In The Supreme Court of Bermuda

COMMERCIAL JURISDICTION
2017 No: 295

BETWEEN:

MEXICO INFRASTRUCTURE FINANCE LLC

Plaintiff

And

THE CORPORATION OF HAMILTON

Defendant

RULING

Dates of Hearing:	Wednesday 12 June 2024
Date of Decision: (Stay Application):	Wednesday 12 June 2024
Date of Reasons:	Thursday 12 December 2024
Plaintiff:	Mr. Keith Robinson (Carey Olsen Bermuda Limited)
Defendant:	Mr. Mark Diel / Mr. Changez Khan (Marshall Diel & Myers Limited)

Application for stay of proceedings on case management grounds / Application for stay of enforcement proceedings of a foreign judgment / Application for Security of Costs

RULING of Shade Subair Williams J

Introduction

1. These are enforcement proceedings in respect of a foreign judgment which was obtained in the United States.

2. The Defendant, the Corporation of Hamilton ("the COH") made two interlocutory applications before this Court seeking:

   (i) a stay of these proceedings pending the determination of an appeal against the decision of the United States District Court for the Southern District of New York (the "US District Court") in *Mexico Infrastructure Finance LLC v The Corporation of Hamilton & The Bank of New York Mellon*, Case No. 17-cv-06424 (DLC) and

   (ii) payment by the Plaintiff in the form of security for costs pursuant to RSC Order 23 Rule 1.

3. These Defendant's applications were made on a summons dated 1 February 2024, which is supported by the affidavit evidence of Mr. Charles Gosling, Mayor of the Corporation of Hamilton and Mr. Kenneth Schacter, New York attorney of Morgan, Lewis & Bockius LLP.

4. The Plaintiff, Mexico Infrastructure Finance LLC ("MIF") filed evidence in support of its application for summary judgment and its reply evidence is contained in the affidavits of Mr. Xavier Gonzalez-Sanfeliu, Manager of MIF, and Mr. Mark C. Zauderer, New York attorney of Dorf Nelson & Zauderer LLP.

5. MIF commenced these proceedings by a Generally Endorsed Writ of Summons filed on 6 December 2023. It seeks recognition and enforcement of a foreign judgment obtained against the COH in the US District Court where MIF successfully prosecuted its claim against the COH for damage and loss caused by the COH's breach of an escrow agreement between dated 9 July 2014 (the "Escrow Agreement"). Having obtained judgment against the COH, the Plaintiff commenced these proceedings in Bermuda where the COH's assets are said to be located.

6. The Defendant, however, sought to stay these proceedings pending its efforts to achieve success on appeal from the judgment of the US District Court. Further, the Defendant argued that MIF, a litigant based outside of Bermuda, should be made to pay security for costs in respect of these proceedings for recognition and enforcement.

7. At the close of the arguments heard before me, I refused the stay application and informed the parties that I would later provide these reasons. Having proceeded to hear Counsel on the issue of security for costs, I reserved my decision which I now give with reasons.

Background Facts

8. The background facts are narrated in the previous judgments of this Court, the Court of Appeal and the Privy Council. I therefore confine my rehearsal of the facts to a short summary in order to give context to the present application.

9. On 9 July 2014 the COH secured MIF's $18,000,000 bridging loan to PLV in the form of (1) a guarantee ("the Guarantee") and (2) a mortgage deed of 4 August 2014 conveying the COH's freehold interest in the Car Park ("the Mortgage").

10. The litigation in respect of the Guarantee ended when the Privy Council found that the Guarantee was *ultra vires*. (See *Mexico Infrastructure LLC v The Corporation of Hamilton* [2019] UKPC 2 (Lord Sumption and Lord Lloyd-Jones dissenting).

11. In a separate civil action before this jurisdiction of Court (Case No. 295 of 2017), MIF filed an Amended Generally Endorsed Writ of Summons for declaratory relief, *inter alia*, confirming the validity and binding effect of the Mortgage. Those proceedings have been termed the "Mortgage Proceedings".

12. In its defence, the COH say that the Mortgage is *ultra vires* for the same reasons that the Guarantee was found to be invalid in the majority judgment of the Privy Council. As I observed in an interlocutory Ruling delivered in the Mortgage Proceedings, the COH relies on the Privy Council's findings that the Guarantee was purposed to assist the developer, Par La Ville Hotel and Residences Limited ("PLV"), in obtaining funding for the development of the lavish project, so to enable PLV to obtain credit. Such a purpose did not qualify under the governing legislation as "municipal". On that same basis, the COH says that the Mortgage, too, is *ultra vires*. The trial of the Mortgage Proceedings is pending.

13. In these proceedings, the Court is ultimately concerned with MIF's application for recognition and enforcement of the US District Court's judgment on MIF's claims for breach by the COH of the Escrow Agreement.

