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ROYAL COURT
(Samedi Division) 143

24th July 1997

Before: Sir Philip Bailhache, Bailiff, and
Jurats Potter and Quérée

Between:	Krohn GmbH	Plaintiff
And:	Varna Shipyard	Defendant
And:	(1) The Royal Bank Of Scotland plc (2) The Royal Bank Of Scotland (Jersey) Limited (3) The Royal Bank Of Scotland International Limited (4) Lawrence Graham (a firm)	Parties Cited

Advocate R. J. Michel for the Defendant.
Advocate T. J. Le Cocq for the Plaintiff.

JUDGMENT

THE BAILIFF: This is an application by the Defendant shipyard to set aside both the order of the Deputy Judicial Greffier of 2nd April, 1997, granting leave to effect service out of the jurisdiction and the injunctions imposed upon it *ex parte* by the Bailiff sitting in Chambers on 27th March, 1997. The background to the action was sufficiently described in the judgment of the Court delivered on the 11th June, 1997, setting aside the order of the Deputy Judicial Greffier granting leave to serve these proceedings outside the jurisdiction on the Fourth Party Cited, Messrs. Lawrence Graham, the English solicitors acting for the Defendant, and we do not propose to repeat it.

Mr. Michel based his argument on two propositions. First he submitted that the Court had no jurisdiction, in the sense of territorial jurisdiction, over the Defendant, which is incorporated in Bulgaria, and that the Service of Process (Jersey) Rules 1994 ("the 1994 Rules") did not empower the Court to order service of these proceedings upon it. Secondly he submitted that, even if the Court did have such jurisdiction, it should not have exercised it as a matter of discretion. We shall deal with each submission in turn.

Territorial jurisdiction

In Solvalub Limited v. Match Investments Limited (13th December, 1996), J.U.CofA, the question of territorial jurisdiction did not arise as service was accepted, albeit under protest, in the jurisdiction. The Court of Appeal was concerned with the "power" jurisdiction of the Royal Court to issue Mareva injunctions in aid of proceedings overseas. The Court of Appeal found that the Royal Court did have such jurisdiction and we held, in our earlier judgment in these proceedings, that that finding was not *obiter* and that we were bound by the conclusion that we have jurisdiction in the sense of power to grant a Mareva injunction in aid of proceedings in a foreign court. Mr. Michel very properly accepted that conclusion for these purposes while naturally reserving his right to challenge it in a higher court.

Mr. Michel went on to submit however that the court had no territorial jurisdiction over the Defendant. He drew our attention to an article by Professor Paul Matthews in the Jersey Law Review entitled "No Black Holes, Please, We're Jersey" [1997] Vol. 1, Issue 2, p.132, where the learned author criticised the conclusions of the Court of Appeal in Solvalub. At p.142 he wrote:-

> *"All of this so far has been about 'power' jurisdiction. The Siskina is not to be followed in Jersey on this point. But the position in Jersey on 'territorial' jurisdiction remains as it was. Unless a Defendant is in Jersey, or submits to the jurisdiction of the Jersey court, or is within the 'foreign' service provisions of the Service of Process (Jersey) Rules 1994, or the special rules for trusts in the Trusts (Jersey) Law 1984, the Jersey court has no 'territorial' jurisdiction. It may therefore be asked, what is the point of the Jersey court having a 'power' jurisdiction in such a case if it has no 'territorial' jurisdiction? The answer may be, not much. In the cases where the 'power jurisdiction' is most needed, it may be incapable of being invoked, for want of 'territorial' jurisdiction. But there will be a few cases where the Defendant can be served in Jersey, is within the 'long arm' rules, or submits to the jurisdiction. Abbott Industries v Warner, for example, would be such a case. The change wrought by Solvalub to Jersey law and practice may be very small indeed, but it is nevertheless there."*

It is of course right that the court has no territorial jurisdiction other than in the circumstances there listed. The question for us however is whether the decision in Solvalub affects the interpretation which we ought to place upon the "foreign" service provisions of the 1994 Rules.

Rule 7 (b) provides:-

"7. Service out of the jurisdiction of a summons may be allowed by the court whenever -

.....

(b) an injunction is sought ordering the Defendant to do or refrain from doing anything within the jurisdiction (whether or not damages are also claimed in respect of the doing of or failure to do that thing);"

Mr. Le Cocq, for the Plaintiff, submitted that the words ought to be given their plain and natural meaning. An injunction had been sought ordering the Defendant to refrain from doing something within the jurisdiction, namely from dealing with or disposing of, whether by itself or by its servants or agents, monies or assets held in the name of the Fourth Party Cited within the jurisdiction. Service of proceedings upon the Defendant was therefore justified, he submitted, by Rule 7 (b).

