Case 108
W Nagel (a Firm)

v

Pluczenik Diamond Company NV and Others

[2019] Costs LR 2117

Neutral Citation Number: [2019] EWHC 3126 (QB)
High Court of Justice, Queen's Bench Division
21 November 2019

Before:
Griffiths J

Keywords:
CPR Part 71: examination of non-assessed costs

Headnote

On appeal the court considered whether CPR Part 71 allowed a person to be compelled for examination as a "judgment debtor" when the only outstanding parts of the judgment against him were costs orders for sums which had yet to be agreed or determined by assessment.

Appeal dismissed. It was held that it had been open to the Master in the exercise of her discretion to decide that the defendant remained a judgment debtor for the purposes of CPR Part 71 even though the only part of the judgment outstanding was the unquantified liability to pay costs. The value of the costs order did not appear to be small or trivial such that the Part 71 process was disproportionate; there were likely to be difficulties in re-establishing jurisdiction if Part 71 had to be revived in the future given that the Part

71 jurisdiction had originally been invoked only because of a brief opportunity to issue and serve proceedings when the Directors were in the country for a few days; and the past history of the case showed that unless there was momentum the defendant was unlikely to pay, having deliberately failed to pay on past occasions.

Cases Cited

Broomleigh Housing Association Ltd v *Okonkwo* [2010] EWCA Civ 1113
CIMC Raffles Offshore (Singapore) Pte Ltd v *Schahin Holding SA* [2014] EWHC 1742 (Comm)
Deutsche Bank AG v *Sebastian Holdings Inc and Vik* [2015] EWCA 2773 (QB)
Dickson v *Neath and Brecon Railway Co* LR 4 Ex 87 (1869)
Lombard NatWest Factors v *Arbis*, *The Times*, 10 December 1999; [2000] BPIR 79
Masri v *Consolidated Contractors International (UK) Ltd (No. 4)* [2010] 1 AC 90
Mubarak v *Mubarak* [2003] 2 FLR 553; [2002] EWHC 2171 (Fam)
Republic of Costa Rica v *Strousberg (No. 2)* (1880) 16 Ch D 8
Sucden Financial Ltd v *Fluxo-Cane Overseas Ltd and Garcia* [2009] EWHC 3555 (QB)
W Nagel v *Pluczenik Diamond Company NV* [2017] EWHC 1750 (Comm)
White, Son & Pill v *Stennings* [1911] 2 KB 418

Judgment

1. **Griffiths J:** The main question argued in this appeal is whether CPR Part 71 allows a person to be compelled for examination as a "judgment debtor" when the only outstanding parts of the judgment against him are costs orders for sums which have yet to be agreed or

determined by assessment. Payment of those sums has not yet, therefore, fallen due.

2. The appeal is against an order of Master McCloud on 7 May 2019 ("the McCloud Order") whereby a part heard hearing under CPR Part 71 in respect of orders made after a trial by Popplewell J was adjourned (para 1 of the McCloud Order). Two officers of the company against whom judgment had been entered were directed to attend the adjourned hearing "to provide information about the judgment debtor's means and any other information needed to enforce the order" (para 4), to produce documents (para 5) and to submit to questioning before the High Court judge under oath (para 6).

3. The company appeals on behalf of its officers, contending that since, by the date of the McCloud Order, no ascertained sums of money were outstanding, but only the orders for costs which had not been quantified, the Master had no jurisdiction to continue the CPR Part 71 procedure, alternatively ought not, in her discretion, to have ordered it to continue.

4. There are three Grounds of Appeal:

i) That the Master erred in finding that the court had power to re-list a hearing under CPR 71 in respect of an order for costs to be assessed if not agreed, where the amount of costs had not been assessed or agreed.
ii) That the Master erred in finding that the application for a CPR Part 71 examination in this particular case, and the order made upon that application, had been made in respect of orders for costs.
iii) That the Master's exercise of discretion (if she had a discretion) involved an error of principle and was plainly wrong.

Facts

5. None of the facts which give rise to the questions in this case are disputed. It is only the extent of the jurisdiction which may flow from them and how it should be exercised which is contested.

The Parties and the Trial

6. The claimant in the action ("the claimant") is a firm which for many years acted as diamond broker in London for the Defendant, Pluczenik Diamond Company NV ("Pluczenik"). Pluczenik, a company incorporated in Belgium, but operating globally, is one of the world's leading diamantaires, buying rough diamonds and processing them

into polished diamonds and jewelry for retail sale, or selling them on for profit as rough diamonds.

7. Pluczenik terminated its relationship with the claimant in 2013, when De Beers transferred its diamond wholesaling operation from London to Botswana.

8. Litigation followed, in which the claimant sued Pluczenik for commission and other sums, including compensation for failure to give due notice. After a nine day trial in the Commercial Court, Popplewell J gave judgment for the claimant: see *W Nagel* v *Pluczenik Diamond Company NV* [2017] EWHC 1750 (Comm), dated 13 July 2017.

Orders Made by the Trial Judge

9. On 21 July 2017 Popplewell J ordered Pluczenik to pay some of the claimant's costs on the indemnity basis (and on 28 November 2018 the Court of Appeal increased this so that Pluczenik had to pay all the claimant's costs on the indemnity basis). £400,000 was ordered to be paid on account of these costs and that payment has been made.

10. On 3 October 2017 Popplewell J made a second order, which ordered Pluczenik to pay damages, commission and interest totalling more than US$4 million as a result of the judgment he had given in the claimant's favour. He made a further order for costs in relation to quantum issues, but this time it was in Pluczenik's favour, and on the standard basis. Neither the costs ordered on the indemnity basis against Pluczenik, nor the standard costs order in Pluczenik's favour, have been agreed or assessed. However, it seems likely that there will be a substantial balance of costs to be paid by Pluczenik to the claimant, the lion's share of the costs incurred having been awarded to the claimant, and £400,000 having been ordered by way of payment on account (which has, I understand, been paid).

