19-Feb-10
AJ, QC

IN THE GRAND COURT OF THE CAYMAN ISLANDS

Cause No. 513 of 2008

BETWEEN:

(1) MR MUNIB MASRI

(2) MR LEE MANNING

(in his capacity as Receiver of the Defendant)

Plaintiffs

AND: CONSOLIDATED CONTRACTORS INTERNATIONAL COMPANY SAL

Defendant

Appearances: Mr Anthony Akiwumi of Stuarts Walker Hersant for Mr Munib Masri

Mr Alexander Layton QC, instructed by Kyle Broadhurst of Broadhurst Barristers for Consolidated Contractors International Company SAL

REASONS FOR ORDER

INTRODUCTION

1. This proceeding is a very small part of lengthy and highly contested litigation which has been occupying the English courts at great length over the past five or six years. It is not necessary for present purposes to recite the factual background and procedural history in any detail whatsoever. Suffice it so say that the underlying cause of action arises out of a contract made in 1992 between Munib Masri ("Mr. Masri") and Consolidated Contractors International Company SAL ("CCIC") and a number of related companies which do not feature in this proceeding. The

contract relates to an oil exploration and exploitation concession relating to the Masila oil field in Yeman. The essential principle of the contract is that Mr Masri would be entitled to 10% of certain revenues due to CCIC and liable for 10% of certain costs arising in connection with the concession, which has turned out to be immensely profitable for the parties.

2. CCIC is a company incorporated in Lebanon, which maintains a principal place of business in Athens, Greece. Mr Masri commenced proceedings for breach of contract in the English High Court in 2004. Although CCIC challenged the jurisdiction of the English court, it lost that challenge and thereafter chose to submit and contested the action on its merits. This is an important fact because it leads to the conclusion that, as a matter of Cayman Islands law, the English Court is a court of competent jurisdiction whose judgment is potentially enforceable against CCIC in this jurisdiction. There was a trial on liability issues before Gloster J. which lasted 12 days in March and April 2006. A separate trial of quantum issues took place over two days in November 2006. The result is that four separate judgements have been rendered against CCIC in favour of Mr Masri for a total of approximately US$65 million, which have been referred to as "the English Quantum Judgments". These are final and conclusive judgments of a kind which are capable of being enforced in this jurisdiction by action at common law. The judgments remain substantially, if not wholly, unsatisfied.

3. On 21st October 2008 Tomlinson J., sitting in the English Commercial Court, appointed Mr Lee Manning, a partner of Deloitte & Touche as receiver by way of equitable execution over certain of CCIC's contractual receivables. The effect of this order (referred to as "the English Receivership Order") is to empower Mr Manning to collect these receivables and freeze CCIC's right to receive the money. The appointment of a receiver in this way is a step towards enforcement of the English Quantum Judgments, but it does not constitute execution as such. The property over which Mr Manning is appointed is listed and described in Schedule B to the English Receivership Order. It is relevant for present purposes to note that one of these receivables is a sum due from Baku-Tbilisi-Ceyhan Pipeline Company ("BTC"), which is a company incorporated in the Cayman Islands.

4. On 31st October 2008 Mr Masri issued an originating summons by which he sought a declaratory order that "Mr Manning ... the Receiver of the Defendant as appointed pursuant to [the English Receivership Order] be recognised within the Cayman Islands .... on the same terms and conditions as [the English Receivership Order] and subject to the same Undertakings..." . A declaratory order made on an inter partes originating summons is of course binding only upon the defendant, which in this case is CCIC itself. BTC is not a party to the proceeding and whatever

declaration is made will not be binding upon it. On 18th November 2008 Foster J. made an *ex parte* order, which has been referred to as a "recognition order". It not only declared that "The appointment of the Receiver as receiver of the Defendant pursuant to [the English Receivership Order] is hereby recognised within the Cayman Islands with immediate effect." There followed 26 further paragraphs containing detailed orders and directions which tended to give the impression that Mr Manning was being appointed by the Cayman Court. This impression was reinforced by Mr Manning who misrepresented the effect of the order by telling BTC that "You are required, pursuant to the terms of the Cayman Islands Court Order dated 18 November 2008, to pay any amounts due and/or payable to CCIC under [a specified contract] into the Grand Court of the Cayman Islands." BTC did in fact pay US$750,000 into court where it still remains.

5. CCIC now applies to strike out the originating summons and set aside the "recognition order".

RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

6. It is well established that foreign *in personam* judgments are recognised and enforced by the Grand Court on the basis of what is called "the doctrine of obligation". There is no other basis upon which a foreign judgment can be enforced at common law. The classic formulation of this principle is stated in *Schibsby –v- Westenholz* (1870) L.R. 6 Q.B. 155 as follows –

> "We think that ..... the true principle on which the judgments of foreign tribunals are enforced in England is ..... that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which courts in this country are bound to enforce; and consequently that anything which negatives that duty, or form a legal excuse for not performing it, is a defence to the action."

