Neutral Citation Number: [2020] EWHC 2172 (QB)

Case No: LM-2020-000051

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
LONDON CIRCUIT COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/08/2020

Before :

MISS JULIA DIAS QC SITTING AS A DEPUTY HIGH COURT JUDGE

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Between :

HEINRICH BERND ALEXANDER JOSEF VON PEZOLD	**Claimant**
- and -	
BORDER TIMBERS LTD (in Judicial Management in Zimbabwe)	**Defendant**

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Mr Patrick Goodall Q.C. and Mr Craig Ulyatt (instructed by **Maitland Advisory LLP**) for the **Claimant**
Mr Robert Anderson Q.C. and Mr Dominic Howells (instructed by **Baker & McKenzie LLP**) for the **Defendant**

Hearing date: 30 July 2020

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APPROVED JUDGMENT

Miss Julia Dias Q.C. sitting as a Deputy High Court Judge:

Introduction

1. This is an application to set aside an *ex parte* order made by HHJ Pelling QC on 9 April 2020 in which he gave the Claimant permission to serve the Claim Form and other associated documents in these proceedings (including an application for an interim injunction) on the Defendant in Zimbabwe by alternative means, namely:

   (a) by courier to the Defendant's place of business in Mutare;

   (b) by email to the Defendant's Judicial Manager; and

   (c) by first class post and email to the Defendant's English solicitors in London, Messrs Baker & McKenzie.

2. The application to set aside this order was filed on 24 April 2020 and was made on two grounds:

   (a) service on the Defendant as ordered was contrary to Zimbabwe law and therefore contravened CPR Part 6.40(4);

   (b) there was no good reason to permit service by alternative means as required by CPR Part 6.15(1).

3. Both sides adduced evidence of Zimbabwean law and by the time the hearing took place it was clear that there was a considerable measure of common ground between them. Moreover, in the light of further evidence adduced by the Claimant, the Defendant accepted that (subject to one caveat) there had in fact been good reason to permit service by alternative means at the date of the *ex parte* application even though the reason in question had not been mentioned or relied upon in the Claimant's supporting evidence. This point therefore fell away, although the Defendant reserved its position on costs in this respect.

Background

4. It is unnecessary for me to go into any detail regarding the underlying facts giving rise to these proceedings. In brief, the Claimant is a German, Swiss and Austrian national resident in Zimbabwe. The Defendant is a Zimbabwean company engaged in commercial forestry. The Claimant and his family were formerly 86.49% shareholders in the Defendant, through which they owned a large estate in Zimbabwe. For simplicity, I will refer in this judgment simply to the Claimant.

5. In September 2005, the estate was expropriated by the Zimbabwean government as part of its Land Reform Programme. In 2010, both the Claimant and the Defendant commenced ICSID arbitrations against the state of Zimbabwe claiming relief in respect of the expropriation. The Claimant could obviously only claim for his 86.49% shareholding whereas the Defendant could claim for 100% of the estate. The purpose of the separate claim by the Defendant was therefore to ensure that recovery was made in respect of the minority interest.

6. On 21 January 2015, the Defendant was provisionally placed into a form of administration in Zimbabwe known as judicial management under ss. 299 and 300 of the Companies Act then in force. This was subsequently extended indefinitely on 2 March 2016. The Defendant's Judicial Manager is a Mr Peter Bailey.

7. Meanwhile, the ICSID arbitrations were continuing and, on 28 July 2015, awards were made granting both claimants materially identical relief, namely compensation of around US$124 million failing restitution of the Defendant's forestry assets by a certain date. Each claimant was also awarded around US$1 million in moral damages. The awards in respect of the estate (but not the moral damages) were overlapping and provided that discharge by the Government of Zimbabwe of its liability in respect of the estate to one claimant would discharge its liability *pro tanto* to the other, thereby avoiding double recovery.

8. On 23 October 2015, the Government of Zimbabwe applied to have the awards annulled. By this time, the Claimant and his family had substantially disposed of their interests in the Defendant to a third party. The Defendant, while wishing to contest the annulment application, was either unwilling or unable to pay the costs of doing so. Accordingly, on 22 July 2016, Mr Bailey concluded an agreement on its behalf with the Claimant whereby (in essence) the Claimant undertook to manage the annulment proceedings on behalf of the Defendant and to pay its costs, while the Defendant undertook not to settle or enforce the award in its favour without the prior written consent of the Claimant. The Claimant's witness statement asserts that one of the purposes of this latter provision was to ensure that the Defendant did not succumb to pressure from the Zimbabwean government to enter into a sham settlement which would have the effect of preventing the Claimant from recovering his proper share of the compensation payable.

