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Injunctions Bulletin

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Dadourian Group v Simms [2006] EWCA Civ 399
11th April 2006.

The Court of Appeal set down detailed guidelines relating to the exercise of the courts' discretion to permit the foreign enforcement of an English worldwide freezing order

The Facts

The Claimant obtained worldwide freezing orders against the Defendants. These orders contained the usual undertaking that the Claimant would not seek to enforce the order in a foreign jurisdiction without the court's permission. The Claimant obtained leave to seek to enforce the freezing order in Switzerland. The Defendant sought to challenge the grant of permission.

The Decision

The appeal was dismissed. In giving the judgment of the court, Arden LJ set down the following principles which ought to guide the court in exercising the discretion to permit foreign enforcement of an English worldwide freezing order:

1. The principle applying to the grant of permission to enforce a WFO abroad is that the grant of that permission should be just and convenient for the purpose of ensuring the effectiveness of the WFO, and in addition that it is not oppressive to the parties to the English proceedings or to third parties who may be joined to the foreign proceedings.

2. All the relevant circumstances and options need to be considered. In particular consideration should be given to granting relief on terms, for example terms as to the extension to third parties of the undertaking to compensate for costs incurred as a result of the WFO and as to the type of proceedings that may be commenced abroad. Consideration should also be given to the proportionality of the steps proposed to be taken abroad, and in addition to the form of any order.
3. The interests of the applicant should be balanced against the interests of the other parties to the proceedings and any new party likely to be joined to the foreign proceedings.
4. Permission should not normally be given in terms that would enable the applicant to obtain relief in the foreign proceedings which is superior to the relief given by the WFO.
5. The evidence in support of the application for permission should contain all the information (so far as it can reasonably be obtained in the time available) necessary to enable the judge to reach an informed decision, including evidence as to the applicable law and practice in the foreign court, evidence as to the nature of the proposed proceedings to be commenced and evidence as to the assets believed to be located in the jurisdiction of the foreign court and the names of the parties by whom such assets are held.
6. The standard of proof as to the existence of assets that are both within the

WFO and within the jurisdiction of the foreign court is a real prospect, that is the applicant must show that there is a real prospect that such assets are located within the jurisdiction of the foreign court in question.

7. There must be evidence of a risk of dissipation of the assets in question.
8. Normally the application should be made on notice to the respondent, but in cases of urgency, where it is just to do so, the permission may be given without notice to the party against whom relief will be sought in the foreign proceedings but that party should have the earliest practicable opportunity of having the matter reconsidered by the court at a hearing of which he is given notice.

It should be noted that Arden LJ expressly stated that these guidelines should not be treated as excluding from the court's consideration any matter which it considers to be relevant to the exercise of its discretion.

Banco Nacional De Comercio Exterior v Empresa De Telecomunicaciones De Cuba [2007] EWCA Civ 662

4 July 2007

The English court did not have jurisdiction under Regulation 44/2001 Art.47(1) to make a worldwide freezing order in aid of a foreign judgment and declined to make such an order under the Civil Jurisdiction and Judgments Act 1982 s.25(1).

A Mexican Bank (“BNC”) obtained judgment in Italy for \$167m following an Italian arbitration against the Cuban state controlled telecoms company (“ETC”). BNC sought to enforce the judgment in particular against payments to be made to ETC from roaming arrangements with other telecoms companies offering international mobile phone calls, including payments due from companies based in England.

BNC applied to register the judgment as a domestic judgment and obtained a domestic freezing order from which the judge agreed to omit the undertaking in damages protecting third parties (“the third party undertaking”) because it was a post judgment freezing injunction.

BNC then discovered that ETC had assigned various of its payments rights to another Cuban state controlled company. BNC applied for and obtained a worldwide freezing order which contained the third party undertaking and expressly extended to the debts which had purportedly been assigned.

ETC threatened its roaming partners that if they did not pay the assigned monies to the assignee, then ETC would suspend its roaming services. The third party telecoms companies told BNC that if they suffered loss because of ETC’s actions then they would look to BNC’s undertaking to make good that loss. BNC applied to vary the worldwide freezing order to bring it in line with the domestic freezing order and remove the third party undertaking. At the same time, one of the telecoms companies applied to have the third party undertaking included in the domestic freezing injunction.

The Court of Appeal had to consider two issues:

- (1) Should the Court have granted a worldwide freezing order to BNC who were seeking to enforce an extra territorial judgment in this jurisdiction?
- (2) Should the freezing orders (any of them) have included the standard undertaking in favour of third parties even though they were post-judgment?

The answers were:

- (1) The Court should not have granted a worldwide freezing order to BNC. In *Van Uden BV v KG Deco-Line* [1999] QB 1225 the ECJ confirmed that the courts of the contracting state where the relevant assets were situated were those best placed to guarantee the provisional and protective character of the measures authorised and so there should be a connecting link between the assets the subject of provisional or protective measures. The domestic order was all that was necessary in this context.

Furthermore, the existence of various enforcement procedures in different courts meant that there was a risk of disharmony and inconsistent orders. In so holding the Court also ruled that Article 47(1) of the Council Regulation (EC) 44/2001 (“the Regulation”; concerning protective measures and enforcing judgments) was subject to the same restriction to domestic relief as applied to Articles 47(2) and 47(3).¹

¹ Article 47

(1) When a judgment must be recognised in accordance with this Regulation nothing shall prevent

- (2) The normal undertaking should have been included. It was part of the domestic procedure and was not inconsistent with the provisions for protection and enforcement provided for by the Regulation and the domestic rule was that unless it was an exceptional case an undertaking to protect third parties should be provided as part of the freezing injunction whether it was pre or post judgment.

The Appeals were allowed.

Comment

When considering whether or not to apply for a worldwide freezing order pursuant to the Regulation or section 25 of the Civil Jurisdiction and Judgments Act 1982 against someone not domiciled in the jurisdiction, it will be important to identify for the court the factors which make it appropriate to grant a worldwide order against someone who is not domiciled here and whose connection with the jurisdiction might be limited to the presence of certain assets, for example where

the Applicant from availing himself of provisional, including protective, measures in accordance with the law of the Member State requested without a declaration of enforceability under art 41 being required.

