BRITISH VIRGIN ISLANDS
EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO: BVIHCV 2009/399

BETWEEN:

BLACK SWAN INVESTMENT I.S.A.	Applicant
AND	
(1) HARVEST VIEW LIMITED	Respondents
(2)SABLEWOOD REAL ESTATE LIMITED	

Appearances: Mr Stephen Moverley Smith QC and Mr Robert Nader for the Defendants/Respondents
Mr John Carrington for the Claimant/Applicant

[2010: 18, 23 March]

JUDGMENT

(Freezing injunction granted in aid of proceedings brought by Claimant in South Africa – defendants present within jurisdiction – South African cause of action not available in BVI – whether jurisdiction to grant – *The Siskina* considered)

[1] **Bannister J[ag]:** On 1 August 2000 a company called Hyundai Motor Distributors Limited ('HBVI') went into insolvent liquidation in the BVI. It is alleged that HBVI carried on business in the Republic of South Africa. On 11 November 2000 HBVI was put under some sort of insolvency regime in South Africa. I am going to assume, as was assumed during the hearing giving rise to this judgment, that HBVI is to be treated as having gone into liquidation in South Africa, although I am not making any binding determination as to that. When it went into liquidation, HBVI was heavily indebted to a Belgian Bank ('the bank'). On 31 May 2007 the bank purported to assign that indebtedness to a company called Africa Edge SARL ('Africa Edge'). On 12 December 2008, Africa Edge purported to assign the debt on to the Claimant ('Black Swan'). On 10 March 2009 Black Swan applied in the High Court of South Africa (South Gauteng, Johannesburg) for an order under section 424 of that part of the South African Companies Act 61 of 73 dealing with insolvency ('section 424') for an order that an individual called Muller Rautenbach ('Mr Rautenbach') be made personally liable, as (allegedly) a directing mind of the company and a person responsible for the fraudulent management of the

company[1], to pay to Black Swan the whole of the debt, plus interest. As I understand, there are wide ranging issues between Black Swan and Mr Rautenbach in the South African proceedings and nothing in this judgment is intended to affect the outcome of those issues, which are not for this Court.

[2] On 9 October 2009 I heard an application by Black Swan for an injunction in support of the South African proceedings. The Respondents were a number of BVI registered companies, each of which was alleged to be under the ownership or control of Mr Rautenbach and each of which was said to be the legal owner of valuable assets. Black Swan asked for the appointment of a receiver. I dismissed the application on the grounds of the delay since the commencement of the liquidation. On 18 November 2009 the application was renewed. This time the application was for a freezing order and the number of defendant companies sought to be enjoined had been whittled down. I rejected this application on the same grounds, although I also indicated that I had considerable doubts whether it had been sufficiently established that any but one of the defendants was owned or controlled by Mr Rautenbach.

[3] On 10 December 2009 the Court of Appeal reversed this decision, holding that I had erred in principle in relying upon the delay since the liquidation of HBVI as a ground for refusing relief and granting freezing relief against the first and second Defendants until 6 January 2010 unless continued by further order. On 21 December 2009 I continued the order until determination of the section 424 proceedings in South Africa. On 24 February 2010 Black Swan issued an application for permission to enforce the order in the United Kingdom. That application came before me on 11 March 2010. Mr Gadd appeared for the Defendants. He made two points: first, that the order of 21 December 2009 had automatically expired, because the section 424 proceedings had been discontinued, albeit that identically founded proceedings had previously been issued in their place; secondly, that the Court of Appeal had no jurisdiction to make its order of 10 December 2009 and that any continuation or extension of it was similarly defective. Since Mr Gadd's evidence had only been served at 2 pm the previous day, I adjourned Black Swan's application for enforcement in the United Kingdom to 18 March 2010 and extended the injunction until close of business on that day. On 18 March 2010 the argument on jurisdiction was heard first. At the end of that hearing, I reserved my decision on the jurisdiction point. Black Swan's enforcement application thus remains outstanding.

Jurisdiction

[4] Mr Moverley Smith QC appeared together with Mr Robert Nader for the Defendants. His argument on the jurisdiction point may be summarised as follows:

[1] First Affidavit of Michael J Shone filed on 16 November 2009 paragraph 8(e)

(1) the English House of Lords authority commonly referred to as the Siskina[2] establishes that the Court may not grant a freezing injunction unless the injunction is made in support of a claim which the Court granting it has jurisdiction to enforce by final judgment[3];

(2) the Siskina has been followed 'without elaboration' by the Court of Appeal in this jurisdiction so that the authority (presumably in its unelaborated form) is directly binding upon me.

