

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM NO. BVIHCOM 2022/0132

BETWEEN:

CASHMAN EQUIPMENT CORP.

Claimant

and

EMCS CARIBBEAN LTD

Defendant

Appearances:

Mr. Callum McNeil for the Claimant.

Mr. Stewart Buckingham KC, with him Mr. Peter Ferrer and Mrs. Kimberly Crabbe-Adams for the Defendant

2023: May 16;
June 1.

JUDGMENT

- [1] **MANGATAL, I (Ag.):** The Claimant Cashman Equipment Corp ("**Cashman**") is a company incorporated under the laws of the Commonwealth of Massachusetts, in the United States. The Claimant is principally engaged as a barge rental and marine contracting company.
- [2] The Defendant EMCS Caribbean Limited ("**EMCS**") is a company incorporated in the BVI with its principal place of business being in the BVI.
- [3] There are two applications before me. One is Cashman's application for Summary Judgment dated 8 February 2023 and the other is EMCS's application for summary judgment, or a reverse summary judgment application, as the parties have referred to it, dated 25 April 2023.
- [4] Cashman's claim is based upon a judgment it obtained against EMCS and others, Directors of EMCS, in the Commonwealth of the Massachusetts ("**Massachusetts**") in the United States.
- [5] The Defendant has filed a Defence in which it claims that it is not liable under, or liable to satisfy the Massachusetts judgment, for reasons that I will come to.

The Statement of Claim

- [6] Cashman avers that it is the judgment creditor of EMCS under a judgment issued in Massachusetts which is more particularly described as a Default Judgment dated 28 February 2022 made by Judge Richard G. Stearns of United States District Court for the District of Massachusetts Civil Action No: 1:21-cv-10862-RGS ("**the Judgment**").
- [7] The total debt and costs which Cashman claims under the Judgment is US\$4,029,435.95, with post judgment interest, the breakdown of which is as follows:

Item		Amount in USD
1.	Damages for loss of use of the Vessel at the rate of \$1,300 per day for 652 days	847,600
2.	Custodial fees and costs incurred by Claimants due to Defendant's illegal detention of the Vessel	181,250
3.	Repairs to the Vessel necessitated by the Defendant's acts and omissions	1,700,000
4.	Marine survey expenses	1,841.29
5.	Towing costs to repatriate the Vessel to the United States	780,000
6.	Costs to effect service of process under the Hauge (<i>sic</i>) Convention	6,000
7.	Legal costs for proceedings in Trinidad to recover the Vessel	120,000
Sub-Total:		3,636,691.29
8.	Costs	402
9.	Interest	392,342.66
	Total	4,029,435.95

[8] The pleading continues, that the Judgment was made on the basis of, amongst other matters, a Charter Lease/Vessel Purchase Agreement (“**the Contract**”) made effective on 20 March 2018. The Contract was for the charter hire of the barge registered in the United States and known as JMC 50 (“**the Vessel**”).

[9] It is Cashman’s claim that pursuant to the terms of the Contract, the Defendant agreed to pay charter hire to the Claimant at the rate of \$1,300 per day for the term

of the Contract which was agreed to be six (6) months. Thereafter the Contract continued whilst the Vessel remained in the possession of EMCS.

- [10] Paragraph 10 of the Statement of Claim expressly pleads that Cashman and EMCS elected to have their obligations governed by Massachusetts law and jurisdiction. Clause 24 of the Contract provides:

“Any controversy or claims arising out of or relating to this contract or the breach thereof shall be governed by the general maritime law of the United States, insofar as applicable, otherwise by the laws of the Commonwealth of Massachusetts. The parties to this contract hereby agree that all disputes shall be resolved in the first instance by the United States District Court for the District of Massachusetts and in default of subject matter jurisdiction in the said court then in a court of general Jurisdiction in the Commonwealth of Massachusetts. All parties waive any defence of lack of personal jurisdiction or defence of improper venue associated with said forum selection method as described herein...”

- [11] The pleading goes on to detail that EMCS took possession of the Vessel on 9 May 2018 and claims that during the term of the Contract EMCS failed to pay a significant portion of the charter hire that was due and payable and failed to comply with the Contract in numerous respects.

- [12] Cashman states that it subsequently instituted proceedings against EMCS in Massachusetts on 24 May 2021.

- [13] By its pleading, Cashman seeks enforcement of the Judgment, the sum of \$4,029,435.95 plus interest and costs.

The Defence

- [14] In its Defence, at paragraphs 14, 19 and 20, EMCS admits that the Judgment was issued by the US Court in the US claim, but it denies any liability as a judgment creditor pursuant to the Judgment. It avers that the Judgment was obtained in

default, without EMCS's participation, and in circumstances where EMCS did not submit to the jurisdiction of the US Court.

[15] EMCS also asserts that the Judgment was not in fact obtained in relation to any breach of contract claim. In fact, that the Claimant expressly disavowed any contractual claim that it could make in the US claim. Thus, it is asserted that Cashman's re-characterisation of the nature of the US claim, and hence the Judgment, for the purposes of seeking enforcement in the BVI is illegitimate and an abuse of the process of the Court.

[16] Further or in the alternative, it is stated that the alleged Contract was superseded by the final agreement dated 4 June 2018 ("**the Final Agreement**"), and therefore it is denied that the Contract, or the jurisdiction clause contained within it, was binding or applicable.

[17] EMCS also argues that further or alternatively, and in any event, the US claim and/or Judgment and/or the facts and matters with which the same are concerned are outwith the scope of the jurisdiction clause in the Contract (and/or if, which is denied, the same be relevant, are outwith the scope of the jurisdiction clause in the Final Agreement).

Defence sets out background-Commencement of Trinidad & Tobago Proceedings

[18] Prior to making its challenges in relation to the Judgment set out above, EMCS sets out a background part of which concerns proceedings in Trinidad and Tobago ("**the Trinidad Claim**"). On 8 May 2020, Cashman commenced an admiralty action in rem for the arrest of the vessel in claim No. CV2020-01178.

[19] The Trinidad Claim was brought against EMCS as the entity which at the date of the filing of the Trinidad Claim was in possession of the Vessel and in the alternative, against any other persons claiming to be interested in the Vessel.

- [20] EMCS indicates that it instructed a law firm to defend the Trinidad Claim and has since the filing of its defence and counterclaim been fully defending the Trinidad Claim. On 28 January 2022, the trial Judge in the Trinidad Claim, Justice Kangaloo, ordered the release of the Vessel to EMCS. However, Cashman appealed this decision and the Court of Appeal of the Republic of Trinidad and Tobago reversed the trial judge's decision, ordering the release of the Vessel to Cashman. The release was upon condition of provision of payment of security into court in the sum of US \$637,500. The Vessel remains unreleased at this time.
- [21] The Trinidad Claim was based upon the Contract and included a claim by Cashman for alleged breach of that Contract.
- [22] The Trinidad Claim was set down for a 4-day trial from 22 August 2022 to 25 August 2022 and EMCS avers that it prepared for and fully intended to defend the Trinidad Claim.
- [23] However, on 22 August 2022, the day on which the trial of the Trinidad Claim was to commence, Cashman filed an application to discontinue certain aspects of the Trinidad Claim, which aspects included:
- (1) the sum of US\$283,800.00, together with contractual interest at the rate of 18%;
 - (2) damages for breach of the Contract; and
 - (3) damages and/or mesne profits for conversion and/or detinue of the Vessel,
- (**“the Discontinuance”**).
- [24] The application for the Discontinuance was granted on 22 August 2022. According to the pleading of EMCS, the Discontinuance was such that those aspects of the Trinidad Claim have been finally abandoned and are no longer being pursued.

