Westacre Investments Inc v The State-Owned Company Yugoimport SDPR [2008] APP.L.R. 04/21

JUDGMENT : Mr Justice Tomlinson : Commercial Court : 21st April 2008

Introduction

1. This is an unusual although not altogether unprecedented application. In the context of proceedings in Singapore in which there is sought registration of an English judgment dated 13 March 1998 and, ultimately, enforcement thereof by way of garnishee order, the judgment creditor has, at the direction of the Singapore Court of Appeal, applied to this court for declaratory relief. In the context of its consideration whether it is just and convenient that the English judgment should be enforced in Singapore, the Singapore Court of Appeal has directed the judgment creditor to ascertain whether, if the judgment creditor had applied for a third party debt order on 5 October 2004, the date on which registration of the English judgment was initially permitted in Singapore on the ex parte application of the judgment creditor, the English court would have given leave to enforce the judgment in that manner. The assumption that the English court is asked to make is that there was on 5 October 2004 a third party within the jurisdiction of the English court who owed or held money to the credit of the judgment debtor.

2. In one sense there is no lis pending between the two parties of which this court is seised, and the court is on that footing being asked to determine a hypothetical question. This court is of course always anxious to respond so far as properly it can to a request for assistance from an overseas court. I am not sure however whether it is entirely right to characterise what has here occurred in precisely that way. I do not have a full transcript of the proceedings before the Singapore Court of Appeal, but that court seems to some extent to have tended to the view that, in the light of the nature of the Singapore Reciprocal Enforcement of Commonwealth Judgments Act, it had in any event been incumbent upon the judgment creditor before seeking registration in Singapore first to ascertain from the English court whether the judgment in question is enforceable in England. On that view of the matter the judgment creditor is unable to obtain relief in Singapore without first applying to the English court for declaratory relief, as it has now in any event been directed to do. In at least two reported cases in this area of the law similar applications have been made with a view not to execution in this jurisdiction but to assist the passage of execution in another jurisdiction – see ***Duer v. Frazer*** [2001] 1 WLR 919 and ***The Society of Lloyd's v. Longtin*** [2005] EWHC 2491 (Comm). It should also be borne in mind that what is sought in Singapore is registration and enforcement of a judgment of this court, a remedy which is sought under legislation made *"to facilitate the reciprocal enforcement of judgments and awards in Singapore and other parts of the Commonwealth"*. However the matter is properly to be characterised, it is in my judgment clearly appropriate that the English court should assist the parties and the Singapore court by indicating, so far as it is able, how the discretion of the English court would have been likely to have been exercised in the circumstances posited.

3. The short answer to the question posed is that, as Lord Brown of Eaton under Heywood has recently pointed out in ***A v. Hoare*** [2008] 2 WLR 311 at 336H, conceptually a judgment of this court, although interest bearing for only six years, remains enforceable without limit of time. Different procedural rules apply to the different methods of enforcement. In the context of a third party debt order the relevant rules place the burden on the judgment debtor to show why an interim order should not be made final. In the context of the present case, without encroaching on the fact-finding function of the Singapore court, I find it virtually impossible to contemplate that the English court would in the circumstances either have declined to make an interim order or, if the judgment debtor had filed evidence stating grounds for objecting to the making of a final order, given effect thereto by declining to make the interim order final.

Background

4. The underlying dispute is already familiar to the English court, having been considered by first Colman J and then, on an unsuccessful appeal therefrom, by the Court of Appeal – see ***Westacre Investments Inc v. Jugoimport-SDRP Holding Company Ltd & Ors*** [1999] QB 740, and [2000] QB 288.

5. The Claimant, to which I shall refer as *"Westacre"*, is a company incorporated in Panama. The Defendant, to which I shall refer as "*Yugoimport*", is a state-owned entity, describing itself as a company, based in Serbia. It is the successor to The Federal Directorate of Supply and Procurement of the former Socialist Federal Republic of Yugoslavia, again a state-owned entity which became in turn from 2003 to 2006 a state-owned entity of the now dissolved State Union of Serbia and Montenegro. Yugoimport is or was at all material times engaged in the export of armaments and defence equipment.