The Judgment Obtained in the New York Court on the Escrow Agreement

14. The Escrow Agreement was formed between MIF, the COH, the Bank of New York Mellon ("NY Mellon") and Par-la-Ville Hotel and Residences Ltd. ("PLV"). The Escrow Agreement refers to what is termed the "Underlying Agreement" which is a credit agreement, dated 9 July 2014 (the "Credit Agreement"), entered into between PLV and MIF. MIF's deposit of the net proceeds of the $18,000,000.00 bridging loan ($15,449,858.00) in escrow (the "escrow sum") at NY Mellon was made pursuant to the Credit Agreement. The Escrow Agreement also refers to a "Permanent Loan Funding Agreement" between the "Permanent Lender" and PLV which provides for a "Permanent Loan" to be made to PLV.

15. The Escrow Agreement requires the contracting parties to personally submit to the jurisdiction of the Courts in the City and State of New York (or elsewhere as NY Mellon may select) for all proceedings related to the Escrow Agreement. Clause 12 provides:

    "*Governing Law; Jurisdiction; Waiver of Right to Trial by Jury. This Agreement shall be interpreted, construed, enforced and administered in accordance with the internal substantive laws (and not the choice of law rules) of the State of New York. Each Interested Party hereby submits to the personal jurisdiction of and each agrees that all proceedings relating hereto shall be brought in courts located within the City and State of New York or elsewhere as the Escrow Agent may select. … …* "

16. On 19 July 2017, MIF issued proceedings against the COH and NY Mellon in the Supreme Court of the State of New York, County of New York. On 23 August 2017 those proceedings were transferred to the U.S. District Court's jurisdiction pursuant to a notice filed by the COH. On 15 December 2017, the COH issued a motion to dismiss the U.S. District Court Proceedings on non-jurisdictional grounds. Having failed on the jurisdiction grounds, the COH entered an answer to MIF's claims on 15 April 2019. This was followed by the COH's entry of an amended answer to MIF's claim on 18 April 2019. On 27 September 2019, the COH applied for summary judgment. This was rejected by the US District Court. Nearly a year later on 21 August 2020, the COH moved to reconsider the US District Court's decision denying summary judgment.

17. The evidence before this Court is that the COH actively participated in the litigation before the US District Court. This is illustrated by the COH's active role in the discovery process, its serving of document requests and interrogatories on MIF, its taking of depositions and its serving of expert reports. MIF's breach of contract claims under the Escrow Agreement were bench-tried by the US District Judge, Denise Cote, on 28 June 2023. The COH actively defended the trial proceedings.

18. The breach of contract claims in the US District Court concerned the distribution of the escrow funds which comprised the net proceeds of the Bridging Loan deposited by MIF into NY Mellon's escrow account. The Escrow Agreement provided for a phased disbursement of the escrow funds to PLV. The initial drawdown sum was capped at $1,200,000 and subject to a set of pre-conditions to be carried out by PLV and the COH. Similarly, PLV's entitlement under the final drawdown provisions was contingent on compliance with various conditions precedent.

19. The following steps were prerequisite to the creation of an entitlement for each initial drawdown:

    (i) PLV was to deliver to the COH a drawdown request certifying that the purpose for the amounts to be drawn down is to pay for the expenses associated with the Permanent Loan or as otherwise set out in Schedule 8.7 of the Credit Agreement;

    (ii) The COH and PLV were to then provide written notice to the Escrow Agent confirming the COH's approval of the initial drawdown request; and

    (iii) MIF would then provide written notice to the Escrow Agent confirming its receipt of title insurance in accordance with the Credit Agreement

20. For a final drawdown to be made from the senior escrow account, it had to be preceded by the following steps, *inter alia*:

    (i) PLV was to deliver to the COH (with FYI copies to be provided to MIF) a PLV-signed certification confirming that all conditions precedent had been satisfied for the funding of a loan of $225,000,000.00 and equity investment of $100,000,000.00 or other such substantially similar financial structure from the Permanent Lender, as reasonably acceptable to the COH;

    (ii) PLV was to deliver to the COH and MIF copies of the Permanent Loan Funding Agreement, the Senior Escrow Agreement and all ancillary documents;

    (iii) The COH, in both form and substance, was to find the documents in (i) and (ii) above acceptable;

    (iv) The COH and PLV were to provide a joint written notice to the Escrow Agent (with FYI copies to be provided to MIF) no sooner than (3) business days after receipt by the COH of the signed certification in (i) above. (The joint written notice was to contain a

statement confirming that the documents delivered are approved by the COH and that the disbursement is authorized.)

