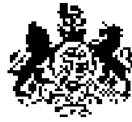

IN THE SUPREME COURT BERMUDA
CIVIL JURISDICTION
(Commercial List)
2008: 142

IN THE MATTER OF THE JUDGMENTS (RECIPROCAL ENFORCEMENT) ACT 1958
AND IN THE MATTER OF JUDGMENTS AGAINST CONSOLIDATED CONTRACTORS INTERNATIONAL COMPANY SAL AND CONSOLIDATED CONTRACTORS (OIL AND GAS) COMPANY SAL OBTAINED IN THE HIGH COURT OF ENGLAND AND WALES DATED 15 JUNE 2007, 5 OCTOBER 2007, 11 FEBRUARY 2008 AND 9 APRIL 2008

BETWEEN:

MUNIB MASRI
Applicant/Judgment Creditor

-v-

CONSOLIDATED CONTRACTORS INTERNATIONAL COMPANY SAL
Respondent/Judgment Debtor

-and-

TEYSEER CONTRACTING COMPANY WLL
Intervenor

RULING (APPLICATION TO SET ASIDE EX PARTE REGISTRATION OF JUDGMENTS)

Date of Hearing: January 28-29, 2009
Date of Ruling: February 11, 2009

Mr. Delroy Duncan, Trott & Duncan,
for the Applicant/Judgment Debtor ("CCIC")
Mr. Jeffrey Elkinson and Mr. Ben Adamson,
Conyers Dill & Pearman, for the Respondent/Judgment Creditor

Introductory

1. On June 13, 2008 on the Judgment Creditor's ex parte application, the following judgments made by Justice Elizabeth Gloster in the Commercial Court in London against the Judgment Debtor were registered by this Court ("the Registration Order"[1]):

   (A) June 15, 2007 (paragraph 3 only-US$ 38,689,761), certified by the English High Court under section 10 of the Administration of Justice Act 1920 on April 18, 2008;

   (B) October 5, 2007 (paragraph 4 only-US$7,413,238), similarly certified;

   (C) February 11, 2008 (paragraph 4 only-US$3,861,645), similarly certified on March 14, 2008.

2. Directions were given for the service abroad of the Originating Summons issued herein on June 11, 2008 and the ex parte Registration Order. Although the Applicant's London solicitors were given notice of these proceedings in June, 2008, they declined to accept service on the Applicant's behalf. The Applicant is incorporated in Greece, and the Respondent was compelled to effect service under the Hague Convention, which could not be effected until October 27, 2008, over four months later. The Applicant's Summons to set aside was accordingly issued on November 25, 2008. Despite having actual notice of the Registration Order for five months, the Applicant also applied on the same date for an extension of time for filing evidence in response beyond the 28 days after service provided for in the Registration Order. This application was granted by me on December 5, 2008 when (a) the Applicant was given until December 24, 2008 to file its evidence in support of the present application, (b) the Respondent was given 14 days thereafter to file its evidence in response and (c) the parties were given seven days to submit convenient dates to the Registrar for a hearing in January after January 7, 2009.

3. On or about December 17, 2008, the Registrar sent a Notice of Hearing to the parties fixing January 28, 2009 as the hearing date. On Thursday January 22, 2009, six days before the hearing of the application to set aside, the Applicant filed a Summons seeking an adjournment of its application until March, and seeking leave to file a response to the Fourth Affidavit of Simon Morgan which was filed late on January 20, 2009. Mr. Elkinson indicated that the Respondent would not seek to rely on the Fourth Affidavit, so the only basis for an adjournment was the Applicant's pending application to admit Leading Counsel which was not submitted to Bar Council until January 19, 2009. I refused the adjournment application.

[1] On the same date I also appointed a Receiver.

4. The hearing proceeded as scheduled and lasted half a day longer than the scheduled one day. The hearing was to some extent prolonged because I was at pains to put my concerns about various aspects of the Applicant's case to Mr. Duncan to ensure that his client's case was fully and fairly understood by the Court. This seemed important not just because the statutory registration regime seemed clearly intended to operate as a summary foreign judgment enforcement mechanism in which the starting point was to assume that, if the *prima facie* requirements for registration were made out, the Court should not lightly set registration aside. But the pre-registration procedural history of an obviously bitter commercial dispute suggested that the Judgment Debtor application might not be meritorious. At the ex parte registration application, Gloster J's December 20, 2007 Judgment appointing an English receiver ([2007] EWHC 3010(Comm)) had been placed before this Court. That judgment revealed that the applicant had been represented by prominent solicitors and leading counsel at trial, had pursued unsuccessful appeals against jurisdiction and liability [2] and had to be restrained by the English Commercial Court from pursuing proceedings abroad designed to render the Judgment Creditor's judgments unenforceable. In the course of describing this procedural history, Gloster J observed :

> "*24. I interrupt the procedural history of this matter to underline the fact that, in the Court of Appeal, Lloyd LJ clearly concluded (as I had done) that the Defendants' failure to pay was not due to any financial inability on their part to do so, but because they had deliberately chosen to ignore their obligations in respect of the interim payment order and costs. In other words, they could pay, but had chosen not to. Indeed, the evidence before the Court of Appeal showed that persons connected with the defendants had said in terms that the Defendants did not intend to pay Mr. Masri. I refer in particular to paragraphs 12, 15-19 and 41-43 of Lloyd LJ's judgment. That remained the evidential position before me on the hearing of the present applications. Accordingly, like the Court of Appeal, I approach these applications on the assumption that the Defendants have the funds available to pay Mr. Masri the sums due to him, but have intentionally chosen not to do so.*"

5. Mr. Duncan, like previous counsel who have appeared elsewhere on behalf of the Applicant, was not in a position to challenge the accuracy of these factual findings.

The grounds of the application

[2] The liability appeal was dismissed by the Court of Appeal because the Judgment Debtor failed to comply with an interim payment order and a costs order. The Judgment Creditor's cross-appeal on quantum succeeded before the English Court of Appeal, which on July 11, 2007 increased the award initially made in his favour. At least two appeals to the House of Lords not now pending were at this juncture still pending.

6. The Applicant's case was forcefully set out in the Applicant's Skeleton Argument which drew the Court's attention, in particular, to the supporting First Affidavit of Jeremy Mash dated December 24, 2008 and the Third Affidavit of Nicole Tovey dated January 23, 2009.

7. Firstly it was conceded that the relevant jurisdictional test to be applied was that prescribed by the governing local statute the Judgments (Reciprocal Enforcement) Act 1958. It was then submitted that (a) no voluntary submission had taken place before the English Court, the only applicable ground relied upon, and (b) the English Court did not in fact possess jurisdiction under its own applicable law (European law-EC Council Regulation 44/2001). On this ground the Court was obliged to set aside the Registration Order. The latter contention was supported primarily by the Declaration of Professor Horatia Muir-Watt, set out at Exhibit "JBM 16" to the First Mash Affidavit. The former contention was supported by paragraphs 34-41 of the First Mash Affidavit.

8. It was common ground that the Applicant had abandoned its jurisdiction appeal to the House of Lords (save as regards a limitation issue which has no relevance to the present application) and accepted that the English courts had jurisdiction over CCIC. This would, on its face, appear to constitute a voluntary submission. However, CCIC contended that its consent was vitiated Mr. Masri's fraud in falsely deposing at the interlocutory jurisdiction phase of the English proceedings to a factual basis for jurisdiction which he admitted at trial did not exist. It was also common ground that section 4(2)(a)(i) of the Act is a deeming provision, so that where a voluntary submission was made, no need to consider whether the English Court actually possessed jurisdiction arises.

9. The crucial element of the jurisdiction point was accordingly essentially the same as the third ground of complaint, the fraud point, which for convenience I will deal with second. It was common ground that if the fraud complaint was made out, as in the case of the jurisdiction point, this Court had no discretion and was bound to set aside the Registration Order.

10. The Applicant submitted that because the English judgments had been procured by fraud, the Registration Order had to be set aside. It was accepted that the relevant judgments themselves were not directly procured by fraud; rather, it was contended, that the trial would not have taken place at all but for the fact that the purportedly voluntary submission was itself procured by fraud. This was the way this somewhat curious point was put in argument, more consistently with the undisputed procedural record. In the First Mash Affidavit, however, it was also asserted that "*absent this false evidence, the English Courts would not have reached the decision they took concerning their jurisdiction over the case and the trial would never have taken place*" (paragraph 52). It was not, however, positively asserted that any specific jurisdiction order was actually procured by

fraud. In essence, a collateral attack on the judgments was made using the fraud argument.

11. The third statutory ground for setting aside was the discretionary appeal ground. It was submitted that because applications to the European Court of Human Rights ("ECtHR") were pending in relation to the English judgments (both liability and jurisdiction) as a result of which the English courts might be directed to reopen the liability appeal, the judgments should be set aside pursuant to section 5(1) (b) of the Act on the grounds that an appeal was pending. This complaint invited the Court to adopt a highly novel interpretation of the term "appeal" in section 5(1) of the Act. This ground was dealt with in the First Mash Affidavit (paragraphs 25-29 and 42-50), supported by reference to the ECtHR applications and the opinions of Lord David Pannick QC and Jonathon Crow QC (on the possible outcome of the ECtHR applications) and the opinion of Richard Siberry QC (on the merits of the dismissed English appeal). The primary ground of the petitions to the ECtHR is that the requirement that CCIC pay an interim payment and security for costs as a condition of appealing (and the dismissal of its appeals for failure to comply with these conditions) contravenes its rights of access to the court in breach of article 6 of the European Convention on Human Rights ("ECHR").

12. The fourth ground of attack was also discretionary. It invited the Court to use the discretionary power under the Rule 12 of the Reciprocal Enforcement of Judgments Rules to set aside registration on the grounds that it was "*not just or convenient*" that the judgment be enforced. It was also contended (without explicit reference to additional statutory support) that if enforcement of the judgments were found to be contrary to the public interest of Bermuda, registration should be set aside. This ground was dealt with in paragraphs 61-72 of the First Mash Affidavit, and relied on the following principal points : (a) the English Court assumed jurisdiction in breach of Articles 22.2, 25 and 24 of the Brussels I Regulation (Professor Michael Stathopoulos and Professor Horatia Muir-Watt); (b) CCIC has applications pending before the ECtHR and will suffer irreparable and serious harm if the judgments are enforced in the interim; (c) irrespective of the outcome of the ECtHR applications, the stifling of CCIC's appeals by the English courts results in it not being just or convenient to allow registration to stand; (d) the outcome of the English judgments is inequitable and the Bermudian Court should not assist the English courts in achieving such an outcome.

