Neutral Citation: [2022] EWHC 2788 (Comm)

Claim No: LM-2022-000197

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (KBD)

Royal Courts of Justice
Rolls Building, London, EC4A 1NL
Date 4 November 2022

Before

Philip Marshall KC (sitting as a Deputy Judge of the High Court)

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Between:

(1) DAVID TYLER MOSS
(2) BRANDON GABRIEL KEATING
(3) FIDELISSIMUS LLC

Claimants

-and-

(1) BRIAN MARTIN
(2) HOLLY SUSAN BONE

Defendants

- -

JUDGMENT

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Roger Laville (instructed by Kelly Owen Limited) for the Claimants
James McWilliams (instructed by Birketts LLP) on behalf of the First and Second Defendants
Hearing date: 26 October 2022

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

This judgment has been handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be 4 November 2022.

PHILIP MARSHALL KC:

Introduction

1. This is an application for summary judgment in proceedings to enforce two foreign judgments.

2. The two judgments in question are as follows:

    2.1 Firstly, a judgment of the United States District Court for the Northern District of Texas, Dallas Division in proceedings brought by the First and Second Claimants (Mr. Moss and Mr. Keating respectively) against a Mr. Marko Princip and the First Defendant, Mr. Martin, dated 15 April 2016 **("the 2016 Judgment")**. This contained an award of damages for breach of fiduciary duty, fraud, tortious interference and conspiracy against Mr. Princip and Mr. Martin quantified in the sum of US$2,100,000 to each of Mr Moss and Mr. Keating for which each were jointly and severally liable. The judgment contained further awards of exemplary damages and a declaration, but these aspects are not sought to be enforced here.

    2.2 Secondly, a judgment of the District Court of the 68th Judicial District of Dallas County, Texas in proceedings brought by Mr. Moss, and the Third Claimant **("Fidelissimus")**, as assignee of the rights of Mr Keating, against Mr. Martin, the Second Defendant (Ms. Bone) and Carolyn Martin (Mr. Martin's mother), dated 12 April 2022 **("the 2022 Judgment")**. This ordered the payment of the sum of US$4,563,984.04 to each of Mr. Moss and Fidelissimus by Mr. Martin in respect of claims for fraudulent transfers, civil conspiracy, aiding and abetting, conversion, common law fraud and statutory fraud in a real estate transaction. There was also an order for the payment of US$2,808,662.87 to each of Mr. Moss and Fidelissmus by Ms. Bone in respect of the same causes of action. The 2022 Judgment contained other relief in the form of awards of exemplary damages and various injunctions, decrees and declarations but, as in the case of the 2016 Judgment, these aspects are not sought to be enforced in this jurisdiction.

3. The issues raised by the Defendants are relatively confined and have become more so in light of a late witness statement served by Mr. Martin on the evening prior to the hearing. In essence Mr. Martin contends that the 2016 Judgment should not be enforced because the foreign court is said to have given judgment contrary to the rules of natural justice and recognition of that judgment would violate Mr. Martin's rights under Article 6 of the European Convention on Human Rights as implemented by the Human Rights Act 1998. He further contends that the 2022 Judgment is parasitic upon the 2016 Judgment and, if the latter is not to be enforced, the former should not be enforced either. As regards Ms. Bone, she says that the 2022 Judgment should not be enforced against her since the foreign court lacked international jurisdiction and she should not be treated as having submitted to its jurisdiction having regard to the provisions of section 33 of the Civil Jurisdiction and Judgments Act 1982 **("CJJA")**.

4. Mr. Moss and Mr. Keating are citizens of the United States and were investors in a business set up by Mr. Princip and involving Mr. Martin which operated a YouTube channel called "VideoGames". They claimed in the proceedings leading to the 2016 Judgment that they entered into various agreements with Mr. Princip and Mr. Martin whereby they were to receive a share of the revenues of this YouTube channel in return for their investment. They contended that Mr. Princip and Mr. Martin failed to honour the terms of these agreements in the operations of the channel. Such claims were accepted by the jury whose verdict led to the relief granted in the 2016 Judgment.

5. Fidelissimus is a company formed in the state of Oregon in the United States and is managed by Mr. Keating. It was assigned various assets, including Mr. Keating's rights under the 2016 Judgment, on 20 November 2019.

6. Mr. Martin says he is a former freelance manager and agent of various YouTube channels. He was and remains a citizen of the United States.

7. Ms. Bone says she is a video animator and content creator for various YouTube Channels. She is a citizen of the United Kingdom.