21. On 5 July 2023 District Judge Cote, issued a 71 page-page written Opinion and Order of her findings following the trial of MIF's claims. Judge Cote found that the COH had breached multiple provisions of the Escrow Agreement in relation to the final drawdown of the escrow funds. Her factual findings are particularised over several pages of the Opinion and Order. Without a full rehearsal of those findings, I note her findings of breach:

    (i) The COH authorised the final drawdown even though PLV had not secured a Permanent Loan. The TPSA did not qualify as a Permanent Loan under the Escrow Agreement;

    (ii) Supposing that the TPSA could have qualified as a Permanent Loan, the COH authorised the disbursement before it was finalised;

    (iii) When the COH authorised the final drawdown, it had not received a certification from PLV that all conditions precedent to funding a Permanent Loan had been satisfied;

    (iv) The COH had not received a duly executed copy of the Senior Escrow Agreement, which was required to authorise the final drawdown. Judge Cote found that although the COH representatives suggested that PLV's Unanimous Written Resolution could serve as the Senior Escrow Agreement, these resolutions were not finalised in time for the COH to authorise the drawdown.

22. Summarising her conclusions on the case established against the COH, Judge Cote held [page 39]:

    "*Breach of Contract Against Hamilton*
    "Hamilton breached the Escrow Agreement. It is undisputed that the Escrow Agreement existed, that MIF performed its obligations under that agreement, and that MIF suffered damages. In addition, as explained below, Hamilton breached multiple provisions relating to the Final Drawdown and these breaches factually and proximately caused MIF's damages. Accordingly, Hamilton is liable for MIF's damages."

23. District Judge Cote also considered the COH's *ultra vires* defence before her in the context of the Privy Council's decision on the validity of the Guarantee. She said [page 48]:

    "*The Escrow Agreement was reasonably incidental to the Development Agreement and was thus intra vires. As the Privy Council held, Hamilton "had power to dispose of an interest in*

its land and was thus able to enter into the development agreement." And, as the Court explained in the Opinion denying Hamilton's motion for summary judgment, the Escrow Agreement "obligated Hamilton to review PLV's permanent loan funding documentation, an certify that PLV satisfied the conditions precedent to obtaining proper financing in furtherance of the development." ... These obligations dovetailed with Hamilton's powers under the Development Agreement to oversee the Project. For example, §14 of the Development Agreement if PLV failed to adhere to a set timeline for the Project. Because the Escrow Agreement required Hamilton to ensure that the Project moved forward as planned, it was reasonably incidental to the Development Agreement and thus not ultra vires."

24. On 11 October 2023 the District Court delivered its judgment, formally entitled "Opinion and Order". The case against NY Mellon was dismissed. However, judgement in the sum of US$ 12,549,216.60 was entered against the COH, in favour of MIF. The total sum for which MIF was held liable, comprising prejudgment interest together with costs and disbursements as taxed by the US Court clerk, was calculated to be $22,472,724.51.

25. The COH appealed the District Court's judgment to the United States Court of Appeals for the Second Circuit (the "US Appeals Court"). However, as the Plaintiff points out, the COH did not bring an application before the District Court for a stay of execution. The Plaintiff avers that the District Court's judgment has thus been enforceable in the United States since 13 November 2023.

The Relevant Legal Principles

26. In a recently reported ruling, *Corbin Erisa Opportunity Fund Ltd et al v Argo Group International Holdings et al* [2024] SC (Bda) 69 civ. (3 December 2024), this Court was concerned with the legal principles which give rise to a case management stay. In the opening paragraphs outlining the law in this regard, I referred to the Court's duty to safeguard the rights of a civil litigant to be given a fair hearing within a reasonable time. I also addressed the source of the Court's unfettered discretionary power to grant a stay. At [paras 57-59] I said:

"*A constitutional analysis, ranking over all other considerations, is the Court's starting point in deciding any question as to whether civil proceedings ought to be suspended, whatever the basis for the application. While the greater portion of section 6 specifically applies to criminal proceedings, section 6(8) of the Bermuda Constitution requires litigants in civil cases to be given "a fair hearing within a reasonable time." Of course, the question as to what constitutes "a reasonable time" engages the particular facts and circumstances of the case.*

The source of the Court's powers to stay litigation proceedings always includes its inherent jurisdiction. In Re Celestial Nutrifoods (in liquidation) [2017] Bda LR 11 Kawaley CJ

explained that the Court, independent of the statutory insolvency stay powers with which he was concerned, is empowered under its inherent jurisdiction to impose a stay of proceedings. Sections 12 and 18 of the Supreme Court Act 1905 is where the Court derives its authority to exercise these fundamental powers with which it never separates.

The use of the Court's inherent jurisdiction is also relied on as a matter of English law. Halsbury's Laws of England / Civil Procedure Volume 12 (2015) para 1039 provides:

"A stay of proceedings arises under an order of the court… which puts a stop or 'stay' on the further conduct of the proceedings in that court at the stage which they have then reached, so that the parties are precluded thereafter from taking any further step in the proceedings… The object of the order is to avoid the trial or hearing of the claim taking place, where the court thinks it is just and convenient to make the order, to prevent undue prejudice being occasioned to the opposite party or to prevent the abuse of process…

The court's power to stay proceedings may be exercised under particular statutory provisions…, or under the Civil Procedure Rules…or under the court's inherent jurisdiction…or under one or all of these powers, since they are cumulative, not exclusive, in their operation.""

