

SUPREME COURT OF SEYCHELLES

Reportable
[2020] SCSC 878
CS 121/2019

In the matter between:

EASTERN EUROPEAN ENGINEERING LIMITED
(rep. by Alexandra Madeleine)

Plaintiff

and

VIJAY CONSTRUCTION (PROPRIETARY) LIMITED
(rep. by Bernard Georges)

Defendant

Neutral Citation: *Eastern European Engineering Ltd v Vijay Construction (Pty) Ltd* (CS 121/2019) [2021] SCSC 878 (3 December 2021).

Before: E. Carolus J

Summary: Registration of Order of the High Court of England and Wales - section 3(1) of the Reciprocal Enforcement of British Judgments Act

Delivered: 3 December 2021

JUDGMENT

CAROLUS J

Background

[1] The plaintiff, Eastern European Engineering Limited (“EEEL”) and the defendant Vijay Construction (Proprietary) Limited (“Vijay”) are companies incorporated and registered under the laws of Seychelles, the defendant company being involved in the business of civil engineering and construction in Seychelles.

[2] In terms of the plaint EEEL seeks the registration of an Order of the High Court of England and Wales pursuant to section 3(1) of the Reciprocal Enforcement of British Judgments Act (“REBJA”). The Order is dated 10th April 2019 and made by Deputy

Master Kay QC. EEEL is cited as the Claimant/Applicant and Vijay as the Defendant/Respondent in the said Order. The Order reads in relevant part as follows:

BEFORE Mr. Registrar Kay QC sitting as Deputy Master of the Queen's Bench Division at the Royal Court of Justice, 7 Rolls Building, Fetter Lane, London EC4A 1NL on 10th April 2019.

UPON the Claimant's application for a Charging Order dated 26th February 2019.

AND UPON the interim Charging Order of Master McCloud dated 27th February 2019.

AND UPON CONSIDERING the Claimant's evidence.

AND UPON the Defendant Filing and serving evidence on 3rd April 2019 less than 7 days before the hearing.

AND UPON CONSIDERING the Claimant's application for an Unless Order dated 4th April 2019.

AND UPON READING the Defendant's solicitors' letter to the Court dated 8th April 2019 indicating that the Defendant withdrew its opposition to the making of a Final Charging Order.

AND UPON hearing Counsel for the Claimant (Mr. Connell) and the Defendant not appearing and relying upon its solicitors' correspondence to the Court and its letter to the Claimant's solicitors dated 9th April 2019.

IT IS ORDERED THAT:-

Final Charging Order

1. Paragraph 1 of the Order of Master McCloud dated 27th February 2019 is made final in respect of the securities detailed in the schedule to that Order. Accordingly, as at 10th April 2019 the securities detailed in the schedule to the Order dated 27th February 2019 stand charged with payment of £17,861,018.03 together with any further interest becoming due and the costs of the Claimant's applications dated 27th February 2019 and 4th April 2019.

Stop Notice

2. Pursuant to r.73.10(8), the attached Stop Notice shall apply in relation to the securities.

Unless Order

3. Unless the Defendant pays the interim payment of costs required by Order of the Honourable Mrs. Justice Cockerill dated 11th October 2018 by 4.00pm on 24th April 2019, the Defendant is debarred from applying to set aside this Final Charging Order or the Interim Charging Order dated 27th February 2019 and/or contesting the enforcement of the Final Charging Order.
4. Any action to enforce this Final Charging Order is stayed until after 4.00pm on 24th April 2019.

Costs

5. *The Defendant is to pay the Claimant's incurred costs of the applications dated 26th February 2019 and 4th April 2019 on the indemnity basis. Those costs to be subject to detailed assessment if not agreed.*
6. *The Defendant is to make an interim payment to the Claimant on account of costs in the sum of £20,000 to be paid by 4.00pm on 24th April 2019.*

Service of the Order

7. *Once sealed and approved, the Claimant do serve this Order on all relevant persons as follows:*
 - I. *The Claimant is serve Q Glazing at its registered office in England and Wales in accordance with CPR Part 6.*
 - II. *The Claimant is to have permission to serve this Order and all other documents required to be served in relation to the enforcement of this Order on the Defendant outside the jurisdiction by the following alternative means and places:*
 - (a) *by email at v.j.patel@vijay.sc; and*
 - (b) *by first class post at the offices of the Defendant's solicitors, Scarmans Ltd, at 10 Lower Thames St, London EC3R 6AF.*
 - III. *The Claimant do have permission to serve this Order and all other documents required to be served in relation to the enforcement of this Order on Mrs. Varsani by the following alternative means and places:*
 - (a) *by first class post to Marycot, Ashford Road, Bearstead, Maidstone, Kent ME14 4NL;*
 - (b) *by first class post to Lake Road, Quarry Wood Industrial Estate, Aylesford Maidstone, Kent, ME20 7TQ; and*
 - (c) *by delivering to or leaving at La Misere, Mahe Seychelles.*

[3] A proper determination of the issues arising in this matter requires an understanding of the circumstances giving rise to the Order of 10th April 2019 which is sought to be registered and rendered executory in Seychelles in the current proceedings. This requires placing the current proceedings in context of previous related proceedings before the Seychelles and other Courts. The Order arises as a result of proceedings before the British Courts to make executory in Great Britain an arbitral award made in France in favour of EEEL against Vijay ("the Arbitral Award"). I take judicial notice of:

- (a) The Arbitral Award delivered by an arbitral tribunal in Paris France on 14th November 2014, pursuant to referral to the said tribunal by EEEL and Vijay of

- disputes arising from agreements between them. The award was the subject matter of proceedings before the French *Cour d'Appel de Paris* and *Cour de Cassation* initiated by Vijay, which resulted in the Arbitral Award being confirmed.
- (b) Proceedings filed by EEL in **CC33/2015** before the Supreme Court for recognition and enforcement of the Arbitral Award in Seychelles, in which it was held that although the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 was not applicable in Seychelles, the Arbitral Award was enforceable in Seychelles under section 4 of the Courts Act. Vide *Eastern European Engineering Ltd v Vijay Construction (Proprietary) Ltd* (CC33/2015) [2017] SCSC (18 April 2017).
- (c) Appeal proceedings in **SCA 15 & 18/2017** pursuant to which the judgment of the Supreme Court in **CC33/2015** was overturned on the grounds that the New York Convention was not applicable in Seychelles as Seychelles was not a party to it, and that in consequence the Arbitral Award obtained by the plaintiff in France was not enforceable in Seychelles. The Court found that the trial judge erred in finding that section 4 of the Courts Act applied in Seychelles to enable the powers, authorities and jurisdiction of the High Court in England to be exercised by the Supreme Court of Seychelles in addition to (but not in the absence of) the jurisdiction of the Supreme Court. Vide *Vijay Construction (Proprietary) Ltd v Eastern European Engineering Ltd* (Civil Appeal SCA 15 & 18/2017) [2017] SCCA41 (13 December 2017).
- (d) Proceedings before the High Court of England and Wales to render the Arbitral Award executory in Great Britain which resulted in an Order dated 18th August 2015 by Mr. Justice Cooke (Cooke Order) permitting the enforcement of the award in the UK, and an Order dated 11th October 2018 by Mrs. Justice Cockerill (Cockerill Order) dismissing Vijay's application to set aside the Cooke Order and in effect confirming the Cooke Order.
- (e) Proceedings before this Court in **CS23/2019** in which the Cooke and Cockerill Orders were, on the application of EEEL, ordered to be registered in terms of section 3(1) of the REBJA thereby rendering them executory in Seychelles. Vide *Eastern European*

Engineering Ltd v Vijay Construction (Proprietary) Ltd (CC23/2019) [2020] SCSC (30 June 2020).

(f) Appeal proceedings in **SCA 28/2020** in which the Court of Appeal, by a majority judgment, confirmed the judgment of the Supreme Court in *CC23/2019*. Vide *Vijay Construction (Proprietary) Ltd v Eastern European Engineering Ltd* (SCA 28/2020) [2020] SCCA (2 October 2020).

[4] Having set out the background to the Order sought to be registered, I now proceed to consider the pleadings. In its plaint, the plaintiff avers that in terms of the Order the defendant was ordered to pay plaintiff's costs of its applications dated 26th February 2019 and 4th April 2019 before the High Court of England and Wales. It is further averred that the defendant has failed to pay the interim costs payments (or any part of it) as ordered. The defendant in its statement of defence has admitted that it has failed to pay the interim costs payment or any part of it. The interim costs payment referred to above is what the defendant is ordered to pay to the plaintiff "*in the sum of £20,000 to be paid by 4.00pm on 24th April 2019*" in paragraph 6 of the Order. I note that in her submissions Counsel for the plaintiff states that the Interim and Final Charging Orders are "*incidental to the applications for enforcement and setting aside in England*".

[5] EEEL also avers in its plaint, that the High Court of England and Wales had jurisdiction to entertain its applications and those of Vijay; that all Vijay's rights were respected in the proceedings in that Court; that the Order of Deputy Master Kay QC of 10 April 2018 is not contrary to public policy and was not obtained through fraud; that the said Order is not subject to an appeal and the relevant time limits under the English Civil Procedure Rules for mounting any appeal have expired; and that the interim costs payment ordered is capable of being enforced in England and Wales. Vijay, in its statement of defence, denies *pro forma* all these averments.

[6] EEEL further avers that it is desirous of rendering the Order of Deputy Master Kay QC of 10 April 2018 executory in Seychelles and prays for the Court to make orders (i) for the registration of and to render executory the said Costs Order in Seychelles under 3(1) of the Reciprocal Enforcement of British Judgments Act; (ii) for the registration of the said

Costs Order without any impediment; (iii) for the said Costs Order, upon its registration, to be executed forthwith; (iv) that the execution of the said Costs Order cannot be stayed before the date when the defendant's application for stay of execution has been heard and granted by the Court; (v) as the court deems fit in the circumstances of the case; and for costs of the present case.