- (2) The declaration of enforceability shall carry with it the power to proceed to any protective measures.
- (3) During the time specified for an appeal pursuant to art 43(5) against the declaration of enforceability and until any such appeal has been determined, no measures of enforcement may be taken other than protective measures against the property of the party against whom enforcement is sought.

the value of domestic assets (shareholdings for example) might be dependent upon the value of assets located elsewhere. The Court of Appeal in this case referred to what is likely to be the most significant factor when it pointed out that it was not part of BNC's case that the order should be made to assist the courts in which enforcement proceedings were pending. It remains that domicile and/or presence of assets will be the most likely justification for the court exercising this particular jurisdiction.

Tasarruff Mevduati Sigorta Fonu v (1) Yahya Murat Demirel (2) Merrill Lynch International Bank Limited [2006] EWHC 3354, affirmed on appeal [2007] EWCA Civ 79
26 July 2007

A case involving Edward Cohen, Head of Chambers. The presence of assets in the jurisdiction was not a precondition of the court's exercise of the jurisdiction under Civil Procedure Rule 6.20(9) (the Rule allowing the court to grant permission to serve a claim form out of the jurisdiction in order to enforce a judgment).

The Facts

The Claimant and respondent was a Turkish public entity with authority to restructure and administer banks whose banking licences had been revoked, usually as a result of insolvency. The respondent had been granted permission to serve proceedings on the applicant out of the jurisdiction in order to enforce three

judgments obtained by it against the applicant in civil actions in Turkey. The judgments arose out of the collapse of three banks, one of which was owned by a group of companies controlled by the applicant and First Defendant.

The applicant applied pursuant to CPR Part 11 to set aside the permission, to set aside the claim form and for a declaration that the court had no jurisdiction or should decline to exercise any that it had. The applicant relied on the fact that there was no evidence that he had any assets in the jurisdiction (as confirmed by his bank, the second Defendant, who had been joined solely to provide information), that he was a Turkish resident and had never lived in the UK, that it was inexpedient for the court to grant interim relief in England in support of Turkish judgments, that the respondent had failed to show England to be clearly the proper place to bring the claim, and that the respondent was in effect seeking to enforce a public law or laws of Turkey in the English court, which was impermissible.

The Decision

Lawrence Collins J, with whom the Court of Appeal agreed, held that the presence of assets in the jurisdiction was not a precondition to the exercise of the jurisdiction under CPR 6.20(9). It was notable that applicants seeking registration of judgments under CPR 74 did not need to show the presence of assets in the jurisdiction; it would be odd if claimants under CPR 6.20(9) were in a worse position.

As to the use of the proceedings to enforce foreign public law, it was true that

Rule 3 of Dicey, Morris & Collins on the Conflict of Laws (2006) stated “English courts have no jurisdiction to entertain an action: . . . for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign state.” (para 5R-019). However this was a point going to justiciability or admissibility of the claim rather than a rule as to jurisdiction. As a result, on an application to set aside, it was not necessary for the respondent to show a good arguable case on the merits, but merely a real prospect of succeeding on the claim.

Further, rule 3 was a rule aimed at preventing the exercise of foreign sovereign authority in the English courts. In this case the application to enforce judgment was not in fact the assertion of a sovereign right but was simply part of the process of enforcing a claim that had been a private law claim in the Turkish civil courts.

However the application was granted in part; the Freezing Injunctions originally made were set aside on the ground that disclosure had been made, there were no assets in England and the effectiveness of the injunctions against foreign assets was doubtful.

Fiona Trust Holdings Corporation & Others v Yuri Privalov & Others [2007] EWHC 121

21 May 2007

Where the Court was satisfied that there was a ‘good arguable case’ in relation to each of the additional claims the Claimants sought leave to add, this justified the grant of further freezing injunctions. This was so even though

the application had been made inter partes and some months after the allegations had first been raised.

The Facts

Proceedings had been commenced involving allegations of conspiracy to defraud the Claimants of substantial sums of money. A freezing injunction had previously been granted in relation to the original claims. An application was subsequently made by the Claimants for leave to add further claims as well as the necessary additional parties. The Claimants also sought freezing injunctions in respect of the new claims.

The Decision

In considering the two applications Steel J reiterated that the standard of proof for the purpose of amendment required the applicant to show that there was 'a serious issue to be tried'. In order to obtain a freezing injunction however a higher threshold existed whereby the applicant must demonstrate that in considering the evidence as a whole, he had 'a good arguable case'.

In determining whether there was any risk of dissipation, given that the applications for further freezing injunctions had been made months after the first allegations had been raised, Steel J emphasised that the rationale behind the freezing injunction was not the risk of dissipation per se; rather, it was the risk that a judgment in favour of the Claimants would remain unsatisfied either due to dissipation, secretion or dispersal.

The Court was satisfied that there was a good arguable case in respect of each of the new claims. Although the delay was a material consideration, it was held that the earlier freezing orders did not provide the Claimant with sufficient security for the additional claims. The applications to amend and to respectively grant the further freezing injunctions were justified.

The Applications were granted.

Fourie v Le Roux & Others [2007] 1 WLR 320 / [2007] UKHL 1
24 January 2007

In the strict sense, the court had jurisdiction to grant a freezing injunction in circumstances where proceedings had not yet been instituted. However, in the absence of any formulation of a case for substantive relief, it was highly likely the grant of such an injunction would be open to successful challenge in the future.

The Facts

This was an appeal to the House of Lords by the Appellant liquidator against the ruling of the Court of Appeal: The latter court upheld a deputy judge's decision to set aside a freezing injunction made against the Respondents and to award costs on an indemnity basis [(2006) 2 BCLC 531].

In allowing the Respondents' application to discharge the injunction, the deputy judge had concluded that where an applicant had no intention of issuing proceedings either immediately or (pursuant to an undertaking) within a short

period, the court did not have jurisdiction to grant a freezing injunction.