13. At first blush, limb (a) could only succeed if the Court accepts the jurisdiction and fraud grounds advanced by the Applicant. If the Respondent/Judgment Creditor's voluntary submission point is accepted (and it can only be plausibly rejected on the grounds of consent being vitiated by fraud), no need to consider the jurisdiction point any further arises as a matter of Bermuda law. This Court cannot simultaneously find that the English Court is deemed to have had jurisdiction and set aside registration on the grounds that it did not. This limb of

ground 4 appears to be wholly redundant, save as a device to obscure, cloud and complicate what is in reality a straightforward case.

14. Limb (b) of ground 4 was conceptually tenable in that assuming the ECtHR applications do not constitute a pending appeal, if this Court considered that there was a real likelihood of the appeals being reopened and/or allowed, this would potentially amount to grounds under rule 12 for either suspending enforcement or perhaps even setting registration aside.

15. Limb (c) is factually frivolous as there is no or no credible evidential support for the notion that the relevant appeals were actually stifled. Limb (d) is legally unsustainable as it is absurd to suggest, in circumstances where no statutory basis for setting aside registration has been made out, that this Court retains the discretion to set aside registration under Rule 12 because it disagrees with the legal, moral or commercial outcome flowing from the judgments embraced by the Registration Order.

16. Overall, the application appeared to be one which should simply be summarily dismissed both because it is wholly unmeritorious and because it is improperly motivated and constitutes an abuse of the process of the Court. However, due to the history of this litigation elsewhere and in deference to the sheer volume of paper which has been deployed in support of the present application (not to mention the elegant style, if not content, of the arguments advanced on the Applicant's behalf), it seems appropriate to deliver a fully reasoned judgment on the merits. It is to be hoped that similar applications in the future in this jurisdiction can, where appropriate, be dealt with in a more summary manner.

Legal findings: the statutory framework and the dominant legislative purpose

Legislative context and purpose

17. While a widely-adhered to multilateral treaty framework backed by implementing national legislation has been in place for some 50 years in relation to arbitration awards, no global equivalent for civil judgments exists. Regional recognition and enforcement of judgments legislation has, more recently, been adopted within the European Community. However, well before the adoption of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, the Administration of Justice Act 1920 (UK) introduced a reciprocal enforcement of judgements regime within Her Majesty's Dominions, creating a special network of judicial cooperation among countries with strong political and legal-cultural ties, streamlining the more cumbersome common law rules for enforcing money judgments. The Foreign Judgments (Reciprocal Enforcement) Act 1933 (UK) made provision for the extension of this regime to truly "foreign" countries as well.

18. The aim of this legislation was to create a statutory mechanism whereby judgments from selected "friendly" overseas jurisdictions could be easily registered and enforced in the same manner as domestic judgments, provided that the overseas judgment creditor passed through the statutory filters which provided limited grounds on which any initial ex parte registration could be set aside. The common law was already hostile to the notion of fully re-trying actions which had been pursued to judgment abroad, whether resulting in monetary or non-monetary foreign judgments. It permitted summary judgment for foreign monetary judgments[3], and the *res judicata* doctrine prohibited the re-litigation of issues which were or ought to have been determined in previous litigation, at home or abroad. In the modern era of globalisation, the need for cross-border judicial cooperation in the sphere of reciprocal enforcement of civil judgments generally is greater than ever before.

19. The 1958 Bermuda Act is generally regarded as giving effect in Bermuda law to the 1920 UK Act. The Act is drafted to apply explicitly to judgments of the "*superior courts of the United Kingdom*" (section 2(1)), although the Act may be (and has been) extended to other Commonwealth countries under section 9. The scope of operation of the 1958 Act, in geopolitical terms, is essentially the same as that contemplated by the UK 1020 Act In the course of the hearing, however, Mr. Adamson (appearing for the Judgment Creditor) helpfully drew the Court's attention to the fact that in some respects the 1958 Act is based not on the 1920 Act alone, as might be expected, but includes some provisions derived from the 1933 UK Act as well. This highlights the need to have careful regard to the actual provisions of the Bermuda statute and not to apply UK case law based on a similar statutory regime in a footloose and fancy free way.

Requirements for registration

20. Registration is expressed to be mandatory if the foreign judgment creditor satisfies the requirements of the Act:

> "***Application by judgment creditor to register judgment in Supreme Court***
> *3 (1) A person, being a judgment creditor under a judgment to which this Act applies, being a judgment given after 14 December 1958, may apply to the Supreme Court at any time within six years after the date of such judgment, or, where there have been proceedings by way of appeal against the judgment, after the date of the last judgment given in those proceedings, to have the judgment registered in the Supreme Court, and on any such application the Supreme Court shall, subject to the proof of the matters required by Rules of Court and to the other provisions of this Act order the judgment to be registered:*

[3] Subject to the exceptions provided in the Protection of Trading Interests Act 1981, which have no relevance to present concerns.

Provided that a judgment shall not be registered if at the date of the application—

(a) it has been wholly satisfied; or

(b) it could not be enforced by execution in the United Kingdom…"

21. Section 3(3) provides that an English judgment once registered is enforceable like a Bermudian judgment, subject to an application to set aside:

> "*(3) Subject to the provisions of this Act with respect to the setting aside of registration,*
>
> *(a) a registered judgment shall, for the purposes of execution, be of the same force and effect; and*
>
> *(b) proceedings may be taken on a registered judgment; and*
>
> *(c) the sum for which a judgment is registered shall carry interest; and*
>
> *(d) the Supreme Court shall have the same control over the execution of a registered judgment;*
>
> *as if the judgment had been a judgment originally given in the Supreme Court and entered therein on the date of registration:*
>
> *Provided that execution shall not issue on such judgment so long as, under this Act and rules made under section 10, it is competent for any party to make an application to have registration set aside, or, where such application is made, until after such application has been finally determined".*

Statutory grounds for setting aside (mandatory jurisdiction and fraud grounds)

22. Two sections of the Act are particularly relevant to applications to set aside. Section 4(1)(a) sets out the grounds on which the Court is obliged to set aside, and the remainder of the section makes other supplementary provisions in relation to these matters:

> "*4 (1) On an application in that behalf duly made by any party against whom a registered judgment may be enforced,* **the registration—**
>
> **(a) shall be set aside if the Supreme Court is satisfied**—
>
> *(i) that the judgment is not a judgment to which this Act applies or was registered in contravention of this Act; or*

(ii) that the courts of the United Kingdom had no jurisdiction in the circumstances of the case*; or*

(iii) that the judgment debtor, being the defendant in the proceedings giving rise to the registered judgment, did not (notwithstanding that process may have been duly served on him in accordance with the law of the United Kingdom) receive notice of those proceedings in sufficient time to enable him to defend the proceedings and did not appear; or

(iv) that the judgment was obtained by fraud*; or*

(v) that the rights under the judgment are not vested in the person by whom the application for registration was made;

(b) may be set aside if the Supreme Court is satisfied that the matter in dispute in the proceedings giving rise to the registered judgment had, previously to the date of such judgment, been the subject of a final and conclusive judgment by a court having jurisdiction in the matter.

(2) For the purposes of this section, the superior courts of the United Kingdom shall, subject to sub-section (3), be deemed to have had jurisdiction—

(a) in the case of a judgment given in an action in personam—

(i) if the judgment debtor, being a defendant in the proceedings giving rise to such judgment, submitted to the jurisdiction of that court by voluntarily appearing in such proceedings otherwise than for the purpose of protecting, or obtaining the release of, property seized, or threatened with seizure in such proceedings or of contesting the jurisdiction of the court*; or*

(ii) if the judgment debtor was a plaintiff in, or counterclaimed in, the proceedings giving rise to such judgment; or

(iii) if the judgment debtor, being a defendant in the proceedings giving rise to such judgment, had, before the

commencement of such proceedings, agreed, in respect of the subject matter thereof, to submit to the jurisdiction of the court giving such judgment or of the courts of the United Kingdom; or

(iv) if the judgment debtor, being a defendant in the proceedings giving rise to such judgment, was at the time when such proceedings were instituted resident in, or being a body corporate had its principal place of business in, the United Kingdom; or

(v) if the judgment debtor, being a defendant in the proceedings giving rise to such judgment, had an office or place of business in the United Kingdom and such proceedings were in respect of a transaction effected through or at such office or place;

(b) in the case of a judgment given in an action of which the subject matter was immovable property or in an action in rem of which the subject matter was movable property, if the property in question was, at the time of the proceedings giving rise to such judgment, situate in the United Kingdom;

(c) in the case of a judgment given in an action other than any of the actions mentioned in paragraph (a) or paragraph (b), if the jurisdiction of the court giving such judgment is recognized by the law of Bermuda.

(3) Notwithstanding subsection (2), the courts of the United Kingdom shall not be deemed to have had jurisdiction—

(a) if the subject of the proceedings was immovable property situated outside the United Kingdom; or

(b) except in the cases mentioned in subparagraphs (i), (ii) and (iii) of paragraph (a) and in paragraph (c) of subsection (2), if the bringing of the proceedings giving rise to a registered judgment was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of the United Kingdom; or

(c) if the judgment debtor, being a defendant in the proceedings giving rise to a registered judgment, was a person who under the rules of public international law was entitled to immunity from the jurisdiction of the courts of the United Kingdom and did not submit to the jurisdiction thereof." [emphasis added]

23. So where the Court finds that the judgments were obtained by fraud or the overseas court lacked jurisdiction, this Court is bound to set registration aside. However, section 4(2) is a deeming provision which sets out a number of circumstances in which the overseas court "*shall…be deemed to have had jurisdiction*". The Judgment Creditor in the present case relied upon the first deeming circumstance, voluntary submission. Where voluntary submission is proved to have taken place, no need to analyse the basis on which the overseas court assumed jurisdiction arises. It is only if the registration cannot be jurisdictionally justified under one of the deeming provisions of section 4(2) that the Court may be required to consider the actual basis on which jurisdiction was founded in the trial court.