6. In 1988 Yugoimport wished to sell armoured vehicles to the Kuwaiti Government. In an attempt to bring this about Yugoimport entered into an agreement dated 12 April 1988 with Westacre pursuant to which Westacre agreed to provide consultancy services to Yugoimport in connection with the proposed sale of military products and construction services to the State of Kuwait. In due course Yugoimport was successful in procuring a contract or contracts to supply Kuwait which contract or contracts was or were duly performed. Yugoimport did not however pay to Westacre the consultancy fees which in consequence fell due.

7. In accordance with the contract in November 1990 Westacre invoked the agreed arbitration procedures in Switzerland. On 28 February 1994 the International Court of Arbitration of the International Chamber of Commerce issued a Final Award in favour of Westacre in the sum of US$50,010,093.36 and £1,029,629.37 together with interest accruing at 5% per annum. The award was in fact made jointly and severally against Yugoimport and Beogradska Bank, the latter liable as guarantor. The respondent parties appealed the award to the Swiss Federal Tribunal which appeal was dismissed on 30 December 1994.

8. On 15 August 1995 pursuant to Westacre's application to this court Buxton J gave leave to enforce the award as a judgment of the court, that order being made pursuant to section 26 of the Arbitration Act 1950 and section 3 of the Arbitration Act 1975. On 15 November 1995 Yugoimport and Beogradska Bank applied to set aside that order and on 19 April 1996 it was ordered that the application should be continued as if begun by writ. The principal ground of resistance to enforcement was on grounds of public policy. It was alleged that the agreement with Westacre was for the purpose of procuring sales through bribery or other corrupt influence, an argument raised before but rejected by the arbitrators. On 23 April 1996 Westacre issued a separate writ commencing an action on the award itself. The 1995 application and the 1996 action were consolidated. On 11 March 1997 Westacre applied in both actions for the trial of a preliminary issue.

9. On 19 December 1997 Colman J found for Westacre and ordered that it be at liberty to enforce the award in the same manner as a judgment against Yugoimport and Beogradska Bank and that judgment be entered in terms of the award in the net sum of £41,584,488.56. The formal judgment which is now sought to be enforced is dated 13 March 1998.

10. Yugoimport and Beogradska Bank appealed to the Court of Appeal. Their appeal was dismissed on 12 May 1999. They then presented to the House of Lords a petition for leave to appeal. That petition was dismissed on 20 October 1999. Yugoimport and Beogradska Bank applied for and obtained from first Colman J and then the Court of Appeal a stay of execution on the judgment pending the appellate process. Execution was in consequence stayed from 13 March 1998 until 10 November 1999, a period of twenty months.

11. It has at all times been the case of Yugoimport that its financial condition is parlous, that its assets in Serbia are extremely limited, that it is impecunious and that it has at all material times been unable to pay the judgment debt. It has adduced evidence to that effect. I believe it to be uncontentious that the judgment debt has at all material times been equivalent to a significant proportion, possibly at times of the order of 50%, of Serbia's foreign currency reserves. I also believe it to be uncontentious that there may be competing claims as between successor states to the assets, if any, of Yugoimport. The turmoil which has afflicted this part of the world in recent years is well-documented. It is unnecessary and inappropriate for me to essay any appraisal of the extent to which that turmoil has affected the efficient functioning of the judicial and administrative systems in Serbia and over what period of time. It suffices to say that, given the circumstances, given that Yugoimport is a state entity and given the nature of the underlying transaction in relation to which the award and thus the judgment has been rendered, it is manifest that over the relevant period Serbia would not have been an obviously fertile territory in which to seek enforcement of the judgment.

12. There is uncontroverted evidence before the court that, since 10 November 1999, Westacre has taken active steps in an attempt to enforce the judgment and the award in England, Cyprus, Germany, France, Switzerland and Kuwait. These efforts have included steps taken in respect of the assets of Yugoimport and Beogradska Bank in relation to a bank in London, AY Bank Limited. Beogradska Bank held shares in AY Bank. It emerged that Yugoimport had a deposit account with AY Bank. AY Bank went into administration on 10 December 1999 and into liquidation on 26 September 2003. Westacre has received about £3.6 million by way of four dividends in that liquidation, and it has also recovered through its other measures a further £460,000 odd. The first dividend was received in January 2004, with subsequent dividends in August 2004, January 2007 and finally December 2007. I believe, although I am unsure, that of this recovery the dividends from AY Bank represent money owed by the bank to Yugoimport whilst the balance of recoveries represents assets of Beogradska Bank. At all events the recoveries made, although substantial, have been only modest in relation to the sum owed. There is also uncontroverted evidence that Beogradska Bank went into liquidation in Yugoslavia in January 2002 at the direction of the National Bank of Yugoslavia. Westacre instructed a Serbian law firm with whom Messrs Clyde & Co London had an association to register a claim in the liquidation. Westacre has never received any confirmation that its claim has been accepted and has not received any payment in respect thereof.

