IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 222 OF 2017 (IKJ)

BETWEEN:

BANCO INTERNATIONAL DE COSTA RICA, S.A.

PLAINTIFF

AND

(1) BANANA INTERNATIONAL CORPORATION
(2) BANACOL DE COSTA RICA, S.A.
(3) BANACOL CORPORATION

DEFENDANTS

Appearances: Ms Gráinne King of Harneys, for Applicants/Defendants
Mr Kyle Broadhurst and Ms Sally Bowler of Broadhurst LLC on behalf of the Respondent / Plaintiff

Before: **The Hon. Justice Kawaley**

Heard: **11 April 2018**

Date of Decision: **11 April 2018**

Reasons Circulated: **18 April 2018**

Reasons Delivered **23 April 2018**

HEADNOTE

Action to enforce New York judgment in the Cayman Islands - application by Defendants to set aside service and set aside the Ex Parte order permitting leave to serve out of the jurisdiction - requirements for showing tangible benefit from enforcement proceedings

REASONS FOR REFUSING JURISDICTIONAL CHALLENGE

(in Chambers)

Introductory

1. The present proceedings were commenced by Writ of Summons issued on October 27, 2017 to enforce the judgment granted by the Supreme Court of the State of New York on September 8, 2015 in favour of the Plaintiff against the Defendants in the basic amount of US$19,750,000 (the "NY Judgment").

2. On November 23, 2017, following an ex parte application, I granted the Plaintiff leave to serve the Defendants out of the jurisdiction pursuant to Order 11 rule 1(1)(m) of the Grand Court Rules ("GCR") (the "Ex Parte Order"). By a Summons dated January 23, 2018, the Defendants applied to set aside the Ex Parte Order and service of the Writ on them.

3. The Defendants' Summons was listed for hearing on April 11, 2018. At the end of the hearing I refused the Defendants' application and awarded the costs of the application to the Plaintiff to be taxed if not agreed and to be payable forthwith. I also made no order as to the costs of the Defendants' application to extend time for filing acknowledgements of service and the Plaintiff's application for Default Judgment against the First and Third Defendants. These applications were both filed on the same day, following which I indicated to the parties that my provisional view on the papers was to allow the Defendants' application and refuse the Plaintiff's. The Plaintiff waived any right to be heard on the applications.

4. These are the reasons for the jurisdictional decision.

<u>Uncontroversial legal and factual issues</u>

5. A number of significant legal and factual issues were common ground. Firstly, the Plaintiff is entitled to obtain summary judgment on the merits of its claim to enforce the NY Judgment. There is no defence to the Plaintiff's claim.

6. Secondly, it could not be disputed that the jurisdictional gateway relied upon by the Plaintiff as the basis for the Ex parte Order was an appropriate one. GCR Order 11 rule 1(1) provides that leave to serve out may be granted where:

> *"(m) the claim is brought to enforce any judgment or arbitral award (within the meaning of section 2(1) of the Arbitration Law 2012) or interim measure (within the meaning of Part VIII of the Arbitration Law 2012)."*

7. Thirdly it was not ultimately disputed that:

(a) the 1st Defendant held at least one bank account in the Cayman Islands which was active and was subsequently closed in November 2016;

(b) by the 1st Defendant's own admission, substantial sums passed through the relevant account;

(c) there was no evidence as to the existence at any time of local bank accounts in the names of the 2nd and 3rd Defendants;

(d) the NY Judgment was granted to enable the Plaintiff to recover monies lent to the 1st Defendant in respect of which debt the 1st, 2nd and 3rd Defendants were jointly and severally liable.

8. In my judgment the main controversy was how the relevant legal principles fell to be applied to these undisputed facts, although subsidiary factual disputes surrounding the practical utility of the present action did arise.

The relevant legal test

9. The first of two cases cited by both counsel was the local decision of Jones J in *Masri-v-Consolidated Contractors International Limited* [2011 (1) CILR 79]. It concerned an application to set aside an ex parte order granting leave under GCR Order 11 rule 1(1)(m) in circumstances where it was accepted that the basic requirements of that gateway were made by an arguable cause of action. At issue was the content and scope of the additional discretionary filter vested in the Court by Order 11 rule 1(4)(2):

> "*(2) No such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Order.*"

10. Jones J (at pages 90-91) lucidly summarised the relevant legal test as follows:

"13...*the purpose of Order 11 rule 1(1)(m) is not simply to allow foreign judgments to be domesticated. Its purpose is to put the judgment creditor in the position of being able to enforce against assets in this jurisdiction or take some other step towards enforcement.*

14... In my judgment, it would be inconsistent with this objective for the court to refuse leave to serve out merely because the judgment creditor is unable to demonstrate that the debtor has an asset, meaning some property having a net present realizable value, against which he could immediately commence enforcement proceedings....In my judgment a judgment creditor ...who will almost certainly succeed in obtaining a judgment if he is given leave to serve out, should not be deprived of the opportunity to commence enforcement proceedings or take some other step towards enforcement (such as the appointment of a receiver or the examination of an officer) unless to do so would be obviously futile. "

11. These governing principles on the exercise of the discretion were in part derived from the second main case to which reference was made at the hearing of the present jurisdictional challenge, *Fonu-v-Demirel* [2007] 1 WLR 2508. This case concerned the English CPR counterpart to GCR Order 11 rule 1(1)(m). The English Court of Appeal (Sir Anthony Clarke MR, at 2516) crucially held as follows:

"*27...we accept that the court should not automatically exercise its discretion in favour of permitting service out of the jurisdiction unless it is just to do so, and that it will not ordinarily be just to do so unless there is a real prospect of a legitimate benefit to the claimant from the English proceedings. We see no reason why that benefit should not be indirect or prospective.*"

12. I adopted the above judicial statements as defining the broad parameters of the discretion which falls to be exercised when considering the following question: whether it is proper to grant leave to serve out in respect of a claim to enforce a foreign judgment in the Cayman Islands under GCR Order 11 rule 1(1)(m) as read with rule 1(4) (2).