Discretionary statutory appeal grounds for setting aside

24. One other statutory provision was central to the present application. This Court has a discretion to set aside registration where an appeal is pending under the following provisions of section 5 of the Act:

"**Powers of Supreme Court where appeal pending or judgment not en-forceable by execution**

5 (1) If on an application to set aside a registration, the applicant satisfies the Supreme Court either that an appeal against the judgment is pending, or that he is entitled and intends to appeal, against such judgment, the Supreme Court may, if it thinks fit, and upon such terms as it may think just, set aside such registration until after the expiration of such period as appears to the Court to be reasonably sufficient to enable the applicant to take the necessary steps to have such appeal disposed of by the competent tribunal.

(2) Where a registration is set aside under subsection (1), or solely for the reason that the judgment was not, at the date of the application for registration thereof, enforceable by execution, the setting aside of such registration shall not operate to prevent a further application to register such judgment when the appeal has been determined or when such judgment becomes enforceable by execution in the United Kingdom, as the case maybe.

> *(3) Where a registration is set aside solely for the reason that the judgment, notwithstanding that it had at the date of the application for registration been partly satisfied, was registered for the whole sum payable thereunder, the Supreme Court shall, on the application of the judgment creditor, order judgment to be registered for the balance remaining payable at that date.*"

25. The crucial question in the present case is not so much whether an appeal is pending, a factual controversy which occasionally arises, but what constitutes an "appeal" for the purposes of section 5 (1) upon which the Applicant relies. Section 1(1) provides:

> "*"appeal" includes any proceeding by way of discharging or setting aside a judgment or an application for a new trial or a stay of execution…*"

26. This non-exhaustive definition clearly encompasses the natural and ordinary meaning of the term "appeal", being seemingly drafted in such a manner as to embrace equivalent procedures in jurisdictions with distinctive legal procedures. This may well be because the definition of appeal was borrowed from section 11(1) of the UK 1933 Act, which was enacted to apply to non-Commonwealth countries as well. In any event, it seems clear that the power to set aside registration on the grounds of a pending appeal is conceptually grounded in the fundamental principle that the overseas judgment is only registrable under section 3(1) in the first instance if it is enforceable by execution *in the UK* (or other applicable Commonwealth jurisdiction). Any pending proceeding in the jurisdiction where the judgment was originally made which aims to either set aside the overseas judgment or stay its execution is potentially "an appeal" for the purposes of section 5(1) of the Bermudian Act. Section 5(1) only permits this Court, in its discretion, to set aside registration for such time as is required "*to enable the applicant to take the necessary steps to have such appeal disposed of* **by the competent tribunal**" (emphasis added).

27. A pending appeal or other application in some other national or international court which is said to possibly lead to a concluded appeal being reopened in the UK courts otherwise than at the instance of the judgment debtor in my judgment is not an "*appeal*" for the purposes of section 5 of the 1958 Bermuda Act because such other court would not be competent to itself to dispose of the appeal as section 5(1) clearly envisages.

<u>Rule 12 as an additional discretionary jurisdictional basis for setting aside</u>

28. Rule 12 of the Judgments (Reciprocal Enforcement) Rules 1976 is also relied upon as a basis for setting aside the Registration Order:

> “**Application to set aside**
>
> *12 The judgment debtor may at any time within the time limited by the order giving leave to register after service on him of the notice of the registration of the judgment apply by summons in chambers to set aside the registration or to suspend execution on the judgment;* **and if the Judge on such application is satisfied that the case comes within one of the cases in which under section 4 of the Act no judgment can be ordered to be registered <u>or</u> that it is not just or convenient that the judgment should be enforced in Bermuda or that there is other sufficient reason** *he may order that registration be set aside or that execution on the judgment be suspended either unconditionally or on such terms as he thinks fit and either altogether or until such time as he directs:*
>
> *Provided that the Judge may allow the application to be made at any time after the expiration of the time herein mentioned.*”
> [emphasis added]

29. Rule 12 on its face (a) provides a procedure for setting aside registration on substantive grounds prescribed by the Act, (b) confers an additional discretionary power of suspending execution of a registered judgment, and (c) provides two additional grounds for setting aside or suspending enforcement: (i) “*just and convenient*”, and (ii) “*other sufficient reason*”. It is not immediately clear whether (c) is intra-vires the Act by purporting to permit the Court to set aside registration on grounds not specified in the Act. This is because the draftsman of the 1958 Act appears to have adopted a “mix and match” approach to defining the scope of the Rules in borrowing from both the Rules made under the 1920 and the narrower rule-defining powers under the 1933 UK Act. This may be demonstrated by a simple comparison of the contrasting rule-making powers in the two UK Acts.

30. Section 9(1) of the UK 1920 Act gives the UK Courts the discretion to register judgments if “*they think it is just and convenient that the judgment should be enforced*”. Section 9 (4) of the 1920 UK Act states that “*Rules of Court shall provide-…(b) for enabling the registering court on application by the judgment debtor to set aside the registration of the judgment on such terms as the court thinks fit.*”[4] Order 71 rule 3 of the English Rules of the Supreme Court 1999 accordingly provide as follows:

> “*Where the Court hearing an application to set aside a judgment registered under the Act of 1920 is satisfied that the judgment falls within any of the cases in which a judgment may not be ordered to be registered under s9 of that Act or that it is not just or convenient that the judgment should be enforced in England or Wales or that there is*

[4] Section 11 simply provides that provision may be made by rules of court to regulate the practice and procedure under the Act.

some other sufficient reason for setting aside the registration, it may order the registration of the judgment to be set aside on such terms as it thinks fit."

31. Rule 12 of the Bermuda Rules are substantially based on an English rule which is based on a rule-making power in the 1920 Act which explicitly permits additional grounds of setting aside to be prescribed by Rules of Court. Moreover, the English rule is made under an Act which makes registration discretionary on broad justice grounds. But Bermuda's Act both makes registration mandatory (as does the UK 1933 Act) and also has a narrower rule-making power that is consistent with a more restrictive approach to setting aside. Section 10(1) of the Bermuda Act (in terms that are materially identical to section 3(1) of the 1933 UK Act) provides as follows:

"*10 (1) Rules for the carrying into operation of this Act shall be made by the Supreme Court and shall provide—*

(a) for the giving of security for costs by persons applying for registration;

(b) for prescribing the matters to be proved on an application for registration and for regulating the mode of proving such matters;

(c) for the serving on the judgment debtor of notice of registration;

(d) for the determination of the period within which an application to have registration set aside may be made and for the extension of such period;

(e) for prescribing the method by which any question arising under this Act regarding the enforceability of such judgment by execution in the United Kingdom, or the interest payable under such judgment, is to be determined;

(f) for prescribing the fees to be paid;

(g) for prescribing any matter which under this Act is required to be prescribed."

32. Our Act, like the UK 1933 Act, creates a rule-making power in respect of "*matters to be proved on an application for registration*" (section 10(1) (b)), but not (as does the UK 1920 Act) in respect of the grounds on which registration may be set aside. Accordingly, paragraph 71/9/1 of the 1999 White Book concisely states as follows (implicitly dealing solely with registration under the 1933 Act[5]): "*The circumstances in which registration may be set aside are set forth in s 4 of the Act of 1933*." This commentary is incomplete because it fails to

[5] This seems an obvious inference since Order 71 rule 9(3) explicitly makes reference to the grounds of setting aside under the 1920 Act, while making provision for additional setting aside grounds.

mention section 5 of the 1933 Act in which the appeal ground is set out in terms substantially the same as those in section 5 of the 1958 Bermudian Act. But the commentary is instructive in confirming that the English rules under an equivalent rule-making power to that contained in section 10(1) of our Act do not purport to add additional grounds of setting aside beyond those specified in the Act itself.

33. Another notable difference between the 1958 Act and the UK 1933 Act on which it is in most respects substantially based is that section 4 (a) of the UK Act contains six mandatory grounds for setting aside including: "*(v) that the enforcement of the judgment would be contrary to the public policy in the country of the registering court*". The Bermuda Act has only five mandatory grounds for setting aside and our section 4(a) omits the public policy ground, which is included neither as a mandatory nor discretionary ground for setting aside registration. This is clear evidence that the drafters of the 1958 Act did not intend the Bermuda Court to be able to set aside registration on public policy grounds.

34. Accordingly, consistently with the provisional view I expressed to the Applicant's counsel on the first day of the hearing, I find that rule 12 cannot properly be construed as amplifying the grounds on which registration may be set aside beyond the scope of those grounds found in the Act itself. It can only properly be construed as empowering the Court when exercising any discretionary power to set aside conferred by the Act to (a) have regard to what is "*just and convenient*", and (b) "*any other sufficient*" matter. In *Bairstowe-v-Queens Moat Houses plc* [1998] 1 All ER 343, the Court of Appeal unanimously held that the judge erred in giving effect to a rule of court which unlawfully purported to modify a statute. Phillips LJ (as he then was) observed (in a case where the rule-making power was contained in a statutory provision which expressly permitted modification of the statute and the issue was who had exercised the power and in what manner):

> "*While I favour a purposive approach to statutory interpretation, I do not consider that this entitles the court to disregard the clear requirement of a statute as to the manner in which powers are to be exercised by delegated legislation.*"[6]

35. I have nevertheless also taken cognisance of the fact that the general rule-making power of the Court under the Supreme Court Act 1905 arguably "*contemplates that rules may, in some circumstances, have the effect of amending or repealing a statute": Bairstowe-v-Queens Moat Houses plc* [1998] 1 All ER 343 (per Pill LJ at page 353c)[7]. This principle may apply in the limitation context where the statute affected does not itself contain a rule-making power and so the general power to make rules to govern practice and procedure under section 62 of the Supreme Court Act 1905 is not restricted by any special procedural regime. But section 62 (3) of the Supreme Court Act 1905 expressly provides that the general

[6] At page 349b.