Commencement of Massachusetts Proceedings

- [25] EMCS refers to the US claim commenced on 25 May 2021, more than a year after the Trinidad Claim, and avers that the US claim pursued purely tortious claims against EMCS relating to alleged fraud and conspiracy.
- [26] The Defence contends that the US claim does not include any claim in respect of breach of the Contract, or any contract, and nor does the Complaint rely upon or otherwise refer to the contractual jurisdiction provision contained in clause 24 of the Contract, whether for the purposes of jurisdiction or otherwise.
- [27] In fact, the Defence continues that by paragraph 34 of the Complaint, Cashman expressly disavowed any claim it could have for breach of contract, by stating *“Notably, Defendants’ breach of contract is not claimed herein insofar as it is pending in Trinidad.”*
- [28] This is the background and context in which EMCS claims that Cashman’s purported re-characterization of the US claim, and hence the Judgment, for the purposes of enforcing it in the BVI is illegitimate and an abuse of the process of the Court.
- [29] The Defence also asserts out that portions of the Judgment comprise costs in relation to the Trinidad Claim and that such costs could only be recoverable in the Trinidad Claim.

Reply

- [30] In its Reply, Cashman denies that these proceedings are in any way abusive of this Court’s jurisdiction and states that this Court has jurisdiction in personam against EMCS as of right because EMCS is incorporated in the BVI.
- [31] As regards the Trinidad Claim, Cashman admits that it did proceed in the Trinidad Courts against EMCS for arrest and recovery of the Vessel, but it denies that it has

in anyway abandoned its right to recover its loss and damage from the Defendant under the Contract, under the Judgment or otherwise. Cashman admits the Discontinuance was granted but denies that it has finally abandoned any rights that it has against EMCS under the Contract or otherwise.

- [32] Cashman further responds that it brought the proceedings in the United States District Court for the District of Massachusetts, which court had lawful authority and jurisdiction over EMCS as pleaded in the Statement of Claim. It further asserts that it did rely on the Contract in order to found the jurisdiction of the Massachusetts District Court and it is denied that Cashman expressly or otherwise disavowed any claim that it may have under the Contract.

The Discontinuance

- [33] I have noted that amongst the grounds stated in the Notice of Application in which the Discontinuance in the Trinidad Claim was sought, there is reference to the Judgment obtained in the US so that Court was, prior to granting the Discontinuance, made aware of the US proceedings as well as the proceedings filed in the BVI. The grounds state the following:

“The grounds of the application are: -

1. *By Judgment dated 28th February 2022, made by Judge Richard G. Stearns of the United States District Court of Massachusetts (“the USA Judgment”)....the Claimant obtained judgment in the sum of US\$3,636,691.29 in damages plus interest and costs against the Defendant herein. The issues of ownership and/or possession of the Barge “JMC 50” were not the subject of the USA Judgment or the USA Proceedings.*
2. *On the 18th July, 2022, the Claimant commenced proceedings in the British Virgin Islands... seeking, inter alia, enforcement of the USA judgment against the Defendant herein.*
3. *On the 17th August 2022, the Claimant instructed its Attorneys-at-Law to withdraw its claims as against the Defendant herein for the following reliefs...*
 - i. *The sum of US\$283,800.00, together with contractual interest thereon at the rate of 18% per annum for the period commencing*

- from the date that sum or any part thereof became due and owing to the Claimant and ending with payment thereof..*
- ii. *Damages for breach of the Charter Agreement..*
 - iii. *Damages and/or mesne profits for conversion and/or detinue of the Barge....”*

Judgment re: claim in rem still awaited from Trinidad Court.

- [34] It is the Court’s understanding that the trial as to the claim in rem as to ownership of the Vessel did proceed but that judgment on that issue is still awaited.

Part 15 of the Civil Procedure Rules (“the CPR”) -Summary Judgment

- [35] Rule 15.2, provides for the grounds for summary judgment, as follows:

“15.2 Grounds for summary judgment

The court may give summary judgment on the claim or on a particular issue if it considers that the –

- (a) Claimant has no real prospect of succeeding on the claim or the issue;*
- or*
- (b) Defendant has no real prospect of successfully defending the claim or issue.”*

- [36] Rule 15.5 requires the applicant for summary judgment to file affidavit evidence in support of the application and requires any respondent to the application who wishes to rely on evidence to file affidavit evidence.

Cashman’s Application for Summary Judgment filed 8 February 2023

- [37] In the grounds of its summary judgment application, Cashman sets out the background, and in paragraphs 3, and 8-13 (inclusive) states as follows:

“3. The Respondent’s Defence has no realistic prospects of success.

.....

The relevant law in support of the Application is summarized as follows:

8. Judgments from the United States are not covered by the Reciprocal Enforcement of Judgments Act (Cap 65) 1922 (the "1922 Act") and must therefore be enforced under the common law. In order for a foreign judgment to be recognized and enforced in the BVI under common law, the Applicant must be able to show the same elements as required for registration and recognition of a foreign judgment under the 1922 Act:

(i) The judgment was given by a Court which had jurisdiction over the parties and gave judgment on the merits;

(ii) The judgment was final and conclusive for a fixed judgment sum; and

(iii) It must be "just and convenient" that the judgment should be enforced in the territory.

9. In this matter, the requirements are satisfied on the basis that:

(i) By clause 24 of the Contract, the parties expressly consented to the jurisdiction of the United States District Court for the District of Massachusetts as the governing law for any claims arising out of or in relation to the Contract. The US court therefore has in personam jurisdiction over the Respondent.

(ii) The Judgment was made by Mr. Justice Steams on the evidence presented to him and referred to in the judgment. The Judgment was obtained on the merits.

(iii) The Judgment is final and conclusive.

(iv) The Judgment is for a fixed sum of money.

10. The Applicant is entitled to have the Judgment recognized and enforced in the BVI at common law. The Applicant is entitled to apply for summary judgment on the ground that the Respondent's defence has no real prospect of success.

11. The Respondent's Defence seeks to attack the Judgment on errors of fact and law. The Judgment is final and conclusive, and made by a court of competent jurisdiction to which the Respondent had submitted and chose not to participate in the US Proceedings which were duly served on the Respondent according to law.

12. There is no other compelling reason for the case to go to trial, and there is no need for the fact-finding mechanisms of a trial.

13. For the reasons set out above, the Applicant is entitled to summary judgment."

[38] Cashman's application is supported by the evidence of Mr. James Cashman, Cashman's President, who has sworn two affidavits, and by two affidavits of Mr. Scott Brownell, an attorney who appeared for Cashman in the US proceedings.

EMCS's Application for Summary Judgment filed 25 April 2023

[39] EMCS also sets out some amount of background in its application, but some of the main points were as follows, at paragraphs 3, and 8:

"3...A summary of the Defendant's position on the Claim is as follows:

- (a) The Judgment was not obtained pursuant to any breach of contract claim;*
- (b) None of the Summons in Massachusetts, the Motion for Default Judgment nor the Judgment refer to clause 24, nor do they identify any basis on which the Massachusetts Court exerts exorbitant jurisdiction over the Defendant;*
- (c) The Contract/ First Agreement, including the jurisdiction clause, was in any event superseded by the Final Agreement ... and was therefore of no effect; and*
- (d) In any event, the claims advanced in Massachusetts were outside the scope of the jurisdiction clause 24, in the Contract/ First Agreement.*

.....

