

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

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

CLAIM NO. BVIHCM 58/2019

BETWEEN:

SANG CHEOL WOO

Applicant/Judgment Creditor

and

**CHARLES C. SPACKMAN
(AKA YOO SHIN CHOI)**

Respondent/Judgment Debtor

Appearances:

Mr. Merrick Ricardo Watson, with him Mr. Timothy de Swardt of Kobre & Kim (BVI) LP,
for the Applicant.

No appearance was entered on behalf of the Respondent

2021: January 12

JUDGMENT

Judgment Enforcement – Order for personal judgment debtor to attend court to be examined – judgment debtor resident and domiciled outside of the jurisdiction – whether Court has jurisdiction to grant committal order against judgment debtor abroad – whether committal order with extraterritorial effect served a practical purpose – whether Court can proceed in the absence of the defendant to hear an application for committal - whether examination order was served on judgment debtor – whether the Court should exercise its discretion to dispense of the requirement for personal service – whether permission required to serve examination order incidental to underlying claim in which permission to serve the claim form outside of the jurisdiction had previously been granted – whether permission required to serve committal application incidental to examination order outside of the jurisdiction – whether examination order and committal application can be validly served by means of alternative service so as to satisfy the requires of the Civil Procedures Rules, 2000 – CPR Part 7, CPR Part 44 and CPR Part 53.

The judgment creditor obtained an order for the examination of a judgment debtor over whom the Court had previously established jurisdiction by granting permission for the claim form to be served out of the jurisdiction on the judgment debtor. The judgment debtor who resides outside of the jurisdiction failed to appear before the Court for his examination after being served with/given notice of the examination order. The judgment creditor applied for an order to commit the judgment debtor to prison for a period of 12 months under CPR Part 53 and the Court's inherent jurisdiction to punish for civil contempt.

Held:

1. The Court has inherent jurisdiction to make a committal order with extraterritorial effect against a judgment debtor who resides outside of the jurisdiction;
2. The Court's inherent jurisdiction is preserved but not limited by section 10 of the Contempt of Court Act, CAP. 14;
3. Where the Court has previously granted permission to serve the claim form outside of the jurisdiction on the judgment debtor, the judgment creditor is not required to seek fresh permission to serve any order, application or document subsequently issued or made in the proceedings including an examination order and a committal application;
4. The question of whether the judgment debtor had been served with the examination order is a question of fact. Where the Court is satisfied, on the evidence, that the judgment debtor was served under the terms of an alternative service order made by the Court, the Court reserves a discretion to order that such service was good service or to hold that service was sufficient to give the judgment debtor notice of the order for the purposes of making a committal order against the judgment debtor;
5. There are practical reasons for the Court to make a committal order where a judgment debtor has refused to engage with the proceedings and has flouted the Court's authority. A committal order in such cases can work to secure compliance with the breached order and ensure respect for the administration of justice.

[1] **Wallbank, J [Ag.]**: This ruling concerns an application ('the Committal Application') brought by the Applicant, Mr. Woo, for a declaration of contempt and an order committing the Respondent, Mr. Spackman, to prison. The Applicant alleges that the Respondent failed to comply with an order made by the Court on 20th August 2020 commanding the Respondent to appear before the Court on 16th September 2020 to be examined under oath by Counsel representing the Applicant ('the Examination Order').

- [2] The Committal Application was supported by an affirmation made by the Applicant on 24th November 2020.
- [3] On 12th January 2020, I heard the Committal Application remotely via Zoom¹ and in the absence of the judgment debtor who, from the evidence led by learned Counsel for the Applicant, Mr. Watson, appeared to have been served or at the very least had notice of the hearing.
- [4] At the end of the hearing, I granted the Committal Application and made an order committing the Respondent to prison for a period of 12 months for his failure to comply with the Examination Order. At the urging of Mr. Watson, I promised to provide written reasons at a later date.
- [5] I am mindful that the Committal Application engages some novel and complex issues of law in this jurisdiction and for that reason, I take the view that a written judgment dealing with the relevant principles is appropriate. I am also mindful that the Respondent did not appear and thus made no submissions, such that the propositions advanced by Mr. Watson were not subjected to counter-argument. Nonetheless, similar arguments have on at least two previous occasions been advanced by applicants such that it would be appropriate to record the analysis, such that it might either be followed or possibly better tested in the future.
- [6] These now are my reasons for granting the Committal Application.

BACKGROUND

The Korean Judgment

- [7] We can pick up the story from 29th September 2011 when the Applicant obtained a monetary judgment in the amount of Korean Won ('KRW') 5,207,884,800 (equivalent at the time to approximately US \$4.6 million) plus interest, which the Respondent appealed unsuccessfully against ('the Korean Judgment').

¹ As permitted by CPR 2.7 (4), CPR 29.3 and paragraph 5 of Practice Direction No. 4 of 2020 (3rd Re-Issue) COVID-19 Emergency Measures.

[8] The Applicant took steps to enforce the Korean Judgment in various jurisdictions including in the BVI, Hong Kong, the United States and Singapore. To summarize, the Applicant, among other steps:

- (1) took discovery in aid of enforcement pursuant to 28 U.S.C. § 1782 in both Connecticut and Massachusetts respectively;²
- (2) initiated enforcement proceedings in Hong Kong³ where he obtained a worldwide injunction order dated 3rd June 2019 against the Respondent and 3 of his alleged nominees;⁴
- (3) successfully applied to recognize the Korean Judgment in New York⁵ where on 11th September 2018 he obtained summary judgment enforcing the Korean Judgment.

[9] The Applicant also sought post-judgment enforcement and discovery in this court before Adderley J (Ag.) where he:

- (1) applied for and was granted Norwich Pharmacal discovery against the registered agents of certain BVI companies ('the BVI Companies') believed to be owned by the Respondent and used to conceal and dissipate his interest in Spackman Media Group Limited;⁶
- (2) obtained freezing injunctions against the BVI Companies ('the Freezing Injunctions').⁷

² In cases captioned In Re: Application for an Order under 28:1782 to Take Discovery from Martin A. Mohabeer, 3:17-mc-00100-RNC (D. Conn.) and In Re: Application of Sang Cheol Woo for Order under 28:1782 to Take Discovery, 1:17-cv-10745 (D. Mass.).

³ In the case captioned Sang Cheol Woo v Yoo Shin Choi, HCA 1586/2016.

