

Mishcon

Injunctions

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Editor's Note

Without doubt one of the most valuable tools in an Injunction Specialist's tool box is the Norwich Pharmacal or Third Party Disclosure Order, which enables potential claimants to force third parties such as banks to disclose information and documentation to assist the claimant in tracing the whereabouts of stolen assets and/or the identity of those involved in the movement of those assets.

Our beloved prosecuting authorities have taken some time to acknowledge that the tracing, freezing and seizing of the proceeds of crime is often much more effective than a long drawn out prosecution, which may or may not result in a conviction. However, having seen the light they are now leading the way in securing some of the most powerful disclosure orders known to the law, all courtesy of Section 357 of the Proceeds of Crime Act 2002 (see SOCA v Perry below).

Whilst this is reassuring from a public interest perspective, this blows a very chilly wind for us in the civil recovery world. We find more and more frequently that the UK Government are competing with our clients for access and title to the proceeds of crime, particularly now that in many cases the prosecuting authorities are allowed to keep a slice of what they confiscate. The proprietary tracing injunction is therefore going to be even more



important than ever if we are going to be able to protect our clients' interests in and rights to assets that have been acquired out of monies stolen from them.

Finally, my thanks as always to those brave soldiers in the form of Nicholas Kirby and Annie Jaskel who fearlessly waded through months of injunction reports to deliver the delicacies we lay before you in this issue.

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

Gary Miller
Partner
Mishcon's International
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Freezing

Eight month delay denies Cherney a freezer

The Russian billionaire Michael Cherney obtained a £5m Freezing Injunction over funds in the possession of a US businessman, the counterparty to certain of his London property deals. Cherney's application for a worldwide freezer failed because

his delay in seeking injunctive relief (some eight months after serving his claim on the counterparty) meant there could be no risk of dissipation. However, because the counterparty had admitted receipt of certain impugned funds, the High Court was able to grant proprietary relief against the funds in question.

Cherney v Neuman [2009] EWHC 1743 (Ch), 22 July 2009

Lack of English link defeats piggy back freezer

The claimants obtained a worldwide Freezing Order in England in aid of Italian proceedings in which the defendant had been found to have acted fraudulently. Subsequently, the claimants obtained an English Without Notice Order against the defendant's parents living in Monaco, restraining them from dealing with certain assets alleged to belong to the defendant and requiring delivery

up thereof (a so-called Chabra Order after an earlier case). The Monaco parents successfully applied to set aside the English injunction on grounds of there being no jurisdiction because of the absence of any real connecting link between the parents and England and the impracticality of enforcing the order against the parents in Monaco.

Belletti v Morici [2009] EWHC 2316 (Comm), 24 September 2009

[<http://www.bailii.org/ew/cases/EWHC/Comm/2009/2316.html>]

Freezer slashed by £2.3m due to material non-disclosure

Earlier this year, the High Court granted Alphasteel Limited (In Liquidation) a £7m Freezing Injunction against its former director, Mr Shirkhani, based on alleged misappropriation of its assets. S applied to discharge the order on the basis that Alphasteel, in its Without Notice Application, did not comply with the onerous duties of full and frank

disclosure, and produced key documents which it claimed ought to have been put before the Court. The Court agreed there had been serious non-disclosure, though not deliberate. However, because there remained a good arguable case, the Court continued the injunction with a significantly reduced quantum (£4.7m and limited in scope to a property in the UK owned by the defendant) as a means of exacting a penalty for the seriousness of the non-disclosure.

Belair LLC v Basel LLC, [2009] EWHC 725 (Comm)

Anti-Suit

Deutsche Bank loses anti-suit bar against Texan hedge fund

The English Court of Appeal allowed a US hedge fund's appeal against a High Court Anti-Suit Injunction restraining it from pursuing Deutsche Bank in Texas where parallel proceedings were afoot in England. The parties' contract contained a clause submitting to the English jurisdiction and courts but not exclusively and

this, held the Court, envisaged an alternative jurisdiction and parallel proceedings. The parallel proceedings would only be barred by the English Courts if in the interests of justice, that is, if there were exceptional circumstances rendering the parallel proceedings oppressive or vexatious, which was not found to be the case here.

Deutsche Bank AG v Highland Crusader Offshore Partners LP [2009] EWCA Civ 725, 13 July 2009
[<http://www.bailii.org/ew/cases/EWCA/Civ/2009/725.html>]

Risk of inconsistent decisions supports Morgan Stanley's Anti-Suit relief

The English High Court issued an Anti-Suit Injunction in favour of Morgan Stanley restraining its counterparty under a currency swap agreement, a Hong Kong listed fruit juice trader, from suing it in China in breach of an exclusive jurisdiction clause. The Injunction did not affect the counterparty's ability to sue

Morgan Stanley's associate company in China on substantially the same subject matter, as the associate company was not party to an exclusive jurisdiction agreement. The Court found that there was no strong reason for not granting the Anti-Suit Injunction and it would ensure there was no risk of inconsistent decisions.

