



IN THE SUPREME COURT

CL 46/2023

TURKS AND CAICOS ISLANDS

BETWEEN

GAILOR HUNT DAVIS TAYLOR GIBBS PLLC

PLAINTIFF

AND

MATTHEW BOLESKY

DEFENDANT

Before: Registrar Narendra J Lalbeharry

Appearances: Mr. George Missick for the Plaintiff

Hearing Date: 11<sup>th</sup> October 2023

Venue: Virtual

Delivered: 1<sup>st</sup> December 2023



Exparte Summons – Substituted Service – Whether Writ and Statement of Claim may be served on email address and, by publication in a weekly newspaper - Service out of Jurisdiction – Whether Writ and Statement of Claim may be served on an address out of the jurisdiction - Enforcement of Foreign Judgment – Whether a Judgment obtained outside the Jurisdiction may be enforced.

## Cases

1. *Sebastian Holdings Inc. et al v Sarek Holdings Ltd* CL-119/2018
2. *Bremer Oeltransport GmbH v Drewry* [1933] 1 KB 753 and *Grant v Easton* [1833] 13 QBD 302 CA
3. *William v Jones* (1845) 13 M & W 628
4. *The Overseas Judgments (Reciprocal Enforcement) Ordinance Chapter 4.07*
5. *Midtown Acquisitions LP v Essar Global Fund Ltd* [2017] EWHC 519 (Comm),
6. *The Sennar No 2* [1985] 1 WLR 490
7. *Perry v Zissis* [1977] 1 Lloyd's Rep 607
8. *AK Investment CJSC v Kyrgyz Mobil Tel Ltd and Others* [2011] UKPC 7, [2012] 1 All ER (Comm) 319
9. *Vitkovice Horni A Hutni Tezirstvo v. Korner* [1951] A.C. 869, 889, per [1990] 1 Q.B. 391 at 435
10. *Spiliada Maritime Corporation v. Cansulex Ltd.* [1987] A.C. 460.
11. *Ascendency TCI Limited -v- Melva Olaine Williams (2) Tipperary T&C Management Ltd and Anor. -v- Eulon Stubbs; (3) Michael Saunders -v- Magalie Belliard* (CL 101/22; CL 31/23; CL 70/22) [2023] TCASC 72 (31 July 2023)

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## JUDGMENT

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### Background:

1. By Writ and Statement of Claim filed on 6<sup>th</sup> April 2023 the Plaintiff pleaded that Judgment was obtained in the sum of \$941,297.60 against the Defendant in the Wake County Civil Superior Court, North Carolina. The Plaintiff *inter alia* set out various particulars of the said Judgment. The Writ and Statement of Claim pleads the existence of the Judgment of the court in the USA and the relief claimed is the amount of the said Judgment.
2. The Plaintiff filed two (2) interlocutory applications:
  - a. An Ex parte Summons for an Order for Substituted Service pursuant to O. 65 r 4 RSC filed 11<sup>th</sup> August 2023 together with a supporting affidavit of Sheniqua Taylor-Walkin.
  - b. An Ex parte Summons for an Order for service out of Jurisdiction pursuant to O 11 r. RSC filed on the 17<sup>th</sup> of August 2023 with the supporting affidavit of Sheniqua Taylor-Walkin dated 10<sup>th</sup> August 2023.
3. The ex parte Summons for an Order for Substituted Service under Order 65, r 4 sought service of the Writ and Statement of Claim to the Plaintiff's email address and by publication in a weekly newspaper. This application is supported by the affidavit of Sheniqua Taylor-Walkin. The deponent indicated *inter alia* that she believes the Defendant is evading personal service and that publication or email would bring the documents to the attention of the Defendant. She further states that the Plaintiff's US Attorneys have had various communications with the Defendant through the proposed email address.

