EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2019/0003

BETWEEN:

STICHTING ADMINSITRATIEKANTOOR NEMS

Appellant

and

[1] ANNA RADCHENKO
[2] IGOR BORISOVITCH GITLIN

Respondents

Before:

The Hon. Dame Janice M. Pereira	Chief Justice
The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal

Appearances:

Mr. John Carrington, QC with Ms. Pauline Mullings on behalf of the Appellant
Mr. Jerry Samuel on behalf of the First Respondent

2019: March 29.

Commercial Appeal – Jurisdiction of the Supreme Court to grant charging orders – Section 7 of the Eastern Caribbean Supreme Court (Virgin Islands) Act – Service out of the jurisdiction – Service under the Hague Convention – Rules 7.8 and 7.9 of the Civil Procedure Rules 2000

REASONS FOR DECISION

[1] PEREIRA, CJ: On 16th October 2018 the court below granted ex parte, a provisional charging order over 10 shares in Orsford Limited and 50,000 shares in Custom Marine Ventures Ltd., two British Virgin Islands ("BVI") companies said to

be beneficially owned by the second respondent towards enforcement of a money judgment in favour of the appellant ('Nems") against him. The judgment which remained wholly unsatisfied is in the sum of US$3,297,578.89 and Euro $19,807.86 plus interest and costs.

[2] The date fixed for the hearing of the application for a final charging order was 6th December2018. By notice filed on 21st November2018 Ms. Anna Radchenko, the first respondent herein objected to the provisional charging order and the granting of a final charging order under rule 48.10 of the Civil Procedure Rules 2000 ("CPR") on the ground that she, and not the second respondent, is the legal and beneficial owner of Orsford Limited which in turn wholly owns Custom Marine.

[3] At the hearing, counsel for Ms. Radchenko, the interested party, raised two preliminary objections:

(i) that the BVI court has no jurisdiction to grant charging orders and that Part 48 of the CPR are procedural rules only which in essence provide for how the court would exercise the jurisdiction were such given; and

(ii) that she had not been properly served with the provisional charging order in accordance with Russian law.

[4] The learned judge in his judgment delivered 19th December 2018 held at paragraph 9 of his judgment that no statute had been drawn to his attention that gives power to the BVI court to make charging orders. He concluded that "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".

[5] On the question whether the provisional charging order had been properly served, the learned judge ruled that service ought to have been in accordance with the

Hague Service Convention and that service by way of FEDEX did not satisfy the provisions of the Hague Service Convention for service within Russia of foreign process. He accordingly concluded that service was not properly effected on either Ms. Radchenko or the second respondent, the judgment debtor. He so held notwithstanding that Ms. Radchenko had made no reservation in her affidavit through which she sought to intervene, as to being improperly served. This point was raised only at the hearing in counsel's submissions.

[6] The learned judge accordingly dismissed the application to make the charging order final and discharged the provisional charging order. Nems appealed. On hearing the appeal, the Court allowed the appeal and re-instated the provisional charging order. The Court also remitted the application for the final charging order to the court below to be heard on its merits including the question as to the court's satisfaction of proof of service of the provisional charging order pursuant to CPR 48.8(4). What follows are the reasons for allowing the appeal.

Jurisdiction to grant a charging order.

[7] This case highlights the dangers when preliminary objections are sprung upon the court on the day of a hearing rather than providing advance notice to a party and the court. It is a practice which is frowned upon by the court and is to be discouraged in this era when fairness in practice requires a 'cards on the table' approach. Had this opportunity been afforded no doubt the learned judge would have been ably assisted and not fall into error.

[8] The learned judge was correct in holding that the Territory of the Virgin Islands has not enacted its own domestic law conferring on the court jurisdiction to grant charging orders in aid of enforcement proceedings. He was also correct to hold that CPR Part 48 does not confer jurisdiction but merely provides for how the jurisdiction, once conferred, must be exercised. Although the learned judge was referred to section 7(1) of the Eastern Caribbean Supreme Court (Virgin

Islands) Act[1] which is the reception provision for substantive English Law up to 1st January1940, he was not referred to the Judgments Act of England of 1838 and 1840 which were still in effect as of 1st January 1940. We say this because at paragraph 16 of his judgment he said:

> "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".

[9] In England and Wales prior to 1st January1940 there was in force the Judgments Act 1838 and 1840. Section XIV of that Act allowed a judgment creditor to apply for and obtain an order charging 'the Stock, Funds, Annuities, or Shares' of a judgment debtor with the payment of the amount of the judgment, and interests recoverable by the judgment creditor. Section 1 of the Judgments Act, 1840 merely extended the scope of section 14 of the 1838 Act to include "the interest of any judgment debtor, whether in possession, remainder or reversion, and whether vested or contingent, as well as in any such stock, funds, annuities or shares as[are mentioned in section 14 of the 1838 Act] as also in the dividends, interest or annual produce of any such stock, funds, annuities or shares".

[10] The Supreme Court Order which came into effect in all the former Eastern Caribbean colonies of the United Kingdom on 22nd February 1967 was passed pursuant to section 6 of the West Indies Act 1967 of the United Kingdom. This Order was also extended to the remaining colonies of Montserrat and the Virgin Islands. By section 4 of the Supreme Court Order, the Eastern Caribbean Supreme Court was established and section 9 provided for the Court to have "such jurisdiction and powers as may be conferred on it by the Constitution or any other law of the State."

