

ROYAL COURT
(Samedi Division)

181.

13th September, 1996

Before: F.C.Hamon Esq., Deputy Bailiff, and
Jurats Blampied and Herbert.

Between:	Solvalub Limited	Plaintiff
And:	Match Investments Limited	Defendant
And:	Bank of Ireland (Jersey) Limited	Party Cited

Advocate J. P. Speck for the Plaintiff.
Advocate D. J. Petit for the Defendant.

5 THE DEPUTY BAILIFF: On 5th July, 1996, Solvalub Limited, an English company,
obtained an Order of Justice signed by the Bailiff on that day against
Match Investments Limited, a company incorporated in the Republic of
Ireland. The Order of Justice contained a Mareva injunction restraining
10 the defendant from dealing with any of their assets within the
jurisdiction held by Bank of Ireland (Jersey) Limited up to a value of
US\$ 225,000 in certain designated accounts. There were the usual
comforts as, for example, allowing the defendant to draw up to US\$ 500
per week for the payment of its ordinary and usual expenses (including
15 legal advice for the purpose of the proceedings). The party cited was
ordered to disclose certain information to the plaintiff within a
maximum period of five working days. The learned Bailiff ordered the
plaintiff to deposit £1,000 before the interlocutory orders were
executed.

15 The Order of Justice was accompanied by an affidavit given by Mr.
Philippe Guy of the plaintiff and the finance manager of that company.
The affidavit gave an account of a contract entered into by Solvalub for
20 the sale of gasoil to Match. The contract was entered into on 1st
December, 1995, in Moscow (it is written in both Russian and English)
and the proper law is English law with all disputes and differences to
be settled subject to the exclusive jurisdiction of the "High Court of
Justice of England in London in conformity with the rules and procedure
of this Court without recourse to arbitration".

25 Two deliveries were made. Payment was due within thirty days of the
delivery of the gasoil and delivery was deemed to have been made on the
date of the relevant bill of lading. Payment was apparently due on or

before 21st March 1996. Default interest at the rate of Libor + 2% is applicable under the contract. A formal request for payment was made on 3rd June, 1996 to Match and to the directors of Match by registered post. No response was received. The deadline of 14th June 1996 passed and apparently a writ was served in England on 8th June, 1996. That is what Mr. Guy said. We are in something of a quandary in that regard because Advocate Petit passed us a facsimile transmission from his instructing London Solicitors dated 10th September 1996 which is signed by the senior partner of the firm Palmer Cowen and which states in unequivocal language:

"The Writ has not yet been properly served in England. We have said that we shall accept service but that is only effective when I receive the original Writ for endorsement. That has not yet happened".

Be that as it may, investigations carried out by Solvalub in Ireland, Sark (where the two directors of Match live) and London have alerted the plaintiff to the fact that all was apparently not as it seemed when the contract was signed in Moscow.

Indeed, Advocate Speck said in Court today that there was now (and better information is to hand) an "overwhelming case that there is at best a scam and at worst a fraud". There is no allegation whatsoever of fraud in the Order of Justice and the injunction is obtained because of fear of "dissipation of assets".

It is instructive to set out the grounds upon which the deponent relied in obtaining his Mareva injunction in Jersey. He said:

"The sum total of the evidence adduced in this application shows that the Defendant has a network of different properties and that individuals who are not named as officers of the company nevertheless act on its behalf. The Defendant also has an off-shore bank account at its disposal from which it can effect the movement of funds."

I believe that there is a serious risk that unless the Defendant is restrained by the Order sought, once notified of the claims being brought against it the Defendant will take immediate steps to dissipate its assets in Jersey and prevent Solvalub from recovering its money."

My belief as to the serious risk of dissipation is based on the totality of the evidence in relation to the Defendant and its activities. For this reason I would respectfully request that the court grants the application on the basis that it is just and convenient in all the circumstances to do so".

There is no need to go into further detail on the facts except to say that Advocate Speck conceded immediately that the plaintiff has no proprietary right in the monies in Jersey and there is no substantive cause of action in this jurisdiction.

It may be of interest as to how the defendant was served at all. The facts of the matter are that the Mareva injunction was in force and when the case came to be called on a Friday afternoon in the usual way,

Advocate Petit accepted service under protest as to jurisdiction. He did this, he said, to bring the matter to a speedy conclusion but we must not overlook the fact that some means would have had to be shown by Solvalub to bring a foreign defendant into this Court. The defendant had
5 no physical presence in Jersey. It comes before us because, under protest, it chose to come. What if it had not accepted service in the way that it did?