8. Mr. Martin and Ms. Bone are husband and wife, having married in June 2019. Ms Bone says she emigrated to Texas in May 2019 to live with Mr Martin. They say that at first

they rented an apartment between June 2019 and February 2020. Then between February 2020 and August 2020 they moved to a property located at 12452 Cajun Drive, Frisco, Texas **("Cajun Drive")**. They say that this property was purchased with money provided by Mr. Martin's mother but then registered in the name of Ms. Bone by way of a gift to her. This contention, however, has been specifically addressed by the Texan court. Following the 2022 Judgment the court provided a document entitled "Findings of Fact and Conclusions of Law" in which it is recorded that:

"45. Brian D. Martin provided access to $339,984.98 ($3400 earnest money plus $336,584.98 purchase money) to his mother, Carolyn M. Martin. Defendant Carolyn M. Martin then initiated two wire transfers for Holly Bone to purchase 12452 Cajun Drive, Frisco TX 75035.
46. Holly Bone fraudulently purchased this property as a "straw man" for the benefit of Brian D. Martin".

9. Ms. Bone says that in August 2020 she decided that she wished to return home to the United Kingdom as she had not enjoyed living in Texas. She says she placed Cajun Drive on the market for sale and left Texas for the United Kingdom on 25 August 2020.

10. In his first witness statement in these proceedings, dated 23 June 2022, Mr. Martin asserted that he left the United States to join his wife in the United Kingdom on 14 September 2020. However, on the afternoon before the hearing I was informed by Mr. Laville, counsel for the Claimants, that although a flight confirmation email that Mr. Martin had exhibited purported to show that he had left Dallas airport on 14 September 2020, it was evident on the electronic version that this date had been added subsequently as a text field by some form of PDF editing software. Once the text field was deleted the flight confirmation showed that Mr. Martin left the airport on 20 September 2020. The significance of the change is that the proceedings leading to the 2020 Judgment commenced on 15 September 2020 and, if he did not leave until after this date, he would have been present in the United States when that legal action began, a relevant matter for the international jurisdiction of the Texan court.

11. Mr Martin filed a fourth witness statement within a few hours thereafter. In this further statement he accepts that he did not leave Dallas until 16 September 2020 and has produced

various copy receipts for taxis and copy airline confirmations to support this. He states that he first booked a flight which was due to leave on 20 September 2020 but that this was later amended to 16 September 2020. He says that his earlier statement giving his departure date as 14 September 2020 was an error of recollection. I am very troubled by that explanation given that Mr.Martin seems to have had the exhibits to his fourth witness statement confirming the true date readily available to him and has not explained the discrepancies in the electronic version of the exhibit to his first statement. Nevertheless I am not in a position at this stage to reach any firm conclusion on the matter.

The 2016 Judgment

12. The proceedings leading to the 2016 Judgment commenced in June 2014 in the District Court, 191st Judicial District Court of Dallas County, Texas but were subsequently removed to the United States District Court for the Northern District of Texas on 28 August 2014 at the defendants' request **(the "Original Proceedings")**.

13. By the Original Proceedings, Mr. Moss and Mr. Keating brought claims for breach of fiduciary duty, fraud, tortious interference and conspiracy against Mr. Princip and Mr. Martin in respect of the management of the YouTube channel, Videogames.

14. The trial in the Original Proceedings took place before a jury between 28 March and 1 April 2016. The jury found that a partnership existed between Messrs. Moss, Keating, Princip and Martin with the Claimants each owning 30% of the partnership and Mr. Princip and Mr. Martin each owning 20%. The jury reached a verdict in favour of Mr Moss and Mr Keating in respect of their claims for compensation and, as a result, the 2016 Judgment was entered in their favour.

15. Mr. Princip and Mr. Martin appealed the 2016 Judgment to the United States Court of Appeals for the 5th Circuit. The grounds of appeal first addressed the jurisdiction of the federal as opposed to the state court trying the case. It was said that the case ought not to have been heard in the federal court on the grounds that there was insufficient diversity in the location of the various parties to warrant this. This seems to have been based on a further argument that the partnership contended for by the claimants ought to have continued to be a defendant and such partnership would have removed the required level of diversity. Further grounds of appeal were raised as to the merits, namely that the jury had reached

inconsistent conclusions and there was insufficient evidence to support several of the jury's findings. All of these contentions were rejected and the appeal was dismissed on 7 February 2019.

16. I have been informed by counsel for the Claimants, Mr. Laville, that nothing was paid in satisfaction of the 2016 Judgment and only very limited recovery has so far been made as a result of execution carried out in the United States. Apparently recoveries have been limited to the sum of US$848,072 paid into court out of certain YouTube channel revenues. Otherwise nothing has been paid or recovered to date.