[7] For its part, Vijay further claims that the Order sought to be registered and made executory in the present case was made pursuant to an application which sought to obtain an order of exequatur of an arbitral award in the United Kingdom in order that this could then be used as a vehicle to enforce the arbitral award in Seychelles; that the Seychelles Court of Appeal has determined that the arbitral award is unenforceable in Seychelles; that the plaintiff seeks to recover costs incurred and awarded in a matter the sole purpose of which is was to obtain an order in Great Britain with the specific intention of enforcing this in Seychelles; that because the Seychelles Court of Appeal has decided that the arbitral award is unenforceable, it would be unconscionable and contrary to public policy if this Court were to enforce an order for costs made in respect of an application seeking to circumvent the decision of the Seychelles Court of Appeal; and that for these reasons this Court should determine that it is neither legally possible nor just and convenient that the said Costs Order be enforced in Seychelles.

[8] Vijay therefore prays for the dismissal of EEEL's application, with costs; for a declaration that the Order is not capable legally of being registered and rendered executory in Seychelles; and alternatively to declare that it is not just and convenient that the Order be enforced in Seychelles.

[9] In its statement of defence Vijay has also raised the following pleas in *limine litis*:

1. *The Order sought to be enforced in Seychelles is not a judgment within the definition of the word in the Reciprocal Enforcement of British Judgments Act.*
2. *Insofar as the award in respect of which the Order came to be made was rendered in a country not covered by the Reciprocal Enforcement of British Judgments Act, the parties having specifically chosen to arbitrate outside those countries, the Order sought to be enforced is not a judgment falling within the definition of the term.*

3. *Given that the parties chose not to seat the arbitration in respect of which the Order was made in Great Britain, the High Court in England and Wales, in hearing the matters filed there by the Plaintiff and in respect of which the Order was made, was sitting as a subsidiary jurisdiction (and one of potentially many jurisdictions) in making the Order, such that the Order has legal applicability only territorially in Great Britain and is unable to be enforced elsewhere.*
4. *Given that the judgment of the Seychelles Court of Appeal deciding that the arbitral award in respect of which the Order was made was not enforceable in Seychelles is not binding or enforceable in Great Britain, a British Judgment to the contrary effect cannot be enforceable in Seychelles under a law the very basis of which is reciprocity.*

[10] The evidence underlying the application being mostly documentary in nature, the parties agreed to proceed by way of written submissions which they have filed together with supporting documents. These have been carefully considered by this Court and will be referred to as appropriate in the analysis below.

Analysis

Threshold Issues

[11] In his submissions, counsel for Vijay raises two threshold issues which I note were not raised in the pleadings. Consequently, they were not addressed by counsel for the plaintiff in her submissions. It is trite that the Court is bound by the pleadings of the parties. In that respect the Court in *Amelie v Mangroo* (2012) SLR 48, explained that:

Pleadings provide the adverse party with the case it has to meet. Once the other party has prepared to meet the case at hand it is not permissible to ambush it with another case altogether of which it has no notice. Secondly, a party's pleadings ought to act as a beacon to that party delineating for that party the case it has to prove in order to succeed. It is therefore simply not permissible for a party to depart from the case set forth in its pleadings and prove another that the other party has had no notice of and or the chance to respond to. It is not permitted so to speak to move the 'goal posts' of the litigation ...

[12] Nevertheless, I am mindful that a Court should not ignore a point of law even if not raised by the parties if to ignore it would mean a failure to act fairly or to err in law. Vide *Banane v Lefevre* (1986) SLR 110 and *Bogley v Seychelles Hotels* (1992) Ayoola 231/15. Furthermore, I am of the view that a consideration of the two points raised by Vijay's

counsel is necessary to define the scope of any eventual order in the present proceedings, in the event that this Court finds in favour of the plaintiff. I therefore proceed to consider these points.

- [13] The first threshold matter raised by Vijay’s counsel is that the Order of Deputy Master Kay QC made on 10th April 2019, which is sought to be registered and rendered executory in the present proceedings relates to a Charging Order against shares in Q Glazing Limited, a UK company, and that the thrust of the Order is that it is to be enforced through the Charging Order against the shares as made clear from paragraphs 1, 2, 7 and 8 of the Order, which are all directed against Q Glazing and Mrs. Foram Varsani.
- [14] An examination of the Order shows that it was made pursuant to two applications by EEEL to the Queen’s Bench Division of the High Court of Justice of England and Wales against Vijay. The first application dated 26th February 2019 was for a Charging Order pursuant to which an Interim Charging Order was made by Master McCloud dated 27th February 2019. The second application dated 4th April 2019 for an Unless Order was to make the Interim Charging Order final which gave rise to the Order of Deputy Master Kay QC dated 10th April 2019 which is now sought be registered. This Order (reproduced at paragraph 2 hereof) essentially contains three main orders: (1) the Final Charging Order at paragraph 1 (to which the Stop Notice at paragraph 2 is subsidiary); (2) the Unless Order at paragraphs 3 and 4; and (3) the Costs Order at paragraphs 5 and 6.
- [15] The Final Charging Order (paragraph 1) makes the Interim Charging Order (made by Master McCloud on 27th February 2019) final. It charges certain specified securities (described in the schedule to the Order dated 27th February 2019) with payment of (1) £17,861,018.03 together with any further interest becoming due and (2) the costs of the Claimant’s applications dated 27th February 2019 (which gave rise to the Interim Charging Order) and 4th April 2019 (pursuant to which the Order of 10th April 2019 was made). It is to be noted that the costs of the Claimant’s applications hereinbefore referred to are those ordered to be paid by the defendant to the plaintiff in terms of paragraphs 5 of the Order. The securities with which the abovementioned sums stand charged are “*100 Ordinary Shares and any preference shares of Q Glazing Ltd*” as per paragraph 2 of the

Order and the copy of the Stop Notice attached to the Order. The purpose of the Final Charging Order is to secure payment of the abovementioned sums with which the securities stand charged. The Stop Notice prevents any money derived from the securities, for example by the transfer of or payment of dividends or interest in respect of, such securities, from being used otherwise than for the purpose of payment of the abovementioned sums with which such securities stand charged, without notice to EEEL. These sums may be recovered pursuant to proceedings for enforcement of the Final Charging Order commenced by the plaintiff before the British Courts against Q Glazing/Mrs. Varsani, once the interests on the above-mentioned sum of £17,861,018.03 and costs of the applications dated 27th February 2019 and 4th April 2019 have been assessed.

[16] As stated in addition to the Final Charging Order (paragraph 1), the Order also contains an Unless Order (paragraphs 3 and 4) and a Costs Order (paragraphs 5 and 6). It is clear from the plaint that it is the Costs Order which is sought to be rendered executory and enforceable in Seychelles.

[17] Does the existence of the Final Charging Order - which charges securities to secure payment of *inter alia* the costs ordered under paragraphs 5 - mean that payment of such costs can only be obtained through enforcement of the Final Charging Order against the shares in Q-Glazing in the British Courts, and that such costs cannot be made enforceable in Seychelles through registration of the Order dated 10th April 2019 pursuant to the present proceedings? This raises the issue of whether “*it is just and convenient that [paragraph 5 of] the judgment should be enforced in Seychelles*” as provided for in section 3(1) of the REBJA, given that there is a Final Charging Order to secure payment of “*costs of the Claimant’s applications dated 27th February 2019 and 4th April 2019*” in terms of paragraph 1 of the Order. The claimant need only enforce this Final Charging Order to recover the aforementioned costs once they have been assessed.

[18] I note that the order in paragraph 5 differs slightly from the one in paragraph 1 in that paragraph 5 is for payment of claimant’s costs of the “*applications dated 26th February 2019 and 4th April 2019*” whereas paragraph 1 refers to “*applications dated 27th February 2019 and 4th April 2019*”. Emphasis added. These discrepancies are most likely

to be the result of a mistake in paragraph 1 where reference was made to the date of the Interim Charging Order i.e. 27th February 2019 instead of the date of the application for such Interim Charging Order i.e. 26th February 2019. Hence I am of the view that both paragraphs 1 and 5 refer to the same applications namely the application for an Interim Charging Order dated 26th February 2019 and the application for an Unless Order and to make the Interim Charging Order final dated 4th April 2019.

[19] In determining whether it is just and convenient that the Order should be enforced in Seychelles it is important to consider whether the securities charged under the Final Charging Order under paragraph 1 of the Order are sufficient to cover payment of the sums specified in that paragraph. I am of the considered view, that the order for payment of costs of the applications dated 26th February 2019 and 4th April 2019, as per paragraph 5 of the Order, may be the subject matter of an Order for registration in the present proceedings, rendering such order enforceable in Seychelles once the costs have been assessed, but only insofar as the securities charged under paragraph 1 are insufficient to cover payment of the whole sum of the costs as well as the sum of £17,861,018.03 (see paragraph 1 of the Order) once the Final Charging Order is enforced in Great Britain. If the securities are sufficient to cover the whole sum of the costs and the sum of £17,861,018.03, then payment should be enforced in Great Britain and there will be no need to have recourse to enforcement proceedings in Seychelles.

[20] As to Vijay's contention that the Final Charging Order is directed at Q Glazing and Mrs. Forum Varsani, the implication being that the Costs Order cannot be enforced against Vijay in Seychelles, I note that the Vijay is cited as the Defendant/Respondent in the Order. In paragraph 7 of the Order relating to service, the Claimant/ EEEL is required to serve Q Glazing with the Order, and is further granted permission to serve the Order and documents relating to its enforcement on the defendant outside the jurisdiction by and at specified alternative means and places as well as on Mrs. Varsani by and at specified alternative means and places. Although the securities charged comprise of shares of Q Glazing, Vijay Construction Proprietary Limited is the main party to the proceedings giving rise to the Final Charging Order and consequently will also have to be a party to its enforcement. Although the Final Charging Order is directed at Q Glazing and Mrs.