Mr. Michel's reply to that submission was that the rule laid down by the House of Lords in the Siskina [1977] 3 A11 ER 80; [1979] AC 210 was still alive in Jersey, notwithstanding its abolition by statute in England. The rule was stated by Lord Diplock in the following terms, the sub-paragraph to which his Lordship referred being in almost identical terms to Rule 7 (b);

"To come within the sub-paragraph the injunction sought in the action must be part of the substantive relief to which the Plaintiff's cause of action entitles him; and the thing that it is sought to restrain the foreign Defendant from doing in England must amount to an invasion of some legal or equitable right belonging to the Plaintiff in this country and enforceable here by the final judgment for an injunction."

If one returns for a moment to the "power" jurisdiction point, it is clear that the Siskina is no longer good law in Jersey. Delivering the judgment of the Court of Appeal in Solvalub, Le Quesne JA stated -

"If one turns to see what the position is in England, on strict authority it is that the English court has no power to issue a Mareva injunction in aid of proceedings in a foreign court. That was decided by the House of Lords in "The Siskina" (1979) AC 210. However, while the latest authority in the strict sense, that is not the latest judicial pronouncement on the point. The latest pronouncement is the dissenting judgment of Lord Nicholls in the Mercedes Case. In that case the majority, having decided the appeal on the grounds of the point of personal service, found it unnecessary to express any conclusion on

the question of power. Lord Nicholls arrived at a different view on the point of personal service and did consider the question of power. For this conclusion I quote a couple of sentences from his judgment. First, at p.310: "The boundary line of the Mareva jurisdiction is to be drawn so as to include prospective foreign judgments which will be recognised and enforceable in the Hong Kong courts". Secondly, at p.313: ".... a writ claiming Mareva relief and nothing more could have been issued and served on Mr. Leiduck in Hong Kong".

As part of his reasoning in reaching these conclusions Lord Nicholls considered the decision in "The Siskina" and comments made on it in subsequent cases and concluded that "The Siskina" should no longer be followed.

In view of the local authority and the local circumstances to which I have referred I should with respect adopt the conclusions and reasoning of Lord Nicholls and it is not necessary for me to set out that at length in this judgment. In my judgment it is within the power of the Royal Court to grant a Mareva injunction in aid of proceedings in a foreign court and to do that in proceedings here in which no relief other than the grant of the Mareva injunction is sought."

What then is the position in relation to territorial jurisdiction? We think it is helpful to advert to the judgment of Lord Nicholls in Mercedes-Benz AG v Leiduck (1995) 3 All ER 929 at 950 where his lordship considers this very question in the context of the Rules of the Supreme Court order 11, rule 1(1)(b) which is, again, in almost identical terms to rule 7 (b) of the 1994 Rules.

"But what about service of the Mareva proceedings? The Hong Kong court can only entertain Mercedes-Benz's application for a Mareva injunction if the originating process falls within one of the heads of Ord 11, r 1 under which leave may be given for service of a writ outside the territorial jurisdiction of the Hong Kong court. The only head is Ord 11, r 1(1) relevant to this application is sub-para (b). This gives rise to a short point of interpretation.

On the face of r 1(1)(b), all that is required is that in the action an injunction is sought concerning acts or omissions of the Defendant within the territorial jurisdiction of the court. Having regard to the context, however, it cannot have been intended that where substantive relief is being sought from the court at the trial, a claim to an interlocutory injunction meanwhile would bring within the grasp of the court proceedings

otherwise beyond its reach. As Sargant LJ observed in Rosler v Hilbery [1925] 1 Ch 250 at 262, [1924] All ER Rep 821 at 825, what is contemplated is an action where an injunction is part of the substantive relief. This interpretation of sub-para (b) was confirmed in The Siskina.

None of this touches Mareva relief as sought in the present action. In answer to the first question I have already concluded that a writ claiming Mareva relief and nothing more could have been issued and served on Mr. Leiduck in Hong Kong. A claim for a Mareva injunction may stand alone in an action, on its own feet, as a form of relief granted in anticipation of and to protect enforcement of a judgment yet to be obtained in other proceedings. In such an action Mareva relief is not interim relief in the sense relevant for r 1(1)(b) purposes. In that action the Mareva relief is not granted pending the trial of that action. It is granted pending judgment in other proceedings. At the trial of the Mareva action, if it ever took place, the only relief sought would be the Mareva injunction. That is the substantive relief sought. Obtaining that relief is the sole purpose of the action.

This undermines the basis on which the conclusion was reached in The Siskina that sub-para (b) of Ord 11, r 1(1) is inapplicable to Mareva injunctions. That basis disappears if the answer I have given to the first question is correct. A claim for an injunction which can stand on its own feet as the entirety of the relief claimed ought, in principle, to be within sub-para (b). Sub-paragraph (b) exists as an independent head. It is intended to have some scope. As noted in the Siskina, it is apt to apply to quia timet injunctions, and injunctions to protect or enforce equitable rights and duties not arising from contract or outside the ambit of the law of tort. It is equally apt to apply to a Mareva injunction which comprises the sole relief sought in the action, albeit sought in aid of other proceedings. A Mareva injunction is a novel form of injunction, but this affords no reason for excluding it from sub-para (b), applying as this sub-paragrah does to all forms of injunctions.

