[1999–00 Gib LR 167]

BPS SHIPPING LIMITED v. LAEMTHONG INTERNATIONAL LINES COMPANY LIMITED

SUPREME COURT (Pizzarello, A.J.): May 7th, 1999

Conflict of Laws—reciprocal enforcement of judgments—execution of foreign judgment—foreign judgment for as yet unquantified costs unenforceable under Judgments (Reciprocal Enforcement) Ordinance, s.8, since judgment for indefinite sum unenforceable in country of origin and therefore unregistrable in Gibraltar—same position at common law

Civil Procedure—service of process—service out of jurisdiction—action to enforce foreign judgment for indefinite sum, e.g. unquantified costs, not claim "to enforce any judgment or arbitral award" under Rules of Supreme Court, O.11, r.1(1)(m), since unenforceable in Gibraltar by Judgments (Reciprocal Enforcement) Ordinance or at common law

Injunction—Mareva injunction—court's discretion to grant injunction—no injunction to preserve assets pending action to enforce foreign judgment for indefinite sum, e.g. unquantified costs—judgment unenforceable and thus no cause of action in Gibraltar

The plaintiff applied to the Supreme Court to enforce a foreign judgment for costs against the defendant.

The plaintiff, a Gibraltar company, obtained judgment against the defendant in the High Court of Australia and was awarded its costs, which were to be taxed. The defendant, a Thai company, refused to pay

the costs, which remained untaxed, and had given insufficient security for its appeal to the High Court to cover them. The plaintiff issued a writ in the Supreme Court, claiming the sum of the costs, in the hope of recovering them against a ship owned by the defendant—its only asset in Gibraltar. The court granted leave to serve the writ outside the jurisdiction under O.11, r.1(1)(*m*) of the Rules of the Supreme Court, and granted a *Mareva* injunction preventing the defendant from removing the vessel from the jurisdiction unless the defendant paid security into court.

The defendant applied to set aside the writ under O.12, r.8 on the ground that the court had no jurisdiction over it or the subject-matter of the claim.

It submitted that the plaintiff could not enforce the judgment for its costs, since (a) under ss. 4 and 8 of the Judgments (Reciprocal Enforcement) Ordinance, no foreign judgment could be enforced unless it was registered with the Supreme Court, and only a judgment enforceable by execution in the country of origin could be registered; (b) since the costs had not been taxed by the Australian court, judgment for those costs was as yet unenforceable in that court; (c) at common law, a foreign judgment had to be for a definite sum to be enforceable here; and (d) accordingly, the writ should be struck out and the *Mareva* injunction discharged.

The plaintiff submitted in reply that the writ and *Mareva* injunction should remain in place, since (a) O.11, r.1(1)(*m*) gave the Supreme Court power to enforce a foreign judgment whether or not the defendant had assets in the jurisdiction; (b) under s.151 of the Supreme Court Act, a "judgment" included a decree; (c) it had obtained a conclusive judgment of the Australian court for pecuniary relief awaiting evaluation, and therefore had a good cause of action against the defendant; and (d) the power to grant *Mareva* relief under s.37 of the Supreme Court Act 1981 now extended to cases in which no cause of action yet existed within the jurisdiction.

Held, setting aside the writ and discharging the injunction:

(1) The plaintiff could not register the Australian judgment under s.4 of the Judgments (Reciprocal Enforcement) Ordinance and could not enforce it under s.8 of the Ordinance. Until the costs had been taxed and quantified, there was no definite sum payable under the judgment in Australia. Although the plaintiff clearly had a substantive claim to pecuniary relief on a foreign judgment, it could not be enforced under statute or at common law by Gibraltar proceedings served under O.11, r.1(1)(*m*) of the Rules of the Supreme Court. That sub-paragraph referred to an enforceable judgment, namely, a final and conclusive judgment for a definite sum of money, and its plain words could not be taken out of their legal context. The writ would be set aside (para. 8; paras. 18–19).

(2) Accordingly, notwithstanding the developments in the *Mareva* jurisdiction since its inception, the injunction would be set side, since there was no substantive matter giving rise to a cause of action in Gibraltar (para. 17; para. 20).