27. The Court's inherent jurisdiction to grant a stay is also explained in the regularly-cited English High Court decision in *Reichhold Norwary A.S.A and Another v Goldman Sachs International (a Firm)* [1999] 1 ALL ER (Comm) 40. Moore-Bick J (as he then was) said at page 46:

    The court's power to stay proceedings is part of its inherent jurisdiction which is expressly preserved by s.49(3) of the Supreme Court Act 1981. It is exercised under a wide range of circumstances to achieve a wide variety of ends. Subject only to statutory restrictions, the jurisdiction to stay proceedings is unfettered and depends only on the exercise of the court's discretion in the interests of justice. I am in no doubt, therefore, that I do have jurisdiction to stay the present proceedings; the question is whether it would ever be right to do so in a case such as the present, and if so under what circumstances.

28. As was the case in *Corbin Erisa Opportunity Fund Ltd et al v Argo Group International Holdings et al*, the application before this Court is for a stay on case management grounds. The Court's wide discretionary powers to grant or to refuse an application for stay is shaped by its general case management powers and obligations under the Overriding Objective. The Court is dutybound to ensure that cases are dealt with expeditiously and fairly. The Court must also provide an equal footing platform between the parties and be always mindful of the need to save expense.

29. That being so, in *Corbin Erisa Opportunity Fund Ltd et al v Argo Group International Holdings et al*, I accepted that it is only in "rare and compelling circumstances" that the Court will grant a stay of proceedings on case management grounds. (See *Griffin Line General Trading LLC v Centaur Ventures Ltd et al* [2023] SC (Bda) 24 Civ. 31 March 2023.) In *Athena Capital Fund SICAV-FIS S.C.A. v Secretariat of State for the Holy See* [2022] 1 WLR 4570 where Males LJ said [59]:

"*There is, as it seems to me, no reason to doubt that it is only in rare and compelling cases that it will be in the interests of justice to grant a stay on case management grounds in order to await the outcome of proceedings abroad. After all, the usual function of a court is to decide cases and not to decline to do so, and access to justice is a fundamental principle under both the common law and article 6 ECHR. The court will therefore need a powerful reason to depart from its usual course and such cases will by their nature be exceptional."*

30. Upholding Moore-Bick J, in *Reichhold Norway ASA v Goldman Sachs* [2000] 1 W.L.R. 173 at 186C(C.A.) Lord Bingham C.J. agreed that the Court should only exercise its discretion to stay an action pending the final disposition of another claim in another forum in "*rare and compelling circumstances*".

Reasons for Refusing the Stay Application

31. Mr. Diel argued that the grant of a stay would serve to avoid wasted time and expenditure He submitted that the prejudice that COH would face if the stay is refused (and the US appeal is won) is greater than the prejudice that MIF would suffer by the consequential interim delay in seeking to recover the fruits of the judgment.

32. A judgment of the New York Court is not caught by the statutory regime of judgment registration and enforcement under the Judgments (Reciprocal Enforcement) Act 1958 (the "1958 Act"). Accordingly, the Plaintiff's recourse is to seek recognition and enforcement using the common law approach which, although more geographically wide-reaching, is procedurally awkward. Enforcement of the Plaintiff's foreign judgment under the common law regime would require the Plaintiff to prove its case by summary judgment proceedings. Thus, it will be for the Plaintiff to establish that an *issue estoppel* or the doctrine of *res judicata* applies, so to bar the COH from re-litigation here in Bermuda of issues decided by the foreign Court.

33. Notwithstanding, the COH intends to oppose the Plaintiff's application for recognition primarily on the ground that enforcement would be contrary to public policy, a ground seldomly relied on in these kinds of cases. (The summary judgment procedure is addressed in previous cases including *Pamela Anne Ellefsen v Tore Nelson Ellefsen and Others* [1993] Bda

LR 53, Ground CJ ; *Muhl as liquidator of Nassau Insurance Company v Adra Insurance* [1997] Bda LR 36 and *Kader Holdings Company Ltd v Desarrollo Inmobiliario Negocios Industriales de Alta Technologia de Hermosilio, SA de* CV [2014] Bda LR 18).

34. The Defendant's application for a stay of these proceedings pending the finality of the US Appeal Court's decision required this Court to assume any one or more of the following propositions:

    (i) That this Court can properly disregard the findings of the US District Court (and the US Appeals Court, if need be) on the issue of *ultra vires* as it relates to the Escrow Agreement as a question of Bermuda public policy arises on the validity of the Escrow Agreement which ought not to be adjudged by a foreign Court.

    (ii) That the unlawful purpose which rendered the Guarantee *ultra vires* extended to the Escrow Agreement such that any breach of the Escrow Agreement is beyond remedy on the basis that the Escrow Agreement was unlawful, *ab initio*.

    (iii) That the COH's appeal in the US has a real prospect of success as the US Appeals Court may likely quash the US District Court's judgment, thereby rendering these enforcement proceedings nugatory.

