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In the Courts 2015: Civil Procedure

A. INJUNCTIONS

The issue of whether the Chabra jurisdiction to grant **asset freezing injunctions against third parties** exists in the law of the Isle of Man was considered in *Cruz City v. Unitech* (CHP 2013/66, 6 February 2015, unreported). This was a without notice application seeking to add Unitech Overseas Limited (UOL) as a third Defendant to the proceedings and for an interim freezing injunction against UOL as a supplement to an existing freezing order against Unitech Limited. An order requiring UOL to disclose to the Claimant information in respect of its assets was also sought.

Shares in UOL were wholly owned by the Unitech Limited, and while it was not alleged that the Claimant had a direct cause of action against UOL, the Court accepted, on the basis of past conduct, that there was a very real and imminent risk of dissipation. Noting that this was the first time that the issue of *Chabra* jurisdiction had come before the Court, Deemster Doyle (the Island's Chief Justice) was content on the legal argument and law put before the Court at the urgent without notice hearing to follow *Chabra* and declare its extension to Manx common law. In doing so he relied on the English *Chabra* line of authorities and related developments in Australia (*Paul Cardile v. LED Building Proprietary Ltd* [1999] HCA 18) and the Cayman Islands (*Algosaibi and Brothers Company v. Saad Investments Company and others* judgment of Henderson, J. 17 November 2009 and in the Cayman Court of Appeal [2011] (1) CILR 179 judgment 15 February 2011).

Another first exercise of a new jurisdiction occurred in the Cayman Islands, in *Classroom Investments Inc. v. China Hospitals Inc. and another* (Grand Court, FSD 64/2015, 15 May 2015, unreported). Historically the mere existence of assets in the jurisdiction was not enough to obtain injunctive relief: there had to be a local cause of action. In 2014, the Cayman Islands' Grand Court Law was amended to add section 11A, providing for interim relief in the absence of substantive proceedings in the Islands. Classroom Investments, which was a fraud case, was the first case before the Grand Court under the new section. The plaintiff made an ex parte application for injunctive relief against two Cayman Islands companies as protective measures in aid of Hong Kong proceedings. The gateway test in section 11A was met: the claims against the two defendants could result in money judgments which could be enforced at common law, and Smellie, C.J. was satisfied on the standard tests for injunctive relief that then fell to be applied, so the injunctive and disclosure orders sought were granted.

The new section 11A also came into play in *Johnson & Johnson and another v. Medford and another* (Grand Court, G 105/2015, 2 July 2015, unreported). After the discovery of widespread counterfeiting of one of the plaintiffs' popular products, a shipment of counterfeit products was traced to a Barbados corporate consignor,

the sole directors of which were Mr and Mrs Medford, residents of Canada. The plaintiffs commenced action against the Medfords, their company and others in New York for breach of copyright, damages and other related relief. Bank records were obtained showing that Mr Medford held an account with RBC in the Cayman Islands. Bank records of a correspondent bank showed that money flowed out of the RBC account to an account in Barbados and to another account in Jersey. It appeared the Medfords used the RBC account as part of an international network of accounts to receive the proceeds of sales of counterfeit products. Smellie, C.J. granted injunctive relief and ancillary disclosure orders in aid of the New York action, limited to the restraint of and disclosure of assets located within the jurisdiction of the court (rather than worldwide) and limited to the amount of statutory damages to be recoverable in the New York action. The Chief Justice found that there was cogent evidence of assets under the Medfords' control being within the Cayman Islands; that the plaintiffs had a good arguable case that could lead to a judgment in the New York action and such a judgment would be enforceable at common law before the Grand Court; that there was a real risk of dissipation of assets which could frustrate that case; and that it was "just and convenient" to grant the protective orders. (Leave to serve out of the jurisdiction on the defendants in Canada at their known address was also granted).

The question of injunctions in aid of foreign proceedings also came up in Jersey, in *ENRC NV v. Zamin Ferrous Limited* [2015] JRC 217, 27 October 2015, unreported. The Royal Court reiterated its well-established approach to **post-judgment injunctions and disclosure orders**, confirming that it was "completely straightforward" for the Court to make them "so as to ensure that the Court's order is given effect and is not rendered nugatory." It further recognised that without disclosure orders freezing orders "would be rendered a relatively toothless procedure" approving previous judgments of the English Court that a "creditor should normally have all the information he needs to execute the judgment or award anywhere in the world."

In the particular circumstances of the case, the Royal Court had granted an *ex parte* worldwide freezing injunction including disclosure orders, in connection with an English High Court judgment. Disclosure was made in pursuance of the orders but further questions arose particularly as to two agreements entered into by the defendant between the date of the English hearing and the handing down of the English judgment and involving the transfer of rights and interests in the company's assets. Further disclosure orders were therefore sought for the agreements in question and associated correspondence. The further disclosure was opposed on various grounds including commercial sensitivity.

The Court granted the application for disclosure of the agreements but, noting the fact that the parties were in fact commercial competitors and involved in hard-fought litigation, the disclosure of the associated correspondence was not ordered as it was not considered necessary to police the worldwide freezing order or to execute the judgment.

A further point of interest was the approach taken to the corporate structure. It was acknowledged that Zamin had four subsidiaries and that their assets were not technically caught by the freezing order against Zamin. However, relying on the English Court of Appeal judgment in *Lakatamia Shipping Co Ltd v. Su and Others* [2014] EWCA Civ 636, it was held that Zamin was restrained from diminishing the value of its assets and thus from procuring the subsidiary company to make a disposition of its assets which was likely to result in such diminution. Furthermore, it was held that in order to properly police that obligation, information as to the assets within the corporate structure must be made available to the judgment creditor.