4. The ex parte Summons for an Order for Service Outside the Jurisdiction pursuant to Order 11, r 1 (a) is supported by the Affidavit of Sheniqua Taylor-Walkin who states that attempts were made to serve the Defendant at his last known address at Detai Villa, North Caicos without success. She further states that the Plaintiff has reason to believe that the Defendant is currently located at “*either P.O Box 651, Carrboro, North Carolina 27510-0651 or 4850 Randall Road, Durham, North Carolina USA*”. No further information or evidence was provided in support of this statement.
5. At the initial hearing of both applications, the Court enquired about whether the Writ and Statement of Claim was being used to enforce a foreign judgment. In addition to oral submissions, Counsel filed written submissions to assist the Court in this matter.

#### **Submissions on Enforcement of a Foreign Judgment**

6. Counsel directed the court to Section 4 of the Overseas Judgment (Reciprocal Enforcement) Ordinance CAP 4.07. He submitted that pursuant to Section 4 the judgment creditor has a window of six (6) years from the date of judgment to apply for its enforcement and that the Plaintiff’s ‘application’ was submitted within this timeframe.
7. He further submitted that Judgments from the courts in the USA where the foreign judgment was granted do not fall within any of the Turks and Caicos schemes of enforcement, as a result, “*the common procedure for the enforcement of such judgments is the commencement of a claim by way of Writ of Summons*”.

8. Counsel referred to Sebastian Holdings Inc. et al v Sarek Holdings Ltd<sup>1</sup> in which the learned Agyemang CJ stated “*Unlike many common law jurisdictions, there is no provision in the Civil Procedure Ordinance CAP 4:01 (or other legislation) regarding the enforcement of foreign judgments and related matters in this jurisdiction*”.
9. Counsel also referred to Bremer Oeltransport GmbH v Drewry<sup>2</sup> and Grant v Easton<sup>3</sup> and submitted that it is implied that every judgment is a contract between the parties to proceedings obliging them to comply with that judgment, therefore the US judgment contained an implied contract obliging the Defendant to pay that sum to the Plaintiff. He referred to The Eider<sup>4</sup> arguing that “*a debtor must seek out his creditor ... which is exactly what the Plaintiff did in this instant scenario*”.
10. Counsel also referred to William v Jones<sup>5</sup>, where Alderson B stated: “*the true principle is that where a court of competent jurisdiction adjudges a sum of money is to be paid, an obligation to pay it is created thereby, and an action of debt may therefore be brought upon such judgment. This is the principle on which actions on foreign judgments are supported*” and submitted that it is well understood that foreign judgment recognition is processed through an originating summons, while enforcement proceeds through a writ of summons.

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<sup>1</sup> CL-119/2018; [2020] TCASC 28 at para. 113.

<sup>2</sup> [1933] 1 KB 753.

<sup>3</sup> [1833] 13 QBD 302.

<sup>4</sup> [1893] P 119.

<sup>5</sup> (1845) 13 M & W 628; (1845) 153 ER 262 at p 265.

11. Counsel closed submissions on this point by submitting that this *“application is for enforcement of rights and status acquired under foreign law which ought not be refused as there is no conflict with the law”*.

### **Analysis on Enforcement of a Foreign Judgment**

12. **The Overseas Judgments (Reciprocal Enforcement) Ordinance CAP 4.07** in its headnote states:

*“An Ordinance to make provision for the enforcement in the Turks and Caicos Islands of Judgments given in overseas countries which accord reciprocal treatment to judgments given in the Islands; for facilitating the enforcement in such countries or Judgments given in the Islands; and for matters connected with those purposes”*.

13. Section 3 provides that only judgments from countries where the Governor is satisfied that substantial reciprocity of treatment will be assured as regards enforcement of judgments, will be recognised. Currently the only such country is the United Kingdom<sup>6</sup>.

14. Section 4 allows for the registration of foreign judgments in the TCI by applying to the Supreme Court. Once the application is granted the foreign judgment will be recognized in the TCI courts which allows for enforcement proceedings to be commenced. This circumvents the need to initiate new action in the TCI under a Writ of Summons.

