Neutral Citation Number: [2023] EWHC 754 (KB)

Case No: FJ328/04

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 March 2023

Before:

MS CLARE AMBROSE
(Sitting as a Deputy High Court Judge)

- -

Between:

STRATEGIC TECHNOLOGIES PTE LTD	**Claimant**
- and -	
PROCUREMENT BUREAU OF THE REPUBLIC OF CHINA MINISTRY OF NATIONAL DEFENCE	**Defendant**

- -
- -

Mr Damian Prentice (as the Claimant's director) for the **Claimant**
Ms Catherine Gibaud KC & Ms Clarissa Jones (instructed by **Dechert LLP**) for the **Defendants**

Hearing dates: 13 March 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 31 March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

CLARE AMBROSE:

Introduction

1. The parties have been involved in litigation in several countries over many years going back to 1998. The proceedings in this jurisdiction go back to 2004 and relate to recognition and enforcement proceedings in respect of a judgment made by the High Court of Singapore in the Claimant's favour on 10 December 2002 ("the Singapore Judgment").

2. On 16 December 2004 Master Leslie ordered that the Singapore Judgment be registered as a judgment of this court under the Administration of Justice Act 1920 ("the AJA 1920"). The Claimant now seeks permission to enforce by way of writ of control and also applies for a third party debt order against a third party called First Commercial Bank.

3. This is the hearing of three applications:

   a) The Claimant's application dated 16 August 2022 (stamped 1 September 2022) for permission under CPR rule 83.2(3) to seek writs of execution ("the Permission to Enforce Application");

   b) The Claimant's application dated 16 August 2022 for a third party debt order (the TPDO Application) that First Commercial Bank (London Branch) pay the debt owed to the Claimant under the judgment given on 16 December 2004 ("the 2004 Judgment");

   c) The Defendant's application dated 27 October 2022 for an order that, to the extent that the court allows enforcement, the 2004 Judgment be set-off against the costs orders made against the Claimant ("the Set-Off Application").

Background and Parties

4. Much of the factual background is set out in the judgment of Carr J [2020] EWHC 362] and the Court of Appeal [2020] EWCA Civ 1604 relating to the Claimant's attempt in separate proceedings between the same parties to enforce a separate order ("the 2016 Judgment") by which a default judgment from the Grand Court of Cayman ("the Cayman Default Judgment") was registered in this court on 4 April 2016. Carr J decided that the 2016 Judgment should not be set aside. This decision was successfully appealed and the Court of Appeal ordered on 30 November 2020 that the 2016 Judgment should be set aside and that the Claimant should pay the Defendant's costs in the High Court and Court of Appeal.

5. At paragraph 114 of her judgment Carr J set out a detailed chronology that summarised the enforcement history leading up to the writ of control issued on 11 January 2019 in relation to the 2016 Judgment. She also gave a fuller account of the background. The judgment of Carr J and the Court of Appeal also set out the procedural background to the applications that came before them. I do not repeat this background which was not disputed but outline the more essential elements.

6. It was common ground that the Defendant is an instrumentality of the Republic of China ("ROC"), more commonly known as Taiwan. Carr J described it more helpfully as an arm of the government of the ROC. Its London solicitor, Mr Andrew Hearn, made two witness statements in support of its position in the proceedings before me.

7. The Claimant is a Singaporean company. In March 2019 a number of investors took an assignment of the Claimant's judgments against the Defendant (see Carr J [4]). The Claimant entered into members' voluntary liquidation in Singapore on 24 August 2022.

8. Mr Prentice is the Claimant's sole director and was authorised to represent the Claimant at the hearing. He had a strong knowledge of the background and the issues, and was skilful in putting forward the Claimant's case. He served several witness statements on its behalf. Mr Prentice's evidence is that the Claimant's only asset is the judgment debt from the Singapore Judgment and that it has no other means to pay costs orders.

9. The relationship between the parties goes back to a contract between them dated 1 May 1996 relating to the supply to the Defendant of a measuring system for an underground firing range in Taiwan. A dispute arose in 1998 and proceedings in Singapore were initially to restrain the Defendant from seeking payment under a performance bond backed by a Singaporean bank. The proceedings subsequently extended to a substantive claim for damages. There was a dispute on jurisdiction but the action proceeded and default judgment was entered in the Claimant's favour. Directions were made for an assessment of damages but the Defendant did not engage and the Singapore Judgment was entered on 10 December 2002 awarding the sum of USD 1,573,510.40 plus SGD 10,693.00 with interest at 6% per annum from 22 July 1998 until payment with costs and disbursements fixed at SGD 7,425.

10. The Claimant commenced the present proceedings in 2003 and on 16 December 2004 Master Leslie made an order (i.e. the 2004 Judgment) that the Singapore Judgment be registered as a judgment of the Queen's Bench Division under the AJA 1920.

11. A third party debt order ("TPDO") in respect of the 2004 Judgment was obtained on an interim basis by the Claimant on 24 October 2005 but the application came to nothing.

12. On 28 December 2008 the Claimant sought a freezing order in the Cayman Islands over an account held there and then also commenced a common law action on the Singapore Judgment. On 25 June 2009 the Grand Court of Cayman entered a default judgment (i.e. the Cayman Default Judgment) in sums reflecting those ordered by the Singapore Court.

13. In 2011 the Claimant sought a charging order over funds held in the Cayman Islands and a final charging order was made there on 2 August 2013. The Claimant then obtained a consent order in those proceedings (entered by consent of the Defendant's counsel) dated 16 May 2014 which acknowledged that a total of USD 3,523,198 and SGD 28,240.90 was now due pursuant to the Cayman Default Judgment.

14. On 11 February 2016 the Claimant applied to the English High Court to register the Cayman Default Judgment pursuant to the AJA 1920.

15. On 4 April 2016 Master Yoxall made an order (i.e. the 2016 Judgment) registering the Cayman Default judgment. The Defendant disputed service of the 2016 Judgment.

