IN THE HIGH COURT OF JUSTICE **Claim No: HC11CO4374**
CHANCERY DIVISION **Neutral Citation no. [2013] EWHC 3448 (Ch)**

BETWEEN:

DAVID CODY

Claimant

-and-

(1) ANDREW MURRAY
(2) JUDY MURRAY
(3) WILLIAM MURRAY

Defendants

Before:
David Donaldson Q.C. sitting as a Deputy High Court Judge

19 November 2013

1. The First Defendant is the well-known tennis player; the other two Defendants are his parents. They entered into a written Agreement dated 16 December 2003 with the Claimant under which the Claimant was appointed their exclusive adviser in relation to his professional tennis career. The Claimant was to receive 10% of gross payments from inter alia all commercial and sponsorship agreements entered into during or renewed after the term of the agreement, which was for an initial period of two years and thereafter determinable on six months notice by either side. On 25 April 2005 the Second Defendant gave six months notice terminating the contract. There was an issue as to whether this was effective to prevent the contract continuing after 1 December 2005, as the Defendants contended, and whether in the light of the First Defendant being a minor in 2003 the Agreement was enforceable. At that time there was in place a two year sponsorship deal with RBS which had commenced on 1 June 2004. On 3 February 2006 the First Defendant made clear in an email that in his view the entitlement to commission applied only to receipts up to the end of the contract, viz December 2005.

2. Against this background discussions took place in late April and May 2006 with a view to settling the dispute by a payment to the Claimant. The Defendants retained Mr Patricio Apey to act for them in these negotiations, in which they did not personally participate. They resulted in an offer to the Claimant that he should be paid £65,000 in addition to retaining all commissions and other payments which he had so far received, to be in full and final satisfaction of all present and future claims. That offer was accepted.

3. It is not in issue that a new agreement with RBS was concluded on 26 March 2006, due to start on 1 June 2006 on expiry of the old one. The Claimant alleges that he was told by Mr Apey during the negotiations that the 2004 RBS Agreement had not been renewed and that it was uncertain that RBS would continue to sponsor the D2. The Defendants respond that Mr Apey said no such thing and that it is clear from two emails from the Claimant, from which he himself quotes in his Particulars of Claim, where he refers to the *"renewed RBS agreement"* and *"your successful agreement renewal with RBS"*, that he was well aware of the renewal and had negotiated overtly on that basis.

4. The Defendants now apply for an order for security for costs under CPR r.25.13(2)(a) on the basis that the Claimant is resident in Texas.

The applicable principles

5. Since the decision in *Nasser v United Bank of Kuwait* [2002] 1 WLR 1868 it is clear that the mere fact of foreign residence, even in a country not covered by the Brussels/Lugano regime, is without more insufficient to justify the exercise of the

power conferred by the CPR. I set out at length substantial extracts from the judgment of Mance LJ, since it represents a new and radically revised point of departure for all subsequent courts. Having reviewed the requirements of EU law and the ECHR he said:

> *"58. The exercise of the discretion conferred by Part 23.13(1) and (2)(a)(i) and (b)(i) raises, in my judgment, different considerations. That discretion must itself be exercised by the courts in a manner which is not discriminatory. In this context, at least, I consider that all personal claimants ... before the English courts must be regarded as the relevant class. It would be both discriminatory and unjustifiable if the mere fact of residence outside any Brussels/Lugano member state could justify the exercise of discretion to make orders for security for costs with the purpose or effect of protecting defendants ... against risks, to which they would equally be subject and in relation to which they would have no protection if the claim or appeal were being brought by a resident of a Brussels or Lugano state. Potential difficulties or burdens of enforcement in states not party to the Brussels or Lugano Convention are the rationale for the existence of any discretion. The discretion should be exercised in a manner reflecting its rationale, not so as to put residents outside the Brussels/Lugano sphere at a disadvantage compared with residents within. The distinction in the rules based on considerations of enforcement cannot be used to discriminate against those whose national origin is outside any Brussels and Lugano state on grounds unrelated to enforcement ...*
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> *61. ... [I]f the discretion to order security is to be exercised, it should therefore be on objectively justified grounds relating to obstacles to or the burden of enforcement in the context of the particular foreign claimant or country concerned ...*
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> *62. The justification for the discretion under Part 25.13(2)(a) and (b) and 25.15(1) in relation to individuals and companies ordinarily resident abroad is that in some, it may well be many, cases there are likely to be substantial obstacles to or a substantial extra burden (e.g. of costs or delay) in enforcing an English judgment, significantly greater than there would be as regards a party resident in England or in a Brussels or Lugano state ...*
> *63. ... [T]here can be no inflexible assumption that there will in every case be substantial obstacles to enforcement against a foreign resident claimant in his or her (or in the case of a company its) country of foreign residence or wherever his, her or its assets may be. If the discretion under Part 25.13(2)(a) or (b) or 25.15(1) is to be exercised, there must be a proper basis for considering that such obstacles may exist, or that enforcement may be encumbered by some extra burden (such as costs or the burden of an irrecoverable contingency fee or simply delay).*
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> *64. The courts may and should, however, take notice of obvious realities without formal evidence. There are some parts of the world where the natural assumption would be without more that there would not just be substantial obstacles but*

complete impossibility of enforcement; and there are many cases where the natural assumption would be that enforcement would be cumbersome and involve a substantial extra burden of costs or delay. But in other cases - particularly other common law countries which introduced in relation to English judgments legislation equivalent to Part I of the Foreign Judgments (Reciprocal Enforcement) Act 1933 (or Part II of the Administration of Justice Act 1920) - it may be incumbent on an applicant to show some basis for concluding that enforcement would face any substantial obstacle or extra burden, meriting the protection of an order for security for costs. Even then, it seems to me that the court should consider tailoring the order for security to the particular circumstances. If, for example, there is likely at the end of the day to be no obstacle to or difficulty about enforcement, but simply an extra burden in the form of costs (or an irrecoverable contingency fee) or moderate delay, the appropriate course could well be to limit the amount of the security ordered by reference to that potential burden.

65. I also consider that the mere absence of reciprocal arrangements or legislation providing for enforcement of foreign judgments cannot of itself justify an inference that enforcement will not be possible. The present case illustrates this. It is a remarkable fact that no country has ever entered into any treaty providing for recognition and enforcement of judgments with the United States of America. But the reason is concern about the breadth of American jurisdiction, the corollary of which has been a willingness on the United States part to recognise and enforce foreign judgments by action on a similarly liberal and flexible basis: see e.g. Jurisdictional Salvation and the Hague Treaty, Kevin M. Clermont (1999) 85 Cornell Law Review 89, 97-98. I am not aware that anyone has ever suggested that access to justice or to the means of executing justice is an American problem. Certainly no evidence has been put before us to suggest that the defendants would, or even could, face any real obstacle or difficulty of legal principle in enforcing in the United States any English judgment for costs against this claimant.

66. There is also no express suggestion in any evidence in this case that the defendants would face any extra burden in taking any such enforcement action against the claimant for costs. But we can, I think, infer without more that it would in the case of this particular claimant resident in Milwaukee. First, the respondents would have to bring an action on any English judgment for costs, before proceeding to any enforcement steps that United States law or the law of Wisconsin permits. Second, the claimant's impecuniosity has collateral relevance, in so far as it is likely that the respondents would have to investigate whether it is as real and great as she asserts, and this is likely to be more expensive to undertake abroad than it would be if she was resident in the United Kingdom or a Brussels/Lugano state. Third, the course of the present litigation to date suggests that the claimant is a determined litigant who can be relied upon by one means or another to take every conceivable step she can to defend what she asserts to be her

rights, but whose very lack of means to fund the appropriate conduct of litigation appears prone to add to the difficulty faced by the defendants. Fourth, there would be likely to be delay in enforcement, by reason of each of the first three points. Viewing the matter both in the light of these factors and as a matter of general common-sense, I consider that it is open to us to infer that steps taken to enforce any English judgment for costs in the United States would thus be likely to involve a significantly greater burden in terms of costs and delay than enforcement of a costs order made against an unsuccessful domestic or Brussels/Lugano claimant or appellant. It is possible that an irrecoverable costs burden (or an irrecoverable contingency fee) would also be involved, even if the claimant proved to have sufficient assets to satisfy any judgment, but I do not think that this can be assumed without evidence.

