

Neutral Citation Number: [2024] EWHC 3151 (Comm)

Case No: LM-2024-000310
(formerly CL-2024-000320)

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

The Rolls Building
7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Date of hearing: Friday, 22 November 2024

Before:

HIS HONOUR JUDGE HODGE KC
(sitting as a Judge of the High Court)

Between:

(1) XIONG WEI
(2) WENDA CO LTD
- and -
WANG JINHONG

Claimants

Defendant

MR SIMON MILNES KC (instructed by **Sherrards Solicitors LLP**) for the **Claimants**.

MR ANTHONY JONES (instructed by **Lawdit Solicitors Ltd**) for the **Defendant**.

APPROVED JUDGMENT

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JUDGE HODGE KC:

1. This is my extemporary judgment on the substantive application by the defendant, issued on 27 September 2024, to set aside the order of Dias J made on 19 June 2024 on a without notice application by the claimants. The proceedings were initiated by a claim form, issued in the Commercial Court on 3 June 2024, but the action has since been transferred to the London Circuit Commercial Court where it is presently pending under case number LM-2024-000310. The claimants are represented by Mr Simon Milnes KC and the defendant is represented by Mr Anthony Jones (of counsel). Both counsel have submitted detailed written skeleton arguments which I have had the opportunity of prereading.
2. The substantive claim is to enforce a judgment in the sum of some US\$2.129 million with interest that was obtained on 19 April 2021 in a court in the People's Republic of China. The first claimant, Mr Xiong Wei, is a director, and the chairman, of the second claimant, which is Wenda Co Ltd. Both claimants are domiciled and resident in China. The defendant, Ms Wang Jinhong, is a UK citizen who is now also resident in the People's Republic of China.
3. The underlying Chinese judgment was made in favour of the second claimant in what was effectively a derivative claim brought on its behalf by the first claimant. The particulars of claim plead, in paragraph 3, that the Chinese judgment was and is final and conclusive between the claimants and the defendant. There was an appeal against the Chinese judgment, but that was dismissed on 11 November 2022. A petition by the defendant for a retrial was dismissed on 13 November 2023. Paragraph 4 of the particulars of claim pleads that the claimants sue on the Chinese judgment, and that the second claimant is

entitled under that judgment to payment of the sum of some US\$2.129 million with interest.

4. Because of the defendant's residence in China, the claimants applied for permission to serve the claim form out of the jurisdiction, and to do so by way of service by an alternative method, namely service on the solicitor acting for the defendant in other litigation between the parties, which is also now pending in the London Circuit Commercial Court. The evidence in support of that application is contained in the first witness statement, dated 3 June 2024, of Mr Paul David Marmor, a partner in the solicitor's practice of Sherrards Solicitors, which is retained by the claimants.
5. Dias J made her order on 19 June 2024. She gave the claimants permission, pursuant to CPR 6.36 and Practice Direction 6B, paragraph 3.1(10), to serve the claim form out of the jurisdiction under CPR 6.15. The claimants also had permission to serve the claim form, the particulars of claim, and any other application or document in the proceedings, by emailing them to the defendant's solicitor, Mr Michael Coyle. Directions were given for the date of deemed service, and the period for filing an acknowledgment of service and defence. Paragraph 4 provided that the defendant had the right under CPR 23.10 to apply to the court to set aside or vary the order. Any such application was to be made within seven days after the application was served.
6. It is unnecessary for me to relate the reasons for the delay in making the formal application to set aside Dias's J order. Suffice it to say that, on 10 October 2024, Henshaw J approved a consent order which provided for an application notice filed by the defendant on 27 September 2024 to be deemed to have been made under CPR 11.4. I take that to be a reference to CPR 11.1(4). Directions were given for the service of evidence in response to the application, and for

evidence from the defendant in reply. The order included the provision for transfer of the claim to the London Circuit Commercial Court. Costs were, subject to one exception, to be costs in the case.

7. The defendant had already served her evidence in support of the application to set aside the judge's order. That took the form of the first witness statement of the defendant, dated 5 July 2024, and a witness statement from her solicitor, Mr Michael Coyle, of 1 July 2024.
8. The claimant served evidence in answer by way of the witness statements of: (a) Mr Paul Marmor, dated 18 October 2024; (b) Yang Jian, dated 16 October 2024, a lawyer in the Chinese law firm which represented the claimants in the proceedings in the People's Republic of China that had given rise to the underlying judgment; and (c) the first claimant, dated 17 October 2024.
9. The defendant served evidence in reply in the form of: (a) the first witness statement of Mr Scott Kummer, an American attorney, apparently dated 1 November 2024; and (b) the first witness statement of Ma Dejun, also apparently dated 1 November 2024. Ma Dejun is a registered Chinese lawyer and has been acting for the defendant in the legal proceedings in the People's Republic of China.
10. The claimants then sought permission to rely upon the expert evidence of a Chinese law expert, Mariana Zhong. Her report is dated 16 November 2024. That provoked two further witness statements from the defendant, both dated 20 November 2024, two days prior to this hearing. They are the second witness statement of Ma Dejun and the first witness statement of Wang Zhenhua. I have already referred to Ma Dejun as the defendant's lawyer in the People's Republic of China. Wang Zhenhua is an accounting auditor.