Foram Varsani, such order is to secure payment of costs against Vijay. Insofar as these costs are not recoverable under the Final Charging Order, they are enforceable against Vijay.

[21] Counsel for the defendant raises a second threshold issue that if, which it does not admit, the Order also requires the payment of costs (per paragraphs 5 and 6 of the Order) by the defendant over and above the Charging Order against Q Glazing Limited, then only costs amounting to £20,000 are enforceable because these costs are liquidated. He argues that this Court cannot recognise an order in respect of any other amount in costs as these are ordered to be payable on an indemnity basis and no taxed bill of costs has been made a part of the Order. Further that an order for costs which have not been quantified cannot be enforced without the costs having been first liquidated.

[22] In this regard, counsel for Vijay has submitted that since paragraph 5 of the Order orders payment to EEEL of “*incurred costs of the application dated 26th February 2019 [for an Interim Charging Order] and 4th April 2019 [for a Final Charging Order] on the indemnity basis*” which costs are “*to be subject to detailed assessment if not agreed*”, these costs not having been quantified cannot be the subject matter of an order of this Court making such costs enforceable in Seychelles without such costs having been first liquidated.

[23] I cannot agree with that proposition. In my view paragraph 5 of the Order sufficiently identifies the costs so that they can be the subject matter of an Order for registration in the present proceedings. However such costs can only enforced in Seychelles once they are assessed by the British Courts. In that regard, I note that in CS23/2019, this Court in ordering the registration of the Cooke and Cockerill Orders under section 3(1) of the REBJA, rendered enforceable payment of specific sums as well as certain “*costs to be summarily assessed if not agreed*” and certain costs “*on the indemnity basis, to be assessed if not agreed*”.

[24] As to whether the interim payment on account of costs at paragraph 6 may be the subject of an Order under section 3(1) of the REBJA it is important to understand the underlying principle behind an interim payment of costs order as identified by Mr. Justice Jacob, in *Mars UK Ltd v Teknowledge Ltd* [2008] EWHC 226 (Pat), as follows:

8. ... Where a party has won and has got an order for costs the only reason that he does not get the money straightaway is because of the need for a detailed assessment. Nobody knows how much it should be. If the detailed assessment were carried out instantly he would get the order instantly. So the successful party is entitled to the money. In principle he ought to get it as soon as possible. It does not seem to me to be a good reason for keeping him out of some of his costs that you need time to work out the total amount. A payment of some lesser amount which he will almost certainly collect is a closer approximation to justice. So I hold that where a party is successful the court should on a rough and ready basis also normally order an amount to be paid on account, the amount being a lesser sum than the likely full amount.

[25] It is clear that EEEL will not recover their costs awarded under paragraph 5 of the Order until either the parties agree to the costs, or the conclusion of the detailed assessment which may take some considerable time. Following the principle enunciated in *Mars UK Ltd v Teknowledge*, EEEL as a successful party is entitled to its costs and should be paid without delay, hence the interim payment of costs ordered under paragraph 6 as a part payment, until the full amount of costs is agreed or assessed by a British Court and thereafter either paid by Vijay or if he fails to do so by enforcement of the Charging Order. The amount of the interim payment, if it had been paid, would be deducted from the final amount of EEEL's costs. In that regard I note that the interim payment on account of costs was ordered to be paid "by 4.00pm on 24th April 2019". The plaint in these proceedings was filed on 5th September 2019. At paragraph 3 of the plaint it is averred that "*the Defendant has failed to make the interim costs payments (or any part of it) as ordered*" which is admitted by the defendant at paragraph 5 of the statement of defence. The defendant is therefore out of time to effect payment of the interim payment on account of costs.

[26] It is clear from the above that recovery of the sum of £20,000.00 ordered as interim payment on account of costs is not subject to the Final Charging Order and hence may be registered and rendered enforceable in Seychelles – provided of course that the conditions for registration are met.

Applicable Law

[27] This plaint has been filed pursuant to section 3 of the Reciprocal Enforcement of British Judgments Act (“REBJA”), the relevant provisions of which provide as follows:

3. (1) *Where a judgment has been obtained in the High Court of England or of Northern Ireland or in the Court of Session in Scotland, the judgment creditor may apply to the court at any time within twelve months after the date of the judgment, or such longer period as may be allowed by the court, to have the judgment registered in the court, and on any such application the court may, if in all the circumstances of the case it considers it just and convenient that the judgment should be enforced in Seychelles, and subject to the provisions of this section, order the judgment to be registered accordingly.*

(2) *No judgment shall be ordered to be registered under this section if:*

- (a) *original court acted without jurisdiction; or*
- (b) *the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of the original court; or*
- (c) *the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of that court; or*
- (d) *the judgment was obtained by fraud; or*
- (e) *the judgment debtor satisfies the court either that an appeal is pending, or that he is entitled and intends to appeal against the judgment; or*
- (f) *the judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason could not have been entertained by the court.*

(3) *Where a judgment is registered under this section:*

- (a) *the judgment shall, as from the date of registration be of the same force and effect, and proceedings may be taken thereon, as if it had been a judgment originally obtained or entered up on the date of registration in the court;*
- (b) *the court shall have the same control and jurisdiction over the judgment as it has over similar judgments given by itself, but in so far only as relates to execution under this section;*
- (c) *the reasonable costs of and incidental to the registration of the judgment (including the costs of obtaining a certified copy thereof from the original court and of the application for registration) shall be recoverable in like manner as if they were sums payable under the judgment.*

Pleas in Limine Litis

[28] Vijay has raised four pleas in *limine litis* which are set out in **paragraph [9]** hereof. It is worth noting that these same matters were raised in *limine litis* in CS23/2019 in respect of EEEL’s application to register and render executory the Cooke and Cockerill Orders made by the High Court of Justice of England and Wales. Each of the pleas in *limine litis* will be dealt with in turn below.

I. The Order is not a judgment within the definition of the word in the Reciprocal Enforcement of British Judgments Act

[29] The defendant argues that the Order should not be registered and made enforceable under the provisions of the REBJA as they are not “judgments” within the definition of that word under that Act.

[30] The expression “judgment” is defined in section 2 of the REBJA as follows:

“The expression "judgment" means any judgment or order given or made by a court in any civil proceedings, whether before or after the passing of this Act, whereby any sum of money is made payable, and includes an award in proceedings on an arbitration if the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place;”

- [31] The defendant does not dispute that the Order was made in civil proceedings but questions whether it is an Order “*whereby any sum of money is made payable*”. It submits that the Order is for payment of costs but that although on the face of it, it would appear that it is an order whereby a sum of money is made payable, it is not the Order which makes the costs payable but two earlier orders namely: (1) an earlier order of Mrs. Justice Cockerill which makes the orders as to costs, namely the interim payment of £20,000.00 and the payment of costs on an indemnity basis; and (2) another order in respect of the shares in Q Glazing Limited as made clear in the schedule to the Order, which is made final in the Order. The defendant accordingly submits that only one part of the Order could be considered to be a judgment whereby a sum of money is payable, namely the order at paragraph 6 for the defendant to make an interim payment of £20,000.00.
- [32] It argues that the part of the Order in paragraph 1 does not fall within the definition of “judgment” because it is a final order made against the shares in Q Glazing Limited only, and that the part of the Order in paragraph 5 does not fall within the definition of “judgment” either because it does not make a liquidated sum payable. It therefore submits that the Court cannot order registration of the Order because the application of one of its parts (paragraph 1) is restricted to shares in a UK company and another part (paragraph 5) is, as yet, undetermined as to a sum payable. According to the defendant, the clear intention of the definition is that a judgment must be one where, at the end of civil proceedings, a sum of money is made payable and not simply as in the present case, an Order made consequent upon a previous Order in other proceedings.
- [33] The plaintiff on the other hand submits that the Order, insofar as it is an order obtained in the High Court of England and Wales, in civil proceedings and contain an order for payment of a sum of money by Vijay, namely the costs of EEEL’s applications for an Interim Charging Order and a Final Charging Order, falls within the definition of “judgment” under section 2 of the REBJA and may be the subject of an application under section 3 thereof.

- [34] Let me start by reiterating my views stated at paragraph [19] hereof that an order is capable of being registered under section 3(1) of the Act although one or more parts of that order cannot be enforced in Seychelles. However it is only such part or parts of the Order that may be enforced in Seychelles which will be rendered enforceable by such registration.
- [35] The order at paragraph 1 of the Order merely converts the Interim Charging Order (made by Master McCloud on 27th February 2019) the purpose of which was to charge certain securities of Q Glazing Ltd to secure payment of certain sums (sum of £17,861,018.03 with interest and undetermined costs of the Claimant's applications dated 27th February 2019 and 4th April 2019), into a Final Charging Order. It is clear from the UK Charging Order Act 1979, and Civil Procedure Rules, Part 73 (dealing with Charging Order, Stop Orders and Stop Notices) that the making of an Interim Charging Order and the subsequent making of such Interim Charging Order final form part and parcel of the same procedure. Briefly the procedure is as follows: Under Rule 73.1 in an application for a charging order the first step is to make an Interim Charging Order without hearing (See Rules 73.4(2) and 73.6(2)). The second step in the procedure is to hear the matter to consider whether to make the Interim Charging Order final (see Rules 73.4(6) (b), 76(3) (b)). After the hearing or at least after having given the judgment debtor an opportunity to be heard, the Court may make the Interim Charging Order final, in effect confirming that the charge imposed by the Interim Charging Order continues with or without modification (See 73.10A(3) (a)). In terms of 73.1(2) (ca) "*final charging order*" means an order confirming that a charge imposed by an Interim Charging Order continues. Alternatively the Court may discharge the interim charging order and dismiss the application.
- [36] It is therefore incorrect for the defendant to state that the Final Charging Order is based on a previous order i.e. the Interim Charging Order as both orders are made at different stages of the same procedure. Further before the Interim Charging Order is made final, the judgment debtor is given the opportunity to make representations. In that respect I note that the defendant was given an opportunity to be heard before the Interim Charging

Order was made final, but did not avail itself of such opportunity, as shown by the following contained in the recitals to the Order:

... AND UPON the Defendant filing and serving evidence on 3rd April 2019 less than 7 days before the hearing

[...]

