In The Supreme Court of Bermuda

CIVIL JURISDICTION

2018: No. 334

BETWEEN:

ASHLEY DAWSON-DAMER

Applicant

-and-

LYNDHURST LIMITED

Respondent

Before: **Hon. Chief Justice Hargun**

Appearances: **Mr Richard Wilson, QC and Mr Scott Pearman, Conyers Dill & Pearman Limited, for the Applicant**
Mr David Brownbill, QC and Mr Keith Robinson, Carey Olsen Bermuda, for the Respondent

Date/s of Hearing: **13 December 2018**

Date of Judgment: **6 February 2019**

JUDGMENT

Grant of interlocutory preservation order in aid of a proprietary claim; requirement of underlying substantive proceedings; if underlying proceedings pending in a foreign jurisdiction whether any judgment given must be enforceable in the domestic jurisdiction.

Introduction

1. These proceedings are commenced by Ashley Dawson-Damer ("the Applicant") by Originating Summons filed on 24 September 2018 seeking an interim injunction preserving the assets received by Lyndhurst Limited ("the Respondent") in 2006 and 2009 from Grampian Trust Company Limited ("Grampian") in its capacity as a trustee of the Glenfinnan Settlement ("the Settlement") and held by the Respondent as a trustee of the Came, Hewish and Emo Settlements ("The Bermuda Trusts").

2. The Applicant also seeks information from the Respondent in terms of (1) a list of the assets held by it which were received from Grampian ("the Assets"); (2) the whereabouts of the Assets including all relevant account details; (3) the total value of the Assets with separate values ascribed to each Asset class; (4) the extent to which the Assets are encumbered; and (5) a complete list of all distributions made from the Assets from 1 December 2006 to date including all and any capital and/or interest distributions.

Background

3. The Applicant is a discretionary beneficiary of the Settlement which is governed by the laws of The Bahamas.

4. In 2006 and 2009, the trustee of the Settlement, Grampian, a Bahamian private trust company, made two appointments in the aggregate sum of US $402 million ("the Appointments") (representing approximately 98% of the assets of the Settlement) onto *inter alia* The Bermuda Trusts of which the Respondent is the trustee.

5. In March 2015, the Applicant commenced proceedings in the Supreme Court of The Bahamas against Grampian seeking to set aside the Appointments. The Respondent was added as a defendant to the Bahamian proceedings in July 2018. In the Bahamian proceedings the Applicant seeks *inter alia* (1) declarations that the 2006 Appointments and/or the 2009 Appointment are void, or alternatively voidable; (2) an order setting aside the 2006 Appointments and/or the 2009

Appointment; and (3) an order requiring the re-vesting of assets subject to the 2006 Appointments and/or 2009 Appointment (or the traceable proceeds thereof) to the Settlement. The Respondent has elected not to submit to the jurisdiction of the Bahamian courts and has refused to participate in the Bahamian proceedings.

6. In the Bahamian proceedings the Applicant asserts that when exercising its power to make the 2006 Appointments and/or the 2009 Appointment, Grampian failed to exercise its discretion fairly, properly, reasonably or even-handedly. In particular, it is alleged *inter alia* that (1) Grampian unfairly discriminated against the Applicant by adopting a policy that she will not benefit under the Settlement and took that policy into account when considering how to exercise its fiduciary discretionary powers under the Settlement; (2) Grampian failed to give any or any proper consideration whether provision ought to be made for the Applicant from the Settlement whether at that time or in the future; (3) Grampian failed to take into account the Applicant's financial circumstances and weigh them against the needs of the beneficiaries in whose favour the Appointments were made; (4) Grampian purportedly decided by 2004 that the Applicant would not benefit from the Settlement (despite her remaining a beneficiary) and thereby wrongfully closed its mind to the interests of the Applicant and the question of whether she should benefit from any exercise of discretion under the Settlement thereby effectively (and improperly) limiting the scope of the powers conferred on Grampian; and (5) alternatively, Grampian exercised its powers for the ulterior and improper purpose of excluding the Applicant from benefiting from the vast bulk of the trust fund, having determined not to exercise its power to exclude the Applicant from the class of beneficiaries on the grounds that it would be provocative to do so.

