BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

BVIHCV2006/0201

IN THE MATTER OF HINCH INVEST & FINANCE SA LIMITED
AND IN THE MATTER OF SECTION 29 OF THE INTERNATIONAL BUSINESS COMPANIES ACT CAP 291 OF THE LAWS OF THE VIRGIN ISLANDS

BETWEEN:

ANSIS SORMULIS

Claimant

AND

HINCH INVEST AND FINANCE SA

First Defendant

RUDOLF MERONI

Second Defendant

Appearances:

Mr. Paul Webster, Q.C. of O'Neal Webster for the Claimant
Mr. Sydney Bennett, Q.C. of J.S. Archibald & Co. for the Defendants
Mr. John Carrington observed proceedings on behalf of Hinch

2008: March 5th, April 22nd

JUDGMENT IN CHAMBERS

(Practice and Procedure – service of court process outside the jurisdiction – application to set aside leave – whether ancillary claim for injunction to preserve disputed property as against one defendant domiciled in the jurisdiction constitutes a cause of action sufficient to permit service out on another party as a necessary and proper party under CPR 7.3(2)(a) Whether service out not effected in full compliance with the Hague Convention can be treated as an irregularity under CPR 26.6.)

[1] **JOSEPH-OLIVETTI, J.:** This is an application by Mr. Rudolf Meroni, the Second Defendant, to set aside the order of 20th September 2006 granting leave to serve the Claim Form on him outside the jurisdiction in Switzerland.

The Allegations and History

[2] These can be gleaned from the Amended Statement of Claim, the Notice of Application itself filed 16th February 2007, the supporting affidavit of Mr. Meroni, the affidavit of Mr.

Kerry Anderson grounding the ex parte application for leave and the third affidavit of Mr. Sormulis in opposition.

[3] In short, on 3rd August 2006 Mr. Sormulis filed a claim against Hinch Invest and Finance SA ("Hinch") a company incorporated here under the International Business Companies Act and Mr. Sormulis. The allegation having regard to the statement of claim is essentially that Mr. Meroni, a Swiss attorney bought Hinch on Mr. Sormulis' behalf as an investment vehicle for investment purposes in Latvia. Mr. Sormulis is a Latvian citizen. Mr. Meroni subsequently caused Hinch to issue bearer shares but later refused to deliver the share certificates to Mr. Sormulis and caused a company under his control to be the sole director of Hinch thereby seizing effective control of Hinch. Mr. Sormulis claims to have expended in excess of US$480,000.00 on his investment in Hinch. The only substantial allegation against Hinch is that Hinch has denied that Mr. Sormulis is the beneficial owner of the shares.

[4] Mr. Sormulis claims a declaration that he is the beneficial owner of 100% of the issued share capital of Hinch, an order that Hinch provide him with share certificates in his name, an order of rectification of the records of ownership held by the licensed custodian and an injunction restraining Mr. Meroni and Hinch from, inter alia, transferring or delivering the said bearer share certificates to any person other than himself, issuing any additional shares in, or disposing of the assets of Hinch or Regina Development Ltd., another BVI company of which Hinch is the majority shareholder and which was meant to peruse investment in the transportation industry in Latvia.

[5] On 20th September 2006 I granted leave to serve the claim form outside the jurisdiction on Mr. Meroni in Switzerland on an application without notice. On 20th September I granted an ex parte injunction against Hinch and Mr. Meroni prohibiting Hinch and Mr. Meroni from (1) transferring or delivering up the bearer shares to any person other than Mr. Sormulis, (2) prohibiting Hinch from holding out any person other than Mr. Sormulis as being a shareholder, and (3) from issuing any additional shares until further order.

[6] Subsequently, Hinch appealed against the grant of the injunction. The Court of Appeal considered Hinch's application and dismissed it on 26th November 2007.

[7] In the interim, Mr. Meroni filed this application but it was stayed pending the decision on the appeal. Hinch made a forum challenge on 2nd March 2007 which was likewise stayed.

