85/123

22nd November, 1985.

Johnson Matthey Bankers Limited

-v-

Arya Holdings Limited

DEPUTY BAILIFF: The question before the Court this afternoon is whether it should discharge peremptorily an interlocutory injunction granted to the plaintiffs in this case, Johnson Matthey Bankers Limited, against the defendant, Arya Holdings Limited. That interlocutory injunction was obtained upon attending at my chambers by Advocate Dessain on behalf of the plaintiff and before it was issued there was produced to me an affidavit of Mr. Dessain and an affidavit of Mr. Martin John Harper, a director of the plaintiffs.

Now it is said by the defendant who is applying to have certain interlocutory injunctions which were imposed by me at the time, removed, as I say peremptorily, that the Court today should not look at the merits of the case but lift the injunctions at once because there has not been within the necessary requirements, as I understand it, of the English Law which for our purposes we are prepared to adopt, a necessarily full and frank disclosure of everything that was material.

Not material in the sense that it was believed to be material by Mr. Harper but in the sense that it actually was material and there are three matters relied upon by Mr. Wheeler for the defendant this afternoon. First, that there were in existence a number of agreements or an agreement of the 28th September, 1985, between the defendant or at any rate between some companies in the U.K. which are controlled by the defendant company here and the plaintiff. Secondly, that there were negotiations taking place throughout this period which should have been brought to my attention, up to the 1st November, that is, of course. And thirdly, receivers had been appointed and he says that those matters were sufficient and should be sufficient for the Court today to remove the injunctions and the orders which were made by me, forthwith, without examining the merits or otherwise of the case.

The test, as I understand it, is whether in applying to the Court for an interlocutory injunction the person, (in our jurisdiction the Bailiff or the Deputy Bailiff) that is, the Judge, was deceived, or any matters were with-held from him which if they had been made known to him, would have caused him not to grant the injunction sought. We are satisfied that none of these matters and indeed so far as the appointment of receivers is concerned that is specifically referred to in Mr. Harper's affidavit in any case - leaving

the other two matters - that the other two matters were of sufficient materiality such that they would have influenced myself had they been made known to me to the extent that I would have refused to have granted the injunction and therefore we are not satisfied that the burden - and it is on the applicant this afternoon, we think, to support his application by full affidavits and there has indeed been one by Mr. Tite but of a limited nature - has been discharged and accordingly we are not prepared forthwith, peremptorily, without looking at matters further, to lift the injunctions.

The next matter I have to deal with can be dealt with quite briefly. It is the question of concurrent jurisdictions and simultaneous actions. There is no doubt that there are some assets of the defendant company in Jersey - exactly what they are is not known, exactly where they are is not known. We are told that all the papers which presumably would lead a person in possession of them to know where the assets if any, are, are at present held by the defendant's previous firm of Jersey Advocates and Solicitors. That may well be true but for the purposes of this Court we have no doubt that if there are assets within this jurisdiction, then notwithstanding any orders made in any other jurisdiction it cannot be urged with any strength, we think, upon us that this Court is not a proper place to apply to, to protect those assets within this, our own jurisdiction and therefore the fact that there are other proceedings in the English Courts is not a reason, per se, for our refusing to continue to look at the merits of the injunction sought and accordingly, we now propose to do so.

Looking at the Law as I understand it, the requirements - certainly in England and I have no doubt, here - because we have applied the English principles when we come to consider interlocutory injunctions which of course you have rightly said Mr. Dessain are distinguishable from a "saisie conservatoire" but that is used in different circumstances where there is a "somme liquide" - that is one easily ascertainable and so on but not in the present circumstances, we have in fact adapted the Mareva injunction principle to our own jurisdiction. So far as the English jurisdiction is concerned, the matters which a Court has to consider before granting an interlocutory injunction I think are succintly set out and I don't suppose I can pronounce it properly, in "Ninemia Maritime Corporation -v- Trave Schiffahrtsgesellschaft m.b.H. Und Co. K.G. which is reported at 'The Weekly Law Reports', 1983, a Court of Appeal case on July 18th and the headnote is quite clear - "....the jurisdiction to grant Mareva injunctions was exerciseable in cases where it appeared just and convenient to the Court to grant the injunction and the plaintiff had, inter alia, to show, on the evidence as a whole that there was at least a good argueable case that he would succeed at the trial and that a refusal of an injunction