13. Yugoimport is critical of Westacre for having failed to attempt to search a register which is apparently maintained in Serbia by the Ministry of Foreign Economic Relations in which, it is said, Yugoslav companies which own shares in foreign companies must record their shareholdings. It is said that a search of this register would have revealed that Yugoimport has at all material times had a shareholding in a Singapore company, Deuteron (Asia) Pte Limited, to which I shall refer hereafter as *"Deuteron"*. The evidence suggests that in order to search this archive a sufficient *"legal interest"* must be shown. Yugoimport has not itself produced in evidence a copy of what appears on the register. It says that it is unable so to do because it lacks a sufficient legal interest to be permitted to inspect the record of its own shareholdings. That notwithstanding, it is suggested that Westacre as a judgment creditor would have been regarded by the relevant authorities in Serbia as possessing a sufficient legal interest to be permitted to inspect the register. The significance of the foregoing is that it is said, and not I think challenged, that in late July 2004 Westacre learned for the first time that there is in Singapore a bank account at DnB Nor Bank AsA held by Deuteron in which, allegedly, funds amounting to approximately US$14.8 million are held by Deuteron for Yugoimport. It is said that the existence and location of these funds and the identity of the account holder were disclosed to Westacre under strict condition of confidentiality by a source resident in the former Federal Republic of Yugoslavia who requires anonymity. It is not in dispute that Deuteron holds these funds although it is in dispute whether they are held beneficially for Yugoimport. Yugoimport says that they are not. That is a matter which will fall for determination by the Singapore court. Deuteron's accounts for the years ended 30 June 1998, 30 June 1999, 30 June 2000, 30 June 2001, 30 June 2002 and 30 June 2003 filed with the Singapore authorities state that the relevant funds belong *"wholly and exclusively"* to Yugoimport. Westacre says that until July 2004 it was unaware of

any link between Yugoimport and Deuteron which would have led it to search for these accounts. Yugoimport's shareholding in Deuteron is not identifiable from Yugoimport's balance sheet.

14. It was as a result of the revelation in July 2004 that on 5 October 2004 Westacre applied ex parte to the High Court of Singapore for registration of the English judgment with a view thereafter to obtaining a garnishee order in respect of the funds held at DnB Nor Bank. A Mareva injunction, as it is still there called, was granted on 28 October 2004. On 29 April 2005 garnishee orders to show cause were made against Deuteron and DnB Nor Bank in relation to the funds identified.

15. Yugoimport has applied to the Singapore court to set aside the registration of the judgment, which was effected pursuant to the Singapore legislation to which I have already referred. Assistant Registrar Low refused this application but varied the original registration order so as to provide that the judgment be capable of execution in Singapore by garnishee proceedings only. Yugoimport appealed. Kan J allowed Yugoimport's appeal, holding that it was not just and convenient that the judgment should be enforced in Singapore. It is Westacre's appeal against that ruling of which the Singapore Court of Appeal is now seised and in the course of hearing which it directed Westacre to make this application to determine the following question:

"On the assumption that there was a third party within the jurisdiction of the English court who owed or held money to the credit of the Judgment Debtors, whether an English court in the exercise of its discretion would have given leave to enforce the English Judgment dated 13 March 1998 if the Judgement Creditors had applied for a third party debt order on 5 October 2004."

The law in England and Wales

16. I gratefully adopt here and in paragraphs 17 and 18 below the historical account helpfully set out by counsel for Westacre in their skeleton argument for the purposes of the hearing before me. As Lord Bingham of Cornhill pointed out in ***Société Eram Shipping Co. Ltd v. Compagnie Internationale de Navigation*** [2004] AC 206 HL(E) at paragraph 10:

"As many a claimant has learned to his cost, it is one thing to recover a favourable judgment; it may prove quite another to enforce it against an unscrupulous defendant. But an unenforceable judgment is at best valueless, at worst a source of additional loss. This was a problem which our Victorian forebears addressed with characteristic energy and pragmatism."

