EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(COMMERCIAL)

CLAIM NO. BVIHC (COM) 0001 OF 2018

Between:

STICHTING NEMS

and

IGOR BORISOVITCH GITLIN

Appearances:

Mr John Carrington, QC of Sabals Law for the judgment creditor,
Mr Jerry Samuel and Ms Lauren Peaty with him of Conyers Dill & Pearman for the judgment debtor

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2018: December 6, 19

JUDGMENT

[1] ADDERLEY J: This is an application to make a provisional charging order final.

[2] A provisional charging order was granted ex parte on 16 October and filed 23 October 2018 charging 10 shares in Orsford Limited, and 50,000 shares in Custom Marine Ventures Ltd. Stated to be beneficially owned by the defendant.

[3] The Provisional Charging Order was made by way of commencing enforcement of a judgment against the defendant judgment debtor for the sums of US$3,297,578.89 and €19,807.86 and costs of US$3,950 with interest thereon at the rate of 5% per annum from 27 June 2018 until payment.

This judgment remains wholly unsatisfied. The court was satisfied that the case merited the appointment of a provisional charging order, as it was satisfied earlier that it was just and convenient to impose a freezing order on the assets of the two companies which are incorporated in the British Virgin Islands ("BVI").

[4] The facts and arguments leading to the imposition of the freezing order are outlined in [11] to [28] of my judgment in Stichting Nems v Orsford Limited and Custom Marine Ventures Limited BVIHC(COM) 103 of 2017 dated 9 November 2017 so I will not repeat them here.

[5] The date set out in the order for hearing the application for a final charging order was 6 December 2018 at 10 am at the Commercial Division of the High Court at Road Town Tortola which was contained in the order.

[6] By notice filed 21 November 2018 Ms Anna Radchenko as an "interested party" gave a Notice of Objection to the Provisional Charging Order pursuant to CPR 48.10 on the grounds that she is the legal and beneficial owner of Orsford Limited which owns Custom Marine Ventures Limited, and that the companies are not beneficially owned by the defendant.

THE PRELIMINARY OBJECTIONS

JURISDICTION

[7] This is the first time the objection, that the court has no jurisdiction to grant charging orders has ever been raised before me. Mr Samuel sets out the issue in his skeleton arguments thus:

> "38. The Charging Order application seeks relief pursuant to Part 48 of the CPR. It is trite law that the procedural rules do not confer substantial jurisdiction on the court, but merely regulate the exercise of such jurisdiction, usually established by common law, in equity or by statute. The absence of any such jurisdiction being conferred by the procedural rules alone was endorsed by the Judicial Committee of the Privy Council in Privy Council appeal No 87 of 2006 between Beverly Levy v Ken Sales and Marketing Ltd **("Levy")**. At paragraph 19 of that decision, Lord Scott of Foscote opined as follows:
>
> 'There appears to have been no statutory power for courts of Jamaica to make charging orders until the recent enactment of legislation enabling courts to do so. That legislation came into effect on 25 March 203. Neither the charging order made by Anderson J on 23

> October 2001 in action K-062 nor the charging order made by McIntosh on 15 January 2003 can draw support from that enactment. The Civil Procedure Rules 2002, which came into effect on 1 January 2003, contains Rules relating to the making of charging orders but while rules can regulate the exercise of an existing jurisdiction they cannot themselves confer jurisdiction..."

[8] Lord Foscote then went on to state that it was satisfactorily demonstrated to the Board from the trial judges' judgments that a practice had developed in Jamaica for courts when making an order under section 134 for the purpose of execution against a debtor's land, to complement the order by the addition of a charging order. However, he stated that in the absence of any clear statutory authority for the practice they were persuaded to treat the charging order as an adjunct to the proprietary effect of the execution order for sale and it could not be given a life of its own, with the consequence that if the proprietary effect of the execution order became spent a charging order made prior to the date of the statute must become spent with it.

[9] No statute has been drawn to my attention that gives power to the BVI court to make charging orders. If there is no such statute, the obiter remarks of Lord Scott in Levy are applicable to this case. There is no statutory underpinning for CPR 48 which purports to empower the court to grant charging orders and there is no power to do so under the common law. The rules themselves do not confer jurisdiction; they only set out the procedure to be followed in exercising the jurisdiction.