Both applications were scheduled for hearing on 5th March 2008. However, Mr. Carrington who appeared on behalf of Hinch and Mr. Bennet Q.C for Mr. Sormulis, agreed that that application should be stayed pending the hearing and determination of Mr. Meroni's application. The court made the requisite order as it appeared to be the sensible way to proceed.

The Issues Arising

[8] The issues which fall to be determined are:-

1. Whether Mr. Sormulis can properly rely on CPR 7(3)(2)(a) to support the order granting leave and in particular whether there is a real issue between he and Hinch which it is reasonable for the court to try and to which Mr. Meroni is a necessary and proper party .

2. Alternatively, whether Mr. Sormulis can now rely on CPR 7.3.(2) (b) to support the order granting leave;
3. Alternatively, whether service should be set aside as it was not effected in accordance with CPR 7.8 and the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters, "the Hague Convention Hague.".

Discussion

[9] **Issue 1 –** Can Mr. Sormulis can properly rely on CPR 7(3)(2)(a) to support the order granting leave and in particular is there is a real issue between he and Hinch which it is reasonable for the court to try and to which Mr. Meroni is a necessary and proper party ?

[10] The starting point is CPR Part 7 which prescribes the circumstances in which court process may be served outside the jurisdiction and the process involved. (See r. 7.1). Rule 7.2 stipulates unambiguously that a claim form **may** be served out of the jurisdiction **only if** r. 7.3 allows and the court permits. This is conjunctive – an applicant must satisfy both conditions and plainly the court has discretion whether to grant leave or not.

[11] Rule 7.3 lists the types of claims for which the court may permit service outside the jurisdiction. The includes claims in contract, tort, enforcement of judgments or arbitral awards, claims about property within the jurisdiction, claims about trust and miscellaneous statutory proceedings and the category enigmatically titled **'features which may arise in any type of claim'** with which we are directly concerned and to which we will revert shortly.

[12] In his application for leave[1] which was made ex parte as permitted by r. 7.5(1), the gateway specifically relied on by Mr. Sormulis was r.7.3(2)(a). See Notice of application Ground (1). This application was supported by the affidavit of Mr. Kerry Anderson, an associate of the firm of O'Neal Webster, the attorneys for Mr. Sormulis.

[13] It is remarked that r. 7.5(1)(a) to (d) specifically provide that the supporting affidavit must state the grounds on which the application is made, that in the deponent's belief **the claimant has a claim with a realistic prospect of success,** in what place within what country the defendant may probably be found and if an application is made under r. 7.3(2)(a), the grounds for the deponent's belief that the conditions of that rule are satisfied.

[14] Mr. Anderson attempted to meet these requirements. In paras. 3 – 7 of his affidavit he alleges that Mr. Meroni bought Hinch as an investment company on behalf of Mr. Sormulis, held the bearer shares on his behalf and subsequently refused to acknowledge Mr. Sormulis' right to the shares and appointed his own agent as the sole director of Hinch thus giving him effective control of Hinch. In paras. 8, 9 and 10 Mr. Anderson deposed that the claim form was served on Hinch's registered agent here, that Mr. Meroni is a necessary and proper party to the action and that he believed that Mr. Sormulis has a good cause of action against Mr. Meroni.

[15] Rule 7.7(3) states the grounds on which the court may set aside service of the Claim Form. Service out may be set aside if (i) service out of the jurisdiction is not permitted by the rules, (ii) the claimant does not have a good cause of action and (iii) the case is not a proper one for the court's jurisdiction.