Morgan Stanley v China Haisheng Juice Holdings Co Limited [2009] EWHC 2409 (Comm), 5 October 2009

[<http://www.bailii.org/ew/cases/EWHC/Comm/2009/2409.html>]

Trademarks

Balance of convenience saves Stella McCartney's perfume from interim injunction

The company of fashion designer Stella McCartney, batted off an injunction application in the High Court, brought by Nude Brands Limited, in relation to Stella's new 'Stellanude' perfume range. Whilst the Court agreed it was plainly arguable that 'Stellanude' was similar to the mark 'Nude' and there was therefore a triable issue, on the balance of justice it

was considered not appropriate to grant the injunction. The risk of irreparable harm to the 'Nude' brand in the period before trial was small because it had yet to begin to market a perfume under its brand and there was also no present risk of confusion in the marketplace. On the other hand, the 'Stellanude' launch was in its advanced stages and therefore the likely damage to it if an injunction was wrongly granted outweighed the damage to 'Nude' if it was refused.

Nude Brands Limited v Stella McCartney Limited [2009] EWHC 2154 (Ch), 20 August 2009

[\[http://www.bailii.org/ew/cases/EWHC/Ch/2009/2154.html\]](http://www.bailii.org/ew/cases/EWHC/Ch/2009/2154.html)

Ex Director barred from using Spicy Burger secret recipe for three years

Walsh Family Foods, presently in receivership, obtained injunctions from the Irish High Court against its former director, Patrick Walsh, restraining him from using the company's famous Spicy Burgers secret recipe. Walsh Foods

allege that Mr Walsh obtained a copy of the closely guarded recipe and has used it to manufacture and attempt to 'pass off' his own new version of the burger. The injunction prevented anyone who may have come into receipt of the recipe from deleting or destroying it. The parties are reported to have subsequently reached a settlement by which Mr Walsh agreed to leave production of the burgers to the company for three years.

Irish High Court, 25 August 2009

Illegality overseas no bar to damages on cross undertaking

In previous hearings, the claimants claimed the defendant's business infringed their community trademarks over certain prescription drugs. The defendant received orders for drugs from US patients with US prescriptions and sourced branded drugs in Turkey which it exported to a Canadian supplier. Shipments were exported via the UK and it is here that the defendant allegedly infringed the trademarks, based on which allegations the claimants obtained

injunctions restraining the defendant's business. However, the Court of Appeal later found there to be no infringement as the drugs were never released for circulation in this jurisdiction. The High Court discharged the injunctions accordingly and assessed losses suffered by the defendants as a result of injunctions as including: costs in relation to lost business, unsold stock and staff redundancies.

Lilly Icos LLC and others v BPM Chemists Limited [2009] EWHC 1905 (Ch)

[\[http://www.bailii.org/ew/cases/EWHC/Ch/2009/1905.html\]](http://www.bailii.org/ew/cases/EWHC/Ch/2009/1905.html)

Disclosure Orders

Freedom of Speech trumps Trafigura's super injunction

The High Court granted a rare form of injunction, dubbed a "super injunction," against The Guardian in September 2009 that not only prevented publication of a document considered privileged by the applicant, Trafigura, but which required that the existence of the injunction itself be kept secret. The document was a draft report into the dumping of toxic waste in Ivory Coast which injured 31,000 and cost Trafigura £130m in clean up and settlement sums. The wide ranging effect of the injunction was brought into sharp focus when an MP tabled a question regarding it for

discussion in Parliament which, had it been reported by The Guardian, would have placed the newspaper in contempt of Court. This effective 'gag' on the ability of a newspaper to report on parliamentary business caused uproar in the press and social networking sites as it appeared to transgress the fundamental principles of freedom to report parliamentary business and transparency in the administration of justice. Ironically, the effect of this particular injunction against The Guardian was precisely what Trafigura had attempted to avoid; the draft report and its contents, and Trafigura's attempt to have it suppressed, became headline news overnight.

(1) RJW (2) SJW v (1) Guardian News and Media Limited (2) The Person or Persons Unknown, 11 September 2009

No connection to England necessary for SOCA disclosure order

The High Court granted the Serious Organised Crime Agency (SOCA) a Without Notice Disclosure Order against Mr Perry and his family members and Mr Perry applied to set the Order aside. Mr Perry had been convicted of dishonesty offences in Israel and SOCA had commenced a civil recovery investigation when it located English bank accounts linked to him. Mr Perry sought

to have the order set aside on the basis that he and his family were not present, resident or domiciled in England and had no other connection to the jurisdiction save for the accounts. The High Court refused Mr Perry's application and upheld the Disclosure Orders which were made pursuant to SOCA's wide ranging powers under Section 357 of the Proceeds of Crime Act 2002.

SOCA vs Perry et al [2009] EWHC 1960, 30 July 2009

[<http://www.bailii.org/ew/cases/EWHC/Admin/2009/1960.html>]

Service of Injunctions

Anonymous infringer clobbered by Twitter injunction

The English High Court for the first time permitted an injunction to be validly served via the social networking website, Twitter. The injunction required an anonymous blogger - who was misusing the site to impersonate a right-wing commentator allegedly in breach of copyright – to desist from impersonating other users and to reveal his identity to

the Court. The Judge noted that allowing service via the site itself was the best way to get to the anonymous account holder, who would be served when he next logged into his account. It has since been reported that the anonymous blogger has complied with the injunction by identifying himself and agreeing a confidential settlement with the applicant involving a payment to charity.

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