In *Amana Middle East Holdings Limited & Anor v. Abdul Aziz Abdulla Al Ghurair & Ors* (2015 SCJ 401, 10 November 2015, unreported) for the first time, the Supreme Court of Mauritius granted an interim order in the

nature of an injunction under the International Arbitration Act in favour of the Applicants pending the effective setting up of an Arbitral Tribunal to determine a dispute between shareholders that was the subject of an arbitration clause. The Court held that section 23 of the Act grants the Court a substantive jurisdiction of supervision in matters of international arbitration and section 23(1)(a) is a restatement of the powers of the Court to grant injunctive relief in equity.

In another Mauritius case involving arbitration, *Bounty Harvest v. Monsoon Global Trading & Ors* SC/COM/WRT/01291/2015, the court granted an order prohibiting the Respondent from acting in any manner so as to diminish the value of its assets pending the final determination of arbitration proceedings.

B. STAYS IN FAVOUR OF ARBITRATION

In both the British Virgin Islands and Mauritius we saw decisions on claims for orders restraining proceedings in favour of arbitration. This theme arose in the BVI in *Sonera Holdings B.V. v. Cukurova Holdings A.S.* BVIHC (Com) 119/2011, 12 February 2015, unreported. The legal battles between the Alfa Group and Cukurova have been the subject of our e-alerts before. In this application, Sonera sought anti-suit relief to restrain Cukurova from bringing arbitral proceedings, the practical effect of which was to overturn an award which had already been made in Sonera's favour and enforced as a judgment of the BVI Court. Sonera sought to rely upon the well-known statements in *Turner v. Grovit* and *Masri v. Consolidated Contractors* to the effect that the Court will act to protect its jurisdiction, processes and judgments from abusive foreign proceedings. He accepted that the new arbitral proceedings were plainly subversive of the existing BVI judgment, but nevertheless held that he had no jurisdiction to interfere with foreign arbitral proceedings as a result of Section 3(2) of the Arbitration Act 2013.

In *Mall of Mont Choisy Limited v. Pick N' Pay Retailers (Proprietary) Limited & Ors* (2015 SCJ 10, 19 January 2015, unreported) the Claimant brought an action in the Mauritius Supreme Court seeking sums under an agreement to develop and lease a shopping centre in Mauritius. The defendant made an application under section 5 of the International Arbitration Act 2008 (IAA) to refer the matter to arbitration, on the grounds that an arbitration clause in the lease over the property covered the dispute. The claimant asserted, in reply, that the lease, including the arbitration clause, had not become binding because it had been signed only as a holding measure by one director, while negotiations continued.

Section 5 of the IAA provides that where proceedings are started in a Mauritian court and it is asserted that the dispute is covered by an arbitration agreement, the matter shall be referred immediately to the Supreme Court. Unless the party denying the arbitration agreement can show, on a prima facie basis, a very strong possibility that the arbitration agreement is null and void, inoperative or incapable of being performed, the Supreme Court will refer the case to arbitration.

Noting the test of a "very strong probability" in section 5 of the IAA to be a very high one, and adopting the principles laid down by the Canadian Supreme Court in *Dell Computer Corporation v. Union des Consommateurs and Olivier Dumoulin* (2007) 2 SCR 80 the Mauritius Supreme Court exercised its discretion and granted the application to transfer. In the Court's view this was a fit case for referral as it was a factual issue for the arbitrator to determine whether the signature of a sole director alone was sufficient to bind the plaintiff to the arbitration agreement. For a more detailed commentary see our eAlert on the case.

C. CROWN IMMUNITY

In *Stephen Harding v. Adam Wood* (ORD 2015/44, 30 October 2015, unreported) the Isle of Man High Court reviewed the operation of Crown immunity at Manx common law. The Claimant, Her Majesty's Attorney General of the Isle of Man, made an application for interim and final injunctions and unspecified 'declaratory relief' to prevent the Defendant, the Lieutenant Governor of the Isle of Man, from continuing disciplinary proceedings against him as it was alleged that such proceedings were in breach of the terms and conditions of his appointment, were ultra vires and were in breach of natural justice by reason of unfair delay. The Lieutenant Governor (who is the Queen's official representative in the Isle of Man) made cross-applications for summary judgment and to strike out the claim on a number of grounds including Crown immunity from private suit. In response, the Claimant submitted that Crown immunity would contravene his right of access to the Court as guaranteed under Article 6 of the European Convention on Human Rights. As the complaint and relief sought related to the exercise by the Lieutenant Governor of his official function, His Honour Deemster Rosen held that the Court did not have jurisdiction to entertain the Claimant's claim or his application for an interim injunction, on grounds of Crown immunity. The Court further concluded that as Crown immunity is a denial of a substantive right, rather than the imposition of a procedural bar, Article 6 was not engaged. This case is currently under appeal.

D. COSTS

In further proceedings on the question of costs in the *Harding v. Wood* matter referred to above, the Lieutenant Governor's claim for costs of the proceedings was resisted by the unsuccessful claimant, who asked for no order as to costs on the grounds that, as established in *Johnson v. R*. [1904] AC 817, "the Crown neither pays nor receives costs unless the case is governed by some local statute, or there are exceptional circumstances justifying a departure from the general rule." He argued that in this instance no such statutory provision existed. Deemster Rosen agreed with counsel for the Lieutenant Governor that the case was governed by statute by reason of section 53(1) of the Rules of the High Court of Justice 2009 and awarded costs in favour of the Crown.