35. Mr. Diel submitted that the COH is not precluded from raising public policy issues even in circumstances where *res judicata* or *issue estoppel* arises from the foreign judgment. He argued that the question of Bermuda public policy can only be defined and applied by a Bermuda Court.

36. Explaining the premise for the public policy objection, Mr. Diel submitted that the enforcement of the District Court's judgment would be tantamount to a reward for illegality. He submitted that the Escrow Agreement was purportedly entered into contrary to the clear requirements of section 20(1A) of the 1923 Act and, therefore, in accordance with the express terms of section 20(1C) it was void *ab initio*. Referring to the Privy Council's judgment in *SR Projects Ltd. v Rampersad* [2022] UKPC 24 at [52], Mr. Diel submitted that this Court is bound to find the contract is void or unenforceable because that it what the legislation requires.

37. In Mr. Gosling's evidence, he grouped various agreements with the unlawful Guarantee. In his 3 January 2024 affidavit Mr. Gosling says [5]:

    "*Various inter-connected agreements were contemporaneously entered into to document and support the loan transaction, including, inter alia, a Credit Agreement, Escrow Agreement, Guarantee, Mortgage, Note, Deed of Surrender, and Security Agreement*."

38. Mr. Gosling put a special nexus between the "Purported Guarantee", the "Purported Mortgage" and the "Purported Escrow Agreement", cohering these three transactions as "the principal means of security for MIF's financing". By implication, he invited this Court to consider whether the Guarantee tainted the Escrow Agreement with illegality.

39. However, District Judge Cote considered and fully rejected the Defendant's *ultra vires* defence in the context of the validity of the Escrow Agreement. She held that the Escrow Agreement was incidental to the *intra vires* Development Agreement and that the COH's contractual obligations "*dovetailed with Hamilton's powers under the Development Agreement to oversee the Project*".

40. The Development Agreement is explained in the factual background provided in the Privy Council's judgment [2]:

"On 11 April 2012, the Corporation entered a development agreement and agreement for lease ("the development agreement") with Par La Ville Hotel and Residences Limited ("PLV") to build a hotel complex ("the development") on the Car Park and thereafter run the hotel as a five-star hotel. The estimated cost of the development was $350m. It would involve the Corporation granting the developer a ground lease over the Car Park, which could be terminated if the developer failed to secure the funding that it needed to complete the development within a specified period or if it failed to complete the hotel within the agreed time."

41. When District Judge Cote referred to the *intra vires* status of the Development Agreement, she quoted from the following passages of the Privy Council's judgment [41-42]:

"***The Board's view: the guarantee was ultra vires because it was not for a municipal purpose***

41
To succeed on this appeal, the appellant must show that the execution of the guarantee was reasonably incidental to the development agreement or alternatively that the execution of the guarantee was itself a "municipal purpose… being [a purpose] of an extraordinary nature…" within section 23(1)(f) of the 1923 Act.

42
It is well established that there must be implied into a statutory provision constituting a public body the power to do that which is reasonably incidental to any express power (see the well-known case of Ashbury Railway Carriage and Iron Co Ltd v Riche (1875) LR 7 HL 653). In asking whether a power is reasonably incidental to the exercise of an express power, it is

necessary to examine the express power that was exercised. Here the Corporation had power to dispose of an interest in its land and was thus able to enter into the development agreement. It cannot be said that the guarantee was incidental to the execution of that agreement. The development agreement deliberately distanced the Corporation from the development. If the developer did not demonstrate within a stipulated period that it had obtained the finance needed to complete the hotel, the Corporation could terminate the development agreement and the developer would never be able to complete the development. The terms of the agreement specifically provided that the Corporation and the developer were not partners for the purpose of the hotel development."

42. Inevitably, this Court will be required to consider whether it is even open to the COH to further advance the *ultra vires* point under the shield of Bermuda public policy. The COH will need dispel any concern that the public policy objection is a masked attempt to re-litigate the *ultra vires* issue which was considered and settled by the US District Court.

43. For the purpose of the application for a stay of these proceedings, Mr. Diel invited this Court to independently find favour, *prima facie*, with the Defendant's prospects of success in objecting to the Plaintiff's application for summary judgment as a means of recognition and enforcement. The COH, in its efforts to link the Escrow Agreement to the Privy Council's finding that the Guarantee was *ultra vires,* contends, at least implicitly, that the purpose for which it entered into the Escrow Agreement was as illegal under the 1923 Act as was the purpose underpinning the Mortgage.

44. The Privy Council likened the COH's role in the Guarantee to that of a "banker" to PLV. The Privy Council found that the COH's provision of funding, as a means of building on a PLV's credit, constituted an illegal purpose in that it was not a "municipal" purpose as per section 23(1)(f) of the 1923 Act. The Board found that the term "municipal" requires the underlying purpose to be aimed at the COH's provision of a service (including the provision of facilities) for the benefit of Hamilton City's inhabitants.

