HOUSE OF LORDS SESSION 2008–09

[2009] UKHL 43

on appeal from:[2008] EWCA Civ 876

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Masri (Respondent) *v* Consolidated Contractors International Company SAL and others and another (Appellant) and another

Appellate Committee

Lord Scott of Foscote
Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe
Lord Brown of Eaton-under-Heywood
Lord Mance

Counsel

Appellants:
Alexander Layton QC
Thomas Raphael

(Instructed by Olswang)

Respondents:
Laurence Rabinowitz QC
Simon Salzedo
Colin West

(Instructed by Simmons & Simmons)

Hearing dates:

18, 19, 20 and 21 MAY 2009

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LORD SCOTT OF FOSCOTE

My Lords,

1. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Mance. I agree with it, and for the reasons given by Lord Mance I would allow this appeal and restore the order of Master Miller.

LORD RODGER OF EARLSFERRY

My Lords,

2. I have had the advantage of reading in draft the speech which is to be delivered by my noble and learned friend, Lord Mance. I agree with it and, for the reasons which he gives, I too would allow the appeal and make the order which he proposes.

LORD WALKER OF GESTINGTHORPE

My Lords,

3. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Mance. I agree with it, and for the

reasons given by Lord Mance I would allow this appeal and restore the order of Master Miller.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

4. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Mance. I agree with it, and for the reasons given by Lord Mance I would allow this appeal and restore the order of Master Miller.

LORD MANCE

My Lords,

Introduction

5. Mr Masri, the respondent, is owed a judgment debt of US$ 64m by Consolidated Contractors International Company SAL ("CCIC") and Consolidated Contractors (Oil and Gas) Company SAL ("CCOG"), both Lebanese companies. The debt arises from judgments on liability and quantum of Gloster J in the Commercial Court on 28 July 2006 and 4 May 2007. CCIC and CCOG have manifested their intention to avoid payment of this judgment debt at all costs. Permissions to appeal to the House of Lords on jurisdictional and other issues in the proceedings were discharged for failure to comply with conditions requiring payment of all or most of the judgment debt. Lord Bingham of Cornhill observed too truly in *Société Eram Shipping Co. Ltd. v Cie Internationale de Navigation* [2003] UKHL 30; [2004] 1 AC 260, para. 10:

> "As many a claimant has learned to his cost, it is one thing to recover a favourable judgment; it may prove quite another to enforce it against an unscrupulous defendant. But an unenforceable judgment is at best valueless, at worst a source of additional loss."

He added that this was a problem that our Victorian forebears had addressed with characteristic energy and pragmatism. That applies in this case. CPR 71 on which the appeal turns reflects the provisions of s.60 of the Common Law Procedure Act 1854, as extended by the Rules of the Supreme Court 1883 to redress the effect of the decision in *Dickson v Neath and Brecon Railway Co* (1869) LR 4 Ex 87.

6. The issues now before your Lordships arise not between Mr Masri and CCIC or CCOG, but between Mr Masri and Mr Toufic Khoury. Mr Khoury was the chairman, general manager and a director of CCIC. He has at all times been habitually resident in Greece. On 6 July 2007, Mr Masri obtained without notice an order for his examination as an officer of CCIC in respect of CCIC's means under CPR 71. The order, granted without notice and on paper by Master Miller, provided for service on the London solicitors then acting for CCIC. It is common ground that this was not appropriate. Subsequent steps were taken to serve Mr Khoury personally in Greece.

7. On an application by Mr Khoury on 20 December 2007, Master Miller set aside the order, primarily on the grounds of lack of jurisdiction under both European Community and domestic law, and without finding it necessary to determine whether valid personal service had been effected in Greece. He gave permission for a "leap-frog" appeal to the Court of Appeal on all but one presently immaterial issue. On 28 July 2008 the Court of Appeal allowed Mr Masri's appeal, and remitted the matter for further consideration of the issue relating to the validity of the service effected in Greece. The House gave leave to appeal on 14 January 2009, indicating that it would hear first the issues of English law, and that, if the appeal failed on those points, it would refer the points of European law concerning in particular the application of the Evidence Regulation (EC) No 1206/2001 of 28 May 2001 and the Brussels Regulation (EC) No 44/2001 to the Court of Justice. In the meanwhile in January 2008 Mr Khoury resigned from his offices with CCIC, while continuing to enjoy the benefit of the same legal team as represents CCIC. In December 2008 CCIC entered into judicial administration in Lebanon, but the appeal proceeds on the basis of the facts before Master Miller in December 2007. The Court of Appeal ordered on 19 February 2009 that no examination of Mr Khoury should take place until after the House's determination of the English law issues.

8. CPR 71 provides:

“71.2 Order to attend court

(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) (i) must be issued in the court which made the judgment or order which it is sought to enforce, except that
(ii) if the proceedings have since been transferred to a different court, it must be issued in that court.