In *Broadhead v. Spread Trustee Company Limited* (Judgment 10/2015, 10 March 2015, unreported) the Royal Court of Guernsey confirmed that the principle of awarding an interim payment towards costs had become the norm in modern litigation and that there should be presumption in favour of ordering such a payment as part of the final order. The Court considered that it would not be fair for a successful party to Guernsey litigation to be unduly delayed in receiving money already expended and which will undoubtedly be recoverable from the unsuccessful party, merely because the determination of the precise amount payable is pending. Payments on account should, therefore, be made if the Court can be satisfied that the successful party will certainly be entitled to at least the sum ordered.

An area where the question of costs has become increasingly significant is in relation to the **costs of third parties responding to statutory disclosure orders**. The Isle of Man court addressed this in *Fourth Age Limited et al v. Microgaming Software Systems Limited* (ORD 2014/44, 6 February 2015, unreported). The proceedings in this case originated in the USA and involved a claim that the defendants used depictions of characters from the JRR Tolkien books in online gambling games, without the permission of the Claimant, the owner of the relevant intellectual property. The Claimant obtained a letter of request from the US court and applied to give effect to it in the Isle of Man by seeking an order from the Manx court requiring Microgaming to conduct a search of documents in its possession or power relevant to the use of Tolkien characters in gambling

games. The letter of request required some 25 classifications of documents to be searched for. Microgaming filed a response to the Claimant's application questioning the relevance of certain requested documents and submitting that the disclosure sought was too wide. Settlement was reached prior to adjudication and approved by the court, leaving only the issue of costs for consideration.

While the Court acknowledged that there is a significant difference, in terms of scope of disclosure allowed, between the statutory regime for letters of request from foreign courts under the Evidence (Proceedings in Other Jurisdictions) Act 1975 as applied in the Isle of Man and the *Norwich Pharmacal* jurisdiction based on a duty of disclosure, the Court was of the view that the principle that an innocent third party required to produce documents for use in proceedings in which it is not a party ought to have its costs for appearance at court and complying with the request made by the applicant for such information should apply, unless the third party had acted unreasonably. Finding no unreasonable conduct on the facts of the case, the Court ordered the Claimants to pay Microgaming's legal costs of and incidental to the claim, assessed on the standard basis. Such costs did not include work conducted by the Defendant's American lawyers nor management costs of staff preparing for court hearings.

The Royal Court of Jersey was faced with a question of when it is right to make a **costs order against a person who is not a party to the proceedings**. In *Weston v. Leeds United* [2015] JCA 159A, 30 July 2015, unreported (CA), long-running litigation between Leeds United Football Club and a company trading as Admatch ended in judgment for the club, with various costs awards following. However, by this time, the company had been struck off the company register, so the question of whether or not costs orders should be made against Mr Weston, a director of AdMatch, was explored.

It was accepted that an order for costs against a non-party is an exceptional order. In particular, an order against a director of a company would not normally be made unless it appears that the director is the person truly interested in the outcome of the matter. One of the relevant considerations was whether the director could be regarded as acting in the interests of shareholders and creditors rather than in his own interests. The Court found that Mr Weston had promoted the defence of the proceedings for his own benefit rather than in the interests of Admatch, which was insolvent and had no assets to be taken and no ongoing business to defend. Certain reductions were then allowed on the facts of the case.

The Court of Appeal upheld the decision of the Royal Court, reiterating that appellate courts rarely interfere with costs determinations particularly where it is the trial judge who has presided over a long running case, who has made the decision. It rejected arguments that the costs rules in Jersey did not include the concept of proportionality and were thus incompatible with the European Convention on Human Rights. Whilst the term "proportionate" did not appear in the relevant rules, the authorities make it clear that the taxing officer is entitled to "regard costs that are disproportionate – in the sense of being unnecessary if the litigation had been conducted in a manner proportionate in the context of a particular case having regard to the amount and issues at stake – as unreasonable."

Two cases, *Kenney v. ACE* in Cayman and *Hornbeam v. Halliwell* in the BVI, addressed issues of the service out of the jurisdiction of proceedings relating to costs, and are dealt with in the section on cross-border issues below.

E. SECURITY FOR COSTS

In each of our jurisdictions there is a regime for the recovery of the costs of proceedings from the losing party, and for certain claimants, in particular those based outside the jurisdiction, to have to provide security to cover a possible award against them if unsuccessful. Cases in the Isle of Man, the Cayman Islands, BVI, Jersey and Guernsey addressed different aspects of this topic during 2015.

Historically, where security for costs was ordered on the basis that the plaintiff was outside the jurisdiction, the amount of security required was referable to the defendant's anticipated costs of the entire proceedings. The English case of *Nasser v. United Bank of Kuwait* [2002] 1WLR 1868 restricted security for costs orders against non-resident claimants to the extra costs of enforcement of any costs award, in order to prevent discrimination. This rule was adopted by the Isle of Man Courts in *Akhavan v. Quinn Legal Advocates Limited* [2013] MLR 310 and remains the general rule. However, in *Prest v. Petrodel Resources Limited (in liquidation)* (CHP 2014/73, 13 August 2015, unreported) the Isle of Man court demonstrated its willingness to depart from this general rule where there is a real risk based on lack of probity, that the defendant will be unable to recover assessed costs.