45. Lady Arden [at para 41] explained that in order for MIF to have been successful it would have had to establish that the execution of the Guarantee was "*reasonably incidental to the development agreement or alternatively that the execution of the guarantee was itself a "municipal purpose… being [a purpose] of an extraordinary nature…" within section 23(1)(f) of the 1923 Act*."

46. To form a general impression of the merits of the COH's Bermuda public policy - *ultra vires* objection, it follows that I would be asked to ignore the passages in the judgment of the US District Court where Judge Cote found that the Escrow Agreement is indeed incidental to the Development Agreement. In order for the COH to succeed on the breach of public policy

objection, it must first persuade this Court to not only consider but to find that the Escrow Agreement is reasonably incidental to the illegal Guarantee, more so than the Development Agreement. To be so satisfied, I would be required to make a factual finding which is directly contrary to what Judge Cote found in the US District Court. No doubt, Mr. Robinson would and has pounced on this approach as improper and wrong in principle.

47. Supposing that I might put the US District Court's judgment to one side (only for the purpose a cursory examination of the Defendant's prospect of success in these enforcement proceedings), I pause to allow myself to consider the role of the COH under the Escrow Agreement which was purely administrative and supervisory on the face of it. Unlike the Guarantee, the Escrow Agreement did not require the COH to provide a security interest, nor did it require the COH to take on any fiscal responsibility or to dispose of its assets.

48. As I earlier noted, what is termed the "Underlying Agreement" to the Escrow Agreement is the Credit Agreement to which the COH was not party. The Credit Agreement between MIF and PLV is the instrument under which MIF agreed to make the $18,000,000.00 loan. It is also the case that $15,449,858.00 of the loan proceeds was deposited into escrow by MIF pursuant to the terms of a security agreement, also dated 9 July 2014 (the "Security Agreement"). The Security Agreement was the contract by which PLV granted MIF a lien and security interest in consideration for MIF's deposit of the escrow sum. The COH is not party to the Security Agreement.

49. The administrative and supervisory functions of the COH under the Escrow Agreement related directly to pre-conditions for PLV's drawdowns from the escrow account. For the initial drawdown phase of the Escrow Agreement, the COH's contractual duties were (i) to receive a drawdown request from PLV certifying PLV's purpose for the amounts to be drawn and (ii) to provide written notice confirming the COH's approval of the initial drawdown request. Similarly, for the final drawdown phase of the Escrow Agreement, the COH's contractual duties were to receive and approve a PLV-signed certification confirming that all conditions precedent had been satisfied for the funding of the Permanent Loan. The COH also agreed to receive the Permanent Loan Funding Agreement, the Senior Escrow Agreement and all ancillary documents for the purpose of confirming its approval. In the event of the COH approving these transactional documents, the Escrow Agreement required the COH, together with PLV, to provide a joint notice to the Escrow Agent after a 3-day period following the COH's receipt of the aforesaid documents. That joint notice was to confirm that the documents delivered to the COH were approved by the COH and that the disbursement was authorized by the COH.

50. In essence, the COH agreed to have oversight over PLV's drawdowns from the monies provided by MIF. The COH put itself forth to act as a watchdog (as opposed to a banker to

PLV) over PLV's drawdowns in order to ensure that those drawdowns were legitimate and in keeping with the development project which was to be carried out in accordance with the Development Agreement between the COH and PLV. So, it is not immediately obvious to this Court that: (i) the Escrow Agreement is tainted with the same illegality which rendered the Guarantee unlawful and/or that (ii) the Escrow Agreement is more incidental to the Guarantee than it is to the Development Agreement.

51. Those are my provisional remarks as it relates to the anticipated objections from the COH in these enforcement proceedings. However, for the purpose of deciding whether or not to grant a stay of proceedings, it would certainly be wrong in principle for this Court to have relied on any assessment of the Defendant's prospects of success on appeal before the US Appeals Court. One might see this distinction as artificial because the basis of the COH's US appeal is said to hinge on the same *ultra vires* argument.

52. Be that as it may, this Court did not examine any appeal documents lodged in the US Appeals Court and has no full or in depth understanding of the grounds of appeal in those proceedings. So, it is indeed the case that I have not given any real consideration to the Defendant's prospects of success on appeal, save to say that I understand it to be the COH's case that the Court erred in its construction and application of the Municipalities Act 1923, as a matter of Bermuda law and in so doing the US Court failed to find that Escrow Agreement was *ultra vires*, having regard to the relevant provisions of the 1923 Act.

53. As matters currently stand, the District Court's judgment is enforceable in the US.[1] It is a judgment in *personam* within the meaning provided by Rule 42 in *Dicey*. That is to say that the COH submitted to the jurisdiction of the US District Court. Under the *Dicey* Rule the finality of the District Court's judgment is not disturbed by the existence of a pending appeal (See *Colt Industries v Sarlie (No. 2)* [1966] 1 W.L.R. 1287). This Court is guided by these principles. As such, I was bound to find that there were no exceptional circumstances upon which this Court could justify granting an order of stay these proceedings.