11. In an extemporary ruling made after submissions at the outset of this hearing, I gave permission for the claimants to rely upon Ms Zhong's expert evidence and for the defendant to rely upon the two witness statements of 20 November 2024.
12. In terms, the defendant's application notice seeks an order setting aside the order of Dias J pursuant to CPR 23.10. However, pursuant to the consent order approved by Henshaw J, this application is properly made under CPR 11.1(4). The reasons given in the application notice are that the defendant will argue that the Chinese judgment has been procured improperly, and in breach of Chinese law, and that she is in the process of challenging the same; and, for the reasons referred to in the attached supporting witness statements, she believes that the appropriate forum is the Chinese court. In fact, there has been no submission that the Chinese judgment was procured improperly. Reliance is placed upon the appropriate forum being the Chinese court. But the challenge to Dias's J order has proceeded along different lines.
13. For the defendant, Mr Jones uncontroversially identifies three elements for any application for permission to serve outside the jurisdiction. The first is that one or more of the jurisdictional gateways in Practice Direction 6B is available. It is common ground that this case falls squarely within one of those jurisdictional gateways, namely paragraph 3.1(10). Mr Jones accepts, by reference to the Court of Appeal decision in *Tasarruf Mevduati Sigorta Fonu v Demirel* [2007] EWCA 799, reported at [2007] 1 WLR 2508, that all a claimant needs to establish for this gateway to be satisfied is the fact that the claim is one for the enforcement at common law of a foreign judgment.
14. In light of that authority, it is unnecessary for the claimant to demonstrate that the defendant actually has assets in England. On the evidence in the present case, however, it is quite clear that the defendant does have assets in England,

although they have been the subject of proprietary and freezing injunctions for some three years now in the litigation initiated by the second claimant.

15. The second element is that the claim has reasonable prospects of success. I am satisfied that that is the same as the existence of a serious issue to be tried. In substance, this is the test for resisting a claim for summary judgment. The claim must carry some degree of conviction, and must be more than barely capable of serious argument, although it need not necessarily be a claim which has a better than 50% chance of success.
16. The third element is that England is the proper forum in which to bring the claim. The grounds on which the defendant now seeks to set aside the grant of service out of the jurisdiction are, first, that the claim has no reasonable prospects of success, and, secondly, that England is not the proper place for the claim to have been brought.
17. It is, again, common ground that, to enforce a Chinese judgment, the common law principles apply. They require the foreign judgment to be for a definite sum which is final and conclusive on the merits. The defendant submits that a key problem for the claimants in the present case is that the Chinese judgment is not final and conclusive. First, it is said that it is not presently even enforceable in China because a ruling of the relevant Chinese court in June 2023 terminated the enforcement of the Chinese judgment in light of a lack of enforceable assets.
18. In this regard, reliance is placed upon paragraph 40 of the expert report of Ms Zhong, introduced by the claimants. It is, perhaps, at this point appropriate for me to relate the relevant parts of Ms Zhong's expert evidence. At paragraph 37, she states that she is of the view that the Chinese judgment is final and remains effective under Chinese law, notwithstanding the fact that the Procuratorate has commenced a review of the defendant's complaint.

19. Under a section headed ‘VI. B’, the expert addresses the question of whether the Chinese judgment could still be enforced against the defendant’s assets if there were available assets for compulsory execution, notwithstanding the fact that the Procuratorate has commenced a review of Ms Wang’s complaint.

20. At paragraphs 38 and 39, it is said that:

It is trite law that a party’s petition for a retrial cannot discontinue the enforcement/execution of an effective judgment or ruling. The enforcement proceedings can only be paused after a competent court decides to grant a retrial procedure ... and thereby a ruling will be issued to suspend the enforcement of the original final judgment. In this case, [that] has not occurred ... Accordingly, the Chinese Judgment remains in effect and compulsorily enforceable.

21. At paragraphs 40 and 41, the expert addresses the enforcement ruling issued by the Dalian Intermediate People’s Court on 30 June 2023.