would involve a real risk that a judgment or award in his favour would remain unsatisfied". Now we have noted in the course of this morning that the debts and the guarantees are not denied but of course there is a cross action, we understand, in the English Courts setting up a defence and pleading the previous agreements and a breach of those previous agreements and the contractual breach of those agreements by the plaintiff but we have to ask ourselves whether if we refused the injunction or if we lifted it, rather, whether that would involve a risk that a judgment, which may well not be in this Court but it may well be in the English Courts, might remain unsatisfied. We think that there is a considerable risk involved if we were to do that. According to the affidavit of Mr. Stebbings which we have seen today and which in fact, will be sworn in due course although it was unsworn when presented to us, the matters in English Courts are to come to a head on the 9th December when there will be a trial of the proceedings which have been commenced by the defendant, Mr. Shamji, the beneficial owner - we assume he is - and other associated companies in the Chancery Division of the High Court and as we were sitting this morning there was an application being heard by Mr. Justice Hoffman to transfer the proceedings relating to the defendant's guarantee and relating to Mr. Shamji's guarantee to the Chancery Division and I do not know what the result of that is, but it is clear to me that there is every chance that the substantive issues will be dealt with out of this jurisdiction next month whereas as far as the position is being reached here, it is unlikely if the matter ever comes to trial here that the issues between the parties will be dealt with for some considerable time to come. We have looked at the requirements of Mareva injunctions and the guidelines which have to be followed by an applicant before a Court can be persuaded to exercise its discretion to grant such an injunction and they are referred to in Halsbury 37th Volume of the 4th Edition at page 264 and I now read them: "The guidelines to be observed on an application for a Mareva injunction are (1) the plaintiff must make full and frank disclosure of all matters in his knowledge which are material for the judge to know" - well, I have already said that we think that has been done by Mr. Harper's affidavit - "(2) he must give particulars of his claim against the defendant, stating the ground of his claim and its amount, and fairly stating the points made against it" - there is not much said about what might be the defence but where there is a straight guarantee and a straight debt it is possible that there is no defence but at any rate it was not set up totally but one must balance that against the other matters - "(3) he must give some grounds for believing that the defendant has assets within the jurisdiction" - well, that was done - "(4) he must give some grounds for believing, beyond the

mere fact that the defendant is abroad, that there is a risk of the assets being removed before the judgment or the arbitral award is satisfied; (5) he must give an undertaking as to damages" - and that number (5) was done. So far as the Jersey Courts are concerned we were referred to the case of Jose Miguel Cerqueira -v- Bilbao International Bank (Jersey) Limited and the Royal Trust Bank (Jersey) Limited, (who was an eighth defendant in the case). It is a very short judgment of the 17th November, 1981 and there the Court lays down what it considers to be the requirement for obtaining an interim injunction. The Court says this on page 142: "Now as regards the interim injunction itself, it is not necessary that the Court should find a case which would entitle the plaintiff to relief at all events" and we think that is very similar to what I have referred to in the Ninemia case. "It is quite sufficient", the Court goes on, "to find a case which shows that there is a substantial question to be investigated and that the status quo should be preserved until the question can be finally disposed of" and they are in fact citing from page 537 of the twenty-fourth edition of the fourth volume of Halsbury.

Well, that is the question here, there is an English case between the parties, there are assets in Jersey, there is a Jersey case pending and really we have to ask ourselves whether it is right to try to preserve the status quo. On the other hand, Mr. Wheeler has suggested that matters have changed very much between the 1st November when I issued the interlocutory injunction and today and so that even if we, as we have done reject his application to throw out the interlocutory injunctions peremptorily without examining the position, we should ask ourselves and we have indeed done that, whether the position is so changed that it would not be right to continue with the injunctions in their present form. So has the position changed between the 1st November and now? Well, the position is clearly that there are still assets over here - they have not been moved and they cannot be at the moment because they are frozen - but the assets are here and I have said that the trial of the proceedings against the plaintiff will be heard in December according to Mr. Stebbings' affidavit and we have no reason to doubt it and thirdly, more importantly, in spite of the actions in the U.K. and in spite of the urgings of you, Mr. Wheeler, we are not very sanguine, considering what happened to the land certificate of title, the registration certificate, we are not very sanguine that if the order was lifted, it would not be possible notwithstanding the English Court's order, for Mr. Shamji or through his company - the company of the defendant, on instruction presumably of the beneficial shareholder - to remove such assets as there might be here and we think that it would not be right to run that risk, we think that apart

from anything else that where there is an action in the U.K. and assets in Jersey, it is quite customary in Jersey for us to be called in aid to impose an injunction so that a judgment obtained in the English Court jurisdiction should not be rendered nugatory by people being able to use our own jurisdiction to evade the results of that judgment and that position has influenced us as much as any in the particular circumstances of this case. There only remains really to decide whether we should continue the order in the exact terms as were imposed when I signed it and there are two remaining orders we are concerned with really, one is the conserving of the assets and the other is allowing copies to be taken of those documents relating to assets under B in the Order of Justice. Looking at the case of A. -v- C. - so far as the discovery is concerned as I say and the question of taking copies and so on as asked for in the injunction, there is a passage in A. -v- C. which is reported in '2 Weekly Law Reports' 1981 and the passage is at page 633 and the judgment of Mr. Justice Goff, and after dealing with the facts he then says: "Considerations such as these" - that is of course protection for the defendant's bankers in that case - "point, in my judgment, to the conclusion that the court should, where necessary, exercise its powers to order discovery or interrogatories in order to ensure that the Mareva jurisdiction is properly exercised and thereby to secure its objective which is, as I have described, the prevention of abuse. That the court has power to order discovery of particular documents and interrogatories at an early stage of proceedings is, I think, not in doubt" and the Court had to ask itself and did ask itself whether this was the appropriate time to order what was in effect, discovery. Mr. Wheeler suggested that a better time would be when the pleadings had been completed. We think not. We think that under these particular circumstances we agree with the words used in Mr. Harper's affidavit taken from a case whose name escapes me for the moment * that the Mareva injunction has to be properly "policed". This is a method of "policing" the present Mareva injunction and ensuring that not only the assets should be traced and held but the appropriate extracts of what they are and where they lead should be known to the plaintiffs. Accordingly Mr. Wheeler, your application is dismissed. Costs will be in the cause Mr. Dessain.

* House o f Spring Gardens Ltd. -v- Waite (1984 F.S.R. 277)