



Neutral Citation Number: [2020] EWHC 506 (Ch)

No: BR-2019-000707

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST

Royal Courts of Justice
Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 24 February 2020

Before:

Deputy Insolvency and Companies Court Judge Baister

Between :

ALFRED SCHEFENACKER

Claimant

- and -

DARKO HORVAT

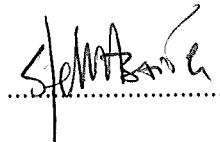
Defendant

Mr Daniel Lewis (instructed by **JMW Solicitors LLP**) for the **Defendant/Applicant**
Mr Jason Robinson (instructed by **Mishcon de Reya LLP**) for the **Claimant/Respondent**

Hearing date: 11 February 2020

Approved Judgment

I direct pursuant to CPR PD 39A para 6.1 that no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.


.....

Deputy Insolvency and Companies Court Judge

Deputy Insolvency and Companies Court Judge Baister:

The application and the background

1. On 6 June 2019 Insolvency and Companies Court Judge Barber made an order requiring the Defendant to attend court to be examined as to his means in accordance with the provisions of CPR Part 71. This judgment deals with the Defendant's application to set aside that order. (Other relief is also sought but is not pursued at this stage.) Evidence has been filed and served by or on behalf of the Claimant and the Defendant, but I need not refer to it since the issues between the parties are now matters of law, and the evidence is relevant mainly for the documents underlying the limited propositions the court is now required to deal with.
2. A number of grounds were originally relied on by the Defendant:
 - (a) the court had no jurisdiction to make the order it made;
 - (b) the application was made without notice, and the court was not informed of material facts and matters which should have led to the dismissal of the application;
 - (c) it was inappropriate to seek the order obtained in circumstances in which a statutory demand had been served on the Defendant.

In my view sensibly, Mr Lewis largely abandoned the non-disclosure point in the course of his submissions (I say "largely" because I do not think he abandoned the point in so far as it goes to jurisdiction and what the judge should have been told). There is no reason I can discern why a judgment creditor should not pursue more than one remedy at the same time with a view to enforcing or obtaining other relief based on a judgment, so that seems to me not to be a good ground for making the order or upsetting it. That leaves the jurisdiction point on which in fact both parties' submissions were focussed.

3. I need not say much about the background or the facts. The Claimant brought proceedings against the Defendant in Germany which culminated in his obtaining a judgment from the Regional Court of Cologne on 21 June 2017. The case was transferred to the Regional Court of Berlin which upheld the judgment save in respect of certain claims for interest. The Berlin court issued a certificate of enforceability on 12 November 2018. The Defendant applied to the Berlin Court of Appeal for a stay of execution, but that was refused on 19 December 2018. I understand that the substantive appeal is still pending but that the court has expressed the provisional view that the prospects of the appeal succeeding are not strong, although the Defendant has adduced evidence to the contrary. I think I should be neutral on that point. The likelihood of the Defendant's appeal succeeding has no real bearing on the present application. My starting point is simply that the Claimant has a judgment which is at present enforceable.
4. Mr Lewis says there was no jurisdiction to make the order which Judge Barber made. Mr Robinson says that there was and that there is authority to support that.

The law

5. The application raises interesting and difficult questions about the relationship between the recast Regulation (EU) No 121/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters and CPR Part 71. I was taken to both in some detail. The relevant law to which I was taken is as follows.
6. I begin with CPR Part 71.

Scope of this Part

71.1 This Part contains rules which provide for a judgment debtor to be required to attend court to provide information, for the purpose of enabling a judgment creditor to enforce a judgment or order against him.

Order to attend court

71.2 (1) A judgment creditor may apply for an order requiring—

- (a) a judgment debtor; or
- (b) if a judgment debtor is a company or other corporation, an officer of that body,

to attend court to provide information about—

- (i) the judgment debtor's means; or
- (ii) any other matter about which information is needed to enforce a judgment or order.

