

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

Claim No. BVIHC (Com) No. 105 of 2014

BETWEEN:

HORNBEAM CORPORATION

Claimant

and

[1] HALLIWEL ASSETS INC

[2] PANIKOS SYMEOU

[3] MARIGOLD TRUST COMPANY LIMITED

Defendant

**AND IN THE MATTER OF HALLIWEL ASSETS INC
AND IN THE MATTER OF THE BVI BUSINESS COMPANIES ACT 2004
AND IN THE MATTER OF THE INSOLVENCY ACT 2003**

CLAIM NO. BVIHC (COM) 134 OF 2014

BETWEEN:

HORNBEAM CORPORATION

Claimant

AND

HALLIWEL ASSETS INC

Defendant

Appearances: Mr Richard Evans for the Applicant first Defendant
Ms Louise Hutton for the Applicant second and third Defendants

JUDGMENT

2014: December 11, 18

(Third party costs order – whether power to permit service of application out of the jurisdiction – CPR 7.3(10) considered - whether necessary for application to be served out in any event)

- [1] **Bannister J [Ag]:** The Claimant Hornbeam Corporation, a Panamanian company, ('Hornbeam') is one of the three members of the first Defendant company ('Halliwell'). The other two members are the Second and Third Defendants (respectively 'Mr Symeou' and 'Marigold'). Each of Hornbeam, Mr Symeou and Marigold is a nominee shareholder. On 29 August 2014 Justice Byer granted Hornbeam an injunction *ex parte* restraining Halliwell, Mr Symeou and Marigold from convening an EGM of Halliwell and from causing or procuring a restructuring to be carried out of Halliwell's wholly owned subsidiary, Warren Steel LLC ('Warren'). The injunction was continued by consent on 25 September 2014 and came on *inter partes* on 13 October 2014, when the application was abandoned at the outset of the hearing. Instead, an application was made in proceedings issued by Hornbeam on 10 October 2014 for the appointment of provisional liquidators to Halliwell. That application was dismissed.¹ I ordered Hornbeam to pay the costs of each of Halliwell, in respect of its separate representation in the injunction proceedings (which I was satisfied was justified) and of Mr Symeou and Marigold in respect of their joint opposition to the injunction proceedings. I ordered Hornbeam to pay one set of costs to Halliwell, Mr Symeou and Marigold in respect of the provisional liquidator application.
- [2] On 10 December 2014 on the application of Halliwell, Mr Symeou and Marigold I assessed the costs payable to Halliwell in respect of the injunction proceedings at US\$192,276 and the costs of Mr Symeou and Marigold of those proceedings at US\$629,250. I assessed the costs payable by Hornbeam in the liquidator proceedings at US\$25,000.
- [3] Meanwhile on 28 November 2014 Halliwell separately and Mr Symeou and Marigold together had made applications that all of those costs should be

¹ the proceedings in which the PL application had been made were subsequently withdrawn

paid by Mr Vadim Shulman ('Mr Shulman'), who is the ultimate beneficial owner of Hornbeam's Halliwell shares and is resident in the principality of Monaco. In accordance with the practice developed in the English Courts Halliwell, Mr Symeou and Marigold applied for orders that Mr Shulman be joined as a party to each set of proceedings and be made liable, pursuant to CPR 64.10, jointly with Hornbeam for the costs which I have mentioned above. Because Mr Shulman is out of the jurisdiction, they also seek permission to serve him with these applications in Monaco.

The law

- [4] Ms Louise Hutton, who represented Mr Symeou and Marigold at the hearing, bore the brunt of the argument and took me through the parallel English legislation and Rules of Court, together with the most important English and Commonwealth jurisprudence. Although the jurisdiction to make non-parties liable for costs is regularly exercised in England and Wales, the judges seem to have difficulty in identifying with any precision the principles which underpin it, or its boundaries. It has been said that it may be resorted to where the non-party is 'the real party interested in the outcome of the suit,' or where he has been 'responsible for' bringing the proceedings or where he conducts or procures the conduct of proceedings in the name of another for his personal benefit or improperly or vexatiously. Generally speaking, the law may be summarized by saying that such orders will be made where the justice of the case demands it.

Service out

- [5] It is convenient to consider first the position regarding service, because if it is necessary for these applications to be served on Mr Shulman in Monaco then unless there is some gateway available under CPR 7.3 it will not be possible for them to proceed.
- [6] The Court has no inherent power to grant permission to serve out. It can do so only pursuant to powers conferred upon it by legislation – ordinarily, by subordinate legislation made pursuant to rule-making powers granted by statute. The only rule in the Eastern Caribbean CPR which might be said to come close to permitting service of these applications abroad is Rule 7.3(10):

A claim is made under an enactment which confers jurisdiction on the Court and the proceedings are not covered by any of the other grounds referred to in this Rule.

- [7] In my judgment this sub-rule covers cases where a statute gives the Court a jurisdiction which it would not have but for the provisions of the enactment in question. A good example is section 31 of the Trade Marks Act 1887, conferring upon the Court a specific jurisdiction to rectify registers maintained under that Act and which does not fall within any other of the provisions of CPR 7.3. The power to make a third party costs order is not a power which the Court would not otherwise have unless conferred by an enactment. It is part of the Court's general *batterie de cuisine*. Certainly that appears to have been the view of the English Rulemaker, because instead of relying upon the English equivalent to our CPR 7.3(10), he inserted a special provision into the English Rules to provide for 'claims' for third party costs orders to be served, with permission, outside the jurisdiction. In my judgment, there is no currently available gateway under CPR 7.3 for the service abroad of an application for a third party costs order.
- [8] Quite apart from that, and despite the different view taken by the English Rulemaker, I do not think that CPR 7.3 is appropriate to deal with applications for third party costs orders. CPR 7.3 deals with causes of action, requiring acknowledgements of service and defences to be filed and served to meet them. Applications for third party costs orders are not 'claims' as that word is used in Rule 7.3.
- [9] The answer to the conundrum may be that in cases where it is appropriate for the Court to make a third party costs order at all there is no need for permission to be granted to serve out, because the third party will have submitted to the jurisdiction by conduct. If (which I am not deciding) it is correct to regard Mr Shulman as the 'real' party, then it seems to me that it must also be correct to regard him as having assented to the Court's jurisdiction. All that would be needed would be compliance with CPR 64.10, which could be achieved by giving notice to the BVI lawyers who took his instructions during the course of the proceedings and, in order to ensure that the third party was personally notified, by writing to him at his overseas address advising him of the fact that such an application was on foot and of the date when the Court would deal with it. I do not decide the point, however, because I have not had the benefit of argument upon it.
- [10] As things stand, however, I do not consider that I have any power to permit service of the application notices out of the jurisdiction.

Merits

[11] In these circumstances, I do not think that I need to, or should, say anything about the underlying merits.

Conclusion

[12] For the reasons which I have given above, I therefore make no order on these applications other than to refuse permission to serve out.

A handwritten signature in black ink, appearing to read 'L. H. Smith', written in a cursive style.

Commercial Court Judge
18 December 2014