Offshore Cases

Bermuda

Supreme Court

Ashley Dawson-Damer and Lyndhurst Limited [2019] (Bda) 8 Civ (6 February 2019)

Supreme Court grants preservation order over trust assets in Bermuda in aid of proceedings in Bahamas

This was an application by Ashley Dawson-Damer ("the Applicant") on 24 September 2018 for an interim injunction preserving assets received by a Bermudian company called Lyndhurst Limited ("the Respondent") in 2006 from a Bahamian company called Grampian Trust Company Limited ("Grampian"). Grampian is the trustee of a Bahamian trust known as the Glenfinnan Settlement ("the Settlement"). The assets are held by the Respondent as a trustee of the Came, Hewish and Emo Settlements ("the Bermuda Trusts").

Background

The Applicant is a discretionary beneficiary of the Settlement, which is governed by the laws of the Bahamas. In 2006 and 2009, the trustee of the Settlement, Grampian, a Bahamian private trust company, made two appointments in the aggregate sum of US$402 million ("the Appointments") - representing approximately 98% of the assets of the Settlement – $290 million of which were appointed onto the Bermuda Trusts of which the Respondent is the trustee.

In March 2015, the Applicant commenced proceedings in the Supreme Court of the Bahamas against Grampian seeking to set aside the Appointments. The Respondent was added as a defendant to the Bahamian proceedings in July 2018. In the Bahamian proceedings, which are ongoing, the Applicant sought *inter alia* (1) declarations that the 2006 Appointments and/or the 2009 Appointment are void, or alternatively voidable; (2) an order setting aside the 2006 Appointments and/or the 2009 Appointment; and (3) an order requiring the re-vesting of assets subject to the 2006 Appointments and/or 2009 Appointment (or the traceable proceeds thereof) to the Settlement. The Respondent elected not to submit to the jurisdiction of the Bahamian courts and refused to participate in the Bahamian proceedings.

In the Bahamian proceedings the Applicant claimed that when exercising its power to make the 2006 Appointments and/or the 2009 Appointment, Grampian failed to exercise its discretion fairly, properly, reasonably or even-handedly. In particular, *inter alia*, the Applicant asserts that Grampian exercised its powers for the ulterior and improper purpose of excluding the Applicant from benefiting from the vast bulk of the trust fund, having determined not to exercise its power to exclude the Applicant from the class of beneficiaries on the grounds that it would be provocative to do so.

The Applicant contended that if she succeeded in a claim in the Bahamian proceedings, the assets representing the traceable proceeds of those Appointments would be held by the Respondent on bare trust for Grampian as trustee of the Settlement. In these circumstances the Applicant sought an undertaking from the Respondent that the Respondent would not dissipate the Assets pending the resolution of the Bahamian proceedings. The parties engaged in lengthy correspondence in relation to the issue of the undertaking by the Respondent. The Respondent confirmed that it had made no distributions to the beneficiaries of the Bermuda Trusts and whilst it had no present intention of making any distributions to the beneficiaries, it did not consider it appropriate to give the undertaking sought. Therefore the Applicant sought a preservation order from the Supreme Court of Bermuda to preserve the Assets pending the resolution of the Bahamian claim.

Outline of the issues between the parties

The Applicant contended that the test for granting injunctive relief in the form of a preservation order where a proprietary claim was advanced was the *American Cyanamid* test (*American Cyanamid -v- Ethicon* [1975] AC 396) but it was not necessary to show that there was a real risk of dissipation of the assets. er.

The Respondent accepted that this was the case where proceedings were pending in Bermuda. However, it contended that as the underlying proceedings were not pending in Bermuda but pending in a foreign jurisdiction the Court should not exercise its statutory jurisdiction to grant a preservation order in aid of the foreign proceedings unless it could be shown that any judgment resulting from the foreign proceedings would be enforceable in Bermuda. The Respondent argued that there was an established body of case law holding that if the foreign judgment would not be enforceable in Bermuda, having regard to Bermudian conflict of law rules relating to the enforcement of foreign judgments, a Bermuda court would not grant the relief sought.