7. The Applicant contends that if she succeeds in a claim in the Bahamian proceedings, the assets representing the traceable proceeds of those Appointments will be held by the Respondent on bare trust for Grampian as trustee of the Settlement. In these circumstances the Applicant has sought an undertaking from the Respondent that the Respondent will not dissipate the Assets pending the resolution of the Bahamian proceedings. The parties have engaged in lengthy

correspondence in relation to the issue of the undertaking by the Respondent. The Respondent has confirmed that it has made no distributions to the beneficiaries of the Bermuda Trusts and whilst it has no present intention of making any distributions to the beneficiaries, it does not consider it appropriate to give the undertaking sought. In the circumstances the Applicant has commenced these proceedings seeking a preservation order from the Court.

Outline of the issues between the parties

8. The Applicant contends that the test for granting injunctive relief in the form of a preservation order where a proprietary claim is advanced is the *American Cyanamid* test (*American Cyanamid v Ethicon* [1975] AC 396). Under this test the Court has to be satisfied of three matters: first, has the Applicant shown a serious issue to be tried on the merits; second, is the balance of convenience in favour of granting injunctive relief; and third, is it just and convenient in all the circumstances to grant the order.

9. The Respondent accepts that in the case of a proprietary claim, where proceedings are pending in this jurisdiction, the relevant test is as set out in the *American Cyanamid* case. However, the underlying proceedings, in aid of which this injunction is sought, are not pending in this jurisdiction but are pending in a foreign jurisdiction. In these circumstances, the Respondent contends that this Court will not exercise its statutory jurisdiction to grant an injunction in aid of the foreign proceedings unless it can be shown that any judgment resulting from the foreign proceedings will be enforceable in Bermuda. The Respondent argues that there is an established body of case law holding that if the foreign judgment will not be enforceable in Bermuda, having regard to Bermudian conflict of law rules relating to the enforcement of foreign judgments, a Bermuda court will not grant an injunction in aid of the foreign proceedings.

Discussion on the jurisdiction issue

10. This Court's jurisdiction to grant interlocutory relief is to be found in section 19(c) of the Supreme Court Act 1905 which provides that, *"an injunction may be granted, or a receiver appointed, by an interlocutory order of the court in all cases in which it appears to the Court to be just or convenient that such order should be made"*.

11. RSC O. 29 r. 2(1) deals specifically with injunctions aimed at detention and preservation of subject matter of cause or action and provides that, "*On the application of any party to a cause or matter the Court may make an order for the detention, custody or preservation of any property which is the subject-matter of the cause or matter, or as to which any question may arise therein, or for the inspection of any such property in the possession of a party to the cause or matter."*

12. The wording of section 19(c) of the 1905 Act, like its corresponding English provision, is wide and open ended. However, the exercise of this jurisdiction, as the cases show, has always been subject to constraints. One such constraint is that the court will not ordinarily make an interlocutory preservation order unless the court has jurisdiction over the underlying cause of action to which the interlocutory injunction relates.

13. The root case dealing with this constraint is *The Siskina* [1979] AC 210 where Lord Diplock stated the general proposition that an interlocutory injunction cannot exist in isolation and must be linked to an underlying cause of action:

> "*That subsection, speaking as it does of interlocutory orders, presupposes the existence of an action, actual or potential, claiming substantive relief which the High Court has jurisdiction to grant and to which the interlocutory orders referred to are but ancillary. This factor has been present in all previous cases in which Mareva injunctions have been granted. ...A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion,*

> *actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the* status quo *pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction*"

