IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 206 OF 2018 (IKJ)

BETWEEN:

WILLIAM GAYHART AND DEBRA BUCHANAN
As personal representatives of the estate of Myong-He M. Gayhart (deceased)

Plaintiffs

-v-

JOHN G. SCHANCK

Defendant

IN CHAMBERS

Appearances:	**Ms Kirsten Houghton, Campbells, for the Plaintiffs**
	Mr Tom Wright, Solomon Harris, for the Defendant
Before:	**The Hon. Justice Kawaley**
Heard:	**5 February 2019**
Judgment Delivered:	**7 February 2019**

HEADNOTE

Enforcement of foreign money judgments- application to dismiss proceedings on forum non conveniens grounds- no clear evidence of assets belonging to the defendant within the jurisdiction-whether plaintiffs could establish that enforcement of any judgment they might obtain would not be obviously futile

EX TEMPORE RULING

Introductory

1. In this matter the Plaintiffs on 30th October 2018 issued a Writ of Summons against the Defendant accompanies by a Statement of Claim. The Plaintiffs are personal representatives of the Estate of Mrs Gayhart and the Defendant was married to Mrs Gayhart but divorced from her on 16th July 2015. Following the divorce, various sums were paid by the Defendant to Mrs Gayhart, who sadly died on 31st July 2016, according to the Statement of Claim. After she died, it appears that the Defendant ceased to make payments.

2. The Plaintiffs' case is that sums in excess of $500,000 are owed under orders made in the divorce proceedings. The Plaintiffs accordingly seek to recover those sums by way of enforcing the foreign judgments at common law by way of a summary judgment application.

3. The Defendant initially issued a Summons on 13th December 2018 challenging service of the proceedings on his Florida attorneys. But that matter was not pursued and on 27th December 2018 he issued a Summons seeking the following relief:

> "*1. An Order declaring that the Grand Court of the Cayman Islands has no jurisdiction to try the claim brought against the Defendant, alternatively should not exercise any jurisdiction which it may have;*
>
> *2. An Order that the proceedings herein be struck out on the grounds of forum non-conveniens i.e. the Cayman Islands is not the proper place in which to bring the claim against the Defendant…*"

The evidence distilled

4. The evidence can be summarised or distilled into the following key propositions:

   (1) the Plaintiffs have adduced some evidence that in or about 2016, the Defendant caused certain assets to be transferred to an entity which operates in the Cayman Islands;

   (2) the Defendant has filed evidence disputing that he owns any assets that are currently in the Cayman Islands;

   (3) the Defendant does not go so far as to positively deny transferring assets to the Cayman Islands at *any time*.

Governing legal principles

5. Accordingly, the factual matrix falls within the general ambit of the facts which were considered by me in *Banco International de Costa Rica S.A.-v- Banana International Corporation & Others*, FSD 222 of 2017 (IKJ) (unreported), Judgment dated 23rd April 2018. In that case I adopted the following legal principles which were set out at paragraphs 9-12:

> ***"The relevant legal test***
>
> *9. The first of two cases cited by counsel was the local decision of Jones J in Masri-v-Consolidated Contractors International Limited [2011 (1) CILR 79]. It concerned an application to set aside an ex parte order granting leave under GCR Order 11 rule 1(1) (m) in circumstances where it was accepted that the basic requirements of that gateway were made by an arguable cause of action. At issue was the content and scope of the additional discretionary filter vested in the Court by Order 11 rule 1(4) (2):*
>
> > *"(2) No such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Order."*
>
> *10. Jones J (at pages 90-91) lucidly summarised the relevant legal test as follows:*
>
> > *'13...the purpose of Order 11 rule 1(1) (m) is not simply to allow foreign judgments to be domesticated. Its purpose is to put the judgment creditor in the position of being able to enforce against assets in this jurisdiction or take some other step towards enforcement.*
> >
> > *14... In my judgment, it would be inconsistent with this objective for the court to refuse leave to serve out merely because the judgment creditor is unable to demonstrate that the debtor has an asset, meaning some property having a net present realizable value, against which he could immediately commence enforcement proceedings....In my judgment a*

judgment creditor ...who will almost certainly succeed in obtaining a judgment if he is given leave to serve out, should not be deprived of the opportunity to commence enforcement proceedings or take some other step towards enforcement (such as the appointment of a receiver or th examination of an officer)unless to do so would be obviously futile.'

11. These governing principles on the exercise of the discretion were in part derived from the second main case to which reference was made at the hearing of the present jurisdictional challenge, Fonu-v-Demirel [2007] 1 WLR 2508. This case concerned the English CPR counterpart to GCR Order 11 rule 1(1) (m). The English Court of Appeal (Sir Anthony Clarke MR, at 2516) crucially held as follows:

'27...we accept that the court should not automatically exercise its discretion in favour of permitting service out of the jurisdiction unless it is just to do so, and that it will not ordinarily be just to do so unless there is a real prospect of a legitimate benefit to the claimant from the English proceedings. We see no reason why that benefit should not be indirect or prospective.'"

12. I adopted the above judicial statements as defining the broad parameters of the discretion which falls to be exercised when considering the following question: whether it is proper to grant leave to serve out in respect of a claim to enforce a foreign judgment in the Cayman Islands under GCR Order 11 rule 1(1) (m) as read with rule 1(4) (2)."

Adjudication of jurisdictional challenge

6. In the present case, Mr Wright for the Defendant pointed out that his client had in fact sought to obtain from RBC Dominion Securities Global Limited ("RBC") confirmation that no assets existed in the jurisdiction which belonged to the Defendant. Regrettably from the Defendant's perspective, that request for confirmation has not yet been responded to. Even if it had been, such a response would not have been, for present purposes, a complete one. Because RBC was not asked to confirm that they had never received any assets which emanated from the Defendant.

7. In these circumstances, it seems to me, Ms Houghton was right to submit in her Skeleton Argument that the present case was, as she put it, "*completely indistinguishable*" from *Banco International de Costa Rica S.A.-v- Banana International Corporation.*

8. The Plaintiffs have demonstrated that not only do they have a good arguable case for enforcing the foreign judgments but also that their doing so would not be "*obviously futile*". It is not necessary in circumstances such as these to identify any precise enforcement steps which a judgment creditor may take and Mr Wright did not seek to engage with that somewhat speculative exercise.

Conclusion

9. For these reasons I dismiss the Defendant's jurisdiction Summons and award costs to the Plaintiff in any event, to be taxed if not agreed on the standard basis.

HON. JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT

GRAND COURT · CAYMAN ISLANDS GOVERNMENT · 14/17