The solution which was found was to allow the attachment of choses of action belonging to the judgment debtor.

17. The Judgments Acts of 1838 and 1840 allowed choses in action to be taken in execution of a judgment. The Common Law Procedure Act 1854 then introduced a new garnishee procedure (ss.61-63, 65). As Lord Hoffmann pointed out in ***Société Eram Shipping*** (para. 34), this resulted from the recommendation of the Second Report of the Royal commission on the Superior Courts of Common Law:

"We may suggest, that the remedies of creditors against the property of their debtors might be made more extensive by enabling a creditor after judgment to attach debts and monies of his debtor in the hands of third persons, and so obtain satisfaction of his judgment. We are not aware of any process, either in the superior courts of law or equity, in suits between subject and subject, by which this can directly be done, though the course of proceeding under writs of execution at the suit of the crown, and by way of foreign attachment in the mayor's court of London and some other cities, as well as in the courts of many foreign countries, shows that such a remedy would be practicable and useful."

18. The procedure which was established was regulated by the Rules of Court scheduled to the Supreme Court of Judicature Act 1875 when that Act took effect, and by the Rules of the Supreme Court promulgated in 1883 when those replaced them. In each of these codes of rules Order 45 regulated garnishee proceedings. When the rules were revised in 1965 (Rules of the Supreme Court (Revision) 1965, SI 1965/1776), Order 45 was substantially reproduced as Order 49. It is clear from the terms of rr.1(1) and (2), 3 and 8 of this Order as last amended in 1981 that the nature of the 1854 procedure remained essentially unchanged.

19. The provisions which now empower the court to make a third party debt order are contained in CPR 72. Relevant provisions include:

"72.1(1) This part contains rules which provide for a judgment creditor to obtain an order for the payment to him of money which a third party who is within the jurisdiction owes to the judgment debtor. …

72.2 (1) Upon the application of a judgment creditor the court may make an order (a 'final third party debt order') requiring a third party to pay to the judgment creditor—

(a) the amount of any debt due or accruing due to the judgment debtor from the third party; or

(b) so much of that debt as is sufficient to satisfy the judgment debt and the judgment creditor's costs of the application.

(2) The court will not make an order under paragraph (1) without first making an order ('an interim third party debt order') as provided by rule 72.4(2). …

72.3 (1) An application for a third party debt order—

(a) may be made without notice; and

(b) (i) must be issued in the court which made the judgment or order which it is sought to enforce except that

(ii) if the proceedings have since been transferred to a different court, it must be issued in that court.

(2) The application notice must—

(a) (i) be in the form; and

(ii) contain the information

Required by the relevant practice direction; and

(b) be verified by a statement of truth.

72.4 (1) An application for a third party debt order will initially be dealt with by a judge without a hearing.

(2) The judge may make an interim third party debt order—

(a) fixing a hearing to consider whether to make a final third party debt order; and

(b) directing that until that hearing the third party must not make any payment which reduces the amount specified in the order.

(3) An interim third party debt order will specify the amount of money which the third party must retain, which will be the total of—

(a) the amount of money remaining due to the judgment creditor under the judgment or order; and

(b) an amount for the judgment creditor's fixed costs of the application, as specified in the relevant practice direction.

(4) An interim third party debt order becomes binding on a third party when it is served on him.

(5) The date of the hearing to consider the application shall be not less than 28 days after the interim third party order is made. …

72.8 (1) If the judgment debtor or the third party objects to the court making a final third party debt order, he must file and serve written evidence stating the grounds for his objections. …

(5) If the court is notified that some person other than the judgment debtor may have a claim to the money specified in the interim order, it will serve on that person notice of the application and the hearing.

(6) At the hearing the court may—

(a) make a final third party debt order;

(b) discharge the interim third party debt order and dismiss the application;

(c) decide any issues in dispute between the parties, or between any of the parties and any other person; or

(d) direct a trial of any such issues, and if necessary give directions."

These provisions are similar in substance to those which governed the grant of what under the old Rules of the Supreme Court were called garnishee orders – see again per Lord Bingham of Cornhill in ***Société Eram Shipping Co. Ltd v. Compagnie Internationale de Navigation*** at page 265. The power to make both an interim order, on the ex parte application, and the final order, is discretionary. At the interim stage there is no hearing, but the process is judicial not administrative. The onus is expressly cast upon the judgment debtor to make good any objection to the interim order being made final. The Practice Direction to which reference is made in CPR 72.3(2)(a)(ii) naturally requires that the application notice must contain details of the judgment or order sought to be enforced but the rule makes no reference whatever to the time elapsed since the date of that judgment or order.