(3) The application notice must –
(a) be in the form; and
(b) contain the information
required by the relevant practice direction.

(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 –

‘You must obey this order. If you do not, you may be sent to prison for contempt of court.’”

The issues

9. The issues now before the House are short, although the argument was long. They are (1) whether the language of CPR 71.2 purports to confer power to order examination of a foreign director of a foreign company, (2) whether it purports to confer power to order such examination in respect of foreign assets, (3) whether, if it does, it is ultra vires the rule-making power, (4) whether, if it does, there is any basis under CPR 6 for service upon Mr Khoury out of the jurisdiction in Greece, and (5) whether, if there is, the English courts should nonetheless give "primacy" or priority to use of the Evidence Regulation (EC) No 1206/2001, before contemplating such domestic means. Mr Khoury submits that the last contention, were it thought to have any force at all and to be potentially decisive, should be referred along with the other European issues to the Court of Justice.

Scope of rule-making power

10. It is convenient to start with the third issue. This depends upon the width of the rule-making power contained in s.1 of the Civil Procedure Act 1997. The first and second issues arise only if the first issue is answered in Mr Masri's favour and they depend upon the proper construction of CPR 71 and CPR 6. A conclusion about what would be within or outside the rule-maker's power may itself affect the construction to be put on the rules. At the heart of Mr Alexander Layton QC's submissions on behalf of Mr Khoury on all three issues is however a single theme, that the court lacks extra-territorial power – over Mr Khoury because he is abroad, and over CCIC's assets (about which Mr Masri wishes to question Mr Khoury) because they are also abroad. The principle relied upon is one of construction, under-pinned by considerations of international comity and law. It is that "Unless the contrary intention appears ….. an enactment applies to all persons and matters within the territory to which it extends, but not to any other persons and matters": *Bennion, Statutory Interpretation,* 4th ed. (2002), p 282, s.106, cited with approval, along with the considerable case-law, by Lord Bingham of Cornhill in *R (Al-Skeini) v Secretary of State for Defence (The Redress Trust intervening)* [2007] UKHL 26, [2008] AC 153, para.11. The principle may not apply, at any rate with the same force, to English subjects (see e.g. *The Zollverein* (1856) Swab. 96, 98, per Dr Lushington and *Ex p. Blain, Ex p Sawers* (1879) 12 Ch D 522, 526, per James LJ, cited with approval by Lord Scarman in *Clark v Oceanic Contractors Inc.* [1983] 2 AC 130, 144E-H), but that is presently irrelevant. Whether and to what extent it applies in relation to

foreigners outside the jurisdiction depends ultimately as Lord Wilberforce said in *Clark v Oceanic Contractors Inc.* (p 152C) upon who is "within the legislative grasp, or intendment" of the relevant provision. To this a nuanced answer may be given, as in that case where United Kingdom PAYE legislation was held to apply to a foreign company employing workers to work in North Sea operations and as in *Holmes v Bangladesh Biman Corp.* [1989] AC 1112 where apparently general wording of a United Kingdom carriage by air Order was not taken to apply to carriage by air wholly to be performed in the territory of a foreign state.

11. The rule-making power in s.1 of the Civil Procedure Act 1997 reads:

> **"1 Civil Procedure Rules**
> (1) There are to be rules of court (to be called 'Civil Procedure Rules') governing the practice and procedure to be followed in-
> ……
> (b) the High Court
> ..……
> (2) Schedule 1 (which makes further provision about the extent of the power to make Civil Procedure Rules) is to have effect."

Schedule 1 includes these provisions:

> "1. Among the matters which Civil Procedure Rules may be made about are any matters which were governed by the former Rules of the Supreme Court ….
> …..
> 4. Civil Procedure Rules may modify the rules of evidence as they apply to proceedings in any court within the scope of the rules."

This language raises the questions: what is the scope of "practice and procedure" within s.1(1), and what is the scope of the matters "governed by the former Rules of the Supreme Court" to which paragraph 1 of Schedule 1 refers? Mr Layton took the House through legislative and rule-making history from the reign of Queen Elizabeth I onwards. His primary submission was that any exercise of jurisdiction in respect of foreigners abroad fell outside the concept of "practice and procedure" and required express statutory legitimation before it could become one of the matters governed by rules of court. He cited Lord Halsbury's statement in *British South Africa Company v. Companhia de*

Moçambique [1893] AC 602, 630 that "Rules of procedure and practice in England would not, I think, in the contemplation of any one, touch questions of territorial or international jurisdiction". That was however said in relation to a claim brought for trespass to land situate abroad, long recognised as a context in which jurisdiction is strictly territorial. He also cited *In re Grosvenor Hotel, London (No 2)* [1965] Ch 1210 and *General Mediterranean Holdings SA v Patel* [2000] 1 WLR 272 for the proposition that rules of practice and procedure cannot alter substantive law (in those cases, the rules relating to privileged documents). In the former case, it was also said that they cannot alter rules of evidence, a matter now expressly catered for by Schedule 1, para. 4 to the Civil Procedure Act 1997.