The jurisdiction issue

The court found that its jurisdiction to grant interlocutory relief was to be found in section 19(c) of the Supreme Court Act 1905.

The wording of section 19(c) of the 1905 Act, like its corresponding English provision, was wide and open ended. However, the court accepted that exercise of this jurisdiction, has always been subject to constraints. One such constraint was that the court would not ordinarily make an interlocutory preservation order unless the court had jurisdiction over the underlying cause of action to which the interlocutory injunction relates.

The root case dealing with this constraint was *The Siskina* [1979] AC 210 where Lord Diplock stated the general proposition that an interlocutory injunction could exist in isolation and must be linked to an underlying cause of action:

The basic statement of principle enunciated by Lord Diplock in *The Siskina has been affirmed by the House of Lords in Channel Tunnel Group and Anor -v- Balfour Beatty Ltd and Ors* [1993] AC 334 and by the Privy Council, despite a strong dissent by Lord Nicholls, in *Mercedes-Benz AG -v- Herbert Heinz Horst Leiduck* [1996] AC 284 HK PC. *The Siskina* and *Mercedes-Benz* have been referred to by the Court of Appeal for Bermuda, without any qualification, in *New Skies Satellite BV -v- FG Hemisphere Associates LLC* [2005] Bda LR 59.

In *Black Swan Investments I.S.A. -v- Harvest View & Others* BVIHCV 2009/339, Bannister J of the Eastern Caribbean Supreme Court, following the reasoning of Lord Nicholls in *Mercedes-Benz*, held that there was no logical distinction between the grant of an interlocutory injunction in aid of domestic judgment and a grant in aid of a foreign one, unless the foreign judgment is such that the domestic court declined to enforce it.

The decision and reasoning in *Black Swan* was approved by the Eastern Caribbean Court of Appeal in *Yukos CIS Investments Limited and Anor -v- Yukos Hydrocarbons Investments Limited and Ors* HCVAP 2010/028:

"Although ordinarily an interlocutory injunction is sought in support of a substantive claim before the court to which the relevant application is made, in the present context this requirement had to be met by reference to (a) the substantive claim before the foreign court, and (b) the prospect that the applicant will obtain a foreign judgment which will entitle him to execute a money judgment against or control pursuant to a proprietary judgment, of the local assets sought to be frozen. In the present case the reasons why the jurisdictional (in the broader sense) requirements were not met for exercising the discretion to grant injunctive relief may be summarized as follows. The jurisdiction to grant an interim freezing order is not ordinarily exercised unless it is necessary to do so in aid of either relief, the claimant is likely to obtain from the local court or from a competent foreign court. The relief the appellants are likely to obtain from the Netherlands court will neither entitle them to enforce a money judgment against the respondents' assets nor establish a proprietary claim respect of any such assets."

The Court of Appeal in *Yukos* also held that the reasoning in *Black Swan* was not limited to foreign money judgments but also applied to other foreign judgments, for example, judgments declaring proprietary rights of the parties and consequential orders (see [87] per Redhead JA and [144] per Kawaley JA).

This case was concerned with a preservation order designed to hold the ring pending a judgment in the Bahamian proceedings.

The grant of an interlocutory injunction, in both *Black Swan* and *Yukos*, was premised on the basis that the foreign judgment would be enforceable in the domestic court. In *Black Swan* Bannister J stated that there was no logical distinction between the grant of an injunction in aid of a domestic judgment and a foreign judgment, *"unless the foreign judgment is such that the domestic court would decline to enforce it"*. In *Yukos* Justice of Appeal Kawaley stated that *"establishing justice and convenience will ordinarily require, at a minimum, proof of a good arguable case that the applicant will obtain a judgment which will be enforceable (whether by registration, recognition or otherwise) by the local against the local defendant".*

It was argued by the Applicant that the wording in the majority judgment in *Yukos* suggested some flexibility in relation to the requirement of enforceability of the foreign judgment. In particular it was argued that Kawaley JA's statement that the Court "will ordinarily require" that the foreign judgment will be enforceable in the domestic court "whether by registration, recognition "or otherwise" created some latitude in this respect. However, the Hargun CJ found that it was the ability to enforce the foreign judgment in the domestic court that connected the interlocutory injunction obtained in the domestic court with the underlying cause of action litigated in the foreign court.

