IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: FSD 96 OF 2011 (PCJ)
(Originally Cause No: 329 of 2008)

The Hon. Sir Peter Cresswell
6th August 2012

BETWEEN:

CIGNA WORLDWIDE INSURANCE COMPANY (BY AND THROUGH ITS COURT APPOINTED RECEIVER, JOSIE SENESIE AND IN RESPECT OF THE ASSETS, UNDERTAKINGS AND AFFAIRS OF ITS LICENSED LIBERIAN BRANCH AND BUSINESS)

Plaintiff

AND

ACE LIMITED

Defendant

Appearances: Colin McKie and Jan Golaszewski of Maples and Calder on behalf of the Defendant

RULING

Introduction

1 The background to these proceedings is set out at pages 2 to 16 of my Ruling dated 27 January 2012.

2 Pursuant to that Ruling, this Court ordered, among other matters, that the Plaintiff provide security for costs in the amount of US$850,000 within 28 days, failing which the Amended Writ would be struck out and the Plaintiff would pay the costs of the Defendant ("**ACE**") on the standard basis save as otherwise provided for in the Order. The Plaintiff did not pay/ provide the security as ordered. On 27 February 2012, this Court entered a default judgment against the Plaintiff by which the Amended Writ was struck out and the Plaintiff was ordered to pay ACE's costs of the proceedings (not otherwise provided for in the Order dated 27 January 2012) on the standard basis.

3 The Sixth Affidavit of Mr Stephen Alexander sets out the history of the taxation of ACE's costs payable by the Plaintiff. On 31 May 2012, the Taxing Officer issued an interim costs

certificate payable by the Plaintiff to ACE in the amount of US$436,376.99. On 31 May 2012, Maples and Calder, on behalf of ACE, wrote to Walkers, acting for the Plaintiff, requesting the Plaintiff's confirmation that full and immediate payment of the costs certified by the interim certificate would be made and that full payment would be made of the order for costs following completion of the taxation. To date, the Plaintiff has not paid the sum demanded or provided the confirmation sought. The taxation of ACE's bill of costs commenced on 31 July 2012 and is ongoing.

4 On 10 April 2012, ACE issued a summons (the "**Costs Summons**"), by which it applied to join five parties and Mr James Little as parties to these proceedings for the purposes of paying, jointly and severally, the unsatisfied costs orders in paragraph 2 of the Order dated 27 January 2012 and paragraph 2 of the Default Judgment.

5 On 12 April 2012, ACE applied for permission to serve the Costs Summons out of the jurisdiction on those five parties and Mr Little. By Order dated 18 April 2012, this Court granted ACE permission to serve the Costs Summons out of the jurisdiction on four parties and Mr Little. In respect of Mr Little, this Court granted permission to serve the Costs Summons on him in the following manner:

> "*1.5 ... by way of personal service at 316 Wyndhurst Avenue, Baltimore, Maryland, 21210, U.S.A., or elsewhere in the U.S.A.*"

6 Paragraph 5 of the April Order gave liberty to apply to vary the April Order. The Costs Summons has been served on the four other parties, but not on Mr Little.

7 In his First Affidavit sworn on 5 July 2012, Mr Hackell sets out the unsuccessful efforts to serve the Costs Summons on Mr Little at 316 Wyndhurst Avenue, Baltimore, Maryland, 21210, USA, the identification of a possible alternative address for service at 2123 Chapel Valley Lane, Lutherville-Timonium, Maryland 21093, USA, the unsuccessful efforts to serve Mr Little at that address, and the unsuccessful efforts to identify any residential or business address for Mr Little in the USA.

8 In his Second Affidavit sworn on 3 August 2012 Mr Hackell updates his first affidavit. I refer to that affidavit for its full terms and effect. Mr Hackell states at paragraph 8 of his Second Affidavit:

*"On 20 July 2012, Judge Diamond of the EDPA entered an Order permitting CWW to take jurisdictional discovery from Mr Little relevant to CWW's motion to hold Mr Little in contempt (**"EDPA Order"**). The EDPA Order provides that CWW "may take Mr. Little's deposition between August 3, 2012 and August 10, 2012."*"

9 Mr Hackell states at paragraph 10 of his Second Affidavit:

"...it is my considered view, formed upon consultation with CWW's Pennsylvania counsel ... that it would be inappropriate and could be viewed as disrespectful to Judge Diamond to use the opportunity of a Court-ordered deposition for purposes of jurisdictional discovery to serve Mr Little with process in this proceeding."

10 Today ACE applies *ex parte* by its Summons dated 10 July 2012 for an order that service be effected on Mr Little by serving the Costs Summons on Messrs Kellogg, Huber, Hansen, Todd, Evans & Fiegel, PLLC ("**Kelloggs**") (for the attention of Mr Derek T. Ho), 1615 M Street, NW, Suite 400, Washington, DC 20036, USA, and Messrs Dechert LLP ("**Decherts**") (for the attention of Mr Joseph A. Tate), Cira Centre, 2929 Arch Street, Philadelphia, PA 19104-2808, USA.