8. In the premises, the Claimant has no real prospect of succeeding on the Claim. As such, summary judgment ought to be entered in the Defendant's favour.

[40] EMCS's application is supported by the evidence of Mr. Craig Noblett, a director of EMCS.

The Evidence

Mr. Cashman

[41] The evidence of Mr. Cashman covered the circumstances in which Cashman and EMCS entered into the Contract together, and what led to the Trinidad Claim as well as the US proceedings. In his evidence Mr. Cashman indicates that the Contract dated 20 March 2018, was executed on 23 May 2018 and that EMCS took physical

delivery of the Vessel on 29 May 2018. According to Mr. Cashman, within months of taking possession of the Vessel, EMCS fell into arrears with the charter hire fees. He also indicates that EMCS failed to procure and maintain insurance in full force for the Vessel. He further claims that EMCS refused to provide information as to the whereabouts of the Vessel. According to Mr. Cashman it was only after investigations were carried out that it was found out that the Vessel was in Trinidad and Tobago. Further, that even if insurance coverage had been maintained as required under the Contract, the policy which was originally issued would not have covered the Vessel while it was in Trinidad & Tobago, since that would be outside the navigation limits that were prescribed in the Policy.

[42] Mr. Cashman indicates that it was after attempts at securing EMCS's agreement to hand over the Vessel had failed, that it became necessary to file the Trinidad Claim to issue a warrant for the arrest of the Vessel. He also indicates the other aspects of the claim made in the Trinidad Claim. He describes how because of Covid-19 and other delays in the court system, as well as the hearing of interim applications and a procedural appeal, the trial was not listed until September 2021. In September 2021, the trial was fixed for June 2022, but that date was also vacated and rescheduled for August 2022.

[43] Mr. Cashman notes that EMCS defended the Trinidad claim and filed a Defence and Counterclaim in which it was claimed, amongst other points, that the parties had an agreement for purchase of the Vessel by EMCS and that the purchase price was to be offset by monies paid to Cashman since the commencement of the contractual arrangement. Mr. Cashman further indicated that it is Cashman's position that no such agreement for sale of the Vessel had been reached between the parties and that EMCS had not exercised the option to purchase contained in the Contract in accordance with the time frame set out in the relevant clause. Cashman denies that there was a further version of the Contract reached after the execution of the Contract on 23 May 2018. Mr. Cashman also points out that in any event, the Final Agreement as referred to by EMCS contains an identical jurisdiction

clause, save that it appears as Clause 24 in the Contract, and as clause 25 in the alleged Final Agreement.

- [44] Mr. Cashman then outlines how in May 2021, proceedings were commenced in the US for relief based upon torts under US Law, and the process leading up to the ensuing Judgment thereafter.

Mr. Noblett. -EMCS

- [45] Mr. Noblett, director of EMCS, in his affidavit indicated at paragraphs 12-17, 21, 26,27, and 31, EMCS's position and understanding as follows:

" 12. The timing of the Discontinuance is important for a number of reasons. These reasons will be explained in the following sections which chronicle the Massachusetts Claim and the filing of the BVI Claim.

Commencement of Massachusetts Proceedings

13. As above, notwithstanding the commencement of the Trinidad Proceedings, the Claimant subsequently, on 25 May 2021 commenced the Massachusetts Claim..... pursuant to certain federal jurisdiction provisions, and in respect of which it pursued tortious claims against the Defendant relating to fraud and conspiracy.

14. Although it did refer to the Contract/ First Agreement as part of the background facts, at no point in the Massachusetts Claim did the Claimant assert any claim for breach of contract, nor did ... the Complaint refer to the contractual jurisdiction provision contained in the Contract/ First Agreement....

15. In fact, at paragraph 34 of the Complaint, the Claimant confirmed that it would not be pursuing any claim for a breach of contract in the Massachusetts Claim insofar as those claims were being pursued in Trinidad....

16.... The Defendant did not participate in the Massachusetts Claim. As such, the judgment which the Claimant obtained in the Commonwealth of Massachusetts on 28 February 2022.... Was a judgment in default....

The BVI Pleadings

17. After obtaining the Judgment, on 18 July 2022, the Claimant filed a claim in the ...

BVI...by which it seeks the recognition of the Judgment in the BVI. The basis upon which the Claimant seeks the enforcement of the Judgment is

that it was made by virtue of the Defendant's alleged breach of the Contract/First Agreement (paragraphs 11-13 of the Statement of Claim), and pursuant to a jurisdiction clause contained in clause 24 of the Contract/First Agreement (paragraph 10 of the Statement of Claim).

.....

21. The Civil Cover Sheet [in the Massachusetts Claim] discloses that the Claimant only selected one sub-category within the "Torts" category, being "Other Personal Damage." There was no selection of the "Contract" category, nor was there any selection of any of the contract sub-categories.

....

The New Agreement

26. On 4 June 2018, a new contract was entered into by the Claimant and Defendant. It was agreed that the Defendant would purchase the barge [Vessel], and therefore it was necessary to facilitate the sale and purchase of the Barge. A second agreement was therefore entered into to give effect to this new arrangement (the Final Agreement) which entirely replaced the earlier, first Agreement. ...

27. It is this Final Agreement which is the only contract effective as between the Claimant and the Defendant. Not the First Agreement/Contract. As such, the First Agreement ceased to have effect once the Final Agreement was signed by the parties. It is not clear on what jurisdictional basis the US Court acted. To the extent that it was acting on the basis of the First Agreement/ Contract, then it was acting on the basis of a contract that did not apply and was of no effect.

.....

31. As above, the Claimant discontinued the breach of contract elements in the Trinidad Claim after the entry of the Judgment. Then, the Claimant sought the enforcement of the Judgment in the BVI by suing the Defendant in the BVI and by asserting that the Judgment was a judgment rendered on the basis of a breach of contract, which now entitles the Claimant to seek the same remedy in the BVI. However, there was never any breach of contract claim asserted in Massachusetts. (And to the extent that the Massachusetts Claim referred to a contract at all, as part of the background, it referred to the wrong contract, the Contract/First Agreement, which had been superseded by the Final Agreement). "

Mr. Brownell -evidence on behalf of Cashman

[46] In his affidavit evidence, Mr. Brownell indicates that he is an attorney who acted for Cashman in the US proceedings. He describes his qualifications and some of his

experience. At paragraphs 8-12, Mr. Brownell describes how EMCS was served via its agent in the BVI, and refers to an additional procedural step ordered by the Court, i.e. service on EMCS and the other Defendants with the entry of Default that had been entered, and Cashman was required to provide proof of service on the Court docket.

[47] Mr. Brownell indicates that in making the Judgment, the Judge read the evidence filed in support of the application for judgment, and that this included the Contract/Agreement containing the Jurisdiction Clause. At paragraphs 14-19 of his 1st Affidavit, Mr. Brownell states as follows:

“14. I have had sight of the Defendant’s application for summary judgment in the BVI proceedings, and note the comments made in the Defendant’s Application Notice and the supporting affidavit of Craig Noblett regarding the jurisdictional basis upon which the US judgment was ordered. Paragraphs 6 and 7 of the Complaint in the US Proceedings addressed jurisdiction and established that the District Court had jurisdiction over the subject matter. There is no statutory nor procedural requirement that the Complaint include specific language as to the personal jurisdiction over EMCS or its directors. The threshold for jurisdictional pleading is simply to advise the court that the court has subject matter jurisdiction, as a matter of US law, over the issue and to explain the basis for that assertion, which is satisfied by paragraphs 6 and 7 of the Complaint.