12. In the present case, Mr Layton also relies upon the limitation of the court's power to enforce the attendance of witnesses or fine defaulting witnesses. From the Statute of Elizabeth (1562) onwards, this had been regulated by statute and had never extended beyond the United Kingdom. The procedure enacted in relation to other jurisdictions involves the taking of evidence, on commission or otherwise, with the assistance of the foreign court. The service of a writ of subpoena is still only possible under s.36 of the Supreme Court Act 1981 in respect of persons in one of the parts of the United Kingdom. The limitation of the court's power in this respect corresponds with the principle of international law, summarised robustly by Dr Mann in his Hague lecture "The Doctrine of Jurisdiction in International Law" (*Recueil des Cours*, 1964-I, *The Definition of Jurisdiction*, p.137):

> "Nor is a State entitled to enforce the attendance of a foreign witness before its own tribunals by threatening him with penalties in case of non-compliance. There is, it is true, no objection to a State, by lawful means, inviting or perhaps requiring a foreign witness to appear for the purpose of giving evidence. But the foreign witness is under no duty to comply, and to impose penalties upon him and to enforce them against his property or against him personally on the occasion of a future visit constitutes an excess of criminal jurisdiction and runs contrary to the practice of States in regard to the taking of evidence as it has developed over a long period of time."

13. With regard to the heads of extra-territorial jurisdiction involved in what used to be RSC O.11 and is now CPR 6, Mr Layton was able to trace many of them to express statutory provisions. But he accepted that

there are a number which cannot be so derived. Thus, for example, the Rules of the Supreme Court 1883 were made under s.17 of the Supreme Court of Judicature Act 1875, which authorised the making of rules for regulating practice and procedure. But they included for the first time as grounds for service out of the jurisdiction that relief was "sought against any person domiciled or ordinarily resident within the jurisdiction" (para. (c)) and that "any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction" (para. (g)). Much later, of course, the latter provision was itself amended to apply whether the action was brought against another person served within *or out of* the jurisdiction: SI 1983/1181. A reading of the Supreme Court Practice 1997 (applicable immediately prior to the CPR) makes it clear that there was a regular process of amendment and minor extension of the powers under O.11 in order to address some new need or "small but irritating loophole": see 11/1 (history of rule, including SI 1983/1181 and its amendment by SI 1990/1689 and 2599, SI 1992/1907 and SI 1993/ 2760) and notes 11/1/18 (breach within preceded by breach out of the jurisdiction), 11/1/19 (tort), 11/1/23 (trusts) and 11/1/25 (foreign judgment or award sufficient ground for grant of leave without presence of assets here). Most recently, following the expression by the Court of Appeal in *National Justice Compania Naviera SA v Prudential Assurance Co. Ltd. (The Ikarian Reefer)(No 2)* [2000] 1 WLR 603, 615D-F of anxiety about the existence of a possible lacuna in the rules, the rule-making committee added CPR 6.20(17) expressly to enable service out of the jurisdiction of a claim against a non-party for costs under Supreme Court Act 1981 s. 51 (now s. 4 of the Courts and Legal Services Act 1990) as interpreted by the House in *Aiden Shipping Co. Ltd. v Interbulk Ltd.* [1986] AC 965.

14. In these circumstances I find both unpromising and unattractive Mr Layton's submission that the rule-making power in respect of extra-territorial jurisdiction is limited to matters covered by specific statutory authority. Parliament must be taken to have understood and endorsed the manner in which the power has been understood and exercised over the years; and it permits the extension of the jurisdiction of the English courts over persons abroad to cover new causes of action and situations. This being so, I would also reject, indeed regard as paradoxical, Mr Layton's further submission that the rule-making power in respect of persons outside the jurisdiction must exclude "purely procedural powers against non-parties". The exercise of the power to make CPR 6.20(17) was in my view legitimate. The statutory constraint contained in s. 36 of the Supreme Court Act precludes the possibility of a rule requiring an ordinary witness outside the jurisdiction to attend for examination within the jurisdiction. But it seems to me that the statutory rule-making

power is wide enough, in principle, to permit the rule-making authority to enact rules relating to the examination of an officer abroad of a company against which a judgment has been given within the jurisdiction. While the two situations are not precisely comparable (see below), it is of some interest in this connection to note the origin of the rule-making power which was held by the Court of Appeal in *In re Seagull Manufacturing Co. Ltd.* [1993] Ch 345 to enable service out of the jurisdiction of an order for the public examination of an officer of a company being wound up by the court. S. 411 of the Insolvency Act 1986 authorises rules "for the purpose of giving effect" to, inter alia, Part IV of that Act, which includes the provisions in s.133 for public examination of such an officer. Rule 12.12 of the Insolvency Rules 1986 (SI 1986/1925), which was held to permit service out, was made under that general power.