The 2022 Judgment

17. Fresh proceedings were commenced on 15 September 2020 by Mr. Moss and Fidelissimus against Mr. Martin, Ms. Bone and Mr. Martin's mother, Carolyn Martin, in the District Court, 192nd Judicial District Court of Dallas County, Texas claiming relief in respect of fraudulent transfer, civil conspiracy, aiding and abetting, conversion and fraud. The claims focussed on alleged transfers of assets into the name of Ms. Bone which it was said were fraudulently designed to inhibit the execution of the 2016 Judgement. This included the registration of Cajun Drive in the name of Ms. Bone, and the alleged diversion of revenue derived from various YouTube channels into her name.

18. Mr. Martin's defence, in the form of his "Original Answer", was filed on 2 November 2020 and consisted of a single paragraph general denial of the allegations made against him and the requirement that the claimants prove their case. Carolyn Martin did not appear. Ms. Bone entered an appearance at a later stage, as I describe below.

19. The course of these proceedings was somewhat involved as a result of various interim orders sought by Mr. Moss and Fidelissimus and the existence of further proceedings before the 68th Judicial District Court, which were consolidated on 30 September 2020 with the original claims before the 192nd Judicial District Court (as so consolidated these are hereafter referred to as the **"Subsequent Proceedings"**).

20. The interim orders appear to have begun with a successful application for a temporary restraining order on 18 September 2020 in the 192nd Judicial District Court preventing the

transfer of Cajun Drive or disposition of funds generated by various YouTube channels said to be owned by Mr. Martin. This was followed by an order granting a temporary injunction made by the 68th Judicial District Court on 15 October 2020. This appears to have substantively replicated the terms of the order made on 18 September 2020 save that it extended its temporal effect.

21. On 23 November 2020 the 68th Judicial District Court granted a "turn over" order in favour of Mr. Moss and Fidelissimus which required certain non-parties, namely Google LLC and related companies operating the YouTube website (collectively **"Google"**), to pay into court revenues derived from various YouTube channels that were said to be owned by Mr. Martin and restraining them from disposing of future revenue derived from such channels otherwise than by paying it into court[1].

22. According to the witness statement of Mr. Eugene DuBose, he was instructed as the attorney for Ms. Bone on 30 November 2020.

23. On 7 January 2021 Mr. Moss and Fidelissimus filed a "motion for partial summary judgment on liability" by which they sought default judgment as against Ms. Bone because of her previous failure to respond.

24. On 15 January 2021 the above motion was granted and judgment entered against Ms. Bone.

25. On 1 February 2021 Ms. Bone entered an appearance before the 68th Judicial District Court and filed her "Original Answer" to the claim in the Subsequent Proceedings. This consisted of a single paragraph denying all of the claims. I note that the general denial was not limited to the claims to facilitate execution against property which she claimed to own. It also denied the claims in conspiracy and fraud, in respect of the attribution of assets to her ownership, that sounded in damages. She also subsequently applied for a new trial of the claims.

26. Ms. Bone then filed a "Motion for Reconsideration of the Temporary Injunction" on 17 February 2021 and a "Motion for Reconsideration of Orders" on 21 February 2021 which

[1] This order seems to have duplicated in part an earlier ex parte order of the same court dated 21 September 2020 granting, among other things, an order requiring Google to "turn over for levy" the same YouTube channels as covered by the 23 November 2020 order

appear to have been designed to set aside the previous interim injunctions and "turn over" orders made by the 68th Judicial District Court.

27. On 12 March 2021 the "turn over" orders as against Google were vacated by consent. The temporary injunction granted on 15 October 2020, however, remained in place.

28. On 11 May 2021 Ms. Bone's application for a new trial of the Subsequent Proceedings (grounded on her contention that she had not been properly served) was granted.

29. On 24 May 2021 the application by Ms. Bone to discharge the temporary injunction was refused.

30. On 6 August 2021 the application by Ms. Bone to discharge the "turn over" orders as they affected her was also refused.

31. On 29 July 2021 Ms. Bone appealed both the 24 May and 6 August 2021 decisions to the Court of Appeals, Fifth District of Texas. The appeal was dismissed on 17 February 2022.