Faced with evidence to suggest that it was likely that the Claimant would do all within his power to avoid paying costs from any available assets, His Honour Deemster Corlett held that the authorities did not prevent him from tailoring an order to the circumstances of the case. Noting that the whole point of security for costs is to protect a litigant who is obliged to litigate at the election of a claimant, security was ordered based on the full anticipated costs of the proceedings.

In the Cayman Islands, the Grand Court appeared to go a step further, and ordered security for the costs of proceedings themselves (at least up to a pending summary judgment hearing), rather than merely the additional costs of overseas enforcement, on the basis of the weakness of the plaintiff's case rather than any finding of lack of probity or intent to evade payment. In *Hui-Mei v. Mayer Holdings Limited* (Grand Court, G 0228/2014, 20 March 2015, unreported), the plaintiff, a resident of Taiwan, was the registered holder of shares in the defendant Cayman Islands company. She sought declarations that the business purportedly transacted at two extraordinary general meetings was void. The defendant claimed that notice of the meetings had been validly served and that the plaintiff's pleadings constituted an attempt by Mr Lai (a former director of the company) to disrupt the orderly hand-over of the company to its new owners and management and to seek to retain illegitimate control. The company was successful in its application for an order for security for costs on the basis of the plaintiff's residence outside the jurisdiction. The judge took into account that (a) the plaintiff provided no evidence that she had assets available in the Cayman Islands (aside from the shares in the company which were worthless) or anywhere else; (b) the plaintiff's case was not an especially strong one nor a promising one; and (c) there was no evidence that if the plaintiff were to be ultimately successful, the remedies sought (including having the two extraordinary general meetings reconvened) would enhance the value of her shareholding in the company. The court referred to Cayman cases in which the principle of limiting security to the additional costs of enforcement had been accepted, but does not seem to have regarded them as establishing a general rule to that effect.

The question of security for costs is always a sensitive one for any court to deal with – especially where the litigant has limited means and granting the order will often effectively bring an end to those proceedings. This inevitably raises questions of whether there is an infringement of the right to a fair and public trial under Article 6 of the European Convention of Human Rights (an adoption or equivalent of which appears in the laws of our

jurisdictions). The appeal courts of Jersey, Guernsey and the Isle of Man all addressed this point in the context of security for the costs of appeals.

In *Shelton v. Barby*, Guernsey Court of Appeal, Judgment 26/2015, 1 June 2015, unreported, the appellant in the proceedings sought to argue that the order of security for costs in relation to his appeal was an unlawful interference with his Article 6 right. Given the relative merits of his appeal, it was perhaps unsurprising that the Court of Appeal was satisfied that the order was justified in the circumstances, even though it was recognised it did interfere with his Article 6 right. However, in reaching its decision the Court of Appeal made clear that there is an important distinction between security orders in appeal cases, where an individual has already had their day in court and so it ought to be relatively straightforward to form a view on the prospects of success, compared with first instance decisions where this has not taken place and so naturally the justification needed to grant such an order would need to be more persuasive.

The case before the Jersey Court of Appeal was *Home Farm Developments v. Le Sueur* [2015] JCA 180, 1 September 2015, unreported. It involved an appeal from an order of the Jersey Royal Court rejecting an appeal from a Master's order striking out the appellant's claim on the grounds that it was vexatious and an abuse of process. In addition to submitting that an order for security would result in a breach of their Article 6 rights, the appellants sought to distinguish the recent Guernsey Court of Appeal decision in *Shelton v. Barby* (above) submitting that they had not yet had an opportunity of having their case dealt with at first instance because it had been summarily dismissed. Considering the principles set out in *Shelton v. Barby* to the facts of the case and noting that different considerations potentially may apply where a matter has been disposed of without a full hearing on the merits, the Deputy Bailiff applied "the cautious approach" and refused the application for security.

In the Isle of Man case, the issue was the burden of proof of showing than an order for security would in reality stifle an appeal. In *Wallis v. Soberano Limited* (2DS 2014/21, 16 January 2015, unreported), the Isle of Man Staff of Government (Appeal Division) cited previous Manx authority acknowledging an appellant's Article 6 rights and accepted that the court should decline to order security for costs against a non-resident appellant where there is unequivocal evidence that to do so would have the effect of stifling its appeal. However, the where it is contended that an award for security for costs would have this effect the onus is on the party so contending to adduce full, frank and clear unequivocal evidence in support. Noting as relevant the possibility of third party financial support and the potential realisation of personal assets, the Court held that the appellant had failed to discharge this burden of proof and ordered security for the respondent's costs of appeal.

Very similar considerations applied in the Cayman Islands in *Re BTU Power Company (in Official Liquidation)* (CICA Cause 20/2014, 6 March 2015, unreported). Chief Justice Smellie, sitting as a single judge of the Court of Appeal, addressed the issue of whether the Court of Appeal has jurisdiction to order security for costs of an application for leave to appeal, as well as the costs of the subsequent appeal should leave be granted. Mr Alamazeedi, who was not a resident of the Cayman Islands, proposed to appeal every order made in the course of these winding up proceedings on grounds of apparent judicial bias, including the order that commenced the proceeding with his consent. (We deal with this aspect of the case further below). It was Mr Almazeedi's expressed intention not to comply with any security that the court may order and he had failed to pay substantive costs orders already made against him in favour of the Joint Official Liquidators of BTU. While Mr Almazeedi argued that an order for security would stifle his appeal, Smellie, C.J. ordered security to be provided, having concluded that Mr Almazeedi was anything but impecunious and noting as a relevant factor his refusal to provide evidence and explain why third party funding (which he alleged to be the source of funding

previous litigation) would not be available to meet a reasonable security for costs order. As Mr Almazeedi was a foreign appellant who had also manifested an intention to flout orders of the Court, it was Smellie, C.J.'s view that security should be ordered to protect against the manifest likelihood that any costs order made in favour of the JOLs by the Court of Appeal would not be honoured.

