EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2013/0020

BETWEEN:

WESTBURG ANSTALT

Appellant

and

PROFITSTAR ANSTALT

Intended Defendant

Before:

The Hon. Dame Janice M. Pereira, DBE — Chief Justice
The Hon. Mr. Davidson K. Baptiste — Justice of Appeal
The Hon. Mr. Tyrone Chong, QC — Justice of Appeal [Ag.]

Appearances:

Mr. Vernon Flynn, QC, with him, Mr. Jeremy Child, instructed by Harney Westwood & Riegels, for the Appellant

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2013: December 5;
2014: February 4.

Interlocutory appeal – Enforcement of final and conclusive foreign monetary judgment within jurisdiction – Service of claim form out of jurisdiction for that purpose – Permission to serve out refused by learned judge – Rule 7.3(5) of the Civil Procedure Rules 2000 (as amended) – Reciprocal Enforcement of Judgments Act, Cap. 65 – Whether learned judge erred in construing CPR 7.3(5)(b) – Whether purposive construction should have been applied to CPR 7.3(5)(b)

The learned judge dismissed the appellant's ex-parte application for leave to serve a claim form out of the jurisdiction on the respondent, in order to enforce a final and conclusive foreign monetary judgment for a definite sum obtained in its favour. The appellant sought to enforce by way of charging order against shares held by the respondent in a BVI incorporated company by bringing a claim based on the foreign judgment within the jurisdiction. On appeal to this Court, the appellant argued that the learned judge had erred in construing rule 7.3(5)(b) of the Civil Procedure Rules 2000, which deals with service of

court process out of the jurisdiction for the purpose of the enforcement (within the jurisdiction) of a judgment or arbitral award made by a foreign court or tribunal.

Held: allowing the appeal, and construing CPR 7.3(5)(b) so as to give effect and purpose to what the intent was behind the addition of subparagraph (b) to rule 7.3(5), that:

1. The learned judge ought to have applied a purposive construction to CPR 7.3(5)(b) and found, as a matter of law, that the words 'and registered in the High Court pursuant to Part 72' which appear in the rule, should be ignored as 'mere surplusage'. These words have clearly been added to the subrule in error, and in order to give effect to the intention of the legislators, the rule should be construed so as to ignore these words.

   McMonagle v Westminster City Council [1990] 2 AC 716 applied; Salmon v Duncombe and Others (1886) 11 App Cas 627 followed; Attorney General's Reference SLUHCVAP2012/0018 (dated 24th May 2013, unreported) followed.

REASONS FOR DECISION

[1] By amended notice of application dated 25th September 2013, Westburg Anstalt ("Westburg") sought (ex-parte) the permission of the court below to serve a claim form out of the jurisdiction on Profitstar Anstalt ("Profitstar"). The claim was for the enforcement in the BVI of a final and conclusive judgment for a definite sum of the Supreme Court of Liechtenstein dated 2nd August 2013. The appellant's application was made pursuant to rule 7.3(5) of the Civil Procedure Rules 2000 ("CPR 2000") or alternatively, rule 7.3(6), and/or the inherent jurisdiction of the court. The learned judge, on 3rd October 2013, dismissed the application, having made the finding that the court had no power under CPR 7.3(5) to allow service out of the jurisdiction of a claim form by which a claim is being made to enforce a judgment made by a foreign court or tribunal, which judgment has not been registered in the BVI High Court pursuant to Part 72 of CPR 2000. The learned judge, at the same time, granted the appellant leave to appeal his order.

[2] The appeal was heard by this Court on 5th December 2013, and it was allowed. An order was made construing CPR 7.3(5) so that it reads:

> "A claim form may be served out of the jurisdiction if a claim is made to enforce any judgment or arbitral award which was made –
>
> (a) …
>
> (b) by a foreign court or tribunal and amenable to be enforced at common law"

so as to give effect and purpose to what the intent was behind the addition of subparagraph (b) to CPR 7.3(5).