[7] Citing *Rodriguez v Parker* [1966] 2 All ER 349, [1967] 1 QB 116, a case concerning the impact of Order 20 rule 8 on a limitation defence.

rule-making power under the 1905 Act does not extend to matters dealt with in other statutes containing special rule-making powers:

> "*Nothing in this section shall affect the power conferred by any Act to make general rules for carrying into effect the objects of such Act and the power to make rules of court under this section shall not extend to the matters with respect to which rules or orders may be made by virtue of any such Act.*"

36. Accordingly I rule that rule 12 of the 1976 Rules cannot, to the extent that it purports to have this effect, validly create additional substantive grounds for setting aside registered judgments supplementing those provided for in the 1958 Act. The power to modify the substantive terms of the Act is neither expressly nor impliedly conferred on this Court by the rule-making power contained in section 10 of the Act. Rules may be made to regulate the way in which applications to set aside are to be determined, but not to prescribe the substantive grounds on which such applications are to be determined. According to '*Halsbury's Laws*':

> "*An enabling power will not readily be construed as authorising the repeal or modification of enactments, or the granting of powers of repeal or modification, so that, for example, subordinate legislation is prima facie ultra vires if it is inconsistent with the substantive provisions of the Act by which the enabling power is conferred…The overriding principle in the interpretation of legislation made under powers conferred by statute is that it should be construed in the light of the enabling Act generally, and in particular, so as to be consistent with the substantive provisions, at any rate where it is not authorised to repeal or amend them, and otherwise in conformity with the terms of the enabling power.*"[8]

<u>The applicable test for establishing that the English judgments are liable to be set aside on the grounds that they were obtained by fraud</u>

37. One final point of statutory construction is the legal test the Applicant has to meet for establishing that the Registration Order should be set aside on the grounds that the English judgments were obtained by fraud. Mr. Duncan submitted that the question of whether the judgments were shown to have been "*obtained by fraud*" for the purposes of section 4(1) (a) (iv) of the Act fell to be determined as a matter of Bermuda law and was not the same as simply deciding whether the judgments were liable to be set aside by the English Court.

38. On the facts of the present application it was (a) clear that no application to set aside had been made or was pending before the English Commercial Court, and (b) strongly arguable that the fraud issue relied upon ought to have been raised before the judgments were (i) entered, at the earliest, or (ii) registered for overseas

[8] 4th edition (Reissue), Volume 44(1), paragraphs 1521-1522.

enforcement by the English Court, at the latest. Accordingly, the narrow legal point which arose was whether this Court was bound to set aside registration even if the fraud allegation relied upon could with reasonable diligence have been raised in the original proceedings. The determination of this point will only be operative as a finding if I reject the Judgement Creditor's primary submission that no *prima facie* case of fraud requiring investigation at a full trial of the issue has been raised on the evidence.

39. Mr. Duncan relied on the House of Lords decision in *Owens Bank Ltd.-v-Bracco* [1992] 2 A.C. 443. This case supports the proposition that where a Commonwealth judgment was registered and shown to be liable to be set aside on grounds of an allegation that was admitted to constitute a *prima facie* fraud, section 9(2) (d) of the 1920 Act (the counterpart to our section 4(1) (a) (iv)) requires the enforcing court to order a trial of the fraud issue afresh even if the issue was or could have been canvassed before the overseas court where the judgment was initially obtained. The rationale for this decision was that the 1920 Act had not altered the position which would appertain if a judgment was being enforced at common law in which case any prima facie allegation that a foreign judgment had been obtained by fraud would have to be retried by the local court: *Abouloff-v-Oppenheimer & Co* (1882) 10 Q.B.D. 295 C.A.; *Vadala-v- Lawes* (1890) 25 Q.B.D. 310 C.A. I decline to follow this non-binding decision which I find unpersuasive in our distinguishable statutory context, for the following reasons.

40. Firstly, and most fundamentally, the Applicant's reliance on this case overlooks an important difference between the statutory registration regime under consideration by the House of Lords and that which appertains to the present case. I have already alluded to the distinction between the ample discretion to refuse enforcement on just and convenient grounds under the 1920 Act which was not incorporated into the 1958 Bermudian statute with reference to the rule-making power and the broad discretion conferred by the Rules applicable to applications under the 1920 UK Act as contrasted with the 1933 UK Act. The statutory jurisdiction itself is fundamentally different under the two UK Acts as well.

41. Section 9(1) of the 1920 UK Act defines the statutory jurisdiction to register as follows (emphasis added):

> " *Where a judgment has been obtained in a superior court in any part of His Majesty's dominions outside the United Kingdom to which this Part of this Act extends, the judgment creditor apply to the High Court…to have the judgment registered in the court,* **and on any such application the court <u>may</u>, if in all the circumstances of the case they think it is just and convenient that the judgment should be enforced in the United Kingdom**, *and subject to the provisions of this section, order the judgment to be registered accordingly.*"

42. So registration may be refused on broad discretionary grounds of justice and convenience. In addition to the mandatory grounds for refusing registration which are to be found in the 1933 UK Act and the Bermudian Act, the 1920 Act contains the following additional public policy ground in section 9(2)(f): "*the judgment was in respect of a cause of action which for reasons of public policy or some other similar reason could not have been entertained by the registering court.*" The 1920 UK Act regime is broadly similar to the common law bases for refusing to enforce foreign judgments, which Ground J (as he then was) has described as follows in *Muhl (as Liquidator of Nassau Insurance Company)-v-Ardra Insurance Company Ltd.* [1997] Bda LR 36:

> "*(1) want of jurisdiction in the foreign court, according to the view of the English Law; (2) that the judgment was obtained by fraud; (3) that its enforcement would be contrary to public policy; and (4) that the proceedings in which the judgment was obtained were contrary to Natural Justice (or the English idea of 'substantial justice,' as it was put in the leading case…*"[9]

43. As Lord Bridge explained in his authoritative analysis of the 1920 UK Act in *Owens Bank Ltd.-v-Bracco* [1992] 2 A.C. 443, both the peculiar legislative history of the 1920 UK Act's provisions and the legislative provisions themselves required the approach to proving fraud in the context of impeaching a registered foreign judgment to be approached in a similar manner:

> "*The Act of 1868 made the judgments of superior courts in England, Scotland and Ireland reciprocally registrable on satisfying purely formal requirements, whereupon they became enforceable as if they were judgments of the courts in which they were registered. The Sumner Report points out that the adoption of this principle of strict reciprocity would give to all judgments of courts within the Empire an equal status and currency in all parts of the Empire and that some overseas governments had commented adversely on this principle. The committee accepted the criticism and recommended a much more cautious approach, the reasons for which the report explains in detail. This caution leads to the specific recommendations in paragraph 35 (a) and (b) which were in due course directly implemented by section 9(1) and (2)(a) to (e) of the Act of 1920.*
> *Even without reference to the Sumner Report section 9(2) (d) would have to be construed with reference to the common law as understood in 1920. But the context in which the recommendations which came to be embodied in section 9(2) were made leaves no room for doubt.*"[10]

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[9] Judgment, page 3.
[10] At page 488C-F.

44. The Bermudian counterpart provisions, like those in the 1933 UK Act on which they are based, (a) make registration mandatory (if the statutory prerequisites are met), and (b) do not prohibit registration because the cause of action could not be entertained by the Bermuda court on public policy grounds. It may be something of an oddity that the Bermudian Commonwealth registration regime departs as distinctly from the common law enforcement of foreign judgment regime as does the 1933 UK Act regime (which applies to judgments from both a select number of Commonwealth and "foreign" countries as well). Be that as it may, in my judgment a clear statutory break with the common law was made when the drafters of the 1958 Bermudian Act chose to follow the UK 1933 Act rather than the UK 1920 Act approach. In fact, the Bermuda Act departs even further from the common law position than the 1933 UK Act in explicitly abandoning the common law rule that registration of a foreign judgment which is contrary to local public policy must be set aside.

45. Accordingly, the Applicant has no automatic legal right under section 4(1)(a)(iv) of our Act to have a prima facie case of fraud tried, as part of an application to set aside registration, even if the issue was or could with reasonable diligence been raised before the overseas court.

46. The second ground on which I would decline to follow *Owens Bank Ltd.-v-Bracco* [1992] 2 A.C. 443 is that there is nothing in the language of the strongly pro-enforcement 1958 Act which suggests that, in the context of applications to set aside registration, the Court's inherent jurisdiction to prevent its processes from being abused should be regarded as having been repealed by implication. In the context of a common law enforcement action in the related case of *Owens Bank Ltd.-v-Etoile Commerciale S.A.* [1995] 1 W.L.R. 44, the Judicial Committee of the Privy Council declined to follow the *Bracco* case without formally disapproving the earlier House of Lords decision holding (at 51):

> "*These are interesting and important arguments. Their Lordships do not, however, find it necessary to deal with them, because there is a much shorter answer to this appeal. Every court of justice has an inherent power to prevent misuse of its process, whether by a plaintiff or a defendant: see Hunter v. Chief Constable of the West Midlands Police [1982] A.C. 529, 536 per Lord Diplock. This was the alternative ground on which the Court of Appeal decided in the plaintiffs' favour in House of Spring Gardens Ltd. v. Waite [1991] 1 Q.B. 241.*
>
> *There is nothing in the authorities which precludes a party from obtaining summary judgment or an order striking out a pleading on the grounds of abuse of process where a fraud is alleged. It is axiomatic that where fraud is alleged full particulars should be given. Where allegations of fraud have been made and determined abroad, summary judgment or striking out in subsequent proceedings are appropriate remedies in the absence of plausible evidence disclosing at least a prima facie case of fraud. No*

strict rule can be laid down; in every case the court must decide whether justice requires the further investigation of alleged fraud or requires that the plaintiff, having obtained a foreign judgment, shall no longer be frustrated in enforcing that judgment."