54. The COH's request for a stay of the judgment of the US District Court is rooted in its hope that its liability to pay the judgment sum will be suspended pending appeal. In pursuit of success, the COH aim to persuade the US Appeals Court to sear the Escrow Agreement with the same mark of illegality which the Privy Council found to have poisoned the Guarantee, thereby overturning Judge Cote's decision. However, any application for a stay pending an appeal ought to be made in the US Court system seized of the Escrow Agreement proceedings.

[1]At the time of the hearing before me, the hearing of the appeal in the New York proceedings was projected to take place on a date between 24 June and 30 September 2024. On Mr. Zauderer's evidence, the Second Circuit's decision, if not delivered by the end of this year, may not be delivered until early 2025.

55. In these proceedings, the COH has possible recourse to obtaining a stay of execution. This point was amply made by Mr. Robinson. In well-measured submissions, Mr. Robinson said [para 25]:

"*There is no undue prejudice to the Corporation if a stay is rejected. That is because:*

a. The Corporation is not being asked to pay the SDNY Judgment immediately upon entering of judgment in this Court. It will still have the opportunity to seek a stay on execution if the Appeal remains outstanding. Such an application may be granted but may be subject to common conditions, such as requiring the Corporation to pay the SDNY judgment Sum into Court, or post sufficient security.

b. …

c. *Any suggestion that the Corporation will be unable to recover the SDNY Judgment Sum from MIF in the (unlikely) event the appeal is overturned by the Second Circuit can be protected against by conditions, for example, by requiring the SDNY Judgment Sum to be held in Court pending determination of the Appeal*."

56. Having considered the case management factors, this Court considers that these enforcement proceedings may be determined after a one-day hearing of legal arguments, give or take. The common law enforcement regime for recognition and enforcement, although arguably cumbersome if contrasted to convention law procedures, will not likely require particular complexity or any inordinate expense of time. In less contentious cases, an application for recognition of a foreign judgment might be disposed of within a one-hour hearing, whether it be under the common law regime for recognition or the statutory regime for registration. In both cases, the end goal for the foreign judgment creditor is enforcement of its money judgment.

57. It is now a global norm for such proceedings to be streamlined and disposed of efficiently. For territories which are members of The Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters ("HCCH 2019 Judgments Convention"), the modernity of the process for recognition of a foreign judgment is evidenced by a high turn-over of recognition orders arising out of a particularly swift and cost-efficient proceeding. (Although the United Kingdom Government signed the HCCH 2019 Judgments Convention on 12 January 2024 and ratified the Convention on 27 June 2024 with effect from 1 July 2025, the HCCH 2019 Judgments Convention has not (yet) been extended to Bermuda.)

58. As a matter of record, MIF has been engaged in years of bitterly fought litigation against the COH. MIF's relentless pursuit for obtaining judgment is as unsurprising as the COH's unabated efforts to resist judgment. As perpetual as it all may appear, there will come a point

in time when one side will be compelled to accept the checkmate. However, for now both kings remain on the board, albeit that one may be better positioned than the other.

59. In respect of the application for the stay, however, I found myself bound to refuse the Defendant's application for a stay of these enforcement proceedings pending the overseas appeal.

The Defendant's Application for Security for Costs

60. The Defendant's application for security for costs is made on the basis of MIF being ordinarily resident outside of Bermuda. RSC Order 23/1(1) which provides:

> "*23/1 Security for costs of action, etc.*
> *1(1) Where, on the application of a defendant to an action or other proceedings in the Court, it appears to the Court-*
>
> *(a) that the plaintiff is ordinarily resident out of the jurisdiction…*
> *… …*
> *then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceedings as it thinks just*."

61. It is entirely a matter of judicial discretion whether an order for security for costs should be made against a Plaintiff who is resident overseas. In this case, the Plaintiff is a would-be judgment creditor seeking recognition of a foreign judgment. While the Plaintiff is indeed ordinarily resident outside of Bermuda, the Defendant's application for security for costs infringes on the Court's starting position which is pro-recognition and pro-enforcement where its statutory or common law regime applies.

62. In this case, the common law mechanism has been invoked and recognition is being sought by way of summary judgment. The common law regime was created to allow for recognition of a foreign judgment in circumstances where the foreign judgment originated outside of the United Kingdom, thus outside of the scope of the Judgments (Reciprocal Enforcement) Act 1958 (the "1958 Act") and the Judgments (Reciprocal Enforcement) Rules 1976 (the "1976 Rules").