67. The risk against which the present defendants are entitled to protection is, thus, not that the claimant will not have the assets to pay the costs, and not that the law of her state of residence will not recognise and enforce any judgment against her for costs. It is that the steps taken to enforce any such judgment in the United States will involve an extra burden in terms of costs and delay, compared with any equivalent steps that could be taken here or in any other Brussels/Lugano state. Any order for security for costs in this case should be tailored in amount to reflect the nature and size of the risk against which it is designed to protect."

6. Before considering the application of these principles to the facts of the case before me, I must deal with an important preliminary question raised by the decision of Hamblen J in *Dumrul v Standard Chartered Bank* [2010] EWHC 2625 (Comm). He there (at paragraph 23) drew a distinction between what he termed "enforcement" and "execution", the former stopping at the point when an order or judgment is obtained from the foreign court opening the door to execution, which might be in the form of an exequatur, or an order or judgment obtained under reciprocal enforcement treaties or legislation, or - particularly - in the USA a new judgment through an action on the English judgment.

7. Hamblen J decided in favour of the more restricted ambit. His route to this conclusion was twofold.

8. Firstly, he focussed (at paragraph 26) on the use of the word "enforcement" in the judgment of Mance LJ in *Nasser*. I have severe reservations about construing the words used in a judgment on the basis of their supposed literal meaning, particularly when "enforcement" can depending on the context of its use extend ambiguously to either meaning. His interpretation also seems to me to ignore at least the second of the matters addressed by Mance LJ in paragraph 66 of his judgment.

9. Hamblen J's second line of approach is set out in paragraph 27 of his judgment[1]:

> *"Further, underlying the Nasser approach is the common enforcement regime in Brussels and Lugano states. It is this which enables a comparison to be made between the obstacles to and burdens in enforcement in those states and other countries. Neither the Brussels nor the Lugano Convention addresses means of execution and there is no commonality of regime. Each country has its own processes by which judgments may be executed."*

10. Of course, if one restricts one's gaze to the Judgments Regulation and the Convention themselves, they do not attempt to harmonize anything beyond the exequatur stage. That does not mean that there may not be a similar pattern of execution across the European area – typically attachment of earnings, garnisheeing of debts, seizure and/or sale of property. But one can in my view expect a substantial variation within that similar pattern. The state may play a larger part in the execution process in some countries as compared with others, and fees to the state may vary, perhaps significantly. The costs of the lawyers are also likely to show significant variations across the European landscape, both in amount and in the basis of charging. Nor can any of these matters be known to the English court without a comparative, probably expensive, and potentially contentious survey, which is inappropriate to an application of this sort. In many cases, it may also be entirely unclear at the date of the application for security which particular processes might be appropriate for the Defendants to invoke in the Claimant's country[2] or hypothetically in a Brussels/Lugano comparator state. Finally, *Nasser* gives no guidance on whether that comparator is to be the most or the least difficult or expensive state, or perhaps some average or median, nor is it obvious on what basis of principle or even convenience the court should opt for one or the other.

11. I have therefore considerable sympathy with the proposition underlying Hamblen J's approach that the inclusion of "execution" is likely to face the court with an intractable task in making the comparison required by *Nasser*. That means however in my view no more than that the court in *Nasser* was not attentive to these difficulties: the judgment of Mance LJ gives no indication that they had arisen in argument. It therefore provides no basis for the proposition that he intended any such restriction as adopted in *Dumrul.* I note also that the restriction does not eliminate all these practical problems. In particular, the English court can without comparative evidence only speculate at the cost of obtaining an enforcement order across the Brussels/Lugano states. The practical difficulties may be of apparently less moment (except perhaps in the relatively

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[1] See also his remarks in paragraph 52.