16. Attempts to enforce the Cayman Default Judgment in Italy and France were unsuccessful.

17. On 11 January 2019 the Claimant obtained a writ of control for the enforcement of the 2016 Judgment on two Taiwanese banks in London and the Taipei Representative Office (described by the Defendant as the *de facto* consulate for the ROC) in London.

18. On 31 January 2019 the Defendant applied to set aside that writ of control and the matter proceeded to a 4 day hearing before Carr J. She gave judgment on 21 February 2020. The matter then went to the Court of Appeal and it gave judgment on 30 November 2020 setting aside the 2016 Judgment and ordering the Claimant to pay the Defendant's costs of the High Court and Court of Appeal proceedings and make an interim payment on account in the sum of £300,000 by 21 December 2020.

19. On 29 October 2021 the Defendant applied for a detailed assessment of costs.

20. On 19 November 2021 the Claimant filed points of dispute and on 23 November 2021 the Defendant applied for an order that unless the interim payment on account was paid by 28 February 2022, the Claimant's points of dispute would be struck out.

21. On 31 January 2022 a hearing took place before Costs Judge Whalan. Both sides were represented by counsel. Judge Whalan made the requested unless order and ordered the Claimant to pay the Defendant's costs of the application summarily assessed at £20,000. Judge Whalan concluded that there were no arguable grounds for the Claimant's submission that there was an equitable set-off between the substantive judgment debt and the Claimant's liability for costs orders. Judge Whalan ruled on 31 January 2022 that the Claimant's participation in the proceedings was "*highly selective"* and its failure to pay the sum ordered on account was *"determined and deliberate, and constitutes at the very least a breach of the court order, but in practical terms an abuse of the court's process"*.

22. On 17 February 2022 the Defendant made an application to stay the unless order on the basis of set-off.

23. On 22 February 2022 the Claimant made an unsealed application to enforce the 2004 Judgment and also applied for a TPDO. It withdrew these applications on 3 May 2022 having indicated in a letter to Master Thornett dated 29 March 2022 that the Claimant would withdraw its applications rather than disclose the application for a TPDO.

24. On 28 March 2022 a hearing took place before Judge Whalan and he refused the Claimant's application for a stay of the unless order and ordered the Claimant to pay the Defendant's costs of the application assessed summarily at £15,000. This was the first hearing where the Claimant was not represented by counsel, and was instead represented by Mr Prentice.

25. The Claimant applied to appeal the aforesaid order of 28 March 2022 out of time. By order dated 15 June 2022, Pepperall J refused an extension of time ("the Pepperall Order") and the Claimant subsequently applied on 1 July 2022 to have the Pepperall Order set aside.

26. On 16 August 2022 the Claimant issued the TPDO Application herein based on the 2004 Judgment and its Permission to Enforce Application, maintaining that the amount now due to it was £2,459,085.67 (based on a US/GBP exchange rate on 15 August 2022). Mr Prentice wrote a covering letter stating that "*the Court may have some concerns about enforcing a judgment that on the face of it are 18 years old. The enforcement of the judgment debt in this jurisdiction was last attempted in 2019, and was the subject of a hearing at the EWHC in 2020 and at the EWCA in November 2020".*

27. On 25 August 2022 Master Thornett made an interim TPDO ("the Interim TPDO") on the papers in the sum of £2,568,812.01 and listed a hearing on 4 October 2022 for the purpose of deciding whether to make a final TPDO. The Defendant served witness evidence on 28 September 2022 such that the hearing listed for 4 October 2022 was deferred. The third party, First Commercial Bank (London Branch), has indicated it is neutral on whether any order should be made.

28. On 2 December 2022 a directions hearing took place at which both parties were represented by counsel. Master Thornett directed that the Permission to Enforce and Set-Off Application be heard on 13 March 2023, together with the issue raised as to whether the Interim TPDO should be set aside. This is how the matters were listed before me. Master Thornett directed that if the Interim TPDO were not set aside, the question of whether it would be made final was adjourned to a later hearing before him fixed for 22 March 2023.

29. A hearing also took place in the Senior Courts Costs Office on 2 December 2022 at which Mr Prentice represented the Claimant. Judge Whalan made an order noting that the Defendant's recoverable "High Court Costs" had been assessed at £1,120,051.65 and its "Court of Appeal Costs" had been assessed at £366,479.49 by orders dated 25 April 2022. The Claimant was ordered to pay the Defendant's costs of the detailed assessment proceedings assessed summarily in the sum of £13,000 in respect of the High Court Costs, and £12,000 in respect of the Court of Appeal Costs. By reason of Part 36 offers, the Defendant was entitled to post judgment interest on the High Court Costs and the Court of Appeal Costs at 10% over the base rate from 23 July 2021 and additional amounts of £75,000 and £36,647.95 pursuant to CPR 36.17(4)(d) with the costs of the hearing on 2 December 2022 assessed summarily on the indemnity basis at £10,000.

30. Following a hearing on 2 March 2023 (at which Mr Prentice represented the Claimant), Mrs Justice May dismissed the Claimant's application to set aside the Pepperall Order, which she ruled was totally without merit. She also refused the Claimant's application for permission to appeal the 28 March 2022 order.

The Permission to Enforce Application

The law on permission to enforce

31. Under English law there is a statutory 6 year limitation period under section 24(1) of the Limitation Act 1980 for bringing an action on a judgment but the machinery for enforcing a judgment is not subject to a statutory limitation period. However, there are long established rules of court precluding enforcement by way of writ or warrant of

execution after 6 years unless the court exercises its discretion to allow enforcement (as explained in *Lowsley v Forbes* [1999] 1 AC 329).

32. The present rule is CPR rule 83.2(3) which states that:

> "*(3) A relevant writ or warrant must not be issued without the permission of the court where—*
>
> *six years or more have elapsed since the date of the judgment or order*."

33. Rule 83.2(4) sets out the requirements for such an application, including that the applicant must "*state the reasons for the delay in enforcing the judgment or order*".