AND UPON READING the Defendant's solicitors' letter to the Court dated 8th April 2019 indicating that the Defendant withdrew its opposition to the making of a Final Charging Order.

AND UPON hearing counsel for the Claimant ... and the Defendant not appearing and relying upon its solicitors' correspondence to the Court and its letter to the Claimant's solicitors dated 9th April 2019.

- [37] However I agree with the defendant that paragraph 1 of the Order cannot be considered as “*an order for the payment of a sum of money*”. As previously stated, it merely makes the Interim Charging Order into a final Charging Order, which has to be enforced pursuant to proceedings before the British Courts in order for payment of the sums charged to be effected. To that extent, that part of the Order will not be enforceable in Seychelles.
- [38] The defendant further submits that the order for payment of costs under paragraphs 5 and 6 of the Order was made pursuant to an earlier order of Mrs. Justice Cockerill (“Cockerill Order”). A reading of paragraph 5 of the Order shows that the costs which the defendant is ordered to pay “*on the indemnity basis*” at paragraph 5 is for costs incurred by the Claimant in relation to the applications of 26th February 2019 (for Charging Order) and 4th April 2019 (for an Unless Order).
- [39] The Costs Order at paragraph 5 insofar as it relates to the application for a Charging Order, for the reasons given above, namely that the Interim Charging Order and the Final Charging Order form part and parcel of the same procedure, cannot be argued to have been made payable by Justice Cockerill's Order. The Costs Order was properly made in

the Order dated 10th April 2019 at the conclusion of the process commenced by the application for a Charging Order and in respect of those proceedings.

[40] The Unless Order (paragraphs 3 and 4 of the Order) for which costs are awarded in paragraph 5 of the Costs Order may be considered to be related to the Cockerill Order in that the Unless Order prevents the defendant from applying to set aside the Final Charging Order or the Interim Charging Order and from contesting enforcement of the Final Charging Order unless it makes interim payment of costs ordered by Mrs. Justice Cockerill, within a specified time frame after which the Final Charging Order may be enforced. However the Order at paragraph 5 of the Costs Order (insofar as it concerns costs of the Unless Order) is an order made by a Court independently of the Cockerill Order, based on the proceedings before that Court namely the claimant's application for the Unless Order. Pursuant to that application, the Court, in granting the Unless Order also ordered payment by the defendant to the claimant of its costs of the application. Therefore, to my mind, it cannot be argued that the Costs Order was made payable by the Cockerill Order.

[41] The costs ordered at paragraph 5 of the Costs Order have not been quantified or liquidated but are to be assessed if not agreed, and on that basis the defendant submits that the Costs Order cannot be considered as a judgment "*whereby a sum of money is made payable*". In my view the Costs Order does make a sum of money payable albeit not a specific sum but a sum which is yet to be assessed or agreed upon by the parties.

[42] The defendant is ordered at paragraph 6 to make an interim payment of such costs in the sum of £20,000.00. The defendant has conceded that that part of the Order can be considered to be a judgement "*whereby a sum of money is made payable*".

[43] In light of the above, I find that the Order is a judgement within the definition of that word as provided for in section 2 of REBJA in that it is in an Order "*whereby a sum of*

money is made payable”subject to the qualification that only paragraphs 5 and 6 of the Order are enforceable in Seychelles.

II. The Costs Order is not a judgment within the definition of the word in the Reciprocal Enforcement of British Judgments Act, in that the award in respect of which the Order came to be made was rendered in a country not covered by that Act.

[44] Vijay pleads in *limine litis* that insofar as the award in respect of which the Order came to be made was rendered in a country not covered by the REBJA, the parties having specifically chosen to arbitrate outside those countries, the Order sought to be enforced is not a judgment falling within the definition of the term.

[45] Vijay submits that the Order relating to costs arose from actions brought in the United Kingdom to make executory in the United Kingdom, an arbitral award rendered in France (where the parties had agreed to arbitrate and where it is assumed that the award had executory status). To recapitulate, the Arbitral Award rendered in France was made executory in the United Kingdom by the Cooke and Cockerill Orders pursuant to proceedings before the High Court of England and Wales. The Cooke and Cockerill Orders were rendered enforceable in Seychelles in CS23/2019. The Order now sought to be registered in the present are connected to those previous proceedings before the High Court of England and Wales.

[46] To be able to register a judgment under section 3(1) of the REBJA, the judgment has to be obtained “*in the High Court of England or Northern Ireland, or the Scottish Court of Sessions*”. Vijay argues that similarly, the British judgment i.e. the Cockerill Order on the basis of which the Order sought to be registered was made, would have to be a judgment of the High Court of England or Northern Ireland, or the Scottish Court of Sessions. He contends that if this were not the case, and the British Judgment i.e. Cockerill Order on the basis of which the Order is based was not obtained “*in the High Court of England or Northern Ireland, or the Scottish Court of Sessions*”, it would not fall under the definition of “*judgment*” in the Act, and consequently the Order also

cannot amount to a “*judgement*” within the definition of the Act “*for to do so would be akin to rising a stream above its source*”.

[47] Vijay argues that in order for the British judgement on the basis of which the Costs Order was made, to qualify as a “*judgement*” under the REBJA, it would have to be in respect of an award made in one of the countries making up Great Britain and not a foreign award. He submits that to hold otherwise would be to empower a British Court to render executory in Seychelles (as opposed to Great Britain) an award foreign to both Great Britain and Seychelles by the simple expedient of making an order in respect of that award, and vice-versa empower a Seychelles Court to do the same with regard to Great Britain. Worse it would empower a British Court, as here, to domesticate a foreign award and render it executory in a country notwithstanding that the parties to the dispute had specifically decided not to arbitrate in Britain or those countries covered by the British Judgement Act (Tanganyika, Nyasaland, India, Mauritius, Uganda, New South Wales and Australia). It is submitted that this cannot have been the intention of the law and any order consequential to an unenforceable judgment cannot be made executory because it is an accessory to a previous unenforceable judgment.

[48] It appears that Vijay’s contentions that the Cockerill Order does not fall within the definition of “*judgment*” in the REBJA thereby rendering it unenforceable in Seychelles ultimately rests on the fact that it is based on an Arbitral Award made in France. Consequently its reasoning is that if the Cockerill Order is not a “*judgment*” as defined in the REBJA then the Order sought to be registered made pursuant to the Cockerill Order also cannot be “*a judgment*” under that Act.

[49] I note that the same point was raised in *limine* in CS23/2019 in which EEEL sought to have the Cooke and Cockerill Orders registered under the REBJA. The Court, in considering the question of whether the Cooke and Cockerill Orders fall within the definition of “*judgment*” in section 2 of the REBJA, given that the arbitral award which they render executory was made in France and not in Great Britain stated as follows at paragraph 46 of its judgment:

46. *As previously stated the term “judgment” is defined in section 2 of the REBJA as including arbitral awards. As a result arbitral awards made in England, Northern Ireland and Scotland which are enforceable under the laws of these respective countries in which the award was made, may be subject of an application for registration under section 3(1) of that Act. These arbitral awards are directly registrable under section 3 of the REBJA provided that they are enforceable in the place where they were given. The question which arises in this case is whether an Order of the High Court of England and Wales rendering enforceable an arbitral award given in a jurisdiction other than England, Northern Ireland and Scotland and which is enforceable in the jurisdiction in which the award was rendered, may be registered under section 3 (1) of the REBJA. (Emphasis added.)*

[50] The Court then went on to consider both the Cooke and the Cockerill Orders and the proceedings giving rise to these Orders. In respect of the Cooke Order it stated at paragraph [50] that “*leave to enforce a foreign arbitral award [in Great Britain] is granted almost automatically provided the requirements of section 102 of the [British] Arbitration Act relating to production of documentary evidence in support of the application are complied with*” and at paragraph [52] that “*[t]he Cooke Order was made after considering the documentary evidence produced by the plaintiff as proof that the arbitral award was made and the terms of the award as required by section 102 of the Arbitration Act*”. With regards to the Cockerill Order made pursuant to an application to set aside the Cooke Order under section 103 of the Arbitration Act 1996 on grounds set out in that section, this Court found at paragraph [53] that the Order was based on and refers to the 20 page judgement of Mrs. Justice Cockerill of 11 October 2018. It stated at paragraphs [50] and [51] that:

50. *... the applicant may file an application to set aside the order, on any of the grounds enumerated in section 103 of that Act, as occurred in the present case ... the set aside application is designed to test the foreign award and to satisfy the Court as to its integrity, the jurisdiction of the tribunal making that award, its finality and that due process was followed throughout the arbitration process. I observe that the provisions of the Commercial Code governing recognition and enforcement of foreign arbitral awards in our jurisdiction are much the same as obtains in England under the Arbitration Act. The defendant may invoke the same grounds under section 150 of the Commercial Code as section 103 of the British Arbitration Act for refusing enforcement of a foreign arbitral award.*