The Court further ordered ex-parte that:

(1) Westburg be granted permission to serve the claim form on Profitstar, personally, out of the jurisdiction through The Foreign Commonwealth Office to the Liechtenstein court of first instance located at Furstliches Landgericht, Spaniagasse 1, FL 9490 Vaduz;

(2) Profitstar has 35 days from receipt of the claim form to file an acknowledgement of service;

(3) Profitstar has 56 days from receipt of the claim form to file a defence;

(4) Costs be reserved.

At the hearing, we promised to put our reasons for the above decision in writing, and we now do so.

Background

[3] Both Westburg and Profitstar are domiciliary Liechtenstein companies. The link which these foreign companies have with the BVI for the purpose of the present proceedings is Profitstar's 50% shareholding in the BVI incorporated company Mortimer Holdings & Finance SA ("Mortimer"), which shareholding is valued at approximately US$16,250.000.00.

[4] Westburg commenced proceedings against Profitstar in the courts of the Principality of Liechtenstein ("Liechtenstein") after Profitstar had defaulted on a loan agreement between them, dated 31st December 2009. This loan agreement had required Profitstar to pay to Westburg the sum of US$27,712,128.00, together with 20% interest for the time from 1st January 2008 to 31st December 2008 and

40% interest on the sum of US$33,254,554.20 up until the date of payment. On 15th June 2011 Westburg obtained a payment order from the first instance court in Liechtenstein, requiring Profitstar to repay the sums and interest under the loan agreement within 14 days of the order, together with 5% compound interest as from the date of pendency of the proceedings. The first instance court also issued a Warrant of Security, pledging and bonding to the Court, Profitstar's shares in Mortimer ("the Mortimer shares") pending the outcome of the proceedings. The Warrant of Security purports to secure up to the value of Westburg's claim in the sum of US$27,712,128.00 plus 20% interest on the same sum for the period from 1st January 2008 to 31st December 2008, together with 40% interest on US$33,254,554.20 effective from 1st January 2009 and 5% compound interest effective from the date of pendency of the case and the payment order fees amounting to CHF 11,627.54.

[5] Profitstar utilised every tier of the Liechtenstein appellate system available to them to challenge the decision of the first instance court. Their final appeal to the Supreme Court of Liechtenstein, the highest appellate court in the jurisdiction, was filed on 7th March 2013 and the Court's decision was handed down on 2nd August 2013. The Supreme Court found in favour of Westburg, and ordered that the sums owed be paid immediately. Further, the legal costs granted to Westburg relating to the hearing before the Supreme Court were payable within 4 weeks of the judgment being handed down. Since Profitstar had exhausted all means available to them to appeal the first instance decision, Westburg averred that it (Profitstar) would have been unable to raise any arguments in defending the proceedings in the BVI. As such, the proceedings to enforce the foreign judgment were to be brought by way of fixed date claim form and judgment was sought on the same terms as the final Liechtenstein judgment. Westburg wished to enforce by way of charging order against the Mortimer shares by "localising" the decision of the Liechtenstein courts. The situs of ownership of shares in a BVI company is BVI.[1]

[1] See s. 245 of the BVI Business Companies Act, 2004, Act No. 16 of 2004, Laws of the Virgin Islands.

The grounds of appeal

[6] Westburg appealed to this Court on the basis that the learned judge failed to apply the proper methods of statutory construction in his interpretation of CPR 7.3(5). Westburg submitted that while the judge rightly found that a literal reading of CPR 7.3(5) would render it a rule that could never be relied upon, he erred in law by not applying a purposive construction to the rule so that it would be read as allowing the court to grant leave to serve a claim form out of the jurisdiction where that claim form is issued in order to enforce a foreign judgment in the BVI. Westburg contended, further or alternatively, that the learned judge erred in law in not properly applying the mischief rule to his construction of CPR 7.3(5). He ought to have considered that the mischief that CPR 7.3(5) was designed to correct was the inability within the service out provisions to enforce a foreign judgment within the BVI. Another of Westburg's grounds of appeal was that the learned judge erred in law in finding that CPR 7.3(6) did not provide the appellant with "a gateway" under which it could apply for leave to serve the claim form out of the jurisdiction.