F. SERVICE OUT OF THE JURISDICTION

Service out of the jurisdiction raises two issues: whether it is to be permitted, and if so, how. On the 'whether', we have a case from Cayman and one from BVI, in both of which the proceedings sought to be served happen to involve costs against third parties. On the 'how', we have two decisions, both from the BVI.

In *Kenney and another v. ACE Limited* (Cayman Islands Court of Appeal, CICA 35/2013, 6 May 2015, unreported), the issue raised by the appeal was whether the trial judge had been wrong to allow service out of the jurisdiction of a summons seeking a non-party costs order against the appellants: Mr Kenney, a lawyer resident in the BVI who acted for a claimant seeking payment from ACE of a Liberian judgment, and CCI, a Nevis company holding other Liberian judgments. ACE applied for the order after the plaintiff in proceedings before the Grand Court failed to provide security for costs as ordered. Evidence taken into account by the trial judge was that over a period of five years, Mr Kenney and CCI and other cost parties funded (in whole or in part) and facilitated the pursuit of the Liberian claims against ACE and encouraged the plaintiff to pursue the Liberian claims against ACE in the Cayman Islands, with the expectation of profiting from their investment. The appeal was dismissed. Chadwick, P. held that on an application in the Cayman Islands to authorise service of a costs summons on a non-party out of the jurisdiction, the Grand Court should ask itself whether, on the material before it, the application has "much the better of the argument" that the circumstances are such that it is legitimate to assimilate the party to the existing proceedings with the non-party on whom the applicant seeks to serve the summons; and so legitimate to treat the non-party as a 'party' for the purposes of GCR Order 11, rule 9(2).

In the BVI, a decision of Bannister, J. that there was no procedural mechanism by which an application for a third party costs order could be served out of the jurisdiction was reversed by the Court of Appeal in *Hornbeam Corporation v. Halliwell Assets Inc et al* BVIHCM 2015/0001 (delivered on 12 October 2015). The Court of Appeal held that such an application could be served out under CPR 7.14 where the underlying claim could be served out of the jurisdiction. As we noted in the 2012 edition of this round-up, Appleby had previously been successful in establishing that where a third party meddles with BVI litigation (as with wrongfully directing the conduct of a company) the Court does have an inherent power to safeguard its own process from abuse by making such an order: *Liao v. Upbeat Global Limited* BVICVAP 2011/0034. However that decision does not appear to have been available to the Court of Appeal in *Hornbeam*.

On the question of how service abroad is to be effected, 2015 has seen the need for both the English and the BVI courts to grapple with the problematic issue of service in Russia. The Russian Federation is a Hague Convention country, and the procedures there apparently involve the giving of notice to the defendant by the central authorities and setting an appointment at which the documents will be served.

In *Sloutsker v. Romanova* [2015] EWHC 545 Warby, J. confronted this issue in English libel proceedings in circumstances where the defendant failed to attend the appointment. He held that it would be an improbable gap in Russian procedural law if it permitted the Defendant to evade effective service of proceedings and held

that valid service took place upon the notice of the appointment being given. He therefore refused to make an order for alternative service, because it was unnecessary to do so.

Bannister, J., in the Commercial Court in the BVI, was confronted with broadly similar evidence in *JSC VTB Bank v. Katunin and another* BVIHC (Com) 62/2014, 28 January 2015, unreported. He acknowledged that the Hague Convention was to be regarded as the 'prime' means of service, but distinguished *Deutsche Bank v. Sebastian Holdings* [2014] 4 All ER 733 on the basis that it is not necessarily the only means of service – where service through the Hague Convention was impracticable. This decision is notable also because the Defendant applied for summary judgment, whilst purporting to reserve its right to challenge jurisdiction. Bannister, J. held that this reservation was ineffective: on well-known principles, an application for summary judgment involved an engagement with the merits and therefore a step in the proceedings. He memorably noted that a man cannot walk through an open door whilst simultaneously reserving the right not to have done so.

Then in the first reported decision of the newly appointed Commercial Court Judge in the BVI, Mr Justice Barry Leon, in *Storca Intertrans Corp. et al. v. Minco Enterprises Limited et al.* BVIHC (Com) 0096/2015, the Court appeared to broaden the circumstances in which alternative service may be permitted upon a defendant in a Hague Convention country under the Easter Caribbean Supreme Court's relevant rule, CPR 7.8A. The Judge held that the CPR does not require mandatory or exclusive use of the Hague Convention, and that the rules relating to service were to be seen as aids available to a claimant who needed to give a defendant notice of the commencement of proceedings, rather than as impediments which stand in the Claimant's way. This was a written decision but as it followed an ex-parte application, it is to be treated with some caution as regards the abandonment of the priority of Convention service which it appears to espouse.