10 The Royal Court cannot make orders against any person outside its jurisdiction unless it is authorised by statute to do so. In order to find the necessary authority we need to have regard to the Service of Process (Jersey) Rules 1994 which were made in pursuance of Article 11 of the Royal Court (Jersey) Law 1948 and of Articles 1, 2 and 8 of the Service of Process and Taking of Evidence (Jersey) Law 1960. These are
15 the only relevant means available to this Court. In particular the powers fall under Rule 7 and (in even better particular) Rule 7(b) and 7(i).

Those two rules state:

20 *"Service out of the jurisdiction of a summons may be allowed by the Court whenever:*

25 (b) *an injunction is sought ordering the defendant to do or to refrain from doing anything within the jurisdiction (whether or not damages are also claimed in respect of the doing of or failure to do that thing).*

30 (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".*

35 The wording of those two regulations is identical with Order 11 Rule 1(1)(b) and 1(1)(i) of the Rules of the Supreme Court.

40 We can dispose of 1(1)(b). A Mareva injunction does not decide any substantive rights. It is unlike any other form of injunction. It does not, in our view, give the Court extra-territorial jurisdiction under 1(1)(b). It certainly has the machinery to hold assets but it cannot do anything with those assets, unless there is some power to drive the machinery forward. The real question posed by 1(1)(b) is whether that
45 section was ever intended to assert extra-territorial relief grounded on one matter only, namely the presence of the defendant's assets within the jurisdiction.

50 In the Privy Council case of Mercedes-Benz A-G v. Leiduck (1995) 3 All ER 929 the principle was applied that where a person is resident abroad and had assets within the jurisdiction leave to serve proceedings out of the jurisdiction when a Mareva injunction alone was claimed could not be granted even though there were proceedings pending in the Court of residence and Mareva type relief had been granted there.

55 We should also point out that Jersey is not a signatory to the Brussels or Lugano Conventions on jurisdiction and the enforcement of

5 judgments in civil and commercial matters. The reason for stating this is that the Supreme Court of England and Wales under Section 25 of the Civil Jurisdiction and Judgments Act 1982 has jurisdiction to grant interim relief in support of substantive proceedings pending before the Courts of another State which is a party to the Convention. The consequence of that is that Rule 7(1)(b) and 7(1)(i) retain their original purpose.

10 We need, before reaching a conclusion, to examine the Jersey cases and some English cases on this matter. We will concentrate on two leading judgments.

15 In Middle East Engineering Limited v. Charles Edwards (1980) JJ 25, Crill, Deputy Bailiff, outlined the facts which appear very similar to the facts of this case in this way:

20 *"The two parties to this action, the plaintiff company and the defendant, are both resident outside the jurisdiction. There is a dispute between the plaintiff company and the defendant, who has been suspended, if not sacked, from his employment in Bahrain. The defendant has some money in a bank in Jersey. It was that money which was distrained upon by the Order of Justice. Neither the plaintiff company nor the defendant have any ties whatsoever with this Island, and to all intents and purposes the action is before a foreign Court, albeit a friendly foreign Court, but it is a foreign Court, and the parties themselves have not submitted to this jurisdiction; on the contrary the defendant has denied that he accepts jurisdiction"*.

30 The Court was able to find that the facts corresponded to a case decided in Jersey in 1955 Godman-Irvine v. Jacomb, Lloyds Bank Ltd. à la cause (1955) 248 Ex 545, (1955) 249 Ex 405 where the Royal Court found that the defendant, reprehensible though his conduct may have been in deliberately evading his responsibilities, had not submitted to the jurisdiction. The fact that money was standing to the credit of a person in Jersey did not, *per se*, give jurisdiction. The action was dismissed.

40 The Court in Middle East Engineering declined to examine The Siskina (1977) 3 All ER 803 because it did not feel that it was called upon to decide that matter at all.

45 Dailey International Sales Corporation v. Middle East Petroleum Equipment Incorporated (3rd April, 1985) Jersey Unreported remains unreported perhaps because the Court found that there was a proprietary interest to found jurisdiction.

50 However, in Johnson Matthey Bankers Ltd. v. Arya Holdings Limited & National Westminster Bank plc (1985-86) JLR 208 the Court again presided over by Crill, Deputy Bailiff appears to approach the matter differently.

55 There are some difficulties in this case, as far as we are concerned. It may be very significant (for it does not appear to have been mentioned in the judgment) that at all material times Arya Holdings Limited was a company incorporated in Jersey. That will explain why the company was able to be served. The Service of Process Law did not apply

to it. Having been served, the Court was able to, as the Court said, "police" the Mareva injunction. The Court however went on to say this (at page 214):

5 *".... where there is an action in the U.K. and assets in Jersey, it is quite customary for us in Jersey to be called in aid to impose an injunction so that a judgment obtained in an English Court should not be rendered nugatory by people being able to use Jersey to evade the results of that judgment. That*
10 *position has influenced us as much as any in the particular circumstances of this case"*.