51. *Similarly if an arbitral award is sought to be registered under the provisions of the REBJA, the Court shall refuse registration of such an award if any of the grounds set out in section 3(2)(a) to (f) of that Act which are reproduced at paragraph 21 hereof exist. There are similarities between the grounds for refusing enforcement of a foreign arbitral award under section 102 of the British Arbitration Act and section 150 of our Commercial Code, and the grounds on which the Supreme Court may refuse to register an arbitral award under section 3(2) of the REBJA, despite the different wordings in these provisions.*

[51] After rejecting the defendant's arguments that the Cooke and Cockerill Orders are not judgments within the meaning of the REBJA because the Courts making the Orders did not hear evidence and made no determination on the merits of the dispute between the parties, and because they are not judgments "whereby any sum of money is payable", for reasons stated in that judgment, the Court ultimately held at paragraph [73] of its judgment that:

73. *The Defendant also argues that the Orders sought to be enforced are not judgments falling within the definition of the term as provided in the REBJA as they are not based on an award rendered in a country not covered by that Act, the parties having specifically chosen to arbitrate outside those countries. In that respect I note that the arbitral tribunal was seated in Paris which was the jurisdiction of choice of the parties. The Orders sought to be registered in Seychelles render enforceable in the United Kingdom, the arbitral award made in that jurisdiction of choice of the parties, subject to certain conditions provided in the English Arbitration Act being satisfied. I therefore find no merit in this argument. Emphasis added.*

[52] This issue was canvassed by Vijay on appeal against this Court's judgment in CC23/2019. Dingake JA, at paragraphs [91] and [92] of the judgment rendered on appeal in SCA28/2020 stated:

[91] *As indicated at the beginning of this judgment in terms of the Order of Justice Cooke leave was granted under section 101 (1) of the UK Arbitration Act 1996 for the Respondent to enforce the arbitral award, including the post award interest. Justice Cooke also entered judgment in terms of the said award against the Appellant pursuant to section 101(3) of the UK Arbitration Act. It is plain and requires no interpretation, that having regard to section 101(3) aforesaid, by*

entering judgment in terms of the award, the said award was converted into a UK judgment.

[92] *It follows in my view that the UK Orders qualify as a judgment in terms of section 101(3) of the Arbitration Act and section 2 of REBJA and are capable of both recognition and enforcement in Seychelles in accordance with the applicable law, namely, REBJA and or FJREA. Emphasis added.*

[53] The second plea in *limine litis* therefore fails.

III. The Order is legally applicable only in Great Britain

[54] Vijay's 3rd plea in *limine litis* is that the Order sought to be registered has legal applicability only territorially in Great Britain and is unable to be enforced elsewhere. It is submitted that the Order was made in Britain for enforcement in Britain against the shares in Q Glazing Limited. Counsel for Vijay argues that while the original orders for costs may be taken to have been judgments with a wider scope of application, by contrast the Order in the present proceedings is clearly predicated upon Master McCloud's Interim Charging Order dated 27th February 2019, and to the extent paragraphs 5 and 6 of the Costs Order make mention of costs, the thrust of the Order is that these costs will be recoverable from the shares in Q Glazing Limited and not otherwise. He submits that it follows that the Order was meant to apply only against the shares in Q Glazing Limited in the United Kingdom and had no wider territorial application. He questions how the Order, even if it was were to be rendered executory in Seychelles, could be enforced in Seychelles against the shares in Q Glazing Ltd. Suffice it so say that this argument has been addressed under the Threshold Issues before consideration of the pleas in *limine litis* with the Courts findings thereon at **paragraphs 19 and 20** hereof.

[55] As to the original Order for costs (interim payment of costs) made by Mrs. Justice Cockerill dated 11th October 2018, Counsel for Vijay seems to be labouring under the mistaken impression that paragraph 6 of the Order sought to be registered in the present proceedings ordering "*an interim payment ... on account of costs ... in the sum of £20,000*" is based on the latter Order of Mrs. Justice Cockerill. As has been explained at **paragraphs 26 and 27 hereof**, the interim payment on account of costs under paragraph 6

of the present Order is for part payment of the costs ordered under paragraph 5 until the such costs are agreed or assessed by the British Court and thereafter either paid by Vijay or if he fails to do so by enforcement of the Final Charging Order. It is not made on the basis of the interim payment of costs made by Mrs. Justice Cockerill.

[56] However the costs awarded in paragraph 5 of the Order in regard to the application dated 4th April 2019 for the Unless Order, may be considered to be related to the Cockerill Order in that the Unless Order (paragraphs 3 and 4 of the Order) prevents the defendant from applying to set aside the Final Charging Order or the Interim Charging Order and from contesting enforcement of the Final Charging Order unless it makes interim payment of costs ordered by Mrs. Justice Cockerill, within a specified time frame after which the Final Charging Order may be enforced. I note as stated at paragraph [42] above the Order at paragraph 5 of the Costs Order (insofar as it concerns costs of the Unless Order) is an order made by a Court independently of the Cockerill Order, based on the proceedings before that Court namely the claimant's application for the Unless Order and it cannot be argued that the Costs Order was made payable by the Cockerill Order.

[57] Having said that, even if this Court were to accept Counsel for Vijay's argument that the costs ordered under paragraphs 5 and 6 of the Order arise from the Mrs. Justice Cockerill's Order, and is therefore not enforceable, this argument would also fail for the following reason: Counsel referred to its submissions in CS23/2019 on the subject, in which it was argued that the Cockerill Order was not enforceable because it was made in a matter where, EEEL faced with the 2017 Court of Appeal judgment barring it from enforcing the arbitral award directly, sought to enforce it indirectly, through the process of obtaining a judgment in the British Courts and subsequently, via the REBJA, enforcing the British Judgment in Seychelles. Given these circumstances, it was argued that the judgment obtained in the British Courts should not be rendered executory in the Seychelles as to do would be unconstitutional, unconscionable and contrary to public policy.

[58] I take note that this Court in CS23/2019 held that both Orders sought to be registered under the REBJA in that case (including the Cockerill Order) were enforceable in

Seychelles. The Court found no merit in the argument that registration of the Orders would be unconstitutional, unconscionable and contrary to public policy and in that regard stated at paragraph [90] of its judgment:

90. ... this Court finds nothing objectionable about the procedure followed by the plaintiff, which, finding itself unable to render enforceable in Seychelles, the arbitral award obtained in France under the provisions of the Commercial Code because foreign arbitral awards were held not to be enforceable as Seychelles was not a party to the New York Convention at the time, had to resort to this roundabout way of doing it by applying to register not the award itself but orders that enforce the award made by the High Court of England and Wales. In my view, the plaintiff having properly obtained an arbitral award in its favour from an arbitral tribunal of the parties' choice, which was confirmed by the French Cour D'Appel, and which was prevented from enforcing the said award because of the inapplicability of the New York Convention to Seychelles at the time, which situation no longer exists, cannot be faulted for attempting to enforce the arbitral award in this manner.

[59] On appeal in SCA 28/2020 against this Court's decision in CS23/2019, Vijay's second ground of appeal related to "the question whether it was just and convenient for the Supreme Court to enforce the UK Orders in the face of the decision of this Court in *Vijay Construction (Proprietary) Ltd v Eastern European Engineering Ltd (Civil Appeal SCA 15 and 18/2017 SCCA 41 (13 December 2017))*, holding that the award was not enforceable in Seychelles because Seychelles was not a party to the 1958 New York Convention". In that regard, Vijay contended that "it was not just or convenient to register the judgment as that would be tantamount to trying to enter through the back door after this Court closed the front door when it held that the award was not enforceable in Seychelles". In rejecting this argument. Dingake JA stated as follows at paragraphs [71] to [73] of his judgment:

[71] It is my considered opinion that this ground is without merit. The Court of Appeal in its 2017 decision was considering an enforcement of an award not a judgment as is sought to be done in the present case. As shown earlier the two concepts are fundamentally different and import different considerations. For instance, a Court seized with an enforcement of an award would be keen to ensure that the award is not tainted with procedural defects, such as non-compliance with the Arbitration Agreement. However, when considering enforcement of a foreign judgment, the

Court may have to grapple with issues concerning the extra-territorial application of a foreign judgment and the notion of comity of nations.

[72] *The doctrine of comity is the legal principle which demands that a jurisdiction recognize and give effect to judicial decisions rendered in other jurisdictions unless to do so would offend public policy or other prohibited grounds. The doctrine of comity facilitates the achievement of the primary purpose of law – the orderly, consistent, predictable resolution of disputes. Although the doctrine is not a matter of absolute obligation, it does require the Courts, as part of the state, to have regard both to the international duty of the state and to the rights of its own citizens or of other persons/entities who are under the protection of its laws.*

[73] *Having regard to all the above, it seems plain to me that this Court is seized with a fundamentally different issue to the one that this Court dealt with in 2017. It can therefore not be credibly argued that it would offend public policy, or that it would be unjust or inconvenient for this Court to deal with this present appeal arising out of a totally different cause of action from the one that ended up in this Court in 2017.*

[60] In the circumstances this plea in *limine litis* also fails.

IV. The Costs Order is not Reciprocally Enforceable in Seychelles.

[61] The fourth plea raised in *limine litis* by Vijay is that given that the 2017 judgment of the Seychelles Court of Appeal (*Vijay Construction (Proprietary) Limited v Eastern European Engineering Limited SCA 15 & 18/2017*) deciding that the arbitral award in respect of which the Order was made was not enforceable in Seychelles, is not binding or enforceable in Great Britain, a British Judgment to the contrary effect cannot be enforceable in Seychelles under a law the very basis of which is reciprocity.