(3) this Court has no jurisdiction to enforce any claim against Mr Rautenbach, because (a) he is neither within the jurisdiction nor amenable to being made subject to the jurisdiction by being served with process pursuant to CPR Part 7 and (b) even if he were, the law of the British Virgin Islands knows of no right similar to that conferred by section 424 pursuant to which creditors may bring proceedings against persons involved in fraudulent trading with a view to securing payment of their debts directly by such persons;

(3) therefore, not only are there no proceedings by Black Swan against Mr Rautenbach pending within the jurisdiction such as to support the grant of a freezing injunction, but Black Swan is not and never will be in a position to institute such proceedings;

(4) Black Swan has no stand alone claim against either Defendant, so that there is no pre-existing cause of action upon which Black Swan can rely in order to justify the grant of freezing relief against either: the Siskina, at 256E.

[5] Mr Carrington, for Black Swan, submits that

(1) that is necessary to distinguish between jurisdiction in the territorial sense (which answers the question by what geographical limits, if any, the powers of the Court are restricted); and jurisdiction in the sense of power (which answers the question whether an act is beyond any power of the court to order, whether the defendant is within the territorial jurisdiction of the court or not). To that I would add that the word jurisdiction is frequently used in a third sense to mean proper exercise, according to the practice and procedure laid down by the court, of its strict jurisdiction;

(2) the Siskina deals only with the questions (1) whether and, if so, in what circumstances a foreigner may be made subject to the territorial jurisdiction of

[2] Owners of Cargo Lately Laden on Board the Siskina v Distos Compania Naviera SA [1979] AC 210

[3] Siskina at page 256D-F

the English Court and (2) whether it is possible to bring him before the English court if no substantive relief is sought against him in England. He says that the case decides no more than that if no final judgment is sought against the foreigner in England, then it is not possible to bring him before the English Court;

(3) the Siskina fails to recognize the distinction between a freezing injunction and other types of interlocutory injunction. Mr Carrington categorises these latter as 'status quo' injunctions (i.e. as designed to hold the ring until judgment is given) and he describes freezing orders, in contrast, as disruptive of the status quo; he also relies upon the distinction drawn by Lord Nicholls in his dissenting judgment in **Mercedes Benz AG v Leiduck**[4] between the usual type of interlocutory injunction, which protects the underlying right which the proceedings are brought to protect or enforce and, on the other hand, freezing injunctions, which are designed to protect, not the underlying right, but the claimant's ability to collect a money judgment should he succeed in obtaining one at trial;

(4) where a party is already properly before the court, an injunction may be granted against him where is it appropriate to avoid injustice: per Lord Scarman in **Castanho v Brown v Root (UK) Ltd**[5], a decision to which Lord Diplock himself was party; he relies also on **British Airways Board v Laker Airways Ltd**[6], where Lord Diplock accepted that the statement of principle in the stark terms in which he had expressed it in the Siskina required to be qualified by what Lord Scarman had said in Castanho; and

(5) relying again on Lord Nicholls' dissenting judgment in **Mercedes Benz**, if the court where the freezing order is sought is one which would permit enforcement of a foreign money judgment, then certainly where the defendant is within the jurisdiction, the court should, if otherwise persuaded that that was a proper exercise of its jurisdiction in the non-territorial sense of the word, grant a freezing order in aid of the claimant's prospective right to the money judgment sought in the foreign court. That prospective right is sufficient to support the grant of a freezing order to protect it.

[4] [1996] AC 284

[5] [1981] AC 210 at 256

[6] [1985] AC 58 at 81

Analysis

[6] In my opinion, Mr Carrington's submissions are generally to be preferred. The difficulty supposedly caused by the **Siskina** for present purposes arises out of that part of Lord Diplock's speech[7] in which he said that the High Court in England had no power to grant an injunction except in protection or assertion of some legal right which it has jurisdiction to enforce by final judgment. However, it has been subsequently held[8] that this formulation does not preclude the English court from granting an interlocutory injunction ancillary to a claim for substantive relief to be granted by a foreign court or an arbitral body. It was said in the same case that 'even applying the test laid down by the **Siskina**', the court has power to grant interlocutory relief based upon a cause of action recognised by English law against a defendant subject to its jurisdiction where such relief is ancillary to a final order, whether that order will be made by the English court, a foreign[9] court or an arbitral body.