(2) An application under paragraph (1)—

- (a) may be made without notice; and
- (b) must be issued in the court or County Court hearing centre which made the judgment or order which it is sought to enforce, except that—
 - (i) if the proceedings have since been transferred to a different court or hearing centre, it must be issued in that court; or
 - (ii) subject to subparagraph (b)(i), if it is to enforce a judgment made in the County Court Money Claims Centre, it must be issued in accordance with section 2 of Practice Direction 70.

(3) The application notice must—

- (a) be in the form; and
- (b) contain the information

required by Practice Direction 71.

(4) An application under paragraph (1) may be dealt with by a court officer without a hearing.

(5) If the application notice complies with paragraph (3), an order to attend court will be issued in the terms of paragraph (6).

(6) A person served with an order issued under this rule must—

(a) attend court at the time and place specified in the order;

(b) when he does so, produce at court documents in his control which are described in the order; and

(c) answer on oath such questions as the court may require.

(7) An order under this rule will contain a notice in the following terms, or in terms to substantially the same effect—

“If you the within-named [] do not comply with this order you may be held to be in contempt of court and imprisoned or fined, or your assets may be seized.”

7. CPR 70 contains general rules about the enforcement of judgments and orders including:

Scope of this Part and interpretation

70.1(1) This Part contains general rules about enforcement of judgments and orders.

(Rules about specific methods of enforcement are contained in Parts 71 to 73, 81, 83, 84 and 89 and Schedule 2 CCR Order 28.)

(2) In this Part and in Parts 71 to 73 –

(a) ‘judgment creditor’ means a person who has obtained or is entitled to enforce a judgment or order;

(b) ‘judgment debtor’ means a person against whom a judgment or order was given or made;

(c) ‘judgment or order’ includes an award which the court has –

(i) registered for enforcement;

(ii) ordered to be enforced; or

(iii) given permission to enforce

as if it were a judgment or order of the court, and in relation to such an award, ‘the court which made the judgment or order’ means the court which registered the award or made such an order; and

(d) ‘judgment or order for the payment of money’ includes a judgment or order for the payment of costs, but does not

include a judgment or order for the payment of money into court.

8. CPR 74.4A, introduced as a result of the recast Regulation provides:

Procedure for enforcing judgments under the Judgments Regulation

74.4A. A person seeking the enforcement of a judgment which is enforceable under the Judgments Regulation must, except in a case falling within article 43(3) of the Regulation (protective measures), provide the documents required by article 42 of the Regulation.

9. Practice Direction 71—Orders to Obtain Information from Judgment Debtors provides:

1.3 The court officer considering the application notice -

(1) may, in any appropriate case, refer it to a judge; and

(2) will refer it to a judge for consideration, if the judgment creditor requests the judgment debtor (or officer of the judgment debtor) to be questioned before a judge.

10. The recast Regulation contains the following recitals:

Whereas:

[...]

(3) The Union has set itself the objective of maintaining and developing an area of freedom, security and justice, inter alia, by facilitating access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters. For the gradual establishment of such an area, the Union is to adopt measures relating to judicial cooperation in civil matters having cross-border implications, particularly when necessary for the proper functioning of the internal market.

(4) Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters, and to ensure rapid and simple recognition and enforcement of judgments given in a Member State, are essential.

(5) Such provisions fall within the area of judicial cooperation in civil matters within the meaning of Article 81 of the Treaty on the Functioning of the European Union (TFEU).

(6) In order to attain the objective of free circulation of judgments in civil and commercial matters, it is necessary and

appropriate that the rules governing jurisdiction and the recognition and enforcement of judgments be governed by a legal instrument of the Union which is binding and directly applicable.

(I was not taken to these but set them out to give something of the flavour of the Regulation.)

11. I was taken in the course of submissions to the following substantive provisions of the Regulation:

Art 2

For the purposes of this Regulation:

(a) 'judgment' means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court.

Art 24 [under the heading Exclusive jurisdiction]

The following courts of a Member State shall have exclusive jurisdiction, regardless of the domicile of the parties:

[...]

(5) in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced.