[62] Vijay's Counsel conceded that there was no reason why the High Court of England and Wales should have considered itself bound by the Seychelles Court of Appeal judgment, since it was adjudicating on a different matter altogether, namely whether to enforce a previous order as to costs against shares in Q Glazing Limited. However he argued that the point was that the British Court proceeded to uphold the costs order with no reference to Seychelles; that in doing so it was clearly acting within its legal parameters and upholding an order which had territorial application in the UK alone; that had it

intended its order to apply extraterritorially to Seychelles, it would have performed had to consider the Court of Appeal Judgment; that it follows therefore that since the British Court did not consider itself bound by the Seychelles Court of Appeal Judgment, the Seychelles Courts are likewise not bound, on the basis of reciprocity, to consider the Order as binding on them, but as binding territorially in Great Britain only.

[63] I note that the same arguments were raised in CS23/2019 in regards to the Cooke and Cockerill Orders in which the Court stated at paragraph 77 of its judgment that:

77. *The defendant submits that the REBJA is premised on reciprocity and that British judgments have the potential to be registered and enforced in Seychelles because Seychelles judgments have the potential to be registered and enforced in Great Britain. It submits that the 2017 Court of Appeal judgment in Vijay Construction (Proprietary) Limited v Eastern European Engineering Limited (supra) which ruled that the New York Convention was not applicable in Seychelles, and that in consequence the arbitral award obtained by the plaintiff in France was not enforceable, would not be enforceable in Great Britain which would not consider itself bound by it. Mrs. Justice Cockerill therefore upheld the Cooke Order with no reference to the Seychelles judgment. It is also submitted that in doing so the British Court was clearly acting within its legal parameters and upholding an order which had territorial application in the UK alone, and that had it intended its Order to apply extraterritorially to Seychelles, it would have performed had to consider the Court of Appeal judgment. The defendant further submits that, “It follows therefore that – since the British Court did not consider itself bound by the Seychelles Court of Appeal judgment – the Seychelles Courts are likewise not bound, on the basis of reciprocity, to consider the two Orders as binding on them, but as binding territorially in Great Britain only”.*

[64] The Court concluded at paragraph 78 that –

78. *I do not follow the reasoning behind such an argument which in my view is misconceived. The application before the British Courts was for enforcement of the French arbitral award in England under the British Arbitration Act on the basis of reciprocity between England and France both of which are parties to the New York Convention. The Seychelles Court of Appeal judgment had no relevance to these proceedings and there was no reason therefore for the British Courts to consider it. All the British Courts had to do was apply the provisions of the British Arbitration Act and relevant procedural laws. The present case involves an application under the REBJA, which is where reciprocity between Seychelles and*

Great Britain in terms of registration and enforcement of their respective judgments comes in. I fail to understand how the Supreme Court is prevented from registering the Cooke and Cockerill Orders on the basis of the defendant's argument.

[65] On the basis of the same reasoning as in CS23/2019 with regards to the Cooke and Cockerill Orders, I find no merit in this plea in *limine litis* which therefore fails. Having found no merit in any of the pleas raised in *limine litis* the Court proceeds to consider the matter on the merits.

On the Merits

Requirements for Registration of Judgment under the REBJA

[66] The requirements for registration of a judgment under the REBJA are set out in subsections (1) and (2) of section 3 of that Act. Under subsection (1) of section 3 –

- (1) The judgment must have been obtained in the High Court of England or of Northern Ireland or of the Court of Session in Scotland.
- (2) The application must have been made within twelve months after the date of the judgment or such longer period as may be allowed by the court.
- (3) The Court must consider it just and convenient, in all the circumstances of the case that the judgment should be enforced in Seychelles.
- (4) The other provisions of section 3 must be complied with.

[67] Subsection (2) of subsection 3 sets out certain circumstances in which the Court cannot order registration of a judgment. These are as follows:

- (a) *the original court acted without jurisdiction; or*
- (b) *the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of the original court; or*

(c) the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of that court; or

(d) the judgment was obtained by fraud; or

(e) the judgment debtor satisfies the court either that an appeal is pending, or that he is entitled and intends to appeal against the judgment; or

(f) the judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason could not have been entertained by the court.

[68] The Order sought to be registered is an Order of the High Court of England and Wales dated 10th April 2019. The plaint was filed on 5th September 2019, within the prescribed time limit of twelve months after the date of such Order. I therefore find that the first two requirements set out at paragraph 3(1) and (2) respectively have been fulfilled.

[69] The next matter to be determined is whether considering all the circumstances of the case, it is just and convenient that the Order should be enforced in Seychelles. While the plaintiff has not specifically addressed this issue, the defendant, in paragraph 12 of its defence on the merits, raises the following objections to making the Order enforceable in Seychelles:

12. The Order was made pursuant to an application which sought to obtain an Order of exequatur of an arbitral award in the United Kingdom in order that this could then be used as a vehicle to enforce the arbitral award in Seychelles. The Seychelles Court of Appeal has determined that the arbitral award is unenforceable in Seychelles. The plaint here seeks to recover costs incurred and awarded in a matter the sole purpose of which was to obtain the Order in Great Britain with the specific intention of enforcing this in Seychelles. Because the Seychelles Court of Appeal has decided that the arbitral award is unenforceable, it would be unconscionable and contrary to public policy if this Court were to enforce an Order of costs made in respect of an application seeking to circumvent the decision of the Seychelles Court of Appeal.

[70] The defendant goes on in paragraph 13 of its defence to aver that “... *for the foregoing reasons, this Honourable Court should determine that it is neither legally possible, nor just and convenient that the Orders be enforced in Seychelles under the Reciprocal Enforcement of British Judgments Act*”.

[71] The above raises an issue which were previously raised in CS23/2019 in respect of the Cooke and Cockerill Orders namely back-door entry, that is the attempt by the plaintiff to enforce the arbitral award of the French arbitral tribunal in Seychelles by seeking to render enforceable in Seychelles the Cooke and Cockerill Orders, which render the arbitral award enforceable in England, after it had been prevented from doing so by the Court of Appeal in SCA15&18/2017.

[72] In his submissions counsel for Vijay states that “*It is submitted that this Court will be loath to render executory a costs order made in a matter which is submitted cannot itself be enforced. To do so would be unconstitutional, unconscionable and contrary to public policy*”. He invites the Court to consider the submissions made on this issue in CS23/2019.

[73] In addition he further submits that assuming that all six conditions in section 3(2) have been satisfied:

32. “*on a consideration of the fact that the Order was (i) made in a case seeking a British Judgment on an unenforceable arbitral award for the simple expedient of enforcing this in Seychelles where the award itself could not be enforced for legal limitation reasons, (ii) made in respect of costs as yet unquantified, and (iii) made for the principal reason of enforcing it against a UK company and not against Seychelles assets, it would not be just and convenient to order registration of the Order*”.

[74] This Court has already dealt with points (ii) with regards to unquantified costs and (ii) enforcement of the Order against Q Glazing. In regards to the issue of back-door entry this Court in CS23/2019, in rejecting Vijay’s argument found as follows:

[89] *The defendant’s argument that allowing enforcement of the Cooke and Cockerill Orders will allow the enforcement of the arbitral award, and that as Seychelles has*

established that foreign arbitration awards are not enforceable in Seychelles, the plaintiff should not be allowed to use the ‘back-door entry’ by clothing the award in the garment of a British judgment to enforce it, may have carried much weight prior to the ratification by Seychelles of the New York Convention. However, this argument no longer holds much weight. As stated above, the Seychelles’ position has now changed and this argument no longer holds the strength it used to when the case commenced. It can no longer be argued that to allow enforcement of the arbitral award would be unconstitutional, unconscionable and contrary to public policy as since 2020 Seychelles is a party to the New York Convention and foreign arbitration awards are now capable of being enforced. The question of circumventing the constitutional order and of flouting the Executive’s decision not to put in place a mechanism for the enforcement of foreign arbitral awards no longer arises.

[90] *In view of this change of the Seychelles position, this Court finds nothing objectionable about the procedure followed by the plaintiff, which, finding itself unable to render enforceable in Seychelles, the arbitral award obtained in France under the provisions of the Commercial Code because foreign arbitral awards were held not to be enforceable as Seychelles was not a party to the New York Convention at the time, had to resort to this roundabout way of doing it by applying to register not the award itself but orders that enforce the award made by the High Court of England and Wales. In my view, the plaintiff having properly obtained an arbitral award in its favour from an arbitral tribunal of the parties’ choice, which was confirmed by the French Cour D’Appel, and which was prevented from enforcing the said award because of the inapplicability of the New York Convention to Seychelles at the time, which situation no longer exists, cannot be faulted for attempting to enforce the arbitral award in this manner.*

[75] On appeal in SCA28/2020, Dingake JA, seized with the question of “whether it was just and convenient for the Supreme Court to enforce the UK Orders in the face of the decision of [the Court of Appeal] in *Vijay Construction Proprietary) Ltd v Eastern European Engineering Ltd* (Civil Appeal SCA15 & 18/2017 SCCA41 (13 December 2017), holding

that the award was not enforceable in Seychelles because Seychelles was not a party to the 1958 New York Convention” pointed out that the issue before the Court of Appeal in SCA15 & 18/2017 concerned the enforceability or otherwise of the award whereas the issue before it in SCA28/2020 was the enforceability of the foreign judgment. It proceeded to explain the differences between a an award and a judgment as follows:

[69] The difference between an award and a judgement are subtle, yet important. Conceptually and theoretically there is a fundamental difference between an award and a judgment. The former may be rendered by an individual or a private arbitral body, often pursuant to a private arrangement to that effect. A judgment on the other hand is rendered by a Court, which represents the sovereignty of the state. The requirements to be taken into account in assessing enforcement of each are also different.

[76] He then goes on to reject Vijays’s contention that “*it was not just or convenient to register the judgment as that would be tantamount to trying to enter through the back door after this Court closed the front door when it held that the award was not enforceable in Seychelles*” holding that this ground was without merit for reasons stated at paragraphs [71] to [73] of his judgment which are reproduced at paragraph [59] hereof.