14. The basic statement of principle enunciated by Lord Diplock in *The Siskina* has been affirmed by the House of Lords in *Channel Tunnel Group and Anor v Balfour Beatty Ltd and Ors* [1993] AC 334, a case of an interlocutory injunction in England in aid of arbitration proceedings pending in a foreign jurisdiction and by the Privy Council, despite a strong dissent by Lord Nicholls, in *Mercedes-Benz AG v Herbert Heinz Horst Leiduck* [1996] AC 284 HK PC. *The Siskina* and *Mercedes-Benz* have been referred to by the Court of Appeal for Bermuda, without any qualification, in *New Skies Satellite BV v FG Hemisphere Associates LLC* [2005] Bda LR 59. In *Channel Tunnel Group* Lord Mustill restated *The Siskina* doctrine at page 362:

> "*For present purposes it is sufficient to say that the doctrine of The Siskina, put at its highest, is that the right to an interlocutory injunction cannot exist in isolation, but is always incidental to and dependant on the enforcement of a substantive right, which usually although not invariably takes the shape of a cause of action. If the underlying right itself is not subject to the jurisdiction of the English court, then that court should never exercise its power under section 37(1) by way of interim relief.*"

15. *The Siskina* was a case where leave was sought to serve the defendant outside the jurisdiction in circumstances where the only relief sought within the jurisdiction was a *Mareva* injunction. It has been suggested that *The Siskina* merely decides that if no final judgment is sought against the foreigner in England, then it is not possible to bring him before the English courts. In particular *The Siskina* was not dealing with the question whether an interlocutory injunction should be granted in

aid of foreign proceedings against a defendant who is subject to the domestic court's jurisdiction and the assets sought to be preserved are within the jurisdiction (see *Black Swan Investments I.S.A. v Harvest View & Others* BVIHCV 2009/339 23 March 2010; cited with approval in the Eastern Caribbean Court of Appeal in *Yukos CIS Investments Limited and Anor. v Yukos Hydrocarbons Investments Limited and Ors.,* HCVAP 2010/028).

16. In *Black Swan* Bannister J. of the Eastern Caribbean Supreme Court accepted this analysis and, following the reasoning of Lord Nicholls in *Mercedes-Benz*, held that there was no logical distinction between the grant of an interlocutory injunction in aid of domestic judgment and a grant in aid of a foreign one, unless the foreign judgment is such that the domestic court declined to enforce it. It is to be noted that in England the court's jurisdiction to grant interim relief in the absence of substantive proceedings was expressly provided by statute in terms of section 25 of the Civil Jurisdiction and Judgements Act 1982, and accordingly, the English courts no longer need to deal with the potential lacuna caused by *The Siskina*.

17. The decision and reasoning in *Black Swan* was approved by the Eastern Caribbean Court of Appeal in *Yukos*. Speaking for the majority, Justice of Appeal Kawaley [AG.] stated at [139]:

> "*Establishing justice and convenience will ordinarily require, at a minimum, proof of a good arguable case that the applicant will obtain a judgment which will be enforceable (whether by registration, recognition or otherwise) by the local court against the local defendant. Although ordinarily an interlocutory injunction is sought in support of a substantive claim before the court to which the relevant application is made, in the present context this requirement had to be met by reference to (a) the substantive claim before the foreign court, and (b) the prospect that the applicant will obtain a foreign judgment which will entitle him to execute a money judgment against, or control pursuant to a proprietary judgment, the local assets sought to be frozen. In the present case the reasons why*

> *the jurisdictional (in the broader sense) requirements were* _not_ *met for exercising the discretion to grant injunctive relief may be summarised as follows. The jurisdiction to grant an interim freezing order is not ordinarily exercised unless it is necessary to do so in aid of either relief, the claimant is likely to obtain from the local court or from a competent foreign court. The relief the appellants are likely to obtain from the Netherlands court will neither entitle them to enforce a money judgment against the respondents' assets nor establish a proprietary claim in respect of any of such assets."*

