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

CLAIM NO: BVIHC (COM) 2011/0001

BETWEEN:

OLEKSANDR ZABUDKIN

Claimant/Respondent

and

DIMITRY ITKIN

First Defendant

DIMITRY VITORVICH POPOV

Second Defendant/Applicant

CRYSTAL PROMOTION

Third Defendant

Appearances: Mr Malcolm Arthurs for the Second Defendant, Mr Popov
Mr Paul Dennis for the Applicant, Mr Zabudkin

JUDGMENT

[2011: 13, 21 July]

(Proceedings brought against company within the jurisdiction – permission granted to serve director and sole shareholder of the company outside the jurisdiction – service proving difficult to effect – Court making order of its own motion at CMC that service may be effected at offices of defendant company's solicitors within the jurisdiction – whether service to be set aside – **Trans-World Metals and ors v Bluzwed Metals Limited (BVI)**[1] considered)

[1] **Bannister J [ag]:** In these proceedings Mr Oleksandr Zabudkin ('Mr Zabudkin') sues Mr Dimitry Popov ('Mr Popov) and a BVI registered company called Crystal Promotion Ltd

[1] BVIHCV 2003/79 22 March 2005

('the Company') for a declaration that he, Mr Zabudkin, is the sole owner of the Company and that Mr Popov, who claims that he is its rightful owner, is a usurper. The proceedings commenced early this year and the Company was served here as of right. An application pursuant to CPR Part 7 came before me on 26 January 2011 and I made an order permitting service on Mr Popov within the Russian Federation, where he resides. No application has been made to have that order set aside.

[2] The Company put in a defence through local lawyers, Messrs Barker Adams. The statement of truth was signed by Mr Popov. At a hearing on 24 February 2011 and in answer to a question from the Court, Mr Michael Pringle, of Barker Adams, confirmed that he was receiving instructions from Mr Popov in his capacity as sole member and director of the Company. On 25 February 2011 Messrs O'Neal Webster, Mr Zabudkin's lawyers, asked Barker Adams whether Mr Popov would be prepared to accept service through locally appointed Counsel. Mr Pringle consulted Martin Kenny & Co, who it appears act for Mr Popov personally within the jurisdiction, and was told by that firm that Mr Popov would not accept service at the offices of BVI lawyers. The answer was conveyed to O'Neal Webster.

[3] A case management conference ('CMC') was held on 23 June 2011. Still Mr Popov had not been served and, without going into details, Mr Dennis who appeared for Mr Zabudkin, indicated that service was not proving easy. I expressed the (necessarily provisional) view that in those circumstances it was going to be difficult to have a proper trial of the issues, which, if Mr Zabudkin was successful, would result in the need to make declarations binding Mr Popov. If he was not then a party there would be difficulties, to say the least, about the effectiveness of those declarations. Mr Popov was clearly a necessary party, which is why permission to serve out was granted in the first place. Although Mr Dennis maintained that an effective trial would be possible in Mr Popov's absence, I was not then persuaded that that was so. It was made clear by Mr Pringle that instructions on behalf of the Company continued to come from Mr Popov and Mr Pringle did not demur when I suggested that Barker Adams' fees must also be coming from Mr Popov, although it would not follow that the payments were not being made on behalf of the Company.

[4] Although I was aware of the authority of **Trans-World Metals SA (Bahamas) & ors v Bluzwed Metals Limited (BVI)**[2] ('**Transworld**') it seemed to me possible that its reasoning could be distinguished in the present case. Taking into account the fact that Mr Popov was active, through the agency of Barker Adams in this jurisdiction, in opposing Mr Zabudkin's claim against the Company yet was remaining personally out of the jurisdiction for the purposes of the proceedings against himself, it seemed to me that there was a good arguable case that CPR 5.14 could be relied upon to justify service of Mr Popov at the offices of Barker Adams. I therefore made such order of my own motion and service was effected shortly afterwards in accordance with that order.

[5] An application for permission to appeal my order of 23 June 2011 came before me on very short notice on 5 July 2011. In light of the objections of Mr Dennis, who appeared for Mr Zabudkin as he has done throughout these proceedings, the matter was adjourned to come on Wednesday 13 July 2011 and by consent I made an order that time for Mr Popov to acknowledge service or file and serve a defence was extended until further order.

[6] The application duly came before me on 13 July 2011. It seemed to me that since my order of 23 June 2011 was made against a non-party and, by definition, in his absence, the proper route for a challenge to it was not by way of an appeal, but by application to set it aside. Both Counsel agreed that that was indeed the correct approach and the matter proceeded as an application to set aside. Needless to say, that approach did not involve any implied submission on the part of Mr Popov to the jurisdiction.

