

Mishcon

Injunctions

Issue 2 - April 2009

Editor's Note

Welcome to our second offering on Injunctions. I am delighted to report that we had some very interesting and stimulating responses to our first edition from litigants who had been on the receiving end of an injunction and offered some valuable insight as to how the Courts do not necessarily always get it right.

The thing that stands out to me from the cases we have selected for this edition is the amazing accessibility and responsiveness of our judiciary to applicants who need to act in a matter of hours to prevent irretrievable damage. In the Barclays v Guardian case the fact that Barclays were able to extract the Judge from his bed at 2:30 am and in a matter of a couple of hours secure and serve the injunction on the Guardian speaks volumes for the flexibility of our judicial system. The fact that the full hearing of the order took place the following day at 3:30pm also shows how our Judges will bend over backwards to ensure that the rights and interests of the respondents will also be protected when ex parte orders are granted.

From my experience in obtaining and defending injunctions in various parts of the world including Asia, USA and Europe, the English jurisdiction is by far the most flexible and creative in tailoring injunctive remedies to prevent both litigants and third parties from acting in a way that would permanently prejudice one side or the other and to hold the status quo pending an orderly hearing of a dispute. Quite understandably therefore the rest of the world continues to look to the English Courts as leading the way in developing the law and practice relating to injunctive remedies. Long may it last!



Finally a sincere vote of thanks to my colleague Richard Trainer who has selflessly poured over the last three months' injunctions in order to prepare the delicacies we have offered up in this edition of Mishcon Injunctions.

A handwritten signature in black ink that reads "Gary Miller".

Gary Miller
Partner
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Contributor - Alex Layton QC

“When anti-suit injunctions to restrain court proceedings in other EU countries in breach of an exclusive jurisdiction agreement were outlawed by the European Court’s decision in *Turner v. Grovit* in 2004, it was probably only a matter of time before the European Court did the same for anti-suit injunctions to restrain a breach of an arbitration agreement. That has now happened in the *West Tankers* decision described elsewhere in this bulletin.

The *West Tankers* decision has been widely criticised, not only by common lawyers but by many eminent European lawyers too. It appears to treat an arbitration clause as no more than a defence to court proceedings, whereas arbitration is more usually seen as an entirely independent means of dispute resolution by which the parties have opted out of the decision-making powers of the ordinary courts. Perhaps even more disturbingly, the European Court has used vague and wide language in its decision which might lead to the impression that arbitrators’ own powers to determine their own jurisdiction (what Germans and now the wider world call *kompetenz-kompetenz*) have been undermined. This is surely an application of the law of unintended consequences (or at least one hopes so).



The good news is that the European Commission has this month issued its Green Paper about the amendment of the Brussels Regulation, and that it contains a proposal which would reverse the effect of this difficult decision. So watch this space.”

Alex Layton QC
20 Essex Street

*Alex appeared as counsel for the UK government in the *West Tankers* case.*

Freezing

Appeal Judges sever penal provisions to grant SEC £2m UK Freezer

The SEC had issued proceedings in the US against *Manterfield* for an alleged fraud which duped Taiwanese investors to the tune of around £34m. Those proceedings involved a claim for “disgorgement of ill gotten gains” as well as a claim for a civil monetary penalty. *Manterfield* sought to appeal a freezing order made against him by a Judge in respect of his UK assets on grounds that the UK Court should not enforce a foreign penal law and

also that the Judge should not have dispensed with the undertaking in damages. The Court of Appeal rejected both arguments and had no difficulty in severing the “penal” element of the US proceedings from the civil element which was in effect no more than a claim for unjust enrichment.

The United States Securities and Exchange Commission v Manterfield, [2009] EWCA Civ 27, 28 January 2009

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

<http://www.bailii.org/ew/cases/EWCA/Civ/2009/27.html>

Freezing

Appeal Court confirms freezer despite non-disclosure

After a trial of the main action where the appellants were all found liable for making fraudulent misrepresentations, they appealed amongst other things against the trial Judge's refusal to discharge a freezer notwithstanding there had been material non disclosure. The Court of Appeal upheld the Judge's decision and because the non disclosure was remedied shortly after the granting

of the injunction and the Judge granted a post judgment freezer these were special circumstances which justified not discharging the injunction. The time for assessing the evidence was held to be the date of the discharge application not the time when the injunction was granted.

Dadourian Group International Inc and others v Simms and others [2009] EWCA Civ 169, 13 March 2009

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

<http://www.bailii.org/ew/cases/EWCA/Civ/2009/169.html>

Judge grants Freezer and Mandatory Transfer Order in support of Arbitration

In the course of arbitration proceedings between two ex-city firm solicitors the counterclaiming defendant Mr Emmott obtained an order from the Tribunal that certain shares in dispute between the parties "the Steppe Shares" should be transferred by the claimant, MWP, to be held to the order of the Chairman of the Tribunal. MWP failed to comply with this order and one of its directors transferred the shares in MWP itself to a Liechtenstein Anstalt. Emmott applied to the High Court and secured a freezing order against MWP as well as an order

compelling them to comply with the Tribunal's order regarding transfer of the Steppe Shares. The Court made it clear that it was fully prepared to support the Tribunal's order without undertaking a review of the Tribunal's decision making process on the basis that judicial interference with the arbitral process should be kept to a minimum.