15. I would also reject Mr Layton's submission that s.1 of the Civil Procedure Act 1997, should be read as limited to assets within the jurisdiction. Rules of practice and procedure could clearly be made to enable the examination of an officer within the jurisdiction about assets anywhere worldwide. If and so far as it would be legitimate to make a rule for the examination of such an officer who is abroad, I see no basis for limiting the scope of the power to authorise such examination to assets within the jurisdiction.

Scope of CPR 71

16. I turn to the scope of the rule actually made. I accept Mr Layton's submission that, even though the rule-making power is wide enough to enable rules to be made relating to the examination of an officer who is outside the jurisdiction, the presumption against extra-territoriality still applies when considering the scope of CPR 71. Mr Laurence Rabinowitz QC for Mr Masri points out that CPR 71 covers first and foremost judgment debtors who may be anywhere in the world. It must be possible to obtain an order for examination of an individual when he or she is the judgment debtor. Service out of the jurisdiction on such an individual will be possible with leave under, or without leave by implication from, the terms of CPR 6.30(2), stating:

> "…. where the permission of the court is required for a claim form to be served out of the jurisdiction the permission of the court must also be obtained for service

> out of the jurisdiction of any other document to be served in the proceedings".

O 11, r 9(4) (the differently worded predecessor to CPR 6.30(2)) was, rightly, held to authorise service out with leave in such a situation in *Union Bank of Finland Ltd. v Lelakis* [1997] 1 WLR 590. Further, I would accept Mr Rabinowitz's submission that there is nothing in CPR 71 to limit its scope to domestic assets. The Court of Appeal was right to reject a contrary submission in *Interpool Ltd. v Galani* [1988] 1 QB 738.

17. That being so, Mr Rabinowitz submits that, where the judgment debtor is a company, there is no reason to limit the concept of "an officer of that body" to an officer within the jurisdiction; the situations of an individual and corporate debtor ought to be given parallel effect. Mr Layton counters by submitting, correctly in my view, that the two situations are not truly parallel. The judgment debtor is already subject to the court's jurisdiction. In relation to him or her, the adjudicative and enforcement stages are for this purpose part of a single whole: see *Union Bank of Finland Ltd. v Lelakis*, above, 593F, per Henry LJ. But there is nothing in CPR 71 to enable the court to summon a third party witness who might have information about the personal judgment debtor's assets. A corporate judgment debtor has a separate legal personality, and is not to be equated with its officers. They may have information about its affairs, but they have not submitted to the jurisdiction. Some, but certainly not all, officers of a company may for some purposes be regarded as its alter ego. That was a central element in the reasoning by which the Court of Appeal concluded that it had jurisdiction to order Mr Comninos, a non-party, to pay the costs of the false claim by his shipowning company which he had instituted, controlled and financed in *The Ikarian Reefer*, above. But CPR 71 is not limited to officers constituting a company's alter ego, and the present order was not obtained and is not defended on the basis of any suggestion that Mr Khoury was CCIC's alter ego. In these circumstances, the conjunction in CPR 71 of provision for oral examination of a personal judgment debtor (against whom an order may be obtained although he or she is out of the jurisdiction) with provision for oral examination of officers of a corporate judgment debtor is not persuasive support for a proposition that an order may be made against the latter when he or she is out of the jurisdiction. There are basic differences between the two situations, and the presumption against extra-territoriality has a potential application to the latter which it does not have to the former.

18. In Mr Rabinowitz's submission the key to the scope of CPR 71 lies in a recognition of the English court's jurisdiction over the subject

matter of the action (including the judgment) against CCIC and the close connection between that subject matter and Mr Khoury, who was CCIC's chairman, general manager and director. In *The Ikarian Reefer* it was the existence of substantive proceedings over which the court had jurisdiction and of "a substantial connection with those proceedings by a non-party" that Waller LJ stressed in his judgment as the key to understanding the circumstances in which orders for costs would be made against such a non-party (pp.611B-612B). Mr Rabinowitz took this as a useful analogy and found direct support for his submission in Professor Brownlie's identification in *Principles of Public International Law* (7th ed, 2008) p.311 of one criterion of jurisdiction as "a substantial and bona fide connection between the subject-matter and the source of the jurisdiction" (to which however Professor Brownlie added that "the principle of non-intervention in the domestic or territorial jurisdiction of other states should be observed"). Mr Rabinowitz also relied on the statement by Sir Robert Jennings and Sir Arthur Watts in *Oppenheim, Public International Law* (9th ed.), vol 1, pp. 457- 458 that there must be "a sufficiently close connection to justify th[e] state in regulating the matter and perhaps also to override any competing rights of other states".