Application to Examine the Officers

11. The defendant, Pluczenik, was a company incorporated overseas and it seems that none of its officers were ordinarily in the jurisdiction. This meant that the CPR Part 71 procedure, which requires personal service on the company officers who are going to be examined, was not available in this case unless those officers happened to visit the jurisdiction: *Masri* v *Consolidated Contractors International (UK) Ltd (No. 4)* [2008] EWCA Civ 876 paras 12–14, *CIMC Raffles Offshore (Singapore) Pte Ltd and Another* v *Schahin Holding SA* [2014] EWHC

1742 (Comm) para 22, and *Deutsche Bank AG* v *Sebastian Holdings Inc and Vik* [2015] EWCA 2773 (QB) para 23.

12. On 22 June 2018, the claimant made an application for an order under CPR Part 71 against two named officers of Pluczenik: Mr Chaim Pluczenik (the Managing Director) and Mr Tsvi Pluczenik (another Director), whom I will refer to as "the Directors". It was supported by a witness statement from the claimant's solicitor, which explained that the Directors would be in the jurisdiction briefly, for a diamond industry event, on 24–25 June 2018, and any order had to be made while they were in the jurisdiction and in time for them to be served within the jurisdiction. This was achieved. On 25 June 2018, Master Kay QC made orders against both the Directors under CPR Part 71 ("the Kay Orders") and these orders were duly served on the Directors before they left the country.

13. There is now no challenge to the validity of the service, or to the appropriateness of that order when it was made. When the Kay Orders were made, it was not only the Popplewell costs order which was outstanding, albeit not quantified, but also a significant part of the quantified money judgment of Popplewell J which had not been paid. None of the arguments about jurisdiction now advanced against the McCloud Order could, therefore, be advanced in relation to the original Kay Orders, because the Kay Orders were made when Pluczenik was still in breach of an order to pay specific judgment sums, and the date on which payment of those sums was due had passed.

The Oral Hearing

14. An oral hearing took place before Master Leslie on 8 November 2018 (after delays caused by ultimately unsuccessful attempts by Pluczenik to appeal, and to obtain a stay of execution, and to obtain adjournment of the oral hearing pending the appeal). At the oral hearing, the Directors were examined pursuant to the Kay Orders. However, the examination was not concluded on that day and it was adjourned. Master Leslie gave a short judgment, in which he said that the examination had ended "on an unsatisfactory note" because there were documents outstanding "which the officers have said are available and they will produce". He noted that "if they do not produce them or further questions arise as a result of them, then everyone is going to have to come back". In the meantime, however,

and expressing the hope that it might not be necessary to come back, Master Leslie made an order for costs. Those costs (like the costs orders of Popplewell J) were on the indemnity basis. Master Leslie explained that this was because the Directors "refuse to pay"; had "wriggled and squirmed"; that the company was in "financially good health" but "it is not a question of cannot pay, it is plainly just a question of will not pay". Master Leslie said that the hearing before him had been "entirely unnecessary" and was "a result of the judgment debtor company's intransigence" in refusing (for example) to pay money into court pending the outcome of its appeal.

Attempts to Restore the Oral Hearing

15. Pluczenik's appeal ran its course, and failed on 28 November 2018, when the Court of Appeal dismissed the appeal, allowed a cross appeal, increased (as I have mentioned) the indemnity costs order made by Popplewell J to 100% of the claimant's costs of the trial, and also made a further costs order (on the standard basis) in respect of the appeal.

16. Pluczenik did not, however, satisfy the judgment, and continued to resist the claimant's attempts to continue the CPR Part 71 process. On 30 November 2018 the claimant applied to restore the oral examination of the Directors which had not been completed at the hearing before Master Leslie. This was opposed by Pluczenik, which argued for adjournment. However, Master Kay QC ordered it to be resumed on 8 March 2019, and made another order for costs, again on the indemnity basis. Pluczenik subsequently made another application to adjourn. Master McCloud relisted the oral hearing for 11 March 2019 and made another order for costs against Pluczenik.

17. The adjourned hearing took place on 11 March 2019 before Master McCloud but the Directors failed to attend, although they and Pluczenik were represented by leading counsel. It was argued on the Directors' behalf that there had not been proper service. That is a point that is not pursued before me, although it is not conceded, and has not been decided.

18. In view of the non-attendance, and the challenge to service, Master McCloud at the conclusion of the hearing on 11 March 2019 ordered a further hearing, this time to be listed before a High Court judge. However, the parties failed to agree a minute of her order although it seems clear that she did make an order, because in her later

order of 7 May 2019 (in fact, the McCloud Order which is under appeal to me), it was referred to in the recitals as "her order made on 11 March".

Payment

19. Pluczenik at this point took a different tack. The day after the hearing on 11 March 2019 which the Directors had not attended except by counsel, Pluczenik started to make substantial payments in settlement of those parts of the orders against them which were quantified money sums, including the interest which was accruing on them. These payments were made in three instalments: on 12 March, 19 March and 27 March 2019. In view of the issues before me, those three dates are important. Although the payments began the day after the hearing on March 11, they were not complete until March 27. The payment on 27 March 2019 finally settled all the sums due by way of quantified orders for payment and accrued interest. The final payment (according to an email explaining the payment the following day) was said to be in respect of interim payments ordered by Master McCloud on account of costs on 28 February and 11 March 2019, in the sum of £70,000 in total. No payment was, however, made in respect of the balance of costs (apart from the interim payment) which had been ordered by Popplewell J but not yet agreed or assessed. In March 2019, Pluczenik could say, for the first time, that it was no longer a judgment debtor except (possibly, this being central to the argument before me) in relation to unquantified portions of the orders for costs.

