

**BRITISH VIRGIN ISLANDS
EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM NO: BVIHC (COM) 2012/0008

BETWEEN:

STAR REEFERS POOL INC

Applicant

and

JFC GROUP CO LTD

Respondent

Ms Arabella di Iorio appeared for the Applicant
The Respondent was not represented

JUDGMENT

[2012: 7, 16 February; 29 March; 2 April]

(Reciprocal Enforcement of Judgments Act 1922 (CAP 65) – Applicant holding money judgment of High Court in England against Respondent judgment debtor – whether Respondent voluntarily appeared or otherwise submitted or agreed to submit to jurisdiction of the English Court – whether Court may allow enforcement of registered judgment before expiration of the time limited for the judgment debtor to set aside registration of the judgment)

- [1] **Bannister J [ag]:** This is an application for the registration here of a judgment obtained by the Applicant, Star Reefers Pool Inc ('Star Reefers'), in the Commercial Court in London on 23 August 2011 against a Russian company, JFC Group Co Ltd ('JFC'). The judgment was entered two days later on 25 August 2011. Star Reefer's claim arose out of breaches of two charterparties by which it had chartered three vessels to an affiliate of JFC, the performance of which had been guaranteed by JFC. The judgment was for a sum of over US\$16 million, together with interest and costs, and thus qualifies as a judgment within the meaning of section 2(1) and 3(1) of the Reciprocal Enforcement of Judgments Act 1922 (CAP 65) ('the Act').

Submission to the jurisdiction of the English Court

- [2] The first question, which has been very properly raised by Ms di Iorio, for Star Reefers, is whether, in the light of the procedural history in London, JFC can be said to have voluntarily appeared or otherwise submitted or agreed to submit to the jurisdiction of the English Court. If it did not, then since JFC neither carried on business nor was ordinarily resident in England, section 3(2)(b) of the

Act precludes registration.¹ It is important to bear in mind that whereas the Act gives the Court a discretion whether or not to order registration of a complying foreign judgment, it precludes registration where the conditions of section 3(2)(b) are not satisfied. In such a case, the Court has no discretion, but must decline to enforce by way of registration.

- [3] I have come to the conclusion, contrary to my initial inclination, that at least for the purposes of a without notice application,² which this is, Star Reefers has sufficiently demonstrated that JFC submitted to the jurisdiction of the High Court in England by actively participating in post-judgment freezing order proceedings taken by Star Reefers. There is authority that such intervention is sufficient at common law to constitute a submission³ and the Court should not be astute, on a without notice application, to discern fine distinctions once it is presented with a good arguable case for making the order sought. I will therefore say no more at this stage on that aspect of the matter. There is reason to believe that there are assets available for execution within the Territory and in my judgment that makes it just and convenient that the judgment be registered here.
- [4] However, the application was originally presented on the grounds that JFC had submitted to the jurisdiction of the English High Court by seeking unsuccessfully to challenge its jurisdiction and to argue *forum*. That seems to me to raise a point of considerable importance, so that although I am not persuaded by this submission, it seems to me that because a similar point may arise in future I should set out my conclusions on that issue.
- [5] In the English proceedings Star Reefers obtained permission to serve JFC out of the jurisdiction on the basis that the guarantee in question was a contract governed by English law. The claim form was served in Russia on 13 October 2010 and on 8 November 2010 JFC acknowledged service, indicating that it intended to challenge the jurisdiction of the English Court. On 11 February Andrew Smith J gave judgment on that challenge. It appears from his judgment that the challenge was two pronged. First, JFC said that the guarantee was governed by Russian law and accordingly that permission to serve out under paragraph 3.1(6)(c) of the English CPR 6B Practice Direction should not have been granted. In other words, that the English Court had no jurisdiction to try the case. Secondly, JFC submitted that if the English Court did have jurisdiction it should decline, on *forum* grounds, to exercise it. Both issues were decided against JFC, which went on to take no further part in the substantive proceedings down to judgment.
- [6] There are *obiter dicta* of the English Court of Appeal to the effect that an appearance under protest solely for the purpose of challenging the jurisdiction of a foreign Court is not to be treated by the English Court as a submission to the jurisdiction of that Court.⁴ There is clear English Court of Appeal authority that an appearance for the purpose (whether solely or in addition to a challenge to the jurisdiction of the foreign Court) of persuading the foreign Court that it should not exercise

¹ the section provides: *No judgment shall be ordered to be registered under this section if . . . the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original Court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that Court*

² CPR 72.2 permits applications for registration of foreign judgments to be made without notice

³ see Dicey, Morris & Collins, *The Conflict of Laws*, 14th Ed at paragraph 14-067

⁴ **Henry v Geopresco International Ltd** [1976] 1 QB 726 at 748F. The Court of Appeal did not explain what form such an application would take

jurisdiction over the defendant will amount to a voluntary submission.⁵ There are also English Court of Appeal *obiter dicta* to the effect that if a defendant appears conditionally in order to persuade the foreign Court to set aside its order permitting service upon him outside its jurisdiction and that application fails, he will be treated as having submitted to its jurisdiction, apparently on the grounds that in applying to set aside an order for service out the applicant is inviting the Court to exercise a discretion.⁶

[7] These authorities and *dicta* are no longer part of the law of England, having been abrogated by the United Kingdom Civil Jurisdiction and Judgments Act 1982. No such legislation exists here in the BVI. Ms di Iorio submits that the cases referred to in the preceding paragraph, although not binding on me, comprise highly persuasive authority and that I should apply them in applications made here under the Act. If I do, there can be no doubt that JFC's application to Andrew Smith J for a stay on *forum* grounds will be caught by the second of the two propositions which I have extracted from those authorities.

