3 February 2016

PRESS SUMMARY

Vizcaya Partners Limited (Appellant) v Picard and another (Respondents) (Gibraltar) [2016] UKPC 5
From the Court of Appeal of Gibraltar

JUSTICES: Lord Neuberger, Lord Mance, Lord Clarke, Lord Sumption, Lord Collins

BACKGROUND TO THE APPEAL

In 2008, Mr Bernard Madoff was exposed as the operator of a fraudulent Ponzi scheme, through his company Bernard L Madoff Investment Securities LLC ("BLMIS"). In April 2009 Mr Irving Picard, the trustee in BLMIS's liquidation in the New York Bankruptcy Court, started proceedings against those investors who had been repaid by BLMIS before the fraud was discovered, to avoid and recover those transfers. This included Vizcaya Partners Limited, a British Virgin Islands-registered investment fund which had invested around US$328m with BLIS between 2002 and 2008, but had been repaid US$180m before discovery of the fraud. Amongst the Account Management Documents governing Vizcaya's investment with BLMIS was a Customer Agreement, which included an express choice of New York law.

The trustee obtained a default judgment for $180m against Vizcaya in New York on 3 August 2010, and sought enforcement of the judgment in Gibraltar, where Vizcaya had substantial assets. Vizcaya applied for summary judgment on the grounds that the default judgment could not be recognised and enforced in Gibraltar. The Chief Justice of Gibraltar dismissed Vizcaya's application, holding that it was arguable that Vizcaya had submitted to the jurisdiction of the New York courts by (i) its presence in New York at the time when proceedings were commenced and (ii) its agreement to submit to that jurisdiction. The Court of Appeal of Gibraltar allowed Vizcaya's appeal in part. It dismissed the trustee's claim to enforce the default judgment in reliance on Vizcaya's presence in New York. But it held that the claim to enforce in reliance on an agreement to submit to the jurisdiction had a reasonable prospect of success.

ADVICE OF THE BOARD

The Board advises Her Majesty that Vizcaya Partners Limited's appeal should be allowed. Lord Collins gives the advice of the Board.

REASONS FOR THE ADVICE

The issue in this case is the content and scope of the rule that a foreign default judgment is enforceable against a judgment debtor who has made a prior submission to the jurisdiction of that foreign court [**3**]. This has been the subject of conflicting decisions and dicta [**55**].

When does a judgment debtor agree to submit to the jurisdiction of a foreign court? There does not necessarily have to be a contractual agreement to submit: the ultimate question is whether the judgment debtor has consented in advance to the jurisdiction of the foreign court. That consent or a contractual agreement may be implied or inferred. The authorities denying the possibility of implied agreement were cases about whether there had to be an actual agreement or consent at all, in the context of the enforcement of foreign default judgments against shareholders of foreign companies or partnerships [**56**].

In English law a term or agreement may be implied as a matter of fact, or by law. In the context of contracts being considered in foreign proceedings, a term may not be implied from the fact that the contract was made or performed in the foreign country, or governed by its law (even if, under that foreign law, the foreign court would have jurisdiction) [**58**]. Where conflicts of laws issues arise in the context of enforcing foreign judgments based on a submission to the foreign jurisdiction, English law determines that question, and so the agreement to submit to the foreign jurisdiction may arise through an implied term [**59**].

Terms implied as a matter of fact depend on the construction of the contract, which is governed by the foreign law if that is the law of the contract. A legal expert does no more than prove the rules of construction of the foreign law. Where terms are said to be implied by law, the legal expert on the foreign law would give an opinion on how the term arises [**60-61**].

In this case, the trustee submitted evidence that under New York law, Vizcaya submitted to the jurisdiction of the New York courts because (i) the choice of New York law applied New York substantive law to all maters relating to the Account Management Documents and it agreed to those documents and carried on business in New York, and (ii) specific jurisdiction was established under the New York Civil Practice Law and Rules over a non-domiciliary transacting business in New York [**62-68**].

But that evidence did not show, as a matter of New York law, that there was a term implied as a matter of fact or law that Vizcaya consented to the jurisdiction of the New York courts. As to an implied term by fact, there was no New York law evidence on any rule of construction that could allow the Gibraltar court to conclude that the choice of law clause amounted to a choice of jurisdiction. As to an implied term by law, there was no New York law evidence on the relevant implied term. The fact that the contract was deemed to have been made in New York made no difference [**70-72**]. Even if there had been an agreement to submit, it would *prima facie* not apply to these proceedings, because they were insolvency-related avoidance proceedings [**74**].

After the hearing of the appeal but before the advice was tendered, the litigation was settled by the parties, subject to the approval of the New York Bankruptcy Court. The Board decided that the appeal raised issues that were not only of general importance, but were of international importance in other common law countries, and would therefore deliver its advice after the settlement was approved by the New York Bankruptcy Court [**9**].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Committee's decision. It does not form part of the reasons for that decision. The full opinion of the Committee is the only authoritative document. Judgments are public documents and are available at: www.jcpc.uk/decided-cases/index.html