GCR, Order 65, rule 4

11 GCR Order 65, rule 4 deals with substituted service and provides as follows:

"(1) If, in the case of any document which by virtue of any provision of these Rules is required to be served personally on any person, it appears to the Court that it is impracticable for any reason to serve that document personally on that person, the Court may make an order for substituted service of that document.

(2) An application for an order for substituted service may be made by an affidavit stating the facts on which the application is founded.

(3) Substituted service of a document, in relation to which an order is made under this rule, is effected by taking such steps as the Court may direct to bring the document to the notice of the person to be served."

12 This is the same wording as was found in the English RSC Order 65, rule 4.

13 The provisions now contained in the English CPR are now materially different to those in the RSC. For completeness I refer to CPR Volume 1 2012 at CPR 6.15 and following for the current practice in England and Wales.

Relevant Case Law

14 In *Chile Holdings (Cayman) Ltd v. Santiago de Chile Hotel Corp S.A.* [1997] CILR 319 Smellie J (as he then was) considered a plaintiff's application for an order for substituted service of a Writ on a defendant incorporated in Saudi Arabia.

15 In his judgment granting the plaintiff the permission sought, Smellie J followed Harman J's judgment in *Paragon Group Ltd v Burnell* [1991] Ch 498 in holding that the measure of what is practicable must take account of the possible effect of delay upon the cause of action, even if at some later date it may become possible to effect service in the primary manner prescribed (page 326). Smellie J also followed Harman J in *Paragon* by holding that the test of what is "*impracticable*" has to be "*...tested according to the circumstances of any particular case at the time when the request for an order for substituted service is made*". (page 326)

16 Smellie J noted (pages 328 to 329) that the test that an order for substituted service of a writ issued for service out of the jurisdiction should only be made where there is a "*practical impossibility*" of actual service, was first pronounced by the Court of Appeal in *Porter v Freudenberg* [1915] 1 KB 857 and subsequently reaffirmed by the Court of Appeal in In re *a Judgment Debtor (No 1539 of 1936)* [1937] 1 Ch 137 and *Re De Cespedes* [1937] 2 All ER 572. Smellie J then stated:

> *"None the less, I consider that the principle is the same as that applicable in the case of substituted service within the jurisdiction and considered above in the Paragon Group case. The fundamental principle of both English and Cayman law is that any person sued in our courts shall have effective notice of the proceedings instituted against him. And therefore substituted service can only be resorted to when there is a "practical impossibility" of actual service and the method of substituted service will in all reasonable probability be effective to bring the proceedings to the notice of the party or person to be served.*

I take the trouble of citing the earlier cases and the test of "practical impossibility" formulated in relation to substituted service abroad to express my own view that it is the same as that of the current rules already considered. In the Paragon Group case, which is the latest reported case on substituted service within the jurisdiction and on the meaning of "impracticable" – the test prescribed in the Grand Court Rules, O.65, r.4(1) – Ralph Gibson L.J. explained ([1991] Ch. at 510) that the test is synonymous with "practical impossibility" – the test expressed in the older cases. The Shorter Oxford Dictionary, 3rd ed. (1944), gives as the meaning of "impracticable" that which is "not practicable, that cannot be carried out or done; practically impossible." "

17 Smellie J stated that it was a long-settled principle of English and Cayman Islands law that substituted service is as good as personal service (page 329). Smellie J concluded that he was satisfied that substituted service on the company's solicitors in London and attorneys in Panama would bring the proceedings to the attention of the company and accordingly he granted an order for substituted service (pages 329 to 330).

18 I refer for completeness to *Connelly v South Pointe Capital Corp.* [1998] CILR 243 at 247, in particular lines 16 to 35.

19 In *KTH Capital Management Ltd v China One Financial Ltd*, (unreported, 19 July 2007) the Chief Justice was concerned with a case where the first to third defendants applied for leave to serve their counterclaim outside the jurisdiction upon Ms Li and Mr Wang who were to be added as defendants to the first to third defendants' counterclaim. Leave was also sought for substituted service on those two defendants to the counterclaim, by way of service upon Appleby in the Cayman Islands, on the basis that it represented the plaintiff in the proceedings. The Chief Justice granted (see paragraph 26) the order for substituted service as he was satisfied that, although Appleby had no instructions to accept service on behalf of Ms Li and Mr Wang, actual notice of service would be conveyed to them immediately and that no injustice would result from ordering substituted service. At paragraph 26 of his Ruling the Chief Justice said:

"*While I am told that Appleby have no instructions to accept service on behalf of Ms. Li or Mr. Wang, I am satisfied that actual notice of service would immediately be*

conveyed to them and that no injustice should result from ordering substituted service in the manner proposed: that is; by service upon Appleby for them."

20 I also refer for completeness to the English Court of Appeal case of *Knauf UK GmbH v British Gypsum* [2002] 1 WLR 907, a case concerning the Hague Convention.

Substituted Service on Mr Little

21 In his First Affidavit, Mr Hackell describes ACE's attempts over the last seven weeks to effect personal service of the Costs Summons on Mr Little. ACE has attempted, through a process server, to serve Mr Little in the USA at both 316 Wyndhurst Avenue (see paragraph 7) and 2123 Chapel Valley Lane (see paragraphs 9 and 10), but to no avail. ACE has also attempted to find other addresses for Mr Little in the USA (see paragraph 11), also to no avail.