47. The English Court of Appeal has subsequently opined that the doctrine of *res judicata* or issue estoppel can be relied upon in respect of both substantive issues and interlocutory issues which were or ought to have been decided by foreign judgments. In *Desert Sun Loan Corporation-v-Hill* [1996] 2 All ER 847, Evans LJ described what he considered to be the established common law position as follows:

> "*Issue estoppel has a long history, in England as well as other common law countries (see Spencer Bower and Turner The Doctrine of Res Judicata (2nd edn, 1969) p 150), but it is usually thought only to have achieved authoritative recognition in English law by the House of Lords decision in Carl-Zeiss-Stiftung v Rayner & Keeler Ltd (No 2) [1966] 2 All ER 536, [1967] 1 AC 853. It is an off-shoot of what has been called 'cause-of-action estoppel' (see Thoday v Thoday [1964] 1 All ER 341 at 352, [1964] P 181 at 197 per Diplock LJ). In the international context, the principle is based on recognition of the validity of a foreign judgment in respect of the same claim or cause of action as between the same parties: see Owens Bank Ltd v Bracco [1992] 2 All ER 193 at 198, [1992] 2 AC 443 at 484 per Lord Bridge.*
>
> *The principle is that an issue of fact or law which necessarily was concluded in favour of one party in the foreign proceedings cannot be reopened in further proceedings between the same parties here. Dicey and Morris p 467 states as follows:*
>
> > *'For there to be such an issue estoppel, three requirements must be satisfied: first, the judgment of the foreign court must be (a) of a court of competent jurisdiction, (b) final and conclusive and (c) on the merits; secondly, the parties to the English litigation must be the same parties (or their privies) as in the foreign litigation; and, thirdly, the issues raised must be identical. A decision on the issue must have been necessary for the decision of the foreign court and not merely collateral.'*
>
> *The principle extends to issues which were not but which might have been raised in the earlier proceedings. As Spencer Bower and Turner p 148 says, this means that 'questions of considerable difficulty and nicety may arise'. But the rule is also restricted. One restriction is the requirement that the earlier (foreign) judgment which is relied upon in one party's favour must have been 'final' and 'on the merits'. Secondly, particularly in the case of issue estoppel, there are practical reasons why caution must be exercised before the rule is*

applied. This restriction was described by Lord Reid in Carl-Zeiss [1966] 2 All ER 536 at 555, [1967] 1 AC 853 at 918-919:

> *'I can see no reason in principle why we should deny the possibility of issue estoppel based on a foreign judgment, but there appear to me to be at least three reasons for being cautious in any particular case. In the first place, we are not familiar with modes of procedure in many foreign countries, and it may not be easy to be sure that a particular issue has been decided or that its decision was a basis of the foreign judgment and not merely collateral or obiter. Secondly, I have already alluded to the practical difficulties of a defendant in deciding whether even in this country he should incur the trouble and expense of deploying his full case in a trivial case: it might be most unjust to hold that a litigant here should be estopped from putting forward his case because it was impracticable for him to do so in an earlier case of a trivial character abroad with the result that the decision in that case went against him. These two reasons do not apply in the present case. The case for the Stiftung, or on this issue those who purported to represent it, was fought as tenaciously in West Germany as this case has been fought here, and it is not difficult to see what were the grounds on which the West German judgment was based. The third reason for caution, however, does raise a difficult problem with which I must now deal. It is clear that there can be no estoppel of this character unless the former judgment was a final judgment on the merits. But what does that mean in connexion with issue estopped? When we are dealing with cause of action estoppel it means that the merits of the cause of action must be finally disposed of so that the matter cannot be raised again in the foreign country. In this connexion the case of Nouvion v. Freeman ((1889) 15 App Cas 1) is important. There had been in Spain a final judgment in a summary form of procedure; but that was not necessarily the end of the matter because it was possible to reopen the whole question by commencing a different kind of action, so the summary judgment was not res judicata in Spain. I do not find it surprising that the House unanimously refused to give effect in England to that summary judgment.'* ”

48. Evans LJ (with whom Stuart-Smith and Roche LJJ concurred), then made the following legal finding with respect to the novel question of whether issue estoppel could arise with respect to interlocutory procedural orders made in a foreign court:

> “*On balance, and regarding the question entirely as one of principle, I would be prepared to hold that an issue estoppel could arise from an interlocutory judgment of a foreign court on a procedural, ie non-substantive, issue, where the following*

> *conditions were fulfilled: (1) there was express submission of the procedural or jurisdictional issue to the foreign court; (2) the specific issue of fact was raised before and decided by the court; and (3) the need for 'caution' recognised by Lord Reid in Carl-Zeiss is carefully borne in mind. Practical considerations such as whether the issue was or should have been fully ventilated are likely to be especially relevant in relation to procedural, as distinct from substantive, issues and for this reason I would hesitate long before including issues which might have been, but were not in fact raised or decided by the foreign court (cf (2) above). Moreover, as Mr Semken submitted, there is some danger of injustice if an issue estoppel is based, not upon the foreign court's adjudication on a claim or cause of action which is sought to be raised for a second time here, but upon a specific issue which can only be identified within it by a process of 'refining down' or, as he put it, of salami-slicing. As he might have said, Occam's razor can be taken too far.*"

49. Evans LJ went on to explain that where the attempt to re-litigate an issue constituted an abuse of process, no need to rely on issue estoppel arose:

> "*It may be, therefore, that in practice the scope for a plea of issue estoppel arising out of a procedural decision and in relation to non-substantive issues will be very small. At this stage a further consideration becomes relevant. It is well established that apart from issue estoppel the courts have power to prevent any abuse of justice which may be involved in an attempt to litigate matters for a second time. In Owens Bank Ltd v Etoile Commerciale SA [1995] 1 WLR 44 the Judicial Committee of the Privy Council found it unnecessary to decide whether the fraud exception to the recognition of foreign judgments permits the defendant to raise an issue of fraud which has also been determined by the foreign court, because it held that the court has a general power of this kind. Lord Templeman said (at 51):*
>
> *'No strict rule can be laid down; in every case the court must decide whether justice requires the further investigation of alleged fraud or requires that the plaintiff, having obtained a foreign judgement, shall no longer be frustrated in enforcing that judgment.'*
>
> *This was also the second ground of decision in House of Spring Gardens Ltd v Waite [1990] 2 All ER 990 at 1000, [1991] 1 QB 241 at 254; see also Brinks Ltd v Abu-Saleh (No 1) [1995] 4 All ER 65, [1995] 1 WLR 1478.*

> *It appears therefore that reliance on the rules governing issue estoppel is unnecessary and superfluous where such an abuse of justice is established. Conversely, therefore, the cases where issue estoppel will become relevant are those where it cannot be said that there is an abuse of justice. Mr Semken in his thoughtful submission did not go so far as to suggest that, since issue estoppel is said to depend upon fairness and justice, it is difficult to see why it should exist when no injustice exists in raising the issue for a second time. But in my judgment he is right in suggesting that this is or may be a potent factor in deciding whether or not the need for caution should prevail against allowing the plea of issue estoppel in a particular case.*"

50. The above principles are applicable to the enforcement of judgments at common law. This Court must be entitled to have recourse to such common law powers in the context of a legislative reciprocal enforcement regime clearly designed to make enforcement far easier than under the common law. The 1958 Act has not ousted the operation of the general common law and/or equitable rules relating to issue estoppel and the inherent jurisdiction of this Court (all of which rules have a statutory basis in sections 12 and 18 the Supreme Court Act as well) to prevent its processes from being abused. Nor can the Act override the Court's duty to respect the civil fair trial rights of litigants under section 6(8) of the Bermuda Constitution 1968, which like article 6 of the ECHR (on which it is clearly based), includes the right to have one's cases dealt with within a reasonable time. The 1958 Act, which formed part of the "existing laws" when the Constitution was enacted 10 years later, must be construed "*with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution*": Bermuda Constitution Order 1968, section 5(1).

51. This panoply of powers may justify the Court refusing to try a *prima facie* case of fraud which was or ought to have been determined in the overseas court. However, I accept the Applicant's submission that this Court must consider whether there is *prima facie* evidence that the registered judgments were obtained by fraud as a matter of Bermuda law (including Bermuda's conflict rules). However, I will assume English domestic law (as the law governing the fraud claim on the hypothesis that the claim may be brought there) and Bermudian domestic law (as the law governing the fraud claim on the hypothesis that it may be brought here) are the same in this regard, in the absence of evidence to the contrary. Which domestic law rules govern the fraud claim is accordingly a purely academic question in the context of the present facts.

Factual and legal findings: was the purportedly voluntary submission to the jurisdiction vitiated by fraud?

History of the English proceedings

52. The history of the English proceedings leading up to the trial on liability was lucidly summarised by Gloster J in the Liability Judgment as follows:

> "***Procedural History***
>
> *4. The dispute about Mr. Masri's entitlement to receive a share in the revenues of the Concession had rumbled on for many years before he brought the present proceedings in 2004. Initially, in Claim No 2004-124 ("the First Action"), issued on 18 February 2004, he sued the original first defendant, Consolidated Contractors International UK Limited ("CCUK"), and the original second defendant, Consolidated Contractors Group SAL (Holding Company) ("CC Holding"), on the basis that CCUK was a party to the Agreement, or, in the alternative, that CCUK had been an agent for CC Holding who was a party to the Agreement. CCUK and CC Holding both claimed that they were not party to the Agreement. CC Holding also claimed that service of the proceedings upon it had not been properly effected under CPR6.16 (service of claim form on agent of principal who is overseas). Both CCUK and CC Holding applied for summary judgment on the claims against them, by an application notice dated 28 July 2004.*
>
> *5. On 8 October 2004, Mr. Masri issued a second set of proceedings, Claim No 2004-831 ("the Second Action") by which he sued Mr. Khoury, CC Holding, CCIC and CCOG, none of whom were within the jurisdiction of the court. Mr. Masri subsequently (on 16 March 2005) discontinued the First Action against CC Holding.*
>
> *6. The Second Action was served on the defendants to that action out of the jurisdiction. According to an agreed, signed statement of facts and issues ("the Agreed Statement of Facts"), produced by Mr. Masri and certain of the original defendants for the purposes of an appeal to the House of Lords referred to below:*
>
> > *'Mr. Khoury and CCIC are domiciled in Greece. Accordingly, the claim form was served on them in Greece without the permission of the court, purportedly pursuant to Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial proceedings ('the Regulation')*

CC Holding and CCOG are both incorporated in Lebanon, and Mr. Masri obtained ex parte permission to serve them out of the jurisdiction in Lebanon pursuant to CPR 6.20.'