19. I accept that the existence of a close connection between a subject matter over which this country and its courts have jurisdiction and another person or subject over which it is suggested that they have taken jurisdiction will be relevant in determining whether the further jurisdiction has been taken. It will be a factor in construing, or ascertaining the grasp and intendment of, the relevant legislation or rule. Mr Layton submits that in the present case the connection between the judgment obtained in the proceedings against CCIC and Mr Khoury is weak: no or little stronger than that which exists between the court in ongoing proceedings and a witness who could give important evidence that would assist the court to resolve issues of liability or quantum. He cites *In re Tucker (RC) (A Bankrupt), Ex p Tucker* [1990] Ch 148, where the Court of Appeal set aside an order obtained by a trustee in bankruptcy for the examination under s.25(1) of the Bankruptcy Act 1914 of the debtor's brother, a British subject resident in Belgium. S.25(1) gave the court power to summon before it for examination "any person whom the court may deem capable of giving information respecting the debtor, his dealings or property" and to require him to produce relevant documents, while rule 86 of the Bankruptcy Rules 1952 as amended authorised the court to order service out of the jurisdiction of any process or order requiring to be so served. The origin of s.25(1) went back before 1914 to 1883 and the trustee acknowledged that "in the light of the accepted practice of nations and comity in the field of international law and international relations, eyebrows might be

raised at the notion that Parliament had in 1914 or 1883 given jurisdiction to any bankruptcy court, which might well be a county court, to summon anyone in the world before it to be examined and produce documents" (pp.156H-157B). He argued in the alternative that it sufficed that the brother was a British citizen. That submission too was rejected. Dillon LJ noted the limitations of RSC O.11 and of the power to subpoena witnesses, and said that against this background he "would not expect s.25(1) to have empowered the English court to haul before it persons who could not be served with the necessary summons within the jurisdiction of the English court" (p.158E-F). He noted first an alternative procedure provided by orders in aid in respect of persons resident in Scotland or Ireland or other British courts and "finally and conclusively" a provision in s.25(6) giving the court power to order the examination out of England of "any person who if in England would be liable to be brought before it under this section".

20. Mr Rabinowitz relied upon the later case of *In re Seagull Manufacturing Co. Ltd.* [1993] Ch 345 (para 14 above), in which *In re Tucker* was distinguished on several grounds. *In re Seagull* concerned s.133 of the Insolvency Act 1986, authorising the public examination of a narrower category of persons, viz "any person who – (a) is or has been an officer of the company; or (b) has acted as liquidator or administrator of the company or as receiver or manager ….; or (c) not being a person falling within paragraph (a) or (b), is or has been concerned, or has taken part, in the promotion, formation or management of the company". Failure without reasonable excuse to obey such an order was punishable as a contempt of court under s.134. Rule 12.12 of the Insolvency Rules 1986 authorised the court to order service out of the jurisdiction of any process or order requiring to be so served for the purposes of insolvency proceedings. The Court of Appeal upheld an order made for the public examination of a former director living in Alderney. Peter Gibson J, with whose judgment the other members of the court concurred, said (p. 354F-H) that:

> "Where a company has come to a calamitous end and has been wound up by the court, the obvious intention of this section was that those who were responsible for the company's state of affairs should be liable to be subjected to a process of investigation and that investigation should be in public. Parliament could not have intended that a person who had that responsibility could escape liability to investigation simply by not being within the jurisdiction. Indeed, if the section were to be construed as leaving out of its grasp anyone not within the jurisdiction, deliberate

evasion by removing oneself from the jurisdiction would suffice".

21. Peter Gibson J cited the Cork Committee's Report (1982) for the importance placed in it on public examination during compulsory winding up proceedings: to form the basis of reports for submission to the department; to obtain material information for the administration of the estate; and to give publicity, for creditors and the community at large. Peter Gibson J distinguished *In re Tucker*, on the grounds that it involved private examination, that it concerned s.25(1) of the Bankruptcy Act 1914 under which the class of persons who could be "hauled" before the court went notably wider than the three categories identified in s.133 of the Insolvency Act 1986 and that s. 25(6) of the former Act had no parallel in s.133 of the latter Act. The ability to make use of the in aid procedure to procure the private examination of the former director in Alderney was regarded as no adequate substitute for an ability to require an officer abroad to be subject to public examination.