[16] Now to Rule 7.3(2)(a) which is the specific gateway Mr. Sormulis sought to use. This provides:-

[1] Application filed 6 September 2006

"7.3 (2) A claim form may be served out of the jurisdiction if a claim is made –

(a) against someone on whom the claim form has been or will be served**, and–**

(i) there is between the claimant and that person **a real issue** which it is reasonable for the court to try; **and**

(ii) the claimant now wishes to serve the claim form on another person who is outside the jurisdiction and who is **a necessary and proper party to that claim**;" (Emphasis added)

[17] Mr. Sormulis must therefore justify the grant of leave under this rule by satisfying the court of 4 matters:-

1. that he has served or will serve a claim form as of right against Hinch;
2. that there is between he and Hinch 'a real issue' to be tried,
3. that it is reasonable for the court to try this issue; and
4. that Mr. Meroni is a **necessary and proper party**[2] to the action.

[18] Issue is not taken with the first criteria. A claim form was duly served against Hinch as of right as it is domiciled here by virtue of its incorporation in the Territory. The gravamen of Mr. Bennett's challenge is that there is no real issue between Hinch and Mr. Sormulis to be tried. Mr. Bennett says that Hinch has never claimed ownership of the shares or been in possession of them. Further, that Hinch has no function with regard to the recording of any transfer of the shares and cannot validate any claim to their ownership. The shares are bearer shares and thus negotiable instruments. Once Hinch has issued the shares it is bound by its Articles of Association to regard the bearer for the time being as the owner. See Articles 3.3[3] and 3.7[4]. Mr. Sormulis admits that he is not in possession of the shares.

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[2] We note as Mr. Bennett remarked that this rule is slightly different from the similar English rule. The English rule calls for the party to be either **a necessary or a proper party** but not both. I think that there is no substantial difference as it is difficult to envisage a situation where a party is held to be necessary and at the same time not a proper party or vice versa. Our rule is being unnecessarily cautious.

[3] Article 3.3 provides that the bearer of a bearer share certificate shall be deemed to be a member of the company and shall be entitled to all the rights and privileges as he would have been entitled to if his name had been entered in the share register

[4] Article 3.7states that the bearer of a bearer share certificate shall for all purposes be deemed to be the owner of the shares comprised in the certificate and the company has no obligation in any circumstances to inquire into how the bearer came by the certificate.

Accordingly, no action can lie against Hinch for failing to recognise Mr. Sormulis' claim to ownership. In short, Hinch has breached no duty owed to Mr. Sormulis.

[19] Further, Mr. Bennett contended that in the Court of Appeal it was conceded on Mr. Sormulis' behalf that Mr. Sormulis had no cause of action against Hinch and that this concession is decisive of this matter as it amounts to an admission by Mr. Sormulis that there is no real issue to be tried as between he and Hinch. Thus, there is no claim before the court to which it can properly be said that Mr. Meroni is a necessary and proper party to warrant an order to serve out.

[20] On this last point Mr. Webster Q.C. says, that this point was not conceded, rather that it was argued that Mr. Sormulis did not need to have a cause of action against Hinch to obtain an injunction against it. This certainly begs the question why this more precarious position was adopted if indeed Mr. Sormulis had a good cause of action against Hinch.

[21] No express record of any such concession is made in the judgment of the Court of Appeal but the entire tenor of the judgment supports the interpretation that the Court of Appeal proceeded on the basis, whether conceded or not, that Mr. Sormulis had no cause of action against Hinch. If it were otherwise they would have had no need to depart to such an extent as they did from the strict application of **the Siskina** principle. Therefore, implicit in the judgment is a finding that Mr. Sormulis has no cause of action against Hinch.

[22] It is remarked that the Court of Appeal held expressly that Hinch was properly joined for the purpose of obtaining ancillary relief as if Hinch were not restrained it could issue further shares and so dilute Mr. Sormulis' alleged shareholding before the determination of the issue between Mr. Meroni and Mr. Sormulis which the court recognized as being one of breach of trust. See paras. 11 and 12 and 16 of the judgment. The grant of the injunction was upheld as being necessary in the interests of justice. (In passing I remark CPR r. 8.1(6)(b) which seems to make provision for a litigant to obtain injunctive relief against a person in the jurisdiction in aid of proceedings abroad even if no substantive action is contemplated against that person in the jurisdiction. This would seem to mitigate the sometimes harsh effect of the strict application of **the Siskina** principle).