18. Similar reasoning has been adopted by the Court of Appeal of The Bahamas in *Meespierson (Bahamas) Ltd v Grupo Torras SA* [2001] 1 LRC 627, a case referred to with approval in the judgment of Justice of Appeal Kawaley [AG.] in *Yukos* at [146]. The plaintiffs in this case had filed an action before the English Commercial Court against a number of persons including Sheikh Khaled claiming damages of some US $450 million for fraud and conspiracy. They also claimed a declaration that the Sheikh had assets in trust in The Bahamas. They subsequently commenced proceedings in The Bahamas for the purposes of securing their English cause of action which it was hoped or expected would give rise to an entitlement to monetary relief. The trustees of the Bahamian trusts were not parties to the English proceedings. In those circumstances the Court of Appeal of The Bahamas held that a Bahamian court could not exercise jurisdiction to grant a *Mareva* injunction in aid of the English proceedings. As Carey JA pointed out at 642 H-I, any judgment given by the English court could not have been enforced against the trustees in The Bahamas.

19. The Court of Appeal in *Yukos* also held that the reasoning in *Black Swan* was not limited to foreign money judgments but also applied to other foreign judgments, for example, judgments declaring proprietary rights of the parties and consequential orders (See [87] per Redhead JA and [144] per Kawaley JA).

20. *Black Swan* and *Yukos* were concerned with freezing injunctions so that any future judgment which may be obtained in a foreign jurisdiction can be satisfied.

We are concerned here with a preservation order designed to hold the ring pending a judgment in the Bahamian proceedings. In principle, there is no reason why the reasoning applicable to freezing injunctions, in aid of foreign proceedings should not, for present purposes, equally apply to preservation orders in aid of proprietary claims pursued in foreign proceedings.

21. The grant of an interlocutory injunction, in both *Black Swan* and *Yukos*, is premised on the basis that the foreign judgment would be enforceable in the domestic court. In *Black Swan* Bannister J stated that there was no logical distinction between the grant of an injunction in aid of a domestic judgment and a foreign judgment, "*unless the foreign judgment is such that the domestic court would decline to enforce it".* As set out at paragraph 17 above, in *Yukos* Justice of Appeal Kawaley stated that "*Establishing justice and convenience will ordinarily require, at a minimum, proof of a good arguable case that the applicant will obtain a judgment which will be enforceable (whether by registration, recognition or otherwise) by the local against the local defendant".*

22. The wording in the majority judgment in *Yukos* may suggest some flexibility in relation to the requirement of enforceability of the foreign judgment. Thus Kawaley JA states at [139] that the court "*will ordinarily require*" that the foreign judgment will be enforceable in the domestic court whether by registration, recognition "*or otherwise*". However, the underlying reasoning is that it is the ability to enforce the foreign judgment in the domestic court that connects the interlocutory injunction obtained in the domestic court with the underlying cause of action litigated in the foreign court. In the circumstances, the enforceability of the foreign judgment is, in my judgment, an essential condition for the grant of an interlocutory injunction in aid of the foreign proceedings.

23. The Respondent argues, correctly in my view, that applying the traditional rules relating to enforcement of foreign judgments, any judgment given by the Bahamian courts in relation to proceedings pending before it will not be enforceable against the Respondent in Bermuda for lack of jurisdiction (in the international sense) over the Respondent.

24. As set out in Rule 43 in *Dicey, Morris & Collins*, The Conflicts of Laws, 15th ed., a foreign judgment *in personam* is only capable of enforcement or recognition as against the person against whom it was given where (1) the person against whom the judgment was given was, at the time the proceedings were instituted, present in the foreign country; (2) the person against whom the judgment was given was a claimant, or counterclaimed, in the proceedings in the foreign court; (3) the person against whom the judgment was given, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings; and (4) the person against whom the judgment was given had, before the commencement of the proceedings, agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court. It appears to be common ground that in the present case, the Bahamian court does not have jurisdiction over the Respondent in the international sense. In these circumstances it must follow that any judgment given by the Bahamian court would not be enforceable against the Respondent in the courts of Bermuda.

25. For the same reason any Bahamian judgment could not form the basis of issue estoppel resulting in a summary judgment against the Respondent in any subsequent enforcement proceeding commenced in the courts of Bermuda.