[77] In light of the above, I find no merit in the Vijay’s argument regarding the propriety of the proceedings before this Court to render enforceable in Seychelles an Order for costs of an application which relates to an Order which it claims seeks “*to circumvent the decision of the Seychelles Court of Appeal*”.

Conditions under section 3(2) REBJA

[78] Section 3(2) of the REBJA provides for six conditions the existence which, prevents the Court from registering a foreign judgment. These are as follows:

(2) No judgment shall be ordered to be registered under this section if –

(a) the original court acted without jurisdiction; or

- (b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of the original court; or*
- (c) the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of that court; or*
- (d) the judgment was obtained by fraud; or*
- (e) the judgment debtor satisfies the court either that an appeal is pending, or that he is entitled and intends to appeal against the judgment; or*
- (f) the judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason could not have been entertained by the court.*

[79] In respect to these six conditions, the plaintiff avers the following at paragraphs 4, 5, 6, 7 and 8 of its plaint:

- 4. That the High Court of England and Wales had jurisdiction to entertain the applications of the Plaintiff and that of the Defendant.*
- 5. That all the rights of the Defendant were respected in the proceedings in the High Court of England and Wales.*
- 6. That the Order of Deputy Master Kay QC made on 10 April 2019 is not contrary to public policy and was not obtained through fraud.*
- 7. That the Order of Deputy Master Kay QC made on 10 April 2019 is not subject to an appeal and the relevant time limits under the English Civil Procedure Rules for mounting any appeal have expired.*
- 8. That the interim costs payment ordered by the Order of Deputy Master Kay QC made on 10 April 2019 is capable of being enforced in England and Wales.*

[80] All these averments of the plaintiff are denied *proforma* by the defendant which has not put up any specific defence thereto except in regards to public policy, which will be dealt with below under the relevant condition. The court will now proceed to determine whether any of the conditions set out in 3(2)(a) to (f) of the REBJA exist. The conditions set out in paragraphs (b) and (c) of subsection (2) of section 3 will be considered together.

(1) original court acted without jurisdiction (section 3 (2)(a))

[81] In CS 23/2019, the Court relied on the case of *Privatbanken Aktieselskar v Bantele* [1978] SLR 226, where the plaintiff (a Danish Bank in Copenhagen) sought to have a foreign judgment of a German Court against the defendant (a west German national with residency status in Seychelles) rendered executory, and in which it was held that “[T]he jurisdiction of the foreign court must be in relation to (1) international or general competence in the light of the Seychelles private international law, as well as to (2) internal jurisdiction of the foreign law determinable by the internal law of the country of the trial Court”.

[82] The Court in the *Privatbanken* case went on to state that the foreign (trial) court must have both international jurisdiction which is determined by Seychelles private international law as well as local jurisdiction which is determined by the law of the country of the trial Court. With regards to the international jurisdiction of the foreign court, the Court found that:

As far as the jurisdiction of the Supreme Court of Seychelles is concerned it is now almost entirely governed by English law or by law based on English law. Since the rules of private international law must necessarily have their foundation in the internal law, therefore those rules dealing with the jurisdiction of foreign courts in the international sense must be based substantially on the provisions of our law regarding the jurisdiction of Seychelles Courts, more particularly the jurisdiction of the Supreme Court of Seychelles. In this respect therefore we should be guided by English rules of private international law...

In Seychelles, as in England, in the case of a foreign judgment in personam ... the criterion of jurisdiction in the international sense under the rules of private

international law is either residence or presence in, or submission or agreement to submit to the foreign jurisdiction ... The Rules set out in section 6(2)(a) of the Foreign Judgments (Reciprocal Enforcement) Act (Cap 63) are worthy of note. In this case paragraph (iv) of section 6(2)(a) has particular relevance.” Emphasis added.

[83] Relying on these principles, the Court in CS 23/2019, found at paragraph [121] of its judgment that *“the High Court of England and Wales, the original court in the present case, had jurisdiction in the international sense because, although, the defendant, Vijay was not resident in the foreign jurisdiction i.e. the United Kingdom, it was present or at least represented by counsel and had submitted to the jurisdiction of the foreign court i.e. the High Court of England and Wales”*.

[84] Similarly in the proceedings for applications for a Charging Order and an Unless Order before the High Court of England and Wales, although Vijay was not resident in the United Kingdom, it was if not present or at least represented by counsel and had submitted to the jurisdiction of the foreign court. This is clear from the recitals to the Order which states the following at pages 1 and 2 thereof:

[...]

And Upon the Defendant Filing and serving evidence on 3rd April 2019 less than 7 days before the hearing.

[...]

And Upon Reading the Defendant’s solicitors’ letter to the Court dated 8th April 2019 indicating that the Defendant withdrew its opposition to the making of a Final Charging Order.

And Upon hearing Counsel for the Claimant (Mr. Connell) and the Defendant not appearing and relying upon its solicitors’ correspondence to the Court and its letter to the Claimant’s solicitors dated 9th April 2019.

[85] The above shows that Vijay through its solicitors, withdrew its opposition to the making of the Final Charging Order. He was therefore represented in those proceedings to file opposition thereto and to withdraw it subsequently. Having chosen to withdraw its opposition to the making of the Final Charging Order, and not to appear before the Court at the hearing to make the Interim Order final, whereupon the Court relied upon *“its*

solicitors' correspondence to the Court and its letter to the Claimant's solicitors dated 9th April 2019", Vijay cannot now be heard to say that it was not represented in the proceedings or that he had not submitted to the jurisdiction of the Court. In addition there is no evidence to show that Vijay at any point in these proceedings sought to challenge the jurisdiction of the British Court to make the Order.

[86] With regards to the local jurisdiction of the foreign court, the Court in CS 23/2019 found that such jurisdiction is determined by the law of that country; that in the case before it, it was the UK law which applied; that the High Court of England and Wales rightly applied the provisions of the UK Arbitration Act in the proceedings before it which gave rise to the Cooke and Cockerill Orders; and that therefore find that the High Court of England and Wales had local jurisdiction in accordance with UK law.

[87] Similarly, in the present case I find that the applicable law was the UK Charging Orders Act 1979, the provisions of which the High Court of England and Wales rightly applied in the proceedings before it, which gave rise to the Order sought to be registered. Accordingly I find that the High Court of England and Wales had local jurisdiction in accordance with UK law

(2) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of the original court (section 3 (2)(b)); and

(3) the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of that court(section 3 (2)(c))

[88] It is not disputed that the defendant Vijay (the judgment debtor) is a company incorporated and registered under the laws of Seychelles and is involved in the business of civil engineering and construction in Seychelles. I am therefore satisfied that the

defendant was “*neither carrying on business nor ordinarily resident within the jurisdiction of the original court*”.

[89] On 26th February 2019, the plaintiff made an application to the High Court of England and Wales, the original court, for a Charging Order under the provisions of the UK Charging Orders Act 1979 pursuant to which an Interim Charging Order was made by Master McCloud on 27th February 2019. The Interim Charging Order was made final by the Order of Deputy Master Kay dated 10th April 2019 which is now sought to be registered and rendered enforceable by the present proceedings. As stated above, the Order shows that Vijay through its solicitors, withdrew its opposition to the making of the Final Charging Order. This shows that Vijay had notice of the proceedings and was represented therein to file opposition thereto and to withdraw it subsequently. It therefore cannot be argued that Vijay “*was not duly served with the process of the original court and did not appear*” or that it “*did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of the original court*”.

[90] I am therefore satisfied that the requirements set out in sections 3(2)(b) and (c) have been fulfilled, in that the defendant having been served with the process of the High Court of England and Wales, submitted to the jurisdiction of that court and opted not to oppose the proceedings before it.

(4) the judgment was obtained by fraud (section 3 (2)(d))

[91] The defendant has contented itself in denying pro-forma the plaintiff’s averment at paragraph 6 of the plaint that “*the Order of Deputy Master Kay QC made on 10th April 2019 is not contrary to public policy and were not obtained by fraud*”. Its statement of defence does not contain any reference to fraud, and makes no averments that the Order was obtained by fraud. Further it has adduced no evidence of any such fraud.

[92] In the circumstances, and in the absence of any clear averment in the statement of defence that the Order was obtained by fraud and there being no evidence of the same, this Court cannot make a finding that there was such fraud. The issue of public policy will be dealt with under the 6th condition below.

(5) the judgment debtor satisfies the court either that an appeal is pending, or that he is entitled and intends to appeal against the judgment (section 3 (2)(e))

[93] As explained in CS 23/2019, “[t]his condition has to do with the finality of the judgment. If a judgment is not final and conclusive it cannot be registered”.

[94] In terms of paragraph 3 of the Order –

3. *Unless the Defendant pays the interim payment of costs required by Order of the Honourable Mrs. Justice Cockerill dated 11th October 2018 by 4.00pm on 24th April 2019, the Defendant is debarred from applying to set aside this Final Charging Order or the Interim Charging Order dated 27th February 2019 and/or contesting the enforcement of the Final Charging Order.*

[95] In its plaint the plaintiff has averred that the defendant has failed to pay the interim costs payments (or any part of it) as ordered, which has been admitted by the defendant in its statement of defence

[96] In his affidavit sworn on 30th April 2019 at paragraph 4 thereof, Daniel Terence Burbeary avers that –

4. *... The Kay Order ordered Vijay to make an interim payment on account of EEEL’s costs and to pay that monetary amount to EEEL. In particular paragraph 5 of the Kay Order ordered Vijay to pay EEEL’s costs of the Applications on the “indemnity basis” and paragraph 6 of the same Order provided for Vijay to make an interim payment on account of EEEL’s costs in the sum of £20,000 by 24th April 2019. Vijay has failed to pay any (or any part) of the sums that it is required to pay pursuant to the Kay Order. Emphasis added.*

[97] Vijay’s failure to pay the said sums effectively debars it from applying to set aside the Final Charging Order dated 10th April 2019 or the Interim Charging Order dated 27th February 2019 and/or contesting the enforcement of the Final Charging Order.