New Arguments

20. In the light of these payments, Pluczenik urged Master McCloud to set aside her order of 11 March 2019 for the continuation of the CPR Part 71 examination, that order not yet having been minuted, let alone sealed. It was, indeed, partly because Pluczenik maintained that the order was no longer appropriate that agreement could not be reached on a minute of the order of 11 March 2019. By an email to Master McCloud dated 25 March 2019, Pluczenik's junior counsel said:

> "The CPR 71 process is now at an end … Since … the judgment debt including interest has now been satisfied, there are no questions which can be asked under the CPR 71 process. Any further hearing would, therefore, serve no purpose; worse, it would be vexatious and oppressive

> to compel an individual, living abroad, to attend a court hearing for examination in those circumstances. Since the CPR 71 process is complete, the court has no further jurisdiction over the officers of the (former) judgment creditor.
>
> Given these facts, you are able to alter your order since it has not yet been sealed … In any event, given the material change of circumstances, you are able to vary or revoke your order listing a further hearing, under CPR 3.1(7). We respectfully submit that you should do so, there is no purpose in having an order sealed which contains the listing for a hearing which will have to be vacated in any event."

The email was a couple of days before the third and final payment on March 27, which was in respect of orders for interim payments of costs made by Master McCloud herself on 28 February and 11 March 2019.

21. Master McCloud was initially sympathetic to this submission, and responded on the same day, March 25, saying:

> "If anything remains in dispute I shall have a hearing but my view at present is that where the debt and interest have been paid, and the order has not been sealed, then it ceases to be appropriate to continue with the Part 71 questioning …"

22. The claimant's leading counsel, however, by email dated March 27, argued otherwise, saying:

> "The CPR does not provide that jurisdiction falls away if the respondent decides to make payment … The defendant has not satisfied the outstanding judgment … there remains a judgment in favour of the claimant for costs subject to detailed assessment, the value of which is likely to be something well in excess of £600,000 …
>
> Moreover, it is not as if the claimant can wait, see if the judgment for costs is satisfied and then apply again under CPR Part 71 if it is not … the claimant was only able to bring this Part 71 application because it was able to personally serve the defendant's officers in England … The chance of the claimant being able to successful[ly] serve the defendant's officers again … is remote.
>
> If the court was to accede to Mr Head's suggestion, the likely outcome is that the utility of CPR Part 71 will be lost forever and the claimant

will struggle to recover their costs without the availability of this weapon in the court's armoury …"

The Hearing and the McCloud Order Appealed From

23. Master McCloud had a hearing on 7 May 2019 in order to resolve these disagreements. This is the hearing which resulted in the McCloud Order which has been appealed to me.

24. Master McCloud gave a reasoned judgment and made the McCloud Order at the conclusion of the hearing. She decided that Pluczenik remained a judgment debtor for the purposes of CPR Part 71 even though the only part of the judgment outstanding was the unquantified liability to pay costs. She rejected a submission that the original application dated 22 June 2018 had not been in respect of the costs as well as the other parts of the Popplewell orders. She referred to the difficulty in re-establishing jurisdiction, if it were relinquished, because of the difficulties in service. She suggested, based on the history, that "unless there is momentum, nothing much will happen. The Part 71 process is relevant and, in my judgment, live."

25. The McCloud Order:

i) Refused Pluczenik's variation application, i.e. the application "for her order made on 11 March 2019 to be varied or set-aside" (quoting the ninth recital to the McCloud Order);
ii) Addressed penal notices to the Directors;
iii) Ordered relisting before a High Court judge of the hearing adjourned, originally, by Master Leslie; and
iv) Made further orders for costs against Pluczenik, some on the indemnity basis and some on the standard basis, and ordered payment of £7,500 on account of costs.

26. Although they have not been agreed or assessed, the value of the costs orders in the claimant's favour is clearly substantial. The figure "well in excess of £600,000" mentioned in the claimant's email to Master McCloud on March 27 (and quoted above) was followed by a high-level breakdown in a letter from the claimant's solicitors dated 1 July 2019 which claimed solicitors' costs and disbursements totalling £1,209,085 against payment by Pluczenik on account of £524,436, leaving a net recoverable of £684,649. However, a bill of costs on 8 October 2019 apparently reduced the figure to £953,227, which I am told would leave a net recoverable of about £550,000 after credit for

payments on account and excluding enforcement costs. There is also the costs order in Pluczenik's favour to offset.

27. The claimant has not initiated detailed assessment proceedings (nor has Pluczenik taken the steps available under the CPR to force it to do so). The figures for costs are, therefore, no more than estimates. It also follows that no date for payment of costs has been reached (and this is a point which Pluczenik emphasises).

28. In a letter dated 9 July 2019, the claimant's solicitors offered to bring the CPR Part 71 proceedings to a close if £684,649 was paid into the defendants' solicitors' client account pending determination of the costs. That figure was based on the calculation in their letter of 1 July 2019, which has since been reduced. However, the suggestion was not accepted, whether on the basis of that figure or any other. The defendants' position on this appeal is that I should grant a declaration "that the CPR 71 proceedings commenced by applications dated 22 June 2018 have concluded", save only that "Any applications in relation to any alleged breaches of previous orders, whether in contempt or otherwise, shall be released to a High Court Judge" (appellants' notice section 9).

The Appeal

Ground (1)

29. The main ground of appeal is that there is simply no jurisdiction under CPR Part 71 in respect of a judgment for money which has not fallen due because it has not yet been assessed – in this case, costs.

30. The CPR Part 71 procedure is a new and self-contained code brought in by the 1998 Civil Procedure Rules governing (to quote the title of CPR 71) "Orders to obtain information from judgment debtors". Its predecessor was Order 48 of the Rules of Supreme Court 1965, replacing Order 42 rule 32 of the previous Rules which went right back to Order 42 rule 32 of the Rules of the Supreme Court 1884. The Rules of the Supreme Court have their origin in the proposal for unified procedural rules introduced by the first Judicature Act in 1873. However, the power to order oral examination of a judgment debtor was older, and its exercise in the Court of Exchequer, for example, was considered in *Dickson* v *Neath and Brecon Railway Co* LR 4 Ex 87 (1869), in which the power derived from s 60 of the Common Law Procedure Act 1854. The earliest provision for such a procedure of which I am aware was the Small Debts Act 1845 (8 & 9

Vict. c. 127). This was introduced to provide a new tool for judgment creditors in the aftermath of the abolition of imprisonment for small debts in 1844: Archbold's *Practice of the New County Courts* vol. 2 p. 71 (1847). This history may explain the language still found in CPR Part 71, in which "judgment debtor" and "judgment creditor" immediately bring to mind claims for money only and, moreover, claims for money which is actually due for payment (debts), as opposed to liability to pay money which has yet to be quantified or due (such as a claim for general damages, or costs to be assessed).