15. Any dispute as to personal jurisdiction must be raised by the defendant. In the US Proceedings, Federal Rule of Civil Procedure 12(b)(2) specifically allows a defendant to appear in a limited capacity to contest personal jurisdiction, without actually subjecting itself to the personal jurisdiction of the presiding court. The Defendant declined to avail itself of this process and simply chose not to respond to the Complaint. It then declined its second, and gratuitous opportunity to contest personal jurisdiction following the Entry of Default, despite the US Court’s unusual insertion of the additional procedural step described above. Undoubtedly, the Defendant was provided with additional protection from the perspective of service.

16. The causes of action (“Counts”) asserted in the Complaint are all ex delictu, i.e. sound in tort. But the existence of a contract is a foundational element for at least two of the claims asserted.

17. For example, Count II is for the “Violation of the Covenant of Good Faith and Fair Dealing.” The Massachusetts court where this action was filed recognizes that in every contractual relationship, there exists a covenant of good faith and fair dealing. Importantly, a breach of this covenant gives rise

to a tort claim that is discrete from a traditional “breach of contract” claim. In other words, a contracting party may tortiously breach this covenant without violating the strict terms of the contract.

18. Count III includes the claim that Defendant fraudulently induced Claimant to enter into a contract. Again, this is a tort claim, specifically one that includes the necessary element of a contract.

19. Counts II and III were not available to the Claimant in the absence of the contract. The contract was a necessary foundational basis for Judge Stearns to make the US Judgment.”

[48] At paragraphs 4 and 5 of Mr. Brownell’s 2nd Affidavit he says:

“US Judgment is Final

- 4. As referenced at paragraph 13 of my first affidavit, judgment in default was ordered by Judge Stearns on February 28, 2022 (the “**US Judgment**”). As also referenced by Mr. Cashman at paragraph 43 of his first affidavit...., the US Judgment is a final judgment. This because the US judgment is no longer capable of appeal by the Defendant or by the Claimant. I note that at paragraph 43 of Mr. Cashman’s first affidavit he stated that, “Stearns J entered a final judgment...” and that this statement as to finality of the US Judgment is uncontested by the Defendant in its evidence.*
- 5. In order to preserve its right of appeal, the Defendant was required to comply with Rule 4(a)(1)(A) of the United States Federal Rules of Appellate Procedure. Per same, the Defendant was required to file a Notice of Appeal with the District Court within thirty (30) days of the entry of the Judgment. Judgment was entered on February 28, 2022, triggering a deadline of March 28, 2022 for the Defendant to file its Notice of Appeal. The Defendant failed to comply with this deadline.”*

The Jurisdiction Clauses

[49] I note that in the Contract relied upon by Cashman there are two clauses that address jurisdiction. These are clauses 23 and 24. Whilst EMCS asserts that Cashman has relied upon the wrong contract, it is noteworthy that the clauses in the contract upon which EMCS relies has the identical clauses as clauses 24 and 25 of the Final Agreement. Clauses 23 and 24 of the Contract exhibited to the affidavit evidence in support of the Judgment read as follows:

23..... *The validity and interpretation of this Agreement and the rights and obligations of the parties hereto shall be governed by the laws of the Commonwealth of Massachusetts, without giving effect to the conflicts of law provisions thereof.*

24. *Any controversy or claims arising out of or relating to this contract or the breach thereof shall be governed by the general maritime law of the United States, insofar as applicable, otherwise by the laws of the Commonwealth of Massachusetts. The parties to this contract hereby agree that all disputes shall be resolved in the first instance by the United States District Court for the District of Massachusetts and in default of subject matter jurisdiction in said court then in a court of general jurisdiction in the Commonwealth of Massachusetts. All parties waive any defence of lack of personal jurisdiction or defence of improper venue associated with said forum selection method as described herein. Notwithstanding the foregoing, [Cashman] retains the right to initialize proceedings pursuant to the Supplemental Rules of Admiralty Procedures in any forum in order to enforce its contractual rights therein. Both parties specifically waive and disclaim any right to claim of consequential damages which may arise out of a breach of this agreement.* (My emphasis)

The Main Arguments advanced on behalf of Cashman

[50] Mr. McNeil helpfully referred the Court to a number of passages from the well-known work of ***Dicey, Morris & Collins on the Conflict of Laws***, 16th Edition 14-025, 14-012, 14-027 Rule 46, Rule 47, and Rule 51, 52.

[51] Mr. McNeil referred to Rule 46 of ***Dicey*** and submitted that at common law, in order for a foreign judgment to be capable of recognition and enforcement, the judgment must be:

- (1) For a debt or a definite sum of money (*Sadler v Robins* (1808) 1 Campbell 253), other than a sum payable in respect of taxes or the like, or in respect of a fine or other penalty (*India v Taylor* (1955) 2.W.L.R. 303);
- (2) Final and conclusive (*Nouvion v Freeman* (1889) 15 App. Cas. 1);
- (3) On the merits (*The Sennar No. 2* [1985] 1 WLR 490 at 494); and
- (4) Given by a court with jurisdiction to give that judgment (*Harris v Quine* (1869) LR4 Q.B. 653).

- [52] It was submitted that the Judgment fits all of these criteria.
- [53] Mr McNeil also referred to Rule 47 and Rule 51 in relation to EMCS's main challenges as to jurisdiction and he submitted that the headline concept in Rule 51 is that even if the foreign court made an error, it is impermissible for this Court to seek to re-examine that. He asserted that it makes no difference which of the contracts was the contract in force because in any event, the relevant clause is identical, just differently numbered in each.
- [54] Mr. McNeil pointed out that, although the Judgment was entered against both EMCS and its directors, Cashman only intends, and is only seeking to enforce the Judgment against EMCS since EMCS has by the Contract agreed to submit to the jurisdiction of the Massachusetts Court.
- [55] He further pointed out that the Defence does not raise any of the more common grounds for impeaching a Judgment. The Defence does not, for example challenge the Judgment on the grounds of fraud, as being against either the rules of natural justice, or the public policy of the British Virgin Islands.
- [56] As regards the challenges as to the scope of the jurisdiction clause, Mr McNeil referred to the cases of ***Premiun Nafta Products Ltd. v Fili Shipping*** ("**Fiona Trust**")¹ and ***Terre Neuve Sarl***², in support of his submission that the jurisdiction clause is wide enough to encompass the claims made in the US Court. Although the ***Fiona Trust*** case concerned the construction of an arbitration clause, the reasoning has been applied to jurisdiction clauses. The cases demonstrate that these clauses are to be given a wide and purposive construction. He submitted that matters arising out of the Contract, such as tort issues are also covered by the jurisdiction clause.

¹ [2007] UKHL 40.

² [2020] EWHC 772.