7. After the Second Action was served, the defendants to the Second Action applied for an order declaring that the court had no jurisdiction over them and that the service of the claim form on them out of the jurisdiction should be set aside. By order dated May 2005, Creswell J dismissed the defendants' applications on jurisdictional grounds in the Second Action, and also dismissed CCUK's summary judgment application[11]*. In relation to the jurisdiction applications, he held that:*

i)Mr. Masri had made out a good arguable case that the court had jurisdiction under Article 6(1) of the Regulation in relation to Mr. Khoury and CCIC. As an exception to the general rule that a defendant be sued in the jurisdiction of its domicile, Article 6(1) of the Regulation permitted the Greek defendants to be sued in England since the claim against them was so closely connected to the first claim against an English defendant that it was expedient to hear and determine the claims together to avoid the risk of irreconcilable judgments resulting from separate proceedings. The defendants' contention that Article 6(1) only applied where all the relevant defendants were sued in the same action was rejected.

ii)Mr. Masri had also made out a good arguable case that the place of performance of the obligation in question, under Article 5(1) of the Regulation, was England. The relevant contractual obligation was to make payments to Mr. Masri under the Agreement, the relevant time for determining the place of payment was the time when the contract was made, no mode of payment was prescribed in the Agreement and there was a good arguable case that the default rule – that payment was required to be made at the place where Mr. Masri resided at the time of the contract, i.e. England – applied irrespective of the fact that Mr. Masri was living in Jordan at the time the alleged payments became due.

iii)In the light of his conclusions on CCUK's application for summary judgment, and on the applications by Mr. Khoury and CCIC based on the Regulation, Cresswell J refused the applications of CC Holding and CCOG.

8. Upon Mr. Masri's application, the judge ordered the consolidation of the two actions. The foreign domiciled defendants (with the leave of the

[11] [2005] EWHC 944 (Comm).

Court of Appeal) appealed to the Court of Appeal on the following grounds:

a. Mr. Khoury and CCIC appealed on the grounds that neither of the bases for jurisdiction under the Brussels Regulation relied on, namely Articles 5(1) and 6(1), applied to them;

b. CC Holding and CCOG (both companies incorporated in Lebanon) appealed on the ground that the question of whether England was clearly the appropriate forum for the trial of any claim against them would fall to be reconsidered in the light of success on the appeal by Mr. Khoury and CCIC.

CCUK's application for permission to appeal against the dismissal of its application for summary judgment was refused by Cresswell J, and by the Court of Appeal.

9. On 25 October 2005[12]*, the Court of Appeal (Sir Anthony Clarke MR, Rix and Richards LJJ) dismissed the defendants' appeal on the ground that the court did have jurisdiction over the claims against them under Article 6(1) of the Regulation. The Court of Appeal did not hear oral argument or consider whether there was also jurisdiction under Article 5(1). Permission to appeal that decision was granted by the Appeal Committee of the House of Lords on 24 February 2006. However, the actions were not stayed pending the resolution of the appeal to the House of Lords.*

10. In January 2006, Mr. Masri applied to join the defendants to the Second Action (viz. the foreign domiciled defendants) as defendants to the First Action, to which all the defendants consented, subject to such joinder to the First Action being effective only so as to allow Mr. Masri to claim against the foreign domiciled defendants in the First Action in respect of such claims as had not become time-barred before 13 January 2006. In this respect, the Agreed Statement of Facts stated (at paragraph 29):

> *'The result of this joinder is that the outcome of this appeal will not affect the question of whether or not the claims should have been heard in England, because it is <u>accepted by the defendants that the court does have jurisdiction over the claims against all of the defendants in the First Action</u>. However, the appeal remains potentially relevant for the purposes of limitation, because if the appeal of CCIC and*

[12] EWCA Civ 1436, reported at [2006] 1 WLR 830.

> *Mr. Khoury is successful, the Second Action would be dismissed as against CCIC and Mr. Khoury, and the claim against them would only proceed in respect of any claim that was not time-barred by 13 January 2006 (rather than 8 October 2004, the date of commencement of the Second Action). In the light of the joinder of the defendants to the First Action in January 2006, CC Holding and CCOG indicated on 24 May 2006 that they no longer pursue their appeal to your Lordships' House.' (My emphasis).*

11. *Thus, critically, before the trial on liability, the Defendants positively accepted that the English Court indeed had substantive jurisdiction over the claims against all of the defendants in the First Action.*"

<u>The Applicant's jurisdiction and fraud complaints before the Bermuda Court</u>

53. The jurisdiction issue which was renewed before this Court may be summarised as follows. The Judgment Creditor commenced two actions in the UK which were eventually consolidated. In the first action against CCUK, no jurisdiction issue arose because CCUK was an English company. CCUK sought to dismiss the first action on the grounds that it was not a party to the relevant contract, but its application for summary judgment was refused. In the second action against CCIC, a jurisdictional objection was raised based to a material extent on the argument that CCUK was not a party to the contract the Judgment Creditor was seeking to enforce and that the requisite nexus of the relevant transactions to the UK did not exist. CCUK's summary judgment and CCIC's jurisdiction applications were dismissed by Creswell J on May 17, 2005. He also ordered that the two actions should be consolidated. The Court of Appeal dismissed CCIC's jurisdictional appeal in October 2005, holding that jurisdiction existed under Article 6(1) of the European Regulation. CCUK were refused leave to appeal by both Cresswell J and the Court of Appeal against the refusal of its summary judgment application.

54. On November 24, 2005, CCIC and others applied for leave to appeal from the House of Lords, which was granted in February 2006. But in the interim, the Judgment Creditor applied on January 6 2006 to join the two actions which order was granted by the English Court (on January 13, 2006) with the consent of all defendants including CCUK and CCIC. This agreement constituted a submission to the jurisdiction only in respect of the Judgment Creditor's claims which were not time-barred before January 13, 2006. This submission was reflected in the Agreed Statement of Facts prepared for the trial. It was also reflected in a January 17, 2006 letter written by Herbert Smith (CCIC's then London Solicitors) to the House of Lords, which stated in material part as follows:

> “*As a result (and subject to the terms of the endorsement as set out above) it is now agreed by all parties that the court has jurisdiction over all the defendants. To that extent, the petitioners’ appeal, if allowed to proceed, will not be determinative of whether or not a trial against them takes place in this country…*”

55. The fraud complained is set out in the First Mash Affidavit at paragraphs 51 to 60. The following key allegations are made: (a) in Mr. Masri’s First and Second Witness Statements of September 17, 2004 and February 1, 2005, he stated that he believed that CCUK was a party to the contract; (b) this evidence was rejected by Gloster J at trial and proven to be false; (c) this false evidence was relied upon by Cresswell J and “*absent this false evidence , the English Courts would not have reached the decision they took concerning their jurisdiction over the case and the trial would never have took place*” (paragraph 52). I found it difficult to digest the legal coherence of this complaint on paper, and only Mr. Duncan’s persistent advocacy helped to clarify that the Applicant’s legal case was that (a) the voluntary nature of the submission was vitiated by fraud, and that (b) this pre-trial fraud impeached the validity of the judgments which were entered following trial. As I indicated to counsel at the hearing, it appeared to me that the jurisdictional rulings which led to the consensual joinder and voluntary submission were not based on a positive finding of the truth of the Judgment Creditor’s contested evidence, but merely an interlocutory finding that it was arguably true. The position might be otherwise if jurisdiction was based on an exclusive jurisdiction clause in a contract which was believed to be genuine but was later found to be a forgery.

56. Whether or not a *prima facie* case for impeaching registration of the judgments on the grounds that they were obtained by fraud depends on an analysis of the fraud relied upon and the legal test applicable to setting aside judgments on the grounds of fraud. Both counsel relied on a purely factual analysis. And Mr. Elkinson’s illumination of the relevant facts made it clear that the use of the term fraud to characterise the evidence which was said to be false was wholly misconceived. This is because: (a) the assertion that CCUK was a party was only advanced as one of alternative claims and Cresswell J fully appreciated that the assertion might be rejected at trial; (b) the rejection of the assertion at trial was not based on any express or implied judicial finding that the relevant assertion when advanced at the outset was known to be false; and (c) the rejected assertion was to a significant degree based on undisputed independent evidence, namely that the contract was written on CCUK letterhead, and was not wholly or substantially based on Mr. Masri’s own written or oral evidence.

57. Moreover, as submitted by Jonathon Sumption QC to Creswell J in the course of the hearing: “*the question of who is the contracting party…is a question which depends on the objective construction of the contract. It is not one which depends*

on the subjective intention of the parties involved."[13] In other words, jurisdiction was not founded on the assumption that Mr. Masri's initial assertion that he believed he was contracting with CCUK was true. It was merely founded on the fact that it was arguable that, irrespective of what any individual's subjective intent was, the evidence objectively viewed might support a finding at trial that CCUK was a party. This conclusion finds support in the following observations made by Creswell J in the course of the joint hearing on CCUK 's application for summary judgment and CCIC's jurisdiction application (during submissions by the Judgment Creditor's counsel, Mr. Sumption):

> "*MR. JUSTICE CRESWELL: Of course, it is right to remind ourselves that I am dealing with an application which goes against you to dismiss the claim against CCUK. I am not going to be deciding who the true party is. But in the context of considering the application which you face, I am entitled to look at whatever the parties say [are] the alternative possibilities. Commercially I suppose it is at least possible if you have two businessmen who do not care a hoot about company identities to deal on the basis that the group stands behind this…in practice those companies in the group which are likely to be relevant players in the transaction…*
>
> *Mr. SUMPTION: …Indeed it is substantially what Mr. Masri says in his evidence where he says he dealt effectively with Mr. Sabbagh and Mr. Khoury, two men he had known for many years and in whom he trusted…these businessmen were surely acting on the basis that it should not matter which particular company within the group actually paid or received money in relation to this concession…In my submission, they actually achieved precisely that objective by selecting a convenient contracting party and making the dealings of the rest of the group the measure of that contracting party's rights and obligations. That is a perfectly rational thing for them to have done and what, as a matter of legal analysis, one would infer from the fact that that obligation was assumed on a document of CCUK…*"[14]

58. It is against the background of this argument that on May 17, 2005, Cresswell J made the crucial findings to which Mr. Elkinson referred:

> "*The true construction of the Agreement must, in my opinion, await a trial at which the background knowledge available to the parties will be clearly established. A different conclusion as to the contracting party or parties may result from a trial. I emphasise that this is an interlocutory application….* **I consider that the claimant has a real prospect of success at trial in showing that the Agreement was between Mr. Masri and CCUK because CCUK's name appears at the head of the**

[13] Exhibit "JBM33", page 44.
[14] Ibid, pages 61-62.

document containing the Agreement (and no other company is mentioned by name)..."[15] [emphasis added]

59. This finding formed the basis of the corresponding conclusion that CCIC's application to dismiss on jurisdictional grounds should be refused because Mr. Masri had shown that there was "*a good arguable case that the court has jurisdiction….*" (Judgment, paragraph 77). Creswell J stated that the issues which he felt could not be determined by way of summary judgment included : "*Disputes as to the extent of Mr. Masri's knowledge (if any) as to which CCC Group companies held relevant interests in, or owed relevant obligations in respect of, the Concession…*" (Judgment, paragraph 71(1) (iii)). So the first instance interlocutory decision on jurisdiction was factually grounded on the fact that CCUK letterhead was used for a document said to evidence the contractual participation of CCUK. The Court of Appeal hearing essentially turned on whether Creswell J was wrong in law to conclude that jurisdiction against CCIC could be grounded on the fact that a related dispute against CCUK was being asserted in separate proceedings; in any event, the first instance decision was upheld on appeal.