The House of Lords' decision

The House of Lords had two issues to consider, namely:

- (1) Whether the judge had been correct to initially grant the freezing injunction; and
 - (2) Whether the deputy judge had been right to order the Appellant to pay costs on the indemnity basis.
- (1) In the leading judgment, Lord Scott of Foscote highlighted the changing nature of the practice surrounding the grant of injunctions since the decision in *The Siskina* [1977] 3 All ER 803, both in light of judicial precedent and rules of court. As a result of section 25 of the Civil Jurisdiction and Judgments Act 1982² (as extended by the Civil Jurisdiction and Judgments Act 1982

2 (1) The High Court in England and Wales or Northern Ireland shall have power to grant interim relief where--

(a) proceedings have been or are to be commenced in a [Brussels or Lugano Contracting State] [or a Regulation State] other than the United Kingdom or in a part of the United Kingdom other than that in which the High Court in question exercises jurisdiction; and
[(b) they are or will be proceedings whose subject-matter is within the scope of the Regulation as determined by Article 1 of the Regulation (whether or not the Regulation has effect in relation to the proceedings)].

(2) On an application for any interim relief under subsection (1) the court may refuse to grant that relief if, in the opinion of the court, the fact that the court has no jurisdiction apart from this section

(Interim Relief Order 1997)³ the High Court was now able to 'grant interim relief' where 'proceedings have been or are to be commenced' in a foreign state. Although an interim injunction is intended to be of temporary duration

in relation to the subject-matter of the proceedings in question makes it inexpedient for the court to grant it.

- (3) Her Majesty may by Order in Council extend the power to grant interim relief conferred by subsection (1) so as to make it exercisable in relation to proceedings of any of the following descriptions, namely--
 - (a) proceedings commenced or to be commenced otherwise than in a [Brussels or Lugano Contracting State] [or Regulation State];
 - [(b) proceedings whose subject-matter is not within the scope of the Regulation as determined by Article 1 of the Regulation;]
 - (c)
- (4) An Order in Council under subsection (3)--
 - (a) may confer power to grant only specified descriptions of interim relief;
 - (b) may make different provision for different classes of proceedings, for proceedings pending in different countries or courts outside the United Kingdom or in different parts of the United Kingdom, and for other different circumstances; and
 - (c) may impose conditions or restrictions on the exercise of any power conferred by the Order.
- (5)
- (6) Any Order in Council under subsection (3) shall be subject to annulment in pursuance of a resolution of either House of Parliament.
- (7) In this section "interim relief", in relation to the High Court in England and Wales or Northern Ireland, means interim relief of any kind which that court has power to grant in proceedings relating to matters within its jurisdiction, other than--
 - (a) a warrant for the arrest of property; or
 - (b) provision for obtaining evidence.

3 SI 1997/302

and is dependent upon the institution of proceedings, it takes immediate effect; if no such steps are taken, then the injunction may simply lapse or be the subject of a discharge application. As such, the court concluded that the judge had had jurisdiction to grant the injunction in the strict sense.

The underlying issue however was whether the judge ought to have granted the injunction given the factual context of the present case. A freezing injunction is a draconian measure and strict rules apply to ensure the defendant does not suffer any injustice. Lord Scott of Foscote stated that he found it *'difficult to visualise a case where the grant of a freezing order, made without notice, could be said to be properly made in the absence of any formulation of the case for substantive relief that the applicant for the order intended to institute'*⁴. As not even a draft claim form had been prepared by the Appellant, nor had any directions been given regarding the institution of proceedings, no protection had been put in place for the Respondents. In such circumstances, a challenge to the propriety of the freezing injunction was entitled to succeed and the deputy judge's decision to discharge the freezing injunction was therefore upheld.

- (2) Although the procedural deficiencies in the application for the freezing injunction may not have warranted indemnity costs, the Woolf reforms had ensured greater flexibility in the award of costs. This was a matter for the first instance judge, whereupon the Court of Appeal could correct any

obvious errors. As the Court of Appeal had confirmed the deputy judge's decision, the House of Lords would not interfere.

The Appeal was dismissed.

Apex Frozen Foods Ltd (in Liquidation) v (1) Abdul Ali (2) Foods (London) Ltd (3) Robert Derek Smailes [2007] EWHC 469
9 March 2007

Where a freezing injunction obtained in the absence of full and frank disclosure was subsequently discharged, the liquidator of the applicant company was deemed to be personally liable under an undertaking, even though he was innocent of any personal failure.

The Facts

A freezing injunction had been granted on the condition that the cross-undertaking was given by the liquidator of the applicant company ("the Company"). The freezing injunction was subsequently discharged by Warren J on the basis that, amongst other reasons, there had been instances of non-disclosure of material facts [*Apex Frozen Foods Ltd (in Liquidation) v Ali and others* (2006) EWHC 1639 (Ch)]. The Second Respondent applied for an order that the liquidator pay the costs occasioned by the initial grant of the freezing injunction together with the costs of the successful application to discharge the same.

4 Paragraph [35]

The Decision

Warren J stated that the starting point for determining the liquidator's potential liability was the construction of the undertaking. This was to be considered in light of the background and general purpose of the undertaking; namely, to ensure a defendant was compensated for any loss incurred if it was subsequently established that the injunction should never have been granted.

Although the liquidator may have been innocent of any personal conscious failure, this should not absolve him from liability. Otherwise the Court would simply be producing the precise injustice which the undertaking was designed to protect.

Warren J concluded that the Second Respondent had suffered loss as a result of the freezing injunction and was therefore entitled to recover its costs occasioned by the order as recoverable damages on the standard basis [c.f. *Dadourian Group International Inc v Simms* (2007) EWHC 454 (Ch)]

The Application was successful.

SmithKline Beecham plc and others v Apotex Europe Ltd and others **[2006] EWCA Civ 658**

23 May 2006

A cross-undertaking in damages that was given in support of an interim injunction was given to compensate parties identified in the undertaking. There was no scope for a non-party to proceedings to claim in restitution

under a cross-undertaking, nor for a party to proceedings to claim damages in respect of losses sustained by a third party.