This reading of sub-para (b) gives rise to no difficulty in the ordinary case where a Plaintiff seeks judgment and a Mareva injunction meanwhile in the same proceedings against a non-resident Defendant. On an application for leave under Ord 11, r 1, the claim for Mareva relief would follow the same fate as the main claims. If leave were refused in respect of the latter, there would be no prospective judgment calling for Mareva protection.

The end result, that a Mareva injunction in aid of a prospective judgment being sought from another court is an injunction within the meaning of sub-para (b), is sensible and reasonable. Sub-paragraph (b) applies only to acts or omissions within the territorial jurisdiction of the Hong Kong court, so it would embrace only Mareva injunctions confined in this way. There is nothing exorbitant about the Hong Kong court granting Mareva relief limited in this fashion, given the prerequisite that the anticipated judgment must be one which will be recognised and enforceable in Hong Kong. The alternative result would be deeply regrettable in its unfortunate impact on efforts being made by courts to prevent the legal process being defeated by the ease and speed with which money and other assets can now be moved from country to country. The law would be left sadly lagging behind the needs of the international community."

Mr. Michel argued that it was not for the Court to adopt this line of reasoning and that it was for the Rules Committee or for the legislature to decide whether the territorial jurisdiction of the court should be extended in this way. We cannot accept that argument. We have to construe Rule 7 (b) of the 1994 Rules and we have to do so in accordance with the current state of the law. The Court of Appeal in Solvalub adopted the reasoning of Lord Nicholls and held that this Court had the "power" jurisdiction to issue a Mareva injunction in aid of proceedings overseas. The Court decided, in effect, that a Mareva injunction in such circumstances was the substantive relief sought. As Lord Nicholls stated in relation to the rules of the Supreme Court in the passage from his judgment cited above, this undermines the basis upon which the conclusion was reached in The Siskina that the relevant sub-paragraph was inapplicable to Mareva injunctions. We can see no logical reason for holding ourselves bound by the ruling in The Siskina on the question of territorial jurisdiction when its substructure has been so fatally weakened by the Court of Appeal in Solvalub.

In addition there are, in our judgment, sound reasons of judicial policy for reaching the same conclusion as Lord Nicholls. They were touched on by the Court of Appeal in Solvalub where Le Quesne JA stated:

"If the Royal Court were to adopt the position that it was not willing to lend its aid to courts of other countries by temporarily freezing the assets of Defendants sued in those other countries, that in my judgment would amount to a serious breach of the duty of comity which courts in different jurisdictions owe to each other. No only so, but the consequences of such an attitude would be that Jersey would quickly become known as a safe haven for

a Mareva injunction against a Defendant outside the territory of Jersey. Furthermore as a matter of practice the judge requires an affidavit to be produced before a Mareva injunction is issued. In proceedings between litigants present in Jersey the affidavit will invariably be sworn by an officer of this court amenable to the discipline of this court. In proceedings between litigants overseas that discipline will be absent.

Mr. Michel submitted in essence that there was no risk of dissipation of assets because, *inter alia*, the Defendant was a state corporation with a substantial turnover and both Bulgaria and the United Kingdom were parties to the 1958 New York Convention on the enforcment of judgments.

Mr. Le Cocq responded that there was doubt as to the financial standing of the Defendant, the strength of the Bulgarian economy, and the willingness of the Bulgarian courts to give effect to obligations where that might conflict with Bulgarian economic interests.

We do not find it necessary to reach a conclusion on these conflicting arguments. One matter appears to us to be decisive. There appears to be no doubt that, faced with an order of the Hamburg court which arguably did not arrest their monies in Germany, the Defendant moved swiftly to transfer the monies away from Germany and into Jersey. The Defendant chose not to argue the merits of the arrest with the Plaintiff before the German court but to take advantage of a perceived flaw in the German order and to place the monies beyond the reach of the court. In our judgment this was and is sufficient to justify the conclusion that there is a risk of dissipation.

We accordingly dismiss the application to set aside the injunction contained in paragraph A (i) of the prayer.

Authorities.

R.S.C. (1997 Ed'n): O.11.

Service of Process (Jersey) Rules 1994

Solvalub Limited -v- Match Investments Limited Unreported Judgment dated (13 December 1996) JU. CofA.

Krohn GmbH -v- Varna Shipyard. (11th June 1997) JU.

Mercedes-Benz AG -V- Leiduck (1995) 3 All ER 929.

Invercargill City Council -v- Hamlin [1996] 1 ALLER 756 at 764.

James Capel (Channel Islands) Limited -v- Koppel and Fenchurch Trust Limited [1989] JLR51. at P.68.

Asher -v- Cross (23rd September 1994) JU.

"The Siskina" [1979] AC210; [1997] 3 All ER 80.

Third Chandris Shipping Corporation -v- Unimarine [1979] QB645; [1979] 2 All ER 972.

Commercial Litigation: Pre-Emptive Remedies, (3rd Ed'n) 1997: P214. Pdg.405.

Matthews: Jersey Law Review: "No Black Holes, Please, We're Jersey" [1997] Vol.1, Issue 2, p.132 at p.p.142, 146.