Hargun CJ found that, in the circumstances, the enforceability of the foreign judgment was, in his judgment, an essential condition for the grant of an interlocutory injunction in aid of the foreign proceedings.

The Respondent argued, correctly in the court's view, that applying the traditional rules relating to enforcement of foreign judgments, any judgment given by the Bahamian courts in relation to proceedings pending before it would not be enforceable against the Respondent in Bermuda for lack of jurisdiction (in the international sense) over the Respondent.

Referring to Rule 43 in Dicey, Morris & Collins, *The Conflicts of Laws* (15th ed.) Hargun CJ found that a foreign judgment *in personam* was only capable of enforcement or recognition as against the person against whom it was given where (1) the person against whom the judgment was given was, at the time the proceedings were instituted, present in the foreign country; (2) the person against whom the judgment was given was a claimant, or counterclaimed, in the proceedings in the foreign court; (3) the person against whom the judgment was given, had submitted to the jurisdiction of that court by voluntarily appearing in the proceedings; or (4) the person against whom the judgment was given had, before the commencement of the proceedings, agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court. It was common ground in the present case that the Bahamian court did not have jurisdiction over the Respondent in the international sense.

In these circumstances Hargun CJ found that any judgment given by the Bahamian court would not be enforceable against the Respondent in the courts of Bermuda. For the same reason the Learned Judge found that any Bahamian judgment could not form the basis of an issue estoppel resulting in a summary judgment against the Respondent in any subsequent enforcement proceeding commenced in the courts of Bermuda.

It was suggested on behalf of the Applicant that the Bahamian judgment was likely to be enforced on a "practical basis" as the Respondent was bound to seek the direction of the Bermuda court following any judgment against it in the Bahamian

proceedings; it was argued that on this basis the judgment in the Bahamas would thereby be enforceable. The Court found that the outcome of any such enforcement application, if made, was highly uncertain and would not provide a sufficient basis to grant the relief sought by the Applicant.

Given the lack of enforceability of any Bahamian judgment, the court found that it was not just and convenient to grant such an order in aid of the Bahamian proceedings.

Mr Wilson QC for the Applicant represented to the Court that if the Court was minded to refuse the grant of a preservation order on this jurisdictional ground, then he was prepared to undertake, on behalf of the Applicant, that the Applicant would issue proceedings in Bermuda and serve them on the Respondent. Mr Brownbill QC for the Respondent accepted that if such proceedings were commenced in Bermuda then any jurisdictional objection to the grant of a preservation order would disappear. On the basis that the Applicant undertook to commence such proceedings in Bermuda and effect service on the Respondent within the next 90 days, the court proceeded to consider the application for such an order on its merits.

Application for a preservation order

The Applicant argued that, as this was an application for a proprietary preservation order, unlike an application for a *Mareva* injunction there was no requirement on the party seeking a preservation order to prove a real risk of dissipation of assets. In making a preservation order, the Court was not seeking to restrain a party from dissipating its own assets so as to evade enforcement of the judgment, but was merely seeking to ensure that the subject matter of the claim was preserved pending identification of the rightful owner. The Applicant argued that these propositions were amply supported by authority: see *Polly Peck International plc -v- Nadir and Ors*.Q,(No. 2) [1992] 4 A11 ER 769,where the English Court of Appeal made a clear distinction between proprietary preservation orders and the *Mareva* jurisdiction.