34. There was common ground that the basic test on the court's discretion to give permission to enforce a judgment by way of execution after more than 6 years is whether circumstances take the case out of the ordinary so as to justify the granting of permission.

35. This test follows Court of Appeal authority. In *Patel v Singh* [2002] EWCA Civ 1938 [14-25] Colin Gibson LJ explained that:

> "*21. …The court must start from the position that the lapse of six years may, and will ordinarily, in itself justify refusing permission to issue a write of execution, unless the judgment creditor can justify the granting of permission by showing that the circumstances ….take its case out of the ordinary. That may be done by showing the presence of something in relation to the judgment creditor's own position, or ….in relation to the judgment debtor's position. The judgment creditor might be able to point, for example to the fact that for many years that the judgment debtor was thought to have no money and so was not worth power and shot but that… on winning the lottery or having some other change of financial fortune, it has become worthwhile…to pursue the judgment creditor.*
>
> *22. Of course, since the coming into force of the Civil Procedure Rules the exercise of discretion is informed by the overriding objective of enabling the court to deal with cases justly. That goes without saying.*
>
> *…*
>
> *25. …It was for [the judgment creditor] to justify [its] delay*" *[21, 25].*

36. In *Patel v Singh* at [24] Peter Gibson LJ also considered that the Master had been correct in looking for exceptional circumstances, and acknowledged that requiring the applicant to show that it would be demonstrably just to grant permission (as explained by Evans-Lombe J in *Duer v Frazer* [2001] 1 WLR 919) also reflected the requirement of taking something out of the ordinary. Given that the circumstances of this case are

somewhat unusual the test as to whether a case is out of the ordinary has to be applied against the overriding objective. Whether it would be demonstrably just to give the Claimant permission to enforce remains a relevant question.

37. In *Navengante SA v Metalexportimport SA* [2003] EWCA Civ 1668 ("*The Good Challenger*") at [106] the Court of Appeal also cited with approval the judgment of Evans-Lombe J in *Duer v Frazer* at [25] stating:

> "*Each case must turn on its own facts but, in the absence of very special circumstances…the court will have regard to such matters as the explanation given by the judgment creditor for not issuing execution during the initial six-year period, or for any delay thereafter in applying to extent that period, and any prejudice which the judgment debtor may have been subject to as a result of such delay including, in particular, any change of position by him as a result which has occurred. The longer the period that has been allowed to lapse since the judgment the more likely it is that the court will find prejudice to the judgment debtor.*"

38. The Claimant emphasised the comments of Tomlinson J in *Westacre Investments Inc v Jugoimport SDPR* [2008] EWHC 801 (Comm) ("*Westacre"*) where he referred to these Court of Appeal authorities and commented that

> "*25. The authorities show that remaining active in attempting to enforce the judgment is of itself a factor upon which a judgment creditor can successfully rely in seeking to establish facts which take the case out of the ordinary and thus lead the court to disapply the general rule of non-enforcement after six years. Furthermore a particular factor which may take the case out of the ordinary is the discovery of assets within the jurisdiction amenable to execution.*
>
> …
>
> *26. Secondly, it is in my judgment plain from the authorities that although under RSC Order 46 [now CPR 83] the onus is cast upon the judgment creditor to show why he should be permitted to enforce after the lapse of six years, still the touchstone of the discretion and in most cases the key factor is prejudice to the judgment debtor. In particular the key question will ordinarily be whether the judgment creditor has so conducted himself as to lead the judgment debtor reasonably to believe that the judgment debt would not be enforced*."

The Claimant's position

39. Mr Prentice emphasised that Carr J had recognised at [123] & [142] of her judgment that the Claimant had considerable difficulties in enforcing against the Defendant, that its writ of control was a genuine attempts to enforce against assets properly available, and that there had been no tangible prejudice to the Defendant arising out of its delay

in relation to the applications before her. He also referred to Tomlinson J's comment in *Westacre* at [25] that, "*It was not unnatural that Westacre was obliged to prioritise its efforts to directing them to avenues which seemed most likely to bear fruit."*

40. Mr Prentice emphasised that over the previous years the Claimant had been continuously seeking to enforce the Singapore judgment in the Cayman Islands, Italy, France and the UK, among other countries. Mr Prentice referred to Carr J's account and his own account and I have taken these fully into account.

41. Mr Prentice gave statement evidence referring to measures taken to enforce up to and including the 2019 application to obtain a writ of control based on the 2016 Judgment. He explained that the Claimant started enforcement in 2019 in the UK when it realised from the French judgments that if the Defendant was an instrumentality of the ROC, then the assets of the ROC were available to meet the Defendant's debts. This realisation (described by Mr Prentice as a eureka moment) meant that it started to pursue execution against assets of the ROC.

42. His evidence was that following the Cayman Default Judgment the Claimant elected to register it in England in 2016 because it (and the consent order made in 2014) represented the most recent milestones in the long running enforcement. He acknowledged that the Claimant was mistaken in its approach but emphasised that it had taken a reasonable view on the wording of the AJA 1920, although ultimately the Court of Appeal had taken a different approach.

The Defendant's position

43. The Defendant opposed the application on grounds of delay, material non-disclosure and the Claimant's conduct in the litigation including its abusive repeat attempts to enforce where it has failed to comply with costs orders, giving rise to serious prejudice including irrecoverable costs, all factors which it says bear on the fairness of granting such permission.

44. While the non-disclosure was relevant to the granting of an interim TPDO, it was not shown to be relevant to the decision on granting permission to enforce.

Discussion

45. In its TPDO Application the Claimant expressly sought a TPDO in respect of the order of 16 December 2004 (i.e. the 2004 Judgment). However, in its Permission to Enforce Application the Claimant referred to a foreign judgment debt. In argument the Claimant also maintained that it was seeking permission to enforce the Singapore Judgment. It argued that once it is accepted that the relevant judgment is the Singapore Judgment and the subsequent orders and judgments were genuine and continuous attempts to enforce the Singapore Judgment then it is axiomatic that permission to enforce should be given and a TPDO should be made.