[This] expressly states that “in accordance with the provisions of Article 517 of the [SPC’s Judicial Interpretation], the ruling is as follows: Terminate this enforcement procedure ... Pursuant to Article 517, the enforcement proceedings of a judgment which is ‘terminated’ for lack of enforceable asset can be revived of enforcement if assets available for enforcements are found.”

Therefore, although the enforcement proceedings of the Chinese Judgment are now tentatively ‘terminated’ for lack of enforceable assets in China, [the second claimant] could apply to the Dalian Intermediate Court to revive the enforcement proceedings as long as enforceable assets are found in China.

22. I have been taken by Mr Milnes to the relevant part of the enforcement ruling. That makes it clear that the defendant remains under the obligation to continue to perform the debt.

23. Mr Jones submits that the claimants cannot apply in England to enforce a foreign judgment here which is unenforceable according to the law of the country under which the judgment was given. He submits that there is therefore no reasonable prospect of the claimants demonstrating that the Chinese

judgment is final and conclusive, and thus capable of enforcement in these proceedings.

24. Secondly, Mr Jones submits that the Chinese judgment is, in any event, subject to supervisory review under a procedure involving an application to the Procuratorate in China. There, it may result in the matter being sent back for review to the original court. Although the defendant has exhausted her direct appeals, the Procuratorate is now reviewing the case; and the result of that review may be to lead to a retrial. As a result, the court can have no confidence that the Chinese judgment will stand. The upshot of the Procuratorate process may be that it recommends a retrial, which may, in turn, deprive the Chinese judgment of its legal effect. Mr Jones submits that the original judgment is subject to challenge on the basis that the court had taken no account of relevant auditing documents. He submits that the substance of the defendant's evidence is that relevant audit evidence was never properly considered.
25. I am entirely satisfied that there is absolutely nothing of substance in the defendant's challenge to the judgment of Dias J on the basis that the claimants have no reasonable prospects of success in enforcing the Chinese money judgment. I accept the reasons advanced by Mr Milnes in opposition to this limb of Mr Jones's submissions. There are essentially four reasons for this.
26. The first is that evidence about the complaint to the procuratorate does not amount to any challenge to the finality and conclusiveness of the Chinese judgment. Mr Milnes has taken me to the relevant passages in **Dicey & Morris**. The finality and conclusiveness of a judgment is addressed in Rule 46-(1). That makes it clear, in a proviso, that a foreign judgment may be final and conclusive, though it is subject to an appeal, and though an appeal against it is

actually pending in the foreign country where it was given. I was also taken to paragraph 14-027:

“In order to establish that [a final and conclusive] judgment has been pronounced, it must be shown that in the court by which it was pronounced, it conclusively, finally, and forever established the existence of the debt of which it is sought to be made conclusive evidence in this country so as to make it res judicata between the parties”: it follows that the possibility of an appeal to a higher court does not alter the finality of the judgment. ... a default judgment may, in this sense, be final and conclusive, even though it is liable to be set aside in the very court which rendered it. ... The test has been stated as whether the default judgment was “entirely floating as a determination, enforceable only as expressly provided and in the course of that enforcement subject to revision”, in which case it will not be final, or “given the effect of finality unless subsequently altered”, in which case it will be final.”

On the evidence here, I have no doubt that this judgment falls into the latter category. The evidence is that the complaint to the Procuratorate may possibly lead to a retrial. That is not the same thing as rendering the Chinese judgment lacking in finality or conclusiveness.

27. The second point is that, on the evidence, it is entirely clear that the Chinese judgment remains final and conclusive until the Procuratorate has taken the step of ordering a retrial. That indeed is accepted by the defendant’s Chinese lawyer.

In paragraphs 14 and 15 of the second witness statement, Ma Dejun says this:

Before a retrial is ordered, the legal effect of the judgement remains intact. This statement made by Mariana Zhong is correct, and her statement that the judgement remains effective at the time of the Procuratorate commencing a review is also right. However:

Once the retrial ruling is issued, the former judgement order will not take legal effect unless and until the court of retrial issues a judgement to sustain the original former judgement order, otherwise the retrial court revokes the former judgement.

It is therefore clear on the evidence that the Chinese judgment remains final and conclusive.