31. However, I am concerned with a provision in the Civil Procedure Rules. They are new rules. CPR Part 71 is completely re-cast from its predecessor, RSC Order 48. The meaning of the rules must be found within the rules themselves, following ordinary principles of construction. The search for meaning will, naturally, be informed by the context of the rules, and (in case of real uncertainty) by a grasp of the purpose and policy lying behind them, as well as by consideration of authority. It will also, importantly, be conducted in the light of the overriding objective in CPR 1.1, which provides that the CPR are "a new procedural code, with the overriding objective of enabling the court to deal with cases justly and at proportionate cost" and CPR 1.2, which provides that the court must seek to give effect to the overriding objective when it "interprets any rule". Cases on old rules cannot be allowed to obscure the process of interpreting the "new procedural code", especially when the old rules are differently worded and possibly even (as suggested by Hart J in *Lombard NatWest Factors* v *Arbis*, *The Times*, 10 December 1999; [2000] BPIR 79) when they are not.

32. Moreover, CPR Part 71 introduced a major change from its immediate predecessor RSC Order 48. In RSC Order 48, separate provision was made for questioning judgment debtors against whom a money judgment had been entered (RSC Order 48 rule 1, "Order for examination of judgment debtor") and for questioning people against whom non-money judgments had been entered (RSC Order 48 rule 2, "Examination of party liable to satisfy other judgment"). The latter circumstance might arise, for example, when the judgment was for recovery of specific moveable property, such as a car or a painting, and questions needed to be asked in order to locate it (Supreme Court Practice 1999 vol. 1 p. 829 notes 48/3/6). This division went back to the original Rules (Order 42 rules 32 and 33 of the RSC 1885). It

meant that the definition of "judgment debtor" was, before the CPR, limited to the money judgments in Rule 1 (RSC Order 48 rule 1), while persons against whom other types of judgment had been entered were covered by the subsequent Rule 2 (RSC Order 48 rule 2). Rule 2, instead of using the language of "judgment debtor" in Rule 1, referred to "the party liable to satisfy the judgment or order".

33. The Civil Procedure Rules, by contrast, merge the two situations and create a single, flexible power, applicable to both. This is achieved by broadening the definitions of "judgment debtor" and "judgment creditor", so that they do not operate only in the case of money judgments, but apply in relation to judgments or orders of any kind at all. "Judgment creditor" is defined as: "a person who has obtained or is entitled to enforce a judgment or order". "Judgment debtor" is defined as "a person against whom a judgment or order was given or made" (CPR 70.1(2)). These definitions apply throughout CPR Parts 70–73 (see CPR 70(2)). The power to order a judgment debtor to attend court is then drafted as a single power, applicable to all types of judgment and order: CPR 71.2(1).

34. Another innovation is that in the CPR (but not in the RSC) it is expressly provided that "a judgment or order for the payment of money" includes "a judgment or order for the payment of costs".

35. The White Book note at 70.1.3 states "The amount of costs payable must have been decided before enforcement" but gives no authority for this proposition. I do not have to decide whether and, if so, why it might be correct in respect of what are clearly the enforcement procedures in CPR 72 (Third Party Debt Orders, the modern name for what used to be garnishee proceedings) and CPR 73 (charging orders, stop orders and stop notices).

36. The note does not, however, appear to apply to CPR 71, which is not an enforcement procedure as such, but a process for obtaining information that will help the judgment debtor decide what the best means of enforcement might be – or, indeed, whether it worth attempting enforcement at all. As Sir Jack Jacob put it ("The Enforcement of Judgment Debts" in *The Reform of Civil Procedural Law and Other Essays in Civil Procedure* (1982) p. 297):

> "In order to enable a judgment creditor to choose more intelligently and more effectively the appropriate mode of enforcement against a judgment debtor, provision is made for what is called discovery in aid of

> execution, i.e. the oral examination of the judgment debtor as to his circumstances and in particular what his assets, income and property are and what are his liabilities, so that both the judgment creditor and the court can see how he stands and the judgment creditor can decide which method he should employ to enforce the judgment in a fruitful and effective way."

The process assists in choosing a mode of enforcement for the future; it is not enforcement in itself.

37. This remains the correct analysis under the Civil Procedure Rules. In *Sucden Financial Ltd* v *Fluxo-Cane Overseas Ltd and Garcia* [2009] EWHC 3555 (QB), Teare J rejected a submission that "enforcement" included proceedings under CPR Part 71. He said that an order under CPR 71 "is an order which puts the judgment creditor into a position where he might hereafter be able to enforce the judgment but it does not seem to me to be part and parcel of the process of enforcement" (para 7). A Part 71 order is not "part and parcel of the process of enforcing a judgment. Rather it is, as I have said, anterior to such process" (para 8).

38. Does the amount of costs payable have to be determined before CPR Part 71 can be invoked, or (as in this case) if a CPR Part 71 is to be continued solely on the basis of a costs order?

39. The definitions of "judgment debtor" and "judgment creditor" in CPR 70.1(2) which I have cited do not suggest that the amount of costs has to be determined, provided only that an order for costs has been made. A person against whom an order for costs has been made is "a person against whom a judgment or order was given or made" and the person who has obtained the order for costs is "a person who has obtained or is entitled to enforce a judgment or order".

40. Is there something in the concept or in the situation, however, which means that the definition should not be understood to include an unquantified order for costs?