46. Mr Prentice argued that the AJA 1920 gave effect to the Singapore Judgment, not a new judgment created by registration. For this purpose he referred to case law (including the Court of Appeal judgment at [2020] EWCA Civ 1604) which draws a firm distinction between the statutory right to register a foreign judgment and a common law action on a foreign judgment.

47. English law recognises this distinction and I accept that in practical terms the Claimant has been attempting to obtain the fruits of the Singapore judgment in different jurisdictions over many years. Different measures have been taken by the Claimant (as set out in Carr J's chronology), for example the Cayman Default Judgment was obtained by way of a common law action on the Singapore Judgment in the Cayman Islands. These various measures are relevant to the court's discretion, and the court would not look solely to measures being taken to enforce the 2004 Judgment.

48. An order registering a foreign judgment under the AJA 1920 is invariably called a judgment because it takes effect as an English judgment (see section 9(3)(a) of the AJA 1920) and has a separate legal existence to the original foreign judgment. For example, Carr J referred to the 2004 Judgment as "the First Registered English Registered Judgment". This terminology is used while also recognising that the 2004 Judgment is based on the Singapore Judgment and gives effect to it. Reference to the English order is essential because it would be incorrect to suggest that this court would (or could) give permission to enforce the Singapore Judgment itself by way of writ of execution. The court's power to make the orders that the Claimant is now seeking (namely orders for a writ of execution and a TPDO order) do not arise merely from the Singapore Judgment. They arise by reason of the statutory powers allowing the court to make the 2004 Judgment and are exercised in relation to that judgment, as was made clear in the Claimant's TPDO application made by reference to the 2004 Judgment.

49. Here the Claimant has not led the Defendant to believe that it would not pursue enforcement of the Singapore Judgment. However, as Carr J and the Court of Appeal firmly highlighted, there was a significant absence of any explanation from the Claimant as to why it was not seeking to enforce the 2004 Judgment. This would have led the Defendant to believe that the Claimant had abandoned its rights to enforce that order.

50. The fact that the Defendant knew that measures were being taken more broadly to enforce (rather than in relation to the 2004 Judgment) is an important consideration but it is not decisive, especially where the Singapore Judgment is over 20 years old, and the 2004 Judgment had not been pursued for 17 years. On this aspect alone the case was distinguishable from *Westacre* where Tomlinson J expressly took into account that the delay in question was only a number of months over 6 years.

51. Mr Prentice is undoubtedly genuinely frustrated that the Defendant has not satisfied the Singapore Judgment. Mr Prentice argued that the Defendant had taken every available measure to resist or frustrate enforcement. I take account of the Defendant's failure to challenge jurisdiction or fight the merits of the substantive claim, and its acknowledgment of the debt in relation to the 2014 consent order in the Cayman proceedings. However, taken as a whole, the history of the Claimant's enforcement measures in the period up to 16 January 2019 (as summarised by Carr J and expanded upon by Mr Prentice) did not support Mr Prentice's allegations of frustration or evidence evasion or dissipation by the Defendant. Indeed, Carr J did not accept such allegations. The evidence of measures up to January 2019 showed that the Claimant was faced with difficult and challenging enforcement issues but had consistently failed to establish a legal entitlement to enforce against targeted assets.

52. In relation to activity since January 2019 the Claimant provided no evidence of proceedings pursued outside this jurisdiction. It failed to substantiate its allegations

(made in relation to both the Claimant's applications) that the Defendant had incurred disproportionate sums within this jurisdiction in resisting enforcement (the sums in question were awarded following detailed assessment proceedings), that it had wrongfully required service by way of the diplomatic route (Carr J had found this was required and the Defendant had agreed to service on its solicitors in relation to these applications). Similarly, it failed to make good allegations that the Defendant falsely stated that it enjoyed sovereign immunity or was attempting to punish the Claimant's directors by way of third party costs orders.

53. Mr Prentice identified further measures and investigations outside legal proceedings for example extensive research into procurement contracts for helicopters or his threat (that Carr J found troubling but that he maintained in argument was an available option) to sell the debt to the People's Republic of China. However, these did not evidence frustration, evasion or dissipation on the Defendant's part or justify repeated attempts to enforce the same underlying debt in this jurisdiction.

54. The Claimant's knowledge of the location of assets is not a factor taking this case out of the ordinary. It had already issued an application for a TPDO in London in October 2005 and had stronger knowledge relating to assets from early 2019 but made a positive election not to pursue the 2004 Judgment. At that stage it had the benefit of expert legal advice. Both Carr J and the Court of Appeal expressly flagged up the unsatisfactory absence of any explanation for the Claimant's failure to enforce that judgment.

55. A key consideration is that the Claimant has failed to provide an adequate explanation to justify its delay in enforcing the 2004 Judgment.

a) There has been almost 17 years delay in taking any step to enforce the 2004 Judgment. There was a notable absence of any explanation for this delay in the evidence served by the Claimant. This period of delay is exceptional and requires a strong explanation.

b) Mr Prentice suggested that it was sufficient that there had been continuous efforts to enforce the Singapore Judgment over the years. However, this does not provide an adequate explanation.

i) Measures taken to enforce the Singapore Judgment up to the decision of the Court of Appeal in November 2020 did not provide a satisfactory explanation for the Claimant's failure to enforce the 2004 Judgment during that period, as found by Carr J, and commented on by the Court of Appeal.

ii) The Claimant's conduct of proceedings in this jurisdiction between 2016 and 2020 pursued to register and enforce the Default Cayman Judgment were mistaken, and also provided no satisfactory explanation of its delay in enforcing the 2004 Judgment. These proceedings led to very substantial costs orders against the Claimant.

iii) The Claimant's continued participation in the proceedings following the Court of Appeal's ruling on 30 November 2020 has been found to be highly selective and its failure to comply with costs orders has been held to be deliberate and abusive.

iv) The Claimant's delay is unjustified whichever way it is looked at, whether 18 years since 16 December 2004 (the 2004 Judgment), 3.5 years since 16 January 2019 (seeking a writ of control to execute the 2016 Judgment), or the 21 months since 30 November 2020 (the Court of Appeal rejecting enforcement of the 2016 Judgment).