22. Peter Gibson J also laid some emphasis on the fact that the issue before the court was the scope of the Act and the court was not concerned with whether the order for public examination could be effectively enforced out of the jurisdiction. I have some difficulty with this aspect of his judgment. Peter Gibson J cited *Theophile v. Solicitor-General* [1950] AC 186, 195. That was a case concerned with the legitimacy of making bankrupt, on the basis of debts unpaid in respect of his English trading, a foreigner who had left the jurisdiction. Lord Porter observed in that context that the person concerned could not take exception to such an order "though it may be he will escape from compliance with its terms because he is out of the jurisdiction and cannot be reached by English process". Making a bankruptcy order in respect of English trading against a debtor who has gone abroad is a different matter to making a mandatory order against someone abroad with no personal connection with England for attendance within the jurisdiction to be examined as a witness. Impracticality of enforcement is in my opinion a factor of greater relevance than Peter Gibson J's words suggest. It is in particular a relevant factor when considering whether CPR 71 covers officers abroad.

23. The present case stands between *In re Tucker* and *In re Seagull*. The category of persons embraced by CPR 71 is confined to "an officer" of the company or other corporation – on the face of it probably only a current officer at the time of the application or order, whereas s.133

extended (unsurprisingly since it deals with a company being wound up) to past officers and some other closely connected persons. There is in the context of CPR 71 no equivalent of the provision in s.25(6) which was for Dillon LJ "conclusive" in *In re Tucker*. On the other hand, CPR 71 is concerned with obtaining information in aid of the enforcement of a private judgment. The public interest that "those responsible for the company's state of affairs should be liable to be subjected to a process of investigation and that investigation should be in public" (*In re Seagull*, at p 354) is absent. The universality of a winding up order, in the sense that it relates at least in theory to all assets wherever situate, is also absent. Private civil litigation is different. A fair and efficient legal system is of course a cornerstone of the rule of law, and it can also be said that there is a public interest in a court getting to the bottom of litigation and ensuring that parties have the means of obtaining full information to enable it to do so. Yet the parties have no right to ask the court to summon witnesses from abroad for that purpose. While a judgment crystallises rights and establishes an unsuccessful defendant's liability, the court is still acting in aid of private rights after judgment, and it may be questioned whether, in terms of public interest, there is a very great difference between the importance of evidence for the trial of liability and quantum and for the enforcement of a judgment. A judgment which is mistaken because of a lack of full information or documentation could even be seen as a greater miscarriage of justice than a judgment which is not enforced because of the same lack.

24. In my view Dillon LJ's observation in *In re Tucker* that "eyebrows might be raised" at the notion that Parliament had in 1914 or 1883 given jurisdiction to any bankruptcy court to summon anyone in the world before it to be examined and produce documents has weight also in the context of CPR 71. The historical origin of CPR 71 consists in an amendment of the Rules in 1883 made in the light of the decision in *Dickson v Neath and Brecon Railway Co* in 1869. The Court of Exchequer there held that the pre-existing power to order oral examination of a judgment debtor did not enable examination of the company's three directors, about whose presence within the jurisdiction there was clearly no doubt. The rules committee in 1883 is likely to have been focusing on domestic judgments and domestically based officers. If it thought at all about foreign judgments, which might be enforced in England, it is unlikely to have contemplated that a judgment creditor, having come here for that purpose, would then need assistance abroad to make the enforcement effective. The extreme informality of the process by which the rules enable an order for examination to be obtained continues to point towards a purely domestic focus. An application for an order may under CPR 71 be made without notice, may be dealt with ministerially by a court officer and will lead to the automatic issue of an

order (albeit with the general safeguard of the right to apply to set aside which exists under CPR 23.10 in the case of any order made without service of the relevant application notice). These considerations all tend to point against the application of CPR 71 to company officers outside the jurisdiction.

25. Sir Anthony Clarke MR, with whose judgment the other members of the Court of Appeal in the present case agreed, said ([2008] EWCA Civ 876; [2009] 2 WLR 699, para. 16) that it would "defeat its object" if CPR 71.2 were restricted to persons within the jurisdiction. That is, I think, to put matters substantially too high. Small though the world may have become, relatively few officers of companies are likely to contemplate, let alone be able to undertake, emigration or flight to a different country in order to avoid giving information about their company's affairs. For the same reason, the deployment in *In re Seagull* of the possibility of "deliberate evasion" by an officer removing himself from the jurisdiction seems to me a factor of greater forensic than real weight, although such weight as it may have may be greater after the calamity of compulsory winding-up (when something has evidently gone wrong and may require embarrassing or even potentially incriminating investigation) than in the context of an unpaid judgment debt.

26. In my view CPR 71 was not conceived with officers abroad in mind, and, although it contains no express exclusion in respect of them, there are lacking critical considerations which enabled the Court of Appeal in *In re Seagull* to hold that the presumption of territoriality was displaced and that the relevant statutory provision there, on its true construction and having regard to the legislative grasp or intendment, embraced a foreign officer. Although CPR 71 is limited to officers of the judgment debtor company, I regard the position of such officers as closer to that of ordinary witnesses than to that of officers of a company being compulsorily wound up by the court. I conclude that CPR 71 does not contemplate an application and order in relation to an officer outside the jurisdiction.