9. From early 2019 onwards, the Claimant became increasingly concerned that the Defendant, with the encouragement of its new shareholders, was seeking to negotiate a settlement with the Zimbabwean government without his permission in breach of the July 2016 agreement. The present proceedings were accordingly issued seeking a final injunction restraining the Defendant from settling its award without the Claimant's consent. At the same time, an on notice application for an interim injunction was issued, as well as a without notice application for permission to serve by alternative means.

10. Although I am not concerned with the merits of the underlying dispute, I record the Defendant's position that it is not bound by the July 2016 agreement and that any restraint on enforcement should in any event apply mutually. I should also note that there are parallel proceedings on foot brought by the Defendant's current majority shareholder against the Claimant for a similar injunction restraining him from enforcing his award in so far as it relates to the Defendant. The court has ordered that both sets of proceedings are to be managed together, and although the latter action has no direct bearing on this application, its outcome undoubtedly will.

Judicial Management and Corporate Rescue

11. In order to understand the issues which arise in this application, it is necessary to say something at this point about the provisions of Zimbabwe law dealing with the

administration of companies in financial difficulty, since these lie at the heart of this application.

12. Part V of the Companies Act [Chapter 24:03] (the "Old Companies Act") provided for a process of judicial management whereby a company which was unable to pay its debts could avoid winding up. Section 300 authorised the court to make an order for judicial management if there was a reasonable probability that such a process would enable the company to pay its debts and become a successful concern. Section 301 provided that an order for judicial management could contain directions that: *"while the company is under judicial management, all actions and proceedings and the execution of all writs, summonses and other processes against the company be stayed and be not proceeded with without the leave of the court."*

13. It was under these provisions that the orders of 21 January 2015 and 2 March 2016 were made in respect of the Defendant. Both orders included a direction in the terms contemplated by section 301 (allowing for immaterial typographical errors). It is common ground between the experts that a direction in this form had the effect of staying *existing* proceedings against the Defendant but did not apply to proceedings commenced after the date of the order.

14. On 25 June 2018, a new Insolvency Act [Chapter 6:07] (the "New Insolvency Act") was brought into force. Part XXIII of the New Insolvency Act created a regime of temporary "corporate rescue" for the rehabilitation of financially distressed companies (defined as companies which were reasonably likely within the next six months either to be unable to pay all of their debts or to become insolvent) under the oversight of an appropriately qualified corporate rescue practitioner. Sections 122 and 124 provided for corporate rescue proceedings to be commenced either voluntarily by company resolution or by application to court. Corporate rescue was envisaged as a temporary measure and, if the proceedings had not ended within three months, section 125 required the practitioner to provide monthly updating reports.

15. Importantly, for the purposes of this application, section 126 provided as follows:

"(1) During corporate rescue proceedings, no legal proceedings, including enforcement action, against the company … may be ***commenced*** *or proceeded with in any forum, except –*

(a) with the written consent of the practitioner; or

(b) with the leave of the Court and in accordance with any terms the Court considers suitable; …" (Emphasis added.)

16. It appears that the original intention of the legislature had been to enact a new Companies Act at the same time as the New Insolvency Act and to repeal the Old Companies Act and assimilate the existing judicial management regime with the new corporate rescue regime. To that end, clause 197 of the draft Insolvency Bill contained a provision expressly repealing Part V of the Old Companies Act and providing that anything done under any repealed provision of law which could be done under a corresponding provision of the New Insolvency Act would be deemed to have been done under the latter. In the event, however, for whatever reason (although it seems likely that Mr Chinhengo is correct in surmising that it was because the new

Companies Act was not ready), the part of the clause repealing Part V of the Old Companies Act was withdrawn from the New Insolvency Act as enacted. In the event, the Old Companies Act was only repealed when the Companies and Other Business Entities Act [Chapter 24:31] (the "New Companies Act") was brought into force on 13 February 2020.

17. It is common ground that the consequences of this legislative history are somewhat less than satisfactory. Thus, the experts are agreed that:

    (a) The Old Companies Act was not repealed on the enactment of the New Insolvency Act, whether expressly or impliedly. Accordingly, the old judicial management regime continued to co-exist with the new corporate rescue regime for about twenty months until the Old Companies Act was finally repealed.

    (b) The New Insolvency Act did not remove the power of the court to continue to make judicial management orders under the Old Companies Act while it was still in existence. Neither did it affect existing judicial management orders, which also thus remained in full force and effect.

    (c) Existing judicial management orders continued to remain in full force and effect even after the repeal of the Old Companies Act.

    (d) Neither the New Insolvency Act nor the New Companies Act specifically addressed existing judicial management orders, whether by way of transitional or other saving provisions. There was therefore no express provision that existing judicial management orders should be transformed into or replaced by corporate rescue orders, or that the corporate rescue regime should otherwise apply to companies already in judicial management.