41. It is true that the definitions apply to all of Parts 70–73, and it was argued before me that it could not be right that judgments for unquantified sums of money such as costs could immediately give rise to third party debt orders under Part 72 (garnishee proceedings) or the other forms of attachment and enforcement in Part 73. However, a third party debt order will always correspond to "the amount of money remaining due to the judgment creditor" plus fixed costs (CPR

72.4(3)) and will be discharged if no actual amount of money is owing (CPR 72.8(3)). Charging orders under CPR 73.2 are either made under s 1 of the Charging Orders Act 1979 (which only applies to a judgment or order requiring payment of "a sum of money") or reg 50 of the Council Tax (Administration and Enforcement) Regulations 1992 (which applies only when "at least £1000 of the amount in respect of which the liability order was made, or, where more than one liability order was made, the aggregate of the amounts in respect of which those liability orders were made, remains outstanding"). They therefore require money sums to be due in particular amounts for reasons other than the definition of "judgment debtor" or "judgment creditor". Stop orders under CPR 73 are orders freezing sums in court so that they may be available to judgment creditors: it is not clear to me why it would be wrong in principle for them to be available if the value of a judgment is clearly substantial, although not yet precisely ascertained.

42. It was strongly urged on me that, if I decide that the Part 71 procedure is available as soon as an order for costs has been made, but before it has been quantified, the court will be (as it was put) "inundated with applications to cross-examine under CPR 71 as soon as order for costs to be assessed had been made". It was pointed out that the CPR 71 procedure can be invoked by a without notice procedure which is dealt with administratively, and that the grant of the procedure is, at least in the first instance, mandatory: CPR 71.2(5) and *Broomleigh Housing Association Ltd* v *Okonkwo* [2010] EWCA Civ 1113 per Moore-Bick LJ at [12].

43. I am not convinced by this threat. A person who obtains an order for costs has usually also obtained a substantive judgment, and the free-standing beneficiary of a costs order will be relatively rare. In many cases, the beneficiary of a costs order will be paid without the need to enforce, and in other cases the means of enforcement will be obvious and straightforward, without the need to obtain information under CPR 71 before proceeding to that stage. In other cases, the value of a costs order will not, in practice, justify expending yet further time and money in mounting a CPR 71 information gathering exercise. Sir Jack Jacob, in the essay I have already cited, referred (at p. 287) to the Report of the Committee on the Enforcement of Judgment Debts (1969, Cmnd 3909), saying that it:

> "emphasised that under the present system of enforcement, in the great majority of cases, the judgment creditor would proceed to choose his mode of enforcement without having knowledge of the actual circumstances of the debtor and without therefore being able to know which would be the most appropriate method of enforcement to adopt. It is true that there are provisions for obtaining discovery in aid of execution, i.e. obtaining knowledge about the circumstances of the debtor, what property and assets he owns and so forth and on that basis choosing the appropriate method of enforcement; but the Report emphasised that comparatively few judgment creditors proceed in this way but are more inclined to proceed in the dark without knowing what the financial circumstances of the debtor are and very often the mode of enforcement they choose proves entirely useless and abortive, thus delaying recovery and increasing costs."

44. If comparatively few judgment creditors of any description proceeded under the predecessor to CPR 71, even fewer can be expected to do so when all they have is an order for costs. But, if they do, they will be doing so in order not to "proceed in the dark", and there seems to be nothing at all wrong with that, whether the order is for costs or not, and whether the judgment or order is for sums to be assessed, or not.

45. Leading counsel for the Directors suggested a hypothetical case where "the quantum hearing might determine the liability to be nil or, for example, £1". In such a case, it would be unlikely that any judgment creditor would think it worthwhile to proceed directly to a Part 71 examination. But, if they did, and if that appeared inappropriate, disproportionate, or premature, the court has powers to step in to stop or delay the process, and thereby prevent abuse: see *Masri* v *Consolidated Contractors International (UK) Ltd (No. 4)* [2010] 1 AC 90 per Lord Mance at para 24 ("the general safeguard of the right to apply to set aside which exists under CPR rule 23.10"); *Mubarak* v *Mubarak* [2003] 2 FLR 553; [2002] EWHC 2171 (Fam) per Hughes J at 560A (power to adjourn) and *CIMC Raffles Offshore (Singapore) Pte Ltd* v *Schahin Holding SA* [2014] EWHC 1742 (Comm) per Field J at paras 25–26 (discretion to set aside would be exercised in favour of an elderly officer who would have difficulty travelling because requiring attendance would be "excessive and disproportionate"; discretion to postpone order against another officer

would be exercised "to take account of the parallel steps that are being taken to enforce the judgment against judgment debtor").

46. This is not such a case. It seems likely that the costs orders in this case are worth a lot of money. It has never been any part of the objection to the CPR Part 71 examination in this case that it is disproportionate to the amounts likely to be agreed or assessed.

47. Where the unquantified costs order is evidently valuable enough to make the CPR Part 71 procedure worthwhile, and where a lack of information makes it appropriate, I do not see any reason in principle why the immediate invocation of Part 71 to inform decisions about what to do next would be wrong. It might turn out that there is no means of enforcing the costs order, in which case it would be pointless to go through a detailed assessment. It might turn out that only a small proportion of the estimated value of the costs order could realistically be enforced, in which case the Part 71 procedure might produce a quick agreement on an amount of costs falling well below what might be obtained on a contested (and potentially prolonged) detailed assessment.

48. Since CPR Part 71 is an information gathering exercise, rather than an enforcement exercise, it seems to me arbitrary to say that it is an exercise that cannot begin until the exact amount of a money judgment has been fixed, when it will often (as here) be clear that it is very valuable before precise quantification. Costs orders can be worth a lot of money: I have mentioned that the claimant's total costs were originally said to be in excess of £1.2 million, after an action leading to a nine day trial in the Commercial Court, although the estimate has now been reduced. Since a CPR Part 71 examination is, to use Teare J's language in *Sucden,* "anterior" to enforcement, there seems to be no reason why it can only start when enforcement can begin, when the amount of the costs order has been fixed. All that is necessary, as the definitions in CPR 70.1 make clear, is that the person invoking Part 71 "has obtained or is entitled to enforce a judgment or order". The claimant in this case obtained an order for indemnity costs, and on the face of it fell within the definition. Although the claimant would not be entitled to enforce the order for costs without having agreed or assessed the amount, he was entitled to assessment as a matter of course, and the definition offers the person "entitled to enforce" as an alternative to the "person who has obtained" the judgment or order, not as an additional requirement. Having obtained the order, there was

nothing inappropriate in my judgment about the claimant proceeding directly to the process of obtaining information for the purpose of enabling enforcement in due course. On the contrary, it will often make sense to obtain the information before deciding how to enforce, or even whether to enforce. It is not, therefore, essential to be in a position immediately to enforce, so long as the information is sought in relation to an existing judgment or order in respect of which the information will be relevant. I therefore reject the submission that policy considerations should lead me to reject an interpretation which applies Part 71 to the facts of this case.