The Applicant argued that it was merely required to satisfy the well-known tripartite test in *American Cyanamid* test: that (1) there was a serious issue to be tried on the merits; (2) the the balance of convenience favoured the granting of injunctive relief; and (3) it was just and convenient in all the circumstances to grant the order.

The court accepted that this was the correct approach. It found that on the face of the pleadings filed by the parties in the Bahamian proceedings, there was a serious issue to be tried. It was noted that Grampian, as the defendant in the Bahamian proceedings, had not pursued an application to strike out the proceedings on the basis that the pleaded case did not disclose a reasonable cause of action. The Bahamian action was proceeding to trial. If the Bahamian court declared that the Appointments were void in equity, the result would be that the beneficial interest in the Assets would never have passed to the Respondent and the Respondent would hold the assets on trust for the trustee of the Settlement (see *Allan v Rea Brothers Trustees Ltd* [2002] EWCA Civ 85, [48], per Robert Walker LJ). If the Bahamian court treated the Appointments as voidable and set them aside at the Applicant's request, the proprietary consequences were the same as if the Appointments were void *ab initio.*

In correspondence the Respondent had argued that, as the Applicant was a discretionary beneficiary of the Settlement, she did not have the standing to pursue any proprietary claim that might exist. Hargun CJ rejected this argument and accepted that a discretionary beneficiary was entitled to assert and pursue such a claim, citing the following passage from *Lewin on Trusts,* 19th edition, at 41-048: *"The beneficiary may himself, if he wishes, assert the proprietary remedy against the recipient, rather than relying upon the trustee do so, and if the proprietary remedy is successfully asserted by the beneficiary, there will be nothing that the trustee need do as against the recipient beyond claiming an account from the recipient in a case where the recipient has become accountable in equity".*

Accordingly the court was satisfied that the Applicant had shown there was a serious issue to be tried.

The Respondent argued that delay was a weighty factor in assessing where the balance of convenience lay. In response the Applicant made two points. First, that factually any allegation that there had been an unjustifiable delay was unfair. While it was true that the Respondent had refused to provide an undertaking in 2017, it was only more recently that the true extent of the Respondent's refusal to acknowledge the very existence of the proprietary claim had become apparent, together with its position that it would not submit to the jurisdiction of the Bahamian court, notwithstanding its joinder. Second, the Applicant contended that, in any event, the existence of delay was no bar to the relief as a matter of law; this is not a claim for a *Mareva* injunction, but rather a claim for a preservation order in support of the proprietary claim. The court accepted these arguments.

In light of Respondent's failure to give an undertaking to preserve the Assets pending the determination of the Bahamian proceedings, Hargun CJ was satisfied that the balance of convenience favoured the grant of a preservation order. He said: "*On behalf of the Respondent it is said that the Respondent has no intention to dissipate the Assets by making distribution, but has offered no satisfactory explanation as to why in those circumstances the Respondent is not prepared to give the undertaking sought. I am satisfied that damages would not be an adequate remedy as there is no evidence before the Court that the Respondent has the resources to pay damages which could be very substantial indeed*." He continued:

"*If the ambit of the preservation order is limited to restraining the making of distributions to the beneficiaries of The Bermuda Trusts it is difficult to see what damage can be suffered by the Respondent or The Bermuda Trusts. In the circumstances it is appropriate that the Applicant should give an undertaking as to damages in relation to any loss suffered by the Respondent or The Bermuda Trusts but I do not make an order that such an undertaking be fortified*."

Hargun CJ also accepted that, having decided that the balance of convenience lay in the granting of a preservation order, there was no need separately to consider the "just and convenient" limb of the American Cyanamid test. In this he approved the following passage from the judgment of Flaux J. in *Madoff Securities International Ltd v Raven* [2011] EWHC 3102 (Comm):"*Furthermore… once the court has decided that the balance of convenience favours the granting of the proprietary injunction… although the question whether it is just and convenient to do so is a separate question, it is extremely unlikely that the court would say it was not just and convenient, having decided the balance of convenience in favour of the claimant."*