60. Against this procedural background it is contended that Mr. Masri's own evidence at trial demonstrates that his pre-trial evidence was deliberately false. The following passage in the Liability trial transcript (at pages 64-65) was relied upon by CCIC's counsel :

> "*Q. Right. Now you were then asked about your knowledge of which CCC company was the original contracting company To the concession. Could I show you your evidence about this? It is on Day 3, page 79 line 8. Do you have, at line 8, a question? 'If you read out the full name of the company that holds the interest in the concession…'And then down to line 25: "You accept that?" And then on page 80, line 1*
>
> *Answer: Yes, yes."*
> *A. Yes, sir.*
>
> *Q. Now, the question as formulated did not incorporate a date. What I want to ask you is what date did you first know that the original contracting party on the CCC side was CCIC?*
>
> *A. For a long time, long time. I do not know. It is just because – your Ladyship, as I said before, I dealt with the two gentleman, with Mr. Khoury and Mr. Sabbagh, as they are the CCC. To me it was the CCC company which – I never had any knowledge of the structure of the CCC*

15 Exhibit "JBM6"; Judgment, paragraph 71(4).

group so I would not know anything as CCIC or CC –
I know I signed the thing on CCUK, but I did not know, at the time, really the structure of the CC group of companies. I was not aware.

Q. Yes, it is not so much the structure of the group companies I am asking you about, it is your knowledge of which company within that structure was the original contracting party to the concession.

A. I did not know. It was – to me it was the CCC so far as I am concerned.

Q May I put a more specific question? Did you know that CCIC was the original contracting party as at 6th November 1992?

A. Definitely not." [emphasis added]

61. This passage is substantially consistent with the Judgment Creditor's case as explained by his counsel in argument before Creswell J at the jurisdiction hearing. It is true that it does suggest that Mr. Masri's assertions in his witness statements were inaccurate in that they did not reveal that he had no cogent factual basis for his belief that CCUK was a contracting party, other than the fact that he had signed on CCUK letterhead. He also positively stated in his witness statements that he "believed" CCUK was party for various reasons. Creswell J himself was clearly not impressed with these portions of Mr. Masri's witness statements, because he hypothesised that when the parties were negotiating they might not have cared "a hoot" about specific corporate identities. And Masri's counsel made it clear to Creswell J that this view of what happened was broadly consistent with his client's true case, inviting the judge to accept that CCUK might be a party in reliance on the use of CCUK's letterhead alone. This submission was fortified by the legal submission that the parties' subjective intentions were irrelevant and that who the parties were was a point of law to be inferred by the Court from the facts proven at trial. So the passage relied upon by Mr. Duncan is capable of supporting a finding that Mr. Masri's evidence in his witness statement about his belief as to who was a party was false, but this conclusion does not come close to amounting to an arguable case that this false evidence was both (a) material, and (b) deliberately and dishonestly so, having regard to both the way in which his case was advanced and the way the case was decided by Creswell J.

62. Mr. Elkinson suggested that the best indicator of the fact that this evidence under cross-examination at trial, which is now said to be evidence of fraud, is not

evidence any such thing is the fact that CCIC's counsel[16] did not immediately erupt in outrage and resile from their submission to the jurisdiction before the trial concluded. While football referees and cricket umpires are not supposed to be influenced by the strength of appeals for a penalty or a wicket (as judges ought not to be influenced by counsel passionately advancing a poor point), the absence of any appeal or complaint at all is rarely insignificant. In the present case if Mr. Masri's admission at trial that he really did not know which specific company he was dealing with did constitute evidence that he had procured the jurisdiction orders (and CCIC's voluntary submission) by fraud (a conclusion which is not supported by the evidence in any event), it is difficult to comprehend why CCIC's eminent legal team's reaction to this shocking discovery was delayed until so long after the fact. The alleged fraud was discovered on March 15, 2006, and not complained of until after the judgments were obtained and certified for enforcement abroad in March and April 2008, two years later.

63. Carefully scrutinised and properly analysed, the Applicant's case is based on the bare assertion that because the Judgment Creditor's original case on jurisdiction was rejected at a trial when jurisdiction was not in issue, his earlier evidence was materially false and the judgments subsequently obtained and registered are liable to be set aside on the grounds of fraud. This is the way Gloster J dealt with the issue of whether or not CCUK was a party to the 1992 agreement in the Liability Judgment:

> "72. **In my judgment the suggestion that Mr. Khoury was contracting on behalf of CCUK, an English company with a limited role within CCC, merely because its writing paper was used for the purpose of setting out the terms of the 1992 Agreement, has an air of total unreality about it.** *Although I consider, on the basis of Mr. Brawley's evidence that Mr. Khoury would have had actual authority to contract on CCUK's behalf (and not merely ostensible authority), it was not the legal or beneficial owner of any interest in the Concession and an identification of it as the contracting party would have been wholly inconsistent with the express terms of the 1992 Agreement, as Mr. Aldous submitted, and indeed with the factual matrix which I have set out above.* **Not only was Mr. Masri aware that the entity that held the legal interest in the Concession was CCIC and that it was the contracting party under the PSA, but he had never suggested at any time, prior to serving his proceedings in June 2004, that CCUK, the English company, was in any way involved or liable to him**. *Nor is there any basis for suggesting that Mr. Khoury, in his personal, individual, capacity was a party to the 1992 Agreement. He clearly contracted as an officer, and on behalf of, the relevant CCC entities and there is no*

[16] Charles Aldous QC and Simon Birt, instructed by Herbert Smith, appeared before Creswell J, the Court of Appeal and at trial, joined by a second junior counsel (Ms. Helen Davies) at trial.

reason to suppose that he was assuming any personal liability thereunder.

73. *In my judgment, the correct analysis, given the facts which I have set out above, was that Mr. Khoury, as the controlling shareholder in the CCC group, with Mr. Sabbagh's blessing, had the necessary actual authority to enter into the 1992 Agreement on behalf of whichever one or more company, or companies, within the CCC group was the appropriate corporate entity to agree to grant Mr. Masri an interest in the Concession. It was simply not a matter that concerned Mr. Masri or Mr. Khoury which precise corporate entity was the appropriate corporate entity; as far as they were concerned, Mr. Khoury was agreeing on behalf of "CCC" and that was enough. If the issue about the about the identity of the contracting party or the Assignment had been raised at the meeting, and they had had explained to them that, as became common ground during the trial, the legal title to the interest in the Concession was in CCIC, but that, because of the Assignment, and the fact that no notice of it had been given, the beneficial interest in the Concession was now with CC (Oil & Gas), it is inconceivable that they would have said anything other than "well, in that case, of course, the contract is entered into on behalf of both companies, both the legal and the equitable owners." In my judgment that is preferable to the analysis, as pleaded at paragraph 29 of the Amended Defence, that some term is to be implied that to the effect that CCIC was obliged, in the event that it assigned its interest under the PSA, to procure that the assignee assumed CCIC's obligations under the 1992 Agreement so that the assignee would undertake to pay a share of its own revenue from the Concession to Mr. Masri. The reality is that, at the time of the 1992 Agreement, the interest in the Concession had already been assigned in equity to CC (Oil & Gas). The effect of my conclusion on this issue on the limitation defences will, as I have said, fall to be considered on another occasion.*"[17] [emphasis added]

64. Taking the Applicant's case at its highest, Gloster J infers that Mr. Masri's initial evidence, to the effect that he believed CCUK was a party was untrue. So, even more clearly than was the position when Mr. Masri stated under cross-examination that he did not know what company he was dealing with, Gloster J's Judgment sets out a written finding that he must have known he was dealing with CCIC all along. If his knowledge had indeed been crucial to the jurisdiction decision, and the subsequent voluntary submission, and if this finding did constitute grounds for setting aside the Liability Judgment (and any subsequent

[17] [2006] EWHC (Comm) 1931.

quantum judgments) on the grounds that they were procured by fraud, it is difficult to comprehend why this relief was not immediately sought before the English Court. Courts do not like to be deceived; so the court which actually was deceived would be the most favourable tribunal to deal with such an application on the part of a defendant which is clearly willing to move heaven and earth to try and challenge the judgments concerned.

65. This second delayed response to a grievance which, if genuine, should have led to swift legal action merely confirms what the record of the jurisdictional hearing otherwise makes obvious. At the jurisdictional hearing and at trial, primary reliance was placed as a matter of legal inference on the fact that the contract was written on CCUK letterhead. This must be why it is this point alone (the CCUK letterhead point) that Gloster J, explicitly and somewhat robustly, rejected without any suggestion whatsoever that CCIC had been duped into submitting to the jurisdiction of the English courts by fraud. The jurisdictional orders were made, and the subsequent voluntary submission as well, on the express understanding that CCUK might be found not to be a party at trial. As Mr. Elkinson for the Judgment Creditor rightly pointed out, the record of the English proceedings discloses little more than the typical contest between two competing versions of the relevant facts, with Mr. Masri's evidence on one issue being rejected.