Available procedures for enforcement of foreign judgments in the BVI

[7] In the BVI, the legislation which deals with the registration of final and conclusive foreign monetary judgments is the Reciprocal Enforcement of Judgments Act.[2] Section 3 of this Act provides that a judgment creditor who has obtained any such judgment, may apply to the High Court at any time within 12 months after the date of the judgment or such longer period as may be allowed by the Court, to have the judgment registered in the High Court and on any such application the Court may, if in all the circumstances of the case they think it is just and convenient that the judgment should be enforced in the BVI, order the judgment to be registered accordingly.[3]

[2] Cap. 65, Revised Laws of the Virgin Islands 1991.
[3] The registration of the judgment would be subject to the provisions subsequently set out in s. 3 of the Act.

[8] Part 72 of CPR 2000, provides the procedural mechanism for registering such foreign monetary judgments in the BVI under the above Act. It sets out in detail how the application should be made, as well as other procedural steps that the applicant may wish to carry out in registering the judgment locally.

[9] The Reciprocal Enforcement of Judgments Act however, only applies to 15 countries/regions,[4] Liechtenstein not being one of them. As a result, for a judgment creditor to enforce a final and conclusive money judgment from a Liechtenstein court in the BVI, he must look to the common law, and bring a claim based upon that foreign judgment for its enforcement. This claim would of course, have to be served on the judgment debtor, out of the jurisdiction.

[10] Part 7 of CPR 2000 deals with the service of court process out of the jurisdiction and is the applicable set of procedural rules in the present case, since service out of the jurisdiction is necessary. The recently amended CPR 7.3[5] deals with service of the claim form out of the jurisdiction in specified proceedings. Sub-rule (5) of CPR 7.3 deals more specifically with 'enforcement' and sub-rule (6), with 'claims about property in the jurisdiction'. The two sub-rules state as follows:

> "*Enforcement*
>
> (5) A claim form may be served out of the jurisdiction if a claim is made to enforce any judgment or arbitral award which was made -
>
> (a) within the jurisdiction;
> (b) by a foreign court or tribunal and registered in the High Court pursuant to Part 72.
>
> *Claims about property within the jurisdiction*
>
> (6) A claim form may be served out of the jurisdiction if the whole subject matter of the claim relates to property within the jurisdiction."

[4] England, Northern Ireland, Scotland, Bahamas, Barbados, Bermuda, Belize, Trinidad and Tobago, Nigeria, Grenada, Saint Lucia, Saint Vincent, Guyana, Jamaica, New South Wales.
[5] Amended by rule 7 of the Eastern Caribbean Supreme Court Civil Procedure (Amendment) Rules 2011.

Westburg's arguments on appeal

[11] Westburg challenged the learned judge's approach in construing the meaning and effect of CPR 7.3(5) and 7.3(6). The appellant contended that the construction which the learned judge placed on these rules, which led to his ultimate finding that the Court had no power under the rules to allow service of the claim form in Liechtenstein for the enforcement of Westburg's foreign judgment, was wrong in law.

[12] Westburg argued that the learned judge's initial finding, that the literal interpretation of CPR 7.3(5)(a) and 7.3(5)(b) would render them both entirely ineffective, was correct. With regard to CPR 7.3(5)(a), there would be no need for a claim form to be served out of the jurisdiction in order to enforce a judgment or arbitral award which was made within the jurisdiction since the party against whom the judgment is made would have already been served with the original claim form at the commencement of the proceedings, for which leave would have already been granted. No additional claim form would need to be served in order to specifically commence further proceedings to enforce the locally obtained judgment. With regard to CPR 7.3(5)(b), Part 72 (mentioned at paragraph 8 above) sets out the procedure to be followed for the registration of a foreign judgment without any need for a claim form at all. This is implied by CPR 72.6(2):

> "(2) Service of [a notice of the registration of a judgment] out of the jurisdiction is permissible without leave, and rules 7.8, 7.9 and 7.10 apply to such a notice as they apply to a claim form."[6]

Therefore, there would be no need for CPR 7.3 to be applied in this situation.