⁴ On 20th October 2020, the Hong Kong court handed down a decision that the continuing the injunction order is continued until trial or further order.

⁵ In the case captioned Sang Cheol Woo v. Charles C. Spackman, No. 652795/2017.

⁶ In the case captioned: Sang Cheol Woo and Overseas Management Company Trust (B.V.I.) Ltd., & ors, BVIHC(COM) No. 233 of 2018.

⁷ See the case captioned Sang Cheol Woo v Azur Investissement Ltd. & ors BVIHC (Com) 2019/0047.

Claim to enforce Korean Judgment at common law

- [10] The Freezing Injunctions were sought against the BVI Companies in order to protect against any further dissipation of their assets. As a condition of granting the Freezing Injunctions, Adderley J (Ag.) ordered the Applicant to file a claim form and statement of claim to have the Korean Judgment recognized and enforced at common law in the BVI ('the Common Law Enforcement Claim').
- [11] On 18th April 2019, the Applicant filed the Common Law Enforcement Claim in compliance with that condition.

Permission to serve the Claim Form out of the jurisdiction

- [12] On 4th October 2019, the Applicant sought for permission to serve the Common Law Enforcement Claim out of the jurisdiction personally on the Respondent, at a particular address in Hong Kong ('the Hong Kong Address') or wherever he may be found.
- [13] The Applicant sought permission to effect personal service on the Respondent at the Hong Kong Address because the Respondent filed evidence in related enforcement proceedings in Hong Kong⁸ and Singapore⁹, confirming the Hong Kong Address to be his address.
- [14] On 21st November 2019, Jack J (Ag.) made an order granting the Applicant permission to serve the Respondent personally, at the Hong Kong Address, with the Common Law Enforcement Claim ('the Service Out Order').

⁸ The 5th Affirmation of Charles C. Spackman dated 5th March 2020.

⁹ The 3rd Affidavit of Charles Choi Spackman dated 23rd July 2019.

- [15] In his affirmation in support of the Committal Application, the Applicant pointed the Court to evidence that numerous attempts were made to locate and serve the Respondent at the Hong Kong Address which proved unsuccessful.
- [16] According to the evidence, the process server was told by the receptionist of the building in which the Hong Kong Address is located that the Hong Kong Address was vacant.¹⁰
- [17] Faced with difficulties in locating the Respondent to effect personal service of the Common Law Enforcement Claim on him, on 28th February 2020 the Applicant was forced to file an application for permission to serve the Respondent out of the jurisdiction by alternative means under rule 7.8A, Civil Procedure Rules 2000) ('CPR') ('the Alternative Service Application').
- [18] The Alternative Service Application was supported by affidavits filed by attorneys in Kobre & Kim's Hong Kong and New York offices, Mr. Han and Mr. Stein respectively. The evidence established that in relation to the Applicant's efforts to enforce the Korean Judgment in New York, attempts were made on 14th June 2019 to serve a post-judgment information *subpoena* on the Respondent by mailing it to an address associated with the Respondent in Cambridge, Massachusetts and by sending it via FedEx to Counsel currently representing the Respondent in the related enforcement proceedings in Hong Kong, John C.H. Suen ('Mr. Suen').
- [19] Mr. Suen maintained that he was not authorized to accept service on behalf of the Respondent but did not dispute that he presently acted for the Respondent in the Hong Kong proceedings.
- [20] On 26th February 2020, the New York court entered an order compelling the Respondent to respond fully to the post-judgment information *subpoena* and ordering that it be served on the Respondent via first-class mail to his last known postal address and via first-class mail and e-mail to his counsel of record,

¹⁰ Paragraphs 11, 13, 15 and 17 of the Affidavit of Liu Kai Wan Gabrielle dated 28th February 2020.

including Mr. Suen and although Mr. Suen claimed that he was not authorized by the Respondent to accept service.

[21] The Applicant adduced evidence that on 10th March 2020 Mr. Suen emailed Mr. Stein to convey a message from the Respondent in which the Respondent stated his intention to comply with the post-judgment information *subpoena*.

[22] Though Mr. Suen declined to accept service on behalf of the Respondent and claimed that he did not represent the Respondent in the New York proceedings, Mr. Suen sent correspondence to the Applicant's Counsel in New York on behalf of the Respondent repeatedly viz on 10th March 2020, 13th March 2020, 28th April 2020, 1st June 2020, 2nd June 2020, 23rd June 2020, and 30th June 2020.

[23] On 2nd June 2020, Mr. Suen sent the Applicant's Counsel in New York a copy of the Respondent's answers to the post-judgment information subpoena at the request of the Respondent. It appears that ultimately, the Respondent did not fully, completely, and truthfully comply with the post-judgment information *subpoena*, which resulted in the New York court holding him in contempt on 7th July 2020.

[24] Being satisfied that service by email directly to the Respondent as well as by email and post on Counsel representing the Respondent in Hong Kong and in Singapore was likely to bring the Common Law Enforcement Claim to the Respondent's attention, on 19th March 2020 Jack J (Ag.) made the order for alternative service. The order provided for service on the Respondent directly at his email address. It also provided for service by email and post on the Respondent through Mr. Suen, and his current Counsel in Singapore, William Ong ('Mr. Ong') ('the Alternative Service Order').

[25] The Alternative Service Order included a provision similar to CPR 7.14 which permitted the Applicant to serve the Respondent by alternative means with any order, application or document subsequently issued, made or given in the proceedings.

[26] The evidence shows that on 20th March 2020, service of the Common Law Enforcement Claim was effected on the Respondent in accordance with the terms of the Alternative Service Order.

Default judgment

[27] As a result of the Respondent's failure to acknowledge service or file a defence, on 19th May 2020 the Applicant filed a Request for Entry of Default Judgment asking that Default Judgment be entered against the Respondent in the amount of US\$14,047,405.02 which included interests and costs as at that date.

[28] On 4th June 2020, the Court entered Default Judgment against the Respondent in the amount sought. The Applicant affirms that on the same date, the Default Judgment was served on the Respondent directly in conformity with the terms of the Alternative Service Order.

Examination Order

[29] Having not received a reply from the Respondent with respect to the Default Judgment served on him, on 11th August 2020 the Applicant filed a request under CPR Part 44 for an order for the oral examination of the Respondent ('the Examination Request').¹¹

[30] The Examination Request asked for the Respondent's examination to be conducted via ZOOM as a result of the COVID-19 pandemic and pointed the Court to the fact that the Alternative Service Order allowed for the Respondent to be served directly by email and by email and post through Mr. Suen and Mr. Ong.

