

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

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

CLAIM NO. BVIHC (COM) 2018/0225

BETWEEN:

STARR INVESTMENTS CAYMAN II INC

Applicant

and

[1] OU WEN LIN

[2] QUNGPING LIN

Respondents

Determined on paper:

Ms. Hazelann Hannaway Boreland of Harney Westwood & Riegels LP for the
applicant

The respondents did not appear

2020: June 8

JUDGMENT

[1] **JACK, J [Ag.]:** This is an application dated 20th May 2020 seeking the adjournment of the hearing of this matter currently listed on 18th June 2020 to a date after 1st December 2020. This would be the fourth application for an adjournment.

[2] The facts are straightforward. By two awards of the Hong Kong International Arbitration Centre both made on 19th December 2012 the applicant was awarded the equivalent of US\$178,548,518 and US\$37,861,228 respectively against *inter alia* the defendants. By order of Green J made 21st March 2019, leave was given

to enforce the arbitration awards in this Territory. The judge also granted a provisional charging order over the second respondent's interest in 10,000 shares (comprising all the issued shares) in China Medical Service Investment Holding Ltd ("China Medical"), a BVI company.

- [3] Since then the applicant has been attempting to serve the respondents with the application, including the application against the second respondent to make the charging order final. The respondents both have addresses for service in Fuzhou City in the Fujian Province of the People's Republic of China. Service of originating process in the People's Republic must be made under the **Hague Convention**.¹ The applicant promptly took steps to start the procedure for service under the **Hague Convention** by passing the relevant documents for service to the Governor's Office for transmission to the Foreign and Commonwealth Office in London. They in turn should have passed the documents to British Embassy in Beijing, who then finally would pass them to the Chinese authorities for actual service.
- [4] Service under the **Convention** is never a speedy process, but the coronavirus appears to have stopped the process completely. After chasing the Governor's Office for news on the progress of service, Harneys discovered that "due to the COVID-19 pandemic the [Service of Process] Unit in London is currently closed and the majority of the Foreign and Commonwealth Office staff has been temporarily reassigned due to the pandemic." There was no means of telling whether the documents had even made it to the British Embassy.
- [5] The Court has to consider how best to deal with this problem. Under the overriding objective, the Court must ensure that cases are "dealt with expeditiously": CPR 1.1(2)(d). It is not satisfactory simply to adjourn the return date repeatedly. Where there are difficulties in effecting service, the classic response is to make an order for alternative or specified service under either CPR

¹ Convention of 15th November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

5.13, 5.14 or 7.8A. The Court also has a power to dispense with service completely: CPR 7.8B. Yet another route might be for the Court to make an order under CPR 42.12, whereby a non-party can be made bound by an order of the Court.

- [6] I am not going to refuse the application for an adjournment outright, but it seems to me that the applicant needs to consider these other possibilities before I make final decision on the application.
- [7] Looking first at alternative or specified service, the easiest form of service of the applications would be at an address within the jurisdiction. Now CPR 5.13 deals with alternative service, which in the Eastern Caribbean is an *ex post facto* authorisation of a form of service chosen by the claimant. In the current case, the applicant has made no attempt to serve by an alternative method chosen by itself, so at present the rule has in my judgment no application.
- [8] CPR 5.14 deals with “service by a specified method”. This more closely resembles the English order for alternative service (English CPR 16.5) in that the order is made *before* service is attempted. The Court determines the method by which service is to be affected. Although this rule does not itself refer to service outside the jurisdiction, CPR 5.4 requires a claim form to be served at a place within the jurisdiction “[e]xcept as permitted by Part 7”.
- [9] Is specified service within the jurisdiction available in the current case under CPR 5.14 and 5.4? The registered agent of China Medical is Vistra (BVI) Ltd (“Vistra”). In order for the Court to order that service on Vistra be good service, the applicant would need to file an affidavit “showing that that method of service is likely to enable the person to be served to ascertain the contents of the claim form and statement of claim”: CPR 5.14(2)(b). Given that the second respondent is the sole shareholder of China Medical, Vistra may, as part of its “know-your-client” duties, be able to pass documents on to the second defendant. Thus, the applicant may

be able to provide such evidence. Specified service *within* the jurisdiction may thus be available. Again, no application for specified service has been made.