[7] In **Mercedes Benz** Lord Mustill, giving the opinion of the majority, who held that in the absence of an equivalent to section 25 of the UK Civil Jurisdiction and Judgments Act 1982 ('section 25') the Hong Kong court had no jurisdiction to grant a freezing order against a foreign defendant not subject to the jurisdiction of the Hong Kong court in aid of proceedings being prosecuted against that defendant in Monaco, left open[10] the question whether such relief could have been granted had the defendant been present in Hong Kong. But he indicated that, *where the proposed defendant was already subject to the territorial jurisdiction of the court*, the approach of Lord Nicholls, in his dissenting judgment, might, if the question fell to be decided in a future case, prevail. In fact, it seems to me that Lord Mustill, in suggesting that if it did succeed, then it would be well for the Hong Kong rule making body to consider enabling such relief to be available against defendants not subject to the territorial jurisdiction of the Hong Kong court, was giving a strong hint that he thought that on such facts Lord Nicholls' analysis would indeed prevail. But that is not the same as a

[7] Page 256D-F

[8] **Channel Tunnel Group v Balfour Beatty Ltd** [1993] AC 334 at 342B – 343C

[9] The actual language used in the speech of Lord Browne-Wilkinson at page [1993] AC 334, 343C is 'some other court', but in context that can mean only a foreign court

[10] At [1996] AC 284, 304G-305A

ruling that it would, so that the question (described in Lord Mustill's speech as 'the second question'[11]) was left open in Mercedes Benz.

[8] In **Fourie v Le Roux**[12] Lord Scott held that the passage from Lord Browne-Wilkinson's speech in **Channel Tunnel** to which I have already referred[13], taken together with other authorities which he also cited, showed that the English court does have jurisdiction, in the strict sense, to make an order in aid of a prospective judgment to be obtained in foreign proceedings, provided that the person restrained is subject to the *in personam* jurisdiction of the English court. Lord Scott went on to say that had such an injunction been granted following the **Siskina** decision, the party injuncted could have argued that although such an order was within the strict jurisdiction of the English court to make it, it fell outside the broad jurisdiction and ought not to have been granted, because such injunctions should not be granted otherwise than in support of proceedings being prosecuted in England. Lord Scott confined himself to saying that 'in 1977' freezing injunctions were in their infancy and that at that date the House might have agreed with the objection. He went on to say that in England the argument would now fail because of the passage of section 25. But he left open the question what would be the answer today in the absence of a provision equivalent to section 25 was once more left open.

[9] There is therefore high authority (**Mercedes Benz**) that in the absence of a provision to the effect of section 25 the court may not grant a freezing order in aid of foreign proceedings against a defendant who is not subject to the court's *in personam* jurisdiction. There is also high authority (**Mercedes Benz, Fourie v Le Roux**) that the question whether a freezing order *should* be granted in aid of foreign proceedings against a defendant who is subject to the court's jurisdiction is open – in other words, that that question is not decided by the **Siskina**, which was not dealing with that set of facts.

[10] Given that state of the authorities, I consider that it is open to me to decide in these proceedings whether there is any reason why I should not exercise the

[11] For its formulation see [1996] AC 284 at 298A-B

[12] [2007] 1 WLR 320 at paras 29, 30

[13] [1993] AC 334, 342b-343c

jurisdiction, which in the strict sense, I undoubtedly have[14] to continue this injunction.

[11] In my judgment, the reasoning of Lord Nicholls in Mercedes Benz[15] is compelling. It is described by the learned editors of Dicey, Morris & Collins[16] as 'powerful'. Lord Nicholls points out that freezing orders are unlike 'ordinary' interlocutory injunctions, because they bear no relation to the subject matter of the proceedings. Their only purpose is to prevent dissipation of assets available to satisfy a money judgment. In particular, Lord Nicholls held that they do not depend upon there being a pre-existing cause of action. Moreover, here is no logical distinction between the grant of such relief in aid of a domestic money judgment and a grant in aid of a foreign one, unless the foreign judgment is such that the domestic court would decline to enforce it. Mr Moverley Smith, rightly, does not suggest that there is any reason why this court should not enforce a money judgment obtained on the conclusion of the section 424 proceedings in South Africa. Lord Nicholls points out that there is no reason in principle why a writ should not be issued claiming only relief ancillary to a foreign award and that the courts are already familiar with such 'stand alone' writs – for example, in anti-suit claims and in proceedings for Norwich Pharmacal orders and he says (and I respectfully agree) that Channel Tunnel is authority for the proposition that such a writ may be issued.