It was for long thought that this formulation of the doctrine meant that the obligation must be one to pay a definite sum of money, but in *Miller –v- Gianne* [2007] CILR 18 the Chief Justice held that a foreign *in personam* judgment which created a non-monetary obligation could be recognised and enforced if specific performance of it could be ordered. However, no such issue arises, or should arise, in this case because the English Quantum Judgments are money judgments which are prima facie capable of enforcement in this jurisdiction. The English court is regarded, as a matter of Cayman Islands law, as a court of competent jurisdiction because CCIC submitted and contested the actions on their merits. The English Quantum Judgments are also "final and conclusive". The test of finality is that the judgments must be treated as establishing a *res judicata* and I think that it is plainly obvious that they do so. It follows that Mr Masri is entitled to have English Quantum Judgments recognised and enforced in this jurisdiction. They can be enforced because the payment obligation created by these foreign judgments is a cause of action in respect of which this Court can render a domestic money judgment upon which execution can

be levied. However, for some reason which has not been explained, Mr Masri chose not to commence an enforcement action based upon CCIC's obligation to pay approximate US$65 million. Instead, Mr Masri asks the Grand Court to "recognise" the English Receivership Order.

7. In my judgment the English Receivership Order has legal consequences which probably can and should be recognised, but it is not an order which is capable of being enforced in this jurisdiction. The circumstances in which recognition is possible as a matter of English law, and by derivation as a matter of Cayman Islands law, is stated in Dicey, Morris & Collins, *The Conflict of Laws,* 14th Edition at paragraph 30-127 as follows –

8. "Such jurisdiction has been said to exist if there is 'sufficient connection between the defendant and the jurisdiction in which the foreign receiver was appointed to justify recognition of the foreign court's order. When a sufficient connection will exist cannot be definitively stated. However, first, it seems that an appointment by a court in the country where a company is incorporated will be recognised. Secondly, it is also likely that the appointment will be recognised if the defendant submitted to the jurisdiction of the court by whose order the appointment was made, although such a submission by a subsidiary of the defendant company is likely to be regarded as an insufficient basis for such recognition. Thirdly, it is possible (but no higher than that) that an English Court would recognise the order of a foreign court if that order would be recognised by the law of the place where the defendant company was incorporated. Fourthly, there is something to be said for recognising an appointment made by a court in a country where central management and control of the company is exercised, particularly, perhaps, if there is no likelihood of intervention from the courts of its place of incorporation."

9. CCIC is incorporated in Lebanon. I was told that a Lebanese court has appointed an administrator with a general power to act on its behalf. The decision of the Court of Appeal in *Kilderkin Investments Ltd –v- Player* [1984] CILR 63 is authority for the proposition that the Lebanese court's order should be recognised in the sense that the administrator will be recognised as the person entitled to act on behalf of and in the name of CCIC in this jurisdiction. Counsel confirmed to me that he and his instructing attorneys are acting (directly or indirectly) upon the instructions of the administrator and I implicitly recognised that they were entitled to do so. This conclusion is not necessarily inconsistent with the proposition that I should also recognise the English court appointed receiver as being entitled to act on CCIC's behalf for the limited purpose of collecting in specified debts due from third parties with which to satisfy the English Quantum Judgments on the basis that CCIC voluntarily submitted to the jurisdiction. In this regard I think that it would be relevant to know whether the limited effect of the English

Receivership Order is recognised by the law of the place of CCIC's incorporation. In spite of the fact that no evidence of Lebanese law has been put in evidence, I think that the English Receivership Order probably should be recognised as conferring a limited power upon Mr Manning to act in the name of CCIC.

10. However, there is a fundamental and important distinction between the concepts of recognition and enforcement. They do not amount to the same thing. This point is made in Dicey Morris & Collins, *The Conflict of Laws,* 14th Edition, Rule 34 which states – "A judgment of a court of a foreign country (hereinafter referred to as a foreign judgment) has no direct operation in [the Cayman Islands] but may – (1) be enforceable by claim or counterclaim or under statute, or (2) be recognised as a defence to a claim or as conclusive of an issue in a claim." It is plain that, while this Court must recognise every foreign judgment which it enforces, it need not enforce every foreign judgment which it recognises. It can be enforced only if it creates a final and conclusive obligation in respect of which the Grand Court can render a money judgment or an order for specific performance. In my judgment an order appointing a receiver by way of equitable execution does not meet the criteria for enforcement.