The Facts

In patent proceedings an interim injunction had been made that the appellant companies should not deal in any pharmaceutical preparation similar to the respondents', and in return the respondents gave a cross-undertaking in damages.

At trial, the patent was found valid but not infringed, and the appellants accordingly sought damages on the cross undertaking. At this point the Canadian manufacturers of the appellants' products sought to be joined as parties to the action in order to claim on the cross-undertaking. The appellants argued that the cross-undertakings could also be enforced by or for the benefit of the Canadian manufacturers, and applied under the slip rule to amend the cross-undertakings. They further argued that they would have made profits if the interim injunction had not been made, and these lost profits should be compensated by the respondents under principles of restitution, as they had used the process of litigation to gain an advantage and then lost on appeal.

The judge rejected the applications under the slip rule and for joinder. He further held that that the Canadian manufacturers were not entitled to recover in restitution the losses they had sustained, and that the appellants were not entitled to claim the losses of the Canadian manufacturers as third party losses under the cross-undertaking. These claims would be struck out under CPR Rule 24.

The Decision

The Court of Appeal held that the judge had been right to strike out the restitution claim. There was no basis for a third party to claim in restitution for benefits that had been gained by a claimant who had obtained an injunction but lost at trial. The loss claimed by the appellants was not an identifiable gain by the respondents, but was the loss of an opportunity to compete in the market. Further, a cross-undertaking was given to the court to compensate parties identified in it. It was not given to the parties, and gave rise to no notional contract between the parties. A party identified in a cross-undertaking as one whom the injunctor would compensate could claim compensation for having been prevented from doing the restrained act(s) himself, but he could not also claim on behalf of others who had suffered as a result of the injunction. Indeed, the Court of Appeal held that even if there had been a contract between the parties, the respondents had not promised to pay the appellants for losses suffered by third parties, but only to abide by any order of the court requiring it to compensate the appellants for their own losses.

HMRC v Egleton [2006] EWHC 2313 (Ch)

19th September 2006

The court's jurisdiction to make a freezing order in respect of a third party (against whom the Claimant seeking the order had no direct cause of action) was not limited to cases in which either (a) the third party was holding property which was beneficially owned by Defendant; or (b) the Defendant's

liability to the Claimant caused a separate liability to arise between the Defendant and the third party. However, this extended jurisdiction should only be exercised in the most exceptional cases.

The Facts

HMRC brought a winding up petition against C&E ("the Company"), claiming that the Company owned substantial sums in respect of VAT. HMRC alleged that the Company's debts arose as a result of a VAT fraud perpetrated by certain individuals and companies who were closely associated with the Company ("the Third Parties"). On the basis of this allegation of fraud, HMRC obtained freezing orders against the Third Parties.

The Third Parties sought to have the freezing orders set aside on the grounds that (a) the court lacked jurisdiction to make the orders; and (b) it ought not to have made them in exercise of its discretion (assuming that the discretion were held to exist). The Third Parties' principal contention was that HMRC had no claim against them, and (even in the event that the Company were wound up and a liquidator appointed) would never be capable of pursuing any such claim.

The Decision

Briggs J concluded that the freezing orders ought to be maintained. The key steps in his reasoning were as follows:

(1) The court had jurisdiction to make the orders in the first place. He rejected

the jurisdictional limitations set out in *Private International Bank v Chabra* [1992] 1 WLR 231⁵ and suggested by Aikens J in *C Inc v L* [2001] 2 Lloyds Rep 459⁶. The difficulty is that the judge did not suggest any alternative limitations. The consequence of this approach would appear to be that there are no jurisdictional limits on the courts' power to grant a freezing order against third parties.

- (2) In relation to discretion, the judge stated that he would not have made the orders had the application come before him originally. This was because the appropriate course in such a case would have been for HMRC to secure the appointment of a provisional liquidator who would then be able to seek freezing orders in respect of any person against whom the Company might have a claim (including the Third Parties).
- (3) Despite this, the judge allowed the freezing orders to continue. His reasoning was that the hearing of the winding up petition relating to the Company was imminent. If the freezing orders were lifted, HMRC would appoint a provisional liquidator at very short notice and for a very short time. This would lead to a duplication of cost and would not confer any real benefit on the Third Parties.

5 That an order could only be made where the third party was holding assets beneficially owned by the Defendant

6 That an order could only be made where the Defendant's liability to the Claimant caused a liability to arise between the Defendant and the third party.

- (4) The judge did underline that his conclusion was a most exceptional one, and that HMRC should almost invariably proceed by appointing a provisional liquidator in such cases.

***Elektrim SA v Vivendi Universal SA and Others* [2007] EWHC 571 20 March 2007**

In order for the Court to consider granting an injunction to restrain an arbitration, it must be satisfied not only that the prosecution of the arbitration was such that the jurisdiction under section 37 of the SCA 1981 could be invoked, but also that the grant of the injunction was consistent with the Arbitration Act 1996. Moreover, the test to be applied for an 'anti-arbitration' injunction is different to that applied for anti-suit injunctions.

The Facts

The parties had previously been involved in extensive litigation and arbitration. Two arbitrations, each commenced by the Respondent against the Claimant, are pertinent to the present application.

- (a) In accordance with the terms of an investment agreement entered into between the parties an arbitration had been commenced in the London Court of International Arbitration ("LCIA") in 2003 ("the LCIA arbitration").

- (b) A further arbitration had been commenced in Geneva in 2006, in purported reliance upon a Settlement Agreement, which the Respondent asserted was binding on the parties (albeit this was disputed by the Claimant and was also unsigned by the Claimant). The Settlement Agreement provided for all existing proceedings to be settled (“the Geneva arbitration”).

On three occasions the Claimant unsuccessfully sought a stay of the LCIA arbitration from the LCIA arbitrators, pending the outcome of the Geneva arbitration. The Claimant therefore applied for a final ‘anti-arbitration’ injunction.

