

Mishcon

Injunctions

Issue 1 - January 2009

Editor's Note

From my experience in being on the issuing and (sometimes) receiving end of injunctions over the last 30 odd years I feel I can say with some degree of confidence that *"he who injuncts wins"*.

In the vast majority of all the injunctions that Mishcon's International Injunction Group has been involved with over the last two years (over 100 injunctions) the dispute in question was resolved in favour of the applicant within 90 days from the date the injunction was granted. This means that the applicant was able to force the other side to capitulate or agree to a completely one-sided settlement no more than 90 days from the time the injunction was granted.

If these statistics are in any way representative of the experience of other litigators in the UK (and our anecdotal feedback from the barristers we are using says that they are), I think that the mantra of every hot blooded litigator at the outset of every case should be *"can we get an injunction?"*

In light of the overwhelming tactical advantage that an injunction provides to a litigant, we at Mishcon feel that the injunction deserves pride of place in the tool box of every litigator or dispute resolver.

Our small contribution to acknowledging the significance of the injunction in modern day dispute resolution is to dedicate a regular briefing to the topic of injunctions, of which this is the first.

We will be looking at what we believe are the more significant and/or interesting developments in the law and practice of injunctions (in the UK and sometimes abroad). Where appropriate we will also be adding some commentary from either a member of our team or other



contributor (or both), on what has been described by our Judiciary as *"the nuclear weaponry of the High Court."*

We invite everyone whether practitioner, litigant, third party, supervising solicitor, forensic accountant, forensic computer analyst, investigator, academic or interested observer to contribute their views/comments/experience of being involved in, or affected by, an injunction.

In this way we can share with each other the good, the bad and the ugly experiences of the world of injunctions.

My e-mail address is shown below and I encourage you all to send me your views, news and comments on anything to do with injunctions and (provided they are not too offensive) I promise to give the most interesting or amusing contributions pride of place in this little missive.

Welcome to the inaugural edition of Mishcon Injunctions. Enjoy!

A handwritten signature in black ink that reads "Gary Miller". The signature is written in a cursive, slightly slanted style.

Gary Miller
Partner
Mishcon's International
Injunction Group

Contributor - Tony Peto

"Injunctions can provide a dramatic cure to some of the acutest legal emergencies. However, as with any strong medicine, you need to go to a specialist to avoid damaging side-effects. The law of injunctions bristles with traps for the inexperienced. Judges rightly insist on strict compliance with complex procedural and evidential rules designed to protect the rights of respondents. Even inadvertent non-compliance can lead to injunctions being discharged with heavy orders for costs and damages. Therefore, applicants for emergency injunctions need a body of expert practitioners who have kept themselves up-to-date with recent legal developments and who can give accurate advice on the spot. The launch of this periodical is welcome news to all those who aspire to be such experts."



Tony Peto
Barrister
Blackstone Chambers

Anti-Suit

Blades hammer Hammers

Sheffield United FC injunctioned West Ham United FC from appealing an adverse arbitration ruling to the Swiss Court of Arbitration for Sport. Sheffield won the award entitling them to damages for breach of contract by West Ham relating to the engagement of Argentinean player Carlos Tévez during the 2006/7 season.

The Hammers tried to appeal that award, but the Court prevented them on grounds that the appeal would constitute a breach of the arbitration agreement to which both parties were bound in the rules of the Football Association.

To view the judgment from the bailii website, please click on the link below.
<http://www.bailii.org/ew/cases/EWHC/Comm/2008/2855.html>

Vivendi gets no relief in Florida

The Court of Appeal upheld an anti-suit injunction, granted by Lewison J, preventing Vivendi taking action in Florida against a Polish company that had guaranteed a bond issue in which Vivendi had heavily invested and which was in default. The bond conditions and the trust deed contained a clause which provided that only the trustee of the bond issue could enforce the bonds

and prevented Vivendi from proceeding directly against the Polish company. Vivendi tried to circumvent this clause by bringing a fraud claim. The Court held that the clause in question applied to the fraud claim as it would in a contractual claim because it was, in substance, an action to enforce an entitlement under the contract.

To view the judgment from the bailii website, please click on the link below.
<http://www.bailii.org/ew/cases/EWCA/Civ/2008/1178.html>

Consolidated cannot get second bite of Yemen cherry

The Court of Appeal upheld a decision of Mr Justice Mackie QC preventing Lebanese based members of the Consolidated Contractors Group from re-litigating a case in the Yemen that had already been determined against

them in England. The Court held that Consolidated Contractor's submission to the jurisdiction in the substantive claim was sufficient to found jurisdiction to grant the anti-suit injunction and an independent basis for jurisdiction was not required.

To view the judgment from the bailii website, please click on the link below.
<http://www.bailii.org/ew/cases/EWCA/Civ/2008/625.html>

Trademarks

“Hotel Cipriani” delivers knock out blow to “Cipriani London”

Mr Justice Arnold granted the Claimant owners of “Hotel Cipriani” in Venice, Lisbon and Madeira an injunction against the owners of a London restaurant operated under the name “Cipriani London”. The Court held that the

Defendants had infringed the Claimants’ registered trade mark in the name “Cipriani” and committed the tort of passing off. The Court did not accept the Defendants’ argument that the “own name” defence applied.