The position in England

[13] Westburg stated in its written submissions that the learned judge's conclusion that the BVI Court has no power to allow service out of a claim form in circumstances where a claim is made in order to enforce a foreign judgment is, in itself quite

[6] CPR 7.8 deals with the mode of service of the claim form (general provisions); CPR 7.9 deals with the service of the claim form through foreign governments, or judicial or consular authorities; CPR 7.10 deals with the procedure where the claim form is to be served through foreign governments, etc.

surprising, since such enforcement is normal in other common law jurisdictions. In England, the jurisdictional gateway may be found at paragraph 3.1(10) of PD6B which states as follows:

> "The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where –
> …
>
> *Enforcement*
>
> (10) a claim is made to enforce any judgment or arbitral award."

It was Order 11 rule 1(1)(m) of the Rules of the Supreme Court which introduced this wording in 1983 to close a loophole in the law that previously allowed only for the enforcement against assets of those domiciled or ordinarily resident within the jurisdiction. Westburg cited the case of Tasarruf Mevduati Sigorta Fonu v Demirel and Another[7] in which Collins J, in considering the enforcement of a Turkish judgment in England under Part 6 of the English Civil Procedure Rules, recognised, at paragraph 52, that RSC Order 11 rule 1(1)(m) had filled 'a gap revealed in cases where judgment creditors sought to enforce at common law judgments emanating from countries whose judgments were not capable of registration in England'. Collins J went on to state:

> "Prior to the amendment, where the judgment creditor wished to proceed against assets in England, and the judgment debtor was not present or domiciled in England, there was no basis for service out of the jurisdiction, even though the judgment debtor had assets in England which could be attached to satisfy the judgment: see *Perry v Zissis* [1977] 1 Lloyd's Rep 607."[8]

[14] Westburg further submitted that since the pre-amended CPR 7.3(5) was identical to the present CPR 7.3(5)(a), sub-rule (b) was clearly added in order to expand the circumstances in which the court might give permission for a claim to be served out of the jurisdiction for enforcement purposes. The purpose of the addition was to be able to grant an applicant permission to serve out of the jurisdiction where the claim form is issued in order to enforce a judgment made by a foreign court or

[7] [2006] EWHC 3354 (Ch).
[8] At para. 52.

tribunal. So logically, CPR 7.3(5)(a) concerns domestic judgments and awards and CPR 7.3(5)(b) concerns foreign judgments and awards.

[15] In the case of McMonagle v Westminster City Council[9] Lord Bridge of Harwich held that a literal interpretation of the statute under consideration would frustrate the legislative purpose behind it and that the phrase concerned, which also created an absurdity in the statute could be treated as 'mere surplusage'. He went on to state:

> "The presumption that every word in a statute must be given some effective meaning is a strong one, but the courts have on occasion been driven to disregard particular words or phrases when, by giving effect to them, the operation of the statute would be rendered insensible, absurd or ineffective to achieve its evident purpose. The principle is shortly stated by Brett J. in *Stone v. Yeovil Corporation* (1876) 1 C.P.D. 691, 701 where he said:
>
> > 'It is a canon of construction that, if it be possible, effect must be given to every word of an Act of Parliament or other document; but that, if there be a word or a phrase therein to which no sensible meaning can be given, it must be eliminated.'"[10]

Lord Bridge of Harwich cited the Privy Council decision of Salmon v Duncombe and Others[11] which he found 'very instructive' and an example of the above principle in operation.

[16] Westburg stated that the learned judge rightly accepted that the principle enunciated in the case of McMonagle applied to the construction of rule 7.3(5) of CPR 2000, and the Court agrees. The learned judge, however, went on to state:

> "In my judgment however, the real question in this case is not whether apparently contradictory wording can be ignored if it destroys the plain intention of the legislature or rule maker. The question on this application is whether there exists a gateway for the service overseas of a claim to enforce a foreign judgment."