The Decision

The Arbitration Act (“1996 Act”) does not contain any provision whereby the Court can grant an injunction to restrain a party from commencing arbitration. However, although Aiken J acknowledged that section 37 of the Supreme Court Act 1981⁷ could be relied upon to restrain arbitrations, in order to grant such an injunction, the Court had to be satisfied that: (1) the prosecution of the LCIA arbitration was an act which entitled the Court to invoke the jurisdiction under section 37; and (2) the grant of the injunction would be consistent with the statutory scheme of the 1996 Act.

⁷ Section 37

- (1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases where it appears to the court to be just and convenient to do so.
- (2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just.

As regards (1): By analogy with the position regarding the restraint of foreign proceedings, Aiken J considered that the ‘anti-arbitration’ injunction could be granted on two bases: (i) where one of the applicant’s legal or equitable rights had been infringed or threatened by the continuation of LCIA arbitration; or (ii) where the continuation would be vexatious, oppressive or unconscionable.

The Court noted that the investment agreement contained a clause whereby the parties agreed to submit disputes to LCAI. Moreover, as the two arbitrations dealt with entirely different matters, the continuation could not be said to be vexatious or oppressive. Aiken J therefore concluded that the Claimant had been unable to demonstrate that either of the bases applied.

As regards (2): The scope for the Court to intervene by way of injunction, before an arbitration award is made, is limited. Aiken J concluded that even if the Claimant had overcome the difficulties outlined above in (1), the Court would not have intervened. In particular, the LCAI had refused on three occasions to stay the LCAI arbitration and the 1996 Act did not contain any power to review or overrule those procedural decisions. To try and rely on section 37 to circumvent this, ‘**would undermine the principles of the 1996 Act and would grant the court a general supervisory power which it has never had**’.⁸

Aiken J also considered the case of *Intermet FZCO v Ansol Limited* [2007] EWHC 226 (Comm); he disagreed with the decision of Gloster J insofar as the latter had suggested that the test to be applied was the same for both ‘anti-suit’ and ‘anti-arbitration’ injunctions. Aiken J stated that Gloster J had failed to consider the

⁸ Paragraph [75]

relationship between section 37 and the provisions of the 1996 Act, even though the arbitration in *Intermet FZCO* was not subject to the 1996 Act.

Judgment for the Respondent.

Comment

Aiken J sought to narrow the Court's power to invoke section 37 and grant an injunction restraining arbitration by relying on the limits of the 1996 Act. It should be noted that in distinguishing the decision in *Intermet FZCO* Aiken J also seemed to be suggesting that the same principles should be applied, irrespective of whether or not the arbitration was governed by the 1996 Act.

Vertex Data Science Ltd v Powergen Retail Ltd [2006] EWHC 1340 *9 June 2006*

The court considered the effect of an arbitration clause which was expressed to deprive the arbitrator of power to grant injunctions, order specific performance and to make declarations. Such a clause was held not to prevent the contracting parties seeking these remedies in court actions.

The Facts

The parties had entered a contract for the applicant to supply Powergen with outsourcing services including the management of customer accounts, enquiries and billing. The contract was due to last from April 2005 to May 2012, with a break

clause after four years. The performance of the contract was held to require extensive mutual cooperation between the parties. However the relationship worsened over time. Powergen served a notice of termination on the applicant on the basis of failure to perform its obligations under the agreement. The applicant disputed that Powergen were entitled to terminate the contract and sought an injunction to prevent Powergen acting on its notice. Initially an interim injunction was sought, and a permanent injunction was then to be claimed at trial.

The contract contained dispute resolution clauses that included provisions for arbitration. By section 48(5) of the Arbitration Act 1996 an arbitration tribunal is empowered to grant injunctions, order specific performance and to make declarations. However these powers were excluded from any arbitrator appointed under the parties' contract. Further the contract provided that neither party should take legal action against the other in relation to any matter arising under or in connection with the contract, but should refer such matter to expert determination or arbitration, save that a party was not prevented from applying to the court to seek relief in a situation of a genuine dispute which was incapable of being referred to another form of resolution. Powergen argued that these provisions prevented the applicant seeking permanent injunctive relief. The applicant disagreed, arguing that the dispute was not capable of being referred to dispute resolution under the contract since the relief sought by the applicant was expressly excluded from such resolution proceedings.

There was also disagreement over whether an injunction would be ordered at trial given the extent to which the parties had fallen out and could be expected to work together in the future.

The Decision

Tomlinson J rejected an argument by the applicant that at the stage of the interim injunction application the court need only be satisfied of a triable case for a final injunction before granting the interim relief sought. Tomlinson J held that he should decide the proper construction of the arbitration clause at this hearing. If the effect of the dispute resolution clause was that the applicant had agreed not to apply to the court for injunctive relief, the court would be wrong to grant such relief on the basis that the contrary proposition is arguable and must be decided at trial. Such a decision would irretrievably deprive Powergen of the benefit of an important and substantial part of the bargain which it had struck. Tomlinson J stated that if he were satisfied that the parties had agreed not to resort to the court for permanent injunctive relief in such circumstances as appeared in this case, the court ought not to grant an interim injunction.

On a true construction of the relevant clause however, the parties had not agreed that the remedies listed in section 48(5) of the Arbitration Act 1996 should be wholly unavailable to them. Rather the clause expressly reserved to the court powers which were denied to the arbitration tribunal. This was done by allowing parties to apply to the court in a situation of genuine dispute incapable of being referred to arbitration.

In the circumstances there was no realistic prospect of the applicant obtaining an interim injunction at trial given the breakdown in relations and the need for the parties to co-operate if the contract were to function. Any injunction against terminating the contract would be an injunction compelling the parties to work

together. For a court to enforce the terms of a contract in this way there would have to be precision as to what was expected by way of co-operation, and what was required of Powergen in order to avoid hindering the applicant in his performance of the outsourcing services to be supplied. There was in fact a lack of certainty in the contract terms which would be fatal to an application for a court order enforcing the terms of the contract. In *Co-Operative Insurance Society v Argyll Stores (Holdings) Ltd* [1997] 2 WLR 898 Lord Hoffman suggested that the question of certainty as to terms had to be decided on the assumption that the court might have to enforce the order according to its terms. There was insufficient certainty here, and the application for an injunction to restrain action on Powergen's notice of termination was refused.