[2] Or, perhaps, in some other country where the claimant maintains most or an important part of his assets, a point not addressed in the analysis of Mance LJ.

rare case of intended execution in a state in which it is legally or practically impossible to obtain an enforcement order), but only because the exequatur stage is much more limited and has a comparatively small financial impact.

12. I can see no indication in *Nasser* that any restriction was intended such as that adopted in *Dumrul.* Had it been, it would surely have been clearly addressed and articulated by Mance LJ together with the reasons impelling its adoption. Moreover, as I have pointed out, part of paragraph 66 of *Nasser* apparently assumes the contrary. While comity and the rules of precedent prescribe that I should only depart from the decision in *Dumrul* if I am clearly satisfied that it was wrong, that is with great respect to Hamblen J the conclusion which I have reached. It is clear however that *Nasser* calls, it may be thought urgently, for at least substantial guidance from the appellate courts if not some element of re-consideration, to address the practical difficulties which have since emerged at the first-instance coal-face, exemplified in both *Dumrul* and the present case.

Application of the principles to the facts

13. In Texas the first step would be to obtain the "domestication" of the English judgment, which I understand to be the order or judgment rendering it capable of execution in that jurisdiction. There is no suggestion of any difficulty in obtaining such an order. Its cost is relatively modest: $500 for the court fee and in the region of $1,000 as a flat fee for the lawyer. In the absence of any evidence to the contrary, I am unpersuaded that this represents any significant additional cost compared with a European equivalent.

14. In any event, the real heart of the Defendants' application lies thereafter[3]. Its principal focus is on a special feature of many southern states in the USA, including Texas. As one of the experts explained, Texas, when it joined the Union in the middle of the nineteenth century, attracted many immigrants from elsewhere seeking a fresh start, and often leaving debts behind them. That led to Texas enacting liberal exemptions from execution which survive to this day for several items of real and personal property

(1) Firstly, there is a right of any unmarried person to an exemption of $30,000[4] for inter alia home furnishings; equipment, books and motor vehicles used in a trade; clothes, jewellery; a car.

(2) Secondly, there is a right to declare real property (up to one city block or 200

[3] It would therefore fail *in limine* if I had thought it right to follow and apply *Dumrul.*

[4] I was told that the Claimant was unmarried: otherwise the exemption would be $60,000.

rural acres) as an exempt personal homestead, provided it is used as a home.

(3) A further exemption applies to life, health and accident insurance policies, and savings plans.

15. According to his witness statement, the Claimant has no assets and nothing but bank debts. In the context of *Nasser* this was relied on in support of an argument that the exemptions do not represent an additional obstacle, on the basis that there is nothing for the exemptions to bite on.

16. (1) I am not satisfied that the Claimant is either now or potentially in the near future without assets which would benefit from the $30,000 exemption. On the contrary, I would be surprised if he did not have at least that modest level of such assets.

(2) I have no basis for rejecting the evidence of the Claimant that he lives in rental accommodation. I note also that a homestead must be designated in an instrument filed with the clerk of the county in which the property is located, and I assume that this is open to public inspection. This suggests to me in the absence of contrary evidence that the Defendants could probably have discovered if the Claimant has misled the court.

(3) I equally have no basis for rejecting his evidence that he has no qualifying policies or savings plans, and it strikes me as entirely plausible.