[23] However, to obtain leave Mr. Sormulis needs to establish the obverse as Mr. Bennett put it, that is, that he has a good cause of action against Hinch to which Mr. Meroni is a necessary party not that he has a good cause of action against Mr. Meroni to which Hinch

is a proper party. This to my mind means that Mr. Sormulis must establish a good arguable cause of action which he can properly pursue against Hinch.

[24] In **Borealis A.B. v. Stargas Ltd. (The Berge Sisar)**[5] a case cited by Mr. Bennett, Waller, J. at 640 held that it was not proper to grant leave to serve process abroad merely to obtain the ancillary benefit of discovery - "**However convenient to the court, and whatever the advantages of discovery for any of the parties who wish to establish that the propane was defective pre-shipment, it would clearly be wrong to countenance for example a hopeless claim by Bergesen against Borealis as a basis on which Borealis could then bring into the action Saudi Aramco simply for the purpose of forcing Saudi Aramco in the action to give discovery".**

[25] The main question here in my view is whether the claim for ancillary relief for an injunction by Mr. Sormulis against Hinch raises a real issue between Mr. Sormulis and Hinch which calls for a trial. If the answer is yes then we can go on to answer the other questions whether it is reasonable for this court to try it, that is, whether the BVI is the more convenient forum and then whether Mr. Meroni is a necessary and proper party to that action.

[26] I must confess that initially I harboured some doubts as to whether an ancillary claim against a party domiciled or resident here will suffice to ground the jurisdiction to serve out under r. 7.3(2)(a) and have been not a little troubled by what I perceived to be the inevitable result of setting aside the order . However, I am reminded that the jurisdiction of the court is territorial and that the court has no inherent jurisdiction to order service of process abroad. Exercising jurisdiction over persons resident abroad has always been regarded as an 'exorbitant jurisdiction' and it follows that such jurisdiction cannot be lightly exercised. This is borne out by the observations of Gatehouse, J at p. 401 E in **Metall and Rohstoff v. Donaldson Lufkin & Jenrette Inc.**[6]:- "**I think the law is clear enough: the intending plaintiff must (1) demonstrate a good arguable case on the merits of each claim in respect of which he seeks to serve out of the jurisdiction, and (2) demonstrate a strong probability that such claim falls within one or other of the various paragraphs of Order 11. Ambiguities are to be resolved in favour of the**

[5] 1997 1 Lloyd's Rep. 635
[6] 1990 1QB 391

foreigner, and the approach is strict: see for example Waterhouse v. Reid [1938] 1 KB 743."

[27] **Metall and Rohstoff** concerned a case under the old rules (Order 11) but the general approach and underlying policy are still applicable. In the Court of Appeal Slade LJ referred to the tests to be applied in "service out" cases at p.434 G - "**Order 11, r. 4(2) provides that leave to serve a defendant out of the jurisdiction shall not 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 the Order. This imposes a three-fold burden on a plaintiff seeking leave. First, he must show that the claim he wishes to pursue is a good arguable claim on the merits. While the court cannot at this stage determine whether the plaintiff, if given leave, will succeed, it must be satisfied that the plaintiff has a good chance of doing so. Secondly, the plaintiff must show a strong probability that the claim falls within the letter and spirit of the sub-head or sub-heads of Ord.11, r. 1(1) relied upon. This requirement is treated strictly since if leave is granted (and, if challenged, upheld) it will never thereafter be investigated: Vitkovice Horni A Hutni Tezirstvo v. Korner [1951] A.C. 869,889, per Lord Tucker. It is, furthermore, an established principle that a foreigner resident abroad will not lightly be subjected to what is, to him, a foreign jurisdiction. Thirdly, the plaintiff must persuade the court that England is the forum in which the case can most suitably be tried in the interests of all the parties and for the ends of justice. This calls for the making of a judgment, the nature of which has recently been comprehensively reviewed in Spiliada Maritime Corporation v. Cansulex Ltd. [1987] A.C. 460, to which we revert below."**