26. It was also suggested on behalf of the Applicant, that the Bahamian judgment is likely to be enforced on a "practical basis" as the Respondent is bound to seek direction of the Bermuda court following any judgment against it in the Bahamian proceedings. The outcome of any such application, if made, seems highly uncertain and does not, in my judgment, provide a sufficient basis to grant the interlocutory order sought by the Applicant at this hearing.

27. In the circumstances I would have declined to grant a preservation order on the basis that as the Bahamian judgment cannot be enforced in Bermuda, it is not just and convenient to grant such an order in aid of the Bahamian proceedings. However, Mr Wilson QC represented to the Court that if the Court is minded to refuse the grant of a preservation order on this jurisdictional ground then he is

prepared to undertake, on behalf of the Applicant, that the Applicant will issue the underlying proceedings in Bermuda and serve them on the Respondent. Mr Brownbill QC accepts that if such proceedings are commenced in Bermuda then any jurisdictional objection to the grant of a preservation order disappears. On the basis that the Applicant commences such proceedings in Bermuda and effects service on the Respondent within the next 90 days, I proceed to consider the application for such an order on its merits.

The application for a preservation order

28. In making this application Mr Wilson QC emphasised that this is an application for a proprietary preservation order and that unlike in respect of a *Mareva* injunction, there is no requirement on a party seeking a preservation order to prove a real risk of dissipation of assets. In making a preservation order, the Court is not seeking to restrain a party from dissipating its own assets so as to evade enforcement of the judgment, but is merely seeking to ensure that the subject matter of the claim is preserved pending identification of the rightful owner. These propositions are not in dispute and are amply supported by case authorities. In *Polly Peck International plc v Nadir and Ors.(No. 2)* [1992] 4 All ER 769, the English Court of Appeal made a clear distinction between proprietary preservation orders and the *Mareva* jurisdiction and the different tests applying to each:

> "*There is, however, an important difference. Equitable tracing leads to a claim of a proprietary character. A fund is identified that, in equity, is regarded as a fund belonging to the claimant. The constructive trust claim, in this action at least, is not a claim to any fund in specie. It is a claim to monetary compensation. The only relevant interlocutory protection that can be sought in aid of a money claim is a Mareva injunction, restraining the defendant from dissipating or secreting away his assets in order to make himself judgment proof. But if the identifiable assets are being claimed, the interlocutory relief sought will not be a Mareva injunction but relief for the purpose of preserving intact the asset in question until*

their true ownership can be determined. Quite different considerations arise from those which apply to Mareva injunctions (per Scott LJ at 776).

I now come to the question whether a limited injunction preserving, pending trial, the £8.9m should be granted. This would not be a Mareva injunction. It would not be subject to provisos enabling the use of the money for normal business purposes, or for the payment of legal fees, or the like. There is, in general, no reason why a defendant should be permitted to use money belonging to another in order to pay his legal costs or other expenses. The objection in principle to the grant of the Mareva injunction to which I have referred does not apply to an injunction to preserve a fund that, in the contention of PPI, belongs to PPI.

In deciding whether or not an interlocutory injunction to protect the £8.9m should be granted, the approach prescribed by American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504, should be followed. First, PPI must show an arguable case. If an arguable case is shown, then the balance of convenience should be applied. If the scale appears very evenly balanced, it is then legitimate to take into account the strength or weakness of PPI's claim (per Scott LJ at 784)."

29. Accordingly and as set out at paragraph 8 above, in order to satisfy the *American Cyanamid* test, the Court is obliged to consider: (1) has the Applicant shown a serious issue to be tried on the merits; (2) is the balance of convenience in favour of granting injunctive relief; and (3) is it just and convenient in all the circumstances to grant the order.