Service out of the jurisdiction

27. This conclusion is reinforced by a consideration of the position relating to service. Mr Salzedo advances two alternative bases upon which he submits that an order made against a non-party under CPR 71 could be served: under CPR 6.30(2), or alternatively under CPR 6.20(9).

The Court of Appeal accepted the former, and found it unnecessary to consider the latter.

28. The primary purpose of CPR 6.30(2) is, on any view, to require leave for service out of the jurisdiction on a defendant to proceedings of documents requiring to be served during such proceedings on such defendant, where the original claim form required such leave. It is an understandable provision. By inference, it indicates that if the claim form did not require leave for service out of the jurisdiction, then ancillary documents requiring to be served on the defendant during the proceedings do not require such leave. The Court of Appeal interpreted CPR 6.30(2) as having a second and much wider effect, that of enabling any non-party on whom it might be appropriate to serve any document during the course of proceedings to be served, with leave if the proceedings against the original defendant required leave for service out, without leave if they did not.

29. The wider interpretation put by the Court of Appeal on CPR 6.30(2) leads to a surprising result. In a case where service of the original proceedings took place abroad with leave using one of the gateways in CPR 6.20, there would be an open discretion to grant leave for service out of the jurisdiction of any ancillary document on a non-party. Still more surprisingly, if the original proceedings did not require leave to serve out (e.g. because the defendant was domiciled in a Brussels Regulation State), a non-party could be served abroad (on the face of it in any country in the world) without leave.

30. The Court of Appeal relied upon two cases under O.11 r.9 of the previous Rules, which read (as amended):

> "(1) Rule 1 of this Order shall apply to the service out of the jurisdiction of an originating summons, notice of motion or petition as it applies to service of a writ.
> …..
> (4) Service out of the jurisdiction of any summons, notice or order issued, given or made in any proceedings is permissible with the leave of the court but leave shall not be required for such service in any proceedings in which the writ, originating summons, motion or petition may by these rules or under any Act be served *out of the jurisdiction* without leave" (italics added).

In *Union Bank of Finland Ltd. v Lelakis* [1997] 1 WLR 590, the Court of Appeal held that it was sufficient to engage O.11 r.9(4) if the proceedings against the defendant were proceedings which could have been served out of the jurisdiction. They did not actually have to be so served. (In that case, the proceedings had in fact been served within the jurisdiction under submission to jurisdiction clauses contained in the guarantees upon which suit was brought against the defendant.) The issue under O.11 r.9(4) arose in relation to the service on the defendant of an order for his examination as a judgment debtor. So there was no question of service on a non-party. The case does not help on the present issue.

31. The second case is *The Ikarian Reefer*, where the Court of Appeal was concerned that there might be a lacuna in the rules in relation to a non-party whom the successful defendant sought to hold liable for costs ordered against the unsuccessful claimant company. However, the court considered, first, that O. 11 r.9(4) enabled leave to be given for service of an application for such costs on Mr Comninos, and opined, second, that there must anyway be an inherent power to give leave to join a non-party and serve him out of the jurisdiction.

32. The latter proposition is at odds with the generally understood position accepted by the court in the *Lelakis* case (at p.593H). It has long been established that service out of the jurisdiction requires express authorisation either by statute or in the Rules. Thus, in *In re Aktiebolaget Robertsfors and La Société Anonymes des Papeteries de l'Aa* [1910] 2 KB 727, where the Court of Appeal had to construe O.XI r.8A made in 1909 to extend the power to serve out to summonses, orders or notices, the court held that this power was only exercisable in situations where service out of a writ was permissible under O.XI r.8 and so did not cover a summons to set aside an arbitration award. There was no suggestion that the heads of O.XI r.8 were anything other than exclusive. O.11 r.9(1) which replaced O.XI r.8A confirmed the exclusive nature of the heads of jurisdiction to serve out provided by O.11 r.1.

33. As to the former proposition, *The Ikarian Reefer* may be viewed as a special case, since Mr Comninos was the alter ego of the claimant company whose proceedings he had instigated, controlled and financed. In such circumstances it may be legitimate to assimilate the party and non-party, and to treat any means of service available against the former as available also against the latter. As Waller LJ put it, at p.613E, "…. if what is alleged ….. is that the non-party in reality brought the main

proceedings, the English court has jurisdiction to decide whether there has in effect been a submission to the jurisdiction by the non-party". Nothing equivalent can be or is alleged in respect of Mr Khoury in the present case, and Waller LJ's statement was by way of coda to the primary basis on which the Court of Appeal held that there was jurisdiction to serve out on a non-party. That involved reliance upon the Court of Appeal's previous decision in *Mansour v Mansour* [1989] 1 FLR 418.