66. It is difficult to comprehend how the mere rejection of Mr. Masri's case against CCUK at trial, when jurisdiction was founded on the mere fact that CCUK *might be* found to be a party, can be said to even arguably vitiate CCIC's submission and/or the subsequent judgments by reason of fraud. The position might have been otherwise if jurisdiction was founded solely on factual assertions by Mr. Masri, assertions which were subsequently proven to be false. Even the liberal use of smoke and mirrors cannot elevate the facts on which the Applicant relies to the level required to support its fraud case.

<u>The legal elements of a prima facie case for setting aside registration on the grounds of fraud</u>

67. At this juncture it may be helpful to recall what Bermudian/English law requires to be proved to support an application to set aside a judgment on the grounds that it has been obtained by fraud. In *Fidelity –v- APP China Ltd.* [2007]Bda LR 35, this Court held that (a) deliberate or reckless dishonesty must be strictly pleaded and proved, and (b) the fraud must relate to an issue which was material to the result. As regards what constitutes fraud, in *Fletcher-v- Royal Automobile Club Ltd*. [2000] 1 BCLC 331, Neuberger J held:

> "*The fraud alleged in the present case is therefore an admittedly inaccurate statement made by or on behalf of RACL allegedly in order to deceive the court into granting the relief which it duly granted. So far as the principles are concerned in relation to*

pleading and establishing this fraud, it seems to me that the following five points apply.

First, the position is no different from any other allegation of allegedly fraudulent misstatement. **What has to be pleaded and established is actual dishonesty or recklessness. Mere negligence or inadvertence is plainly not enough. In other words, the plaintiffs would have to establish that the person responsible for giving the information knew it was wrong or was completely unconcerned as to whether it was right or wrong and took no steps whatever to check;** *it would not be enough to show carelessness…."* [emphasis added]

68. As regards when the Court may exercise its discretion to set aside an order on the grounds that the order was *obtained* by fraud the Judicial Committee of the Privy Council, in *Boodosingh-v-Ramnarace*[2003] UKPC 50, approved the following materiality test:

> "*'Where a party deliberately misleads the court in a material matter, and that deception has probably tipped the scale in his favour (or even, as I think, where it may reasonably have done so), it would be wrong to allow him to retain the judgment as unfairly procured. Finis litium is a desirable object, but it must not be sought by so great a sacrifice of justice which is and must remain the supreme object. Moreover, to allow the victor to keep the spoils so unworthily obtained would be an encouragement to such behaviour, and do even greater harm than the multiplication of trials. In every case it must be a question of degree, weighing one principle against the other. In this case it is clear that the judge and jury were misled on an important matter.'* "[18]

<u>Has Applicant made out a prima facie case of fraud?</u>

69. I find that the Applicant has failed to establish a *prima facie* case that Mr. Masri (a) deliberately and/or recklessly misled the English Court at the summary judgment/jurisdictional hearing before Cresswell J; and/or (b) (in any event) misled the Court on a matter which was material to the interlocutory ruling on jurisdiction and the Applicant's subsequent voluntary submission to the jurisdiction of the English Court.

<u>Conclusion: finding on jurisdiction and fraud grounds for setting aside</u>

70. It follows that neither the jurisdiction nor fraud grounds for setting aside registration have been made out. I decline to order a trial of the fraud issue.

[18] Lord Brown, Judgment, paragraph [19], citing Holroyd Pearce LJ in *Meek-v-Fleming* [1961] 2 QB 366 at 379.

71. Even if I was obliged to find that a *prima facie* case for impugning the Registration Order was made out on the grounds of fraud only apparent to CCIC when the Liability Judgment was delivered, I would find in the alternative that the Applicant could with reasonable diligence have applied to set aside the English judgments before they were certified for registration abroad. I would hold that CCIC (which filed appeals before the English courts and has sought relief from the ECtHR since Gloster J's Liability Judgment was handed down on July 28, 2006, some two years before the judgments were registered in this Court) is either (a) estopped from seeking to raise the fraud allegation at this late stage, or (b) liable to have its allegations struck-out as an abuse of the process of this Court.

Factual and legal findings: should the Court suspend the Registration Order pending the determination of CCIC's ECHR applications under Rule 12 of the Rules?

72. I have already rejected on legal jurisdictional grounds the Applicant's request that the Court set aside registration either (a) under section 5(1) of the Act on the grounds that an appeal is pending, or (b) under rule 12 of the Rules on just and convenient and/or public policy grounds. Rule 12 cannot confer additional grounds for setting aside registration; but in my judgment the rule may be construed as conferring case management powers to be exercised in a manner designed achieve the objects of the 1958 Act. A wide variety of situations may occur where the Court, without fully enquiring into the merits of an application to set aside, might exercise its discretion to postpone registration because it seemed likely that grounds for setting aside registration would in the near future be made out.

73. So, even though the applications to the ECtHR do not constitute appeals for the purposes of section 5(1) of the Act, the legal position must be as follows. If there was a reasonable prospect that within a short time the ECtHR might give a ruling which would result in the Applicant's dismissed appeals against the registered judgments being reconsidered by the English Court, this Court could in its discretion postpone or suspend the Registration Order until the ECtHR applications were determined. However, there is no or no sufficient material before this Court which would justify the exercise of such residual discretionary powers. Indeed, the eminent opinions deployed in support of the Applicant's case on the ECtHR "appeal" point were directed towards establishing the theoretical possibility that the ECtHR might direct the reopening of the appeal, studiously avoiding any assessment of the likelihood of such a direction being made on the facts of CCIC's case.

74. Lord Pannick's Opinion was obtained by CCIC as long ago as July 7, 2008, which illustrates how long they have in reality had to prepare for the present application[19]. His Opinion was supported by Jonathon Crow QC's January 23,

[19] According to paragraph 2, the expert understood that the Opinion might be relied upon in Lebanon "*and possibly other enforcement proceedings, arising out of the judgments of the English courts*."

2009 Opinion, which responded to the Sir Sydney Kentridge QC Opinion of November 27, 2008 and the Addendum to this dated December 11, 2008. I accept Mr. Crow's conclusion (confirming the earlier David Pannick QC Opinion) that the powers of the ECHR "*include the ability to order the UK courts to allow the Appeal against the Trial Judgment in this case to proceed to a hearing, if so requested by the Appellants. Whether the ECtHR would in fact exercise that power is, of course, a matter entirely within its discretion*" (paragraph 32).

75. I agree that if such a direction was given, the English courts would more likely than not comply with the ECtHR direction, whether strictly compelled to or not. However, I also accept Sir Sydney Kentridge QC's general view that the facts of the present case where a judgment debtor has simply refused to make the interim payments and post the security for costs ordered as a condition of appealing are very far removed from the sort of facts which make it likely that the ECtHR will both (a) find that the impugned payment orders were so disproportionate an exercise of judicial discretion as to constitute a substantial impairment of CCIC's right of access to the court under article 6 of ECHR and (b) result in the ECtHR concluding that the only appropriate remedy is for CCIC is for its appeal to be reopened.

76. It appears to be the case that human rights points have been raised with increasing frequency in commercial litigation in England of late[20]. This is because, while Bermuda has had a constitutionally entrenched Bill of Rights since 1968, the UK Human Rights Act (which provides far more limited remedies than Chapter 1 of our own Constitution) was only enacted in 1998. Now ECHR points can be taken before the English courts; in my judgment this makes it less likely that alleged breaches of Convention rights which have been found unmeritorious by the UK courts will be upheld under international treaty law[21]. Even before such relief was available in the UK, however, the ECtHR took a generous view of the scope of the UK Court's "*margin of appreciation*" in regulating access to the appellate courts in relation to litigants with ample means to pay substantial security for costs orders. Sir Sydney Kentridge QC in his Opinion aptly cited the following passage from the ECtHR decision in *Tolstoy Miloslavsky –v-United Kingdom* (1995) 20 E.H.H.R 442:

> "*The Court's task is not to substitute itself for the competent British authorities in determining the most appropriate policy for regulating access to the Court of Appeal in libel cases, nor to assess the facts which led that court to adopt one decision rather than another. The Court's role is to review under the Convention the decision that those authorities have taken in the exercise of their power of appreciation.*"[22]

[20] Frances Gibb, '*Rise in companies using human rights laws to sue',* The Times Online, January 26, 2009.

[21] In present case the Applicant's ECtHR Petition discloses that the article 6 point was argued before the English Court of Appeal and summarily dismissed.

[22] Paragraph 59.

77. What weight should be given to the proposition that the ECtHR will, in the context of international commercial litigation, conclude that ordering a judgment debtor to comply with interim payment and security for costs orders which it is capable of complying with as a condition of pursuing an arguable appeal constituted a breach of article 6 and/or 14 of the ECHR which can only be remedied by directing the English courts to reopen the dismissed appeal? In my judgment the likelihood of this result being achieved by the Applicant is highly fanciful at worst or unrealistically optimistic at best.

78. For these reasons I rule that no sufficient grounds exist for this Court exercising its residual discretion by way of suspending the Registration Order pending the determination of admissibility phase of the Applicant's petitions to the ECtHR.

Conclusion

79. CCIC's application to set aside the Registration Order is dismissed. Unless either party applies to be heard as to costs within 21 days, I would award the costs of the present application to the Judgment Creditor to be taxed if not agreed on an indemnity basis. The present application is demonstrably part of a wider litigation strategy by the Applicant in various parts of the world (including the jurisdiction where the registered judgments were first obtained) to frustrate the Judgment Creditor's legitimate efforts to obtain the fruits of his hard-earned judgments. This Court's view of the motives underlying why this unmeritorious application has been brought cannot ignore the following observations of Gloster J in the English Commercial Court:

> "*Since the date of the liability judgment, the actions of the Defendants have demonstrated in a patently obvious fashion that they propose to take advantage of any opportunity open to them to resist enforcement of the judgments of the English courts, to evade their responsibility to pay Mr. Masri what is due to him, as found by the English courts, and to put every obstacle in his way to prevent him from enforcing judgment against them.*"[23]

Dated this 11th day of February, 2009 ____________________

KAWALEY J

[23] [2007] EWHC 3010 (Comm) at paragraph 82.