(1) Serious issue to be tried

30. A summary of the Applicant's pleaded claims in the Bahamian proceedings is set out at paragraph 6 above. In its Defence, Grampian pleads that (1) the 2006 Appointments and the 2009 Appointment were made by Grampian validly and in good faith in exercise of its powers of appointment; (2) in exercise of its powers

of appointment in the Settlement, Grampian, as trustee of a discretionary trust, was entitled to appoint capital in favour of some, but not all, of the beneficiaries; (3) before making the 2006 Appointments and the 2009 Appointment Grampian duly considered the claims of the Applicant on the trust funds; (4) Grampian denies that it was hostile to the Applicant, or that the 2006 and 2009 Appointments were affected by hostility towards the Applicant; and (5) at trial Grampian will adduce full evidence about the factual circumstances surrounding the creation of the Settlement and the background to the 2006 and 2009 Appointments which will show that, at all times since the creation of the Settlement, Grampian had intended that, save in *"exceptional circumstances"*, the assets of the Settlement should not be applied for the benefit of, *inter alia*, the Applicant, but should instead be preserved for the succeeding generations of beneficiaries.

31. In the Reply filed in the Bahamian proceedings the Applicant asserts that (1) the averment that the purpose of the Settlement was to serve as an accumulation trust for the "*next generation*" is inconsistent with the founding intentions of the settlor and the terms of the Settlement; (2) even were it correct for Grampian to view the primary purpose of the Settlement as being a long-term accumulation trust for the *"next generation"*, the 2006 and 2009 Appointments did not constitute a distribution of the assets of the Settlement to the "*next generation",* but merely an appointment onto further trusts, which differed substantively from the trusts of the Settlement only (or principally) in the exclusion of the Applicant from the beneficial class; (3) it is to be inferred that the real underlying purpose of the 2006 and 2009 Appointments was to remove from the Applicant rights as a beneficiary of the Settlement, which was an ulterior and improper purpose because it ran contrary to the purposes for which the Settlement was established; and (4) as well as being in substance decisions taken for the improper and ulterior purpose of excluding the Applicant from any possibility of future benefit from the assets of the Settlement, the 2006 and 2009 Appointments also constituted an improper circumvention of the formal safeguards against improper exclusion in the trust deed of the Settlement: namely, the exclusion of the beneficiary required the Protector's consent. It is to be inferred, the Applicant contends, that Grampian

chose to circumvent these formal safeguards so as to avoid the prospect of the Applicant becoming aware that it was taking steps to exclude her from benefit.

32. On the face of the pleadings filed by the parties in the Bahamian proceedings, there would appear to be a serious issue to be tried. It is to be noted that Grampian, as the defendant in the Bahamian proceedings, has not pursued an application to strike out the proceedings on the basis that the pleaded case does not disclose a reasonable cause of action. By all accounts the Bahamian action is proceeding to trial. If the Bahamian court declares that the Appointments have been void in equity, beneficial interest in the Assets will be declared to have never passed to the Respondent and the Respondent would hold those Assets on trust for the trustee of the Settlement (see *Allan v Rea Brothers Trustees Ltd* [2002] EWCA Civ 85, [48], per Robert Walker LJ (as he then was)). If the Bahamian court treats the Appointments as voidable and sets them aside at the Applicant's request, the proprietary consequences are the same as if the Appointments were void *ab initio* (see *Gany & Rangoonwala v Khan and Ors.* [2018] UKPC 21, [60]).

33. In correspondence the Respondent made the point that as the Applicant is a discretionary beneficiary of the Settlement, she does not have the standing to pursue the proprietary claim that may exist. However, I accept that a discretionary beneficiary is entitled to assert and pursue such a claim. The position is as stated in *Lewin on Trusts, 19th edition, at 41-048*: "*The beneficiary may himself, if he wishes, assert the proprietary remedy against the recipient, rather than relying upon the trustee do so, and if the proprietary remedy is successfully asserted by the beneficiary, there will be nothing that the trustee need do as against the recipient beyond claiming an account from the recipient in a case where the recipient has become accountable in equity".*