56. Tomlinson J in *Westacre* pointed out that a judgment creditor may naturally prioritise the avenues for enforcement that are most likely to bear fruit. However, this does not give a judgment creditor an open-ended licence to pursue enforcement proceedings by way of repeated attempts in this jurisdiction without regard to the overriding objective. While Carr J considered that the Claimant's application for a writ of control in 2016 was a genuine attempt at enforcement, she also said it was unsatisfactory that no explanation was given as to why the 2004 Judgment had not been pursued and made clear that the court should guard against unwarranted and abusive repeat attempts to enforce the same debt in the same jurisdiction via different routes [120, 142].

57. The onus did not lie on the Defendant to establish prejudice (see *Patel v Singh* [21]) but it was able to establish that it had suffered significant prejudice due to the Claimant's delay in enforcing the 2004 Judgment, and in particular its failure to seek permission to enforce the 2004 Judgment in January 2019. The Claimant's delay and its repeat attempt to enforce in this jurisdiction has meant that the Defendant is now unfairly and unnecessarily faced with significant and irrecoverable costs, and continues to be exposed to escalating legal costs and irrecoverable time spent by the Defendant in the ROC, and its local solicitors. It is also exposed to the Claimant's litigation conduct that the Judge Whalan has found to be an abuse of the court's process in practical terms.

a) The Claimant elected not to pursue enforcement of the 2004 Judgment when it registered the 2016 Judgment and then sought a writ of control in 2019. No satisfactory explanation was given for this, at highest Mr Prentice said that the Claimant decided to look to the more recent milestones. The most likely inference is that the Claimant had concluded that there was no real prospect of success on enforcing the 2004 Judgment (whether alone or alongside the applications it did issue).

b) Now as a last resort it is attempting to enforce the 2004 Judgment after yet further delay in circumstances where it has now entered members' voluntary liquidation, is no longer funding legal representation and maintains it is unable to meet existing costs orders.

c) During the period since January 2019 the Claimant's mistaken pursuit of enforcement of the 2016 Judgment entailed a 4 day hearing in the High Court, a substantial 1 day hearing before the Court of Appeal, and a significant number of hearings and paper applications before Masters, costs judges and High Court judges. This involved the courts' resources and caused the Defendant to incur costs assessed in excess of £1.5 million, and costs orders in that amount in the Defendant's favour remain unpaid.

d) While it may not have been unreasonable to pursue the original application, the Claimant's mistaken approach cannot now be regarded as a good reason for allowing the Claimant permission to enforce the 2004 Judgment at this stage (another 3.5 years later), especially in circumstances where it cannot justify its

failure to comply with costs orders arising out of its unsuccessful application, and where its conduct in relation to costs has been found to be deliberate and abusive.

e) The Claimant continues to resist paying costs as ordered on grounds without merit, as shown by the order of May J dated 2 March 2023 concluding that its application to set aside was totally without merit.

f) While still engaging in the litigation the Claimant maintains it cannot meet any costs order made unless enforcement is granted in its favour. This is disputed but assuming it is true, this would equally suggest that the Defendant has been unfairly exposed to significant prejudice whereby the Claimant pursues proceedings seeking to reap the benefit of litigating in this jurisdiction without bearing the burdens.

58. Overall, the Claimant has failed to justify its delay or to establish that the circumstances are out of the ordinary so as to justify the grant of permission to enforce after 6 years. The prejudice caused to the Defendant by the Claimant's delay since 2019 is an additional reason why permission should be refused. The Claimant's application for permission is declined.

Should the Interim TPDO be set aside?

59. The Claimant maintained that there was no basis for setting aside the Interim TPDO since it had followed the procedure for obtaining such an order under CPR Part 72. It denied that there was any duty of full and frank disclosure on an application for a TPDO, and suggested that an application for a TPDO was wholly distinguishable from an application pre-judgment for a freezing order.

60. The Defendant argued that the TPDO should be set aside on grounds of delay (encompassing the delay of 17 years in pursuing the 2004 Judgment together with its election to enforce the same underlying debt by other means) and material non-disclosure. It points to the absence of any efforts by the Claimant to enforce the 2004 Judgment over 17 years and maintains there was significant non-disclosure of the following matters:

a) The material history of the 2004 Judgment and the Claimant's inaction since 2005. In particular, Carr J and Males LJ had both commented upon ST's failure to explain why it did nothing after 2005 to seek to enforce the 2004 Judgment.

b) The Claimant had tried and failed to enforce a different judgment within this jurisdiction (i.e. the 2009 Cayman Default Judgment as registered by the 2016 Judgment), in different enforcement proceedings which occupied the parties between 2019-2020. Instead Mr Prentice had suggested in his letter to the court in support of the TPDO that the enforcement of "*the judgment"* was last attempted in 2019, thereby incorrectly suggesting that the Claimant had been recently pursuing the 2004 Judgment.

c) The Claimant was (and remains) in breach of court orders to make payments to the Defendant for sums over £1,500,000 (excluding interest) in costs. Instead

Mr Prentice had suggested in his letter that "*the consequential matters are ongoing"* which amounted to an omission as to the Claimant's non-compliance.

d) The Claimant had been found to be in breach of numerous court orders arising out of its failed enforcement proceedings within this jurisdiction. Indeed, the Defendant maintained that the Claimant should have disclosed that it was in contempt of court and had still not purged that contempt.

The Law

61. It was common ground that:

a) The procedure for an application for a TPDO is prescribed by CPR 72 and PD 72.

b) The court has a discretion in deciding whether to make an interim or final TPDO.

c) A different regime applies as between the court's discretion to grant a final TPDO and its discretion to grant permission to enforce by way of writ of execution.

d) The court may grant a final TPDO even if it has not granted permission to enforce by way of writ of execution.

e) On an application for a final TPDO the onus is expressly cast upon the judgment debtor to make good any objection to the interim order being made final (as explained by Tomlinson J in *Westacre* [19]).

f) While delay is one factor to be taken into account in the discretion to grant a TPDO there is no general rule that delay of more than 6 years would prevent a judgment creditor from obtaining a TPDO (Tomlinson J in *Westacre* [22]).