11. The nature and effect of the English Receivership Order has been most helpfully analysed by Lawrence Collins L.J. in *Masri –v- CCIC (No.2)* [2009] 2 WLR 621 in which he said at page 637 – "The authorities bear out the proposition, important in this case, that the appointment does not have a proprietary effect. It has effect as an injunction restraining the judgment debtor from receiving any part of the property which it covers, if that property is not already in his possession, but it does not vest property in the receiver. As Lindley LJ said in *Re Sartoris* [1892] 1 Ch. 11: 'it operates as an injunction restraining the defendant from getting in money which the receiver is appointed to receive' ". The receiver is authorised to act on behalf of or in the name of the company for the limited purpose of collecting and, if necessary, suing on the debts specified in the schedule. The dual consequences of recognition are that the Grand Court would be able to give judgment against BTC in an action commenced by the receiver, but would strike out an action commenced by the administrator for want of authority. It follows that payment of the debt owed by BTC (which is treated as property located in Cayman) to the receiver is, as a matter of Cayman Islands law, a good discharge of BTC's obligation to CCIC. In these respects there is no difficulty in principle about recognising the English Receivership Order in the sense of recognising that the receiver is entitled to act in the name of CCIC as against the identified debtor counterparties. (The fact that CCIC is not incorporated in England is a complicating factor in this particular case but, as I have already said, I do not think that it necessarily prevents recognition of

the English Receivership Order). However, I do not see how any order of an English court appointing a receiver by way of equitable execution can be "enforced". Nor, for that matter, do I see how any order of a Lebanese court appointing an administrator can be "enforced".

12. The Grand Court enforces foreign judgments because those judgments impose an obligation which is recognised in this country and leads to judgment here also. The foreign judgment must not only be final and conclusive, but it must create an obligation of a kind which enables the Grand Court to render its own judgment in respect of it. It follows, for example, that a foreign decree of divorce cannot be enforced. It can be recognised, for example as a defence to a charge of bigamy, but the Grand Court has no jurisdiction to issue its own decree, based upon the decree of a foreign court. Similarly, the Grand Court cannot enforce foreign injunctions or orders which are wholly negative in effect, even if they are regarded as final and conclusive. This is one of the reasons why the Grand Court will not enforce a *mareva injunction* or temporary restraining order. The other reason is that such orders are not final and conclusive in that they are liable to be varied and are temporary in effect. The English Receivership Order is unenforceable for the same reasons. First, it does not create obligations on the part of CCIC of a kind which can be enforced. Second, it is not final and conclusive in the sense that it is temporary in effect; it is liable to be varied on the application of the parties; and the exercise by the receiver of his right to seek directions may lead to a variation of the terms of his appointment. As Lawrence Collins LJ observed, the English Receivership Order operates as an injunction as against CCIC. It restrains CCIC from collecting the debt due from BTC and confers that authority upon the receiver. The Grand Court can recognise this result, but no positive obligation arises on the part of CCIC in respect of which the Grand Court can render a judgment or order for specific performance. I have not overlooked the fact that parts of the English Receivership Order are positive in effect. It imposes upon CCIC and its directors and officers a duty to co-operate with the receiver, in particular by producing documents to him and providing him with information, but generalised obligations of this sort cannot be enforced by specific performance, especially if such directions are liable to be varied. Clearly, CCIC's obligation to pay US$65 million to Mr Masri is one which can be enforced by the Grand Court, but it is an obligation which arises under the English Quantum Judgments, not the Receivership Order.

13. The English Receivership Order operates as an injunction, but it also constitutes the appointment of an officer upon whom the English court has conferred powers and imposed duties, which are exercisable independently of Mr Masri on whose application the appointment was made. As in this country, English court appointed receivers are treated as officers of the court. As such, they

are subject to supervision by the court and can seek the protection of the court by applying for directions. One of the consequences of this supervisory jurisdiction is that a receivership order of this kind cannot be regarded as final and conclusive. The Grand Court can recognise that Mr Manning is entitled to do certain things in his capacity as an officer of the English court, but it cannot at the same time "enforce" the English Receivership Order by treating him as if he were an officer of the Cayman court. The Grand Court has no jurisdiction to give directions to Mr Manning *in his capacity as an officer of the English High Court.* In my judgment the attempt to do so in the guise of "recognition" is not only impractical and inconsistent with the basic notions of comity, it is also wrong in principle. Similarly, the Grand Court can recognise that the Lebanese court appointed administrator is entitled to act on behalf of CCIC (for all purposes other than those conferred upon Mr Manning), but this does not lead to the conclusion that that the Grand Court can give directions to the administrator or entertain an action against him for breach of duty.