The main arguments advanced on behalf of EMCS

EMCS's own application

- [57] In relation to its own application for summary judgment, through Mr. Buckingham K.C., its lead Counsel, reiterates its view that it is not clear on what basis the US Court was purporting to give judgment against EMCS. It is postulated that, to the extent that jurisdiction is presumed to be based on clause 24 of the Contract, that that agreement was superseded by the Final Agreement and was of no effect. Therefore, the Contract cannot provide a valid jurisdictional basis.
- [58] Cashman, it was submitted, could not rely for jurisdiction upon the Final Agreement, because both the Judgment and these proceedings are based on the Contract (only). Hence, if Cashman desired to rely on the Final Agreement (although it continues to deny its existence) then it would be required to commence fresh proceedings in the US. It was submitted that, notwithstanding that both agreements have the exact same wording, of Clause 24 in the Contract, and clause 25 in the Final Agreement, as Mr. Buckingham KC put it quite eloquently, Cashman cannot be allowed to “*straddle both horses*” at the same time.
- [59] In its skeleton argument, at paragraph 27, EMCS expressly accepts that it contracted to submit to the jurisdiction of the US Court but it says that it only submitted to such jurisdiction in relation to contractual claims. That, however, contractual claims have been disavowed by Cashman and that the US Judgment cannot be said to relate to any matter in respect of which EMCS accepts that they submitted to the jurisdiction of the US Court. It was contended that, in order for the US Court to have appropriately exercised jurisdiction in relation to the specific tortious claims advanced by the Claimant in the US proceedings, there would need to be a submission by EMCS to the jurisdiction of the US Court for the adjudication of tortious claims.

- [60] Moreover, argues EMCS, to the extent that Cashman may contend that clause 24 (whether in the Contract, or clause 25 in the Final Agreement) extends beyond contract claims to claims the subject of the Judgment (i.e. for fraud and conspiracy), which is doubtful, then that would require evidence of US Maritime law/ Massachusetts law. There is no such evidence before the Court.
- [61] EMCS say that it appears from the First Affidavit of Mr. Brownell that the question of jurisdiction was neither addressed nor considered in the US proceedings. Therefore, jurisdiction was not established against EMCS, and nor was any attempt made to establish it. Thus, the argument continues, Cashman's reliance on clause 24 of the Contract is misconceived because it does not appear to form the basis on which the US Court acted.
- [62] Further, the Judgment includes costs incurred by Cashman in the Trinidad Claim and the US Court had no jurisdiction to make an order for the payment of such costs.

In relation to Cashman's application

- [63] It is argued that EMCS states that its primary position is that it is entitled to summary judgment on its application, as regards the issue of the Final Agreement superseding the Contract, as this is proved by the documents. However, Mr. Buckingham KC submits, at the very least there is a triable issue in this regard.
- [64] Further, EMCS asks the Court to note the many factual issues which it claims arises in relation to the underlying relationship between Cashman and EMCS as shown by the affidavit evidence on this application and the pleadings in the Trinidad Claim.
- [65] Additionally, it was submitted that the Trinidad costs are not severable from the remainder of the Judgment, and this Court cannot partially enforce the Judgment. It was submitted that this goes to the heart of the Judgment, and is in any event not an issue that this Court can determine summarily (even if it considers that the issue

of severance should be explored) and would have to be the subject of detailed submissions.

Cashman's Reply

[66] Mr. McNeil made a number of points in reply, including pointing out that the Contract had been before Judge Stearns in the affidavit of Raymond W. Riddle, Jr in support of the Motion for Entry of Default Judgment. He insisted that Cashman was relying on the Contract, and no other. He also relied on Dicey Rule 51 to argue that this Court cannot re-examine the merits of the Judgment, and that it cannot be impeached on grounds of error of either fact or law. It was not in dispute that EMCS had been properly served, but chose not to participate in the proceedings in Massachusetts (having been party to the Contract containing clause 24), at its peril. He said that Cashman stands by its assertion that there was no abandonment of contractual rights, but that in any event what Cashman seeks from the BVI Court is enforcement of the Judgment.

[67] It should be noted that when asked about the matters raised by EMCS to do with the Judgment including aspects of costs to do with the Trinidad Claim, Mr. McNeil consistent with his other arguments, maintained that this Court cannot look into that matter even if the US Court made an error, which he does not concede it did. However, he gave an undertaking, which the Court accepted, that there would be no claim in what is left of the Trinidad proceedings for any costs or sums that would be effectively double-counting.

The Law

Test for Summary Judgment

[68] The test for summary judgment has been well-settled in this jurisdiction-see for example the fairly recent judgment of Jack J in *Hengde Co (PTC) Ltd et al v Zhao*

Long et al³, which in turn quotes from the judgment of the judgment of George-Creque JA (now Pereira CJ) in **St. Lucia Motor & General Insurance Co. Ltd.v Peterson Modeste**.⁴ The guidance of Woolf MR in the English Court of Appeal decision **Swain v Hillman**⁵ has withstood the test of time. In that case it was pointed out that the words “no real prospect of succeeding”, do not need amplification as they speak for themselves. The words direct the Court to the need to see whether there is a realistic as opposed to a fanciful prospect of success. In **Swain v Hillman** and in **St. Lucia Motor** it was pointed out that it was not necessary for the Court to find that a defence or a claim was bound to fail before acceding to an application for summary judgment. On the other hand, in **Swain v Hillman** as Lord Woolf indicated, at page 94 b, if the Court does in fact form the view that a party has a claim or defence that is bound to fail, the party should know as soon as possible that that is the position. Likewise, if a claim or defence is bound to succeed, the party should know as soon as possible. I will not elaborate further on the general case law since the summary judgment jurisdiction itself arises quite frequently in the arena of enforcement of foreign judgments and is referred to in relevant context below.

[69] This case raises a number of very important conflict of laws points and thus, the authority of **Dicey, Morris & Collins** has been invaluable, and indeed, relied upon by both parties.

The bases of enforcement and recognition

[70] At Rule 45, paragraph 14-007, the learned authors discuss the base premise for enforcement and recognition as follows:

“The bases of enforcement and recognition

14-007 *English Courts have recognized and enforced foreign judgments from the 17th century onwards. It was at one time supposed that the basis of this enforcement was to be found in the doctrine of comity. English judges believed that the law of nations required the courts of one country to assist*

³ BVIHC 2017/0125.

⁴ [2010] ECSCJ No. 8 at [21] f.

⁵ [2001] 1 All E.R. 91.

*those of any other, and they feared that if the foreign judgments were not enforced in England, English judgments would not be enforced abroad. But later this theory was superseded by what is called the doctrine of obligation, which was stated by Parke B in Russell v Smyth and Williams v Jones. And approved by Blackburn J. a generation later in Godard v Gray and Schibsby v Westenholz in the following words : ‘We think that... the true principle on which the judgments of foreign tribunals are enforced in England is...that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce; and consequently that anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action.’ **It followed that provided the foreign court had jurisdiction to give the judgment according to the English rules of the conflict of laws, the judgment is conclusive in England (unless it is impeachable for reasons of fraud, public policy or the like) and not merely prima facie evidence of the defendant’s liability as had at one time been supposed.**” (My emphasis)*

- [71] At paragraphs 14-012 and 14-032 the topic of enforcement at common law and its interplay with summary judgment are helpfully discussed. It is my view that the circumstance of enforcement of foreign judgments at common law, is one of the classic instances in which, unless the defendant raises with a real prospect of success a defence within the narrowly prescribed defences that may be pleaded in respect of an action on a foreign judgment, this is a situation in which a claimant should know as soon as possible whether it is bound to succeed, and a defendant should know as soon as possible if it is bound to fail. The paragraphs read as follows:

“Enforcement at common law

14-012

*A judgment creditor seeking to enforce a foreign judgment in England at common law cannot do so by direct execution of the judgment. It must bring an action on the foreign judgment. **But it can apply for summary judgment under what is now Pt 24 of the Civil Procedure Rules, 1998, previously Order 14 of the Rules of the Supreme Court, on the ground that the defendant has no real prospect of successfully defending the claim; and if the application is successful, the defendant will not be allowed to defend at all. The speed and simplicity of this procedure, coupled with the tendency of English judges narrowly to circumscribe the defences** that may be pleaded to a claim on a foreign judgment,*

mean that foreign judgments are in practice enforceable at common law much more easily than in many other foreign countries.