Kallang Shipping SA v AXA Assurances Senegal [2006] EWHC 2825 7 November 2006

An anti-suit injunction would be maintained where the evidence showed that there had been attempts to frustrate a London arbitration clause by use of arrest proceedings in Senegal in order to require resolution of the claim there, rather than in London in accordance with the terms of the contract between the parties.

The Facts

The respondent was the owner of a vessel known as the Kallang. The applicants included the ultimate receiver of cargo loaded on board the vessel and the

underwriter of that cargo. A dispute had arisen between the parties on the vessel's arrival in Senegal relating to alleged missing items of cargo. The contract between the parties contained an English law and London arbitration clause. Notwithstanding this, the applicants had insisted on the respondent providing a bank guarantee for the disputed amount and had failed to respond to an alternative offer of security on P & I Club terms, subject to English law and London arbitration being agreed. The applicants obtained a court order in Senegal entitling them to arrest the vessel as security for the disputed sum. They then insisted on the provision of a bank guarantee subject to the exclusive jurisdiction of Senegal, not only for the resolution of any claim under the guarantee, but also for the determination of the underlying dispute relating to the cargo.

The respondent obtained a without notice anti-suit injunction in London on the grounds that the applicants had in effect invoked the jurisdiction of the Senegalese court in order to obtain resolution of the underlying dispute, contrary to the London arbitration clause.

The applicants applied to set the injunction aside.

The decision

Gloster J held that the injunction should not be set aside. The evidence showed to the standard of a good arguable case that the applicants were attempting to use the security proceedings in Senegal, and the requirements of a bank guarantee issued by a Senegal bank, as a means of avoiding or frustrating the London arbitration proceedings. While there was no objection to the obtaining of

an order from the Senegal court for the purpose of security, and the English court could not have restrained the applicants from applying for the arrest of the vessel in order to obtain security for the claim in Senegal, it would have restrained the applicants by way of personal injunction:

- (i) from insisting before the Senegal court on a form of security to be provided by the respondent, in order to allow the arrest to be lifted, that required resolution of the cargo claim in Senegal, whether directly or indirectly;
- (ii) from putting forward submissions to the Senegal court that the only reasonable security which it should accept to prevent release of the vessel was a bank guarantee which required resolution of the cargo dispute in, and subject to, Senegalese jurisdiction; and
- (iii) from contending before the Senegal court that only a Senegalese bank guarantee was acceptable security, in circumstances where the respondent's P & I Club had offered its letter of undertaking.

The applicants were thus bound by the letter and the spirit of the London arbitration clause they had signed up to.

Customs and Excise v Barclays Bank Plc [2006] UKHL 28

21st June 2006

The fact that a bank has been notified of a freezing order affecting monies held in an account belonging one of its customers does not by itself impose

on the bank a common law duty (owed to the party who obtained the relevant order) to take reasonable care to ensure that it does not permit payments to be made out of the affected accounts

The Facts

Customs and Excise brought proceedings alleging that two companies (“the Companies”) owed substantial VAT. In support of these proceedings, Customs and Excise obtained freezing orders against the Companies. These orders were served on the Companies’ Bank (“the Bank”). Each of the Companies had an account with the Bank with a substantial credit balance. After having received copies of the freezing order (and in breach of the express terms of that order) the Bank continued to authorise substantial payments out of the Companies’ accounts. As a result, Customs and Excise was unable to enforce the judgment it eventually obtained against the Companies to the extent of the unlawful payments described above. It therefore sued the bank in negligence in respect of its failure to comply with the terms of the freezing order.

The Decision

The Bank did not owe Customs and Excise any duty to take reasonable care to ensure that it complied with the terms of the freezing order. Each of their lordships speeches emphasised slightly different reasons for this conclusion. However, the reasoning of the House of Lords is best encapsulated by the following six propositions put forward by Lord Bingham (at paragraphs 17-23 of his speech):

- (1) The freezing order itself stated that non-compliance with its terms would amount to a contempt of court. It did not suggest that any other remedy would be available. Lord Hoffmann developed this point further by pointing out that case was analogous to one where a claimant seeks to found the defendant’s duty of care upon the negligent performance of a statutory duty. No such duty would be held to exist unless the relevant statute (on its true construction) actually envisaged the availability of a civil remedy
- (2) That (as they were opposing parties in litigation) it was clear that the Companies did not owe Customs and Excise any common law duty of care in negligence in relation to compliance with the terms of the order. In those circumstances, it would be odd if such a duty were to be imposed upon the Bank.
- (3) Customs and Excise could not point to any previous example where the existence of a court order had, without more, been sufficient to generate a common law duty of care in negligence.
- (4) There was no Commonwealth jurisprudence which supported the existence of such a duty.
- (5) The two key authorities relied upon by Customs and Excise (*Al-Kandari v JR Brown & Co* [1988] QB 665 and *Dean v Allin & Watts* [2001] EWCA Civ 758) were not at all analogous to the present case.

- (6) It would be unjust and unreasonable to impose upon the Bank a duty arising out of an order which it had no opportunity to resist. On a related point, all of their Lordships agreed that a crucial factor in the decision was that the freezing order was imposed on the Bank from above, and the duty to comply with it had no connection with any voluntary act on the part of the Bank. In particular, this led to the conclusion that Bank could not be said to have voluntarily assumed responsibility towards Customs and Excise.

K Ltd v Natwest [2006] EWCA Civ 1039

19th July 2006

Under s.328 of the Proceeds of Crime Act 2002, a bank must refuse to transfer funds on the instructions of its customer if it suspects that the transfer will facilitate “the acquisition, retention use or control of criminal property”. In subsequent proceedings by the customer, a letter from the bank simply stating that it held the relevant suspicions was sufficient to satisfy the court that the section applied.