14. In my judgment the English Receivership Order is not a foreign judgment of a kind which can be "enforced" in this jurisdiction. The *ex parte* order made by Foster J. on 18th November 2008 is not merely a declaration that Mr Manning is entitled to act on behalf of CCIC for certain limited purposes. It goes much further and attempts to "enforce" the English receivership Order by treating Mr Manning as if he were an officer of the Cayman. It purports to give directions to Mr Manning; to impose duties upon him; and to give him the right to apply for directions. In effect, Foster J. was treating the English Receivership Order as if it had direct effect in the Cayman Islands and treated Mr Manning as if he was a receiver appointed by the Grand Court by way of equitable execution in aid of a domestic judgment. In my judgment there is no jurisdiction to make an enforcement order in this way. Having reached this conclusion, I think that it is important to make the point that I am not depriving Mr Masri of a remedy. If he had commenced an enforcement action and obtained a judgment of the Grand Court for US$65 million, then this Court could have appointed its own receiver by way of equitable execution of its own judgment. This could have been done long ago, whether or not the English court had itself appointed any receiver. The terms of a Cayman appointment would no doubt be designed to compliment any pre-existing English appointment (and avoid conflict with the Lebanese appointment), but the Grand Court's jurisdiction to make its own appointment, having rendered judgment for US$65 million on the basis of the English Quantum Judgments, is in no way dependent upon the English court having granted the same or a similar remedy. It is the practice of this Court that its officers must be local resident professionals, but Mr Manning might possibly have been appointed as receiver jointly with a partner of the Cayman Islands firm of Deloitte & Touche, so as to facilitate a

co-operative approach towards the performance of their respective tasks. In other words, it would be possible for Mr Manning to be appointed by both courts. However, it is not possible to treat Mr Manning as an officer of the Grand Court without actually appointing him as such.

ENFORCEMENT ACTIONS

15. Mr Masri's originating summons is not an enforcement action. It is not "a claim brought to enforce any judgment or arbitral award" within the meaning of GCR O.11, r.1(1)(m). The provision encompasses proceedings to enforce foreign arbitral awards (governed by the Foreign Arbitral Awards Enforcement Law), but this aspect of the rule is not relevant for present purposes. An action based upon the judgment of a foreign court will fall within sub-paragraph (m) of the rule 1(1) if the following criteria are met. First, the claim must be brought by a "judgment creditor", by which I mean the beneficiary of any foreign judgment which creates an obligation capable of being enforced as a matter of Cayman Islands law. Mr Masri is a judgment creditor in respect of the English Quantum Judgments. For reasons which I have explained above, it cannot be said that either Mr Masri or Mr Manning are judgment creditors in respect of the English Receivership Order. Second, the claim must be brought against "the judgment debtor", meaning the person named in the foreign judgment as the obligor. CCIC is a judgment debtor. Third, it follows from the first two criteria that the subject matter of the action must be a judgment of a kind which the Grand Court can enforce. The English Quantum Judgments fall into this category, but the Receivership Order does not. Fourth, the relief sought must be "enforcement". This means that the writ must claim a money judgment or order for specific performance or mandatory injunction, which is then capable of being executed. A claim for a declaration that a foreign judgment can be recognised as having some particular effect as against the defendant is not "enforcement" and does not fall with sub-paragraph (m). Mr Masri's originating summons does not meet these criteria, with the result that he was not entitled to an order for leave to serve it out of the jurisdiction.

16. This does not of course lead to the conclusion that Mr Manning is unable to commence proceedings in the Grand Court for the purpose of collecting the receivables due to CCIC. He can sue BTC or any debtor listed in the schedule to the English Receivership Order in the name of CCIC and, for reasons which I have already explained, he can expect the Grand Court to recognise his right to do so. Since BTC is a company incorporated in the Cayman Islands, the question of obtaining leave to serve it out of the jurisdiction does not arise. If Mr Manning were to sue one of the foreign debtors, he might be able to obtain leave to serve process out of the jurisdiction, but this would probably depend upon the contractual arrangements between them

and CCIC. If there is a basis for giving leave to serve out of the jurisdiction it would probably arise under GCR O.11, r.1(1)(d) and the fact that Mr Manning is acting on behalf of CCIC for the purpose of satisfying its liability to Mr Masri would have no bearing upon the issue. The fact that the debtor might challenge Mr Manning's right to act for CCIC does not turn the proceeding into an enforcement action or bring paragraph (m) of the rule into play.

17. Enforcement actions should always be commenced by writ. For reasons explained above, the proper plaintiff was Mr Masri and it would not have been proper to join Mr Manning as a party to the action. The writ should have been endorsed with a statement of claim which sets out, in a clear and concise manner, the facts and matters which need to be proved in order to establish that the English Quantum Judgments are enforceable against CCIC in this jurisdiction. In particular, the statement of claim should set out the basis upon which it is said that the English High Court was a court of competent jurisdiction in accordance with Cayman Islands rules, in this case the fact that CCIC had voluntarily submitted to the jurisdiction and contested the actions on their merits. Having commenced his enforcement action and obtained leave to serve the writ out of the jurisdiction, Mr Masri could have applied for a *mareva injunction* or other interlocutory relief, including the appointment of a receiver for the purpose of preventing the dissipation of CCIC's assets pending judgment. Given the form and content of the English Quantum Judgments, it was inherently unlikely that CCIC could have any defence to a properly formulated enforcement action and Mr Masri could have expected to obtain a summary judgment. It has to be said that a great deal of time, effort and money has been wasted by his failure to proceed in the proper and usual manner.