[28] And Slade J added at p. 435 C **- "As we have already indicated, our courts must always be cautious before allowing a writ to be served out of the jurisdiction. "If on the construction of any of the sub-heads of Order 11 there was any doubt, it ought to be resolved in favour of the foreigner." The Hagen [1908] p. 189, 312; See also Siskina (owners of cargo lately laden on board) v. Distos Compania Naviera S.A. [1979] A.C. 210, per Lord Diplock."**

[29] Having regard to CPR part 7 and to the tests as formulated by Slade L.J. it can readily be seen that CPR has not significantly changed the law on service of process outside of the

jurisdiction. Scrupulous adherence to the rules is called for and the relevant rules must be strictly or narrowly interpreted as if one exercised this jurisdiction in a situation where the basis on which our court assumed jurisdiction would be unlikely to be recognized by a foreign court then the grant of the leave and any resulting decision on the substantive issue could be rendered ineffective for purposes of enforcement in a foreign jurisdiction and so largely defeat the purpose of serving out.

[30] In **Konameneni & Ors. v. Rolls Royce Industrial Power (India) Ltd. & Ors. [2003 BCC] 790** Lawrence Collins J. was considering, inter alia ,service out under a provision of the English CPR on all fours with our Rule 7.3(1)(a) save that it requires that the person to be served out must be a necessary **or** proper party, namely r. 6.2. The learned judge held at para. 44 that the requirement that there should be a real issue to be tried between the claimant and those served within the jurisdiction is intended to ensure that the claim was brought bona fide against the defendant resident in the jurisdiction and not merely in order to bring in the foreign defendant as a necessary or proper party. He also held at para. 41 that the overriding principle is that the court will not give permission to serve out unless satisfied that England is the proper place to bring the claim.

[31] On a proper construction of our r. 7.3(2) it is evident that these principles are equally applicable here. In the final analysis, the court will not give permission to serve out under 7.3(2) (a) unless satisfied that the BVI is the proper forum for the trial of the claim. See in particular r. 7.3(2)(a)(ii).

[32] The gravamen of Mr. Webster's submissions is that Mr. Sormulis has met the tests laid down in **Seaconsar far East ltd. v. Bank Markazi Jomhari Islami Iran** (tests not dissimilar to those in **Metall and Rohstoff)** in that he has a good arguable case for a declaration and injunction against Hinch and there is a serious issue to be tried between Mr. Sormulis and Hinch of the ownership of the shares. This is because Hinch has not adopted a neutral position in this dispute as it denies that Mr. Sormulis is the owner and actually asserts that a third party owns the shares. Hence the claim for a declaration against both defendants to the effect that Mr. Sormulis is the beneficial owner of all the issued sharers in Hinch as it is necessary to bind Hinch. A decision in Switzerland would not bind Hinch. Counsel also submitted that there is a further serious issue to be tried namely the law which determines the ownership of shares in a BVI company.

[33] On a proper consideration of the claim, it seems to me that Mr. Sormulis does not have a real issue or a good arguable claim on the merits or a good cause of action against Hinch. On the pleadings, the real dispute lies between Mr. Sormulis and Mr. Meroni. The fundamental issue is whether Mr. Meroni holds the bearer shares on trust for Mr. Sormulis and whether Mr. Meroni acted in breach of trust. These are issues which fall to be determined only against the two of them and Hinch has no part in that dispute. There is no allegation that Hinch caused Mr. Sormulis any loss or damage in any way, simply, that it refused to recognize him as the beneficial owner of the bearer shares in circumstances where he admits that he is not the bearer. Having regard to Articles 3.3 and 3.7 of its Articles of Association, Hinch is under no legal obligation to treat with Mr. Sormulis as a shareholder.