The Facts

Section 328 of the Proceeds of Crime Act 2002 (“the 2002 Act”) makes it an offence for a person to enter into or become concerned in an arrangement which he knows or suspects facilitates the acquisition, retention use or control of criminal property by or on behalf of another person. The principal exception is that no offence will have been committed if the person makes an authorised disclosure and has “appropriate consent” (defined in s.335 of the 2002 Act)

K Ltd (“the Company”) had an account with Natwest (“the Bank”). The Bank refused to comply with an instruction from the Company to transfer funds to a third party. This refusal was the result of the Bank having suspicions such that it formed the view that to have complied with the instruction would have been an offence under s.328. The Company brought proceedings seeking an injunction to compel the Bank to complete the relevant transfer. In response, the Bank (through its solicitors) sent a letter (“the Letter”) to the Company and the Court that it had made an authorised disclosure (under s.328 of the 2002 Act) in relation to the Company’s request that funds be transferred. It was accepted that this letter effectively amounted to a bare assertion by the Bank that it had the necessary suspicion for s.328 to be engaged.

The key question was whether such a bare assertion of suspicion on the part of the Bank was sufficient to defeat the Company’s claim for an injunction.

The Decision

The court found that the Letter was sufficient to demonstrate that the Bank had the relevant suspicions for the purposes of s.328 of the 2002 Act, and that it was therefore entirely justified in refusing to comply with the Company’s instruction. In particular, Longmore LJ (with whom Laws and Ward LJ agreed) made the following observations:

- (1) Had the Bank followed the Company’s instructions in circumstances where it did hold the requisite suspicions, it would have been guilty of a criminal offence. Reliance upon the contractual obligations which it owed to the Company would have been no defence.

- (2) Section 33 of the 2002 Act (which sets out various rules relating to “tipping-off”) limited the bank to disclosing the fact that it held the relevant suspicions through its legal advisers and in the specific context of legal proceedings. Any other form of disclosure might potentially have exposed the Bank to criminal liability.
- (3) As such, the statutory regime effectively prevented the Bank’s suspicions being evidenced before the court in a manner which would have allowed the Company to conduct any meaningful cross-examination concerning the basis of those suspicions.
- (4) In any event, the existence of a suspicion was a matter of subjective fact. An employee of the bank either held the relevant suspicion or he did not. There was no need for that suspicion to be founded upon objective facts. As such, the ability to cross examine the Bank’s employees as to the reasonableness or basis of their suspicions was valueless.

In all the circumstances, a bare assertion by the Bank that it held suspicions capable of engaging s.328 was therefore sufficient to justify (and indeed require) it to refuse to comply with the Company’s instruction.

Lexi Holdings v Luqman & Ors LTL 7/8/07 (Extempore)

Where a Defendant’s evidence as to his assets was held to be incredible, it was appropriate for the court to order that, unless he fully complied with all

outstanding disclosure orders, his defence was to be struck out and he would be debarred from defending the proceedings

The Facts

The Claimant obtained freezing orders against the Defendant in the course of proceedings in which it was alleged that the Defendant has misappropriated company funds. The freezing orders imposed on the Defendant a duty to disclose his assets.

The judge held that he should, in deciding whether the Defendant’s disclosure of his assets was incomplete, apply a higher standard of proof than merely the balance of probabilities. He would need to be satisfied that the Defendant’s evidence was plainly incredible. The judge concluded that this higher burden was not discharged and so declined to make the unless order sought by the Claimant. He ordered that the cross examination of the Defendant in relation to his assets be postponed.

The Decision

The Court of Appeal concluded that the Defendant’s evidence was incredible, and therefore that an unless order ought to be made. Further, it was found that the judge’s order postponing cross examination of the Defendant was incorrectly made. If the Defendant’s evidence was incredible, then there ought not to be any cross examination at all (as, by definition, it would be unlikely to serve any useful purpose). If his evidence was not incredible, then the cross examination ought not to be postponed.

(N.B. a full text of the above decision is not yet available. This summary is based on the relevant Lawtel case-note).

**Lord Browne of Madingley v Associated Newspapers Ltd [2007]
EWHC Civ 295
3 April 2007**

Where the Court decides not to grant an injunction restraining publication of information, the matters in question should not then be 'published' in the judgment. Rather, the Court should adhere to the principle that neither publication by a defendant or a claimant's remedy in damages should be pre-empted by the Court.

The Facts

A wide-ranging injunction had been granted by Underhill J to restrain the Respondent Newspaper from publishing details about the personal relationship between the Appellant and his ex-partner, together with confidential information obtained by the ex-partner during the relationship.

Although the injunction was subsequently continued by Eady J in relation to two of five categories of information, the Appellant appealed against the decision to exclude the remaining three from the ambit of the injunction. At the hearing before Eady J it had also transpired that when applying for the injunction, the Appellant had deliberately told a lie about the circumstances in which he had originally met his ex-partner. The judgment of Eady J referred to the subject

matter of the lie. The Appellant submitted that the judge had been wrong to do so and the Respondent should be restrained from publishing such details.

The Decision

Two issues were to be considered by the Court of Appeal:

- (1) Whether Eady J had correctly directed himself as regards each category of information.
 - (2) Whether Eady J had erred in refusing to excise the subject matter of the lie from his judgment.
- (1) The three remaining categories of information were as follows:
- (b) An alleged misuse of BP's resources (of whom the Appellant was Chairman) to assist the ex-partner.
 - (c) The bare fact of the relationship between the parties.
 - (d) An alleged breach of confidentiality by the Claimant in discussing confidential matters with his ex-partner.

In reaching its decision in respect of each category, the Court of Appeal adopted the following approach: It primarily considered whether Article 8 of the European Convention of Human Rights ("ECHR") should be engaged, and if so, whether Article 10 should be.⁹ The critical issue then was whether the Appellant had

⁹ 'Right to respect for private and family life' Article 8(1): Everyone has the right to respect for

demonstrated that he was likely to establish at trial that publication should not be allowed as per section 12(3) of the Human Rights Act 1998.¹⁰

The Court of Appeal concluded that Eady J had correctly directed himself when determining whether the Appellant was likely to succeed at trial, as regards each of the three remaining categories. The decision by Eady J not to uphold such a wide-ranging injunction was therefore upheld.