[10] The point is demonstrated by a recent unreported case in TCI. In April of this year the Court of Appeal of the Turks and Caicos Islands (Mottley P, Adderley, and Hammel-Smith JJA) in the case of AG v CBMS & Prince Harris CL-AP14/2017 dismissed the first respondent's appeal seeking an order to vary a charging order to make it absolute against the beneficial interest claimed by the second respondent in the leasehold parcel of land held by his wife, Martha Harris. The reason for the dismissal was that in the final analysis on the facts of the case the judgment debtor's interest was in the proceeds of sale and not an 'interest in land' and ostensibly the court had no jurisdiction to grant a charge over that asset under the relevant statute (the Civil Procedure Ordinance Cap 4.01(s39 (3)), the only property over which the court had jurisdiction to grant a charging order was

in respect of "any interest in land". Sections 39(2) and (3) of the Civil procedure Ordinance provide as follows;

> **"(2)** where the court makes an order or judgment requiring a debtor to pay a sum of money to a creditor, the court may make a charging order in the prescribed form charging such property as may be specified in the charging order to secure the payment of any money due or to become due under the order or judgment.
>
> (3) the property which may be charged by a charging order shall be any interest held by the debtor in land including any **interest held by him beneficially under a trust"**

[11] The provision was modeled after the Administration of Justice Act 1956 of the UK which only allowed an 'interest in land' to be charged. In the UK that Act has since been superseded by the Charging Orders Act 1979 which has widened the scope of the assets beyond land in respect of which interest a charging order may be made, but the T&C Ordinance has not been amended accordingly.

[12] In answer to the jurisdictional challenge raised by the interested party in this case Mr Carrington QC referred the court to section11 of the West Indies Associated States Supreme Court Act (the supreme Court Act"). The difference between legislation conferring jurisdiction, and that setting out the procedure in exercising that jurisdiction is clearly demonstrated in sections 7 and 11. They respectively state the following:

> Marginal Note: Jurisdiction of High court
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> **"7.** The High Court shall have and exercise within the Territory all such jurisdiction (save and except the jurisdiction in Admiralty) and the same powers and authorities incidental to such jurisdiction as on the first day of **January, 1940, were vested in the High court of Justice in England"**
>
> Marginal Note: Practice in civil proceedings, and in probate, divorce, and matrimonial causes

> **"11.** The jurisdiction vested in the High court in civil proceedings, and in probate, divorce, and matrimonial causes, shall be exercised in accordance with the provisions of this Ordinance and any other law in operation in the Territory and rules of court, and where no special provision is therein contained such jurisdiction shall be exercised as nearly as may be in conformity with the law and practice administered for the time being in the High Court of Justice of **England."**

[13] Section 7 clearly allows importation of legislation conferring the jurisdiction (existing as at 1 January 1940), and section11 (1) allows, where there is a void, the importation of legislation setting the procedure for exercising that jurisdiction. Each of the Territories in the Eastern Caribbean has the provision of section 11(1) verbatim in its Supreme Court Act except for the Territory's name.

[14] In Panacom International Inc [1997] 47 WIR 139,the Court of Appeal (Sir Vincent Floissac CJ, Byron and Liverpool JJA) held that section 11 of the Supreme Court Act which is in identical terms to that of the BVI:

> "Relates solely to the manner of exercise of the jurisdiction of the High Court. It is therefore an intrinsically procedural provision. The words "provisions", "law" and "law and practice" appearing in section 11 are evidently intended to be references to procedural (as distinct from substantive) law.
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> The English Law intended to be imported by section 11 is the procedural law administered in the High Court of Justice in England. In enacting section 11, the legislature of St Vincent and the Grenadines could not have intended to import English substantive law nor English procedural law which is adjectival and purely ancillary to English substantive law."

[15] The interpretation in Panacom was followed by the Court of Appeal (Pereira, Baptiste, Michell JJA) in Veda Doyle v Agnes Deane BVIHCVAP 2011/20 in the Territory of Grenada distinguishing Dominica Agricultural and Industrial Development Bank v Mavis Williams 2 DomHCVAP 2005/0020. In approving the conclusion from Panacom it held that the wording of section 11(1), (which is the same as that of the BVI), indicates that the focus on the importation of any law, rule or practice from England is in respect of the exercise of the jurisdiction as distinct from the importation of English law so as to give jurisdiction.

[16] No legislation, statutory provision, or common law authority which confers jurisdiction on the BVI court to make charging orders has been drawn to the court's attention. The Charging Orders Act 1979 of England cannot be imported by virtue of section 7 of the Supreme Court Act because it is

subsequent to 1940, nor can it be imported by virtue of section 11 because it is substantive and not procedural. I am therefore constrained to find that the BVI court has no jurisdiction to make charging orders.