.....

Enforcement

14-032

Where the statement of case in proceedings on a foreign judgment has been served on the defendant and the defendant has acknowledged service or filed a defence, the claimant may apply for summary judgment on the ground that the defendant has no real prospect of successfully defending the claim. Unless the defendant satisfies the court that there is an issue or question in dispute that ought to be tried-for instance, on the ground that the judgment was obtained by fraud- the court may give judgment for the claimant. Where the defendant does not appear the claimant may enter judgment at once. The proceedings upon such an action may thus have a largely formal character. The English court must have in personam jurisdiction over the judgment debtor....” (My emphasis)

Definite Sum of Money

- [72] In the instant case, there does not seem to be any contest about the fact that the Judgment is for a debt or definite sum of money. However, Rule 46(1), paragraph 14-026 in relevant part is instructive in this regard, as follows:

“ Clause (1) of the Rule

“For a claim to be brought to enforce a foreign judgment, the judgment must be for a definite sum of money, which expression includes a final order for costs, eg. In a divorce suit. It must order X, the defendant in the English action, to pay to A, the claimant, a definite and actually ascertained sum of money; but if a mere arithmetical calculation is required for the ascertainment of the sum it will be treated as being ascertained; ...”

Final and Conclusive

- [73] There also does not seem to be any issue between the parties as to whether the Judgment is final. Although in the evidence advanced by EMCS, some emphasis was placed on the fact that the Judgment was a default judgment, no submission was directed at that matter. However, in this regard, the evidence of Mr. Brownell

quoted above, in combination with Rule 46, paragraphs 14-027 and 14-028, make it pellucid that the default judgment in this case is to be considered final and conclusive. The Commentary at paragraphs 14-027 and 14-028 state as follows:

“14-027

*No foreign judgment will be recognized or enforced in England at common law unless it is “final and conclusive”. The expression is repetitive but, having been rendered familiar by many judicial statements, is reproduced in the 1933 Act. The test of finality is the treatment of the judgment by the foreign tribunal as a res judicata. “In order to establish that [a final and conclusive] judgment has been pronounced, it must be shown that in the court by which it was pronounced, it conclusively, finally, and forever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it res judicata between the parties” : it follows that the possibility of an appeal to a higher court does not alter the finality of the judgment. A foreign order which is liable to be abrogated or varied by the court which pronounced it is not a final judgment. **But a default judgment may, in this sense, be final and conclusive, even though it is liable to be set aside in the very court which rendered it. Otherwise, the clearer the claimant’s case, the more useless the judgment would be. The test has been stated as whether the default judgment was ‘entirely floating as a determination, enforceable only as expressly provided and in the course of that enforcement subject to revision’, in which case it will not be final, or “given the effect of finality unless subsequently altered”, in which case it will be final.***

14-028

If the judgment is given by a court of a law district forming part of a larger federal system, eg. An American State, the finality and conclusiveness of the judgment in the law district where it was given are alone relevant in England; its finality and conclusiveness in other parts of the federal system, eg. In other American States, are irrelevant.” (My emphasis)

On the Merits

[74] Again, I do not understand that any issue is taken on this issue either. It seems clear to me that the Judgment under consideration is on the merits. However, as stated by Lord Diplock in **The Sennar No. 2** [1985] 1WLR 490 at 494, cited by Mr. McNeil:

“It is often said that the final judgment of the foreign court must be “on the merits”. The moral overtones which this expression tends to conjure up may make it misleading. What it means in the context of judgments delivered by

courts of justice is that the court has held that it has jurisdiction to adjudicate upon an issue raised in the cause of action to which the particular set of facts give rise; and that its judgment on that cause of action is one that cannot be varied, re-opened or set aside by the court that delivered it or any other court of coordinate Jurisdiction, although it may be subject to appeal by a court of higher jurisdiction."

Jurisdiction

[75] The main issue in this case is the matter of jurisdiction. Rule 52 (1) of **Dicey** and paragraphs 14-126 in material part, state as follows:

"Rule 52(1) A foreign judgment is impeachable if the courts of the foreign country did not, in the circumstances of the case, have jurisdiction to give that judgment in view of English law in accordance with the principles set out in Rules 47-49 inclusive.

.....

COMMENT

14-126

"Clause (1) of the Rule. Lack of jurisdiction on the part of the foreign court is the objection which can most frequently be raised in answer to a party who relies on a foreign judgment in English proceedings. It is not enough, it must be again emphasized, that the foreign court is duly invested with jurisdiction under the foreign legal system. It must have jurisdiction under the English rules of the conflict of laws. These rules have already been considered in Rules 47-49 and there is no need to repeat here what is there said. Clause (1) of the present Rule is thus in a sense merely mechanical, in that it merely refers to other Rules."

[76] Rule 47 is instructive upon the critical issue involved in this case and provides as follows:

"Rule 47

Subject to Rules 48 and 49, a court of a foreign country outside the United Kingdom has jurisdiction to give a judgment in personam capable of enforcement or recognition as against the person against whom it was given in the following cases:

First Case

If the person against whom the judgment was given was, at the time the proceedings were instituted, present in the foreign country. For a natural person this requires physical presence in the territory, and for a legal person it requires a fixed place of business in the territory.

Second Case

If the person against whom the judgment was given was claimant, or counterclaimed, in the proceedings in the foreign court.

Third Case

If the person against whom the judgment was given, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings.

Fourth Case

Subject to Rule 58, if the person against whom the judgment was given, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of that country.

Comment

A fundamental requirement for the recognition or enforcement of a foreign judgment in England at common law is that the foreign court should have had jurisdiction according to the English rules of the conflict of laws. "All jurisdiction is properly territorial," declared Lord Selborne "In a personal action, ... a decree pronounced in absentem by a foreign court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity. He is under no obligation of any kind to obey it; and it must be regarded as a mere nullity by the courts of every nation, except (when authorised by special local legislation) in the country of the forum by which it was pronounced." (My emphasis)

- [77] Cashman relies upon the fourth case discussed in Rule 47. I would just add that although Rule 47 refers to Rule 58, it is common ground that Rule 58 is not relevant to the circumstances of this case. At paragraphs 14-081, and 14-101, the learned authors state the following, in paragraph 14-101, giving illustrations of circumstances where jurisdiction would arise, and the judgment be recognized and enforced and circumstances where it would not:

"The fourth case. Agreement to submit.

14-081

.....

