australian court and how you feel my client can be questioned in a different forum regarding these matters."[69]

[112] The position outlined in the email dated 13 March 2020 illustrates that the statement of 7 March could not be classified as being "unequivocally inconsistent with contesting the Court's jurisdiction". It was facilitative of the presentation of potentially relevant evidence, at best.

[113] The decision of *City of Swan v McGraw-Hill Companies Inc* can also be distinguished from the current case in that the defendant there sought substantive relief: an application to strike out the originating application and its summary dismissal under s 31A(2) of the *Federal Court of Australia Act* 1976 (Cth). Here the evidence and submissions have been directed to the grounds and relief in r 127 UCPR.

[114] It is also necessary to recognise that the conditions in r 127(2) UCPR necessarily engage to a certain degree with the detail of the matter. For example, r 127(2)(c) UCPR deals with "prospects of success" which would necessarily involve some consideration of the merits of the case in an application under r 127 UCPR. Similar

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[69] Exhibit "SCC-14" to first Courtney affidavit, page 33.

factors may be relevant in some circumstances to the balancing exercise under r 127(2)(b) UCPR.

[115] Bernard Cairns in "Australian Civil Procedure" helpfully summarises the position as follows:

> "A conditional appearance for challenging the jurisdiction of the court should not go further than stating the grounds of the challenge. Within this principle, however, the defendant is allowed a good deal of latitude. In *Laurie v Carroll* (1958) 98 CLR 310 at 335-336, the defendant went further than was necessary to challenge the jurisdiction of the court and to a degree dealt with the merits. In the circumstances the court decided he had not submitted to the jurisdiction."[70] (footnotes omitted)

[116] On balance I consider that the applicant has not submitted to the jurisdiction as the arguments and evidence are consistent with the position identified in the conditional notice of appearance filed by the applicant.

Should the proceedings be stayed?

[117] For the reasons outlined above, I am satisfied for the purposes of r 127(2)(a) UCPR that the service of the originating process was not authorised by the UCPR.

[118] In exercising my discretion and balancing the various factors, I am satisfied that the effect of continuing the litigation in the Supreme Court of Queensland is oppressive and vexatious in the sense that it is unfairly prejudicial and unjustifiably troublesome to the applicant. I consider that the overall effect of the various factors taken together establishes that this Court is an inappropriate forum for the trial of the proceeding. These factors include the following:

(a) If an application for leave under r 126 UCPR had been made it is unlikely that the grounds would have been satisfied on the material currently before the Court.

(b) The only connection with Australia is that the plaintiff currently resides here.

(c) No part of any tort occurred in Australia (although it is arguable that the plaintiff "sustained" damage in Australia pursuant to r 125(a)(ii), this is distinct from the loss necessary to establish the pleaded tort).

(d) The chattels alleged to have been detained were detained in the Cayman Islands.

(e) The law of the Cayman Islands applies to the causes of action.

(f) Other than the plaintiff, no witnesses are in Australia.

(g) The defendant is unable to travel to Australia due to serious health problems.

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70 Australian Civil Procedure (above n 62) [5.13] page 242.

(h) Any incapacity of the plaintiff to travel to the Cayman Islands is as a result of his own criminal conduct.

(i) In the divorce proceedings in the Cayman Islands the parties are already litigating various property issues. Relevantly:

  (i) Any asset of a party, regardless of whether it is a pre-marital asset, is subject to the jurisdiction of the Grand Court of the Cayman Islands until that Court makes a final order dealing with financial matters relevant to the divorce which either specifies the treatment of the parties' assets or does not involve an asset of a party.

  (ii) While there is not necessarily an overlap in the proceedings, it is inappropriate and inefficient for this Court to deal with assets that are subject to the jurisdiction of the Grand Court of the Cayman Islands.

  (iii) It is apparent that evidence has already been provided to the Grand Court of the Cayman Islands and will be provided to the Grand Court of the Cayman Islands as part of the divorce proceedings relevant to the assets the subject of these proceedings. It is inappropriate and inefficient to duplicate that process where the divorce proceedings are on-going.

  (iv) There is also the risk of inconsistent decisions in respect of issues and property.

(j) The plaintiff is already participating remotely in the divorce proceedings in the Grand Court of the Cayman Islands.

(k) To require the defendant to litigate in Australia is to put the defendant to unjustifiable expense and trouble, particularly when it is the result of the plaintiff's criminal conduct that would prevent him from returning to the Cayman Islands.

[119] In addition I consider that the issue raised in the statement of claim at [27] relating to the alleged undertaking by Ms Hatfield is also a factor that points to this Court being an inappropriate forum. This is a potentially serious allegation that may require consideration of Ms Hatfield's professional obligations under the local laws and for Ms Hatfield to be given a proper opportunity to respond to the allegation. Allegations such as this are not appropriate to be dealt with in a "foreign jurisdiction". The plaintiff should not have the benefit of raising such allegations in a "foreign jurisdiction" where they cannot fairly be dealt with for all concerned.

[120] On the basis of the matter identified in paragraph [118] above, I am also satisfied that for the purposes of r 127(2)(b) UCPR that this Court is an inappropriate forum for the trial of the proceedings.

[121] On the basis of the findings set out in these reasons, I am satisfied that it is appropriate to order that the proceedings be permanently stayed.

[122] It is clear on the wording of r 127 UCPR that the Court's power is not limited to the circumstances in r 127(2)(a), (b) and (c). There is a wider discretion under r 127(1)

UCPR to decline to exercise jurisdiction.[71] There is also the Court's inherent jurisdiction and the power under r 16 UCPR.

[123] In addition to there being a basis under r 127(2)(a) and (b) UCPR to decline jurisdiction, I am also satisfied that under r 127(1) UCPR, r 16 UCPR and the Court's inherent power that it is appropriate in all the circumstances identified in these reasons to decline jurisdiction and permanently stay the proceedings.

[124] No submissions were made in relation to costs. While the applicant has been successful, I make no order as to costs as it appears to be inappropriate given my reasons and orders.[72] This is something the applicant may want to consider further. If the applicant wishes to pursue an order for costs, I grant liberty to apply in respect of costs only.

[125] I order that:

1. The proceeding be permanently stayed.
2. No order as to costs.
3. Liberty to apply in respect of costs.

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71 Bendigo and Adelaide Bank Ltd v Quine [2018] VSC 272.

72 See Bendigo and Adelaide Bank Ltd v Quine [2018] VSC 272.