20. These provisions are markedly different from those which govern the issue of writs of execution. For enforcement purposes the term *"writ"* has survived the "***Access to Justice***" reforms. The procedure is still governed by R.S.C. Order 46. In general a writ of *fieri facias* may issue to enforce a judgment or order for the payment to, or for the recovery by, any person, of money or costs. The writ may issue immediately upon payment becoming due and, as a matter of course, without permission of the court. The issue of the writ is not a judicial process. The writ is issued by a clerk in the court office on being supplied with a copy of the judgment – see per Millett LJ in ***Ezekiel v. Orakpo*** [1997] 1 WLR 340 at pages 343-344. This procedure applies to all "*writs of execution*", which are defined in Order 46 rule 1 as follows:

"1. In this order, unless the context otherwise requires, 'writ of execution' includes a writ of fieri facias, a writ of possession, a writ of delivery, a writ of sequestration and any further writ in aid of any of the aforementioned writs."

However Order 46 rule 2 describes a series of situations in which a writ of execution may not issue as of right. Order 46 rule 2(1) provides:

"A writ of execution to enforce a judgment or order may not issue without the permission of the court in the following cases, that is to say—

(a) where 6 years or more have elapsed since the date of the judgment or order;

(b) where any change has taken place, whether by death or otherwise, in the parties entitled or liable to execution under the judgment or order;

(c) where the judgment or order is against the assets of a deceased person coming to the hands of his executors or administrators after the date of the judgment or order, and it is sought to issue execution against such assets;

(d) where under the judgment or order any person is entitled to a remedy subject to the fulfilment of any condition which it is alleged has been fulfilled;

(e) where any goods sought to be seized under a writ of execution are in the hands of a receiver appointed by the court or a sequestrator."

21. This dichotomy in the provisions governing on the one hand garnishee orders (and charging orders – see CPR 73) and, on the other, writs of execution, has existed for well over 100 years – see ***Fellows v. Thornton*** [1884] QBD 335, and ***Patel v. Singh*** [2002] EWCA Civ. 1938 per Peter Gibson LJ at paragraph 11. The specific language used in RSC Order 46 rule 2 and its predecessors has given rise to a body of law to the effect that the lapse of six years after the judgment will ordinarily, in itself, justify refusing the judgment creditor permission to issue a writ of

execution, unless the judgment creditor can justify the granting of permission by showing that the circumstances of his or her case takes it out of the ordinary – see per Peter Gibson LJ at paragraph 21 of his judgment in ***Patel v. Singh.***

22. Mr Duncan Matthews QC, for Yugoimport, has suggested in argument in this case that this body of authority should apply by analogy to the regime under CPR 72 and indeed to that applicable to charging orders under CPR 73. There is no support in any authority for this approach. It would run counter to the scheme established in CPR Part 72 which expressly places upon the judgment debtor the onus of making good any objection to the making of a final order. There has never been any practice of declining to grant the interim order on the ex parte application on the ground alone that the lapse of six years since the judgment casts upon the judgment creditor the onus of showing why the order should be made. As I have already indicated the rules have exhibited this dichotomy for over 100 years. In ***Fellows v. Thornton*** Lord Coleridge CJ pointed out that the distinction was between personal process against the individual, which at one time of course could lead to attachment of the person for non-payment of debt, and attachment of debts, attachment being the old legal phrase applicable to a debt in the hands of a garnishee. He went on, at page 337:

" 'Attachment of debts' in Order XLV is, however, plainly different from attachment of the person. Order XLV prescribes that the Court of a judge may, upon an ex parte application of any person who has obtained a judgment or order for the recovery of payment of money … order that all debts owing or accruing from the garnishee to such debtor shall be attached to answer the judgment or order; 'and … it may be ordered that the garnishee shall appear before the Court or a judge … to shew (sic) cause why he should not pay to the person who has obtained such judgment or order the debt due from him to such debtor …': rule 1. In that order, which relates to attachment of debts in the hands of debtors, there is not a word about six years having elapsed since judgment. When a judgment has been obtained and is not satisfied, the garnishee may, on shewing cause, urge before the judge that a long time has elapsed since the judgment, and any other defence, but when he has done so, if the judge is satisfied that there is no good reason why the order should not issue, it may be made. I think Order XLV for attachment of debts stands by itself, and that rules 8,22, and 23 of Order XLII have application to Order XLIV, and not to Order XLV."