[98] In CS23/2019 this Court stated that “[a] judgment which is still capable of being appealed against and is therefore not final and conclusive will not be capable of

execution in the country where it was delivered. The Privatbanken Aktieselskab (supra) judgment sets out conditions for a foreign judgment to be declared executory in Seychelles which are broadly similar to those set out in section 3(2) of the REBJA. These include the condition that the judgment must be capable of execution in the country where it was delivered.”

[99] The plaintiff avers in paragraph 8 of its plaint that the “*the interim costs payment ordered by the Order of Deputy Master Kay QC made on 10 April 2019 is capable of being enforced in England and Wales*”, which is denied *proforma* by the defendant at paragraph 10 of its defence. In its submissions (Pg 9, paragraph 3.2.5 of plaintiff’s submissions) the plaintiff states that “[*h*]aving withdrawn its opposition to the making of the Final Charging Order and non-appearance at the hearing of the said application before the High Court of England, VIJAY is now estopped from objecting to the registration of the Order of 10 April 2019 being an order on the costs of the said applications. The said Order of 10 April 2019 have therefore become enforceable in the UK and can be registered and enforced here in Seychelles under the provisions of the REBJA”.

[100] Further, in his affidavit sworn on sworn on 30th April 2019 at paragraph 5 thereof, Daniel Terence Burbeary avers that, “[*a*]ccordingly, under English law the interim payment on account of costs can be enforced against Vijay” (emphasis added) and explains that:

By way of illustration, section 1 of the UK Charging Orders Act 1979 provides as follows:

“(1) Where, under a judgment or order of the High Court or the family court or the county court, a person (the “debtor”) is required to pay a sum of money to another person (the “creditor”) then, for the purpose of enforcing that judgment or order, the appropriate court may make an order in accordance with the provisions of this Act imposing on any such property of the debtor as may be specified in the order a charge for securing the payment of any money due or to become due under the judgment or order.”

[101] Mr. Burbeary continues at paragraph 6 of his affidavit to state that “*[i]n my professional view, an order for a payment on account of costs is an order requiring a debtor (in the present case, Vijay) to pay a sum of money to a creditor (in the present case, EEEL) and is, therefore, enforceable in England and Wales, for example by applying for a charging order over any assets of the debtor in England and Wales, to secure the payment of the costs ordered on account.* Emphasis added.

[102] There is no evidence before this Court to show that the Order has been successfully challenged on appeal or declared invalid or been set aside by any English Court. Furthermore the defendant has not provided any evidence to counter the plaintiff’s evidence that no appeal is pending, or to show that the defendant is entitled to and intends to appeal, against the Order sought to be registered or that the said Order is enforceable in the United Kingdom. On the uncontroverted evidence adduced by the plaintiff, I am therefore satisfied that the conditions under section 3(2)(e) have been fulfilled.

(6) the judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason could not have been entertained by the court (section 3 (2)(f))

[103] In the case of *Monthy v Buron* (SCA 06/2013) [2015] SCCA 15 (17 April 2015) the Court of Appeal stated “*[I]n our understanding of public policy as expressed in the Code is of one denoting a principle of what is for the public good or in the public interest*”.

[104] In the case of *Privatbanken Aktieselskar v Bantele* [1978] SLR 226, the Court widened the concept of public policy to instances where a foreign judgment was sought to be rendered executory in Seychelles. It stated the following:

“Under the fifth condition the foreign judgment must not be contrary to any fundamental rule of public policy. The rules of public policy which are aimed at under this condition are much wider than the rules of public policy which are applied if the trial has taken place in Seychelles. The foreign judgment must not go against some fundamental concept of Seychelles Law.”

[105] The defendant avers at paragraph 12 of its defence that -

12. *The order was made pursuant to an application which sought to obtain an order of exequatur of an arbitral award in the United Kingdom in order that this could then be used as a vehicle to enforce the arbitral award in Seychelles. The Seychelles Court of Appeal has determined that the arbitral award in unenforceable in Seychelles. The Plaintiff here seeks to recover costs incurred and awarded in a matter the sole purpose of which was to obtain an Order in Great Britain with the specific intention of enforcing this in Seychelles. Because the Seychelles Court of Appeal has decided that the arbitral award is unenforceable, it would be unconscionable and contrary to public policy if this Court were to enforce an Order of costs made in respect of an application seeking to circumvent the decision of the Seychelles Court of Appeal. Emphasis added.*

[106] It is clear that its objections to the Order being made enforceable in Seychelles on the grounds of public policy is based on the fact that it relates to the Cooke and Cockerill Orders which it claims were obtained only to allow enforcement of the Arbitral Award in Seychelles.

[107] The same objections regarding public policy were preferred by Vijay in CS23/2019 against the registration of The Cooke and Cockerill Orders. The Court stated in that regard: “[t]he defendant also objects to the manner in which the plaintiff is seeking to render executory the arbitral award in Seychelles after having been prevented from doing so by the 2017 Court of Appeal judgment, namely by now applying under the provisions of the REBJA to register the Cooke and Cockerill orders which render the award enforceable in Great Britain. It claims that this would be against public policy and in that regards states in paragraph 46 of its submissions that:

46. *What this Plaintiff seeks is to circumvent the constitutional order and de facto obtain the enforcement of the arbitral award by first obtaining a judgment on the award in the British court and then seeking to have this registered here under the British Judgments Act, with a view to then enforcing it. Were this Court to allow this, it is submitted, it would not only be upsetting the constitutional order of the country but also flouting a decision of the Executive not to put in place a mechanism for the enforcement of foreign arbitral awards. The Court of Appeal declined to do this through the mechanism of section 4 of the Courts Act. It would be both unconscionable and contrary to public policy for this Court, with respect, to*

upend the Court of Appeal’s judgment and overrule the executive and legislative powers of the state. Emphasis added.

[108] The Court in CS23/2019 expressed the view that “*enforcing the Cooke and Cockerill Orders does not offend any public policy rules in Seychelles law*” because it is “*the inability to enforce a valid arbitral award due to a procedural and legal anomaly [which] would offend public policy*”. It gave its reasons at paragraph [90] of its judgment (reproduced at paragraph [74] above) for its view that the procedure followed by the plaintiff to have the arbitral award rendered enforceable in Seychelles was proper, and went on to state at paragraph 91 that:

[91] *Further, Seychelles’ previous position on enforcement of foreign arbitral awards having changed, and Articles 146-150 of the Commercial Code of Seychelles having now become operational, provided that it is still within the time frame to register the award, and subject to the principle of finality in litigation, the plaintiff could still arguably succeed in registering the award itself under the provisions of the Commercial Code, if it is unsuccessful in the present proceedings or if successful, the defendant successfully appeals against this judgment.*

[109] The Court in CS23/2019, not having found that registration of the Cooke and Cockerill Orders offended public policy, this Court cannot find that registering the Order in the present case is against public policy on the basis that it is related to the Cooke and Cockerill Orders.

Decision

[110] In view of this Court’s findings, I find it just and convenient that the Costs Order at paragraphs 5 and 6 of the Order of Deputy Master Kay QC dated 10th April 2019 should be enforced in Seychelles, and order the registration of the said Order of Deputy Master Kay QC dated 10th April 2019 in terms of section 3(1) of the REBJA.

[111] Accordingly, pursuant to Rule 4 of the Practice and Procedure Rules GN 27 of 1923, I hereby make order in favour of the plaintiff in terms of paragraphs 5 and 6 of the Order

of Deputy Master Kay QC dated 10th April 2019, in the sums payable thereunder by the defendant to the plaintiff as follows:

- (a) The plaintiff/Claimant's incurred costs of the applications dated 26th February 2019 and 4th April 2019, on the indemnity basis. Those costs to be subject to detailed assessment if not agreed, PROVIDED THAT the payment of such costs shall only be enforced in Seychelles –
- (i) once the costs have been assessed by the British Courts, if not agreed; and
 - (ii) if the securities charged in terms of the Final Charging Order at paragraph 1 of the Order are insufficient to cover payment of the whole sum of the costs (as well as the sum of £17,861,018.03) after initiation of enforcement proceedings of such Final Charging Order in the British Courts.
- (b) An interim payment on account of costs in the sum of £20,000 PROVIDED THAT such sum or any part thereof, if paid by the defendant to the plaintiff or recovered from the defendant by the plaintiff by means of enforcement proceedings, before recovery of the costs referred to in paragraph (a) above, shall be deducted therefrom.
- (c) For the avoidance of doubt, this Court states that only the Costs Order at paragraphs 5 and 6 of the Order of Deputy Master Kay QC dated 10th April 2019 is rendered enforceable in Seychelles by this judgment subject to the qualifications as set out at paragraphs (a) and (b) above.

[112] Subject to the terms of this judgment, as hereinbefore stated, in accordance with –

- (a) Section 3(3)(a) of the REBJA, as from the date of this judgment the Order of Deputy Master Kay QC dated 10th April 2019 shall be of the same force and effect, as if it had been an Order originally obtained or entered up on the date of this judgment;
- (b) Section 3(3)(b) of the REBJA, this Court shall have the same control and jurisdiction over the said Order as it has over similar judgments given by itself,

but only insofar as relates to execution of the Order, under section 3 of the REBJA;

- (c) Section 3(3)(c) of the REBJA, the reasonable costs of and incidental to the registration of the Order (including the costs of obtaining a certified copy thereof from the original court) and of the application for registration before this Court shall be borne by the defendant.

Signed, dated and delivered at Ile du Port on 3 December 2021.

E. Carolus J