[8] So far as the researches of Ms di Iorio have been able to establish, there is no authority dealing with the topic in this jurisdiction. I have come to the conclusion that I should not follow these decisions here. The reason is that they have now become dead letters in the jurisdiction in which they previously applied and that for me to apply them here, where they are not binding, would be to introduce into the law in this jurisdiction an archaic rule which would throw English and BVI practice and procedure out of alignment. I recognise, of course, that there are differences, some significant, between English and BVI practice and procedure, but I bear in mind the overarching provisions of section 11 of the West Indies Associated States Supreme Court Act 1969 (CAP 80):

'11. The jurisdiction vested in the High Court in civil proceedings, and in probate, divorce, and matrimonial causes, shall be exercised in accordance with the provisions of this Ordinance and any other law in operation in the Territory and rules of court, and where no special provision is therein contained such jurisdiction shall be exercised as nearly as may be in conformity with the law and practice administered for the time being in the High Court of Justice in England'.

In my judgment it would be a retrograde step and contrary to the spirit of these provisions of our legislation, for me to introduce into the law of the BVI rules which ceased to be part of the law of England thirty years ago.

[9] Asking a foreign Court to set aside an order for service out on jurisdictional grounds or to divest itself of jurisdiction on *forum* grounds cannot, except by resort to the most pedantic logic, be seen as a submission to the jurisdiction of that Court. No litigant would by the light of nature regard that as being the case. In my judgment, by making the applications which it made before Andrew Smith J, JFC did not 'voluntarily appear or otherwise submit' to the jurisdiction of the English Court.

⁵ **Harris v Taylor** [1915] 2 KB 580, 587; **Henry v Geopresco** (supra) at 747A, 750 C-D

⁶ **Henry v Geopresco** (supra) at 748G and 747E

Execution of a registered judgment

- [10] Another point of general importance was raised by Ms di Iorio in the course of this application. She invited me, if I was otherwise minded to order registration of the judgment, to provide that Star Reefers could execute the judgment (in this case by way of an attachment order under CPR Part 50) forthwith and before the expiration of the period stipulated for the making of any application to set aside the registration had elapsed.
- [11] The Rules currently in force are those of CPR Part 72. For present purposes the most immediately relevant of them are Rule 7.4 and Rule 7.8:

'Order for registration

- 72.4 (1) An order giving leave to register a judgment must be drawn up by, or on behalf of, the judgment creditor.
- (2) Except where the order is made following an application on notice, it need not be served on the judgment debtor.
- (3) The order must state the period within which an application may be made to set aside the registration and contain a notification that execution on the judgment will not issue until after the expiration of that period.
- (4) The court may, on an application made at any time while it remains competent for any party to apply to have the registration set aside, extend the period (either as originally fixed or as subsequently extended) within which an application to have the registration set aside may be made.
- (5) The court hearing the application may order that notice of the application be given to any person.

Issue of execution

- 72.8 (1) Execution may not issue on a judgment registered under the Act until after the expiration of the period which, in accordance with rule 72.4(3), is specified in the order for registration as the period within which an application may be made to set aside the registration or, if that period has been extended by the court, until after the expiration of the extended period.
- (2) If an application is made to set aside the registration of a judgment, execution on the judgment may not issue until after the application is finally determined.
- (3) Any party wishing to issue execution on a registered judgment must produce to the court office an affidavit of service of the notice of registration of the judgment and any order made by the court in relation to the judgment.'

[12] It will be seen that these Rules together provide a regime under which the Court must stipulate a time within which an application to set aside registration may be made and that the order must embody that stipulation and contain a notification that judgment may not be entered until after that period has expired. Rule 72.8(1) contains a prohibition against enforcement during the period for applying to set aside and, if such application is made, until its determination.

[13] Although these Rules are no doubt subordinate legislation, they are made pursuant to the statutory requirement of section 3(4) of the Act:

- ‘(4) Rules of Court shall provide-
- (a) For service on the judgment debtor of notice of the registration of a judgment under this section, and
 - (b) For enabling the High Court on an application by the judgment debtor to set aside the registration of a judgment under this section on such terms as the Court thinks fit; and
 - (c) For suspending the execution of a judgment registered under this section until the expiration of the period during which the judgment debtor may apply to have the registration set aside.’

They are thus not merely procedural rules. They give effect to the intention of the legislature that the judgment debtor must be given an opportunity to have the registration set aside before execution can issue.

[14] Ms di Iorio submitted that I have a discretion under CPR 26.1(6) to disapply the pertinent provisions of Rule 72 in special circumstances. CPR 26.1(6) provides as follows:

- ‘26.1(6) In special circumstances on the application of a party the court may dispense with compliance with any of these rules.’

That Rule by its terms permits the Court to dispense with *compliance* with a rule. This permits the Court to excuse an omission to serve a supporting affidavit, for example, where such service is required under a particular rule. Permitting a party to do something which a rule expressly prohibits, however, has nothing to do with compliance. If a judgment creditor issues execution before the period for setting aside has elapsed, it is not failing to comply with a rule, it is doing something which the rules forbid it to do. I have no power under CPR 26.1(6) to permit that which the CPR forbids.

Conclusion

- [15] For the reasons given earlier, I think it just and convenient that the judgment should be enforced in this Territory and I accordingly order that it be registered here. Any application to set aside must be made within 35 days after notification of the order has been given to JFC. I will formally hand down judgment at 10.00 am on Monday 2 April 2012. There is no need for Counsel to attend.

Commercial Court Judge
2 April 2012