G. JURISDICTION AND FORUM CHALLENGES

Lin Chee Keen v. FAM Capital Management Limited HCMAPP 0002/2015, 4 December 2015, unreported, involved an appeal against the striking out by Bannister, J. of claims in conspiracy against the promoters of an investment fund on the basis that as a matter of law, pleading and common sense the claim was bound to fail. The Court of Appeal overturned Bannister J's finding that a conspiracy could not be formed between a company and its agent, relying in part on a Singaporean decision (*Lim Huat v. Chip Hup Kee Construction* [2009] 2 SLR 318. However, the Court accepted that Bannister, J. was nevertheless right to find that the claim was not one which could succeed since the claim was, at its highest level, nothing more than an investment in an illiquid real estate development where those in charge took a contractually agreed performance fee. More significantly, the Court applied *Nilon* in also agreeing with the judge that the BVI was not the proper forum, notwithstanding the fact that some defendants were BVI companies, on the grounds that the main parties were based in Singapore and the underlying events all occurred in Singapore.

Garkusha v. Yegiazaryan et al. BVIHC (Com) No. 119 of 2011, 12 March 2015, unreported was an application to set aside leave given to serve out of the jurisdiction. A judgment of the Court of Appeal in that case is awaited, but Bannister J decided that claims in relation to the ownership of shares without value had the result that the claim was not one which it was reasonable for the Court to try. The Judge considered that the existence of exclusive jurisdiction clauses in Share Purchase Agreements did not affect this conclusion, because the claims were not claims under the agreements but claims for conspiracy and intimidation which therefore fell outside of those agreements.

The Judge held that the BVI was not the appropriate forum for that dispute anyway, since the litigation concerned minerals exploitation in Russia, the acts complained of and the documents were all in Russia and that the claim did not have anything other than a purely formal connection with the BVI. The Judge also questioned, but did not decide, whether it was realistic to speak of loss being suffered in the BVI within the meaning of CPR 7.3(4).

H. Enforcement of Foreign Judgments

In the matter of *Dallah Albaraka (Ireland) Ltd v. Pentasoft Technologies Limited & Anor* 2015 SCJ 168, 27 May 2015, unreported, the Supreme Court rendered executory in Mauritius an order issued by the English Commercial Court. The judgment now stands as the leading authority under Mauritius law on (a) the jurisdictional basis for enforcing an English judgment before the Supreme Court and (b) applications for '*exequatur'* of foreign judgments.

There are two statutory mechanisms upon which a judgment creditor can rely in seeking to enforce an English judgment in Mauritius: the Reciprocal Enforcement of Judgments Act 1923 and Article 546 of the Mauritian Code of Civil Procedure. It was argued, in this case, that failure to bring proceedings under the 1923 Act was fatal to the Applicant's claim. The Court determined that these remedies are mutually exclusive and that the either procedure is available upon the judgment creditor's election.

On the issue of forum, it was submitted that the Court lacked jurisdiction for '*exequatur'* as the England judgment involved foreign parties and joinder of the co-respondent (a Mauritian company whose shares are wholly held by the respondent) was an insufficient connection to the jurisdiction. The Court rejected this argument concluding that the physical location of the debtor's assets are an important factor in determining the jurisdiction in which the judgment creditor would seek to have the judgment recognised and enforced. A judgment creditor should not be denied access to justice and to all the enforcement remedies on ground of inadequate connection or on the ground that the parties to the judgment are foreign companies. For a more detailed commentary see our eAlert on the case.

I. REMEDIES

One of Bermuda's most significant cases of the year was *The Allied Trust et al v. The Attorney-General of Bermuda et al* [2015] SC (Bda) 61 Civ (24 August 2015). A case of undoubtedly national importance with constitutional implications, it centres on the validity of Parliament's acts in rendering void certain contracts relating to the development of the Hamilton waterfront area. We deal with it in this section because of the issues it raises regarding election between potential remedies.

The First and Second Applicants had entered into various agreements with the Corporation of Hamilton in late 2012 involving exclusive development rights and the granting of a 262 year lease.

However, on the back of the Municipalities Amendment Act 2013, on 7 March 2014 the legislature rejected the said agreements and subsequently, with the introduction of the Municipalities Amendment Act 2014, on 24 March 2014 the rejected agreements were rendered void.

Statutory arbitration proceedings had commenced and were proceeding when on 11 February 2015 the Applicants issued an Originating Summons seeking declarations that neither the 2013 nor 2014 Acts, on their construction, rendered the agreements void, or that if they did this was ineffective because it violated the

Applicant's constitutional and common law rights to property. They sought further declarations in the alternative, that if there was a valid voiding, the Second Applicant was entitled to at least $90,000,000 compensation pursuant to its rights under the Constitution and/or certain declarations as to the correct legal approach to be adopted under the legislation for calculation of compensation.

The Respondents applied to strike out the Originating Summons save for two specific paragraphs seeking relief on the hypothesis that the Agreements were validly avoided, on the grounds that it was an abuse of process to challenge the validity of the avoiding, having accepted its validity in the context of the arbitration. This was asserted on two grounds: first that they should be bound by their election; and secondly that the relief being sought was contrary to public interest in that it cast doubt over the title to the property, which was an important national asset.

The Chief Justice held that when the legislation made the agreements void, there were two distinct legal pathways for relief; compensation and arbitration, or an appeal against the avoiding itself. In seeking compensation and proceeding to arbitration the Applicants made an informed choice, which they freely admitted appeared at the time to be the best commercial choice. It was also found that the Applicants could not fairly complain of being misled as to their chances at arbitration or the position the Government would take. The Applicants also had a further 6 months in which they could have challenged the avoiding by judicial review. Nor were the Applicants unable to afford legal advice having retained established counsel both locally and from overseas.

