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October 2015

Third Party Costs Orders: Service Out Judgment puts BVI Back in Business

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On the 12 October 2015 the Court of Appeal delivered a judgment which undoubtedly clarified the law in the BVI on the service out of the jurisdiction of a non-party costs application, and which will be welcomed by BVI practitioners and their clients alike.

In *Halliwel Asset Inc and Panikos Symeou and Marigold Trust Company Limited-v-Hornbeam Corporation, Vadim Shulam (Respondent)* Claim No BVIHCMAP 2015/0001, a "non-party" Mr Shulman was a resident of Monaco. In the proceedings in the court below the Appellants Halliwel, Mr Symeous and Marigold were granted costs orders against Hornbeam Corporation (the "Respondent"). However, the Appellant's case was that this award, as a matter of practicalities, would be likely worthless given that the Respondent was merely a shell entity. The Appellants therefore made applications that the costs should payable by Mr Shulman, the ultimate beneficial owner of Hornbeam's Halliwel shares, on the grounds that he was the real beneficiary of the failed proceedings and the real party for whose benefit and at whose directions they had been brought. They also applied for Mr Shulman to be joined as a party to the proceedings giving rise to the costs order. Since Mr Shulman was resident out of the jurisdiction, an application for permission to serve the non-party costs application out of the jurisdiction on Mr Shulman was also required, and therefore made.

At first instance, the commercial court judge refused permission to serve the application out of the jurisdiction on the basis that Rule 7.3 of the Eastern Caribbean Supreme Court Civil Procedure Rules did not provide a gateway for service out of third parties costs applications, in particular he found that the claim for costs did not fall within Rule 7.3(10), (the only rule then relied on by the Appellants). Rule 7.3(10) provides for service out of the jurisdiction where the claim is made under an enactment which confers jurisdiction on the Court and the proceedings are not covered by any of the other grounds.

The issues that arose on appeal were: (i) whether Rule 7.3 (10) provided for service out of the jurisdiction of a non-party costs application; (ii) alternatively whether the Appellant could rely on Rule 7.14, which provides that any application, order or notice issued, made or given in any proceedings may be served out of the jurisdiction if it is served in proceedings in which permission has been given to serve the claim form out of the jurisdiction and (iii) in the absence of any rule enabling permission to serve the claim out of the jurisdiction, whether applying the importation provision provided by Section 11 of the *Eastern Caribbean Supreme Court (Virgin Islands) Act* could cure the perceived deficiency.

The Honourable Chief Justice gave the judgment of the Court and adopted what respectfully can be described as her characteristically pragmatic approach to questions of costs and perceived shortcomings in the procedural rules. The first 10 pages of the 22-page judgment were dedicated to an examination of the source of the Court's jurisdiction to award costs. After examining the historical evolution of the jurisdiction the Court concluded that it was grounded purely in statute and was not inherent (as the Court (differently constituted) had previously concluded in the unreported decision of *Norgulf Holdings Limited et al-v-Michael Wilson and Partners Limited*) Claim No BVUHCVAP 2007/0008. Having reached this conclusion, the Court of Appeal found that while it was ostensibly arguable that Rule 7.3(10) could apply, when considered in the context of the service out provisions generally, it was plainly intended to apply to claims commenced by Claim Form; a claim for costs commenced by notice of application did not fall within that category.

Having found that Rule 7.3(10) was not an available gateway, the Court of Appeal then examined whether Rule 7.14 would offer a viable alternative. The arguments in relation to the applicability of this rule had more traction with the court. However, the Court identified as a difficulty the fact that the person against whom service out of the jurisdiction was sought was not a party to the original claim, and the claim for costs against him did not without more render him a party to the original claim. It is, in the context of this inescapable conclusion, that the application for a joinder became relevant. The Court of Appeal said that it was fairly arguable that if the joinder was successful in the court below that the claim form would qualify for service out of the jurisdiction and would thus sufficiently engage Rule 7.14 which was predicated on the ability to serve the claim form out of the jurisdiction. While recognising that at first blush Rule 7.14 did not appear to be limited to parties who were already parties to an action and after examining the relevant English authorities, which construed similar provisions under the *English Civil Procedure Rules*, the Court of Appeal was quick to recognise that service out of the jurisdiction of an application under Rule 7.14 was not permissible without more. It was necessarily parasitic on being able to show that the proceedings in which the application was issued would be one which would qualify for service out under one of the gateways contained in Rule 7.3. The Court accordingly found that the appropriate course would be for the Court to consider the joinder application and to determine it, on its merits, along with the non-party costs application and permissions to serve out. The Appeal was allowed.

As a result of its finding, the Court did not need to consider the previously vexed, but now settled issue relating to the importation of English law into the BVI. The Court of Appeal reiterated, foot noting the previous decisions on point, that Section 11 of the *Supreme Court Act* was a procedural empowering provision and not one which could be relied on as a basis for importing a substantive jurisdiction into the BVI.

The decision of the Court of Appeal is to be welcomed. The clear position is now that applications for costs orders against non-parties may be served out of the jurisdiction once it can be shown that the proceedings within which they arise are themselves amenable to the service out jurisdiction. What has been rendered as that most frustrating of litigation tool – the toothless tiger – has now had its bite firmly restored.

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