¹¹ The Applicant submitted that a default judgment may be enforced like any other judgment, including by way of examination under CPR 44. Mr. Watson referred the Court to *Abadeen Engineering Ltd. v Albury* [2011] 1 BHS J. No. 4, where the Bahamian court ordered an examination of a judgment debtor subject to a default judgment.

- [31] As noted previously, on 20th August 2020, the Court made the Examination Order compelling the Respondent to appear to be examined under oath via ZOOM on 16th September 2020.
- [32] The evidence confirms that on 21st August 2020 the Examination Order was served on the Respondent directly by email and by email on Mr. Suen and Mr. Ong in compliance with the terms of the Alternative Service Order.
- [33] Further, the Examination Order was also posted to Mr. Suen and Mr. Ong on 24th August 2020 and were delivered on 26th August 2020 and 31st August 2020, respectively.
- [34] On 4th September 2020, the Respondent, Mr. Suen and Mr. Ong were also served by email with the Amended Court List indicating that the examination hearing was scheduled for 11:30 am on 16th September 2020.
- [35] For good measure, on 15th September 2020, they were served with the ZOOM dial-in details provided by the Court for the examination hearing.

The 16th September 2020 examination hearing

- [36] The matter came on for hearing before me on 16th September 2020. The Respondent did not appear for his examination as mandated by the Examination Order in spite of the fact that the Examination Order was endorsed with a penal notice warning him of the fact that he could possibly be committed to prison for disobeying the Order.
- [37] I made an order in which I noted that the Court was satisfied that the Respondent had adequate notice of the date and time of the hearing but chose not to appear. I also awarded the Applicant his costs on the application.
- [38] The Applicant affirms that on 23rd September 2020, the order I made on 16th September ('the 16th September Order') and accompanying service letters ('the

23rd September Service Letters') were served on the Respondent, Mr. Suen and Mr. Ong in accordance with the Alternative Service Order.

[39] Mr. Watson took me to the 23rd September Service Letters, where at paragraph 8 the Respondent was warned that the Applicant intended to apply to court for a declaration of contempt and an order for Respondent to be committed to prison for breaching the Examination Order if the Respondent did not take steps within 7 days of the date of the 23rd September Service Letters (that is to say by Wednesday, 30th September 2020) to purge his contempt.

[40] The Respondent was also provided with the Court's telephone number and the E-Litigation Portal Code for filing papers in the proceedings (para. 9 of the Service Letters) and warned to take legal advice without delay (para. 10 of the Service Letters).

[41] At paragraph 12 of the Service Letters he was warned that if he did not appear at the contempt and committal proceedings he could be sentenced to a term of imprisonment.

The Respondent's history of evading service

[42] The Applicant provided cogent evidence to the Court demonstrating that from the inception of his efforts to enforce the Korean Judgment against the Respondent in various jurisdictions worldwide, the Respondent has taken steps to evade enforcement by not making himself available for personal service.

THE APPLICANT'S SUBMISSIONS

[43] In this part I will summarize Mr. Watson's submissions on behalf of the Applicant and I will make no findings in this section. In the '**DISCUSSION**' part below, I will express my own views and judgment on material aspects.

[44] Mr. Watson submitted that there are four issues for the Court to consider. In respect of each of these issues, the Court is asked to make affirmative findings in the Applicant's favour. The issues are whether the:

- (1) Examination Order included clear and unambiguous terms commanding the Respondent to do an act and specifying the date on which that act was to be done;
- (2) Examination Order was endorsed with a penal notice setting out the condign consequences of non-compliance with its terms;
- (3) Respondent was adequately served with the Examination Order under the terms of the Alternative Service Order, or alternatively, had sufficient notice of its terms; and
- (4) The Court has jurisdiction to make an order for committal against the Respondent who is not within the jurisdiction.

[45] He argued that the Examination Order satisfied the requirement of CPR 53.3 (a) since, from a plain reading of the Order, in mandatory language, it commanded the Respondent to attend before the Court via Zoom on 16th September 2020 to be examined under oath.

[46] According to Mr. Watson, the Examination Order also comported with the technical requirement of CPR 53.3 (b) because it was endorsed with a penal notice warning the Respondent that he could be committed to prison for disobedience of the Order. In fact, Mr. Watson notes that out of an abundance of caution the Examination Order was drafted to replicate Form 14 in CPR Part 74.

[47] On the issue of service of the Examination Order, Mr. Watson made alternative submissions. His primary submission urged the Court to find, on the facts, that the Examination Order was properly served on the Respondent under the terms of the Alternative Service Order and that there is no need for the Court to rely on CPR 53.5 (3) to dispense with requirement for personal service. The thrust of this

argument is that the Alternative Service Order, read with CPR 7.14, governs the proper methods for service on the Respondent in this case.

[48] Alternatively, Mr. Watson argued that should I not be convinced by his primary submission, I should exercise my discretion to dispense with personal service on the basis that the evidence demonstrated that the means used to serve the Respondent under the Alternative Service Order were sufficient to give the Respondent notice of the terms of the Examination Order. It was pointed out that the Alternative Service Order was only sought because of the Respondent's history of evading enforcement of the Korean Judgment.

[49] Mr. Watson relied on evidence which illustrated the difficulty encountered by the Applicant in serving the Respondent with the Common Law Enforcement Claim in these proceedings in particular and generally, the difficulty with respect to serving documents in the various other enforcement matters worldwide. He made the case that these difficulties were because the Respondent has taken active steps to provide addresses (such as the Hong Kong Address) at which he does not reside or to move away from addresses at which he resided before he can be found there for service.

[50] What is more, Mr. Watson submits that the Respondent not only had direct knowledge of the Examination Order which was emailed to his email address, which he has confirmed is in current use, but also had notice through service on his attorneys Mr. Suen and Mr. Ong. He argued that the evidence shows that documents sent to Mr. Suen in relation to the related New York proceedings were at all times brought to the attention of the Respondent who would relay instructions to the Applicant's New York Counsel through Mr. Suen. This, he continues, demonstrates that the Respondent at the very least had notice of the Examination Order.

[51] On the issue of whether the Respondent had a reasonably opportunity (as required by CPR 53.3 (c)) to appear at the examination hearing on 16th September 2020 and the hearing of the Committal Application, Mr. Watson argued that the

evidence demonstrates that the Respondent had at least 25 days' advance notice of the examination hearing and 43 days' advanced notice of the Committal Application hearing and deliberately decided not to appear. Taking the argument further, he submitted that the Respondent appears to have deliberately decided to take the approach of complete non-engagement with the Court since the Common Law Enforcement Claim was filed on 18th April 2019.

[52] He argued that CPR 44.4 (2) and 53.3 (a) on their face may appear to require only personal service of the Examination Order and the Committal Application. However, those provisions must be read as being subject to CPR 7.8A and CPR 7.14. This is because CPR 7.14 (1) permits orders, applications and documents (such as the Examination Order and the Committal Application) to be served out of the jurisdiction without need for fresh permission where the Court had previously given permission to serve the underlying claim form out of the jurisdiction.

[53] According to Mr. Watson, since the Court had previously granted permission to serve the Common Law Enforcement Claim on the Respondent Out of the Jurisdiction by alternative means, CPR 7.14 (2) essentially overrides the requirement for personal service of the Examination Order or the Committal Application.

[54] Mr. Watson submitted that there was no need for seeking the further permission of the Court to serve the Examination Order and Committal Application on the Respondent out of the jurisdiction. That is because the Examination is incidental to the main claim (the Common Law Enforcement Claim) in which the Court's jurisdiction over the Respondent had already been established and the Committal Application is incidental to the Examination Order.

[55] Finally, Mr. Watson argued that there is no question that the Court has the power to make a committal order with extraterritorial effect over the Respondent. On this issue, he said that the case law is clear and cited authoritative decisions of the English courts on the point. In his view, the cases are aligned in as far as they establish that where the Court has assumed jurisdiction over a personal judgment

debtor who is not within the jurisdiction of the Court (such as here), the Court has the power to make an order committing that judgment debtor to prison for breach of any of its orders.

[56] Mr. Watson makes the case that were the Court to grant the Committal Application and make an order committing the Respondent to prison, the order would not be in vain because it would serve the very practical purposes of (a) securing compliance with the Examination Order, and (b) ensuring respect for the admiration of justice which is undermined by litigants who disrespect court orders. He cites strong authority from the English courts on this point and urged me to follow them.

[57] In argument, Mr. Watson reminded me that the Respondent has previously incorporated DVG in the BVI, and has previously acted as director of GD Enterprise, two of the BVI Companies against which Adderley J (Ag.) granted freezing relief.

[58] In light of this history, Mr. Watson argued that it is not fanciful to suppose that the Respondent may seek to incorporate or use BVI corporate vehicles in the future. A committal order against him would thus have coercive effect. This is especially so where, under the Economic Substance Rules (the 'ESR') and section 8 of the Economic Substance (Companies and Limited Partnerships) Act, 2018 (the 'ESA'), the board of directors of a BVI company must physically meet in the BVI. This means that any future use of BVI corporate vehicles to do business such as raising financing or capital would necessarily require the Respondent to travel to the BVI if he is a director of those corporate vehicles.

THE RESPONDENT'S LIKELY ARGUMENTS

[59] Mr. Watson stated that it was anticipated that the Respondent would have in fact continued his ill-advised approach of complete non-engagement with the Court by not appearing at the hearing of the Committal Application in spite of being served or having notice of the hearing. He accepted that even though the Committal Application was not made *ex parte*, based on the nature of committal proceedings

and the seriousness of the allegations, it was important for me to be pointed to possible arguments that the Respondent would make in his defence had he appeared.

[60] All the same, Mr. Watson invited the Court to disregard such arguments on the basis that the facts and law before the Court does not support them.

[61] First, he submitted that the Respondent might have argued that he was not served or had no notice of the Examination Order or the Committal Application. The Court was reminded of the evidence adduced by the Applicant which supports the Applicant's position that the Respondent was in fact served or at the very least had notice of the Examination Order and Committal Application.

[62] Secondly, he said the Respondent might have sought to convince the Court that it cannot make a committal order against him with extraterritorial effect since he is not within the jurisdiction of the Court. Here again, Mr. Watson relies on the case law which he says clearly establishes the Court's jurisdiction (on which see further below) to make a committal order against a defendant outside of the jurisdiction over whom the Court had previously established jurisdiction.

[63] Thirdly, Mr. Watson submitted that the Respondent might have said that the Court ought not to make the committal order because permission was separately needed for the Applicant to serve the Examination Order and Committal Applications outside the jurisdiction. Mr. Watson said that there is nothing to this argument since it is clear that the Alternative Service Order firmly established the Court's jurisdiction over the Respondent in respect of the underlying Common Law Enforcement Claim. The Examination Order and Committal Orders are merely incidental to the underlying claim.

[64] Fourthly, Mr. Watson argued that the Respondent might have said that the Court should not exercise a power which will in effect be in vain. Mr. Watson retorted that the committal order would not be in vain since it is possible that the Respondent may use BVI corporate vehicles to transact business like he has done

in the past and if the Respondent is a director of any of these corporate vehicles he would be required to travel to the BVI for board meetings.

[65] In connection to this argument, Mr. Watson cautioned that the Respondent must not be allowed to believe that he can use the BVI where it suits him to structure his business by using nominees to hide his interests in the BVI Companies but when summoned to answer to proceedings before the Courts here, he turns his nose up at the Court with impunity. The Court was urged to denude the Respondent of any misguided view he might harbor that the Court is not a serious court.

[66] Finally, Mr. Watson submitted that the Respondent might have said that the Court should not make a committal order against him in his absence and that in conducting the hearing in his absence he is greatly prejudiced. Once again, Mr. Watson invited the Court to reject that argument on the basis of the case law. He argued that the cases dealing with how the Court should proceed where a respondent does not turn up at a committal hearing (on which see further below), confirm that this court is within its right to proceed and make the order sought.

DISCUSSION

The applicable standard of proof

[67] It is trite law that when a civil contempt is alleged by a complainant, the Court must be satisfied on the evidence on the criminal standard – beyond a reasonable doubt. In the unlikely event that any authority is needed for this proposition, the Court relies on the decision of Edwards JA in **The Attorney General of Saint Christopher and Nevis v Hon. Shawn K. Richards and Another**.¹²

¹² The Attorney General of Saint Christopher and Nevis v Hon. Shawn K. Richards and Another, HCVAP 2009/009 (Unreported, delivered 13th September 2010).