Art 36 [under the heading Recognition]

1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

Art 39 [under the heading Enforcement]

A judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required.

Art 42 [under the same heading]

1. For the purposes of enforcement in a Member State of a judgment given in another Member State, the applicant shall provide the competent enforcement authority with:

(a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and

(b) the certificate issued pursuant to Article 53, certifying that the judgment is enforceable and containing an extract of the judgment as well as, where appropriate, relevant information on the recoverable costs of the proceedings and the calculation of interest.

12. I was also taken to a number of authorities to which I shall refer as necessary when I come to the submissions and my conclusions. Suffice it for the present to note the judgment in *Sucden Financial Limited v Fluxo-Cane Overseas Limited* [2009] EWHC 3555 in which Teare J found (paragraph 8) that an order made under CPR Part 71 was “not part and parcel of the process of enforcing a judgment. Rather it is...anterior to such a process”. As he put it (in paragraph 7), “[I]t is an order which puts the judgment creditor into a position where he might thereafter be able to enforce the judgment”.

The submissions

13. Mr Lewis’s point on jurisdiction rests on CPR 71.2(2) and the requirement for the court making the order contemplated to be the court having substantive jurisdiction by reason of being the court that made the judgment or order to be enforced. He goes on to submit that the use of the Part 71 procedure in relation to a foreign judgment is unprecedented and contrary to the mandatory terms of the rule. He developed that argument in his oral submissions, contending that as Part 71 was not itself an enforcement procedure but was, as Teare J held, “anterior” thereto, it was not governed by the recast Regulation. He also relies on the judgment of Hildyard J in *Bank St Petersburg v Arkhangelsky* [2012] EWHC 2842 (Ch) which concerned a Part 71 application and an application seeking permission to use information given on oath to challenge the adequacy of information provided under the terms of a freezing order. He says it proves his negative. Hildyard J thought it sensible to deal with the two matters together, but the applications arose out of proceedings which had been carried on in the BVI, Cyprus and England and which the parties had agreed to “translate” so that the English court had exclusive jurisdiction, save in respect of some matters of which the BVI courts remained seised. Mr Lewis points out that no order was made by Hildyard J on that occasion, and that the judge did not hear argument on jurisdiction; but that could be explained by the fact that the parties had submitted to the jurisdiction. That was not the position in this case.
14. Furthermore, in this case, although the order was made by a judge and not by a court officer, as was possible under the CPR, the fact that it was made without notice meant that the court had not been addressed on jurisdiction. The order would not have been made, he submits, if the judge had had her attention drawn to the points he was now making.

15. Mr Robinson's starting point is the definitions in the Regulation and the CPR: the judgment is a judgment within the meaning of article 2 of the Regulation; his client is a judgment creditor, and the Defendant is a judgment debtor as defined by CPR 70.1(2)(a) and (b). Articles 36 and 39 of the Regulation make clear that the judgment is enforceable without the need for any further step to be taken to give effect to it in this jurisdiction. Article 42 has been complied with. The overall thrust of the Regulation is to ensure what he calls "the free movement of judgments" in member states. The effect of all that, he says, is that the court should treat the Claimant's judgment exactly as it would treat a domestic judgment.
16. Mr Robinson points out that there is authority for the use of Part 71 in relation to a foreign judgment: *Masri v Consolidated Contractors International (UK) Ltd* [2008] EWCA Civ 876; [2009] UKHL 43; [2010] AC 90 (on which the Defendant's solicitors have relied in correspondence) was just such a case. The reason for the ultimate failure of the application was because the court held that an order for examination under CPR 71.2 could not be made against a company officer who was outside the jurisdiction. There is no company officer in this case, and the Defendant is in the jurisdiction. I shall return in my conclusions to that case and deal with other authorities to which I was taken.