Earlier at page 211 the court said:

15 *"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 that this Court is not a proper place to apply, in order to protect those assets within our own jurisdiction. The fact that there are*
20 *other proceedings in the English Courts is therefore not a reason, per se, for our refusing to look at the merits of the injunction sought"*.

25 We are troubled by some of the rationale in Johnston Matthey v. Arya. Apparently Middle East Engineering though decided only six years earlier, was not cited to the Court nor do the words "proprietary right" appear at any time in the judgment. We feel that where there is doubt between the two, the judgment in Middle East Engineering v. Edwards is preferable.

30 We should note, in passing, that Rule 1(1)(m) states *"the claim is brought to enforce any judgment or arbitral award"*. That is not in point. It was clearly decided by the Privy Council in Mercedes-Benz A-G v. Leiduck (*supra*) that, on the exactly similar wording of Order 1(1)(m) a Mareva type interim order freezing assets in pending litigation in a
35 foreign jurisdiction is not a "judgment" within the meaning of the paragraph.

40 Advocate Speck argued that the proceeding action in "another British Island" for a money sum entitled the Jersey Court to treat these proceedings as though there were a judgment of this Court. The problem is that the defendant is not within this jurisdiction and there is no proprietary right to the money held in Jersey. Lord Nicholls said in his
45 dissenting judgment in the Privy Council in the Mercedes-Benz case:

"The boundary line of the Mareva jurisdiction is to be drawn so as to include prospective foreign judgments which will be recognised and enforceable in the Hong Kong Courts".

50 If Mr. Leiduck had been a Hong Kong resident the Hong Kong Court would have had jurisdiction to grant the Mareva injunction sought. A writ claiming Mareva relief and nothing further could have been issued and served on him in Hong Kong.

55 Lord Nicholls, however, in that dissenting judgment felt that the Mareva injunction could come within 1(1)(b). It must be said that his strongly held argument was lost to a Board that consisted of Lords Goff,

Mustill, Glynn and Hoffmann. It is also said that we are not bound to follow the Privy Council unless, of course, the Board is dealing with matters within this jurisdiction. Such a judgment must, at least, be highly persuasive. It would, in our view, be an impossibility on the facts facing us which are so similar to the facts before the Privy Council to fly before the face of such a body of judicial opinion. The final words of Lord Mustill should perhaps be noted. He said (at page 943):

"Their Lordships believe that it would merit the close attention of the rule-making body to consider whether by an enlargement of Order 11 r. 1(1) a result could be achieved which for the reasons already stated is not open on the present form of the rule".

The same sentiment must apply in this jurisdiction and we recommend such an enlargement without delay particularly because of Jersey's jealously guarded reputation.

We should perhaps pass comment, as it was specifically raised by Advocate Speck, on Republic of Haiti v. Duvalier (1989) 1 All ER 456. On the ratio in this case Lord Mustill says in Mercedes-Benz at 941:

"In one sense, it might be said that a valid claim for the infringement of a substantive right is a cause of action even if no action lies in the English court to enforce it; but this obviously cannot be what is contemplated by Ord 11. In the present situation the only other candidate for the cause of action to whose existence the deponent must speak is the possession of an arguable case for the discretionary grant of a Mareva injunction. Even on the most generous approach to the language (an approach which so far as Ord 11 is concerned has often been discouraged) this bears no resemblance to the ordinary understanding of this expression, and no resemblance to the kind of claim which is to be pursued 'in the action begun by the writ' with which alone Ord 11 is concerned".

In our view the orders obtained by Solvalub on 5th July, 1996, must fall away and the Order of Justice and the injunction therein must be struck out.

Authorities

Mercedes-Benz A.G. -v- Leiduck (1995) 3 All ER 929.

Middle East Engineering -v- Charles Edwards (1980) JJ 25.

Godman-Irvine -v- Jacomb, Lloyds Bank Ltd à la cause (1955) 248 Ex 545;
(1955) 249 Ex 405.

The Siskina (1977) 3 All ER 803.

Dailey International Sales Corporation -v- Middle East Petroleum
Equipment Incorporated (3rd April, 1985) Jersey Unreported.

Johnson Matthey Bankers -v- Arya Holdings Ltd & National Westminster
Bank plc (1985-86) JLR 208.

Republic of Haiti -v- Duvalier (1989) 1 All ER 456.

Service of Process (Jersey) Rules 1994.

Rules of the Supreme Court (1995 Ed'n): O.11, r.1(1)(b)(i).

Civil Jurisdiction and Judgments Act 1982: s.25.