For these reasons and others the Chief Justice found that the Applicants were bound by their election to pursue compensation and had, as a result, abandoned (rather than waived) the right to challenge the validity of the process. It followed that it was an abuse of process for them to pursue any relief designed to regain control of the agreements. The Respondents' strike out application was therefore granted and the offending portions of the Originating Summons were struck out.

In the Isle of Man, *De Yoxall v. Moore* (ORD 2009/17, 4 August 2015, unreported) involved a challenge to statutory discount rates on awards of damages. The Isle of Man High Court dismissed an application to apply a discount rate other than the 2.5% set out in section 24 of the Law Reform Act 1997 and the Damages (Personal Injury) Order 2014. Notwithstanding the statutory rate the Claimant argued that the Court could use its discretion under Section 24(2) (which allows the Court to depart from the rate of 2.5% if an applicant can prove that a different rate is 'more appropriate') to set discount rates similar to those set by Guernsey in the case of *Helmot v. Simon* and followed in in the cases of *Warren v. Harvey* in Bermuda and *Russell v. HSE* in Ireland. By placing reliance upon the debates in Tynwald (the Manx parliament) the Claimant sought to demonstrate that it was not intended that the rate should be set in stone and that the approach in England and Wales should not be followed. By his judgment the Deemster closed the door on further applications seeking to challenge the discount rate save for in exceptional circumstances, specific to the individual Claimant's case. However, what constitutes exceptional circumstances in the context of the discount rate remains to be seen.

J. EVIDENCE

In *Malitskiy v. Stockman Interhold SA* BVIHCM 2015/0008 (22 December 2015) Leon, J. adjourned the hearing of a winding up petition until related litigation in the Court of Appeal had been resolved. The decision is of more interest, however, for the detailed (but obiter) review which the Judge performed of the Barrell jurisdiction and of the circumstances in which fresh evidence will be admitted before judgment has been given

but after argument has taken place. The approach of the Judge was to follow the English decision in *Charlesworth v. Relay Roads* [2000] 1 WLR 230 subject, unsurprisingly, to the overarching need to do justice between the parties. That was particularly important in an insolvency proceeding, where there might be movements in what the judge termed the "state of account" between the parties.

K. JUDICIAL INDEPENDENCE

The background of *Re BTU Power Company* (Civil Appeal 20/2014, 20 November 2015, unreported) lies in the liquidation of BTU, a Cayman Islands company, whose shareholders included Qatari government entities. Cresswell, J., the Cayman Islands judge who ordered the winding-up of BTU on the just and equitable ground and appointed the joint official liquidators, was a supplementary judge of the Qatar International Court and Dispute Resolution Centre (QICDRC). The appeal was brought by BTU's sole director and CEO who, upon discovering the judge's connection to the QICDRC, complained that he ought to have declared his role and recused himself pursuant to the doctrine of apparent bias. The appeal, heard in April 2015, extended to all orders made by the judge in the winding-up proceedings, including the original winding-up order made in 2011. On 26 June 2013, Mr Al Emadi was appointed Minister of Finance of Qatar. He had previously been CEO of Qatar National Bank, a 50% subsidiary of the Qatar Investment Authority, one of the original petitioners and a significant preference shareholder in BTU. The Minister of Finance plays an important role in the appointment and removal of judges of the QICDRC. The Cayman Islands Court of Appeal allowed the appeal in part, drawing a distinction between the judge's initial involvement in the case and proceedings subsequent to Mr Al Emadi's appointment as Minister of Finance, holding that from that time, the fair-minded and informed observer would consider that there was a danger that the judge's independence and impartiality were compromised and in that sense there was a danger of bias. The orders of the judge in these proceedings after 26 June 2013 were set aside.

L. CONFIDENTIALITY/TRANSPARENCY OF COURT PROCESS

In the Jersey case of *ENRC NV v. Zamin Ferrous Limited* [2015] JRC 217, 27 October 2015, unreported, referred to above in the context of injunctions and related disclosure orders, the Defendant made the additional somewhat unusual request that, if the Court was minded to consider granting some of the relief sought, the defendant might address the Court in private without the presence of ENRC's representatives to explain the damaging results that could ensue if ENRC were to obtain copies of the agreements it had entered into in relation to its assets. The Court was concerned at the Defendant's suggestion of addressing the Court in private: proceedings may be held in camera but the evidence must usually be open to the judge and made available to both sides. Judicial decisions must be made on material common to both sides. It was eventually agreed that the two agreements would be disclosed to the members of the Court and not ENRC at an *inter partes* hearing at which the Defendant could make submissions by reference to the agreements as to their disclosure. Whilst ENRC would not have the agreements, it would hear the submissions and could respond to those.

Similar questions arose in Guernsey in *Alpha Development Limited et al v Barclays Wealth Trustees (Guernsey) Limited* (Judgment 11/2015, 4 March 2015, unreported), where the Court extracted from the recent authorities the principles applicable to an application for privacy orders under Guernsey law. These may be summarised as (i) a general presumption that all aspects of a case are to be held in public, which may be rebutted where it can be demonstrated that justice would be frustrated; (ii) a test of strict necessity will apply with the burden lying on the applicant, who must adduce cogent and clear evidence; (iii) there is no discretion for the Court to

exercise: the strict necessity test applies or it does not; (iv) any limitation on open justice will be the minimum required to preserve the necessary confidentiality.