62. The Practice Direction to Part 72 makes clear that applications for a TPDO are treated as urgent business and it sets out information that must be provided in making an application including the "*amount of money remaining due under the judgment or order".* CPR Part 72 does not require an application for a TPDO to be made without notice, and does not expressly state that the applicant is under a duty of full and frank disclosure when it makes a without notice application. However, the Defendant was correct in maintaining that an applicant making an application for a TPDO without notice is subject to a duty of full and frank disclosure. Any application for interim relief made without notice is subject to that duty. This arises as a matter of the overriding objective and reflects an important safeguard where the court is asked to make an order without hearing from the other side.

63. The scope of the duty of disclosure will depend upon the context and the circumstances of the application, with greater disclosure being required where the grounds for making an order are debatable or the consequences of making an order might be severe. On an application for a TPDO where there is no genuine issue, including as to the amount due and the debt owed to the judgment debtor, then a judgment creditor may provide the routine information listed in the practice direction without more. The authorities on the

scope of the duty on an application for a -pre-judgment freezing order need not be imported into an application for a TPDO.

64. However, the fact that most applications for a TPDO will be simple and routine does not undermine the importance of the duty to give accurate evidence in that context, and the fact that a without notice application for interim relief entails a duty of full and frank disclosure. Morris J confirmed this in *BCS Corporate Acceptances Ltd v Daniel Terry* [2018] EWHC 2349 (QB) at [71]

> "*The importance of accurate evidence and the duty of disclosure on a without notice application is undoubted. The extent of the duty and the gravity of the lack of frankness depends on the character of the application. Where…the consequences of an interim third party debt order are potentially serious and the grounds for making an order debateable, the duty of full and frank disclosure will be commensurately higher*."

Conclusions

65. On his own evidence Mr Prentice has many years of experience in collecting debts from recalcitrant debtors. He has been involved in the Claimant's proceedings against the Defendant in this jurisdiction since early 2019 and had conduct over the Claimant's abandoned application for a TPDO in February 2022.

66. When the TPDO application was issued with his covering letter he knew that the Claimant was in breach of very substantial costs orders. In argument he emphasised that in the hearings relating to costs in 2022 the Claimant was maintaining that there was a set-off between these orders and any judgment debt. His submissions showed familiarity with the rules of full and frank disclosure in relation to freezing orders (and given his experience in enforcement of debts this was unsurprising). He also knew in making the TPDO application that an interim TPDO would have the effect of freezing the third party's debts so it would take effect in a similar way to a freezing order.

67. The fact that Mr Prentice wrote a covering letter flagging up, *inter alia,* that the judgment was "very old" and suggesting that enforcement of that judgment was last attempted in 2019 showed that he knew at the time of making the application that it was not a routine application but complex and debateable. He knew that the court had concerns regarding granting an interim TPDO without notice since he had withdrawn the Claimant's application from February 2022 because he was unwilling to give notice. He knew that the Claimant's case was that there was a set-off that would reduce the net sum due. He also knew that delay in taking measures to enforce was a relevant factor for which accurate evidence was required since he acknowledged that the court would have concerns about enforcing a 2004 Judgment and suggested that enforcement steps had been last attempted in 2019. His letter showed that he knew the court would expect more than merely the minimum information listed under Part 72.

68. Mr Prentice would reasonably have known from the earlier proceedings, as spelled out in the judgment of Carr J [140], that the Defendant maintained that enforcing against the Taiwanese banks could have a potentially catastrophic impact on the ROC's consulate in London. While Carr J concluded that enforcement was permissible, Mr Prentice would reasonably have known that an order made without notice that froze the

ROC's London bank accounts in the sum of around £2.5 million could be extremely disruptive. He openly acknowledged that an interim TPDO would give the Claimant a significant tactical advantage in attaching assets. He emphasised that an important benefit accrued to it from making the application without notice to the Defendant since otherwise it would dissipate assets. He also maintained that Master Thornett should not have required it to give the Defendant notice in February 2022, and that it had withdrawn the application at that stage rather than give notice.

69. The requirement on an applicant to give accurate evidence, and make full and frank disclosure, required the Claimant to state the amount of money remaining due accurately and therefore make clear the sum due taking account of its own position on set-off. That duty also meant that the Claimant should have disclosed that it had been ordered to pay sums in excess of £1.5 million in its previous enforcement proceedings relating to the same underlying debt and had failed to do so, and also that it had not attempted to enforce the 2004 Judgment since 2005. The suggestion that there had been an attempt to enforce the 2004 Judgment in 2019 was inaccurate and unjustified.

70. The consequences of a breach of a duty of full and frank disclosure are well established, as set out in *Brink's Mat v Elcombe* [1988] 1 WLR 1350, 1356. The Claimant knew that its application for a TPDO was not a routine case of a simple character. Mr Prentice's letter showed that he knew that an explanation of the delay was required and that the court would need to understand what had happened in the other proceedings relating to the 2016 Judgment. Master Thornett took the view that the application was "dangerously simplistic" at the directions hearing.

71. If the Claimant had disclosed the true position regarding its failure to take any measure to enforce the 2004 Judgment since 2005, and its non-compliance with the costs orders in relation to efforts to enforce a different judgment (where it was seeking to assert a set-off) then it is likely that Master Thornett would not have made the Interim TPDO. The Claimant's non-disclosure was directly material to it obtaining that procedural advantage. The matters not disclosed were of significant materiality to the Claimant obtaining the Interim TPDO.