28. The third point is that the finality and conclusiveness of the judgment falls to be determined at the time when Dias's J order was made, on 19 June 2024. It is clear that, at that stage, no complaint had been lodged with the Procuratorate. The Procuratorate acknowledged receipt of the complaint only on 3 September. I am told by Mr Milnes that the complaint was only filed on 1 August, after the claim form had already been served with the judge's order on the defendant. It therefore cannot be said that Dias's J order was wrongly made in light of the circumstances then prevailing. Although enforcement in China of the judgment had been terminated, that did not affect the enforceability of the judgment as such. The judgment clearly retained its enforceable character. The defendant remained under the obligation to continue to perform the debt. All that was terminated were the enforcement procedures in China. That does not in any way prevent enforcement of the judgment taking place in England and Wales. The claimants have at least raised an issue with a real prospect of success that they can continue to enforce the judgment in this country.
29. Fourthly, the particulars of claim include an express averment that the judgment is final and conclusive. Mr Milnes has taken me to a passage at paragraph 22 of the judgment of Lord Hamblen in the Supreme Court in *Okpabi v Royal Dutch Shell* [2021] UKSC 3, reported at [2021] 1 WLR 1294. There Lord Hamblen said this:

Where, as will often be the case where permission for service out of the jurisdiction is sought, there are particulars of claim, the analytical focus should be on the particulars of claim and whether, on the basis that the facts there alleged are true, the cause of action asserted has a real prospect of success. Any particulars of claim or witness statement setting out details of the claim will be supported by a statement of truth. Save in cases where allegations of fact are demonstrably untrue or unsupported, it is generally not appropriate for a defendant to dispute the facts alleged through evidence of its own. Doing so may well just show that there is a triable issue.

I am satisfied that the defendant has not demonstrated that the averment that the judgment is final and conclusive is demonstrably untrue or unsupportable. I am satisfied that the claimants have, at the very least, shown a triable issue as to its finality and conclusiveness.

30. I turn then to the second limb of the defendant's challenge to Dias's J order: that the English courts are not the appropriate forum. In his skeleton argument, Mr Jones acknowledges that the question of the appropriate forum must be answered by reference to the current proceedings, which are the enforcement in England of a foreign judgment, rather than the proceedings which gave rise to the money judgment in China.
31. Mr Jones submits that the judgment cannot be enforced against the defendant's assets in England because they are subject to worldwide proprietary and freezing injunctions. That may well be the case. But if and when the claimants obtain judgment to enforce the Chinese money judgment, it will be open to them to apply to vary or set aside the existing injunctions. Those injunctions do not give the claimant in the other litigation any priority over those assets, or create any security interest. The appropriate forum in which to enforce a money judgment against assets in England is clearly England.
32. Mr Jones also submits that where all the features of the underlying litigation giving rise to the Chinese judgment relate to a different jurisdiction, it is not proper for enforcement of the judgment to occur in a jurisdiction with absolutely no link to the subject matter. He points to the complex questions that may arise about any suspensory effect of the Procuratorate procedure, and the termination of enforcement in the Chinese jurisdiction. He says that it makes little sense for enforcement to be proceeding in this jurisdiction, where the court has no real understanding of the Chinese doctrines or procedures, and where enforcement

has been terminated in China. He says that the reality is that this is a Chinese claim, and it should be enforced in China.

33. Mr Milnes submits that this objection is really an amalgam of two distinct points. The first is that the centre of gravity of the underlying claim was in China. Nevertheless, we are here concerned, not with the underlying proceedings, but with the enforcement of the resulting money judgment in England. There is no reason why the English court is an inappropriate forum to enforce a foreign judgment.
34. Secondly, the point about the complexity of the issues arising in connection with the Procuratorate review procedure is effectively merely a regurgitation of the arguments that there is no real prospect of the enforcement claim succeeding. For the reasons I have already given, that is not a valid objection to the appropriateness of England as the forum for entertaining this claim. The judgment is binding and enforceable as matters stand; and it is therefore unnecessary to go into any of the asserted complexities of Chinese law.
35. In answer to questions I posed at the end of his submissions, Mr Jones accepted that the jurisdiction challenge postdates the referral to the Procuratorate. He did, however, submit that it would be artificial to ignore the later challenge, particularly in terms of the issue of the appropriate forum. He submits that the judgment may not exist even in China once one proceeds to the enforcement stage here. He submits that the sequencing of the challenge is artificial, and does not affect the question of whether these proceedings should be allowed to go forward in England.
36. I am entirely satisfied that there is no real prospect of demonstrating that this claim is hopeless, and that it is inappropriate to allow this claim to go forward. Objections of the nature identified by Mr Jones can be dealt with as matters of

substance when this claim comes to be determined by the court. They are, however, no reason why this claim should not be capable of determination in these courts.

37. So, for those reasons, I dismiss the challenge to the order of Dias J. That concludes this extempore judgment.

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