- [10] Is specified service *outside* the jurisdiction available in the current case? The ordinary rule for the mode of service outside the jurisdiction is CPR 7.8, which provides:

“(1) Subject to the following paragraphs of this rule, and Rule 7.8A if a claim form is to be served out of the jurisdiction, it may be served—

(a) by a method provided for by—

(i) rule 7.9 (service through foreign governments, etc.); or

(ii) rule 7.11 (service on a State);

(b) in accordance with the law of the country in which it is to be served; or

(c) personally by the claimant or the claimant’s agent.

(2) Nothing in this Part or in any court order may authorise or require any person to do anything in the country where the claim form is to be served which is against the law of that country.”

- [11] The claimant has adduced no evidence about Chinese law, but service otherwise than under the **Hague Convention** may well not be permissible in the People’s Republic. If that is right, then the Court cannot make an order for specified service on the defendants in the People’s Republic.

- [12] The last possibility is to make an order under CPR 42.12. The order would be “that, unless the defendant within 35 days of service of the copy of the order on him acknowledges service under CPR 5.19(3), service of the claim form is dispensed with pursuant to CPR 7.8B.”

- [13] There is a somewhat complicated interaction of rules under Parts 5, 6, 7 and 42. I am reluctant to give a final view on the availability of CPR 42.12 without full argument. The following is merely a preliminary view. It seems arguable that, until a defendant is served, he is not a party, so that the provisions of CPR 42.12 (which only apply to non-parties) are capable of applying. If that is right, CPR 42.12(1) provides for service of a *copy* of an order (i.e. not an original) on a non-

party. The non-party is then bound by the terms of the order or judgment, unless he applies within 28 days to discharge, vary or add to the judgment or order: CPR 42.12(5) and (6).

- [14] “Service must be effected in accordance with Part 5”: CPR 42.12(2). CPR 5.11 deals with service by post and how it is proved and CPR 5.12 with service by electronic means. Neither seems to be restricted solely to service of claim forms. (By contrast, Practice Direction 5, No 1 of 2011, only applies to electronic service of claim forms.) However, these provisions on service of documents other than claim forms need to be read with CPR Part 6.
- [15] CPR 6.1(1) and (2) deal with service of “any judgment or order”. However, this would not seem to be applicable to CPR 42.12(1), because what must be served is a copy, not an original, of the order. (This is how **Halliwell Assets Inc and others v Hornbeam Corp and other**² can be distinguished.) A copy of an order therefore stands to be served as an “other document”. Where the person to be served has not given an address for service, CPR 6.4(1)(b) provides for an individual to be served at his “usual or last known place of residence.” There appears to be no restriction requiring that place of residence to be within the jurisdiction. CPR 5.4 (which does contain such a restriction) only applies to a claim form.
- [16] The traditional reason (now of much less weight) for insisting on special rules for service of originating process out of the jurisdiction is that “the service of proceedings abroad was an assertion of sovereign power over the defendant and a corresponding interference with the sovereignty of the state in which process was served.”³ The old form of writ of summons commenced: “Elizabeth II by the Grace of God... Queen... to [the defendant]: We command you that within 14 days after service of this writ on you... you cause an appearance to be entered for you...” In order to avoid the encroachment on the foreign power’s sovereignty,

² BVIHCMAP 2015/0001 (delivered 12th October 2015).

³ *Abela v Baadarani* [2013] UKSC 44, [2013] 1 WLR 2043 *per* Lord Sumption at para [53].

where leave to serve out of the jurisdiction was granted, the plaintiff served a *notice* that a writ had been issued against the putative defendant; he did not serve the defendant with the writ itself: **Rules of the Supreme Court 1965** (England) Order 11 rule 3.⁴ Service of a notice that a writ had been issued was not an exercise of a sovereign power by the domestic jurisdiction.

[17] If that is right, then service of a copy of an order does not need the protections given by CPR Part 7. Whilst the legal position is not in my judgment very clear, it is at least arguable that the interaction of the rules which I have outlined permits a copy of an order to be served by post or email on someone in a foreign jurisdiction. This would leave the putative defendant on a Morton's fork: either he voluntarily enters an appearance under CPR 5.19(3) or he has judgment given by default on dispensation of service under CPR 7.8B.

[18] After the applicant has been able to consider how it wishes to proceed, I shall list this matter for a short hearing at counsel's convenience.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar

⁴ Repealed with effect from 1st June 1981 by the Rules of the Supreme Court (Amendment) (No 4) 1980 (SI 1980 No 2000), which introduced the new form of writ of summons, which *could* be served abroad.