49. The Directors rely on CPR 71.5(1)(c) and Practice Direction 71 para 1.2(3). CPR 71.5(1)(c) provides that the judgment creditor's affidavit must state "how much of the judgment debt remains unpaid". Practice Direction 71 para 1.2(3) says that "if the application is to enforce a judgment or order for the payment of money", the application notice must "state the amount presently owed by the judgment debtor under the judgment or order". The Directors say, rightly, that none of the costs orders involve an "amount presently owed", because they have not been assessed, and it is not possible to say "how much of the judgment debt remains unpaid", if the total amount has not been determined. It is pointed out that the Practice Direction is incorporated into the rules, by CPR 71.2(3).

50. The weakness of this argument is that there is no doubt that applications under Part 71 can be made in respect of a "judgment or order" (CPR 70.1(2) which does not consist of a "judgment debt [which] remains unpaid" and when it is not possible to "state the amount presently owed". I have already referred to the fusion of the former provisions for examination in respect of non-money judgments and money judgments into one unified rule which covers both. This makes it unconvincing to back-project these references into the otherwise broad definition of the "judgment creditor" who is entitled to evoke CPR Part 70 in CPR 70.2(a) so as to exclude those who are not owed specific sums or whose right to money has not yet crystallised into a debt which is overdue for payment.

51. There is, in any event, in my judgment, no difficulty in reconciling the requirements of CPR 71.5(1)(c) and Practice Direction 71 para 1.2(3) with the broad definition of "judgment creditor" in CPR 70.2(a). The claimant has obtained a judgment or order (for costs to be assessed). It is therefore within the definition of CPR 70.2(a).

The costs have not been agreed or assessed. They are not, therefore, a "judgment debt [which] remains unpaid" and it is not necessary to state any amount in order to comply with CPR 70.1(2). If the costs had been assessed, or agreed, before issue of the application notice, it would have been necessary to "state the amount presently owed by the judgment debtor under the judgment or order" pursuant to Practice Direction 71 para 1.2(3). Because they had not been assessed or agreed, there was no amount "presently owed … under the judgment or order" and it was not necessary to state any such amount: indeed, it would have been wrong to do so.

52. The Directors rely on *Mubarak* v *Mubarak* [2003] 2 FLR 553; [2002] EWHC 2171 (Fam), although that was a case under RSC Order 48, rather than the current CPR Part 71. In *Mubarak*, a husband had been ordered to pay his wife, in ancillary relief proceedings, a lump sum of over £4.8 million, but after several years had paid only £260,000. It was, therefore, a case in which the "judgment debtor" did, indeed, owe a specified sum and was in breach of an obligation to pay that sum. It was in that context that Hughes J said (at 559A) the RSC Order 48 process was "of considerable potential utility to a judgment creditor in a case where the judgment debtor is deliberately evading his obligation to pay", and it does not follow from that passage that RSC Order 48, or CPR Part 71, applies only to cases in which the judgment entails an immediate obligation to pay. Hughes J went on, in the same paragraph, to say "It is a significant tool in the enforcement of the court's order in relation to which, *ex hypothesi,* the judgment debtor is in default." The hypothetical case that Hughes J was referring to in that paragraph was the case of "the judgment debtor … deliberately evading his obligation to pay" and it was, therefore, correct for him to say that such a person was "*ex hypothesi* … in default". It does not follow that there are not other cases covered by the procedure in which this set of circumstances does not apply. In some cases of oral examination, there is no deliberate evasion of an obligation to pay, only an inability to pay. They are not within the case discussed by Hughes J, but they were nevertheless covered by RSC Order 48, as they are now covered by CPR Part 71. Likewise, a judgment debtor may not be under an immediate obligation to pay, and not be in that sense in default, and yet still be a judgment debtor for the purposes of the definition in CPR 70.1(2) and the process in CPR Part 71 to which those within the definition are subject.

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53. The Directors also relied on the decision of the Court of Appeal in *White, Son & Pill* v *Stennings* [1911] 2 KB 418. This was a case about garnishee proceedings, not the examination of a judgment debtor. It was also, of course, a case decided in a procedural environment which has long since been swept away by the 1965 revision of the Rules of the Supreme Court, and then by the 1998 introduction of the new procedural code in the Civil Procedure Rules. The Court of Appeal was construing, in fact, one of the County Court Rules of 1903, which, by Order 26 rule 1 allowed for "attachment of debts". It is immediately obvious that the considerations relevant to "attachment of debts", which is undoubtedly an enforcement process, are not necessarily transferrable to Part 71, which is "to provide information" (CPR 71.1). It was a case about a judgment debt which included, but was not limited to, costs, but the key fact in the case was that the garnishee summons was issued before either the judgment debt or the costs had fallen due for payment, although they did fall due for payment subsequently. On those facts, and under the 1903 rule, the Court of Appeal held that the summons had been issued too soon, and before the rule provided jurisdiction.