Under the common law, if a contract provides that all disputes between the parties shall be referred to the exclusive jurisdiction of a foreign tribunal, not only will proceedings brought in England in breach of such agreement be stayed, but also the foreign court is deemed to have jurisdiction over the parties. Whether there is such an agreement is a matter for determination by the English courts in accordance with English conflict of laws, although one which may depend on interpretation of the contract between the parties pursuant to its governing law. A contractual submission to a particular court is not of itself a submission generally to the jurisdiction of all courts of that country; the question is one of construction of the contract."

.....

The Fourth Case

14-101

15. A is a New York firm carrying on business in New York. X is a British citizen resident in England. By a contract made in New York X agrees to assign certain patent rights to A, the contract providing inter alia **"that all disputes as to the present agreement and its fulfillment shall be submitted to the New York jurisdiction."** In an action by A in the appropriate New York court for breach of the contract, judgment is given for A for \$1 million. **The New York Court has jurisdiction for the purposes of recognition and enforcement in England.**

.....

20. A commences proceedings against X, a company registered in the British Virgin Islands, in New York, pursuant to a contract which does not contain a jurisdiction agreement, but contains a choice of law clause in favour of New York law and a clause deeming the contract to have been made in New York and establishes obligations to be performed in New York. Although consent to the jurisdiction of the New York courts (for the purposes of the English rules on recognition and enforcement) may, in principle, be based on an implied agreement, there is insufficient evidence that an agreement in favour of the New York courts was implied as a matter of fact or New York law. The judgment cannot be recognized or enforced at common law." (My emphasis)

[78] Mr. McNeil has, in response to many of the points raised by EMCS, for example, as to whether the wrong Contract was relied upon, or whether the US Court was wrong

to accede to the aspect of the Judgment that involved costs attendant on the Trinidad Claim, relied heavily on Rule 51. Rule 51 provides as follows:

“ Rule 51

*A foreign judgment which is final and conclusive on the merits and not impeachable under any of Rules 52 to 55 is **conclusive** as to any matter thereby adjudicated upon, and **cannot be impeached for any error either***

(1) of fact; or

(2) of law.”

(My emphasis)

[79] Paragraphs 14-116, 14-121 and 14-122 of the Commentary are also illuminating:

*“During the 18th century and the first part of the 19th century it was much debated whether a foreign judgment given by a court of competent jurisdiction could be re-examined on its merits when recognition or enforcement of that judgment was sought in England. In 1834 Lord Brougham said in the House of Lords “a foreign judgment is only prima facie, not conclusive, evidence of a debt. In 1863 Page Wood V-C refused to recognize a Louisiana judgment on the ground that it showed on its face “a perverse and deliberate refusal to recognize the law of England. **But meanwhile it had been decided in a series of cases that a foreign judgment could not be re-examined on its merits provided the foreign court had jurisdiction according to the English rules of the conflict of laws. And finally, in Godard v Gray, it was held that this was so even if the foreign court made an obvious mistake of English law which appeared on the face of the judgment. Since that decision, the principle of Rule 51 has never been questioned.** It is consistent with the maxims interest reipublicae ut sit finis litium (it is in the public interest that there should be an end to litigation) and nemo debet bis vexari pro eadem causa (no one should be sued twice on the same ground).*

.....

14-121

Closely parallel to the rule that a foreign judgment is conclusive is the rule that the defendant must take all available defences in the foreign court, and that, if it does not do so, it cannot be allowed to plead them afterwards in England. But neither of these rules applies if the judgment was obtained by fraud.

14-122

The meaning of the word “conclusive” in Rule 51 must be carefully distinguished from the meaning of the term “final and conclusive” in Rule 46. For clearly the word “conclusive” is used in these Rules in two quite different senses. In this Rule the reference is to a rule of English law whereby a foreign judgment given by a court of competent jurisdiction, and not impeachable on a number of strictly limited grounds, is conclusive and not merely prima facie evidence of the matters therein decided. But in Rule 46 the reference is to a quality which the foreign judgment must possess by the law of the foreign country concerned, without which quality it cannot be recognized or enforced in England.” (My emphasis)

- [80] In the **Fiona Trust** case, referred to by Mr. McNeil, the House of Lords had before it a jurisdiction clause in relation to arbitration which referred to “*any dispute arising under this charter*”. In my view, the holding at 1 in the Headnote accurately summarizes the decision, delivered by Lord Hoffman in relation to the construction of the arbitration clause in question. It was held:

*“It would require very clear language before the court would decide that rational businessmen intended to have questions about its performance decided by another. The draftsman of so widely used a standard form as Shelltime 4 obviously regarded the expressions ‘arising under this charter’ in clause 41(b) and ‘arisen out of this charter’ as mutually interchangeable. A fresh approach to construction was justified by the developments which had occurred in this branch of the law and in particular by the adoption of the principle of separability by Parliament in s. 7 of the 1996 Act. The construction of an arbitration clause **should start from the assumption that the parties, as rational businessmen, were likely to have intended that any dispute arising out of the relationship into which they had entered or purported to enter to be decided by the same tribunal.** The clause should be construed in accordance with that presumption unless the language made it clear that certain questions were intended to be excluded from the arbitrator’s jurisdiction. Adopting that approach, the language of clause 41 of Shelltime 4 contained nothing to exclude disputes about the validity of the contract, whether on the grounds that it was procured by fraud, bribery, misrepresentation or anything else. It therefore applied in the present dispute.”*

- [81] Whilst the **Fiona Trust** case was concerned with construction of an arbitration clause, the principles have been applied to jurisdiction clauses in general. In the

decision of the Commercial Court in England and Wales, in **Teure Nueve Sarl** at paragraphs 24, 26-28, the Court discussed the issues in this way:

“...24. Two issues arise in this case, and I will take each in turn.

- (1) *The first issue is whether the present dispute (or any part of it) falls within the scope of one or more of the jurisdiction clauses as a matter of construction.... The court will determine whether parties have so “agreed” as an exercise of construction governed by the contract’s substantive law : British Sugar Plc v Fratelli...[2005] 1 Lloyd’s Rep. 332. In this case, the relevant agreements are governed by Swiss law, but neither GPF nor the Claimants have suggested that (or adduced Swiss law evidence to the effect that) the principles of contractual construction are different between Swiss and English law; as such, the clauses are to be construed by reference to English legal principles.*
- (2) *[The dispute is required to be] in connection with the legal relationship with which the agreement containing the jurisdiction clause is concerned: see for example Etihad Airways PJSC v. Prof. Dr. Lucas Flother [2019] EWHC 3107 (Comm) (“Etihad”) per Jaconbs J at [123] ff.*

....

...The First Issue

26. The fundamental question asked as a matter of English law is: how would the jurisdiction clause be understood objectively by a person having all the relevant background knowledge of the transaction (Arnold v Britton [2015] AC 1619)?

27. The English court’s approach to construing jurisdiction clauses was authoritatively restated in Fiona Trust & Holding Corp v. Privalov [2007] UKHL 40 (“Fiona Trust”). This case was concerned with an arbitration clause, but the principles apply equally to jurisdiction clauses : Briggs (Civil Jurisdiction and Judgments, 5th edition : 4 :42).

...