As this passage makes clear, the lapse of six years since judgment in this context enjoys no special significance. It is simply one factor to be taken into account in the overall exercise of discretion, in relation to which there is no *"general rule"*. References to a general rule to be found in cases concerning writs of execution are confined to cases governed by the express wording of RSC Order 46 and have no broader application. In ***The Society of Lloyd's v. Longtin***, above, Morison J went out of his way to make this clear – see paragraphs 1 and 9 of his judgment. ***Ezekiel v. Orakpo*** was an occasion upon which it could have been said, had it been thought necessary or desirable, that the general rule developed by reference to the specific wording of Order 46 should apply by analogy to the regime for enforcement by way of garnishee and charging orders. No such necessity or desirability was identified. Similarly, the **"*Access to Justice*"** reforms would have been another occasion upon which, had it been thought appropriate, the regimes might have been assimilated. The opportunity was not taken, with the garnishee and charging order procedures reproduced in new rules with new wording but with a content indistinguishable from the rules which had previously governed this jurisdiction.

23. In the upshot I do not consider that the court would have hesitated long, if at all, before granting an interim order in the present case, on the assumption which I make that the judgment creditor's evidence would have described the third party debtor within the jurisdiction and the debt owed to the judgment debtor. It is to be noted that neither CPR 72.3 nor the Practice Direction referred to therein would have required the judgment creditor to explain when precisely it had learned of the existence of the third party debt or to justify any lapse of time between the judgment and the application to enforce. Had the judgment debtor raised as an objection to the making of a final order the circumstance that there had elapsed since the judgment six years seven months this would of itself have been a factor of very little weight. In the context of garnishee proceedings where no special onus is placed upon the judgment creditor after the elapse of six years from the judgment the court would in my view have been most unlikely to regard as of any great significance arguments directed to showing that the judgment creditor might, with the exercise of greater diligence, or had it prioritised its efforts differently, have been able to discover the existence of this debt sooner. In the present case, where it is in any event vigorously denied that the third party debt is in fact owed to the judgment debtor, such arguments wear an air of particular unreality. In my judgment in the absence of some compelling evidence of prejudice to the judgment debtor accruing from the delay in enforcement, the court would regard the grant of garnishee relief as virtually axiomatic. This is after all a judgment for a very substantial sum arising out of an international commercial dispute. The parties are corporations, not natural persons. The circumstances as I have already described them and the nature of the judgment debtor combine to produce obvious impediments in the way of straightforward enforcement against easily found assets of the judgment debtor. The starting presumption would be that the court should assist the judgment creditor to recover the debt due to it. As Lord Brightman said in ***Roberts Petroleum v. Bernard Kenny Ltd*** [1983] 2 AC 192 at page 207E:

"… A judgment creditor is in general entitled to enforce a money judgment which he has lawfully obtained against a judgment debtor by all or any of the means of execution prescribed by the relevant rules of court."

Similarly, in ***Credit Lyonnais v. SK Global Hong Kong Ltd*** [2003] HKCA 250, the Court of Appeal of Hong Kong stated, at paragraph 4:

"Where, as in the present case, a party (the judgment creditor) has obtained a judgment against another party (the judgment debtor), the starting (and often, finishing) point is that the judgment creditor should be able to take all legitimate measures to enforce that judgment. That is, after all, his right."

24. I would however go further. In my judgment, even if the court had concluded that it should adopt by analogy the approach in the Order 46 cases, still in the circumstances of the present case the court would in my view have unhesitatingly permitted enforcement by way of a final third party debt order.