Cases cited:

(1) *A* v. *B*, [1989] 2 Lloyd's Rep. 423.

(2) *Channel Tunnel Group Ltd.* v. *Balfour Beatty Constr. Ltd.*, [1993] A.C. 334; [1993] 1 All E.R. 664, considered.

(3) *Itar-Tass Russian News Agency* v. *Pogrebnoy*, C.A., March 19th, 1999, unreported, followed.

(4) *Mareva Cia. Naviera S.A.* v. *International Bulk Carriers S.A.*, *The Mareva*, [1980] 1 All E.R. 213n; [1975] 2 Lloyd's Rep. 509.

(5) *Mercedes-Benz A.G.* v. *Leiduck*, [1996] A.C. 284; [1995] 3 All E.R. 929, considered.

(6) *Siskina (Cargo Owners)* v. *Distos Cia. Naviera S.A.*, *The Siskina*, [1979] A.C. 210; [1977] 3 All E.R. 803; *sub nom. Ibrahim Shanker & Co.* v. *Distos Cia. Naviera S.A.*, [1978] 1 Lloyd's Rep. 1, considered.

(7) *Soinco S.A.C.I.* v. *Novokuznetsk Aluminium Plant*, [1998] Q.B. 406; [1997] 3 All E.R. 523.

(8) *Sugden* v. *Sugden*, [1957] P. 120; [1957] 1 All E.R. 301.

Legislation construed:

Judgments (Reciprocal Enforcement) Ordinance (1984 Edition), s.4:

> "A person, being a judgment creditor under a judgment to which this Part applies, may apply to the Supreme Court . . . to have the judgment registered in the Supreme Court, and on any such application the court shall, subject to proof of the prescribed matters and to the other provisions of this Ordinance, order the judgment to be registered:
>
> Provided that a judgment shall not be registered if at the date of the application—
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> . . .
>
> (*b*) it could not be enforced by execution in the country of the original court."

s.8: The relevant terms of this section are set out at para. 8.

Rules of the Supreme Court, O.11, r.1(1)(*i*):

> ". . . [S]ervice of a writ out of the jurisdiction is permissible with the leave of the Court if in the action begun by the writ—
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> . . .
>
> (*i*) the claim is made for a debt secured on immovable property or is made to assert, declare or determine proprietary or possessory rights or rights of security, in or over movable property, or to obtain authority to dispose of movable property, situate within the jurisdiction. . ."

r.1(1)(*m*): The relevant terms of this sub-paragraph are set out at para. 18.

Supreme Court Act 1981 (c.54), s.37(1):

> "The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so."

s.37(2): "Any such order may be made either unconditionally or on such terms and conditions as the court thinks just."
s.151: The relevant terms of this section are set out at para. 18.

A.E. Dudley for the plaintiff;
R.A. Triay for the defendant.

1 **PIZZARELLO, A.J.:** On April 16th, 1999 the plaintiff issued a writ *in personam* against the defendant in which it claimed for—

> "such sums as shall be found to be due to the plaintiff by way of costs arising out of proceedings between the plaintiff and the defendant in the Supreme Court of the Northern Territory of Australia at Darwin in Admiralty Case No. 198 of 1995 (9520033) and the Court of Appeal of the Northern Territory of Australia in AP 27 of 1995, culminating in a judgment of the High Court of Australia dated December 9th, 1997 in which the said High Court of Australia dismissed the appeal of the defendant ordering the defendant to pay the costs of the plaintiff."

2 The relevant part of the Australian order of December 9th, 1997 is as follows: "The costs of the respondent in this appeal [shall] be taxed by the proper officer of this court and when so taxed and allowed [shall] be paid by the appellant to the respondent or its solicitors." The respondent therein referred to is the plaintiff in the instant matter and the appellant named is the defendant herein. The costs to date have not been taxed.