    (e) The Defendant has never taken any of the steps required under the New Insolvency Act to enter corporate rescue proceedings.

18. Where the parties differ is in regard to the position now that the Old Companies Act has been repealed and, specifically, whether section 126 and its moratorium on commencing and continuing with proceedings now applies to the Defendant or not.

The issues on this application

19. It is common ground that the July 2016 agreement contained an exclusive English jurisdiction clause within Art 25 of the Judgments Regulation and that permission to serve out of the jurisdiction was accordingly not required.

20. In relation to methods of service, CPR Part 6.40(3) and (4) provide as follows:

    "(3) Where a party wishes to serve a claim form or other document on a party out of the United Kingdom, it may be served –

        (a) by any method provided for by -

            (i) rule 6.41 (service in accordance with the Service Regulation);

(ii) rule 6.42 (service through foreign governments, judicial authorities and British Consular authorities);

(iii) rule 6.44 (service of claim form or other document on a State);

(b) by any method permitted by a Civil Procedure Convention or Treaty; or

(c) by any other method permitted by the law of the country in which it is to be served.

(4) Nothing in paragraph (3) or in any court order authorises or requires any person to do anything which is contrary to the law of the country where the claim form or other document is to be served."

21. CPR Part 6.15(1) further provides that:

"Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place."

22. As indicated at the outset, subject to one point which arose out of the Claimant's submissions, the Defendant no longer seeks to support the application on the basis that there was no good reason to order service by an alternative method. I therefore say nothing further about this aspect of its original case. In the light of the agreed expert evidence its case is now confined to two points which remain in contention between the experts:

(a) whether section 126 of the New Insolvency Act applies to the Defendant on the basis that companies which were placed into judicial management under the Old Companies Act automatically became subject to the corporate rescue regime when the Old Companies Act was repealed;

(b) if so, whether section 126 prohibits service of foreign process on the Defendant in Zimbabwe.

23. However, Mr Goodall's submissions gave rise to two further issues, which he suggested were preliminary points. The first was that the Defendant's application was aimed at the wrong target, since Part 6.40(4) is concerned only with the legality of the *method* of service to be adopted and not with the anterior question of whether it is legal to serve the claim at all. The second was that, in any event, Part 6.40(4) was only concerned with the legality of acts carried out in a foreign state. Accordingly, it did not and could not bite on the third method of service authorised by HHJ Pelling QC, namely service by post and email on Baker & McKenzie in London.

24. I can dispose of the first of these points shortly. It is true that Part 6.40(4) is part of a rule which is headed *"Methods of service – general provisions"* and that Part 6.40(1) expressly states that the rule contains general provisions about the method of service out of the jurisdiction. Nonetheless, it would be a bold conclusion for a court to reach that although service of a claim on the defendant was altogether prohibited under foreign law, nonetheless Part 6.40(4) did not apply because it could be served by a method which was not inherently unlawful in itself, and I decline to do so. In this respect, it seems to me that there is a direct analogy with *The Sky One* [1988] 1

Lloyd's Rep. 238, where the court was concerned with an application to set aside service under the old RSC, which contained a provision in materially identical terms to Part 6.40(4). The question was whether service of a writ by private means in Switzerland was contrary to Swiss law because it was an act carried out on behalf of a foreign state which under Swiss law could only be effected through the competent authorities. In that case, as in this, the position was not that the claim could not be served at all; it was simply that service on behalf of a foreign state had to be effected in a particular manner. In particular, there was no suggestion that service by private means was inherently unlawful in itself. Staughton J considered expert evidence on Swiss law from both parties' respective experts and concluded that service by private means did indeed involve a breach of Swiss law, notwithstanding that the method used was not said to have been inherently unlawful. Leave to appeal from his decision was refused by Lord Justice Kerr who clearly saw no error in his judgment as he expressed a great desire to see it published. The situation seems to me to be precisely analogous to the present where s.126 (if it applies at all) does not prohibit service altogether, but merely requires prior consent to have been obtained.

25. I will deal with Mr Goodall's second preliminary point after addressing the substantive questions raised by the Defendant, which occupied the bulk of the argument during the hearing.

Burden and standard of proof

26. It is not in dispute that it is for the Claimant to establish that the alternative methods of service for which permission is sought would not contravene Zimbabwe law. There is nonetheless an issue between the parties as to the appropriate standard of proof.