18. If Mr Masri had commenced an enforcement action, there would have been no scope for arguing about the applicability of GCR O.11, r.1(1)(m). The only question would be whether it was a proper case in which to exercise the Court's discretion to grant leave. At one time it may have been thought that the Grand Court should not exercise is discretion to allow service of an enforcement action out of the jurisdiction unless there was evidence tending to show that the foreign judgment debtor had assets within the jurisdiction. However, any such argument has been put to rest by the decision of the English Court of Appeal in *Tasarruf Mevduati Sigorta Fonu –v- Demirel* [2007] EWCA Civ *799* in which it was held that CPR r.6.20(9) – the equivalent of GCR O.11, r.1(1)(m) – was to be given its ordinary and natural meaning and that there was no reason to imply into it a requirement that there must be assets within the jurisdiction in order to justify the Court exercising its power to allow service out of the jurisdiction on a foreign judgment debtor. It is sufficient for the judgment creditor to demonstrate that he has a good arguable case and that

the action is not wholly speculative in that there is a real prospect that a Cayman judgment will be of some benefit to him, albeit only indirect or prospective. The presence within the jurisdiction of a debtor, whose debt might be attached by means of a garnishee order was sufficient to confer upon Mr Masri a real prospect of benefit.

19. I should mention one other point raised on behalf of CCIC as a result of some novel and imaginative research done by junior counsel. It is said that no action may be taken on a foreign judgment in this jurisdiction without first registering it pursuant to the Jamaican Judgments (Foreign) Reciprocal Enforcement Act, 1936. If true, this would overturn what has been understood to be the law of this country and the established practice of this Court for almost 50 years. Those Jamaican statutes which applied in this country (and in some cases continue to apply) when the Cayman Islands ceased to be dependency of Jamaica are listed in Volume I of *The Law of the Cayman Islands* prepared in accordance with the Revised Edition (Laws of the Cayman Islands)(Amendment) Law 1963. Suffice it to say that the Judgments (Foreign) Reciprocal Enforcement Act, 1936 is not one of them.

THE ORIGINATING SUMMONS

20. Instead of commencing an enforcement action by writ, Mr Masri issued two summonses simultaneously on 31st October 2008 and initiated a chain of technical arguments, all of which were avoidable. He issued an *inter partes* originating summons in expedited form (GCR Form 3) and an *ex parte* interlocutory summons. The relief sought in these two summonses was originally identical and both were listed for hearing on 18th November 2008. Apart from the fact that it must be irregular to issue two identical summonses seeking exactly the same relief, the originating summons was irregular in two other respects.

21. First, the originating summons should not have been heard *ex parte.* It is actually drafted as an *inter partes* originating summons in expedited form. Whether or not there was any justification for granting interlocutory relief on an *ex parte* basis, the trial of the originating summons should not have taken place until after CCIC had been properly served. In fact, by issuing two identical summonses, Mr Masri contrived to achieve what amounted to a trial of the action without any notice to the defendant, which was fundamentally irregular. Having regard to the fact that the English Receivership Order was itself made as a result of an *inter partes* hearing in which CCIC is said to have been represented by leading counsel, it is difficult to see how Mr Masri could justify seeking interlocutory relief on an *ex parte* basis, let alone a final order (albeit one which is capable of being set aside).

22. Second, GCR O.7, r.3 states that every originating summons *must* include a statement of the questions on which the plaintiff seeks the determination or direction of the Court or, as the case may be, a concise statement of the relief or remedy claimed in the proceedings with sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claims that remedy or relief. This rule was ignored. The originating summons seeks only (1) a declaratory order that the receiver appointed by the English Court be recognised in the Cayman Islands; (2) a direction that any sums payable to the receiver pursuant to the Grand Court's declaratory order be paid into court or a local bank account; (3) "such further Order and/or Relief as Counsel may advise and that this Honourable Court may deem just and appropriate"; and (4) an order for indemnity costs against CCIC. The reasonable inference to be drawn from this pleading (when read with the English Receivership Order annexed to it) is that the question to be determined is whether or not the power conferred upon Mr Manning by the English Court to act on behalf of CCIC for the purpose of collecting receivables due from the specified debtors should be recognised in the Cayman Islands as against CCIC. The relief sought is stated to be a declaration to that effect. In fact, the relief actually granted went way beyond what was pleaded and Mr Manning treated the order as if it were an order against BTC requiring that it pay money into court, which it was not. In addition to making the declaratory order, Foster J. went on to make a series of other directions and orders as if Mr Manning was being appointed by the Grand Court. Clearly, Foster J. could have appointed Mr Manning as a receiver by way of equitable execution on the back of a Cayman judgment for US$65 million, but the originating summons did not spell out this cause of action or seek this relief. Even if Mr Masri was entitled to embark upon execution without first obtaining a judgment, he was certainly not entitled to do so without pleading his cause of action and disclosing the relief sought in the originating summons as required by GCR O.7, r.3.