34. In the circumstances, I am satisfied that the Applicant has shown a serious issue to be tried on the merits.

(2) Balance of convenience

35. It is said on behalf of the Applicant that given the Respondent's persistent refusal to give a formal undertaking to preserve the Assets pending determination of the Bahamian proceedings, an injunction is the only way of ensuring that the Applicant's claim to the return of the Assets into the Settlement is not thwarted by the Respondent disposing of those assets in a manner that is inconsistent with that equity. It is further said that despite the fact that the Respondent would be personally liable in the event of dissipation, damages will clearly not be an adequate remedy as there is no evidence that the Respondent has any assets, let alone assets of the magnitude required to compensate the Settlement in the event of the Respondent disposing of the Assets in breach of the bare trust on which they are held if the Applicant's proprietary claim succeeds.

36. In response, the Respondent makes the argument that delay is a weighty factor in assessing where the balance of convenience lies and in this case there has been substantial delay as the Applicant has been aware since at least 8 April 2015 (and possibly earlier), when her lawyers wrote putting the Respondent "on notice" of the consequences of any dissipation. The Applicant has been aware since 26 April 2017, that the Respondent was not willing to give an undertaking not to deal with the Assets and the Originating Summons was only issued in September 2018, some 18 months later. Reliance is placed upon the decision of the Court of Appeal for Hong Kong in *King Fung Vacuum Limited v Toto Toys Limited* [2006] HKCA 145 [20]: "*[Interlocutory injunctions] are not the trial of the action and the court is concerned with whether irreparable damage will occur before a trial can take place. It stands to reason that if a party is prepared to allow matters to proceed and takes no action with respect to matters which have been extant for lengthy periods, it lies ill in their mouth to say that there is likely to be irreparable damage and that is the case here"*

37. In response to the issue of delay the Applicant makes two points. First, it is said that factually any allegation that there has been an unjustifiable delay is unfair. Whilst it is true that the Respondent refused to provide an undertaking in 2017, it is only more recently that the true extent of the Respondent's refusal to

acknowledge the very existence of the proprietary claim has become apparent, together with its position that it will not submit to the jurisdiction of the Bahamian court, notwithstanding its joinder.

38. Second, the Applicant contends that, in any event, the existence of delay is no bar to the relief as a matter of law. The Applicant relies upon the judgment of Flaux J (as he then was) in *Madoff Securities International Limited v Raven* [2011] EWHC 3102 (Comm) at [156] : *"if the court is satisfied on other evidence that there is a risk of dissipation, the court should grant the order, despite the delay, even if only limited assets are ultimately frozen by it".* It is said on behalf of the Applicant that given the Respondent's increasingly aggressive refusal even to acknowledge the existence of a dispute regarding beneficial ownership of the Assets, there is clearly a real and present fear that the Respondent will in future deal with those assets in a manner that renders the proprietary claim nugatory.

39. In any event, the Applicant argues that this is not a claim for a *Mareva* injunction, but rather a claim for a preservation order in support of the proprietary claim. In such cases, delay is definitively not a bar to relief. Reliance is again placed on the judgment of Flaux J in the *Madoff* case at [128]: "*both the basis for a proprietary injunction and the circumstances in which it will be granted are different from the case of a freezing injunction… In particular, unlike in the case of a freezing injunction, it is not necessary to show any risk of dissipation of assets and, even if there has been delay in making an application which might lead to refusal of a freezing injunction, a proprietary injunction may nonetheless be granted".* The Applicant also relies upon *Cherney v Neuman* [2009] EWHC 1743, [100]-[102], per HHJ Waksman (as he then was) who, dismissed an application for a *Mareva* injunction on the basis of finding of a "*very substantial delay without proper explanation",* but nevertheless made a preservation order in support of the applicant's proprietary claim.

40. In light of Respondent's failure to give an undertaking to preserve the Assets pending the determination of the Bahamian proceedings I am satisfied that the balance of convenience decidedly favours the grant of a preservation order. On

behalf of the Respondent it is said that the Respondent has no intention to dissipate the Assets by making distribution, but has offered no satisfactory explanation as to why in those circumstances the Respondent is not prepared to give the undertaking sought. I am satisfied that damages would not be an adequate remedy as there is no evidence before the Court that the Respondent has the resources to pay damages which could be very substantial indeed.