72. The Claimant's lack of legal representation justified some allowance for the non-disclosure. It would otherwise have been regarded as very serious coming from a legal representative. However, it was not an innocent non-disclosure. Mr Prentice was aware of the undisclosed matters and knew that the without notice procedure gave the Claimant a tactical advantage. He would have perceived the significant relevance of the unsatisfied costs orders on the sums due to the Claimant. His level of knowledge means that the non-disclosure was culpable. The Claimant provided no good excuse for its inaccuracy and non-disclosure and it is not entitled to maintain the order which it obtained by reason of it.

73. The Claimant's material non-disclosure is sufficient in itself to justify setting aside the Interim TPDO. However, the prejudice caused by its delay in making the application is a further reason why the Interim TPDO should be set aside. Here the burden lies on the Defendant to show the court that a TPDO should not be made. The same complaints regarding delay apply to the application for a TPDO as the application under CPR Part 83, and the conclusions above apply regarding the lack of explanation for delay.

74. The court's discretion on whether to make a TPDO order is governed by the overriding objective. In *Westacre* Tomlinson J suggested that the starting presumption would be that the court should assist a judgment creditor, and a TPDO should be made unless there was compelling evidence of prejudice to the judgment debtor accruing from the delay in enforcement. There the delay that the court was asked to take into account was around 6 years and 7 months and the judge concluded that no plausible case had been put forward to suggest prejudice had arisen out of the passage of time. He also took into account that the judgment was for a very substantial sum arising out of an international commercial dispute.

75. Here, however, the relevant delay is very much greater, being 17 years since any step was taken to enforce the 2004 Judgment, 4 years since the misguided attempt to enforce the 2016 Judgment and almost 2 years since the Court of Appeal judgment. In addition, the Defendant was able to identify significant prejudice as set out above, including irrecoverable costs and unpaid costs incurred in excess of £1.5 million, and the Claimant's failure to pay costs orders in that amount. The Claimant's unsuccessful enforcement attempts within this jurisdiction have not only used up considerable court resources and given rise to unpaid costs orders but have also reduced the maximum potential amount due to the Claimant (including interest) to a fraction of the costs and original judgment debt involved (as explained below). Unlike in *Westacre,* the Claimant has already had a very full opportunity to enforce in this jurisdiction and elected (without giving any satisfactory reason) not to pursue the 2004 Judgment. In all these circumstances there is no starting presumption that the court should assist the Claimant to take further enforcement measures within this jurisdiction.

76. In all these circumstances it would not be just to allow the Claimant to maintain the Interim TPDO and an order will be made setting it aside.

The Set-Off application

77. The Defendant made the Set-Off Application as an alternative to its primary position (namely that the Claimant should not be permitted to enforce the 2004 Judgment by way of writ or TPDO). I deal with it in case I am wrong on the other applications. The alternative relief requested was that the court set-off any judgment in favour of the Claimant against the existing costs orders made in favour of the Defendant. The application was made on grounds of set-off by judgment (as distinct from legal set-off or equitable set-off).

78. In earlier hearings relating to costs there had been argument as to whether any equitable set-off arose between the Defendant's costs orders and the judgment debt invoked by the Claimant. However, at this stage the parties were agreed that once determined these liabilities should be set-off.

79. The parties' consensus on set-off reflected well established practice where there are cross-judgments (and did not depend on equitable set-off). Here the court has discretion to order a set-off between orders in different proceedings and if I had allowed the 2004 Judgment to be enforced as requested I would have allowed an order for set-off. As George Leggatt QC (as he then was) explained in *Fearns (trading as Autopaint International) v Anglo-Dutch Paint & Chemical Co Ltd and others* ("Fearns") [2011] 1 WLR 366:

> "*[37]…it has long been the practice of the courts as part of their inherent jurisdiction over their own proceedings to allow cross-judgments given in the same action, or in different actions, to be set off against each other: see Edwards v Hope (1885) 14 QBD 922; Reid v Cupper [1915] 2 KB 147 and In re A Debtor (No 21 of 1950) (No 2); Ex p The Petitioning Creditors v The Debtor [1951] Ch 612. As these cases show, this jurisdiction encompasses judgments for damages and also orders for costs. Unlike legal or equitable set-off, such a set-off involves treating the judgment in favour of one party to the judgment in favour of the other. There is accordingly an extinction of liabilities*."

80. Both sides acknowledged that an order for set-off would require a ruling on the amount adjudged in each side's favour. Indeed the amount adjudged was in issue more generally since any order permitting enforcement would require the court to rule on the amount against which enforcement would be allowed (whether by way of writ or TPDO). Both sides put forward detailed calculations on interest and set-off and agreed on using the date of 13 March 2023 as the date of decision. There was consensus on the principal sums ordered by way of judgment and the sums ordered by way of costs (and no material issue as to currency exchange rates).

81. However, there were issues as to 1) the treatment of pre-judgment interest; 2) the rate of interest accruing on the 2004 Judgment; 3) the application of the Limitation Act 1980 on recovery of interest; 4) methodology of set-off; 5) the date for set-off. These factors each made a substantial difference to the overall recovery. Indeed on the Claimant's methodology it maintained that even after set-off it was entitled to enforce in the total sum of USD 2,393,846.04 (including all interest up to 13 March 2023) whereas on the Defendant's calculations that sum was USD 322,133.63 (USD 2,768,448.58 as total judgment plus interest, less principal costs of USD 2,017,162.16 and interest of USD 429,152.79).

The treatment of pre-judgment interest

82. The Claimant suggested that pre-judgment interest accrued on the Singapore Judgment should be merged into the judgment debt as at the date of judgment thereby including an element of compounding. It relied on Singapore's Civil Law Act 1909, Order 42 of the Singapore court rules and a Singapore case called *Chia Ah Sng v Hong Leong Finance Limited* [2000] SGHC 273. I preferred the Defendant's approach (namely that simple interest accrued as ordered and was not compounded) since this reflected the wording of the Singapore judgment, and also the Civil Law Act 1909 which expressly stated that it did not allow the giving of interest upon interest. Order 42 provided no support for the Claimant's suggested compounding, and the authority was to be distinguished since it related to a judgment giving effect to a contractual claim for interest rather than statutory interest.