15. Section 13 provides:

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<sup>6</sup> See OVERSEAS JUDGMENTS (RECIPROCAL ENFORCEMENT) (UNITED KINGDOM) ORDER 2022 (Legal Notice 9 of 2022).

*“No proceedings may be brought by any person in the Islands on a cause of action in respect of which a Judgment has been given in his favour in proceedings between the same parties, or their privies, in a court of an overseas country, **unless that judgment is not enforceable or entitled to recognition in the Islands**”.*

[Emphasis Mine]

16. Currently the only country with reciprocity arrangements with TCI is the United Kingdom. Therefore, the Judgment from the USA is not capable of being registered and by extension recognized by the courts in TCI under the **The Overseas Judgments (Reciprocal Enforcement) Ordinance CAP 4.07**. The Plaintiff was therefore correct to commence an action by Writ and Statement of Claim. The Court will determine what debt if any is owed by the Defendant to the Plaintiff and if the USA judgment (though not capable of registration and recognition) is conclusive evidence of that debt, and if these matters are clearly articulated in the Writ and Statement of Claim.

### **Analysis on the use of an ex parte SUMMONS**

17. In **Ascendency TCI Limited -v- Melva Olaine Williams (2) Tipperary T&C Management Ltd and Anor. -v- Eulon Stubbs; (3) Michael Saunders -v- Magalie Belliard**<sup>7</sup> Gruchot J. observed that the practice in the TCI with respect to bringing exparte interlocutory applications by filing “ex parte summons” is incorrect.

18. He said:

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<sup>7</sup> **(CL 101/22; CL 31/23; CL 70/22) [2023] TCASC 72 (31 July 2023) at para. 21.**

“O.32 r.1 provides “Except as provided by Order 25, rule 7, every application in Chambers not made ex parte must be made by summons.” Note 32/6/26 states that “Rule 1 determines the modes in which applications Chambers may be made, namely, one of three ways, ex parte, or by summons, or by notice under the summons for directions (O.25 r.7).

Note 32/6/5 sets out a list of applications that are made without a summons and includes an application for substituted service of a writ and service out of jurisdiction.”

19. The Plaintiff ought to have made the applications for substituted service and service out of the jurisdiction by letter or any other notice to the court with supporting affidavit.

## ANALYSIS ON SERVICE OUT OF JURISDICTION

20. Counsel in his application for Service out jurisdiction pursuant to Order 11 RSC referred to AK Investment CJSC v Kyrgyz Mobil Tel Ltd and Others<sup>8</sup> where Lord Collins said:

On an application for permission to serve a foreign Defendant (including an additional Defendant to counterclaim) out of the jurisdiction, the Claimant (or counterClaimant) has to satisfy three requirements: *Seaconsar Far East Ltd v Bank Markazi Jomhuri Islami Iran* [1994] 1 AC 438, 453 – 457, [1993] 4 All ER 456, [1993] 3 WLR 756. **First, the Claimant must satisfy the court that in relation to the foreign Defendant there is a serious issue to be tried on the merits, ie a substantial question of fact or law, or both.** The current practice in England is that this is the

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<sup>8</sup> [2011] UKPC 7, [2012] 1 All ER (Comm) 319



same test as for summary judgment, namely whether there is a real (as opposed to a fanciful) prospect of success: eg *Carvill America Inc v Camperdown UK Ltd* [2005] EWCA Civ 645, [2005] 2 Lloyd's Rep 457 at 24. **Second, the Claimant must satisfy the court that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given.** In this context “good arguable case” connotes that one side has a much better argument than the other: see *Canada Trust Co v Stolzenberg (No 2)* [1998] 1 All ER 318, [1998] 1 WLR 547, 555 – 7 per Waller LJ, affd [2002] 1 AC 1; *Bols Distilleries BV v Superior Yacht Services* [2006] UKPC 45, [2007] 1 All ER (Comm) 461, [2007] 1 WLR 12, 26 – 28. **Third, the Claimant must satisfy the court that in all the circumstances the Isle of Man is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.**

[Emphasis Mine]

21. Counsel submitted that the Plaintiff has met the threshold that there is a serious issue to be tried on the merits, there is a good and arguable case and that this court is the appropriate forum to try this case, as the Plaintiff is incorporated in the Turks and Caicos Islands.
  