25. Firstly, the cases in which the court has refused its assistance to a judgment creditor after the lapse of six years are, for the most part, cases involving the elapse of very much more than a further six months and are moreover cases in which no attempt whatever at enforcement had been made over a long period. In ***Duer v. Frazer***, above, a case arising out of a small scale business arrangement which developed into a personal domestic relationship, the relevant judgment was registered in England in 1984. Some desultory steps directed to enforcement were taken before 1989. Between 1989 and 1997 "*no contact was made between the Claimant and the Defendant to indicate that the Claimant was still pursuing her judgment*". The Defendant had destroyed his papers, was 73 years old and in poor health. If execution required the Defendant to leave his house or surrender his possessions it would in those circumstances have been much more onerous than it would have been had it occurred six years after registration of the judgment. Sixteen years had elapsed since the German judgment given in 1984 which was registered in England in the same year. In ***Patel v. Singh,*** above, the Claimant had made no attempt at enforcement for eight years and, moreover, had delayed for six months after discovering the Defendant's address in England, he having been working abroad in Germany in the interim. The present case is obviously very different. Leaving on one side the point that execution of the judgment was stayed for the first twenty months of its life, Westacre made very active efforts to enforce the judgment. It was not unnatural that Westacre was obliged to prioritise its efforts directing them to the avenues which seemed most likely to bear fruit. However the authorities show that remaining active in attempting to enforce the judgment is of itself a factor upon which a judgment creditor can successfully rely in seeking to establish facts which take the case out of the ordinary and thus lead the court to disapply the general rule of non-enforcement after six years. See in particular *Lloyd's v. Longtin*, above, per Morison J at paragraph 23 of his judgment. Furthermore, a particular factor which may take the case out of the ordinary is the discovery of assets within the jurisdiction amenable to execution – Morison J referred to this possibility at paragraph 20 of his judgment. In ***Patel v. Singh***, above, Sir Anthony Evans had pointed out in argument the possibility of reliance upon a significant change in the judgment debtor's position, as where having been thought for years not worth powder and shot he undergoes a change of financial fortune – see per Peter Gibson LJ at paragraph 21 of his judgment.

26. Secondly, it is in my judgment plain from the authorities that although under RSC Order 46 the onus is cast upon the judgment creditor to show why he should be permitted to enforce after the elapse of six years, still the touchstone of the discretion and in most cases the key factor is prejudice to the judgment debtor. In particular the key question will ordinarily be whether the judgment creditor has so conducted himself as to lead the judgment debtor reasonably to believe that the judgment debt would not be enforced. This emerges clearly from the most recent appellate authority in which this jurisdiction has been considered, ***Good Challenger Navegante SA v. Mineralexportimport SA*** [2004] 1 Lloyd's Rep. 67. See in particular the judgment of Clarke LJ, now Sir Anthony Clarke MR, at paragraphs 104-112, pages 85 to 86 of the report. Morison J in ***Lloyd's v. Longtin***, above, in the light of ***The Good Challenger***, adopted just that approach, observing at paragraph 23:

"It seems to me that in this case there are facts which take this case out of the ordinary. From the very outset, Judge Longtin must have known that Lloyd's remained intent on enforcing their rights against him. There can be no prejudice to him. Lloyd's have remained active in seeking to have recognised and enforced the many judgments which they have obtained. In the course of this massive task they must be allowed time to consider their position and to adopt stances which reasonably appear to them to be the best way of proceeding."

27. In the present case the judgment debtor Yugoimport does not for one moment suggest that it has been led to believe that the judgment creditor was not intent on enforcing its rights. Yugoimport does not and could not plausibly suggest any prejudice arising out of the passage of time. It is for these reasons that the English court would in my judgment have regarded as of very little weight arguments directed to seeking to demonstrate additional steps directed towards enforcement which the judgment creditor might have taken in Serbia. Mr Matthews' argument seemed to me at times to proceed from the premise that, assuming the Order 46 regime to be applicable by analogy, that involves a judgment creditor demonstrating that it has within the six years permitted taken all reasonable steps which might have led to enforcement. It is not for me to express a conclusion whether Westacre could here discharge such a burden. However as I have sought to demonstrate, this is not an approach which can properly be spelled out of the authorities. Ultimately it is the effect upon the judgment debtor of the judgment creditor's conduct or inactivity which is the critical factor. In my judgment on the undisputed and uncontroversial facts here present the English court would in October 2004 unhesitatingly have permitted enforcement by way of third party debt order against the presumed debt situate within the jurisdiction.

MICHAEL CRYSTAL QC and TOM SMITH (instructed by Messrs Forsters LLP) for the Claimant
DUNCAN MATTHEWS QC and SIMON MILNES (instructed by Messrs Masseys) for the Defendant