22 Mr McKie submits that, although the earlier English Court of Appeal cases of *Porter v Freudenberg* [1915] 1KB 857 In re *a Judgment Debtor (No 1529 of 1936)* [1937] 1 Ch. 137 and *Re De Cespedes* [1937] 2 All ER 572 do not focus on any difference between "*impracticable*" and "*practical impossibility*" as they apply the test of "*practical impossibility*", this Court should follow Smellie J's reasoning in *Chile Holdings* to the effect that the two phrases are synonymous. I accept that submission and follow Smellie J's reasoning.

23 In *Chile Holdings* (see page 324), there were intentional efforts to deliberately evade service. In the present case, there is no clear evidence that Mr Little is deliberately evading service. However, it is submitted that this factual difference is not a valid reason for distinguishing the present case from *Chile Holdings*. Rather, it is submitted the key consideration is that, whether as the result of deliberate evasion or because of other difficulties in locating Mr Little, it is impractical for ACE to serve Mr Little in the manner prescribed. I accept that submission.

24 ACE knows that Mr Little is in the USA, but it has been unable to locate him at an address in that country in order to effect service. Following the test set out in *Chile Holdings*, it is submitted by Mr McKie that in the circumstances of this case at this time it is impracticable for ACE to serve the Costs Summons on Mr Little personally, whether or not Mr Little is in fact seeking to evade service. It is, submits Mr McKie, not practicable for ACE simply to

make indefinite continued further attempts to serve Mr Little in that manner, which would simply cause further expense and delay. Such delay will be prejudicial to ACE as it will not be able to progress its applications in the Costs Summons until it has served Mr Little. Further, such a delay will also be prejudicial to the other four parties who have been served with the Costs Summons. I accept that submission.

25 Mr McKie also submits that, if the Defendant had to continue such indefinite attempts at service, this would be inconsistent with the overriding objective as set out in GCR Order 1, rule 1.1:

> "*The overriding objective of these Rules is to enable the Court to deal with every cause or matter in a just, expeditious and economical way.*"

26 As set out in GCR Order 65, rule 4(3) and as applied in *Chile Holdings* and *KTH*, the Court must be satisfied that substituted service will bring the Costs Summons to Mr Little's attention. As Lord Reading CJ said in *Porter v Freudenberg,* (supra) the Court must be satisfied:

> "*...that the method of substituted service asked for by the plaintiff is one which will in all reasonable probability, if not certainty, be effective to bring knowledge of the writ or notice of the writ (as the case may be) to the defendant.*"

27 Mr Hackell states that Mr Little has engaged the US law firms of Kelloggs and Decherts to act for him in proceedings between CIGNA Worldwide Insurance Company and Messrs Senesie and Sesay in the US District Court for the Eastern District of Pennsylvania (see paragraphs 12 to 19 of Mr Hackell's First Affidavit). Those US proceedings are closely connected to the proceedings herein (see paragraphs 34 to 36 and 40 to 58 of Mr Donald Hawthorne's Second Affidavit dated 22 November 2011 and pages 11 to 16 of my Ruling dated 27 January 2012). Those proceedings are ongoing.

28 Given that Kelloggs and Decherts are acting for Mr Little in the US proceedings, it is submitted that one or both firms must be in contact with Mr Little to obtain his instructions with respect to those proceedings. Further, the two firms are acting for Mr Little in proceedings which are closely related to the present proceedings in the Cayman Islands. It is submitted that, accordingly, if the Costs Summons is served on those firms then it is

certain, or very nearly so, that one or both firms will bring the Costs Summons to the attention of Mr Little. I accept this submission. It appears to me that service on one or both firms will in all reasonable probability, in not certainty, be effective to bring notice of these proceedings to Mr Little's attention.

29 It is submitted that the *Connelly* case is distinguishable and I accept that submission. The *Knauf* case concerns service in Germany under the Hague Convention and is not relevant here.

30 Mr McKie has drawn to my attention, very properly, the inconsistency between paragraph 10 of the First Affidavit of Mr Hackell ("*Mrs Witherspoon told Mr Crumbley that Mr Little did not presently reside at 2123 Chapel Valley Lane...*") and the second paragraph of the Order of the United States District Court for the Eastern District of Pennsylvania dated 20 July 2012 exhibited to Mr Hackell's Second Affidavit ("*Respondent James Little does not dispute that he resides at 2123 Chapel Valley Lane...*").

31 Mr McKie has also drawn to my attention that Kelloggs have failed to respond on behalf of Mr Little to a conditional offer in an email from Mr Hackell to Mr Ho of Kelloggs dated 31 May 2012.

32 In all the circumstances, I consider that it is appropriate in all the circumstances of this case to grant the Order for substituted service of the Costs Summons on Mr Little, by serving the Costs Summons on Kelloggs and Decherts, and I so order.

DATED this 15th day of August 2012

Cresswell J

The Hon. Sir Peter Cresswell
Judge of the Grand Court