To view the judgment from the bailii website, please click on the link below.

<http://www.bailii.org/ew/cases/EWHC/Ch/2008/3032.html>

Site Scraping

Dutch throw injunction book at Ryanair for rejecting bookings

A District Court in Germany granted a Dutch company, Cheaptickets BV, an injunction against Ryanair for failing to honour bookings that were made by customers utilising the claimant’s website

based in Germany. Ryanair had refused to honour the bookings because they were made by a practice called “site-scraping” whereby a third party website automatically places bookings through Ryanair’s website. Ryanair claimed site scraping breached its standard terms and conditions.

Cheaptickets BV v Ryanair, Frankfurt District Court, 27 August 2008

Springboard

UBS injuncts ex-employee to prevent unfair competition

UBS injuncted start up wealth manager Vestra and its staff from poaching UBS employees or doing business with existing UBS clients pending full trial. S, a former senior UBS executive, commenced business through Vestra following the expiry of his restrictive covenants. Subsequently a further 75 UBS staff resigned to take up

employment at Vestra. The Court held that it was extremely likely that UBS would be able to establish at trial that the poaching had involved both a breach of the implied duty of fidelity by defecting staff and possibly an unlawful conspiracy including the defendants. The injunctions were necessary to prevent Vestra gaining a “springboard” advantage in competition.

To view the judgment from the bailii website, please click on the link below.

<http://www.bailii.org/ew/cases/EWHC/QB/2008/1974.html>

Freezing

State immunity and arbitration exceptions help Bolivia escape from \$50 million freezer

The Court of Appeal upheld a decision of Andrew Smith J which set aside a \$50 million freezing injunction obtained by ETI, a Dutch Company, against the Republic of Bolivia. The injunction had been granted in connection with a claim in arbitration proceedings in the

International Centre for the Settlement of Investment Disputes ("ICSID"), arising from the nationalisation of a joint venture company. It was held that the English Court had no jurisdiction to grant an injunction in support of ICSID arbitrations and also that the Respondents were, in any event, protected in these circumstances by sovereign immunity legislation.

To view the judgment from the bailii website, please click on the link below.

<http://www.bailii.org/ew/cases/EWCA/Civ/2008/880.html>

No Fraud, no UK linkage and no risk of dissipation give Mobil billion dollar blues

Walker J set aside a \$12 billion worldwide freezing injunction obtained by Mobil against the national oil company of Venezuela, which had been granted in support of claims to be determined in a New York arbitration. At the all parties hearing, Walker J found that

in the absence of exceptional features such as fraud, it would only be just and convenient for the court to grant a worldwide freezing order if there was a link with England and Wales. Mobil failed to demonstrate such a link and was also unable to surmount the hurdles of having to show a good arguable case of dissipation of assets and urgency.

To view the judgment from the bailii website, please click on the link below.

<http://www.bailii.org/ew/cases/EWHC/Comm/2008/532.html>

International fraud justified world-wide freezer against Chinese company

Mediterranean Shipping Company obtained an on notice world-wide freezer against Ningbo, a Chinese import/export company which had no significant presence in the UK, arising out of a fraud involving 18 containers. Due to the international nature of the fraud, the fact that there was cogent evidence

of Ningbo's involvement and the fact that it had been masterminded from London, the judge exercised his discretion in favour of Mediterranean. Ningbo's failure to apply to set aside service of the claim, within 28 days of filing of their acknowledgment of service, meant they had submitted to the UK jurisdiction.

To view the judgment from the bailii website, please click on the link below.

<http://www.bailii.org/ew/cases/EWHC/Comm/2008/2150.html>

General Principles

Swedish cash machine company on right side of judge's balancing act

Talaris (a manufacturer of automatic teller machines) obtained an interim injunction against Network Controls (a software developer) restraining further alleged breaches of an exclusive

distribution agreement. The judge went right back to basics in applying the well known American Cyanamid principles and deciding that the balance of convenience lay in granting some relief to Talaris pending the outcome of litigation.

To view the judgment from the bailii website, please click on the link below.

<http://www.bailii.org/ew/cases/EWHC/TCC/2008/2930.html>

Lies told to obtain freezer do not give rise to liability in deceit

The Court of Appeal held that even grossly misleading and deliberately dishonest statements made in affidavits in support of freezing injunctions are protected by the age old witness immunity rule. Walsh had been sued and had his assets frozen by Staines on the basis of evidence that the Court of Appeal found was "grossly misleading". When the original litigation collapsed Walsh sued Staines and his solicitors for deceit and conspiracy to defraud based, amongst other things, on the dishonest statements made in Staines' affidavit.

The Court held that the rule of witness immunity - that witnesses have immunity from legal action arising from their evidence - barred such action against the client in respect of his affidavit evidence, and that the solicitors did not themselves make any representation by putting forward the affidavit. As to representations made by the solicitors in correspondence with the other side, the Court held that the rule of witness immunity extended to cover instructions given to solicitors and passed on as such to the other side.

To view the judgment from the bailii website, please click on the link below.

<http://www.bailii.org/ew/cases/EWCA/Civ/2008/1324.html>

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