54. I have no hesitation in saying that this case has no application to the one I have to decide. The three judgments in the Court of Appeal are framed differently, but there are features common to all which were decisive in that case and do not apply to the present case. First, it was a requirement of the 1903 rule that a garnishee summons would only issue on the basis of an affidavit stating that the judgment or order "is still unsatisfied, and to what amount". Vaughan Williams LJ emphasised this (at 426): "It requires as a condition precedent … that it is still unsatisfied, and to what amount." He concluded (at 427) "I do not think that the judgment can be said to be 'still unsatisfied' so long as there has been no default". Farwell LJ (at 429) and Kennedy LJ (at 431) made essentially the same point, and also emphasised the words "still unsatisfied" in the 1903 rule. This language, of a judgment or order "still unsatisfied", does not appear in CPR Part 71 or in the definition in CPR Part 70. Second, Vaughan Williams LJ and Farwell LJ emphasised the importance to their decision of garnishee proceedings being "a species of execution" (Vaughan Williams LJ at 427) and "intended to have the effect of process by way of execution of a judgment" (Farwell LJ at 428). By contrast, an examination under Part 71.1 is "to provide information", it does not in itself execute or

enforce the judgment. The information obtained may inform the process of execution, but the process of execution itself will come afterwards.

55. The Directors point out that the process of obtaining information from judgment debtors under CPR Part 71, like the examination of judgment debtors under earlier rules, "is not only intended to be an examination, but to be a cross-examination, and that of the severest kind" per James LJ in *Republic of Costa Rica* v *Strousberg (No. 2)* (1880) 16 Ch D 8 at 12–13. They argue that they are at the outer limits of the jurisdiction, being served during the briefest window of opportunity when they were passing through the jurisdiction without having any more than a temporary presence here. They say, therefore, that a sparing application of this jurisdiction should be applied, and its reach should not be allowed to extend so far as to cover an order only for costs, which have not been agreed or assessed, which have not fallen due for payment, and in respect of which the defendant company is not in default. This argument is also advanced in relation to the question of discretion, which is Ground 3 of the appeal. I will deal with it at this point, however, where it first arises.

56. First, the *Costa Rica* case does not mean that the jurisdiction is in any way oppressive, so that it should be applied sparingly. *Costa Rica* merely rejected a submission that the questioning could go no further than (quoting the headnote) "the simple question 'whether any and what debts are due to him'". It is a searching process because it is a valuable and important one, and unless it is searching it will not achieve its aims. Second, were it to be arguable that the nature of the questioning was inappropriate, or that the process being applied was oppressive, or disproportionate, that would be a matter for the court to consider in its discretion to regulate, stop, or defer proceedings, based on the authorities I have cited. It is not a proper objection to the existence of the jurisdiction in the first place. Third, and straying more into the question of discretion, the Directors were properly served and there is no challenge to the service before me. They are international businessmen and it has never been suggested that it is particularly hard for them to comply with the requirements of this jurisdiction, now that they are subject to it. I will consider the merits further, under Ground 3 of the appeal below. But it is obviously not right to let the tail, of the

merits of this particular case, wag the dog, of how far Part 71 extends as a matter of construction and general principle.

57. My conclusion, on Ground 1 of the appeal, is that CPR Part 71 allows a person to be compelled for examination as a "judgment debtor" even when the only outstanding parts of the judgment against him are costs orders for sums which have yet to be agreed or determined by assessment. This is in accordance with the words of the rules, the purpose which I understand to lie behind them, and the authorities to which I have been referred. The Directors' challenge to the McCloud Order on Ground 1 therefore fails.

Ground (2)

58. The second ground of appeal is that Master McCloud erred in finding that the application under CPR Part 71 in this case, and the orders of Master Kay QC on that application, had been made in respect of that part of the order of Popplewell J dated 3 October 2017 requiring the defendant to pay the claimant's costs.

59. Master McCloud said in her judgment (para 8):

> "in my judgment, this application does cover the costs order. It recites the costs order in para 3. The fact that later on it spells out the amount owing simply complies with that part of the rules, that where a sum is owed it has to be stated, but that is not sufficient, in my judgment, to oust the provisions of Part 71 in so far as they apply to currently uncalculated sums."

60. Of the two orders made by Popplewell J after the trial, only the first, the order of 21 July 2017, contained an order for costs in favour of the claimant. The order of 3 October 2017 contained the costs order in favour of Pluczenik.

61. The Part 71 application notices (one for each of the Directors, but in essentially identical terms) were quite clearly made in order to enforce the costs order of 21 July 2017, amongst other matters. They provided in their opening paragraph (with emphasis added):

> "The claimant ('the judgment creditor') applies for an order that an officer of the defendant company or corporation ('the judgment debtor') attend court to provide information about the judgment debtor's means and any other information needed *to enforce the order given on 21 July 2017* by the High Court of Justice, Queen's Bench Division, Royal Courts of Justice, Mercantile Court and the order given on 3 October

2017 by the High Court of Justice, Business and Property Courts of England and Wales, Commercial Court in claim no. CL-2015-000087."

62. Paragraph 3 of the application notices also referred expressly to "the order of Mr Justice Popplewell dated 21 July 2017 … by which the judgment debtor was ordered inter alia to pay … 90% of the judgment creditor's costs on an indemnity basis".

63. The Directors rely on the statement that "The amount now owing is US $3,879,640.28 which includes further interest payable on the judgment debt" because it does not include any reference to the costs, to be assessed if not agreed, ordered by Popplewell J on 21 July 2017. The statement was clearly given in compliance with CPR 71.5(1)(c) and Practice Direction 71 para 1.2(3) which I have considered in paras 49–51 above. For the reasons I explain in para 51 above, this statement was correct in stating (as required by CPR 71.5(1)(c)) "how much of the judgment debt remains unpaid" and in stating (as required by Practice Direction 71 para 1.2(3)) "the amount presently owed by the judgment debtor under the judgment or order". No amount of the costs orders made on 21 July 2017 was "presently owed" because there had been no agreement or detailed assessment. This statement did not, therefore, derogate from the clear statement in the application notices that they were issued to obtain information needed "to enforce the order given on 21 July 2017", which included the orders for indemnity costs.

64. I therefore agree with Master McCloud that the application notices did include the orders for costs within the scope of the proposed examinations.