32. While the decision of the appeal court was awaited, on 8 February 2022, Ms. Bone filed a counterclaim in the Subsequent Proceedings. This counterclaim began by stating *"Holly Bone is a Defendant in this action. Counterdefendants David Tyler Moss and Fidelissimus LLC, are claimants in this cause. Ms. Bone seeks monetary relief over $1,000,000. These damages are within the jurisdictional limits of this court. Counterclaimant will conduct discovery under [Texas procedural rules]".* The document went on to assert that Ms Bone had posted videos and other materials on Youtube channels that she had created, that this material was her intellectual property and protected by US and English law of copyright and the income from the channels was hers. It then recorded Ms. Bone's request for a declaration that she was the owner of the channels and of the intellectual property in the material posted on them, that the income from them could not be the subject of execution of a judgment debt of Mr Martin and *"an injunction against all parties from any interference with her ownership of or profits from her intellectual property and her labor".* The counterclaim concluded by stating *"WHEREFORE PREMISES CONSIDERED, Counterclaimant Bone requests that after a trial on the merits this court declare her rights as set out above, issue an injunction protecting her interests in her intellectual property,*

award her attorney's fees, and grant such other and further relief as may be just and proper".

33. On 3 April 2022 Ms. Bone served a document entitled "Brief on Charge" setting her substantive defence to the claims advanced in the Subsequent Proceedings followed later by a "Brief on Damages" setting out her case on each form of remedy claimed.

34. The new trial, ordered on 11 May 2021, then eventually took place over 4 days between 5 to 8 April 2022 with Ms. Bone appearing and giving evidence by video link. On 12 April 2022 the court handed down the 2022 Judgment and, according to Mr. DuBose's evidence, has implicitly if not expressly dismissed Ms. Bone's counterclaim.

35. Mr. Martin and Ms. Bone filed a notice of appeal against the 2022 Judgment on 9 May 2022 but this document provides no information as to the grounds of the appeal. The appeal is some way from being determined.

The Present Proceedings

36. These proceedings were commenced on 14 April 2022 and on 6 May 2022 the Claimants obtained, without notice, a worldwide freezing order against both Defendants (limited in the case of Mr. Martin to assets to the value of £10,662,368 and in the case of Ms. Bone to the value of £4,493,860). They also obtained orders restraining the Defendants from leaving the jurisdiction.

37. The return date of the worldwide freezing order has been adjourned by order of Butcher J dated 20 May 2022 to a hearing for one day and is yet to take place. It appears that at this hearing the Defendants will wish to allege that the Claimants committed breaches of their duty of full and frank disclosure and fair presentation in the application for the freezing order.

38. The order restraining the Defendants from leaving the jurisdiction was discharged by order of Mr Simon Birt KC, sitting as a Deputy Judge of this court, on 22 September 2022.

39. The present application was issued by the Claimants on 19 May 2022. Retrospective permission for the application to be made in advance of the filing of an acknowledgement of service was granted by Butcher J on 20 May 2022.

Applicable Principles

Enforcement of foreign judgments

40. Each of the foreign judgments in this instance, as judgments *in personam*, fall to be enforced by way of action at common law. It is common ground that the requirements that need to be satisfied for such enforcement potentially to take place are as follows:

    40.1 there must be a final and conclusive judgment of the court which pronounced it;

    40.2 it must have been given by a court regarded by English law as having jurisdiction to give that judgment; and

    40.3 be a judgment for a fixed sum of money,

    See Dicey, Morris & Collins, *The Conflict of Laws*, (15th Edn.) Vol.1, Rule 46, p.724.

41. It is also common ground that the first and third requirements are satisfied in respect of each of the judgments in this instance. The fact that the 2022 Judgment is subject to an appeal does not mean it is not "final and conclusive". To be final and conclusive a judgment need only be *res judicata* in the jurisdiction in which it is given (see Dicey, Morris & Collins, *supra*, at p.725 and 727-728, para.14-027 and Nouvion v Freeman (1889) 15 App. Cas. 1, at 13 (per Lord Watson)).

42. As regards the 2016 Judgment it is also common ground that the second requirement of jurisdiction is satisfied. But in order to prevent enforcement Mr. Martin relies upon an exception under which the English courts will not enforce a foreign judgment if the proceedings in which the judgment was obtained were opposed to natural justice (see Dicey, Morris & Collins, *supra*, Rule 55, p.725).

43. In Adams v Cape Industries Plc [1990] Ch. 433, the Court of Appeal reviewed the earlier decisions of Pemberton v Hughes [1899] 1 Ch. 781 and Jacobson v Frachon (1927) 138 LT 386, and held that, whilst the most common concern will be whether the foreign court has given notice that it is about to determine the rights between the parties and has given the defendant an opportunity of substantially presenting his case, the exception is not limited to such cases. The ultimate question is whether the there has been a procedural defect that constitutes a breach of the English court's view of substantial justice. The court explained the position at 563-564:

"We have had the benefit of very careful and detailed analyses in argument of the judgments in Jacobson v. Frachon. We intend no disrespect to such arguments if we do not prolong an already very long judgment (in which we have already decided that the defendants succeed on the presence issue) by recapitulating these analyses. We will summarise our conclusions in relation to Jacobson v. Frachon, 138 L.T. 386 , as follows.
(1) Atkin L.J. in his judgment was not attempting to make an exclusive or comprehensive statement of the circumstances in which our courts will treat the procedure adopted by a foreign court in reaching its decision as offending against the principles of natural justice.
(2) Lord Hanworth M.R. was clearly of the view, at p. 390, which we share, that the requirements of due notice and proper opportunity to be heard will, in the majority of cases which can be expected to arise, sufficiently comprise the concept of natural justice in a procedural context, but he prudently qualified his statement by saying that they "almost, if not entirely" comprise it.
(3) We therefore reject the contention that the decision of this court in Jacobson v. Frachon restricted the defence of breach of procedural natural justice to the requirements of due notice and opportunity to put a case. Scott J. was entitled, in our view, to direct himself by reference to the test stated by Lindley M.R. in Pemberton v. Hughes [1899] 1 Ch. 781 , 790, and to consider whether the procedural defect alleged by Cape was such as to constitute a breach of an English court's views of substantial justice. The point was not concluded against the defendants merely because they had been given proper notice of the application for default judgment and would, if they had attended, have been allowed full opportunity to put their case.
(4) However, this court in Jacobson v. Frachon, 138 L.T. 386, was not required to consider the relevance, if any, of any remedy which might have been available to Jacobson under the French legal system, whether by way of appeal or by application for the judgment to

be set aside, if the hearing in the French court had itself constituted a breach of natural justice".

44. As regards the last point, the Court of Appeal expressed some doubt (at 569B) as to the significance of a foreign remedy in cases where the defendant had no notice of the proceedings or had not been afforded an opportunity of substantially presenting his case but then expanded on the relevance of a foreign remedy at 570C-E:

"Since the ultimate question is whether there has been proof of substantial injustice caused by the proceedings, it would, in our opinion, be unrealistic in fact and incorrect in principle to ignore entirely the possibility of the correction of error within the procedure of a foreign court which itself provides fair procedural rules and a fair opportunity for remedy. The court must, in our judgment, have regard to the availability of a remedy in deciding whether in the circumstances of any particular case substantial injustice has been proved. However, the relevance of the existence of the remedy and the weight to be attached to it must depend upon factors which include the nature of the procedural defect itself, the point in the proceedings at which it occurred and the knowledge and means of knowledge of the defendants of the defect and the reasonableness in the circumstances of requiring or expecting that they made use of the remedy in all the particular circumstances".

45. In addition to the exception based on a failure to observe rules of natural justice, Mr. Martin also relies upon exceptions to enforcement based on the foreign judgment being contrary to public policy or arising from a violation of the provisions of the Human Rights Act 1998. However, I did not understand any of these additional grounds to engage different principles from those already set out above. In other words, if, in this court's view substantial justice had been done in the Original Proceedings, there would be no separate ground for invoking public policy or the 1998 Act.

46. In relation to the 2022 Judgment Mr. Martin's defence to enforcement depends on the success of his objection to the enforcement of the 2016 Judgment. As regards Ms. Bone, she objects to enforcement on the basis that the second requirement (namely jurisdiction) has not been made out in respect of that judgment. She contends that although she appeared

in the Subsequent Proceedings and indeed made a counterclaim this should not be treated as a submission to the jurisdiction of the Texas courts (which would be sufficient for this requirement to be satisfied – see Dicey, Morris & Collins, *supra*, p.742, Rule 47). In this regard she contends that her appearance and counterclaim were only for the purposes of protecting her assets and relies upon section 33(1)(c) of the CJJA which provides in relevant part as follows:

"(1) For the purposes of determining whether a judgment given by a court of an overseas country should be recognised or enforced in England and Wales or Northern Ireland, the person against whom the judgment was given shall not be regarded as having submitted to the jurisdiction of the court by reason only of the fact that he appeared (conditionally or otherwise) in the proceedings for all or any one or more of the following purposes, namely—
...(c) to protect, or obtain the release of, property seized or threatened with seizure in the proceedings".

47. This provision first appeared within the Foreign Judgments (Reciprocal Enforcement) Act 1933, section 4(2)(a)(i) following the report of the Greer Committee (The Foreign Judgments (Reciprocal Enforcement) Committee, Cmnd. 4213). Although there was some doubt as to whether the principle applied to common law enforcement that has now been made clear by section 33(1)(c) of the CJJA.