The Source of the Court's power to punish for contempt

- [68] The Court has inherent power to punish a party culpable of civil contempt. That power has been preserved by section 10 of the **BVI Contempt of Court Act**, CAP 14 which states that:

“Nothing hereinbefore contained shall be deemed to interfere with or affect the power now possess by the Court to punish, by attachment or otherwise any person who shall disobey a process of the such Court directed to him, or who shall disobey any order or direction of such Court”. (Emphasis supplied).

- [69] The source of the Court's power was acknowledged in **Cowelby E.H.R. Blake v Victor Williams et al.**¹³ Byron CJ (as he then was) stated that:

“The jurisdiction of the Supreme Court in contempt is contained in the Contempt of Court Act (Cap 15) which was enacted in 1898. Civil contempts are dealt with by Section 10 which specifically enacts that the Act shall not be deemed to interfere with or affect the power of the Court to punish disobedience of Court process, orders and directions of the Court...”.(Emphasis supplied).

- [70] In **Griffin v Griffin**¹⁴ Hale LJ (as she then was) noted that the power to commit to prison for contempt is a ‘common-law power which has never been fully regulated by statute or even the rules of court.’

- [71] The relevant principles to which the Court must have regard when considering whether to make a committal order punishing for contempt are set out in **Asia Islamic Trade Finance Fund v. Drum Risk Management**.¹⁵ Popplewell J noted that:

“(1) In contempt cases the object of the penalty is to punish conduct in defiance of the Court's order as well as serving a coercive function by holding out the threat of future punishment as a means of securing the protection which the injunction is primarily to achieve. (2) In all cases it is necessary to consider (a) whether committal to prison is necessary; (b) what is the shortest

¹³ Cowelby E.H.R. Blake v Victor Williams et al. MISC. Suit No. 1 of 1996, St. Christopher and Nevis (Unreported, delivered 28th October 1996) at page 3.

¹⁴ Griffin v Griffin [2000] 2 FLR 44, at p. 48 per Hale LJ cited in Vik v Deutsche Bank AG [2018] EWCA Civ. 2011 at para. 35.

¹⁵ Asia Islamic Trade Finance v Drum Risk Management [2015] EWHC 3748 (Comm) at para. [7] cited in Bunge S.A. v Huaya Maritime Corporation of the Marshall Islands [2017] EWHC 90 (Comm) at para. 34.

time necessary for such imprisonment; (c) whether the sentence of imprisonment can be suspended; and (d) that the maximum sentence that can be imposed on any one occasion is two years. (3) A breach of a freezing order, and of the disclosure provision that attach to a freezing order is an attack on the administration of justice which usually merits an immediate sentence of imprisonment of not an insubstantial amount. (4) Where there is continuing breach the Court should consider imposing a long sentence, possibly even the maximum of two years, in order to encourage future cooperation by contemnors. (5) In the case of a continuing breach, the Court may see it fit to indicate (a) what portion of the sentence should be served in any event as punishment for past breaches; and (b) what portion of a sentence the Court might consider remitting in the event of prompt and full compliance thereafter. Any such indication would be persuasive but not binding upon a future court. If it does so, the Court will keep in mind that the shorter the punitive element of the sentence, the greater the incentive for the contemnor to comply by disclosing the information required. On the other hand, there is a public interest in requiring contemnors to serve a proper sentence for past non-compliance with court orders, even if those contemnors are in continuing breach. The punitive element of the sentence both punishes the contemnor and deters others from disregarding court orders. (6) The factors which may make the contempt more or less serious include those identified by Lawrence Collins J as the then was, at para. 13 of the *Crystal Mews* case, namely: (a) whether the claimant has been prejudiced by virtue of the contempt and whether the prejudice is capable of remedy; (b) the extent to which the contemnor has acted under pressure; (c) whether the breach of the order was deliberate or unintentional; (d) the degree of culpability; (e) whether the contemnor has been placed in breach of the order by reason of the conduct of others; (f) whether the contemnor appreciates the seriousness of the deliberate breach; (g) whether the contemnor has co-operated; to which I would add: (h) whether there has been any acceptance of responsibility, any apology, any remorse or any reasonable excuse put forward.”

- [72] I will refer to these principles in this judgment as the ‘Drum Risk Principles’.
- [73] I am satisfied that the correct interpretation of section 10 of the **BVI Contempt of Court Act**, especially when read against the backdrop of the instructive decision in **Griffin v Griffin**, is that the Court’s inherent jurisdiction to punish for civil contempt is not limited by section 10 nor CPR Part 53.
- [74] Nevertheless, the exercise of that jurisdiction must be principled having regard to all the factual circumstances of a particular case.

- [75] CPR Part 53 sets out procedural guides to aid the Court in the exercise of its inherent power to punish for contempt.
- [76] CPR 53.3 enumerates the circumstances when the Court is empowered to make a committal order viz (a) where the order requiring the judgment debtor to do an act within a specified time or not to do an act has been personally served on the judgment debtor; (b) where the order is endorsed with a penal notice setting out the consequences of noncompliance; and (c) where the order requiring a judgment debtor to do an act within a specified time or by a specified date was served in sufficient time to give the judgment debtor a reasonable opportunity to comply.

Can the Court make a committal order with extraterritorial effect?

- [77] Mr. Watson quite correctly took the Court to one of its earlier decisions, **Petroval SA v Stainby Overseas Limited at Others**,¹⁶ where Joseph-Olivetti J made *obiter* remarks doubting whether making a committal order where the defendant is outside of the jurisdiction would be in vain. Quite apart from the fact that the statement is *obiter*, I note that nowhere in the judgment did the learned Judge doubt in any way whether she had the power to make the order. Her remarks concerned whether she thought there was any practical benefit to making the order and not whether she had the power to do.
- [78] In any event, the law has since developed to make the position more certain. First, in **Masri v Consolidated Contractors International (UK) Ltd (No. 4)**¹⁷ [2009] UKHL 43, Lord Mance made it clear that, in relation to a personal judgment debtor over whom the Court had already established jurisdiction, the power existed to make an examination order even where the judgment debtor is not within the jurisdiction. That is, of course, what has happened in this case.
- [79] That statement of the law has been applied by later courts considering applications for contempt against a respondent outside the jurisdiction. In **Vik v**

¹⁶ *Petroval SA v Stainby Overseas Limited at Others*, BVIHCV 2007/0291 BVIHCV 2007/0291 (Unreported, delivered 7th February 2008) at para. 16 (Joseph-Olivetti J).