- (2) Regarding the lie told by the Appellant: although this had been told deliberately and was taken into account by Eady J when assessing the Appellant's credibility, it was not a reason in itself for refusing to grant the injunctive relief requested.

In deciding whether there should have been detailed reference in Eady J's judgment to the true circumstances in which the parties met, the Court of Appeal considered the case of *Cream Holdings Limited v Banerjee* [2005] 1 AC 253 which addressed this issue (an analysis of this case appears in the *Winter 2004 Injunctions Bulletin*). In the leading judgment, Lord Nichols of Birkenhead indicated that even where an injunction has been discharged, it would not be right for the court to make public the information in question; it was a matter for the particular newspaper to decide

his private and family life, his home and his correspondence.

'Freedom of expression' Article 10(1): Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

¹⁰ Section 12(3): No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

whether to publish the information or not. The court should not pre-empt publication by a defendant or undermine any remedy in damages that a claimant may ultimately have against the defendant, in respect of matters subsequently published by the defendant.

Eady J had therefore erred in failing to excise the details from the judgment. However, it should be noted that the Court of Appeal refused to grant an injunction in respect of the details relevant to the lie.

The Appeal was allowed in part.

A petition by the Appellant to the House of Lords for permission to appeal was refused.

Walbrook Trustees (IOM) Ltd & Island Nominees Ltd v (1) Liberty Centre Trustee No. 1 Ltd (2) Liberty Centre Trustee (No. 2) Ltd
[2007] EWHC 1130

14 May 2007

An interim injunction was granted where retail tenants displayed in their shop windows lingerie and "sexual paraphernalia" that was shown to be found offensive to the public and customers.

The Facts

The claimants were the tenants of shops in a shopping centre owned by the landlords. Their lease included standard covenants prohibiting the premises

being used for an offensive trade or illegal or immoral purpose that was a nuisance and had an effect on neighbouring occupants, and preventing the exhibition of offensive or unsightly signs or advertisements on the windows or exterior of the shops. Before commencing trade, the tenants had begun to place in their shop windows mannequins with provocative lingerie, with whips, manacles and lengths of cable. Protests were received from customers of the shopping centre and the landlords placed hoardings around the premises. Both parties applied for injunctive relief, for the removal of hoardings and the prevention of breaches of the covenants respectively. The tenants argued, inter alia, that other retail tenants also had lingerie displays in the shopping centre.

The Decision

Mann J found that the landlords had established an arguable case (i.e. a serious question to be tried) that the display of the claimants was offensive. A similar arguable case existed that a display without trading could be a breach of the covenants in the lease. Mann J rejected the argument that trade carried on nearby with similar displays meant that the tenants' displays were not offensive. Damages were an inadequate remedy for the Claimant, and balancing all the factors it was appropriate to grant an interim injunction until trial. Importantly, the fact that no trading was being carried out by the tenants meant that there was found to be no loss to them by the grant of the injunction.

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Dawn McCambley specialises in commercial/chancery litigation and advisory work, with particular emphasis on company and insolvency law. She regularly appears on commercial matters in the High Court and County Courts. Regarding insolvency matters, Dawn has a wide range of experience of both corporate and personal insolvency and she undertakes work for private individuals and office holders. Dawn has also recently been appointed Junior Counsel to the BERR (formerly the DTI) for Directors' Disqualification Directions hearings. Together with other members of Chambers' Insolvency team Dawn contributes monthly case law updates to Corporate Rescue and Insolvency, published by Lexis Nexis. Dawn was awarded first place in the Lincoln's Inn Gluckstein Advocacy Competition and was the winner of the ICSL Mooting Competition. She has also been awarded the Denning, Sunley and Hardwicke Scholarships from Lincoln's Inn.



Nick Parfitt's practice is a mixture of commercial litigation and advisory work, particularly fraud, media & entertainment and sports law. His commercial experience encompasses sale of goods, conflicts, software and licensing agreements, commercial fraud & asset tracing and contractual & property disputes including music, sport and media. Nick is a member of the FA Premier League disciplinary panel. His cases often include an international dimension, for example injunctions supporting proceedings in other jurisdictions or cases in which



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David Peters has gained a wide experience of commercial law including contractual disputes, commercial fraud, arbitration, conflict of laws, insolvency and professional negligence. He won the 4 Stone Buildings prize for Civil Litigation in 2005, was awarded a Queen Mother's scholarship by the Middle Temple in 2004 and was elected scholar of Trinity Hall, Cambridge in 2003. He also represented Cambridge University at debating, reaching the 2004 World Debating Championship semi-finals.



Thomas Robinson has a strong commercial / chancery practice with particular emphasis on insolvency, commercial and employment related litigation. Recently he has been involved in reported litigation concerning reservation of title clauses and contesting the use of arrest warrants under the Insolvency Act 1986. His recent six month secondment with a firm in Guernsey has given him first-hand experience of off-shore litigation as well as experience working directly



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Thomas was graded Outstanding in Advocacy during his Bar Vocational Course and was awarded third place in Lincoln's Inn's Gluckstein Advocacy Prize for 2004. In 2005 he spent a legal term as a Judicial Assistant to the Court of Appeal, Civil Division. From June to December 2006 he was seconded to the Commercial Litigation department of AO Hall Advocates in Guernsey, working on trust and banking litigation, shareholder disputes and the enforcement of restrictive covenants.

Thomas is a contributing author to *Asset Recovery: Criminal Confiscation and Civil Recovery* (O.U.P.), has recently contributed to *International Corporate Rescue* (Chase Cambria), and has been published on Complanet, the online resource for compliance professionals. Together with other members of Chambers' Insolvency team he contributes monthly case law updates to *Corporate Rescue and Insolvency*, published by Lexis Nexis. He has also led client seminars on managing litigation and recent commercial case law.

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