3 On the same day, April 16th, 1999, on the application *ex parte* of the plaintiff I did in this court issue a *Mareva* injunction prohibiting the defendant from dealing with its assets in Gibraltar to the amount of US$147,740.25, being the estimated amount of costs due under the said Australian order. I was persuaded at that stage that whilst the plaintiff's claim was as yet unenforceable, there was a good cause of action in substantive proceedings in this court following on the provisions of O.11, r.1(1)(*m*) of the Rules of the Supreme Court. I accepted Mr. Triay's submission that the Australian judgment formed the basis of a good arguable case for a substantive claim.

4 I was also satisfied that the defendant had assets within the jurisdiction, notwithstanding that the asset was a vessel flying a foreign flag and that in the circumstances described to me—namely that (a) the defendant had made it clear that it would not pay those costs; (b) the bond in Australia was not sufficient to cover those costs; and (c) the defendant had withdrawn instructions from its solicitors and had not replaced them—there was a real risk of dissipation. At the same time I granted leave to serve the writ out of the jurisdiction pursuant to O.11, r.1(1)(*m*), having been referred to 1 *The Supreme Court Practice 1999*, para. 11/1/39, at 100.

5 As a result, the *M.V. Laemthong Pride*, which is the defendant's only asset in Gibraltar, is effectively stopped from leaving Gibraltar unless the defendant puts up security by paying the sum of US$147,740.25 into court or makes other provision for security as may be agreed with the plaintiff.

6 The defendant is a Thai corporation and is not within the jurisdiction. It has filed an acknowledgement of service and applies by a summons dated April 28th, 1999, pursuant to O.12, r.8, for an order that the writ of summons be set aside because the court has no jurisdiction over the defendant in respect of the subject-matter of the claim or the relief or remedy sought in the action because no cause of action subsists in Gibraltar.

7 Mr. Dudley pointed out that it is necessary to seek the leave of the court both to issue a writ which is to be served outside the jurisdiction and to serve it (O.6, r.7 and O.11, r.1). That was not done in this case. He does not seek to make an issue out of that, since the omission is not of substance given that the court gave leave to serve outside the jurisdiction, but the point he sought to make is that leave to serve out of the jurisdiction was made pursuant to r.1(1)(*m*) and that alone.

8 It is agreed by both parties that if the costs ordered by the High Court of Australia were to be taxed and quantified, the plaintiff could register the said judgment and would be entitled to seek a *Mareva* injunction under the registered judgment. However, the defendant submitted, the plaintiff cannot register at this stage because it is barred by s.8 of the Judgments (Reciprocal Enforcement) Ordinance from doing so. This Ordinance applies to the Northern Territory of Australia and s.8 reads:

> "No proceedings for the recovery of a sum payable under a judgment given by a court of another country, being a judgment to which this Part applies, other than proceedings by way of registration of the judgment, shall be entertained by any court in Gibraltar,"

The plaintiff, submitted Mr. Dudley, simply has not got a judgment for a sum and "it could not be enforced by execution in the country of the original court" (s.4 of the Ordinance), so registration under that Ordinance is out of the question.

9 Therefore, argued the defendant, the plaintiff can only proceed on the judgment of Australia under well-recognized principles and he refers to 8(1) *Halsbury's Laws of England*, 4th ed., paras. 1012–1015, at 733–735. Paragraph 1013, at 733, reads: "To be enforceable by action upon the judgment at common law, the foreign judgment must be for a definite sum. An order for the payment of costs is therefore not enforceable until the costs have been taxed." The position is the same in Australia. Until

the costs are taxed and the Taxing Master makes an order as to the amount that he will allow, these costs will not be a fixed amount and cannot therefore be enforceable by the plaintiff. That the foreign judgment must be for a definite sum is a prerequisite to the issue of a writ because the cause of action depends on a judgment in a definite sum. This accords with the decision of the Gibraltar Court of Appeal in *Itar-Tass Russian News Agency* v. *Pogrebnoy* (3).

10 It follows, he argued, that if no cause of action subsists in Gibraltar and the writ is struck out, the consequence is that the injunction is also discharged because there is no room, except in certain circumstances which these are not, for an injunction in the absence of substantive proceedings in Gibraltar: see Lord Diplock in *Siskina* (*Cargo Owners*) v. *Distos Cia. Naviera S.A., The Siskina* (6) ([1977] 3 All E.R. at 823–825) and also 1 *The Supreme Court Practice 1999*, para. 29/L/44, at 582. The comment in para. 11/1/39, at 100 does not, he submits, help the plaintiff. It has still to get over the hurdle that the judgment is not for a definite sum.