48. As regards this provision, it is evident that it was not intended to prevent a submission to the jurisdiction where a party defended proceedings on the merits. In a footnote to paragraph 9 of the Greer Committee's report, a distinction was drawn between an appearance to defend the case on the merits and cases where a party has *"only appeared to protect property which has or will be seized in the proceedings if he does not appear and defend the proceedings".* It is therefore clear that a defendant will not be able to rely upon section 33(1)(c), where it has appeared and defended a claim on the merits, by contending that it did so to prevent assets being the subject of seizure or execution if a judgment adverse to it was subsequently given. To interpret the provision otherwise would produce absurd results – a point made in Dicey, Morris & Collins, *supra* at footnote 317 on p.754, in a passage which was applied by Butcher J. in JSC Bank v Turkiye Bankasi [2018] EWHC

835 (Comm), at [77]: *"In my judgment [the footnote] is correct in emphasising that s.33(1)(c) should not produce absurd results and should not extend to cases in which a party has actively defended the case on the merits notwithstanding that it has done so in order to avoid its property being effectively seized".*

49. The emphasis is therefore upon whether the defendant has appeared exclusively for the purposes of contesting the actual or threatened seizure of property and in this context it will be relevant to see whether it has made clear that it was not submitting to the jurisdiction. This point was taken up in the following terms by Cooke J in Motorola Credit Corp. Uzan [2004] EWHC 3169 (Comm), at [52]-[53]:

"52. In my judgment, it is implicit in the wording of the section, and in the common law authorities which preceded the wording, that in order to take advantage of the exceptions given by the statute, the purpose for entering an appearance or taking steps must be solely for all or any of the purposes set out in the section. That is, indeed, the force of the phrase "the person shall not be regarded as having submitted to the jurisdiction of the court by reason only of the fact that he appeared for any one of the following purposes". It is right to say that he protection afforded by Parliament would be abused if a defendant could participate in foreign proceedings, partly in order to obtain protection for property which had not already been seized by the foreign court, and partly in order to fight the case on the merits. In such circumstances, that party could deliberately allow the foreign court to determine this and to choose whether or not to accept the outcome, safe in the knowledge that he could otherwise rely upon the protection of s. 33 . That cannot have been the intention of Parliament.

53. If challenges on merits are made for the sole purpose of challenging the jurisdiction of the court, or for the sole purpose of protection of property seized or threatened with seizure, then s. 33 applies. In each case it is necessary to look at the facts to ascertain the purpose for which appearance was entered and contest was raised. If there is engagement on the merits outside the ambit of jurisdictional challenges, or challenges relating to the seizure or threatened seizure of assets, then s. 33 cannot apply".

50. In Motorola, at [57], Cooke J. noted the failure of the defendants to raise even a reservation as to jurisdiction before the foreign court at any stage or to contest the jurisdiction of that court until enforcement had started against them and observed that it was very hard in these

circumstances for the defendants even to raise an argument based on s.33(1)(c). He also noted the action of the defendants in actively invoking the jurisdiction of the foreign court in seeking an adjournment and modification of certain temporary restraining orders in that case. In the absence of a reservation as to the basis on which the defendants appeared these were actions which went beyond the purposes of section 33(1)(c).

51. In JSC BTA Bank, Butcher J. agreed with the observations of Cooke J. at paragraph [53] in Motorola and also sought to determine whether the steps taken by the defendant went beyond the ambit of a challenge to the seizure or threatened seizure of assets. He concluded in that case that they did since the defendant had invited the foreign court to rule on the merits.

52. Mr. McWilliams, counsel for Ms. Bone, submitted that JSC BTA Bank was a case concerned with a claim under a guarantee where the defendant engaged with the merits of that claim in its defence quite separately from any issues arising over an attachment of assets. He submitted that the position was different where the very issue in the proceedings concerned the ownership of assets, when it would be difficult, if not impossible, to disentangle a defence that engaged the merits of the proceedings from one that was advanced for the purpose of preventing the actual or threatened seizure of assets.

53. In my judgment there is no such distinction as Mr. McWilliams seeks to draw. The authorities set out above do not draw a subject matter distinction of this kind. Rather they indicate that where a defendant wishes to rely on section 33(1)(c) they will generally need to make known the limited basis on which they appear and to eschew contesting the general merits of the proceedings. In practical terms this means that they will generally either be contesting the international jurisdiction of the foreign court (and so the case will overlap with the ambit of section 33(1)(a) which prevents submission where appearance is only for the purpose of contesting jurisdiction) or some jurisdictional or procedural objection will be taken to seizure. The latter point is supported by the observations made in the footnote in Dicey, Morris & Collins, *supra* which received approval in JSC BTA Bank. There the learned editors envisaged the separate ambit of section 33(1)(c) as being limited to cases where there is a challenge to a seizure based on internal jurisdictional rules of the relevant forign state. An example is given of the constitutional objections raised in Shaffer v Heitner, 433 US 186 (1977) (where sequestration of assets was held by the United States Supreme