27. The Claimant argues that it need only demonstrate a good arguable case on the basis that issues of Zimbabwean law are treated as questions of fact before an English court and that this is the applicable standard relating to jurisdiction and service in an interlocutory dispute. It relies on a recent decision of Mr John Kimbell QC in *Gulf International Bank BSC v Aldwood* [2020] 1 All ER (Comm) 334 where, on an application to discharge a freezing order, he applied the "good arguable case" test to a question of Saudi Arabian law, noting that *"[i]t is not the role of the court at this interlocutory stage in a claim to balance the finer points of expert foreign law evidence against each other."*

28. However, that was a case where the question of law in issue went to the substance of the dispute and would therefore have to be considered at trial. In those circumstances, the courts have always been wary of attempting to decide a point on incomplete evidence at an interlocutory stage. By contrast, where the question is one which only arises at the jurisdictional stage, different considerations arise. Thus, in *The Sky One (supra),* there can be no doubt that Staughton J reached his decision on a balance of probabilities. This is evident from his express rejection of an argument that an enhanced standard of proof applied under the doctrine in *Hornal v Neuberger* because the application effectively alleged criminal behaviour by the plaintiff's Swiss lawyer. It is fair to say that the plaintiff in *The Sky One* does not appear to have argued for a lower standard of proof and the point was not specifically addressed. Nonetheless, there was no suggestion by this very experienced judge or either of the equally experienced counsel that it was appropriate to apply anything other than a balance of

probabilities. Nor was there any such suggestion in the brief comments of Lord Justice Kerr when refusing leave to appeal.

29. The cases relied upon by the Claimant in support of a "good arguable case" test were, for the most part, concerned with the application of one of the jurisdictional gateways, often, moreover, in circumstances where the issue in question also arose in relation to the substantive claim. They are thus not directly applicable to Part 6.40(4) in any event. Mr Goodall asked rhetorically why the position should be any different in respect of Part 6.40(4). My answer would be that the application of the gateways does not involve any contravention of the law of a friendly foreign nation. Nor, generally, do the merits of the underlying claim. At least, if they do, it will not be a contravention which has anything to do with service of process. It therefore seems to me that the policy considerations underlying Part 6.40(4) are very different to those arising in relation to other jurisdictional questions.

30. Part 6.40(4) is clear and mandatory in its terms: nothing in any court order should authorise or require a person to do anything which is contrary to the law of the country where service is to take place. This necessarily requires the court to decide what foreign law says about the matter and, whilst this is technically treated as a question of fact, I can see nothing in either the wording of the rule or the policy underlying it to suggest that the standard of proof should be anything less than a balance of probabilities. On the contrary, in my judgment – and particularly bearing in mind that an issue as to whether a particular method of service is contrary to foreign law will arise, and only arise, at the jurisdictional stage of proceedings – considerations of policy and comity require the court to satisfy itself that it is not ordering anything to be done which would be unlawful under the foreign law. Being arguably satisfied is not, in my view, sufficient. I accordingly hold that the Claimant must establish on a balance of probabilities by reference to the evidence before the court that the methods of service in play here were not contrary to Zimbabwe law.

The Experts

31. Both parties served expert reports on Zimbabwean law. The Defendant's expert, Mr Moses Chinhengo, was admitted to the Bar as a legal practitioner of Zimbabwe in 1985. He is a former Judge of the High Court of Zimbabwe, where he served for eight years from 1996 to 2004, and also a former judge of the High Court of Botswana where he served for a further eight years from 2004 to 2012. Since 2015 he has been serving as Acting Justice of the Court of Appeal of the Kingdom of Lesotho. Together with others, he drafted a proposed new constitution for Zimbabwe in 2000 as well as the 2012 new Constitution. He also lectures on procedural law – formerly at the University of Zimbabwe and currently at the Herbert Chitepo Law School of the Great Zimbabwe University – and is a Commissioner for Zimbabwe on the International Commission of Jurists.

32. The Claimant's expert, Mr Adrian de Bourbon, is a dual qualified English and Zimbabwean barrister. He has practised in Rhodesia, as it was then, and subsequently Zimbabwe since 1970, working initially as a public prosecutor and subsequently (since 1974) as an independent referral advocate. He was appointed Senior Counsel in 1984 and was Chairman of the Bar Council of Zimbabwe from 1985 to 1990 and again from 2000 to 2003. He was retained as an expert witness on behalf of both the Claimant and the Defendant in the ICSID arbitrations.

33. There is therefore no doubt that both experts are extremely eminent in the legal field and supremely well-qualified to give evidence on the issues of Zimbabwean law which arise in this case. Unsurprisingly, there was a large measure of agreement between them, much of which has been set out in paragraph 17 above. On the basis of their evidence, I therefore turn to consider the issues.