In the Bermuda case of *Bda Press v. Registrar* [2015] SC (Bda) 48/49 Civ (24 July 2015) it was not access to the courtroom that was in question, but rather the court file. The Appellant media organisation applied to the Registrar of the Supreme Court for copies of documents on the court file which had been referred to in a hearing in the high profile *Allied Trust v. A-G* matter involving the Hamilton waterfront development contracts discussed above in the context of remedies.

The Registrar had refused the application based on the well-established conventional view that the Supreme Court (Records) Act 1955 does not permit non-parties to access documents in pending cases. Bermuda Press Holdings Ltd. appealed that refusal and placed further arguments before the Court in the course of the appeal.

It was essentially argued that the press had a duty to inform the public as fully and fairly as possible about court hearings of public interest and that this required access to written evidence as much as oral evidence rather than being limited to reporting select extracts which counsel choose to emphasise.

In judgment, Kawaley, C.J. agreed with the Appellant that the principle of open justice formed part of Bermuda's common law and was also guaranteed by section 6(9) of the Bermuda Constitution. Where documents are referred to in Court in the course of a public hearing in a case of genuine public interest but not fully read out, the media (and the public generally) should be entitled to receive copies of the documents in question. The judgment noted that Bermuda had received criticism for this failure of transparency where Bermuda lagged behind other jurisdictions. The Chief Justice made note of several articles and proposals (including his own) that formed part of his provisional thinking in respect of the appeal.

This access right which the Court upheld is subject to any valid objections from the parties in the case concerned. This includes the need to protect any confidential information forming part of the documents in question. The practical function of affording such access to Court records is to enable the media and ultimately the public to have the fullest possible understanding of the information being considered by the Court for the purposes of its ultimate decision. The higher level principle involved is the idea that informed public scrutiny of judicial decision-making is the best safeguard for the integrity of the judicial system as a whole.

The Court also decided that, properly read, the Supreme Court (Records) Act 1955 did not exclude public access to documents filed in pending cases altogether. It merely created a starting assumption that such files could not be accessed by the public, which could be rebutted by proof that access was justified in particular cases. Greater clarity of the legal position could best be achieved through updating the Court's Rules.

The Court noted that this access principle would rarely if ever apply in ordinary civil or commercial cases where only private interests were in play.

M. RIGHTS OF AUDIENCE

The offshore jurisdictions have widely varying rules regarding whether and under what circumstances overseas counsel can be admitted to the local bar for the duration and purposes of a particular case. These range from the very liberal approach of the BVI to a complete limit of rights of audience to locally-qualified advocates in Jersey and Guernsey. Cayman, while at the more open end of the spectrum, limits the recoverability of costs to those incurred by lawyers who have been locally admitted (whether generally or for a specific case). This

sometimes leads to pressure to apply for the admission of junior counsel and solicitors from London firms who are working on matters in conjunction with Cayman attorneys.

This was the case in *Re Limited Admission as an Attorney-at-Law* (Grand Court, ATT 135-141/2015, 10 December 2015, unreported). In the context of complex litigation, a local firm applied for the limited admission of seven overseas lawyers of varying degrees of experience to participate in the matter. The Court took into account a number of public interest considerations, including the availability of local lawyers to do trial preparation, the goal of ensuring that the local profession continued to possess appropriate experience and the need for adequate representation given the nature and complexity of the case, and emphasised that the routine of granting applications of this nature would be injurious to the profession. Considering that that the proposal was to rotate supporting counsel in and out of the jurisdiction for trial preparation, with only two of the seven being present in the Cayman Islands at any given time, the Court found that the facts did not meet the test set out in the Legal Practitioners Law that the applicant "has come or intends to come to the Island for the purpose of appearing, acting or advising in … the matter." Following this reasoning two of the applications were granted and five dismissed, with the Chief Justice leaving it to the applicants to determine which two of the seven applicants would come to work in the Cayman Islands for the duration of the action.

In the Isle of Man a temporary advocate's licence may be issued upon satisfaction of certain requirements set out in section 17 of the Advocates Act 1995. These include that the proceedings "require knowledge and experience of a nature not ordinarily available on the Island" and that they "are likely to be so lengthy that they would impose unreasonable demands on the time and resources" of an advocate. These provisions were considered in two decisions handed down in 2015. In *Metro Baltic Horizons PLC v. James et al*. (ORD 2012/61, 31 July 2015, unreported) where the court was not satisfied that a 3 week trial together with pre-trial preparation would impose unreasonable demands on the time and resources of an advocate, a licence was issued pursuant to the first ground set out above, regarding knowledge and expertise. In reaching this conclusion, Deemster Doyle applied guidance from the Court of Appeal in *Carter v. Old Mutual International Isle of Man Limited* (decision 3 April 2015, unreported) in which Tattersall JA stated that the test "is not whether there are some advocates who have the requisite knowledge and experience and are capable of conducting such litigation, but whether such knowledge and expertise is ordinarily available on the Island."

Appleby represented the Respondent in Lin Chee Keen v. FAM Capital Management Limited, the Respondent in Malitskiy v. Stockman Interhold SA, various Respondents in Storca Intertrans Corp. v. Minco Enterprises Limited, and are instructed by several of the defendants in Garkusha v. Yegiazaryan in BVI, the Respondent Lieutenant Governor in Harding v. Wood and the Defendant in De Yoxall v. Moore in the Isle of Man, and the Applicant in the Dallah Albaraka v. Pentasoft case in Mauritius.

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