Court to be in violation of the "due process" protections in the Fourteenth Amendment to the United States Constitution). It is also supported by the logic of the observations made by Butcher J. at [77] in JSC BTA Bank that *"Section 33(1)(c) does not, in my judgment, allow a party to contest the merits in this way and then choose either to accept the judgment if it is favourable, or contend it is not to be recognised if it is unfavourable"*. If a party could contest the merits in the type of case identified by Mr. McWilliams but also rely on section 33(1)(c) to resist recognition and enforcement then it would be in precisely the position that Butcher J. described of being potentially able to take the benefit of the judgment if it won but to deny its effect if it lost.

54. Before leaving section 33, it is also important to note that an appeal on the merits may be sufficient to take a defendant outside of its ambit. In this regard I respectfully agree with the judgment of Butcher J. in JSC BTA Bank, where he explained that an appeal on the merits could have this effect applying the earlier decisions in S.A. Consortium General Textiles v Sun and Sand Agencies Ltd. [1978] 1 QB 279, at 299 and Certain Underwriters at Lloyd's v Syrian Arab Republic [2018] EWHC 385 (Comm).

Summary Judgment Principles

55. Both parties were agreed that the applicable principles on this type of application could be derived from the summary given in EasyAir Ltd v Opal Telecom [2009] EWHC 339 (Ch) at [15] and were as follows:

55.1 the court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 1 All ER 91;

55.2 a "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8];

55.3 in reaching its conclusion, the court must not conduct a "mini-trial";

55.4 this does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made,

particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel *supra* at [10];

55.5 however, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No. 5) [2001] EWCA Civ 550;

55.6 although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 3; and

55.7 on the other hand, it is not uncommon for an application under CPR Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it.

56 Whilst bearing these principles in mind, I also note that summary judgment applications to enforce a foreign judgment at common law, are a regular feature of such claims given the limited grounds on which enforcement can be resisted.

Analysis

57 I now turn to the application of the legal principles described above to the facts of this case and take each of the foreign judgments in turn.

The 2016 Judgment

58 Mr. Martin's objection to the 2016 Judgment is based on his assertion that he was unaware that he was a defendant to the Original Proceedings until the trial and did not have adequate notice of the claim or a proper opportunity to defend himself.

59 In his witness statement dated 23 June 2022 he asserts that he was not aware of any proceedings until one week before the trial in March 2016 *"as I had not been properly served"*. No further details, however, are given as to why he claims he was not properly served. In a further witness statement dated 12 July 2022 he states that he attended trial on the understanding that he was no more than a witness. He also says that the attorney of Mr. Princip, Mr. Robert Wilson, had purportedly made filings on his behalf but that he had no knowledge of those documents.

60 A witness statement of the same date has been made by Mr.Wilson in which he says he had made filings on behalf of Mr. Princip and Mr. Martin in the Original Proceedings but received instructions only from Mr Princip. He then makes the remarkable statement that *"I confirm that I understood the instruction(s) I received from Mr. Princip in relation to the proceedings were not on behalf of Mr. Martin".* He then goes on to say that he is unaware of whether and how Mr. Martin was served.

61 In addition, counsel for Mr. Martin has drawn my attention to part of the transcript of the evidence at the trial of the Original Proceedings in which Mr. Martin denied knowing when Mr Keating had entered a lawsuit and in response to the question *"And yet Mr. Keating has sued you. Is that correct*?" he answered *"No; not at all".*

62 In my judgment, however, none of these matters are sufficient to raise a defence with any real prospect of success that there was a breach of the English court's view of substantial justice in the Original Proceedings or any ground for objection based on public policy or a breach of the provisions of the Human Rights Act 1998. This is for the following reasons:

62.1 Mr. Martin has provided no evidence whatever as to the manner in which service upon him is said to have been defective.

62.2 In the First Amended Complaint filed by the claimants in the Original Proceedings, the proposed method of service upon Mr. Martin was stated to be personal delivery at 941 Cimarron Lane, Corona,California 92879. In the "Defendant's Answer" filed by Mr. Wilson in the Original Proceedings this address was stated to be correct. According to Mr. Wilson's evidence he must have confirmed this was the correct address on instructions from Mr. Martin's colleague, Mr. Princip. No suggestion has been made that Mr. Princip gave a false address to Mr. Wilson in respect of his co-defendant, Mr. Martin. On the contrary, in his witness statement of 23 June 2022 Mr. Martin partly confirms the address by stating that he was indeed living in California at the relevant time. No suggestion has been made that Mr. Moss and Mr. Keating failed to effect service in the manner in which they stated that they would.