Emmott v Michael Wilson & Partners Ltd / Michael Wilson & Partners Ltd v Emmott [2009] EWHC 1 (Comm)

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

<http://www.bailii.org/ew/cases/EWHC/Ch/2009/1.html>

Flouting Freezer lands Respondent in jail for 9 months

In 2004 Microsoft sued Mr Omesuh and his company ITAC for various trademark infringements. In 2006 the case concluded with the Court ordering Omesuh to pay Microsoft £1m in damages and a permanent injunction regarding future infringement. In 2008 Omesuh recommenced his infringing activities and Microsoft obtained Search and Freezing orders against him in support of a multi million pound claim. Under the Freezer Omesuh was obliged to disclose his world wide assets but in responding he declared on oath that he

had none other than his business which was in Administration. After an extensive investigation Microsoft established that Omesuh had a hidden network of offshore companies and bank accounts and had bought and sold assets in breach of the Freezer. The Judge sentenced Omesuh to 9 months in prison for breaching the terms of the Freezer.

Microsoft v Omesuh [2009] EWCH 51

To view the judgment please click on the link below.

http://www.mishcon.com/news/briefings/prison_sentence_handed_down_for_breach_of_a_civil_court_order_02_2009

Norwich Pharmacal

Paribas use Norwich to investigate suspected Norwegian asset strip

Paribas suspected that the Kvaerner Group had devalued Paribas' shareholdings in Trafalgar House by a debt swap that replaced a £350m debt from Kvaerner Group companies with a debt of £900m from a UK shell company with a capital of £1. To get more information about this swap Paribas applied for a Norwich against various members of the Group which was resisted on grounds inter alia that it would be too expensive (ie around

£250k) for the Group to comply with the order. The Judge rejected this argument and held that cost of compliance was no bar to making the order requested although he did refuse to make Kvaerner swear an affidavit in the form requested by Paribas.

BNP Paribas v Th Global Limited, Spinaker Limited, Kvaerner 2004 (No 2) Limited [2009] EWHC 27 (Ch), 15 January 2009

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

<http://www.bailii.org/ew/cases/EWHC/Ch/2009/37.html>

Anti-Suit

R.I.P. Anti Suit Arbitration Injunctions in EC

ERG, an Italian company, recovered compensation from its insurers, Allianz and Generali, in respect of the collision in Italy of a vessel chartered from and owned by West Tankers which damaged ERG's jetty. The insurers sued West Tankers in Italy to recover monies it had paid to ERG. At the same time, West Tankers brought proceedings in UK against insurers to have their dispute referred to arbitration in accordance with the Charterparty Agreement. West Tankers also sought an anti suit injunction to prevent the insurers continuing their claim in Italy in breach of the arbitration provisions in the

Charterparty Agreement. Ultimately the case went to the House of Lords who referred to the ECJ the question of whether an anti suit injunction could be brought to prevent the continuation of proceedings commenced in a Member State. The ECJ found that a court of a member state could not make an order to restrain someone from bringing civil proceedings in another member state even if it is in breach of an arbitration agreement.

Allianz SpA (formerly Riunione Adriatica di Sicurta SpA) v West Tankers Inc, ECJ (C-185/07), 13 February 2009

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

<http://www.bailii.org/eu/cases/EUECJ/2009/C18507.html>

Gag Orders

Four hours exposure on Web no bar to Confidentiality injunction

Barclays applied for an injunction to restrain the Guardian from continued publication of documents it claimed were both confidential and privileged regarding its tax planning schemes. The documents had been leaked by a Barclays' employee and had been posted on the Guardian's website at about 10pm on 16 March. Barclays' lawyers got Mr Justice Ousley out of bed at around 2:30am on 17 March to give them an injunction forcing the Guardian to take down the documents from its website

and refrain from any further publication and from directing its readers to other sites where the documents could be viewed. The Guardian failed in its attempts to discharge the injunction even though the documents were on the website for about four hours and were also still available on other websites such as Wikileaks.

Barclays Bank Plc v Guardian News and Media Limited [2009] EWHC 591 (QB), 19 March 2009

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

<http://www.bailii.org/ew/cases/EWHC/QB/2009/591.html>

No injunction for MP's unorthodox use of Commons Offices

Mr Justice King declined to give MP Nigel Griffiths a restraining injunction against the News of the World in respect of

information about the MP's nocturnal activities with a mystery woman in his Commons study. The Judge accepted the newspaper's argument that there was a legitimate public interest in the manner in which MPs used access to the offices they had obtained as a result of their position in public office.

Disclosure Orders

Times fishing expedition for Berezovsky documents cut short by Judge

Flood, a police officer sued the Times for libel for suggesting that he had accepted bribes from Russian exiles in return for selling them information about the state of extradition proceedings in train against them to return them to Russia. The Times applied for a disclosure order against the Independent Police Complaints Commission seeking documents they had in connection with their investigation into Flood. The Judge

rejected the Times application on the ground that they had not established the relevance of documents they were seeking and that they were simply fishing for evidence to support a case they had not yet pleaded.

Flood v Times Newspapers Ltd, Commissioner of the Metropolis, Independent Police Complaints Commission / Berezovsky v Commissioner of the Metropolitan Police [2009] EWHC 411 (QB), 5 March 2009

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

<http://www.bailii.org/ew/cases/EWHC/QB/2009/411.html>

Corporate

Judge nullifies fraudulent shareholder resolutions

Together with B, the first defendant, C & R were the directors of an Indian company with a registered office in England. B conducted a variety of meetings where C & R were removed as directors and shareholdings were forfeited to give B control over the company. C & R alleged that B had forged their signatures on convening notices and resolutions in order to gain control of the company and its board and applied

for a variety of injunctions declaring the resolutions invalid. C & R succeeded in obtaining orders in effect reinstating them to the Board and restraining both sides from calling General Meetings until the outcome of the litigation. The Judge found that the fact that the Indian company had its registered office in England gave the Court jurisdiction under Article 22 of Regulation 44 which it was bound to exercise to hear the claim even where the potential alternative court was not another member state.

Choudhary v Bhatler [2009] EWHC 314 (Ch), 11 February 2009

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