Issue (1): application of section 126

34. On behalf of the Defendant, Mr Robert Anderson QC, who appeared with Mr Dominic Howells, drew my attention to the detailed provisions of the Old Companies Act and, in particular, to the various powers available to the court as regards judicial management: for example, the power to vary both provisional and final judicial management orders upon application (sections 301(2) and 305(3)) and the right of a judicial manager to apply for a winding-up (section 306(m)). He also referred to section 313 under which certain provisions applying in insolvency would automatically apply to companies in judicial management, including provisions empowering the court to order inspection of the company's books, to summon persons suspected of holding company property for examination, to order the public examination of directors, to disqualify a liquidator/judicial manager from holding office and to appoint a co-liquidator/judicial manager. Section 313 also provided for other insolvency provisions to apply upon order of the court, including those conferring powers to order directors to attend a creditors' meeting, to grant a judicial manager leave of absence and to appoint commissioners to hold an inquiry. Section 314 provided that the court could cancel a final judicial management order upon application.

35. The evidence of Mr Chinhengo was that these various powers were derived, and derived only, from statute and, moreover, could only be exercised upon application under the statute. They were not powers that the court could exercise under its own inherent jurisdiction. Nor was it possible for ongoing judicial management to be conducted simply on the basis of the judicial management order, since the order itself was premised on the availability of the powers available under the Old Companies Act. Accordingly, once the Old Companies Act was repealed, the statutory underpinning for the judicial management regime disappeared such that these powers were no longer available. In the absence of any saving provisions bringing companies in judicial management into the corporate rescue regime, these companies were left dangling in a legal black hole.

36. In these circumstances, his opinion was that:

    (a) The Insolvency Bill and its Explanatory Memorandum are admissible as aids to the interpretation of the New Insolvency Act.

    (b) Although judicial management and corporate rescue were different regimes, they had broadly similar aims of helping struggling companies to re-establish themselves.

    (c) Rather than permitting a legal lacuna, a Zimbabwean court would therefore regard the legislature as having clearly intended, in accordance with the Bill, to bring companies already in judicial management into the new regime, thereby effectively achieving what clause 197(3) of the Insolvency Bill

originally contemplated. This would also be consistent with the fact that the New Companies Act did not create any new judicial management regime.

37. Basing himself on this evidence, Mr Anderson urged me to look at the wider context of judicial management. He submitted that since it was common ground that existing judicial management orders remained in force, there had to be some legal framework within which the management could be conducted. It could not be right that the powers which were necessary for effective judicial management simply disappeared without anything to replace them. Clause 197 of the draft Bill clearly showed that the legislature regarded judicial management and corporate rescue as being sufficiently inter-operable for the new regime to take over without more. In any event, following the repeal of the Old Companies Act, there was no other legal framework available.

38. By contrast, Mr Patrick Goodall QC, who appeared with Mr Craig Ulyatt for the Claimant, argued that section 126 in terms only applied to corporate rescue proceedings and that since it was common ground that the Defendant had never entered corporate rescue proceedings, the section could have no application.

39. He further argued on the basis of Mr de Bourbon's evidence that there was in fact no lacuna because the court had available to it all the powers that it needed within the four corners of the judicial management order itself. However, where he struggled was in articulating quite what powers the court did have available to it under that order. Even on the most generous reading, it only incorporated the provisions of section 306 which dealt with the duties of a judicial manager. It was therefore wholly unclear to me what other powers the court could exercise as part of its supervisory jurisdiction if it needed to intervene, apart perhaps from an inherent power to revoke the order altogether. For example, it was not obvious that the court would have an inherent power to order inspection of books and records or public examination of directors.

40. Although this was not quite the way that Mr Chinhengo expressed himself, it seemed to me that the gist of his evidence was that a Zimbabwean court would construe the New Insolvency Act as impliedly deeming acts done under the Old Companies Act to have been done under the corporate rescue provisions of the New Insolvency Act in accordance with the original intention of clause 197(3) of the draft Bill. As such, this was not a question of the courts legislating to fill a statutory gap: both experts agreed that this was impermissible. Rather, it was a question of statutory interpretation, in which context Mr Anderson urged me to bear in mind that the standard of draftsmanship in Zimbabwe was perhaps not as rigorous as in the United Kingdom.

41. Mr Goodall suggested that there were eight reasons why this argument was misconceived, although in truth most of them were really different ways of making the same point.

42. First, he argued that Mr Chinhengo failed to identify any legal mechanism by which a pre-existing judicial management order made under the Old Companies Act could be transformed into an order under the New Insolvency Act. Even if the Insolvency Bill had been enacted as originally envisaged, he submitted, it would still have been necessary to identify (i) an act carried out under the Old Companies Act and (ii) a corresponding provision of the corporate rescue regime under which it was deemed to have been done. In this case, the relevant act was the making of a judicial

management order and, by definition, there was no corresponding provision under the New Insolvency Act for making a judicial management order.