[34] Further, there is no allegation that Hinch has refused to perform any statutory duty it owes to Mr. Sormulis or that it is the custodian of the bearer shares and has refused to deliver them to Mr. Sormulis. There is no triable issue between Mr. Sormulis and Hinch. Obviously, if Mr. Meroni were not a party, or leave to serve out had not been granted, Mr. Sormulis could not proceed with this action as against Hinch. The Court of Appeal identified the main issue in the action – breach of trust and identified the basis on which Hinch was made a party, that is, for obtaining ancillary relief to preserve the status quo. Accordingly, I am satisfied that there is no arguable issue on the merits between Mr. Sormulis and Hinch which calls for a trial and to which Mr. Meroni is a necessary and proper party.

[35] Alternatively, even if I were mistaken on this, Mr. Sormulis would not have satisfied the third limb as stated in paragraph 17 hereof or Lord Slade's third test referred to in paragraph 28 hereof., namely that this is a dispute which it is reasonable for the court to try. In other words that the BVI is the more convenient forum. In these service out applications unlike in a regular **forum non conveniens** challenge, the burden of proof is on the person seeking leave to serve outside the jurisdiction, here Mr. Sormulis, to satisfy the court that the BVI is the place with which the case has its most real and substantial connection and thus the appropriate forum for the trial. See CPR 7.3(2)(a)(i) which requires the applicant to establish that "there is between the claimant and that person a real issue which it is reasonable for the court to try." Lawrence Collins J. was of the same

opinion in relation to the similar English rule. See para. 57of **Konameneni and NABB Brothers Limited v. Lloyds Bank International (Guernsey) Limited 2005 EWHC 405 para. 56 and 57.**

[36] The dispute according to the allegations made by Mr. Sormulis arises out of a trust made outside the BVI in Switzerland or Latvia and the alleged breaches must be taken to have occurred in one of those countries most likely Switzerland where Mr. Meroni resides. Therefore, the question of whether or not a trust was created and was breached will fall to be governed by Swiss or Latvian law. In addition, both Mr. Sormulis and Mr. Meroni, whom one can anticipate to be the main witnesses, reside in Latvia and Switzerland respectively and will have to travel to the BVI if the trial were held here. It is also anticipated that any other witnesses reside abroad and will most likely be required to come here.

[37] In contrast, there is only one significant connecting factor to the BVI. This is that the BVI is to be regarded as the **situs** of the bearer shares. Thus BVI law will have to be considered in determining the issue of the ownership of the bearer shares regardless of the fact that they are alleged to be in the possession of Mr. Meroni in Switzerland. See s. 245 of the BVI Business Companies Act 2004 as amended which repealed and re-enacted s. 116 of the International Business companies Act. It would be less expensive for a BVI expert to attend abroad to give expert evidence than to have all the parties and their entourage travel here.

[38] Having regard to all the circumstances it seems to me that the more appropriate forum for the trial of this action will be Switzerland and not the BVI.

Issue 2

[39] Now to Issue 2: Alternatively, can Mr. Sormulis rely on CPR 7.3.2(b) he not having relied on that provision at the ex parte hearing? Mr. Webster submits that he can.

[40] Generally, one is required in an application to state the grounds on which one relies. See CPR 11.7. This is even more necessary when it is an application made without notice. The court must therefore be astute to ensure that no prejudice results if a new point is taken at the inter partes hearing.

[41] No reliance was placed on that ground at the ex parte application but it was argued at the inter partes hearing and Mr. Bennet had every opportunity to make submissions and relied on **Parker v. Schuller (1901) 17TLR 299** to support his contention that Mr. Sormulis ought not to be allowed to advance this ground now. However, I do not read **Parker** as imposing an absolute restriction and prefer the approach in **FFSB Limited v. Seward & Kissel LLP P.C. 17/2005**. This is to the effect that if there is evidence before the court the court may consider it. See para. 17.