22. In the courts view the applicant did not provide any detailed evidence to satisfy the three requirements set out above.
  
23. Ord. 11, r. 4(2) of the Civil Rules 2000 TCI provides that leave to serve a defendant out of the jurisdiction shall not be granted *"unless it shall be made sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction"*. This imposes a three-fold burden on a plaintiff seeking

leave. Firstly, he must show that the claim he wishes to pursue is a good arguable claim on the merits. While the court cannot at this stage determine whether the plaintiff, if given leave, will succeed, it must be satisfied that the plaintiff has a good chance of doing so. Secondly, the plaintiff must show a strong probability that the claim falls within the letter and the spirit of the sub-head or sub-heads of Ord. 11, r. 1(1) relied upon. This requirement is treated strictly. In **Mettall Und Rohstoff A.G. v. Donaldson Lufkin & Jenrette Inc. and Another**<sup>9</sup> Slade LJ said: *"It is, furthermore, an established principle that a foreigner resident abroad will not lightly be subjected to what is, to him, a foreign jurisdiction"*. Thirdly, the plaintiff must persuade the court that the TCI is the proper forum in which the case can most suitably be tried in the interests of all the parties and for the ends of justice. This calls for the making of a judgment, the nature of which has been comprehensively reviewed in **Spiliada Maritime Corporation v. Cansulex Ltd.**<sup>10</sup>

24. To assist the court in determining whether an application under Ord. 11, r.1 falls within the ambit of this rule, Ord. 11, r. 4 lays down special rules as to the evidence which must support it. Rule 4(1) provides: "[a]n application for the grant of leave under rule 1(1) must be supported by an affidavit stating – (a) the grounds on which the application is made, (b) that in the deponent's belief the plaintiff has a good cause of action..." Note 11/4/3 in The Supreme Court Practice 1999 under Order 11 rightly stresses the importance of the affidavit by drawing attention to the following points:

"(a) The affidavit should be sufficiently full to show that the plaintiff has a good arguable case for the relief claimed. Drafts of the writ and statement of claim should be exhibited in all but the simplest cases. Copies of the documents pleaded should be exhibited.

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<sup>9</sup> **[1990] 1 Q.B. 391 at 435.**

<sup>10</sup> **[1987] A.C. 460.**

(b) The affidavit must make clear which sub-rule of rule 1 is relied on ..."

25. In respect of Test 1: On the face of the affidavit there is basic information showing that a judgment was issued in a foreign jurisdiction against the Defendant and the said judgement was exhibited. Additionally, the Writ and Statement of Claim alleges facts that the Claim is being brought in order to claim the amount of the judgment in the USA. No other explanation is provided showing that an arguable claim exists.

26. In respect of Test 2: The applicant did not make any submissions nor was there any evidence in the affidavit of Ms. Taylor-Walkin showing the sub heads under Order 11 Rule 1. This takes judicial note of the fact that Order 11 r1 (m) of the Supreme Court Practice 1999 (1) (The White Book) provides that service of a writ out of jurisdiction is permissible with leave if "*(m) the claim is brought to enforce any judgment or arbitral award*". However, this sub-rule (m) does not exist in the Supreme Court, Turks and Caicos Islands Civil Rules 2000. It can therefore be seen that the TCI Civil Rules 2000 does not allow or make specific provision for a Writ for enforcement of any judgment to be served out of jurisdiction. Therefore in addition to the other sub-heads which exist the applicant can apply under Order 11 Rule 1 (c) "that a person out of the jurisdiction is a necessary or proper party thereto" if another specific sub-head does not apply. In the present case the Applicant has not provided any evidence or submissions directing the court to the sub-heads applicable to his case.