43. There are two responses to this argument. First, it all depends how broadly or narrowly the words *"anything done"* are to be construed. This became known as the "salami slicing" argument. On the one hand, the relevant act can be defined so narrowly that it is never possible to find a corresponding provision under the new regime, in which case the provision would be completely otiose. By contrast, if the salami is sliced more generously, so that the relevant act is that of putting of the company into a process of court-controlled recovery, then there would not be a problem.

44. In any event, Mr Goodall accepted that an express deeming provision would have provided a sufficient legal mechanism. If so, then an implied deeming provision must equally be sufficient – provided always, of course, that such an implication can properly be made as a matter of statutory interpretation.

45. Secondly, Mr Goodall argued that Mr Chinhengo's analysis was inconsistent with the agreement of the experts that the existing judicial management order had not been terminated or replaced by the repeal of the Old Companies Act. However, it is not inconsistent with the order nonetheless being deemed to have been made under the new regime.

46. The same answer can be given to Mr Goodall's third, fourth, fifth and seventh points, namely that judicial management and corporate rescue are different regimes with different characteristics and features, and that this is recognised not only by the New Insolvency Act and the New Companies Act (which expressly refer to both judicial management and corporate rescue, thereby drawing a distinction between them), but also by the Defendant itself which continues to refer to itself as being in judicial management. It is undoubtedly true that the two regimes are distinct but deeming a judicial management order to have been made under the corporate rescue provisions does not involve any conflation of the two schemes, or the transmutation of one into the other. Nor does it make it inappropriate to continue describing the Defendant as being in judicial management. They remain distinct regimes and the purpose of the deeming provision is simply to make available to the court in judicial management all the powers that would be at its disposal in corporate rescue proceedings. If anything, I regard the express references to both judicial management and corporate rescue in the New Insolvency Act as being consistent with a recognition that the two schemes, albeit distinct, were nevertheless to be treated in the same way under the new regime.

47. Mr Goodall's eighth point relied upon the decision of the Supreme Court of Zimbabwe in *Zambezi Gas Zimbabwe (Private) Limited v N.R. Barber (Private) Limited* S.C. 3/20. This was a case decided after the enactment of the New Insolvency Act and very shortly before the enactment of the New Companies Act and the repeal of the Old Companies Act. The main point at issue is irrelevant to the current application, but the court had to consider as a preliminary issue the effect of a judicial management order made under the Old Companies Act which provided for a moratorium in almost identical terms to the present. The court confirmed that the moratorium did not apply to the commencement of proceedings after the date of the order. There was no discussion of what the position would be after the Old Companies Act was repealed and whether the provisions of the New Insolvency Act

would thenceforth govern companies already in judicial management. Mr de Bourbon relied upon the absence of any such suggestion as a powerful indication that this was not in fact the position. He said that it was inconceivable that the point would have been overlooked by the Supreme Court.

48. I am not sure that I necessarily agree with this analysis of the decision. Given that the decision in *Zambezi Gas* was made while both regimes were still in force, it was unnecessary for the court to consider whether or, if so, to what extent the corporate rescue regime could be applied to companies already in judicial management after the imminent repeal of the Old Companies Act, particularly since the Court clearly regarded the issue as turning only on the wording of the actual order before it and so did not need to consider the statutory basis on which the order was made. In these circumstances, it is hardly surprising that the Supreme Court did not advert to this possibility, which in any event only arose in the context of a preliminary point which it felt *"need not detain the Court"*.

49. However, Mr Goodall was on much stronger ground with his sixth point. As Mr de Bourbon pointed out, a significant problem with the Defendant's case was its fundamental inconsistency with the acceptance by both experts that the judicial management and corporate rescue regimes continued in parallel after the enactment of the New Insolvency Act. If the New Insolvency Act did not have the effect of assimilating judicial management into the corporate rescue regime when it was first enacted, why should it suddenly have that effect two years later? There is considerable force in this. It is one thing to impute an intention to the legislature that a statute should have a particular effect when it is brought into force. It rather less plausible to impute an intention that that effect should *not* be felt immediately but should be contingent upon the repeal of some other statute at some unspecified date in the future.

50. This is not an easy point. It is unfortunate that it has not yet been raised squarely before the Zimbabwean courts but I remind myself that my task is to ascertain what Zimbabwean law is on the basis of the expert evidence before me and not to substitute my own view of what it ought to be. It is not disputed that the current position is unsatisfactory and I have considerable sympathy with Mr Chinhengo's opinion that, looking at the matter through the spectacles of a Zimbabwean judge, the court might be tempted to discern a parliamentary intention to apply the corporate rescue regime to companies already in judicial management.