[42] Accordingly, the question is whether there is any evidence to support the grant of leave on this ground. Rule 7.3 (2)(b) states:- **"a claim form may be served out of the jurisdiction if a claim is made … (b) for an injunction ordering the defendant to do or refrain from doing some act within the jurisdiction".**

[43] Mr. Sormulis must therefore establish that he is seeking an injunction to restrain Mr. Meroni from doing an action within the BVI. Can it properly be said that in this action Mr. Sormulis is seeking to restrain Mr. Meroni from performing or carrying out an action here? Clearly, despite the wording of the relief claimed in the claim form it is evident that the injunction relates to Hinch issuing additional shares which is an action which can only be taken by Hinch and which must take place within the Territory. Mr. Meroni cannot issue additional shares in Hinch. No other action which he can take within the Territory has been identified to warrant a proper injunction being issued against him which would come within the ambit of r. 7.3(2)(b). It follows then that even if I were minded to allow Mr. Sormulis to rely on this ground that he could not meet the criteria.

Issue 3

[44] I only address this briefly for the sake of completeness as a ruling on this is strictly not necessary having regard to my ruling on the principal issue. Should service be set aside as it was not effected in strict accordance with CPR 7.8 and the Hague Convention?

[45] Mr. Bennett makes two complaints. First, that all the documents served on Mr. Meroni were not translated into German (the official language where service was effected) as is mandated by the Hague Convention Article 5 and CPR 7.10(2) (d), 7.12(20 (b) and 7.14 (2) and that the court has no jurisdiction to waive the irregularity under CPR r. 26.9. Second, that the order granting leave was not served on Mr. Meroni.

[46] I will dispose of the last point first. CPR r. 26.9 gives the court the discretionary power to cure irregularities in procedure. It is implicit having regard to CPR r. 7.5(2) which provides for the order granting leave to state the period for the defendant to file an acknowledgement of service and a defence that the order must be served on the defendant. However, there is no evidence that Mr. Meroni was in any way prejudiced by the failure to serve the order itself and therefore I will waive this irregularity.

[47] The first complaint has more substance. Mr. Webster argued that CPR r. 26.9 should apply. However, Mr. Bennett has raised very persuasive arguments which strike me as correct. The Hague Convention is intended to create uniformity in service of process abroad. If one jurisdiction is allowed to waive irregularities in the observance of the Convention then this will defeat the very purpose of the Hague Convention. I also have had regard to **Shiblaq v. Sadikoglu [2005] 2 CLC 380** an English High Court decision (Colman J.) cited by Mr. Bennett which supports the view that failure to comply with the Hague Convention is not a procedural irregularity that can be cured by the court under provisions akin to CPR r. 26.9. See the headnote paras. 3 and 4. Accordingly, in my view, the court has no jurisdiction to waive breaches of the Hague Convention and the service of the claim form on Mr. Meroni must be set aside.

Conclusion

[48] For the foregoing reasons, in my judgment Mr. Sormulis has not satisfied the court that he has a good cause of action against Hinch which it is reasonable for the court to try and to which Mr. Meroni is a necessary and proper party in accordance with CPR 7.3(20 (a). Accordingly, the order made ex parte on 20th September 2006 granting leave to serve the Claim Form on Mr. Meroni outside the jurisdiction in Switzerland must be set aside. In any event, the service itself was defective as not being in compliance with the Hague Convention and the court has no jurisdiction to cure this as an irregularity under CPR 26.9.

[49] Mr. Meroni is to have the costs of this application to be assessed upon application to be filed and served within 21 days hereof unless costs are agreed.

[50] The parties have become embroiled in lengthy and costly preliminary litigation which has done nothing to resolve the substantive issues. I remark too that Mr. Meroni is a Swiss attorney and no doubt having a lawsuit of such moment hanging over his head can hardly

be conceived as particularly salutary for his business. It is therefore hoped that the parties and their legal advisors will take a fresh look at these proceedings and decide on the most productive and cost effective way forward.

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Rita Joseph-Olivetti
High Court Judge
British Virgin Islands