The rate of interest accruing on the 2004 Judgment

83. The Claimant maintained that interest accrued at 8% based on section 17 of the Judgments Act 1838 and the wording of the AJA 1920. The Defendant argued that interest accrued at 6% based on the Singapore Judgment, the wording of the 2004

Judgment and the court's discretion under section 44(a) of the Administration of Justice Act 1970.

84. I preferred the Defendant's approach because the court has a discretion to depart from the Judgments Act rate where a judgment is in a foreign currency. Indeed this is standard practice for a foreign currency judgment and the 8% rate is not generally regarded as a default rate for a non-sterling debts. Further the wording of the AJA 1920 and the 2004 Judgment firmly supported the Defendant's case. On the face of the order dated 16 December 2004 the Master referred to the 6% rate ordered by the Singapore Court. His order is to be read as providing for this rate to continue to apply. The AJA 1920 provides only for reciprocal enforcement, and expressly gives the English court control and jurisdiction over a registered judgment "*in so far only as relates to execution"*. The purpose of the order for registration under the AJA 1920, as allowed by the Master by express reference to the interest rate awarded by the Singapore court, was to allow reciprocal enforcement of what had been adjudged. It was not intended to operate by way of default to improve the judgment creditor's recovery on the merits by giving effect to higher rates of interest by way of a domestic English statute designed for English judgments.

Date for set-off

85. The Claimant suggested that set-off be calculated as if sums were set-off on 4 October 2022 because this was the original hearing date that was vacated by reason of the Defendant's objections to enforcement. It argued that it should not be penalised by interest accruing since that date.

86. The Defendant suggested that the date of set-off should be 13 March 2023 as the date when the court was making its decision. I accept that sums should be set-off as at 13 March 2023 (reflecting the date of the hearing, the parties' own calculations and the court's decision even if not the date of the order). This most closely reflects the preferred approach from *Fearns* [39] where the judge suggested that there would be no justification for backdating and indicated that set-off should be made when the existence and amount of the two liabilities is finally determined.

Methodology for set-off and the effect of the Limitation Act 1980 on recovery of interest

87. It was common ground that limitation defences were relevant to the recovery of interest. The issue was as to what interest was irrecoverable on limitation grounds, and whether set-off applied to the judgment debt together with all statutory interest that could accrue even if it was not recoverable under the Limitation Act (the Claimant's case) or whether it applied only to the recoverable judgment debt and statutory interest (the Defendant's case).

88. The Claimant acknowledged that section 24(2) of the Limitation Act 1980 (or its Singapore equivalent) was applicable. Given that the issue related to enforcement of the 2004 Judgment the Limitation Act 1980 is the relevant statute. (In any event, the result would have been the same under the law of Singapore which has identical wording). Section 24(2) provides that:

> "*24 Time limit for actions to enforce judgments.*

> *(1) An action shall not be brought upon any judgment after the expiration of six years from the date on which the judgment became enforceable.*
>
> (2) *No arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due*."

89. Mr Prentice argued that since this provision barred the remedy but not the right it should be understood as meaning that "interest will continue to accrue to the judgment debt, but after six years the judgment debtor cannot be forced to pay".

90. The Claimant emphasised that a set-off is to be distinguished from a payment, and does not operate as a recovery but extinguishes the underlying liability. Here, interest continued accruing for 18 years regardless of the Limitation Act 1980 which only precluded recovery. The debt continues to grow (even if the interest is not recoverable), but the set-off applies against the debt without regard to whether it is recoverable. The Claimant argued that extinguishing post judgment interest by way of set-off is not recovery so that interest that accrued more than six years earlier is extinguished by way of set-off even if not recovered for the purpose of the Limitation Act 1980.

91. The Claimant's arguments presented a novel approach to set-off and the effect of the Limitation Act. They were directly contrary to the ordinary meaning of the wording of section 24(2) and the leading authority on its application, *Lowsley v Forbes* [1999] 1 AC 329. That case is authority that *"no arrears of interest…shall be recovered"* is to be given a broad meaning, covering recovery by way of execution under a third party debt order.

92. Section 24(2) makes clear that interest is not recoverable after the expiry of 6 years from the date on which interest became due (and this was how it was applied in *The Good Challenger* [111]). Here interest became due under English law from registration on 16 December 2004 and ceased to be recoverable on expiry of 6 years from that date, namely on 16 December 2010. Simple interest was in play so it did not make a difference which 6 year period was used but it would be relevant where compound interest was allowed (for example where an arbitration award was being enforced).

93. Set-off by judgment only applies when the sum recoverable under a judgment has been determined by judgment (or agreement). This was made clear in *Fearns*. Here set-off would only apply to a sum which has been determined and adjudged as payable. By reason of section 24(2) the Claimant was not entitled to recover any interest arising after 16 December 2010. Any judgment determined in its favour would reflect what was recoverable. Set-off would then apply against that determined liability.

94. The Claimant's approach was anomalous in attempting to suggest that set-off would apply against an irrecoverable sum. It suggested that set-off apply to the entire judgment debt that would have been recoverable regardless of any limitation defence. This approach was not justified by the distinction relied upon between payment and set-off, and ignored the wide meaning given to recovery under section 24(2). Indeed, the Claimant's approach would directly contradict the obvious intention of the Limitation Act. It is rejected and the Defendant's figures were to be preferred.

95. If permission to enforce had been granted (or if the Interim TPDO had been maintained) the sum for which relief would be given would be reduced by way of set-off to an order in the Claimant's favour in the sum of USD 322,133.63 (before consideration of any costs issues on these applications).

Overall conclusions

96. For reasons set out above the Claimant's Permission to Enforce Application is dismissed and the Interim TPDO is to be set aside.

97. It is not necessary for me to decide the Set-off Application but if it had arisen and any order for enforcement was made, such orders would limit any enforcement in the Claimant's favour to a sum of USD 322,133.63 (including all interest up to 13 March 2023 but before consideration of the costs of these applications).