51. Indeed, Mr Anderson submitted that any other conclusion would result in an absurdity so glaring that it cannot have been intended by parliament. However, I am doubtful whether the absurdity is in fact quite so glaring as he suggests, since it was always open to the Defendant (or any other company in judicial management) to apply to put itself into corporate rescue proceedings had it so chosen.

52. Ultimately, my conclusion from the evidence on a balance of probabilities is that it is not possible to ascribe to the Zimbabwean legislature an intention that the New Insolvency Act should apply to companies already in judicial management, not from the date when it was first enacted but only in the event that the Old Companies Act was repealed without any transitional or saving provisions on some unspecified date in the future. To my mind, this would involve going far beyond any legitimate process of statutory interpretation into impermissibly legislating to fill a perceived

lacuna. It is unfortunate that the New Companies Act failed to make provision for companies already in judicial management but that is a deficiency which (to the extent that there is a resulting lacuna) can only be cured by the legislature, not by the courts. Mr de Bourbon said that if the New Insolvency Act did not have the effect of assimilating judicial management into corporate rescue when it was first enacted, it would require specific future legislation to do so. I agree.

Issue (2): extraterritoriality

53. Given my conclusion on Issue (1), the remaining issues become moot. However, they were argued fully and out of courtesy to the experts and counsel, if nothing else, it is appropriate for me to express my views on them.

54. I have set out the wording of section 126 above. Mr Chinhengo and Mr de Bourbon were agreed that it does not have extraterritorial effect but only protects Zimbabwean companies against proceedings being commenced or proceeded with against them in Zimbabwe. They were further agreed that the principle of extraterritoriality means that laws are construed as only extending to acts committed in Zimbabwe unless the contrary is either expressly stated or a necessary implication.

55. On that basis, it was common ground that section 126 could not in any event prohibit the commencement of proceedings in England. Where the experts differed was in relation to the meaning of the words *"legal proceeding"* and *"any forum"*; did this refer to any proceedings worldwide, or only to domestic Zimbabwean proceedings? The answer to this in turn impacts on the proper construction of the words *"commenced or proceeded with"*.

56. The Defendant's position was that the words *"legal proceeding"* and *"any forum"* should be given their natural and ordinary meaning and thus referred to any proceedings in any forum anywhere in the world. The *prima facie* exorbitant effect of the provision was tempered by the principle of extraterritoriality which meant that it would in practice only bite on acts actually committed in Zimbabwe. Mr de Bourbon, by contrast, said that the principle of extraterritoriality operated so as to limit the scope of the section as a matter of construction to domestic proceedings only. On that basis, section 126 had nothing at all to say about foreign proceedings, which simply fell outside its purview.

57. If Mr Chinhengo is right, an apparent problem arises immediately because it is difficult to see how foreign proceedings could ever be *"commenced"* in Zimbabwe. Mr Chinhengo's answer to this was that service is to be viewed as part and parcel of commencement. In any event, service of proceedings which had been issued abroad undoubtedly amounted to *"proceeding with"* an action. He said that there was no illogicality in prohibiting the service but not the issue of foreign process because the touchstone of the principle of extraterritoriality was whether an act was committed within or without the jurisdiction. It was therefore not unprincipled to invoke the section to restrain service in Zimbabwe, even if the commencement of proceedings in England could not be prevented.

58. While I understand the approach of Mr Chinhengo on this issue, I prefer the evidence of Mr de Bourbon that commencement of proceedings refers only to the issue of process. Service is merely a step in those proceedings whereby an action which has

already been commenced is notified to the defendant. Since foreign proceedings can never, by definition, be commenced in Zimbabwe, that naturally suggests that the reference to *"legal proceedings"* and *"any forum"* is only to domestic proceedings in a domestic forum. Mr Chinhengo's suggested answer that service is an aspect of commencement in the context of foreign proceedings (but not, apparently, in domestic proceedings where he accepted that they were distinct concepts) seems to me to be artificially strained. As Mr Goodall said, the effect would be to give section 126 extraterritorial effect by the back door and I can certainly see no necessary implication that the Zimbabwean legislature was purporting to regulate the commencement and conduct of foreign proceedings.

59. In support of his argument that the principle of extraterritoriality was only concerned with acts committed outside the jurisdiction, Mr Anderson relied on the decision of *S v A* 1979 (4) SA 51 (R) appended to Mr de Bourbon's report. However, this was a decision on very different facts and I do not read it as being in any way inconsistent with a construction that limits the scope of section 126 to domestic proceedings.