27. In respect of Test 3: Counsel submits that Turks and Caicos is the proper jurisdiction because the Plaintiff is a company incorporated in the Turks and Caicos Islands. No further evidence or submissions were made on this point.

28. Accordingly, the applicant has failed to fulfil the requirements of Order 11 r.4. Additionally, there is uncertainty by the deponent as to the exact address or location of the Defendant as both a P.O Box and address was provided. In all these circumstances, leave is refused to serve the Writ and Statement of Claim on the Defendant out of jurisdiction.

## ANALYSIS ON SUBSTITUTED SERVICE

29. Gruchot J. in Ascendency TCI Limited -v- Melva Olaine Williams (2) Tipperary T&C Management Ltd and Anor. -v- Eulon Stubbs; (3) Michael Saunders -v- Magalie Belliard<sup>11</sup> stated:

“The question for the Court in deciding whether to make an order for substituted service is whether it would be practicable to serve the writ in the manner prescribed in the rules. If not then substituted service can be ordered but, if the writ is not likely to come to the attention of the Defendant, nor come to his knowledge then substituted service should not be ordered”.

30. The learned Judge referred to Lord Reading CJ in Porter v Freudenberg<sup>12</sup> who said:

“In order that substituted service may be permitted, it must be clearly shown that the plaintiff is in fact unable to effect personal service and that the writ is likely to reach the defendant or come to his knowledge if the method of substituted service which is asked for by the plaintiff is adopted.”

31. Gruchot J also referred to ‘The White Book’ Note 65/4/16 which states that “*in practice, an order for service by advertisement will not be made save in an*

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<sup>11</sup> (CL 101/22; CL 31/23; CL 70/22) [2023] TCASC 72 (31 July 2023) at para. 30.

<sup>12</sup> [1915] 1 K.B. 857.

*exceptional case where there is good reason to believe that the advertisement will be seen by the defendant”.*

32. Ms. Taylor-Walkin in her affidavit dated 17<sup>th</sup> August 2023 stated that attempts were made to serve the Defendant personally at his last known address, at Datai Villa Whitby North Caicos<sup>13</sup>. She also stated that his former attorney Mr. T Chalmers Misick also attempted to reach out to him without success<sup>14</sup>. Ms. Taylor Walkin states “*that I am instructed further that the Plaintiff’s US attorneys have had various communications with the Defendant through email which the Defendant has acknowledged*”<sup>15</sup>.

33. I am satisfied that the Applicant has shown that attempts were made to effect personal service without success and that that if substituted service to the email address mentioned in Ms. Taylor Walkin’s affidavit is granted the Writ and Statement of Claim is likely to reach the defendant or come to his knowledge<sup>16</sup>. Leave is however refused to publish the Writ and Statement of Claim in a weekly newspaper as no evidence has been supplied proving that if published it is likely to come to the knowledge of the Defendant see Lord Reading CJ in **Porter**.

## **Disposition**

34. The Plaintiff is refused leave to serve the Writ and Statement of Claim on an address outside of the jurisdiction.

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<sup>13</sup> Para. 6.

<sup>14</sup> Para. 7.

<sup>15</sup> Para. 12.

<sup>16</sup> The email address is provided at para. 12 of the said affidavit.

35. The Plaintiff is granted leave for substituted service on the Defendant an email address to be included in the sealed Order

36. The Defendant has 14 days to acknowledge service.

37. Costs of the application be costs in the cause.

1<sup>st</sup> December 2023



**Narendra J. Lalbeharry**  
**Registrar of the Supreme Court**  
**Turks and Caicos Islands**