

## Offshore Cases

### Bermuda

Supreme Court

#### ***Ashley Dawson-Damer and Lyndhurst Limited JUDGMENT [2019] (Bda) 72 Civ (18 October 2019)***

**Cross-border litigation - Application for interlocutory preservation order – Requirement for underlying substantive proceedings – Where underlying proceedings are pending in foreign jurisdiction whether any foreign judgment must be enforceable in the domestic jurisdiction**

The decision of Chief Justice Hargun in *Dawson-Damer v. Lyndhurst Limited* appears to be the first time the Bermuda Court has granted an interim preservation order over disputed trust assets pending the outcome of foreign proceedings.

The Judgment reiterates that there are separate tests for obtaining injunctive relief (1) to freeze assets under the *Mareva* jurisdiction ([1980] 1 All ER 213) versus (2) to preserve assets in a proprietary claim.

Following the House of Lords decision in *The Siskina* [1979] AC 210, *inter alia*, the Bermuda Court also held that where a foreign judgment against the Respondent could not be directly enforced in the domestic jurisdiction, it was necessary for the Applicant seeking injunctive relief to issue freestanding proceedings against the Respondent in the domestic jurisdiction to underpin the injunctive relief.

The Court granted the injunction to preserve the disputed trust assets and also compelled the Respondent to provide information about the Bermuda Trusts. But the Court did so only upon the Applicant's undertaking to issue proceedings in Bermuda against the Respondent.

#### **Background**

This is the Bermuda aspect of substantial cross-broader litigation, which has already been ventilated in the High Court (twice) and the Court of Appeal in London ([2016] 1 WLR 28; [2017] EWCA Civ 74;

[2019] EWHC 1258 Ch). The substantive determination of the claim is still to be heard in The Bahamas. At the heart of the dispute is the legitimacy or otherwise of a transfer of a significant amount of assets from The Bahamas to Bermuda.

The Trustee of a discretionary Bahamian trust transferred c. 98% of the trust assets to three Bermuda trusts. Lyndhurst was the Trustee of the Bermuda trusts.

Mrs. Dawson-Damer -- who was a beneficiary of the Bahamian trust, but was not a beneficiary of the recipient Bermuda trusts -- contended that the transfers by the Trustee in The Bahamas were void or alternatively voidable.

She issued a claim in The Bahamas against the Trustee of the Bahamian trust, later adding Lyndhurst as a second defendant to the Bahamian claim.

Lyndhurst then refused:

- (1) to accept the jurisdiction of the Bahamian Court;
- (2) to participate in the Bahamian claim; or
- (3) to undertake to preserve the assets in the Bermuda trusts pending the outcome of the Bahamian claim.

Mrs. Dawson-Damer applied in Bermuda for injunctive relief, in order to preserve the disputed assets transferred from The Bahamas and to compel Lyndhurst to provide information about the Bermuda Trusts.

## The Application before the Bermuda Court

The main issues for the Bermuda Court were:

- (1) whether the Bermuda Court had jurisdiction to make the preservation order;
- (2) whether the test for a preservation order was different than the test for a *Mareva* injunction; and
- (3) whether the proper test to be applied was met on the facts of the case.

## The Respondent's Arguments

Lyndhurst contended it need not accede to the jurisdiction of the Bahamian Court.

Further, having declined to accede to the Bahamian Court, any judgment of that foreign court was not directly enforceable against Lyndhurst in Bermuda.

Lyndhurst therefore contended no injunction could be granted in Bermuda in support of a foreign judgment that was no directly enforceable.

## Cases Considered by the Bermuda Court

The Court considered *The Siskina* (supra), as well as the decision of the House of Lords in *Channel Tunnel Group and Anor. v. Balfour Beatty Ltd and Ors.* [1993] AC 334 and the Privy Council decision in *Mercedes-Benz AG v. Leiduck* [1996] AC 284 HK PC (which decision features a strong dissent by Lord Nicholls).

Hargun CJ also reviewed decisions from the Eastern Caribbean Supreme Court in *Black Swan Investments I.S.A. v. Harvest View and Ors.* BVIHCV 2009/339 23 March 2010 (Bannister J) and the Eastern Caribbean Court of Appeal in the *Yukos* case HCVAP 2010/028 (Kawaley JA).

## Decision of the Bermuda Court

The Bermuda Court determined that it did have jurisdiction to grant the injunction sought, but only on the Applicant's undertaking to issue a freestanding Bermuda claim (which Mrs. Dawson-Damer had undertaken to do if needed).

The Court held that the test for a preservation order was not the same as for a *Mareva* injunction. A

preservation order is a grant of relief in respect of a proprietary claim to disputed assets. Therefore the granting of a preservation order did not first require the Applicant to show any risk of asset dissipation.

Accordingly, preservation orders have lower test than *Mareva* injunctions.

Following the UK Court of Appeal decision in *Polly Peck International plc v. Nadir and Ors. (No.2)* [1992] 4 All ER 769, preservation orders only needed to meet the requirements in *American Cyanamid* [1975] 1 All ER 504, namely that:

- (1) there is a serious issue to be tried on the merits;
- (2) the balance of convenience is in favour of granting injunctive relief; and
- (3) it is just and convenient in all the circumstances to make the order.

The Bermuda Court found all three requirements had been met on the facts of the Application and granted the Applicant the relief sought, but only upon the Applicant's undertaking to issue a claim in Bermuda to underpin the jurisdictional basis for the preservation order.

Scott Pearman and Jonathan O'Mahony acted for the Applicant, Ashely Dawson-Damer. Leading Counsel for the Applicant was Richard Wilson QC of Serle Court Chambers, London.

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.