63. Interestingly, the common law position on security for costs in respect of enforcement proceedings provides a clear starting point and serves to guide the standard position for judgment registration and enforcement cases under the 1958 Act since the corresponding Rules

are silent on the question of security of costs. The common law position is summarised in Dicey, Morris and Collins as follows [14-011 footnote 33]:

"*As to any question of security for costs, it would normally be open to the defendant to make an application for security. However, if the foreign court plainly had jurisdiction over the defendant, and the issue in the English proceedings is whether the defendant can raise a substantive defence to the recognition and enforcement, the defendant is the effective claimant, and in principle, an order for security should not be made against the claimant: Relational LLC v Hodges [2011] EWCA Civ 774, [24]*."

64. In this case, the Defendant submitted to the jurisdiction of the US District. The judgment in question is enforceable in the US. The Plaintiff, by these proceedings, intends to obtain an order for summary judgment based on an *issue estoppel / res judicata*. The starting position is that MIF is entitled to summary judgment and enforcement, unless the Defendant can establish one of that one of the few available exceptions to the grant of recognition by summary judgment applies.

65. In *Pamela Anne Ellefsen v Tore Nelson Ellefsen and Others* [1993] Bda LR 53, Ground CJ, referring to the 1987 Eleventh Edition of Dicey Morris, outlined the common law position on enforcement of a foreign judgment as follows:

"*There is no statutory mechanism here for enforcing American judgments by means of registration and execution by the local Court, and so this statement of the common law represents the normal method for enforcing such judgments in Bermuda, and there is no dispute about that.*

A final judgment in personam given by a court of a foreign country with jurisdiction to give it may be enforced by an action for the amount due under it if it is for a debt or definite sum of money (not being a sum payable in respect of taxes or in respect of a fine or other penalty). The only grounds for resisting the enforcement of such judgment at common law are: (1) want of jurisdiction in the foreign court according to the view of English Law; (2) that the judgment was obtained by fraud; (3) that its enforcement would be contrary to public policy; and (4) that the proceedings in which the judgment was obtained were contrary to natural justice (or the English idea of "substantial justice," as it was put in the leading case). Unless the judgment can be impeached on one of these four grounds, the court asked to enforce it will not conduct a rehearing of the foreign judgment or look behind it in any way: see Dicey & Morris, Ibid., p. 460—

'Rule 42—A foreign judgment which is final and conclusive on the merits and not impeachable under any of rules 43 to 46 [which are the four grounds I have set out above] is conclusive as to any matter thereby adjudicated upon, and cannot be impeached for any error either

(1) of fact; or
(2) of law.'

The commentary states that this has not been questioned since 1870."

66. The concept of pro-enforcement applies more explicitly in cases involving a foreign arbitration award made under the 1958 Convention on the Reciprocal Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention") or pursuant to the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law"), both of which have been incorporated into Bermuda statute law, via the Bermuda International Conciliation and Arbitration Act 1993 Act (the "1993 Act").

67. In *CAT.SA v Priosma Limited* [2019] Bda LR 69; [2019] SC (Bda) 56 Com the judgment debtor applied to set aside an *ex parte* enforcement order which had been granted pursuant to section 40 of the 1993 Act and whereby the judgment creditor was given leave to enforce a New York Convention arbitration award made by a tribunal seated in Paris, France. The judgment debtor also applied for a stay of proceedings pending its final appeal to the Cour de Cassation on jurisdiction grounds which had been argued and rejected by two lower tiers of Court in France. Those appeal proceedings were pending when the judgment debtor sought to have the *ex parte* enforcement order discharged by Hargun CJ (as he then was) sitting in this jurisdiction of Court. Against that background, Hargun CJ granted the stay on a conditional basis. He ordered the judgment debtor to provide security in both the full amount of the award and the costs awarded to the judgment creditor by the tribunal in Paris.

68. In the present proceedings, it is anticipated that the Defendant, the COH, will apply all available efforts and resources to oppose judgment being entered. However, I do not find the Defendant's foreshadowed public policy objections to be so strong on its face that it warrants an order for security for costs to protect the Defendant's access to costs against a foreign resident Plaintiff in the event of a successful outcome for the Defendant. It would be unfair and wrong in principle to require a prospective judgment creditor to offer security for the costs of seeking to enforce a judgment debt against the prospective judgment debtor. To do otherwise would only be justified in circumstances where the Defendant has established a real prospect of success on its objections to recognition and enforcement of the foreign judgment.

69. As the Defendant personally submitted to the jurisdiction of the foreign court and its grounds for resisting recognition appear to be substantially similar to the *ultra vires* issue argued and rejected by the foreign Court, I find that an order for security for costs would not be appropriate in this case. I make that decision in the exercise of this Court's unfettered discretion.

Conclusion

70. For the reasons outlined in this Ruling, on 12 June 2024 I refused the Defendant's application for a stay of these proceedings.

71. In this Ruling I also refused the Defendant's application for security for costs.

72. Either party may be heard on the issue of costs upon filing a Form 31TC within 7 days of the date of this Ruling. Otherwise, costs of this application should follow the event and be granted in favour of the Plaintiff on a standard basis to be taxed if not agreed.

Dated this 12th day of December 2024

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HON. MRS JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT