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

CLAIM NO: BVIHC (COM) 0125/2012

In the matter of

Section 3 of The Reciprocal Enforcement Of Judgments Act (CAP.65)

And in the matter of

An application to register a judgment of the High Court of Justice in England

Between:

JSC BTA BANK

Respondent

and

MUKHTAR ABLYAZOV

Applicant

Appearances: Mr George Hayman and Mr Robert Nader for the Applicant, Mukhtar Ablyazov
Mr Philip Jones QC, Mr Mark Forte and Ms Tameka Davis for the Respondent, JSC BTA Bank

2013: 25 April, 2 May

JUDGMENT

(Reciprocal Enforcement of Judgments Act, 1922 ('the Act') – application to set aside order for registration of English judgments on the grounds that they are under appeal – whether proposed application to European Court of Human Rights ('ECtHR') is an appeal for the purposes of subsection 3(2)(e) of the Act – whether real prospect that ECtHR may declare against the English judgments such that the English Courts may reopen them and possibly set them aside – whether unjust or inconvenient that the English judgments should be registered in the Territory until outcome and effect of application to ECtHR known – meaning and effect of subsection 3(1) of the Act considered – whether contrary to public policy to permit registration and enforcement prior to that)

[1] This is an application made by Mukhtar Ablyazov ('Mr Ablyazov') to set aside the registration here in the High Court of two judgments entered against him in the Commercial Court in England in favour of the Respondent JSC BTA Bank ('the Bank') on 23 November 2012 ('the English judgments'). The English judgments are for the payment of money and together make Mr Ablyazov liable to the Bank for in excess of USD 2 billion. The order for registration was made on 13 December 2012, but was not to take effect until after Mr Ablyazov's application to the United Kingdom Supreme Court for permission to appeal to that Court against the dismissal by the English Court of Appeal of his appeals against the unless orders made by Teare J on 29 February 2012 ('the unless orders') was refused, or if granted, until his subsequent appeal was dismissed. The Supreme Court refused Mr Ablyazov permission to appeal on 21 February 2013, so that the registrations in the High Court here took effect upon the same day, but subject to any application by Mr Ablyazov to have them set aside..

[2] The English judgments were entered as a result of alleged non-compliance by Mr Ablyazov with disclosure orders included in world wide freezing orders which had been made against him in the course of the English proceedings. I say 'alleged' not because I have any view as to whether Mr Ablyazov has complied, but simply to indicate that his non compliance is not a fact found by me on any of these applications. As a result, Mr Ablyazov had been sentenced to twenty two months imprisonment for contempt of Court. He had not, however, surrendered to the relevant authority and by 29 February 2012, when Teare J made the unless orders, had, to all intents and purposes, disappeared.

[3] It was against this background that on 29 February 2012 Teare J ordered (1) that Mr Ablyazov surrender to the authorities so that he could be delivered to prison; (2) that he repeat the exercise of disclosing his world wide assets; and (3) that if he had not done those things by 4 pm on 9 and 14 March 2012 respectively, he should be debarred from defending the proceedings and the Bank would be at liberty to enter judgment against him. It was for failure to comply with either order that his defences were struck out and judgment was entered against him, as I have said, on 23 November 2012.

[4] Mr Ablyazov appealed the making of the unless orders to the English Court of Appeal. The judgments themselves were not appealed, the view being taken, no doubt correctly, that until the unless orders were set aside, the judgments were regular and unimpeachable. After a three day hearing in July 2012 the Court of Appeal dismissed Mr Ablyazov's appeal on 6 November 2012. The only point which I need to mention is that Toulson LJ (as he then was) dissented as to the propriety of making Mr Ablyazov's defence of the proceedings conditional upon his surrender to the authorities, which he considered to be in the nature of a double punishment. But as Toulson LJ pointed out and as Mr Philip Jones QC, who appeared, together with Mr Mark Forte and Ms Tameka Davis, for the Respondent Bank on these applications stressed, the point was academic, since all three judges in any event agreed that Mr Ablyazov should have been debarred

from defending for non-disclosure. As I have said, the United Kingdom Supreme Court refused permission to appeal from that decision, the ground given being that the proposed appeal did not raise a point of law of general public importance which required consideration by the Supreme Court at that time.

[5] Mr Ablyazov has thus run out of avenues in the English Courts, but he intends to apply to the European Court of Human Rights (the ECtHR') for a declaration that the striking out of his defences amounted to a violation of his Article 6 rights (to a court and to a fair hearing) and that execution of the judgments would infringe his right to property under Article 1 of the European Convention on Human Rights ('the ECHR'). Indeed, on 22 April 2013 his Solicitors submitted a Letter of Introduction to the Registrar of the ECtHR indicating that intention. I assume for the purposes of this application that the applications to the ECtHR will be made in due course and will be prosecuted to the point of determination.

The argument for Mr Ablyazov on these applications

[6] Before turning to Mr Ablyazov's submissions on these applications it is necessary to set out the relevant provisions of the Act:

> (1) '(1) Where a judgment has been obtained in the High Court in England or in Northern Ireland or in the Court of Session in Scotland the judgment creditor may apply to the High Court at any time within twelve months after the date of the judgment or such longer period as may be allowed by the Court to have the judgment registered in the High Court and on any such application the Court may, if in all the circumstances of the case they think it is just and convenient that the judgment should be enforced in the Territory, and subject to the provisions of this section, order the judgment to be registered accordingly.'
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> (2) No judgment shall be ordered to be registered under this section if-
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> (a) the original Court acted without jurisdiction; or
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> (b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original Court, did not voluntarily appear otherwise submit or agree to submit to the jurisdiction of that Court; or
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> (c) the judgment debtor being the defendant in the proceedings, was not duly served with the process of the original Court and did not appear, notwithstanding that he was ordinarily resident or was carrying business within the jurisdiction of that Court or agreed to submit to the jurisdiction of that Court; or
>
> (d) the judgment was obtained by fraud; or

(e) the judgment debtor satisfies the High Court either than an appeal is pending, or that he is entitled and intends to appeal, against the judgment; or

(f) the judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason could not have been entertained by the High Court.

[7] Mr George Hayman, who has appeared, together with Mr Robert Nader, for Mr Ablyazov, submits that the BVI judgments[1] should be set aside on two grounds. First, he submits that Mr Ablyazov's intended application to the ECtHR is an appeal for the purposes of section 3(2)(e) of the Act. That submission is unsustainable. An appeal is a proceeding whose outcome, if successful, will result in the making of an order, binding on the Court whose judgment or order is being appealed, setting aside or varying the judgment or order appealed from. Mr Hayman does not and cannot suggest that the ECtHR has the power to set aside or vary the judgment of the English Court of Appeal. For the same reasons, the proposed application cannot be treated as if it were an appeal, since it has none of the characteristics of an appeal. It is in the nature of a complaint against the Government of the United Kingdom.

[8] Mr Hayman's second submission is more formidable. He submits that because the processes of the ECtHR may result in a recommendation or declaration which may enable Mr Ablyazov to persuade the English Courts either to set aside the judgment under the English CPR 3.9[2] or which will persuade the English Court of Appeal to reopen the matter pursuant to rule 52.17 of the English CPR, it would be unjust for the judgments to remain enforceable here while Mr Ablyazov continues to pursue a process which may result in the English judgments being set aside. I am prepared to assume in Mr Ablyazov's favour that he has a real prospect of persuading the ECtHR to recommend that the English judgments be set aside and that he has a similarly real prospect of persuading the English Courts in the light of such a ruling that they should be set aside. In those circumstances, Mr Hayman submits, it would not be 'just and convenient' within the meaning of section 3(1) of the Act to register the judgments here (or alternatively the right course would be to suspend their operation until the processes of the ECtHR are complete and their fall out ascertained) because there is a real risk that Mr Ablazov may suffer irreversible damage if the judgments are executed and the Bank is unable to comply with any order that might be made for restitution as an indirect consequence of a favourable ruling from the ECtHR. I am also prepared to assume in Mr Ablyazov's favour, but without deciding, that that risk is real.

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[1] registration means that the judgments take effect as if made by the High Court here in the BVI

[2] which permits the Court to set aside a default judgment

[9] I am not persuaded by these submissions. While the scheme of the Act is to give the High Court in the BVI a discretion whether or not to register judgments given in the High Courts of the United Kingdom, that discretion, given by subsection 3(1) of the Act, is subject to the other provisions of section 3. Thus, the BVI High Court may not register a judgment of the English High Court which is affected by any of the matters listed in subsections 3(2)(a) to (f). It is only if an English judgment is not so affected that the subsection 3(1) discretion arises. The discretion is to be exercised in favour of registration only where the BVI Court *'in all the circumstances of the case thinks that it is just and convenient that the judgment should be enforced in the Territory.'*

[10] In ascertaining the meaning of these words where they occur in subsection 3(1) it must be borne in mind that any English judgment for which registration is sought will already have passed the subsection 3(2) tests, so that enforcement within the BVI will not offend any of the principles of private international law governing the enforcement of foreign judgments. Further, the English judgment debtor will have been afforded the additional protection, unavailable at common law, that the English judgment will not be enforced if it is, (or imminently will be) under appeal. At common law, there could be no defence to the enforcement of a foreign judgment satisfying these tests. In the light of this consideration, it seems to me that the discretionary words in subsection 3(1) are not to be construed as permitting the BVI Court to refuse registration on the grounds that it would be unjust for an English judgment satisfying subsection 3(2) to be enforced *at all*, but as conferring a discretion to refuse enforcement within the Territory under the Act if circumstances prevail which would render enforcement *within the Territory* unjust and/or inconvenient. That must be so, in my judgment, otherwise the local (BVI) Court would be in a position to refuse enforcement upon objections which had nothing to do with the Territory, but which amounted to challenges, direct or indirect, to the underlying justice of the processes which had culminated in the making of the English judgment.

[11] I appreciate that as a matter of language Mr Hayman's alternative submission does not require me to pronounce upon the justice of the English processes which led up to the entry of the judgments. Instead, he says that it is the intended application to the ECtHR, coupled with the potential for the ultimate setting aside of the English judgments, that makes it unjust to enforce them now in the Territory. I do not regard that as a distinction of any significance. It remains the case that the submission that those circumstances make it unjust now to enforce the judgments in the BVI applies equally to enforcement in England, where no stay is in place and where enforcement is currently under way.[3] Mr Hayman is asking me to lean against enforcement on considerations of justice which are of universal application. If I were to decide, on the basis of Mr Hayman's submissions, that it would be unjust to enforce here I would necessarily be deciding that it would be

[3] Mr Ablyazov disputes that, because he says that the enforcement steps being taken are in fact being taken against the property of third parties, but I do not think that that matters for present purposes.

unjust to enforce anywhere, including in England. I do not believe that the Act is intended to confer upon the BVI Court in a case, such as the present, where subsection 3(2) is satisfied, a discretion to refuse registration and enforcement upon the grounds that a collateral challenge may cause the English judgment to be set aside. The scheme of the Act shows, in my judgment, that provided that subsection 3(2) is satisfied, the BVI Court must take the English judgment as it finds it. It is not entitled to speculate as to whether, in the long term, it will survive collateral attack.

[12] I do not believe, therefore, that the discretionary words in subsection 3(1) of the Act are designed to permit the BVI Court to decide against enforcement upon grounds other than grounds peculiar to the Territory. For example, it would be both unjust and inconvenient to permit enforcement against a judgment debtor which had been put into insolvent liquidation in the Territory. Again, it would not be convenient to permit enforcement against a debtor with no assets in the Territory. Whatever may be the situations in which the BVI Court would be justified in refusing to permit enforcement of an English judgment in the Territory, it would seem to me to be extraordinary if the Court here could decline enforcement within the Territory of such a judgment on the grounds that at some indefinite time in the future it may cease to be enforceable in England for reasons not covered by subsection 3(2) and having no connection with the Territory.

[13] On the contrary, if, contrary to my view, the BVI Court is entitled to take into account considerations of justice generally, I cannot see how it could be just to withhold enforcement within this jurisdiction of a judgment which satisfies subsection 3(2) and in respect of which no stay is in place in England, unless local considerations applied to make enforcement here either unjust or inconvenient. It is not suggested that there are any such.

[14] So far as public policy is concerned, it seems to me that provided that subsection 3(2) is satisfied public policy requires that the provisions of the Act be given effect in this jurisdiction unless, which is not suggested, the causes of action relied upon in the English proceedings were such that the High Court here could not have entertained them on public policy grounds. It could not sensibly be suggested that that would have been the case. The Act was passed so that regular judgments of the English High Court could be enforced in this jurisdiction speedily and without complication. Once subsection 3(2)(f) is satisfied, as it is in this case, I consider that that is the relevant public policy to which this Court should have regard in deciding whether an English judgment should be registered and enforced here. It points in favour of enforcement.

Conclusion

[15] This approach to the matter means that it is unnecessary for me to deal in any depth with the interesting submissions which were made as to the operation of the ECtHR and of

the Human Rights Act 1998. I intend no discourtesy to Counsel who have so skillfully advanced them by not dealing with those submissions as made, but I am satisfied, for the reasons which I have attempted to give above, that it is neither unjust nor inconvenient for these judgments to be enforced in this jurisdiction. On the contrary, it seems to me to be both just and convenient that they should be. For those reasons, this application fails.

[16] I stress that nothing in this judgment should be taken as an indication of this Court's opinion as to the likelihood that Mr Ablyazov will succeed in having the judgments set aside through his intended applications to the ECtHR. I have no opinion about that one way or the other.

Commercial Court Judge
2 May 2013