- (3) *The “relationship” between the parties is the relationship which arises from the contract entered into by them containing the jurisdiction clause. This is clear from the context of Fiona Trust: the parties are not linked by any other “relationship”. This is further supported by the Court’s reference to the 1970 Federal Republic of Germany case , which explicitly refers to “the relationships created by their [the parties’] contract, and claims arising therefrom : Fiona Trust at [14] and [30]. Further, Fiona Trust was concerned with whether the arbitration clause covered disputes over the agreement’s validity, or only its interpretation: the nature of the disputes is different, but they both clearly arise out of the same contract.*
- (4) **Therefore, the Court’s generous approach to the interpretation of arbitration clauses must be read in light of the fact that the relationship between the parties arose out of the same contract. If**

the parties have confidence in their chosen jurisdiction “for one purpose”, they should have confidence in it for other purposes, where those purposes arise from the same contractual relationship.

28. Subsequent cases have supported this interpretation of Fiona Trust. My attention was specifically drawn to Microsoft Mobile OY v Sony Europe (Microsoft v Sony) [2018] 1 All E.R. (Comm) 419 in which Marcus Smith J stated at [45] (after referring to [6] – [13] of Fiona Trust):

“45. The importance of having a “one-stop-shop” for all disputes -and the likelihood that the parties to an agreement would intend this-is clear. But that is true only to the extent that disputes arise out of the parties’ relationship. Thus, absent extremely clear wording, a court would presume that the parties would have intended the same tribunal to deal with the contractual disputes arising out of the relationship, as well as any “parallel” claims in tort. But what would not be covered, absent extremely clear wording, would (to take a somewhat extreme hypothetical case) be Party A’s case against B (Party A and Party B being in a contract with each other containing an arbitration clause) for Party B negligently, but coincidentally and unrelated to the contract, running party A over in the street. That would not be a dispute arising out of the parties’ contractual relationship.” (My emphasis)

Resolution of the Issues

[82] As I have previously indicated, the Judgment fits the criteria set out in Rule 46(1), i.e. it is incontestably a judgment for a definite sum of money, the Judgment is final and conclusive, and is on its merits. There is no challenge to this Judgment on the grounds of fraud, or breach of rules of natural justice, or as offending the public policy of the BVI. It is also plain that the BVI Court has in personam jurisdiction over EMCS, it being a company incorporated in the jurisdiction. The only challenge to the Judgment is directed at Jurisdiction of the US Court

[83] However, before turning to jurisdiction, I wish to address what I think is a misconception in the arguments advanced on behalf of EMCS. EMCS argued that Cashman’s claim in the proceedings before me seeks to say that the Judgment in the US is a breach of contract claim. Whilst the breach of contract is referred to in

the Statement of Claim, there is nothing whatsoever in the Statement of Claim that seeks to characterize the Judgment as being based on a contract claim. I should add that the enforceability of the Judgment in the BVI would not require the Judgment to be based on contract or any other cause of action anyway (which was not against public policy), in order to be enforceable in the BVI. It is plain that Cashman is seeking to enforce the Judgment unembellished or without description or characterization. The Judgment is enforceable by itself; it is not dependent on any cause of action in order to be recognized and enforced in the BVI.

- [84] In my judgment, it is not open to EMCS to come to the BVI Court and take the point about whether the wrong Contract was relied on by Cashman in the US proceedings. Rule 51 does not allow for that type of approach to a foreign Judgment that is on the merits and otherwise unimpeachable; it is conclusive. In any event, since EMCS concedes that it had submitted to the Massachusetts Court jurisdiction in relation to contractual claims it ignored the US proceedings at its peril. This is not a defence with a real prospect of success. In any event, EMCS's position denying the US Court's Jurisdiction on this basis does not gain any traction or attract special consideration because both contracts had identical jurisdiction clauses. The essential point is that the Judgment cannot be attacked for either error of law or fact.
- [85] It is common ground by the parties that the Judgment was based upon claims in US tort law.
- [86] It is plain that the majority of causes of action, counts, in the Complaint were based, as discussed in the ***Tuere Neuve Sarl*** case, at paragraph 28 (referring to the ***Microsoft Mobile*** decision) as being claims in tort arising out of the contractual relationship between the parties.
- [87] Paragraphs 6 and 7 of the Complaint in the US proceedings addressed that court's jurisdiction over the subject matter. However, it is plain that the Contract itself was

before Justice Stearns when he gave the Judgment and he expressly stated that he had considered all of the evidence.

[88] EMCS has conceded that it contracted to submit to the Massachusetts Court based on contractual disputes. The question whether there is such an agreement is a matter for determination by the BVI courts in accordance with BVI conflict of laws, although one which may depend on interpretation of the contract between the parties pursuant to its governing law.

[89] In my judgment in construing what the parties agreed on the fundamental question asked as a matter of BVI law is: how would the jurisdiction clause be understood objectively by a person having all the relevant background knowledge of the transaction -***Arnold v Britton***?⁶

[90] The authorities show that one should start from the assumption that the parties, as rational businessmen, were likely to have intended that any dispute arising out of the relationship into which they had entered or purported to enter to be decided by the same tribunal and that this would include “*parallel*” claims in tort, including the causes of action/counts relied upon in the US proceedings, barring express language to the contrary.

[91] It is obvious from a proper construction of clause 24 of the Contract that the parties intended that there should be a one-stop-shop for all their disputes arising out of their contractual relationship. There are no plain words to exclude claims such as those made in the Judgment. The words “*Any controversy or claims arising out of or relating to this contract or the breach thereof*” could not be clearer, but in any event they stand to be given a broad and generous interpretation.

⁶ [2015] A.C.1619.

- [92] I note that in paragraph 14-101, example 20, referred to in paragraph 76 above, where there was a choice of law clause and no jurisdiction clause, it was held that the Judgment would not be recognized or enforced. That might have been the case here if clause 23 referred to in paragraph 48 above was the sole clause speaking about Massachusetts in the Contract. However, clause 24 is a clear jurisdiction clause in favour of the Massachusetts Courts there delineated.
- [93] Mr. Buckingham KC raised an interesting point about whether there needed to have been evidence about Massachusetts law in order to decide what the parties agreed about the scope of jurisdiction. However, I do not accept that that was necessary in the circumstances. I note that in the example 15 at paragraph 14-101, where the English Court recognized a New York judgment as enforceable based on a New York jurisdiction clause, there was nothing to suggest that evidence of foreign law was needed or produced.
- [94] In any event, if necessary, I adopt the approach in *Tuere Bueve Sarl* and say that since neither party has suggested, and neither has produced evidence to show that Massachusetts law on construction of contractual documents is different than BVI/English law, then I am free to apply the English/BVI approach and have done so. If EMCS was of the view that the law was in fact different, in its endeavour to show that it has a defence with a real prospect of success, then EMCS should have produced such evidence. In the circumstances, it seems obvious that this Court is correct to approach the task of construction according to BVI principles of construction.
- [95] In my judgment, having agreed to submit to the jurisdiction of the Massachusetts Court, and given my construction of the jurisdiction clause, EMCS has no real prospect of succeeding in defending the claim. Indeed, in my view, Cashman is bound to succeed, and EMCS is bound to fail.

Just and Convenient

[96] In my view, it is just and convenient that the Judgment should be enforced.

Disposition

[97] There will therefore be summary judgment in favour of the Claimant Cashman on its claim and an order in terms of paragraphs 1-3 of the draft order at tab 6 of the hearing bundle.

[98] The Defendant EMCS's summary judgment application dated 25 April 2023 is refused, with costs to the Claimant to be assessed if not agreed within 21 days.

[99] It just remains for me to thank the parties for their very helpful and concise submissions. The Court is most appreciative.

Ingrid Mangatal (Ag)
High Court Judge

By the Court

Registrar