41. In relation to the issue of delay it is clear that the Applicant has sought to deal with the issue of an undertaking by the Respondent by consent, if at all possible. This approach has clearly generated delay but in my judgment any such delay does not justify this court refusing a preservation order in aid of her proprietary claim. Accordingly, I would not refuse the grant of an injunction on the basis of delay in making this application.

42. In relation to the balance of convenience the Respondent further argues that this is an application for a collateral purpose of obtaining trust information to which the Applicant is not entitled and to give her power over the administration of trusts entailing further and continuing disclosure of private information concerning the Bermuda trusts.

43. It is also said that the draft order seeking to prevent the Respondent from removing from Bermuda or from "*in any way*" disposing, dealing with or diminishing the value of any of the Assets held by the Respondent "*save with the permission of the Court or the consent of the Applicant"* would cause very substantial difficulties in the administration of the Bermuda trusts. It is said that such an order prevents relevant Assets to be exchanged in any way. It is said that it will prevent the Respondent and all its directors having any role or involvement in the management of investment of the affairs of any company comprised with relevant Assets.

44. In my view most of the perceived practical difficulties in relation to the administration of the Bermuda Trusts are likely to disappear if the scope of the injunction is limited to restraining the Respondent from making distributions to

the beneficiaries. I understood Mr Brownbill QC accepted that to be the case. In all the circumstances, I am satisfied that the balance of convenience favours the grant of the preservation order.

45. If the ambit of the preservation order is limited to restraining the making of distributions to the beneficiaries of The Bermuda Trusts it is difficult to see what damage can be suffered by the Respondent or The Bermuda Trusts. In the circumstances it is appropriate that the Applicant should give an undertaking as to damages in relation to any loss suffered by the Respondent or The Bermuda Trusts but I do not make an order that such an undertaking be fortified.

46. The Applicant must also, in my view, be provided with information so that Applicant is aware of the assets to which this order applies.

(3) Just and convenient to grant the order

47. In the *Madoff* case Flaux J considered the requirement of just and convenient and said at [141]: "*Furthermore… once the court has decided that the balance of convenience favours the granting of the proprietary injunction… although the question whether it is just and convenient to do so is a separate question, it is extremely unlikely that the court would say it was not just and convenient, having decided the balance of convenience in favour of the claimant.*"

48. I have already decided that this is a case where the balance of convenience does indeed favour the grant of the injunction in the terms indicated. I also consider that it is just and convenient to make the order restraining the Respondent from making distributions to the beneficiaries of The Bermuda Trusts pending the determination of the underlying dispute or further order.

49. In the circumstances the Court orders that, upon the Applicant's undertaking to commence proceedings against the Respondent in this Court and serve the

respondent within the next 90 days, until further order, the Respondent must not diminish the value of any of the assets held by it and which were received from Grampian by The Bermuda Trusts by making any distributions to any of the beneficiaries of The Bermuda Trusts. In the event the Applicant fails to commence proceedings against the Respondent within the next 90 days, the Respondent shall be at liberty to apply to this Court to discharge this Order.

50. I also order that the Respondent shall within 14 days provide to the Applicant a list of assets held by it, which were received from Grampian, in its capacity as trustee of The Bermuda Trusts together with information setting out the total value of the assets with a separate value ascribed to each asset class.

51. The Applicant shall give an undertaking as to damages in terms that if the Court later finds that this Order has caused loss to the Respondent, and decides that the Respondent should be compensated for that loss (including any loss suffered by The Bermuda Trusts), the Applicant will comply with any Order the Court may make.

52. I would invite counsel to prepare an Order for Court's approval and in the event they are unable to agree I grant liberty to apply.

53. I will hear counsel in relation to the issue of costs, if necessary.

Dated this 6 February, 2019.

NARINDER K. HARGUN
CHIEF JUSTICE