Conclusions

17. I see some force in Mr Lewis's suggestion that, if CPR 71 is not an enforcement process but "anterior to such process," which is what Teare J said it was in *Sucden v Fluxo-Cane*, the Regulation may not have the force or application contended for by Mr Robinson. I do not, however, accept that it is simple as that. The judgment is plainly within the scope of article 2, as Mr Robinson points out, and the Claimant is a judgment creditor and the Defendant is a judgment debtor as defined by CPR 70.1(2)(a) and (b). CPR 70.1(2)(c) and (d) go on to say what a "judgment or order" and a "judgment or order for the payment of money" include, but do not limit or otherwise define the term "judgment". The Regulation is not just about the enforcement of judgments; it is also about recognition. Article 36.1 provides for recognition without the need for any special procedure. If CPR 71 is not about enforcement, then it would still, on one view, be possible for a judgment creditor armed with a judgment he is entitled to enforce, to use CPR 71 as a free standing, procedure to get information from the creditor against whom the judgment has been given or made before going on to enforce. As Mr Robinson puts it, and I agree, the foreign judgment can be relied on in the same way as a domestic one.
18. Although "anterior to enforcement", it is plain that CPR 71 is part of a set of rules, even though it can be used in isolation. CPR 70.1(1) refers to it as such in the second, bracketed, sentence: "Rules about specific methods of enforcement are contained in Parts 71 to 73, 81, 83, 84 and 89...". It would be odd if a foreign judgment creditor with a judgment that fulfilled the requirements of recognition and/or enforcement could use the processes in the rules that were enforcement in the purest sense while not being able to use those ancillary to them (not only CPR 71 but, say, an injunction to compel disclosure in aid of a judgment, to use Mr Robinson's example). In my view that cannot be so.
19. An oddity of CPR 71 is that sub-rule 2(2)(b) seems to limit jurisdiction to make an application to "the court or County Court hearing centre which made the judgment or order which it is sought to enforce [...]" (I note, in passing, that it only says that the

application must be issued there; it does not prescribe the court that may ultimately make the order.) On the face of it, that would mean that no court could make a Part 71 order on a foreign judgment. I do not think that can be the case. I say that for the following reasons.

20. Article 24(5) of the Regulation gives exclusive jurisdiction “in proceedings concerned with the enforcement of judgments [to] the courts of the Member State in which the judgment has been or is to be enforced”. The Regulation is directly applicable in the UK. The expression “courts” must mean all courts, which must include the High Court; it cannot mean just the County Court. The “courts”, including the High Court, must, then, be able to make orders under CPR 71 because such orders are made “in proceedings concerned with [*sic*] the enforcement of judgments”. The High Court is plainly now the court “in which the [Berlin] judgment...is to be enforced” where the judgment in question is a foreign one.
21. Whilst the facts of the decided cases are not on all fours with those with which we are concerned here, they demonstrate that Mr Lewis’s contention in his skeleton argument that the use of the Part 71 procedure in relation to a foreign judgment is without precedent is wrong, as he accepted during the hearing. *Masri v Consolidated Contractors International (UK) Ltd* began with an application to Master Miller for just such an order. In that case the order was sought against corporate officers resident and domiciled in Greece, and that is why the application failed. Here the order was sought and obtained against a Defendant who lives in London. *Sucden Financial v Fluxo-Cane* was about Part 71 and was dealt with by a High Court judge. One of the applications before Hildyard J in *St Petersburg v Arkhangelsky* was an order for the examination of two defendants in respect of judgments obtained in the BVI. The Part 71 application appears to have started before Master Weingarten who referred it to the judge. *Deutsche Bank AG v Sebastian Holdings Inc*, which is in the authorities bundle but to which I was not referred, again concerned Part 71. It was an application to set aside an order of Teare J made without notice.
22. For the foregoing reasons I conclude that:-

(a) The High Court has jurisdiction to make an order under CPR Part 71 in relation to a foreign judgment and that it had jurisdiction to do so in this case.

(b) It was permissible to apply without notice. To the extent that the Defendant may have been prejudiced by the order having been made without notice (I can find none) that has been remedied by reason of the matter having now been argued.

(c) There would appear to be no reason why the Claimant should be precluded from using CPR 71 after serving a statutory demand.

I shall therefore dismiss this application.