[17] It stands to reason that section11(1) cannot be construed as importing the substantial legislation of England as opposed to the procedure and practice; to interpret the section otherwise would be ceding the substantive law making powers of the BVI Parliament to England. That would be inconsistent with the constitution of the Constitution of the Virgin Islands which gives the power to make laws to the BVI Legislature. Article 72 states: "*Subject to this constitution, the Legislature shall have the power to make laws for the peace, order and good government of the Virgin Islands*." There does not appear to be a reservation in the BVI constitution for the United Kingdom to make laws subject to the consent and approval of the Privy Council, and even if there was there is no evidence that the process has taken place.

Service

[18] Part 48.7 OF the CPR provides that if the court makes a provisional charging order, the judgment creditor must serve on the judgment debtor in accordance with Part 5 (which in CPR 5.4 also incorporates by reference Part 7 for service outside the jurisdiction) certain specific documents including the order, and must serve the order on interested persons listed in the affidavit, and other persons specified in the section. The documents must contain specific information as to the date, time and place when the court will consider making the final charging order, and must be served 28 days before the hearing. The judgment creditor must also file an affidavit of service not less than 7 days before the hearing.

[19] Part 48(8)(4) of the CPR stipulates that if the court is satisfied that the provisional charging order has been served on the judgment debtor the court has the power at the hearing to-

(a) discharge the provisional charging order

(b) give directions for the resolution of any objection that cannot be fairly resolved summarily; or

(c) make a final charging order

[20] The evidence of service is contained in the Affirmation of Sergey Vladimirovic Molozhavy who states at paragraph 5 of the following:

> "…This judgment was served on Mr Gitlin by post in accordance with Russian law on 19th September 2018."

[21] Although Part 48.7 requires the provisional charging order to be served on the interested party, curiously Part 48.7 does not state what the court has power to do if that does not occur. Presumably it has the same powers, but it is not necessary to answer that to decide on this for the issues in this case.

[22] CPR Rule 7.9 provides for service under the Hague Convention as follows:

> "Service under the Hague Convention (also called "the Hague Service Convention")
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> (3) A claim form to be served on a defendant in any country which is a party to the Hague Convention may be served – (a) through the authority designated under the Hague Convention in respect of that country; or (b) if the law of that country permits – (i)in the case of a claim form issued in a Member State – through its consular authority in that country; (ii)in the case of a claim form issued in a Territory – through the British consular authority in that country, or
> (iii) through the judicial authorities of that company

[23] CPR 7.4(2) provides that the procedure by which a document specified in paragraph (1) [an application, order, or notice issued, made, or given in any proceedings in which permission has been given to serve the claim form out of the jurisdiction] is to be served is the same as that applicable to the service of a claim form and accordingly rules 7.8 to 7.13 apply.

[24] The actual practice has not changed over the years. Cap 80 Rules of the Supreme Court, 1907, made July 13, 1907, under the Supreme Court Act 1880, and kept in force by s.38 of the Supreme Court Act, 1939 and by Section 85 of the West Indies Associated States Supreme Court (Virgin Islands) Ordinance set out the procedure for service abroad where a Convention is involved. It reads as follows:

" Order XIA

Marginal note: Service of local documents abroad

2. Where leave is given in a civil or commercial cause or matter to serve any writ or summons, originating summons, notice or other document in any foreign country with which a convention or other document in any foreign country with which a Convention in that behalf has been or shall be made, the following procedure shall, subject to any special provisions contained in the Convention, be adopted."

[25] It then outlines a number of steps including filing a request with the Registrar's office of the registry of the High Court in the prescribed form, setting out the medium through which it is desired the service shall be effected, and so on.

[26] It further provides in section 3:

"3.Rule 2 shall not apply to render invalid or insufficient any mode of service in any foreign country with which a convention has been or shall be made which is otherwise valid or sufficient according to procedure of the High Court and which is expressly excluded by the Convention made with the foreign country.

Service by post has been expressly excluded by the Russian Federation.

[27] The request to the Registrar still remains when effecting service under the Hague Service Convention because the High Court of the BVI is the designated Authority through which the service process must commence.

[28] As to service, Article 10 of the Hague Service Convention provides for types of service:

"Article 10

Provided the State of destination does not object, the present Convention shall not interfere with -

(a) the freedom to send judicial documents, by postal channels, directly to persons abroad,

(b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,

(c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination."

[25] Russia is one of the countries that has expressly registered its objection to Articles 10(a), 10(b) and 10(c) and therefore the service by postal channels and other means, which comes within Article 10 has been taken off the table as the starting point for service outside the jurisdiction on a Russia resident. There could hardly be a clearer case that it has been "expressly excluded" as a means of service in Russian of foreign process.