11 Mr. Dudley also drew attention to the difficult position that arises if the plaintiff continues on its course. Before it can progress, the costs have to be taxed. As soon as they are taxed and the judgment is complete it has then to withdraw the present proceeding—and, I interpose, perhaps it lapses perforce due to s.8 of the Judgments (Reciprocal Enforcement) Ordinance—and start new proceedings for the registration of the Australian judgment now concrete. So, at one point in time, subject to any arguments over abuse of process, there will be no action or injunction against the defendant, and that, he submits, cannot be right.

12 For the plaintiff, Mr. Triay makes the point that the *Mareva* in this action is "in protection or assertion of some legal or equitable right which it has jurisdiction to enforce by final judgment." That will be the case when the order for costs is perfected in due course. At the moment the plaintiff has a good cause of action. It is an unenforceable judgment in Australia but it gives rise to an obligation on the part of the defendant which is inescapable. The Australian judgment is conclusive to the extent that the plaintiff has a right to succeed and is therefore well within sub-para. (*m*). It has succeeded albeit that the amount is not quantified.

13 *The Siskina* (6), Mr. Triay argues, it has to be noted, was decided in 1979 when the *Mareva* jurisdiction had not been developed to the extent that it has and it is still developing. That jurisdiction has moved on and the courts have extended the *Mareva* jurisdiction to cases where there is no cause of action, and he refers to *A* v. *B* (1), in which Saville, J. granted *ex parte* relief before the cause of action arose. In the instant case, he says, the position is stronger, as all the judgment needs is to be perfected by taxation. And as to what amounts to a cause of action, Mr.

Triay refers, as an example, to *Sugden* v. *Sugden* (8), in which Denning, L.J. said ([1957] 1 All E.R. at 302):

> "'Causes of action' are not, however, confined to rights enforceable *by action*, strictly so called—that is, by action at law or in equity. They extend also to rights enforceable by proceedings in the Divorce Court, provided that they really are rights and not mere hopes or contingencies."

Since s.37 of the Supreme Court Act 1981, which founds the *Mareva* injunction, is circumscribed by *The Siskina*, Mr. Triay suggests it is relevant to consider exactly how far that case goes to shut out the plaintiff in the instant matter, for certain opinions raise questions on the case. Lord Nicholls in *Mercedes-Benz A.G.* v. *Leiduck* (5) ([1995] 3 All E.R. at 950) suggested that the proposition that the court cannot grant *Mareva* relief unless it has jurisdiction over the plaintiff's substantive claim "goes to discretion, not to jurisdiction," and Lord Browne-Wilkinson in *Channel Tunnel Group Ltd.* v. *Balfour Beatty Constr. Ltd.* (2) ([1993] A.C. at 343), considered the effect of the decision in *The Siskina* on the assumption that it correctly states the law and reserves the question whether the law as laid down was correct in restricting the power to grant injunctions to certain exclusive categories.

14 Another matter to be borne in mind, submitted Mr. Triay, is that O.11 was revised and sub-para. (*m*) introduced after the *Siskina* decision. O.11, r.1(1)(*m*) blocks a small but irritating loop-hole in the law: see 1 *The Supreme Court Practice 1999*, para. 11/1/39, at 100, which reads:

> "The presence of assets within the jurisdiction does not in itself give the English courts jurisdiction over a person outside the jurisdiction. Accordingly a foreign judgment could not be enforced against English assets in cases not falling within the provisions for the reciprocal enforcement of judgments legislation unless the debtor could be served in England or was 'domiciled or ordinarily resident within the jurisdiction.' Now the foreign judgment or award is itself a sufficient ground for the grant of leave."