JOINDER OF MR MANNING AS A PARTY

23. Mr Masri's interlocutory summons was amended to seek an order "that Mr Lee Manning as Receiver of Consolidated Contractors International Company SAL be joined as a Plaintiff to these Proceedings pursuant to Grand Court Rules Order 15, r.6(2)(b)", but there is nothing in the Court record which explains why this application was made or on what basis the Court made its order that he be joined. There are two limbs to Rule 6(2)(b). Paragraph 67 of counsel's skeleton argument refers only to paragraph (i) which provides that "any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated

upon". However, the skeleton argument does not address why he ought to have been joined or why his presence as a party was in any way necessary for the court to determine the pleaded issue, which is whether or not his powers as the English court appointed receiver should be recognised. The skeleton does not contain any argument on this point at all.

24. Mr Manning also swore an affidavit in support of this application. He recited the fact of his appointment by the English court and said that the connection with the Cayman Islands is that one of the receivables over which he is appointed receiver is due from BTC, a company incorporated in the Cayman Islands. The bulk of this affidavit comprises evidence about his professional experience and the resources available to him as a partner of Deloitte & Touche LLP. It appears that this affidavit is directed towards establishing that Mr Manning is a fit and proper person to be *appointed* as a receiver. It contains no evidence addressing why he ought to be joined or why his presence as a party is in any way necessary to enable the Court to adjudicate the issue of his *recognition.*

25. If Mr Manning's joinder was necessary, one would have expected the originating summons to have been amended in some way. In fact no amendment was made at all apart from adding Mr Manning's name into the title of the proceeding. A consequential amendment made clear that the relief was being sought only by "the First Plaintiff", that is to say Mr Masri. In other words, Mr Manning was not joined for the purpose of asserting any cause of action or seeking any relief against the defendant. It follows that the only possible effect of joining Mr Manning as a party is that he would be bound by whatever order was made by the court and this was presumably the only reason for making the application. However, it seems to me that Mr Manning would have been bound by the result in any event. He is the subject-matter of the proceedings in the sense that the pleaded issue is whether and if so, to what extent, the powers conferred upon him by the English Court can be recognised in the Cayman Islands. By voluntarily participating in the proceeding and giving undertakings to the Court, Mr Manning would have been bound by whatever order was made, whether or not he was joined as a party. It seems to me that Foster J. must have made the order joining him as a party simply for the avoidance of any doubt that he would be bound. There is no jurisdiction to join Mr Manning as a mechanism for "enforcing" the English Receivership Order. Joinder cannot be used as a mechanism for treating a foreign receiver as if he had been appointed by the Grand Court, which it could only do in aid of its own judgment.

26. A number of consequences flow from the conclusion that Mr Manning's joinder was, at best, unnecessary. First, in substance it makes no difference whether Mr Manning was joined as a

plaintiff or defendant. The normal practice is that when a party is added for the sole purpose of making him bound by the whatever judgment or order is rendered, he should be joined as a defendant. Whilst I am inclined to the view that it was irregular for Mr Manning to be joined as a plaintiff, it is an irregularity which has, or should have, no practical consequence. Second, the order by which Mr Manning was joined as a party took effect from the date upon which it was made, namely the 18th November 2008. The subsequent amendment of the originating summons, which was not done until 8th December 2008, is merely a consequential formality. Foster J. did not make any order permitting or requiring the originating summons to be amended, because it was unnecessary for him to do so. The joinder order had the result (to the extent that it is not merely declaratory) that Mr Manning would be bound by the outcome of the proceedings and any further directions which might be made, whether or not the originating summons was subsequently amended or served on CCIC. Third, when the purpose and effect of Mr Manning's joinder is properly understood, it becomes clear that paragraph 15 of Foster J.'s order does not contain any error which needs to be corrected pursuant to the "slip rule". It seems to me that he intended to give leave for the originating summons issued on 31st October 2009 to be served out of the jurisdiction. Whether or not it had been amended to reflect Mr Manning's joinder was irrelevant, because the amendment is nothing more than a consequential formality which has no bearing upon Mr Masri's cause of action or the relief sought against CCIC.