¹⁷ *Masri v Consolidated Contractors International (UK) Ltd (No. 4)* [2009] UKHL 43 at para. [17].

Deutsche Bank AG,¹⁸ when tasked with deciding whether the Court could make such an order, Gross LJ held that rule 71.8 (Similar to our CPR 44.5 (6) – (8)) and rule 81.4 (similar to our CPR 53.7) of the English Civil Procedure Rules had extraterritorial effect.

[80] More recently, Moulder J in the English Commercial Court decision of **Kazakhstan Kagazy plc and others v Zhunus and others**¹⁹ applied **Masri** and committed a contemnor outside of the jurisdiction of England to prison.

[81] Having considered these cases, I have no doubt that the Court has jurisdiction to make a committal order against a respondent who does not reside within the jurisdiction but over whom the Court has previously established its jurisdiction.

[82] I do not believe that that principle was doubted in **Petroval** and in any event if that was the effect of **Petroval**, I would hold that the law has since progressed.

Service of the Examination Order

[83] In my view, when dealing with the service issue there are two questions which must be considered, whether:

- a) the Court's permission was required to serve the Examination Order and Committal Application outside of the jurisdiction on the Respondent; and
- b) CPR 7.8A and 7.14 apply to service of the Examination Order and the Committal Application on the Respondent.

[84] The position in relation to the first question is easily resolved by the cases. In **Vik**,²⁰ Gross LJ held that a committal application is incidental to an order for examination made under Rule 71 of the Civil Procedure Rules.

¹⁸ *Vik v Deutsche Bank AG* [2018] EWCA Civ. 2011 at paras. 8 (1) & 28.

¹⁹ *Kazakhstan Kagazy plc and others v Zhunus and others* [2019] EWHC 2287 at para. 3.

²⁰ *Vik v Sebastian Holdings Inc (Nos 1 and 2)* [2018] EWCA Civ 2011.

- [85] In **Masri**, Lord Mance puts it this way: 'The judgment debtor is already subject to the Court's jurisdiction. In relation to him or her, the adjudicative and enforcement stages are for this purpose part of a single whole.'²¹
- [86] In **Vik**, Gross LJ held that: 'jurisdiction over a person in respect of a claim or order includes jurisdiction in respect of matters incidental to that claim or order'.²² On the facts of that case, the learned Judge found that the committal application in question was incidental to an examination order (in respect of which the Court already had jurisdiction) and therefore there was no need for a fresh application to serve out.
- [87] Arden LJ commented in **Dadourian Group International & others v Simms & others**²³ that 'proceedings for contempt of court are not collateral to the action in which they were launched'.
- [88] I therefore have no difficulty in finding that Applicant did not need any fresh permission of the Court to serve the Examination Order on the Respondent outside of the jurisdiction since, as noted in **Vik**, the Court's jurisdiction over the Respondent in respect of the Common Law Enforcement Claim includes jurisdiction to matters incidental to the Common Law Enforcement Claim such as the Examination Order.
- [89] Equally, as noted in **Vik**, the Committal Application was incidental to the Examination Order and therefore, in my view, no further permission to serve it outside of the jurisdiction was required.
- [90] As concerns the position in relation to the second question, Rules 7.8 to 7.14 (including rule 7.8A) create a particular regime for service when the defendant is located abroad. They are not limited to only certain types of documents: they apply to all applications, orders, or notices filed in the proceedings against the

²¹ At para. 17 of the decision.

²² At para. 55.

²³ **Dadourian Group International & others v Simms & others** (no. 2) (2006) EWCA Civ. 1745 at para. [12].

Defendant. Plainly, that would include the Examination Order. In fact, CPR 7.14 (2) expressly states that 'The procedure by which [such] a document is to be served is the same as that applicable to the service of a claim form and accordingly rules 7.8 to 7.13 apply.'

- [91] For those reasons, I would hold that the Respondent was properly served with the Examination Order and the Committal Application under the terms of the Alternative Service Order notwithstanding CPR 44.4(2) and 53.3(a).

Notice of the Examination Order

- [92] In **Bunge SA v Huaya Maritime Corporation of the Marshall Islands**²⁴ Cranston J dispensed with service in circumstances where an injunction order was served on the respondent by email and courier. The learned Judge noted that the English CPR 81.8 permitted him to dispense with the requirement for personal service in circumstances where he is satisfied on the evidence that the respondent had notice of the order or if the Court thinks it is just to do so. More importantly, he noted that 'The Courts have taken the view that where a party knows, and persistently fails to respond, it is just to dispense with service'.
- [93] Mr. Watson pointed out to the Court that in **Bunge SA** the Respondent remarked in a conversation to another party that he was told by his lawyers that so long as he kept away from the UK there was nothing that could touch him. Mr. Watson submitted that although he cannot say that the Respondent in this case has received any such advice from his lawyers, the Court should be astute to remind him that deliberately not engaging with the Court because he is not within the jurisdiction is not a safe haven.
- [94] I agree with these observations and would only add that it would send the wrong message to the public, were the Court to countenance the Respondent's conduct, that the Court's power can be flouted with complete impunity. That would be

²⁴ *Bunge SA v Huaya Maritime Corporation of the Marshall Islands* [2017] EWHC 90 (Comm) at paras. 26 – 27.

deleterious to the proper administration of justice and contrary to the public policy which requires parties to whom orders of the Court are directed, to obey such orders.

[95] Another compelling factor behind the discretion given to the Court to dispense with the requirement for personal service was succinctly explained by Morritt LJ in **Davy International Ltd and Others v Tazzyman and others**.²⁵ The Learned Judge observed that power to dispense with service under the English Civil Procedure Rules may be exercised retrospectively as well as prospectively since any other interpretation of would mean that 'The Court would be powerless to deal with cases where a party, who is not served with the order during the period for compliance, deliberately refused to comply with a mandatory order...'

[96] Applying the authorities to the case at bar, I am satisfied by the evidence of the Applicant proving that when documents were served on the Respondent in respect of the New York enforcement proceedings through Mr. Suen, Mr. Suen brought those documents to the attention of the Respondent and relayed the instructions of the Respondent to the Applicant's New York Counsel. The Court has no reason to believe that that course was not, or could not be, followed in this situation.

[97] In the result, if I am wrong on my earlier finding that the Respondent was properly served under the Alternative Service Order, I would exercise my discretion under CPR 53.5 (3) to dispense with the requirement for personal service having regard to all the circumstances of this case.

Would a committal order be in vain?