Submissions of Counsel

[7] Mr Arthurs, for Mr Popov, relied upon **Transworld** and, in particular upon paragraphs [31] to [34] of the judgment of Barrow J, as he then was. Barrow J decided that part of the case on the grounds that since CPR 5.14 was contained within a Part dealing with service within the jurisdiction and because there were no indications that it was intended to apply to service out of the jurisdiction (contained in the separate Part 7 which, as

[2] BVIHCV 2003/179 22 March 2005

Barrow J held, contained express provisions that would have been unnecessary had CPR Part 5 been intended to carry over into Part 7) it was impossible to construe the CPR as intending that alternative methods of service should be available in Part 7 cases.

[8] Mr Dennis submitted that since Barker Adams were being instructed by Mr Popov, they were his agents and that in consequence it could be confidently supposed that service of the proceedings at the offices of Barker Adams would come to the attention of Mr Popov. There is no doubt that as a matter of fact that has been the effect of my order.

[9] Mr Dennis further submitted that **Transworld** had no application, because, he submitted, in that case service had been effected out of the jurisdiction, whereas in the present case service had been effected within the jurisdiction at the offices of Barker Adams. I can dispose of this argument immediately. The issue is whether it is permissible for the Court to order service by an alternative method against a defendant not within the jurisdiction *at all*, never mind where that alternative service is to be effected. That issue is not resolved by the making of an order specifying alternative service within the jurisdiction any more than it would be resolved by an order specifying alternative service in Russia.

[10] Mr Dennis referred next to a short passage from the judgment of Lawrence Collins J (as he then was) in a case called **BAS Capital Funding Corporation v Medfinco Ltd**[3], cited at paragraph [49] of **Trans-world** and which certainly suggests that the Judge considered that service by alternative means was available against a foreign defendant under the English CPR as they then stood.[4] Mr Dennis submitted that in the present case Mr Popov was thoroughly involved in the proceedings already and that there could be no objection to an order made for service upon him at the offices here of the Company's Solicitors.

Decision

[11] Having had the opportunity to consider **Trans-world** in some depth, it seems to me that its conclusion on the substituted service point (I shall use that expression in preference to

[3] [2003] EWHC 1798 (Ch)
[4] 25 July 2003

the more cumbersome 'service by alternative method') cannot be faulted. I think that that conclusion, as a matter of interpretation of the Rules, is supported by the terms of CPR 7.8:

> 'Mode of service of claim form – general provision
>
> 7.8(1) Subject to the following paragraphs of this rule, if a claim form is to be served out of the jurisdiction, it may be served –
>
> (a) By a method provided for by –
>
> (i) rule 7.9 (service through foreign governments, etc.); or
> (ii) rule 7.11 (service on a State);
>
> (b) in accordance with the law of the country in which it is to be served;
> or
>
> (2) Nothing in this Part or in any court order may authorize or require any person to do anything in the country where the claim form is to be served which is against the law of that country.'

[12] Although CPR 7.8 uses the word 'may' it is, taken as a whole, defining the only methods (apart from some contractually agreed method pursuant to CPR 5.16) available for effecting service on a prospective defendant resident abroad. It seems to me to follow that CPR 5.14 is necessarily excluded as a result of the manner in which CPR 7.8 is drafted. Of course, if the law of the country in which a claim form is to be served[5] contains a provision for substituted service in any particular case, then it may be that a claim form will be served by such a method. But that will be under the procedural rules of the state where the prospective defendants reside, not under CPR 5.14.

[13] As for **BAS Capital Funding v Medfinco Ltd**[6], upon which Mr Dennis relied, that decision preceded a change to the English CPR effected on 1 October 2008. Before that date the provision for substituted service[7] had been contained within a clutch of rules

[5] CPR 7.8(1)(b)
[6] (supra)
[7] then numbered CPR 6.8

headed 'General Rules about Service.' As a result of the changes of October 2008, rule 6.8 was renumbered and moved to the new Part II of CPR 6, headed 'Service of the Claim Form in the Jurisdiction.' No equivalent provision was included in Part IV of the English CPR 6, which is headed 'Service of the Claim Form and other documents out of the Jurisdiction.' The commentary in the White Book expresses the view that in the result it is doubtful whether the construction to which Lawrence Collins J was referring in the passage quoted by Barrow J at paragraph [49] of **Trans-World** could any longer be sustained – in other words, the White Book adopts the same approach as that of Barrow J in **Trans-World**.

[14] The general principle is that in the absence of some express enabling power, substituted service is not permissible upon a foreigner unless he is within the jurisdiction when the claim form is issued[8]. That is not this case.

[15] For all these reasons, therefore, my order of 23 June 2011 and the purported service of the claim form and statement of claim upon Mr Popov at the offices of Barker Adams must be set aside.

[16] I am sorry to have to reach this conclusion. There is something very unattractive about a foreigner defending litigation being carried on within this jurisdiction to which he is named as a party on behalf of another defendant, while not submitting to the jurisdiction himself. That, however, is his privilege as a foreign national. Only service can make him party to the proceedings, and he has not yet been served.

Commercial Court Judge

21 July 2011

[8] Dicey, Morris & Collins, 14th Ed, paragraph 11-108 at page 348