EXPIRY AND SERVICE OF THE ORIGINATING SUMMONS

27. The date upon which the amendment of a pleading takes effect depends upon its purpose and effect. As I have already observed, the purpose of joining Mr Manning as a party is not apparent from the originating summons itself. Nor is it stated or explained in any affidavit or skeleton argument. It is well established that a receiver *appointed* by the Grand Court by way of equitable execution is an officer of the court. As such, he is entitled to make application to the court for directions and is bound by whatever directions are given to him. He does not need to be made a party to the action for this purpose. However, the mere fact of recognising that a foreign appointed receiver, liquidator or trustee has authority to act in the Cayman Islands on behalf of a foreign company or in respect of its property cannot, by itself, convert the foreign appointee into an officer of the Cayman court. As a result of Mr Masri's failure to commence an enforcement action based upon English Quantum Judgments and the improper attempt to "enforce" the English Receivership Order, Mr Manning's position was inherently ambiguous. The originating summons sought an order declaring that the powers conferred upon him by the English court are entitled to be recognised in this jurisdiction. However, Foster J's order of 18th November 2008

goes much further. It contains a series of directions which treat Mr Manning as if he had been appointed by and become an officer of the Cayman court. Joining him as a party may have been done in an attempt to clarify this inherent ambiguity or in an attempt to confer upon him a right to make application for directions as if he were an officer of the Cayman court, which he is not.

28. In these circumstances I do not think that it is particularly helpful to analyse the affect of amendments made to pleadings for the purpose of changing the way in which a party seeks to puts its case, whether or not the change involves the assertion of new causes of action against existing parties or added parties. The principle that an amendment of a pleading relates back and takes effect from the original date of the pleading (*Sneade –v- Wotherton Barytes and Lead Mining Company Limited* [1904] 1 K.B. 295) so long as the amendment concerned does not involve the addition of a new party or the introduction of a new cause of action (*Liff –v- Preasley* [1980] 1 WLR 781) simply has no application to the circumstances of this case.

29. The fact that the Court decided to treat Mr Manning as a party with effect from the 18th November 2008 had no bearing upon the issue pleaded or the relief sought by the originating summons. In my judgment the fact that the originating summons was amended to reflect Mr Manning's joinder did not have the effect of extending its life as against CCIC. It ought to have been served within six months of the 31st October 2008. If I am wrong about this, it seems to me that it must relate back to the 18th November 2008, being the date upon which is was ordered that Mr Manning be joined as a party. In either case, the amended originating summons had expired before it was actually served in Greece on 28th May 2009.

30. Mr Masri applies by paragraph (v) of his summons issued on 24th September 2009 for an order extending the validity of the originating summons retrospectively. The Court has power under GCR O.6, r.8 (which applies to originating summonses by virtue of O.7, r.6) to extend the validity of an un-served originating summons from time to time for periods up to 4 months. If the Court is satisfied that, despite the making of all reasonable efforts, it may not be possible to serve the writ within 4 months, then the Court may extend its validity for up to 12 months. The power is discretionary. In *The Myrto (N.3)* [1987] 2 Lloyd's Rep.1 the House of Lords said that the test for whether to allow the validity of an originating process to be extended (under the equivalent English rule which was then substantially the same as GCR O.6, r.8) was simply whether there is "good cause" or "good reason". Assuming that I can exercise the power retrospectively, in my judgment Mr Masri has not demonstrated that there is any good reason why I should do so.

31. Mr Masri's Cayman Islands attorneys knew that CCIC would have to be served in Greece through the mechanisms of the Hague Convention and they ought to have appreciated that this process

can, and often does, take months rather than weeks. They were not ready to deliver the documents (including Greek translations) to the Clerk of the Court until 25th January, by which time three months had already elapsed since the original date of issue. It would have been prudent to apply for an extension at that point, even if they believed that it would not expire until 8th June. Having decided not to take the precaution of making an application, it was incumbent upon them to monitor progress, which they could and should have done by communicating with the Foreign & Commonwealth Office, via the Governor's Office. Having failed to take these steps, I am not satisfied that there is any good reason why the Court should retrospectively validate this originating summons.

32. I turn next to consider the argument that the actual service effected in Greece upon CCIC was invalid, although it is not strictly necessary to do so having determined that the amended originating summons had already expired prior to being served. The principal argument made by counsel for CCIC is that service of Cayman Islands proceedings must, as a matter of European Community law, take place in Greece under the procedures in Regulation 1393/2007 (referred to as "the Service Regulation") and that the procedures of the Hague Convention are no longer available. In my judgment this argument is plainly wrong for the reasons stated in the opinion of Mr N.R Calver QC, a lawyer having expertise and experience in matters of European Community law. First, the EC Treaty does not apply to the Cayman Islands at all (except for the 'association' provisions in Part Four) with the result that EU has no competence to legislate for the Cayman Islands. The Service Regulation does not form part of Cayman Islands law. Second, the Service Regulation does not purport to have any application to the Cayman Islands. Third, the United Kingdom Government does not consider that the Service Regulation applies to the Cayman Islands otherwise it would have nominated an appropriate agency to act in relation to the transmission of service in accordance with the regulation.