34. Waller LJ noted that Sir John Donaldson MR in *Mansour* had been addressing a version of O.11 r.9(4), which omitted the words "out of the jurisdiction" which I have italicised in quoting its language above. In fact Sir John Donaldson was in error in omitting those words. Waller LJ, believing that they had been added subsequent to *Mansour*, said that; "With the insertion of those words it is not possible to argue that, simply because the action was started by a writ where service of the same could be made without leave, any summons in the action which is to be served on a person outside the jurisdiction can be served without leave". But he continued by finding in Sir John Donaldson's reasoning support for "the view that, where there is an action pending before the English court, then a summons in that action can be served on a person domiciled and resident outside the jurisdiction", whether or not he or she was already a party. Bearing in mind that the proceedings in *The Ikarian Reefer* were brought by writ served on insurers within the jurisdiction by Mr Comninos's shipowning company, I find it difficult to discern the distinction between the proposition rejected and the proposition accepted in these two sentences. Leaving aside situations where the non-party is the alter ego of a party to existing litigation, any suggestion that any non-party can be served without leave under CPR 6.30(2) with any ancillary summons issued by either party in any proceedings properly brought and served within the jurisdiction clearly cannot be right. It is not without interest that the Rules Committee, following *The Ikarian Reefer*, concluded that the rules should be supplemented by adding CPR 6.20(17) in order expressly to permit service out of a claim for an order for costs against a non-party.

35. Mr Salzedo also referred to dicta of Galliher JA and, on one view, Martin JA in *Sostad v. Woldson* [1925] 3 DLR 779 as supporting the view that the British Colombian equivalent of O.XI r.8A was not subject to restrictions in O.XI r.1. But the dicta do not appear to have been necessary for the decision. Galliher JA made clear that the case had been argued, and Macdonald JA decided the case, on the basis that the relevant obligation arose within the jurisdiction, and so within O.XI r.1(e) (now CPR 6.20(6)). Mr Salzedo also relied upon *In re Liddell's*

Settlement Trusts [1936] 1 Ch 365 as a case where the Court of Appeal had upheld an injunction issued against Mrs Liddell who was not a party to the proceedings and who had taken her children to the United States. But the court was careful to distinguish *In re Aktiebolaget Robertsfors* on the ground that Mrs Liddell was domiciled or ordinarily resident within the jurisdiction (see per Slesser LJ at pp.370-371, per Romer LJ at p.374 and per Greene LJ agreeing with both judgments at p.375); and that there was accordingly an independent head of jurisdiction under O.XI r.1 (now CPR 6.20(1)). The case therefore supports, rather than undermines Mr Khoury's case.

36. The scope of CPR 6.30(2) has been comprehensively reviewed by Tomlinson J in *Vitol AS v Capri Marine Ltd.* [2009] Bus LR 271, in a context paralleling the present – service on an officer resident in Greece of an order for his examination under CPR 71. Tomlinson J held that CPR 6.30(2) was concerned with documents requiring to be served on parties to the proceedings. The Court of Appeal in the present case disagreed and thought that CPR 71 was not "naturally limited" in this way. In my opinion, Tomlinson J was right, and I agree with his clear reasons (including those he gave for distinguishing *The Ikarian Reefer*) and his conclusion.

37. Although there may have been lacunae in the Victorian rules regarding service out of the jurisdiction, the continuing absence in the modern rules of any provision enabling service out of an order under CPR 71 is both consistent with and in my opinion supportive of the view that CPR 71 was not contemplated, any more than its differently worded predecessors were, as applying to officers outside the jurisdiction.

38. Finally, Mr Salzedo submitted that, all else failing, the case could be brought within one of the heads of CPR 6.20, that is "(9) a claim …. made to enforce any judgment or arbitral award". In my view, this submission also fails. An application to enforce a judgment within the jurisdiction is distinct from an application to order examination of a witness who is abroad with a view to enforcing the judgment wherever assets may prove to exist. The former does not trespass outside the jurisdiction of the English courts. The latter would, in a manner which was clearly not in mind in CPR 6.20(9). Nothing in the history of CPR 6.20(9), discussed in *Tasarruf Mevduati Sigorta Fonu v Demirel* [2006] EWHC 3354 (Ch), [2007] 2 All ER 815 (Lawrence Collins J) and [2007] EWCA Civ 799, [2007] 1 WLR 2508 suggests any wider intention.

Conclusion

39. It follows that Mr Khoury is in my opinion correct in submitting that CPR 71 does not enable an order for examination to be made against an officer who is outside the jurisdiction, and that CPR 6 provides no basis for service out of the jurisdiction of any such order, had it been possible to make one. The appeal should be allowed accordingly, the Court of Appeal's order of 28 July 2008 for the examination and service out of the jurisdiction of Mr Khoury should be set aside and Master Miller's order of 20 December 2007 restored. In these circumstances, the European issues considered in the Court of Appeal do not arise, and it is unnecessary to make any reference to the Court of Justice.