[26] For a person with a local address in the BVI personal service is the default position; so too under CPR 7.8, when effecting foreign process in a Hague Convention country the default position is service under the Hague Service Convention. As in the case of personal service only in the event that that mode of service is proved to be impracticable, can an application be made under CPR 7.8A to the court for service by alternative means. The Court of Appeal in JSC VTB Bank v Katunin and Taruta consolidated appeals BVIHCMAP 2105/0004 and BVIHCVAP2015/0007 in allowing the appeal against the decision of the trial judge set out the evidential test that must be met to support a successful application for service by alternative means.

[27] JSC Mcc Eurochem et al v Livingston Properties Equities Inc et al BVIHC(COM) (0097 of 2015) (unreported) delivered 22 February 2018 reaches a similar conclusion. So too has JSC VTB Bank v Katunin BVIHCM 2016/159 (unreported) delivered 11 October 2018 which quoted with approval from the Commercial Court of England where Cooke J in Deutsche Bank AG v Sebastian Holdings Inc and another [2014] EWCH 112, (Comm), 2009 Folio 83,(Transcript) having accepted the views expressed by the English Supreme Court case of Abela[1] in relation to the purpose of service, stated at [27] and I adopted that reasoning:

> "…the fact remains that where there is an applicable Convention, the two states in question have specifically agreed to the service of foreign process in accordance with it. In such circumstances this must represent the prime way of service in such a contracting state. Even if service by

[1] Abela and others v Baadarani et al [2013] 1WLR Supreme Court

alternative means is not to be seen as "exceptional" and to be permitted in special circumstances only, there must still be good reason for allowing service by means other than that provided by CPR 6.40 [the equivalent of BVI CPR 7.8] namely in accordance with the relevant Convention. Otherwise the Convention would be subverted."

[28] Cooke, J also referred at [29] to Knauf UK GmbH v British Gypsum Ltd and another [2001] EWCA Civ 1570, [2002] 2 ALL ER 525, [2002] 1 WLR 907, where the court of Appeal held that where there was a primary method for service under the Convention, a mere desire for speed was unlikely to amount to a good reason within the meaning of CPR 6.15.1 for an alternative method of service since claimants nearly always desire speed and, if permitted on this basis, the alternative method would then become the primary method of service.

[29] Mr Carrington QC argued that Ms Anna Radchenko in her capacity as 'Interested Person' has made no objection to service in her affidavit. While that may be so, she does now raise the issue through her attorney which is an unobjectionable means of doing so, because under the CPR the purpose of affidavits is to state the facts, not the law on which a party relies. The defendant did not respond at all.

[30] The order at paragraph 2 of Chivers J's Order dated 22 March 2018 that "Service shall be effected in a manner that is not contrary to the laws of the Russian Federation" does not progress the matter any further, and does not conflict with the above interpretation because the Hague Service Convention treaty obligations have become a part of the laws of Russia. Chivers J could not be understood by his order to have been authorizing a breach of Treaty obligations. The mere affirmation by Mr Molozhavy that judgment was served on Mr Gitlin by post "in accordance with Russian law" on 19th September 2018 does not satisfy the court that the order has been served in the manner required by the rules where the documents were served by FEDEX. This is confirmed by the Affidavit Verifying Service made by Meurelene Watt-DaSilva showing receipts that FEDEX delivered the Order and supporting documents to Anna Radchenko 125167 Leningradsky Prospect, 62, KB19 Moscow , MC 125167 RU at 12:47 pm and to the defendant in Moscow MC RU 125167 7 903 720-1946. Within the context that permission has been given by the BVI court to serve outside the jurisdiction the service by courier is not, contrary to the assertion by Mr Molozhavy, "in accordance with Russian law". The Hague Service Convention is a part of Russian

law and it does not admit postal service of process from outside Russia directly on Russian residents by post or courier.

CONCLUSION

[31] For the above reasons I discharge the Provisional Charging Order, and dismiss the application to make it final on the basis of either the ground of improper service or the jurisdictional ground. As I am satisfied that the application should be dismissed on either one or both of these preliminary grounds, it is not necessary to decide on the other issues raised.

[32] With respect to the jurisdictional ground, conscious of the fact that this decision may impact a large number of claims I hereby stay my decision. In light of the dissolution of Parliament currently being publically adumbrated, I stay the decision for a period of 120 days to give the Legislature the opportunity during that period to take what remedial steps, if any, it deems necessary. If no such steps have been taken during that period, the decision concerning jurisdiction will immediately come into effect upon the expiration of 120 days from today. The claimant has leave, if necessary, to appeal if so advised.

[33] Costs are to be paid by the claimant to the interested party to be assessed if not agreed.

Hon. Mr Justice K. Neville Adderley
Commercial Court Judge

By the Court

Registrar