Thus, submits Mr. Triay, the judgment of the Australian court properly provides the foundation for a writ under sub-para. (*m*), for that gives jurisdiction even if the amount is unquantifiable. The plaintiff has a cause of action. An injunction in aid can go. Section 37 of the Supreme Court Act 1981 is wide, gives the power and it is just and convenient in this case to proceed in this way. The courts have developed a much more flexible approach to the circumstances in which injunctions, particularly interlocutory injunctions, can be granted. He refers to *Soinco S.A.C.I.* v. *Novokuznetsk Aluminium Plant* (7) to illustrate that the courts have extended the bounds of s.37 which applies to both injunctions and

receivers. There it was held that since the court had jurisdiction to grant an injunction to preserve for execution assets acquired after judgment, there was no reason why it could not appoint a receiver to preserve such assets. There was also jurisdiction to appoint a receiver by way of equitable execution to receive future debts as well as debts due or accruing due at the date of the order and, in the circumstances, it was just and convenient to appoint a receiver in respect of all sums which were due or would in the future fall due for payment.

15 In reply, Mr. Dudley submitted that Mr. Triay's arguments turned on the developing jurisdiction of the *Mareva* injunction, but failed to address the underlying question which is: Was the plaintiff entitled to have been given leave to issue and serve the writ? This is because in order to enforce a foreign judgment there must be a definite sum, and the plaintiff has not got over that hurdle. As for the cases cited, they arose in the domestic scene and a challenge as to jurisdiction was not an issue.

16 It is agreed by both counsel that the provisions of the Civil Jurisdiction and Judgments Ordinance, 1993 do not apply in the instant matter.

17 It seems to me to be fairly clear that a *Mareva* injunction will not, subject to certain exceptions, be granted to an applicant who has no cause of action against the defendant at the time of the application. This stems from *The Siskina* (5), but in my view it is important to note, especially after the observation of Lord Browne-Wilkinson in the *Channel Tunnel Group* case (2), that there are several considerations which attach to that decision. First, Lord Diplock made the point that in that case counsel did not seek to argue that the High Court had no jurisdiction in respect of a foreign defendant who was amenable to the jurisdiction in respect of a substantive claim to pecuniary relief made against him in the action. Secondly, the case did not fall under O.11, r.1(1)(*i*). Thirdly, a reservation was made by counsel and noted by Lord Diplock in order to protect the possibility of an attack on the correctness of the decision in the *Mareva* case (4). That no longer stands, since the *Mareva* jurisdiction is now well recognized. Fourthly, he recognized that O.11 permits the High Court to grant leave to a plaintiff to serve process on a person outside the territorial limits of the court but only in those cases specified in sub-paras. (*a*) to (*o*) of r.1(1). In *The Siskina* the House of Lords held that there was nothing to which a *Mareva* injunction could be attached as the contracts therein concerned were governed by exclusive jurisdiction clauses which took the matter away from England. Finally, Lord Diplock rejected the Court of Appeal's majority judgment which had held that the plain words of sub-para. (*i*) covered the action.

18 With those remarks in mind, I am attracted by Mr. Triay's argument because plainly there is here a substantive claim to pecuniary relief (on a

foreign judgment) albeit waiting for evaluation, and also the claim seems to fall squarely within the literal words of the present sub-para. (*m*). Sub-para. (*m*) states "the claim is brought to enforce any judgment or arbitral award. . ." The point, of course, is: What does judgment mean in the context of the Order which is made in pursuance of the Supreme Court Act 1981. Judgment is defined in s.151 of the Act as "judgment includes a decree," so at first blush that includes an order such as the Australian judgment in this case.

19 On the other hand, Mr. Dudley's arguments have the authority of many years of precedent and I am conscious that plain words ought not to be taken out of context of the legal background in which they are found. With that in mind it seems to me that sub-para. (*m*) is making reference to judgments which may be enforced: that is plain and certainly implicit in the expression "to enforce any." That in turn means (i) a judgment that is final and conclusive and (ii) one which is for a definite sum of money. Mr. Triay's arguments, stripped to their essentials, emphasize in different ways the fact that the Australian judgment is final and conclusive and that the court should move, but they do not bear on the second condition, namely that it be for a definite sum.

20 Having now the benefit of full argument, I have come to the conclusion that the writ should be set aside and the injunction should be discharged because there is no substantive matter at this stage which gives rise to any action in Gibraltar.

Order accordingly.