Conclusion

[12] Given the lacuna in the authorities to which I have referred, I propose to fill it in this jurisdiction by respectfully adopting this reasoning of Lord Nicholls in Mercedes Benz. I hold accordingly that I have jurisdiction not only in the strict but also in the broad sense to continue the injunction originally granted by the Court of Appeal on 10 December 2009. There are assets within the jurisdiction in the shape of the shares in the two defendant companies which justify the grant of such an injunction and the Court of Appeal has held (without having had to decide the jurisdictional issue) that the injunction is otherwise a proper one

[14] Section 24 of the West Indies Associated States Supreme Court Ordinance (CAP 80); Fourie v Le Roux at para 30

[15] [1996] 1 AC 284 between 305B and 312E

[16] 14th Ed at para 8-023

to be granted. I shall not, therefore, discharge it on grounds of want of jurisdiction.

[13] Mr Moverley Smith submits that I am precluded from reaching this result by, in particular, the decision of the Court of Appeal of the Eastern Caribbean Supreme Court in **Alfa Telecom Turkey Ltd v Teliosanera Finland OYJ**[17]. At paragraph [32] of her judgment in that case, Justice of Appeal Janice George-Creque cited the **Siskina** as authority for the proposition that an interlocutory injunction is not a cause of action and cannot stand on its own. The learned Justice of Appeal was doing no more in the passage referred to than insisting that on the facts of the case before the Court of Appeal it was essential for the appellant to identify a cause of action before it could obtain interlocutory relief. The Court of Appeal was not concerned with any of the issues which have arisen in the course of this application. The decision is not relevant to the issues which I have had to decide.

[14] Mr Moverley Smith also referred me to the decision of Hariprashad-Charles J in **Sibir Energy Plc v Gregory Trading SA and ors**[18]. In that case the Court had struck out the claim and accordingly there remained no cause of action to sustain the continuation of an injunction restraining the disposition of certain choses in action. The claimant argued (inter alia) that its right of appeal was sufficient to support the continuation of the injunction. The learned Judge held that the cause of action no longer existed and that there was therefore nothing to sustain the continuation. She relied, inter alia, on the **Siskina**. Again, none of the issues which have arisen for decision in the present application were before the learned Judge. Like **Alfa Telecom**, **Sibir** is not relevant to the issues in the present application. There is thus no authority in this jurisdiction, either binding or merely highly persuasive, which precludes me from deciding this point as I have.

[15] I am fortified in this conclusion by the fact that it appears from a footnote to paragraph 8-023 in **Dicey, Morris & Collins**, 14th Ed, that the Court of Appeal of Jersey and Guernsey reached a similar conclusion in **Solvalub Ltd v Match Investments Ltd**[19]. I have not had the opportunity to read their judgments, but I

[17] HCVAP 2008/12 (28 September 2009)

[18] BVIHCV 2005/174 (23 December 2005)

[19] [1998] ILPr 419

would like to say that it seems to me that, quite apart from the jurisdictional analysis of Lord Nicholls which I have respectfully adopted, there are sound policy reasons why important offshore financial centres, such as Jersey and the BVI, should be in a position to grant such orders in aid where necessary. The business of companies registered within such jurisdictions is invariably transacted abroad and disputes between parties who own them and others are often resolved abroad. It seems to me that when a party to such a dispute is seeking a money judgment against someone with assets within this jurisdiction, it would be highly detrimental to its reputation if potential foreign judgment creditors were to be told that they could not, if successful, have resort to such assets unless they were to commence substantive proceedings here in circumstances where, in all probability, they would be unable to obtain permission to serve them abroad – thus presenting them with an effective brick wall or double bind of the sort so deplored by Lord Nicholls in **Mercedes Benz.**

[16] Mr Moverley Smith has indicated that if I were not to discharge the injunction on grounds of want of jurisdiction, he may be instructed to seek its discharge on other grounds. Pending the outcome of any such application, I will continue the injunction until the determination of the section 424 proceedings currently being prosecuted by Black Swan in the South Gauteng High Court, Johannesburg. I will give directions as to the hearing of Black Swan's enforcement application and generally.

Commercial Court Judge

23 March 2010