Application of legal test: would permitting the Plaintiff to enforce the NY Judgment be obviously futile?

13. Applying the test formulated by Jones J in *Masri*, the critical question was whether or not the Plaintiff was able to demonstrate that enforcement of the NY Judgment would not be "*obviously futile*". Mr Broadhurst made a very powerful forensic point (which also had an evidential foundation) in the Plaintiff's Skeleton Argument which fortified the formal evidential position:

> "*38. That the proceedings are challenged at all, and at significant expense despite the Defendants' alleged impecuniosity is surprising if, as alleged, they are futile and there can be no benefit to the Plaintiff, and (it follows) no detriment to the Defendants, of judgment being secured.*"

14. It is common ground that the 1st Defendant had a bank account within the jurisdiction through which substantial sums of money passed. Whether or not assets belonging to one or other of the Defendants remain in the jurisdiction is better characterised as being presently uncertain rather than disputed. The Defendants relied in part on the Affidavit of Victor Velasquez, President of each of the three Defendants, who deposed that:

(a) the 2nd and 3rd Defendants did not have and had never had any assets in the Cayman Islands;

(b) the 1st Defendant had one bank account in the Cayman Islands which has been closed since 2016 and no assets remain in the Cayman Islands;

(c) although he was the subject of a criminal investigation in Costa Rica in relation to the Finance Agreement, on February 1, 2018 the Prosecutor asked the relevant court to discontinue the proceedings.

15. The Defendants' Secretary-General JDT Botero also swore an Affidavit confirming that the 1st Defendant did have a bank account which was now closed. Exhibited to his Affidavit were documents described as "*bank statements*", which he deposed showed the last deposit being made on July 2, 2014. When pressed by Mr Broadhurst as to

whether the exhibited statements actually emanated from the Bank, Ms King was forced to concede in reply that in fact the statements were obtained by her clients from their own records and were not copies of statements issued by the Bank.

16. The Plaintiff's case on what practical utility the enforcement proceedings would have was, despite its initial brevity, ultimately clear. In the Second Affidavit of Stephanie R. Feldman sworn on behalf the Plaintiff, it was deposed that:

> "*23. The benefits to the Plaintiff of recognition are:*
>
> *a. The First Defendant at least has utilised the Cayman Islands as a jurisdiction in which it has kept assets. It may be that other assets are present or will be present in the future in the Cayman Islands against which the NY Judgment may be enforced; and*
> *b. If recognised, the Plaintiff can proceed to obtain important discovery of information and documentation from the Defendants and/or Banco Colpatria and/or other relevant parties...*
>
> *25. To date the Defendants have gone to great lengths in the Cayman Islands, in Costa Rica and New York to evade enforcement of the NY Judgment on the basis that they have no assets. However, during the course of these proceedings alone the Plaintiff has discovered that before and after the Defendants defaulted on the Loan they were controlling millions of dollars, all of which remains unaccounted for.*"

17. In this factual matrix I found immaterial that the Plaintiff was unable to adduce positive evidence of any connection between the 2nd and 3rd Defendant and the Cayman Islands. The corporate connections between the Defendants make it plausible that monies which were held by the 1st Defendant in the Bank locally were remitted to the 2nd and/or 3rd Defendant. The Defendants placed before the Court documents which were described as "bank statements" but which were in fact quite different. This diminished the weight which I was able to place upon their documentary evidence.

18. Ms King fairly argued that it was unclear precisely what enforcement tools the Plaintiff would be able to deploy in this jurisdiction as her clients were domiciled elsewhere. That uncertainty is a far cry from providing positive support for this Court finding that

the benefits of enforcement are so clearly futile that the Plaintiff should be denied the chance to place itself in a position to be able to initiate enforcement procedures altogether. The remedies which may potentially be deployed are not only flexible; their purpose often entitles the judgment creditor to apply ex parte without notice for various forms of relief. This Court should be slow to stifle enforcement efforts before they have been even initiated, particularly at the instance of non-cooperating judgment debtors.

19. The policy underpinning the relevant jurisdictional gateway (GCR Order 11 rule 1(1)(m)) is to facilitate the enforcement of foreign judgments, not to assist delinquent foreign judgment debtors. The purpose of the proper case filter (GCR Order 11 rule 1(4)(2) is to ensure that the gateway is not abused. Mr Broadhurst submitted that the facts of the present case provided the clearest possible foundation for refusing the Defendants' application to set aside service of the Writ, stronger than the facts in either *Masri* or *Demirel*. I agreed.

20. In the former case this Court was unwilling to permit enforcement in circumstances where there was no evidence of any past or present banking connection with this forum. In the latter case the English Court was willing to permit enforcement without evidence of even any historic banking connection with the forum.

Conclusion

21. For the above reasons, on April 11, 2018 I refused the Defendants' application to set aside the Ex Parte Order granting leave to serve out and service of the Writ.

HON. JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT

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