33. The amended originating summons was served through diplomatic channels in the usual way. The FCO transmitted the documents to the British Embassy in Athens which then transmitted them to the Greek Ministry of Foreign Affairs, by whom they were forwarded to the Greek Ministry of Justice which in turn sent them on to the Public Prosecutor's office for service. I am entitled to infer that this procedure complied with the requirements of Greek law. If it had contravened Greek law in some way, I am entitled to assume that the Greek Ministry of Justice would have taken the point and advised the British Embassy accordingly. If the amended originating summons had still been valid on 28th May 2009, I am satisfied that it would have been properly served on CCIC.

CONCLUSIONS

34. In my judgment, the originating summons (as amended) must be struck out and the order made on 18th November 2008 set aside for the following reasons –

(a) the Court had no jurisdiction to make the order of 18th November 2008 because it constituted an attempt to "enforce" the English Receivership Order, which is not an order of a kind which is capable of being enforced in this jurisdiction;

(b) Mr Masri could and should have commenced an enforcement action based upon the English Quantum Judgments;

(c) enforcement actions should always be commenced by writ;

(d) the originating summons does not constitute an action to enforce a judgment within the meaning of GCR O.11, r.1(1)(m), with the result that there was no proper basis for giving leave to serve it out of the jurisdiction;

(e) the originating summons was irregular in that it did not sufficiently state the relief actually sought and in fact granted;

(f) the hearing on 18th November 2008 was irregular because it effectively constituted the trial of the originating summons which should not have taken place without notice to the defendant;

(g) the originating summons (as amended) was properly served in accordance with the Hague Convention, but it had already expired by the time that service was actually accomplished; and

(h) assuming that there is power to extend the validity of an originating summons retrospectively, there are no grounds upon which to exercise the discretion in favour of Mr Masri in this case.

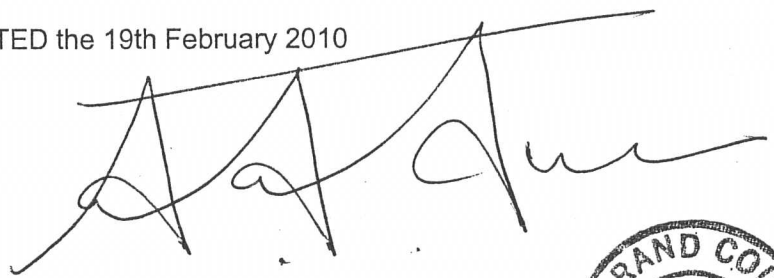
35. Regrettably, this application reveals a catalogue of error and irregularity which has obscured the merits of Mr Masri's case and frustrated the attempt to enforce his US$65 million judgment in this jurisdiction. I was told during the course of argument, that on 3rd September 2009 Mr Masri did in fact commence an enforcement action by writ (Cause No.416 of 2009) against CCIC and a related company in respect of one of the English Quantum Judgments, namely the judgment for US$3,861,645.27 rendered by Gloster J. on 11th February 2008. Leave to serve it out of the

jurisdiction has been granted and service was duly effected through diplomatic channels in accordance with the Hague Convention. This was done before the writ expired. Assuming that a statement of claim was also served, Mr Masri can now expect to obtain a summary judgment. Having done so, he can commence garnishee proceedings in respect of receivables due to CCIC and he can apply to appoint a receiver by way of equitable execution.

36. Notwithstanding that BTC paid its US$750,000 into court in response to an order which has now been set aside, I am not prepared to direct that it be paid out and returned to BTC. I direct that the sum of US$750,000 paid into court in respect of this proceeding (Cause No.513 of 2008) be transferred and treated as having been paid into court in respect of the enforcement action (Cause No.416 of 2009).

37. Finally, I make no order as to the costs of CCIC's summons and Mr Masri's cross-summons. The general rule is that if the Court sees fit to make an order for the costs of any proceedings, the Court should order that the costs follow the event except when it appears that in the circumstances of the case some other order should be made. For the purposes of GCR O.62, CCIC is the "successful party". However, I am entitled to look beyond the actual result in this case and have regard to the underlying merits of the parties' respective positions in the overall litigation between them. CCIC is a judgment debtor. In my judgment the English Quantum Judgments are prima facie enforceable in this jurisdiction by an action at common law. Mr Masri has now belatedly commenced an enforcement action on the basis of which he can expect to obtain a judgment of the Grand Court. Having done so, he can then levy execution on the receivables due from BTC and any other assets of CCIC located in this jurisdiction. According to at least one of the English judges who have dealt with the matter, CCIC is simply refusing to satisfy the judgments notwithstanding that it has the financial means to do so. In these circumstances I consider that it is just to depart from the usual rule and make no order as to costs.

DATED the 19th February 2010



The Hon. Mr Justice Andrew J. Jones QC