60. In relation to Mr Chinhengo's alternative argument that on any view service amounted to *"proceeding"* with the action, I have some doubt as to whether service can properly be said to amount to proceeding with the action *in a Zimbabwean forum* so as to escape the shackles of extraterritoriality. Service may well amount to *"proceeding"* but an English action proceeds only in an English forum. There is no relevant Zimbabwean forum in which it could possibly be said to proceed.

61. For all these reasons, I am satisfied on a balance of probabilities that section 126 is a procedural matter which only affects the jurisdiction of the Zimbabwean courts and thus has no application to English proceedings.

62. Mr Anderson argued that such a construction would enable the moratorium to be completely bypassed in the case of foreign proceedings. He submitted that the policy of section 126 was clearly to protect companies in corporate rescue proceedings and that the courts would therefore interpret it to give the maximum protection possible without attributing to it any exorbitant extraterritorial reach. However, I fail to see why limiting the application of the section to domestic proceedings would be either unreasonable or unorthodox. Mr de Bourbon referred to a line of South African authority holding that bankruptcy and insolvency legislation only had force in the state of enactment and that similar statutory moratoria contained in UK and US legislation were not effective to bar claims brought in South Africa. Mr Goodall also pointed out that the position under English law is exactly the same and referred to *Bloom v Harms Offshore AHT (Taurus) GmbH & Co KG* [2009] EWCA Civ. 632; [2010] Ch. 187 at [16], where Stanley Burnton LJ noted that:

"It has long been established that the statutory prohibition against creditors bringing proceedings against a company being wound up by the court is not extraterritorial, ie, it does not extend to proceedings brought in foreign courts."

Mr Goodall submitted that any remedy lay in cross-border insolvency regulation and that, in truth, the lacuna identified by Mr Anderson only arose because the Defendant was attempting to dress up an insolvency argument as a point on service. There is some force in that.

63. The Defendant's suggested construction of section 126 would also have implications for limitation. Section 126(3) expressly suspends the running of time during any moratorium, but clearly only refers to the running of time under Zimbabwean law. It was not suggested that the section could have any effect on foreign limitation periods. Accordingly, on Mr Anderson's case, a creditor would be at risk of becoming time-barred through no fault of his own.

64. Had it been necessary to do so, therefore, I would have held that even if section 126 did apply to the Defendant, it did not in any event prohibit either the commencement or service of English proceedings.

Issue (3): the "Baker & McKenzie" point

65. Mr Goodall submitted that Part 6.40(4) only applies to acts which are to be carried out in a foreign state and that since, even on the Defendant's case, section 126 did not apply to acts carried out in England, there could be no conceivable objection to the third method of service authorised by HHJ Pelling QC, namely by post and email on the Defendant's solicitors in London.

66. This was a powerful point, to which Mr Anderson raised a procedural objection on the basis that it emerged for the first time only in Mr Goodall's skeleton argument. However, I accept that it is a pure point of law which it was neither appropriate nor necessary to address in evidence. As to the substance of the point, Mr Anderson's answer was that where alternative service in England was sought solely because a claimant could not lawfully serve elsewhere, the court should refuse, either because there was no "good reason" to authorise alternative service, or as a matter of discretion. He pointed out with some force that the Claimant knew that the Defendant was in judicial management when the July 2016 agreement was concluded. He could have incorporated an express service of suit clause or obtained a waiver of the protection offered by section 126 but did not do either. His current predicament was therefore entirely of his own making.

67. I can well see that these are all factors which the court might want to take into account as part of its assessment of the overall circumstances of the case: see *Abela v Baadarani* [2013] UKSC 44; [2013] 1 WLR 2043 at [33], [35]. However, even if I had accepted the Defendant's case on section 126 and concluded that the order authorising the first and second methods of alternative service should be set aside, I would not have set aside the third method on this ground alone. I bear in mind that the Claimant has an arguable claim under a contract which contains an exclusive English law and jurisdiction clause. He did not require permission to bring this claim in England and there is no other forum available to him in which to vindicate his rights. I therefore see no reason why he should not be permitted to do so by any lawful means available to him, including by serving in London or elsewhere outside Zimbabwe. This certainly seems to have been the view of Blair J in *BNP Paribas v OJSC Russian Machines* [2011] EWHC 308 (Comm); [2012] 1 Lloyd's Rep. 61 as [121], where he commented that he did *"not think that questions of the legality of service under foreign law arise if the court exercises power to order service on a foreign defendant in England."*

68. In my view, the illegality which would have arisen under Zimbabwean law on this hypothesis was not so overwhelming as to require an English court to say that service

simply should not be permitted at all, particularly when any objections on grounds of Zimbabwean public policy could no doubt be taken as and when any judgment came to be enforced. The Defendant's application therefore fails for this reason as well.

Conclusion

69. For all the reasons given above, the application is dismissed.