17. In short, I am not persuaded that the Claimant would benefit from exemptions to the tune of more than $30,000. I am prepared to assume, in the absence of evidence to the contrary, that there is typically no comparable exemption in the European environment[5]. Counsel for the Defendants suggests, on that basis, that if and when he lost the litigation, the Claimant might transfer money into one or both of the last two categories of exempt property. On present evidence, however, I am not persuaded that this is likely (the relevant test under *Nasser*, and confirmed in *Dumrul).*

18. It is then suggested that the existence of the exemptions in Texas means that much extra time and costs would have to be spent on taking depositions (and perhaps other investigatory work) to track down non-exempt assets. The Texan lawyer providing evidence for the Defendants put the cost of collection at $50,000 to $100,000 according to size (though this may include the domestication), or if

[5] That assumption might be more problematic if *Nasser* mandated a comparison which included exemptions in the case of personal insolvency. No-one has raised that argument before me, let alone producing relevant comparative evidence of the European scene.

acting on a contingency a fee of 33% of collections. For the Claimant another Texan attorney lawyer said that he would require a contingent fee of 25% of all collections plus reimbursement of expenses. I proceed on the basis that the work would be done on a contingency fee arrangement, which would reduce the amount ultimately recovered by the Defendants by 25 to 33%. But the absolute amount of the fee will be dependent on the collection. On present evidence, I am not persuaded that the Claimant has non-exempt assets to a level which would lead to any significant amount being collected, and the fee would be correspondingly modest. I would have had also to be satisfied that the cost of collection would be greater than the costs and expenses of executing in a European country, and it would be necessary to factor into any comparison that in Europe one may be able to resort to more readily discoverable assets which would be exempt in Texas, such as the equity in a home[6]. I had however no evidence which would have enabled me so to conclude, though as a matter of pure intuition I suspect that any real difference would be likely to manifest itself only in the case of a substantial recovery.

19. Accordingly, a loyal application of *Nasser* would not justify an order in excess of $30,000.

20. The Claimant seeks to resist even this modest order by reference to an ATE policy which has been taken out in the sum of £106,800.

21. I was referred to two reported cases in this connection: *Michael Phillips Architects Ltd v Riklin* [2010] EWHC 834 (TCC) and *Geophyiscal Service Centre Co. v Dowell Schlumberger (ME) Inc* [2013] EWHC 147 (TCC). Both were however concerned with orders against a company, where the "gateway" condition is that *"there is reason to believe that it will be unable to pay the Defendant's costs if ordered to do so*". The issue was accordingly whether potential recovery under the ATE insurance could be regarded as augmenting the claimant's assets. Here, by contrast the "gateway" is satisfied simply by the Claimant's overseas residence.

22. Moreover, in the present case the Claimant has failed to produce the ATE policy. Without sight and analysis of that document, and of the proposal form and pre-contractual correspondence, no assessment can be made of the likelihood that insurers might be able to avoid the cover for misrepresentation or non-disclosure. The factual substratum of the argument, that the monies would be available, is therefore unestablished.

23. A further difficulty is that on any view the Defendants' recoverable costs are

[6] Care is however required here against an overly "Anglo-centric" view of the world. Notoriously, few (if any) countries in Europe have anything approaching the level of home ownership prevalent in the United Kingdom, and the pattern may fluctuate sharply even within a state, for example according to region or an urban/rural divide.

likely to be at least £150,000 (even taking a strongly sceptical view of the estimate advanced by them in the hearing before me). An ATE recovery of £106,000 would therefore not render irrelevant the unavailability of the $30,000 which but for the exemption could have been recovered by enforcement and execution in Texas. Nor would it provide a reason for the court in the exercise of its general discretion not to order security in the latter sum.

24. The final argument advanced on behalf of the Claimant is that the modest level of his assets is such that any order for security would stifle his claim. The evidence which he presented was however quite inadequate for this purpose, ignoring the well-established requirement that he should provide full detail of all his assets and earnings and address whether the security could be found from monies provided from other sources, such as borrowing. In these circumstances I am not therefore satisfied that the Claimant will be unable to find $30,000 and in consequence be prevented from prosecuting this claim further.

25. I will accordingly make an order for the Claimant to provide security of $30,000. In the absence of any other satisfactory proposal I will order that this sum be paid into court within 28 days and the proceedings stayed until such payment is made.