[1] Cap. 80 of the Revised Laws of the British Virgin Islands

[11] The Supreme Court Order was followed by the enactment in the Virgin Islands of The West Indies Associated States Supreme Court (Virgin Islands) Act[2] ("the Supreme Court Act") in 1969. The Supreme Court Act then provided in section 6 that the High Court is vested with all the jurisdiction which was vested in the former Supreme Court by the Supreme Court Act, other laws of the Legislature of the Territory, or any other law for the time being in force in the Territory. The Supreme Court Act then went on to expressly provide in section 7(1) that:

> "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."

[12] It would accordingly follow that the Judgments Acts of 1838 and 1840 of England which gave jurisdiction to a judge of a superior court in England to grant charging orders over shares in which a judgment debtor held an interest in favour of a judgment creditor would have been similarly conferred upon a judge of the High Court of the Virgin Islands (a superior court of record) by virtue of section 7(1) of the Supreme Court Act. The BVI Court therefore has, and has had the jurisdiction, to grant charging orders by virtue not only of the current Supreme Court Act but also its precursor the Supreme Court Act Cap. 76 enacted on 1st January 1940 by virtue of section 22 of that Act.

The service Issue

[13] The issue is whether service by courier delivery was proper service. The starting point for a consideration of this issue is the order of Chivers J which gave permission to serve the claim out of the jurisdiction. The material terms of Chivers J's order in paragraph 2 stated that "service shall be effected in a manner that is not contrary to the laws of the Russian Federation." The second respondent was served with the claim. He has not challenged service and has never participated in the proceedings. The first respondent was served with the provisional charging

[2] Renamed the Eastern Caribbean Supreme Court (Virgin Islands) Act by the West Indies Associated States Supreme Court (Virgin Islands) (Amendment) Act, 1993

order by courier delivery originating from the BVI. No further permission to serve out the provisional charging order would have been required having regard to Rule 7.14 of the CPR which, in essence, provides that an application, order or notice issued, made or given in any proceedings may be served out without the court's permission where it is in proceedings in respect of which permission has been given for service out of the claim.

[14] The question of whether service of the provisional charging order by courier delivery was contrary to the laws of the Russian Federation could only be answered by reference to evidence of Russian Law on this point. It is common ground that no expert evidence was led as to Russian law in order to conclude as a matter of fact, whether or not service by courier delivery was contrary to the laws of the Russian Federation.

[15] Counsel for Nems has asserted that in the absence of a factual challenge by the first respondent as to the content of Russian Law, Nems bore no evidential burden to lead evidence of Russian law on this issue. We respectfully disagree with this contention. With regard to the making of a final charging order, Rule 48.8(4) is in the following terms:

> "At the hearing, if satisfied that the provisional charging order has been served on the judgment debtor the court has power to – …" (emphasis added).

It would appear to us that it is the person who seeks a final charging order bears the evidential burden of providing the evidence to satisfy the judge as to service and not left to be assumed by the lack of objection as to service raised by a judgment debtor or interested person.

[16] We agree that the learned judge erred in concluding that service out could only be in accordance with the Hague Service Convention and then concluding that service was not proper service, in the absence of any expert evidence on Russian Law before him. It appears that the learned judge failed to appreciate that the

modes of service out of a claim, as set out under CPR 7.8, are disjunctive and therefore allows the utilisation of various options. CPR 7.8 is in the following terms:

> "7.8 (1) Subject to the following paragraphs of this rule, and Rule 7.8A if a claim form is
> to be served out of the jurisdiction, (emphasized) 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
> (c) personally by the claimant or the claimant's agent.
>
> (2) Nothing in this Part or in any court order may authorise 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."

[17] CPR 7.9 encapsulates service under the Hague Service Convention. But it bears note that 7.9 (2) expressly states that:

> "the methods of service permitted by this Rule [that is 7.9] are in addition to any method of service permitted under rule 7.8(1)(b) or (c)".

This makes clear that service out by the method provided under the Hague Service Convention is simply one of the methods of service permitted for service out under CPR 7.8. CPR 7.8(1)(b) expressly permits, in respect of service out, and by virtue of CPR 7.14(4) service of a claim, application or notice in proceedings in respect of that claim, "in accordance with the law of the country in which it is to be served" as a separate or another option by which service out may be effected.

[18] This brings us back to the order of Chivers J which provided in terms that "service shall be effected in a manner that is not contrary to the laws of the Russian Federation." Having remitted the application for the final charging order to the court below for consideration on its merits, it will be left for the judge at the hearing of the application to be satisfied as required by CPR 48.8(4) as to whether service was effected "in a manner that is not contrary to the laws of the Russian

Federation". We would add, out of an abundance of caution, that this Court makes no finding on the propriety of service in this case. We said as much at the conclusion of the hearing of the appeal. It is a question to be decided by the trial judge at the hearing of the application.

Conclusion

[19] For the reasons given above, the appeal was allowed and the judge's order set aside. The provisional charging order was reinstated. The application for a final charging order was remitted for hearing by a judge of the court below.

[20] The costs on the appeal and of the hearing of the application for a final charging order shall be borne by the first respondent to be assessed by the court below unless agreed within twenty-one days.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur.
Mario Michel
Justice of Appeal

By the Court

Chief Registrar