[98] In modern litigation the Courts have become more astute to ensuring that disobedience of court orders is discouraged. The cases suggest that every deliberate breach of an order of the Court is an attack on the administration of justice. In **Bunge SA**, for example, the Court noted that the respondent

²⁵ *Davy International Ltd and Others v Tazzyman and others* [1997] 1 WLR 1256 at p. 1261.

‘...deliberately defied the court’s authority by refusing to comply with the disclosure provisions. Failure to comply is an attack on the administration of justice.’²⁶

[99] The first limb of the Drum Risk Principles notes that in contempt cases the object of the penalty is to punish defiance of the Court’s order as well as serving a coercive function by holding out the threat of future punishment as a means of securing the protection which the injunction [order] is primarily there to achieve.

[100] The third limb of the Drum Risk Principles establishes that a breach of a freezing order is an attack on the administration of justice which usually merits an immediate sentence of imprisonment of not an insubstantial amount.

[101] There can be no real doubt that securing compliance with orders of the Court and deterring disobedience are practical reasons for making a committal order.

[102] In **Dadourian** Arden LJ noted that

“a party who proposes to bring contempt proceedings may wish to bring contempt proceedings not simply to persuade the court to punish the alleged contemnor, but also in order to induce the subject of the order to produce more information about the assets falling within the scope of the order than he has so far done, notwithstanding that he has been ordered to provide that information by the terms of the freezing order (or an order made in consequence of the freezing order).”²⁷

[103] Longmore LJ also noted in **Dadourian** that

“More often than not a court exercises its powers in contempt proceedings for the purposes of punishing a party for disobedience to or non-compliance with a court order. In the particular case of freezing injunctions, however, it is common to bring contempt proceedings to ‘improve’ a defendant’s compliance with the original order. Under the pressure of a committal application, a defendant may feel obliged to reveal the whereabouts of assets the existence or amount of which he has hitherto concealed or the ownership of which he has hitherto misrepresented.”²⁸

²⁶ At para. 35 of the decision.

²⁷ At para. [16] of the decision.

²⁸ At para. [38] of the decision.

- [104] For my part, I would agree with the position espoused in **Dadourian** and would only add that it is equally applicable in cases of any mandatory order of the Court endorsed with a penal notice including the Examination Order.
- [105] In a real sense the disclosure requirements of an injunction order are similar to an examination order requiring a judgment debtor to provide information about his assets in order that the judgment can be enforced against him.
- [106] In argument, Mr. Watson impressed upon the Court that this is not a situation where it would serve no purpose to commit the Respondent to prison.²⁹ The Respondent has previously incorporated DVG in the BVI, and has previously acted as director of GD Enterprise, one of the BVI companies against which Adderley J granted freezing relief.
- [107] Learned counsel submitted that in light of this history, it is not fanciful to suppose that the Respondent may seek to incorporate or use BVI corporate vehicles in the future and therefore a committal order against him would thus have coercive effect. That is especially so in light of the Economic Substance requirements now in force.
- [108] Males J in the English Commercial Court decision of **Cruz City Mauritius Holdings v Unitech Ltd and Others**³⁰ remarked that if an order of the English Court cannot be given effect in a foreign jurisdiction where a corporate defendant's assets are located, the sanction of contempt proceedings is available in the England.
- [109] The Learned Judge noted that:

“In circumstances where directors of the Defendants may wish to come to this country on business or for pleasure, the prospect that their next visit may be for a more extended duration and in less comfortable accommodation than anticipated should provide a real incentive to comply with an order. Likewise

²⁹Petroval SA v Stainby Overseas Limited at Others, BVIHCV 2007/0291 (unreported, delivered 7th February 2008), see *obiter* remarks of Joseph-Olivetti J at para. [18].

³⁰ Cruz City Mauritius Holdings v Unitech Ltd and Others [2014] EWHC 3131 (Comm) at para. [38].

if the Defendants wish or need to do business here, whether by raising money on the international capital markets or otherwise.”(Emphasis supplied).

- [110] For those reasons, I do not believe that making a committal order against the Respondent would be in vain. There are practical benefits in the Court making the order. A primary consideration is the public policy of ensuring respect for the administration of justice. Moreover, there is a strong public interest in enforcing court judgments and orders. I noted in this Court’s judgment in **UVW v XYZ**³¹ that the BVI is a pro-enforcement jurisdiction. In keeping with that policy, this Court sought to assist the Applicant with enforcing the Korean Judgment by making the Examination Order so that the Respondent could be examined about his assets which could be used to satisfy the judgment.

Can the Court proceed in the absence of the Respondent?

- [111] As a final matter, I turn to the issue of whether the Court could have proceeded to hear the Committal Application (as it did) in the absence of the Respondent.
- [112] Mr. Watson argued that he had anticipated that the Respondent might not appear at the hearing in light of his persistent approach, as far back as when the Common Law Enforcement Claim was filed on 18th April 2019, of complete non-engagement with the Court.
- [113] For that reason, Mr. Watson helpfully took the Court to the recent decision of Roth J in **Frejek v Frejek**.³² The case concerned an order made by the English court for a respondent to produce documents. The Applicant had encountered difficulties with personally serving the order and so the order was served by post. On an application for the committal of the Respondent for breach of the order to produce documents, the Court exercised its powers to dispense with personal service. The matter came on for hearing remotely by Skype because of the COVID-19 pandemic.

³¹ Claim No. BVI HC (COM) 108 of 2016 (Unreported, delivered 27th October 2016).

³² Frejek v Frejek [2020] EWHC 1181.

[114] In considering whether to grant a committal order against the respondent who did not appear at the hearing, Roth J created the following checklist of factors to which they court should have regard:

- (1) Whether the respondent has been served with the relevant documents including the notice of hearing;
- (2) Whether the respondent has had sufficient notice to enable him to prepare for the hearing;
- (3) Whether any reason has been advanced for the respondent's non-appearance;
- (4) Whether by reference to the nature of the circumstances his behaviour he has waived his right to be present;
- (5) Whether an adjournment would be likely to secure the respondent's attendance;
- (6) The extent of the disadvantage to him of not being able to present his account of events;
- (7) Whether undue prejudice would be caused to the applicant by any delay;
- (8) Whether undue prejudice would be caused to the forensic process if the application were to proceed in the absence of the respondent; and
- (9) Whether the Overriding Objective to deal with cases justly, expeditiously and fairly would be fulfilled if the application was heard in the absence of the defendant.