65. The orders for costs were also within the scope of the orders for examination granted by Master Kay QC on 25 June 2018 (the Kay Orders) upon those application notices. The Kay Orders referred to the application in each case, and also repeated the references to "the orders given on 21 July 2017 and 3 October 2017", thereby including the orders for costs. Although the Kay Orders went on to repeat the specific sum which was "owing", as stated in the application notices, this did not in my judgment limit the scope of the applications being granted, because the Kay Orders were made upon those applications. The reference to the sum "owing" in the Kay Orders did not cancel their application, also, to those parts of the Popplewell orders which did not yet give rise to an amount "presently owed" (Practice

Direction 71 para 1.2(3)), which included the orders for costs to be agreed or assessed.

66. This is confirmed by the operative part of the Kay Orders, which, in para 1, directed each of the Directors to attend "to provide information … needed to enforce the orders". The "orders" referred back to "orders given on 21 July 2017 and 3 October 2017" and therefore included the orders for costs, as well as the paragraphs which provided for payment of specific sums. Indeed, the order of 21 July 2017 did not provide for the payment of any specific judgment sum (except an interim payment of costs), being concerned with general principles to be applied to the judgment sum in due course, such as the currency (para 1), the interest rate (para 2), a process for dealing with a taxation issue (paras 3–4), and a declaration in respect of certain matters raised by Pluczenik in the Belgian proceedings (para 8), as well as the unquantified orders for costs (paras 5 and 7).

67. The Kay Orders were in the standard form which ended by repeating the figure earlier stated for "the amount owing to and including 25 June 2018" and fixed costs, before saying:

> "If the total amount owing is paid (together with any further interest falling due), the judgment creditor may agree that the questioning need not take place (but may ask for an order for costs)."

It was argued that this showed that the examination could only cover the "total amount owing" and, therefore, not the orders for costs. But the sentence, for what it is worth, only states that "the judgment creditor may agree", not that it will, or must. Nor does it refer to any action by the court. It does not state that, were the stated amount to be paid, the judgment creditor would have any right to have the process discontinued. No Civil Procedure Rule, or provision of a Practice Direction, says that either. I am satisfied it is not the case. Payment of the specific amounts due and identified did not entitle the Directors or Pluczenik to have the process halted as of right. If a payment were made, and nothing remained outstanding (with or without detailed assessment or a quantum hearing), or if it appeared that the amount likely to be due on the parts of the judgment or order in question which the payment did not cover, like the order for costs, was too small to justify a Part 71 procedure, an application could be made for the court to exercise the discretionary powers I have referred to in para 45 above. But that is a point going to Ground 3 of the

appeal. It does not persuade me that the Kay Orders, or the application notices upon which they were based, excluded the costs orders made on 21 July 2017 from the ambit of the Part 71 examination altogether.

Ground (3)

68. Ground 3 of the appeal is that:

> "To the extent that the order re-listing a hearing under CPR 71 entailed the exercise of a discretion by the Master and/or was a case management decision, the Master's approach involved an error of principle and was plainly wrong in the sense of being outside the generous ambit where reasonable decision-makers may disagree …"

69. Although this ground moves from an argument about whether the jurisdiction exists at all (Ground 1), or whether it had actually been invoked in respect of the costs (Ground 2), the essentials of the argument against the Master's exercise of her discretion are the same as those I have already considered. The appellants' skeleton argument under Ground 3 refers back to the reasons given in Grounds 1 and 2, which I have already addressed, and the overlap was also conceded in the oral submissions.

70. The appellants argued that it is inherently unfair, and contrary to the interests of justice, to expose a party or its officers to cross-examination in respect of a liability which has not been quantified. For reasons I have already explained, I do not think it is inherently unfair, or contrary to the interests of justice: see particularly paras 47–48 above.

71. The appellants say in their skeleton argument that the claimant "has declined to quantify" the costs, and that they should not be exposed to cross-examination "of the severest form, in respect of a liability which has not been quantified and which, as a result, the party is unable to discharge". The claimant has not declined to quantify the costs: it put forward figures, as I have said, in a letter of 1 July 2019 and served a bill of costs on 8 October 2019. I have not been shown any evidence that either Pluczenik or the Directors showed any interest in agreeing or obtaining detailed assessment of the exact amount due so that they could pay it and I note that they do not appear to have explored the proposal that the examination could be brought to an end if they paid funds into their own solicitors' client account in escrow.

72. The fact is that the application notices and the Kay Orders were unimpeachable on Ground 1, which only became arguable when Pluczenik paid off the quantified sums which had already fallen due. As I have explained this was the case only in March 2019, well after the Kay Orders of 25 June 2018. Master Leslie's judgment shows that Pluczenik was, before that, deliberately failing to pay, rather than unable to pay. It also shows that, had they been fully compliant with the process, it might have ended with the hearing before Master Leslie on 8 November 2018, or at least with production of documents shortly afterwards. This was a most unpromising basis upon which to ask Master McCloud to exercise her discretion to bring the process to an abrupt end, without further examination.

73. Master McCloud identified a number of factors relevant to the exercise of her discretion, none of which are disputed as facts or alleged to have been irrelevant. They were:

i) The value of the costs order did not appear to be small or trivial, such that the Part 71 process was disproportionate (para 10 of Master McCloud's judgment).
ii) The Part 71 jurisdiction had been invoked only because of a brief opportunity to issue and serve proceedings when the Directors were in the country for a few days. If the Master were to relinquish the jurisdiction in her discretion (a jurisdiction, I emphasise, which had been validly invoked in the first place), it seems unlikely that it could be revived in future: "were Part 71 to fall away and have to be restarted … that would prove to be very difficult, I have little doubt" (para 10).
iii) "The past history of this case shows that unless there is momentum nothing much will happen" (para 11).

74. In my judgment, Master McCloud made a decision which was open to her in the exercise of her discretion and she gave an impeccable judgment in support of it. Indeed, it would have been surprising if she had made any other decision on the facts before her.

Conclusion

75. For those reasons, the appeal will be dismissed.

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Simon Colton QC and *Peter Head* (instructed by Mishcon de Reya LLP) appeared for the appellants/defendants.

Jonathan Cohen QC (instructed by DWF LLP) appeared for the respondent/claimant.