[9] [1990] 2 AC 716.
[10] At p. 726D-F.
[11] (1886) 11 App Cas 627.

[17] The Court is of the view that this is where the learned judge fell into error. The appellant submitted that it is wholly unlikely that the legislators of the Eastern Caribbean decided to add enforcement of a foreign judgment or arbitral award as one of the "gateways" for the service out of the claim form, with the intention that this "gateway" be limited to circumstances in which it could never be needed and thus could never be utilised (i.e. where a foreign judgment is registered under Part 72 of CPR 2000). Rather, the intention of the legislators must have been to allow service out of a claim form where it is issued in order to enforce a foreign judgment locally, this being the classic reason in common law countries for enforcing a judgment by way of claim form. The Court agrees with this submission. CPR 7.3(5)(b) must have been added to serve this purpose. The learned judge ought to have applied a purposive construction and found, as a matter of law that the words 'and registered in the High Court pursuant to Part 72' which appear in CPR 7.3(5)(b) should be ignored as 'mere surplusage'. These words have clearly been added to the sub-rule in error, and in order to give effect to the intention of the legislators, the rule should be construed so as to ignore these words. This was a draftsman's error.

[18] A similar situation arose when this Court considered a draftsman's error in the Saint Lucia Constitution Order 1978 in the Attorney General's Reference.[12] In the opinion delivered by this Court of Appeal, the Saint Lucia Constitution was analysed and it was held that a reference to 'section 107' in section 41(7)(a) should in fact have been a reference to 'section 108'. Pereira CJ expressed the view of the majority of the Court of Appeal:

> "The reference to section 107 in 41(7)(a) in my view makes no sense whatsoever and leads to an absurdity in construing this provision. Section 107 bears no rational connection to appeals to the Privy Council, and similarly, an alteration of section 107, to give effect to an agreement between Saint Lucia and the UK concerning appeals to the Privy Council from a court in Saint Lucia is simply, in my view, nonsensical as section 107 simply does not deal with such appeals."[13]

[12] SLUHCVAP2012/0018 (dated 24th May 2013, unreported).
[13] At para. 27.

[19] Westburg stated that in the present case, CPR 7.3(5)(b) similarly bears 'no rational connection' to judgments which have been registered under Part 72. It would be nonsensical for permission to serve out a claim form to be limited to judgments which have been registered thereunder and which have no need of any claim form in order to be enforced. The appellant further submitted that in the present case, there can be no doubt that the words 'registered in the High Court pursuant to Part 72' have been added to rule 7.3(5)(b) in error because of the terms of CPR 72.6(2), which imply that no claim form is necessary. The Court is in full agreement with this; CPR 72.6(2) merely requires that a notice of registration of the judgment to be enforced be served, and the rule further stipulates that certain rules in Part 7 are to 'apply to such a notice as they apply to a claim form'. Westburg submitted that limiting 7.3(5)(b) to situations where foreign judgments are registered pursuant to Part 72 creates a manifest absurdity. This is therefore a case in which the Court has a duty to give effect to the legislators' intention by ignoring the surplus words.

[20] Westburg finally submitted, further or alternatively, that the learned judge erred in law by not properly applying the mischief rule to his construction of CPR 7.3(5)(b). He ought to have considered that the "mischief" that the rule was designed to correct must have been that without the rule, it would not have been possible using the service out provisions in operation to enforce a foreign judgment within the BVI since CPR 7.3(5) was limited to judgments or awards made within the jurisdiction. The learned judge ought therefore to have interpreted the recently inserted sub-rule (b) in such a way as to ensure that the said "mischief" was redressed. The Court accepts these submissions of the appellant.

[21] Having so determined, and allowed the appeal on this point alone we do not consider it necessary to address the arguments advanced in respect of the service out gateway provided under CPR 7.3(6).

[22] The court expresses its appreciation to counsel for their helpful submissions.

Janice M. Pereira
Chief Justice

Davidson K. Baptiste
Justice of Appeal

Tyrone Chong, QC
Justice of Appeal