[115] In argument, Mr. Watson provided responses to this checklist of factors with which the Court agrees. Having considered the evidence the Court is satisfied that:

- (1) There is sufficient and clear evidence that the Respondent has been served with the relevant documents including the notice of the examination hearing and the notice of the committal hearing;
- (2) There is also sufficient evidence proving that the Respondent had at least 25 days' notice of the examination hearing and has had 43 days' notice of the committal hearing which was and is sufficient notice to enable him to prepare;
- (3) The Respondent has advanced no reason for his non-appearance at the examination hearing and the committal hearing and has taken an approach of complete non-engagement with the Court or any process that has been served on him including as far back as when the Common Law Enforcement Claim was filed on 18th April 2019;
- (4) The nature of the Respondent's behaviour confirms that he has waived his right to be present. The Committal Application is itself endorsed with a warning to the Respondent that it is in his interest to attend Court and to seek legal advice. Moreover, the Applicant's 23rd September Service Letters serving the 16th September Order on the Respondent warned the Respondent that the Applicant intended to file these proceedings for committal, provided him with the E-litigation portal Code so that he could access these proceedings on the E-Portal, and cautioned him to take legal advice;
- (5) There is nothing from the Respondent's conduct so far in these proceedings that would suggest that an adjournment would likely secure his attendance. He has had ample opportunity to arrange representation and has chosen not to do so. In fact, the Court is entitled to draw the appropriate inferences that the defendant's tireless efforts to evade service of this court's process is sufficient indication that he has no intention of engaging with the Court;

- (6) There is no disadvantage to hearing the Committal Application in the Respondent's absence since from as far back as 18th April 2019, the Respondent has not engaged in any of the matters arising in these proceedings. He has had ample opportunity to appear at this hearing and has chosen not to do so;
- (7) The Applicant has already suffered undue prejudice in the delay caused to him by the Respondent's actions of resisting enforcement of the Korean Judgment, which was entered more than 9 years ago yet still has not been paid in any amount. The Examination Order was deployed to gather information under oath from the Respondent about his assets so that the Default Judgment obtained by the Applicant on his Common Law Enforcement Claim can be enforced against the Respondent. Further delaying the process, where there is no indication that the Respondent is likely to appear, would only exacerbate prejudice to the Applicant. As I noted in **UVW**, the BVI is a pro-enforcement jurisdiction. The existence of a committal order which may interfere with the Respondent's ability to do business using BVI corporate vehicles in the future may do more to secure his compliance than an adjournment;
- (8) No discernible undue prejudice would be caused to the forensic process if the application were to proceed in the Respondent's absence; and
- (9) The overriding objective requires the Court to deal with cases justly and expeditiously and it cannot be just or fair for the Respondent to repeatedly ignore and flout the Court's power to administer justice by deliberately refusing to engage with the process.

PENALTY

- [116] Mr. Watson urged the Court to sentence the Respondent to a period of 12 months imprisonment. He pointed out to the Court that unlike section 14 (1) of the English

Contempt of Court Act, 1981, where the sentence prescribed for contempt of court is two years, the BVI Contempt of Court Act contains no provision outlining the punishment for civil contempt.

- [117] He asked the Court to take particular note of section 10 of the Act which includes the words ‘nothing hereinbefore contained’ since, in his view, that provision makes it clear that the previous sections in the Act did not proscribe the Court’s discretion to determine sentence. He took the Court to section 4 (8) which deals with the sentencing for criminal contempt committed outside of the presence of the Court and which prescribes a period of 6 months upon a guilty verdict being returned by a jury.
- [118] In light of the decision in **Griffin v Griffin**³³ where Hale LJ (as she then was) reminded us that the power to commit to prison for contempt is a ‘common-law power which has never been fully regulated by statute or even the rules of court’. I am satisfied that power of the Court to determine the appropriate sentence has not been limited by BVI Contempt of Court Act.
- [119] Notwithstanding, the Court must exercise those powers judicially having regard to the nature of the contempt in question and all the circumstances of the case. I find that based on the evidence before me, the Respondent’s breach is deliberate. The breach is further aggravated by the fact that since the Examination Order was made, numerous attempts have been made to serve the Respondent with the Order and to urge him to contact the Court and to seek legal advice. All of these efforts have seemingly fallen on deaf ears.
- [120] In exercising my powers to punish, I have had regard to the Drum Risk Principles and hold that the Respondent’s failure to engage with the process since the service of the Examination Order on him is a continuing breach which warrants a high sentence.

³³ Griffin v Griffin [2000] 2 FLR 44, at p. 48 per Hale LJ cited in Vik v Deutsche Bank AG [2018] EWCA Civ. 2011 at para. 35.

DISPOSITION

[121] Within the premises, the Court declares that the Respondent is in contempt of court for breaching the terms of the Examination Order endorsed with a penal notice. The Court finds that the evidence led by the Applicant has proven the contempt of court on the criminal standard. I will therefore order and direct the following:

- (1) The Respondent do stand committed to Her Majesty's Prison at Balsam Ghut for a period of 12 months for his contempt ('Committal Order').
- (2) The Committal Order be suspended upon the Respondent complying with either of the following conditions (the 'Committal Suspension Order'):
 - (a) paying into Court, or to the Applicant, the full amount of the Default Judgment made by the Court on 4th June 2020 (together with interest) within 7 days of the date of this Order; or
 - (b) filing an application to purge his contempt, within 7 days of the date of service of this Order on him, by making himself available to be examined in accordance with the terms of the Examination Order, such application to be listed before Mr. Justice Wallbank within 7 days after it is filed.
- (3) The Respondent's failure to comply within the stipulated time with either of the conditions attached to the Committal Suspension Order shall result in the Committal Order set out at paragraph 1 above taking immediate effect.
- (4) The Court retrospectively dispenses with the requirement for personal service of the Examination Order in accordance with CPR 53.5 (3) and deems service of the Examination Order on the Respondent under the terms of the Alternative Service Order to be good service on the basis that the Respondent has had sufficient notice of the Examination Order and in

the circumstances it is just to dispense with the requirement for personal service.

- (5) The costs of this Application shall be costs in the Claim.
- (6) The Applicant shall have carriage of the order upon judgment.

[122] I take this opportunity to thank learned Counsel for the Applicant, Mr. Watson and Mr. de Swardt, for their assistance during this matter.

Gerhard Wallbank
Commercial Court Judge [Ag.]

By the Court

Registrar