62.3 The First Amended Complaint stated clearly that Mr. Martin was a defendant both on its face and repeatedly within the document.

62.4 Had the matter been proceeding in England and Mr. Martin had been served by personal delivery of the proceedings at his home address, the court would have been justified in continuing with the proceedings and indeed entering a default judgment had he failed to appear.

62.5 At the beginning of the trial Mr. Wilson clearly stated that Mr. Martin was a defendant and that he represented him. Mr. Martin was present and seated beside Mr. Wilson when this announcement was made. He did not then or at any time afterwards object or inform the court that Mr. Wilson was not his attorney and that he required time to prepare his case.

62.6 Mr. Martin thereafter permitted Mr. Wilson to continue to represent him throughout the trial without objection and took the benefit of the arguments and representation that he provided in seeking to defeat the claim. Counsel for Mr. Martin has submitted that he could not reasonably be expected to raise such objections. I fail to see why not and, perhaps more importantly, no evidence has been provided as to why not.

62.7 Mr. Martin acted jointly with Mr. Princip in instructing new attorneys to mount an appeal against the 2016 Judgment. In doing so he raised no ground of appeal or complaint that he had not been properly served, that Mr. Princip had purportedly given instructions on his behalf but without his authority, that Mr. Wilson had no authority to represent him or that he had not realised he was a defendant and had not had a proper opportunity to represent himself.

62.8 The raising of the defence is evidently an afterthought since in his first witness statement in opposition to the application Mr. Martin did not raise any concerns over natural justice or a breach of his human rights. On the contrary, in paragraph 61 of that statement he said *"I do not seek to contest the 2016 Judgment as part of these proceedings".* It seems likely the afterthought has been prompted by a close review of the transcript of the trial and in particular the passage in which he asserted he was not aware he was a defendant.

62.9 Having regard to the above, there is no proper basis on which the court can conclude that the Original Proceedings were not served in an acceptable manner from the point view of an English court or that Mr. Martin did not have adequate notice of his status as a defendant and a proper opportunity to defend the proceedings. But even if service had not been carried out, it is evident that Mr. Martin decided to take no objection, was content for the trial to proceed with Mr Wilson as his representative and elected to take no point on any of such matters on his appeal. It is also clearly a case where there was ample opportunity for Mr. Martin to take steps locally to remedy the position but that he failed to take any such steps. In the context of this particular case this is a further material factor and supports the conclusion that there was no absence of substantial justice from the English perspective.

63 In all the circumstances, in my judgment, there is no real prospect of Mr. Martin succeeding in his objections to enforcement of the 2016 Judgment.

The 2022 Judgment

64 Given the position in respect of the 2016 Judgment, it follows that there is no basis for Mr. Martin to object to the enforcement of the 2022 Judgment either. His defence to enforcement of the latter stood or fell with his arguments regarding the status of the former.

65 As regards Ms. Bone, in my judgment, it is clear that she submitted to the jurisdiction of the Texas courts and that no exception under section 33(1)(c) of the CJJA arises. Accordingly the second requirement for enforcement (namely jurisdiction of the foreign court) is properly made out. I reach this conclusion for the following reasons:

65.1 Ms. Bone did not limit her participation in the Subsequent Proceedings to a challenge to jurisdiction or the protection of assets from seizure in the relevant sense. On the contrary she decided to engage with the proceedings on the merits by (a) filing an Original Answer which contested all of the claims including those seeking damages for conspiracy and fraud as opposed to the seizure of property she claimed to own; (b) participating in the preparatory stages for trial, including by the filing of a Brief on Charge and a Brief on Damages which contested all of the claims on the merits; (c) attending trial and giving evidence with the same purpose; and (d) more recently filing a notice of appeal.

65.2 In taking each of the above steps she did not state that she was disputing the international jurisdiction of the court or state that her appearance was solely for the purposes of protecting assets from seizure; and

65.3 She decided to invoke the jurisdiction of the Texan courts on the merits by advancing a counterclaim in which she not only sought declarations as to title but also damages.

66 In these circumstances I can see no real prospect of any successful defence to enforcement of the 2022 Judgement. Whilst that judgment is the subject of an appeal that does not prevent it being enforceable for present purposes and I have not yet seen any application for stay.

Conclusion

10 For the reasons set out above I shall grant judgment in favour of the Claimants and shall hear submissions regarding the precise form of order. I shall also hear submissions on costs and on any other consequential matters, including any application for a stay, if these cannot be agreed.