Interim Relief in the Absence of Substantive Proceedings

The recent BVI case *Black Swan Investments I.S.A v Harvest View Limited* BVIHCV2009/399 brought to the fore the issue of the availability of injunctive relief in support of foreign proceedings. The *Black Swan* case held it would be "highly detrimental" to the interests of important offshore financial centres such as the BVI not to have within its armoury the jurisdiction to grant injunctive relief in aid of foreign proceedings where appropriate . Prior to that decision it had been thought that the BVI did not have the power to grant free standing injunctive relief following on from the English House of Lords in *The Siskina* [1979] AC 210.

The position in the Isle of Man has been settled for some time by statute and has been the subject of numerous decisions of the Court. Recent developments in the BVI make this an appropriate time to reiterate the position in this jurisdiction.

The most commonly used remedies of this nature are orders freezing assets located within the jurisdiction to prevent their dissipation and orders for disclosure of information against parties within the jurisdiction who are not necessarily a party to the foreign proceedings.

The rationale behind these remedies is to ensure that "there is not a black hole into which a defendant can escape out of sight and become unreachable"[1].

Arguments such as breach of privacy and confidentiality, the unavailability of the remedy in the jurisdiction of the substantive proceedings and the danger of conflicting judgments have all been cited as reasons why a foreign court should not act where there are no substantive proceedings in that jurisdiction. However, as recognised by the Jersey Court of Appeal in *Solvalub Limited v Match Investments*[2] "If the Royal Court were to adopt the position that it was not willing to lend its aid to courts of other countries by temporary freezing of assets of defendants sued in those other countries, that in my judgment would amount to a serious breach of duty of comity which courts in different [jurisdictions] owe to each other. Not only so, but the consequence of such an attitude would be that Jersey would quickly become known as a safe haven for persons wishing to evade liabilities imposed on them by the courts to which they are subject. This is exactly the reputation which any financial centre strives to avoid". These sentiments are routinely echoed by the judiciary of the Isle of Man.

The position in the Isle of Man is that the court will in certain circumstances grant injunctive relief in the absence of local proceedings. The position derives from the common law (in particular the decision of Deemster Corrin in *In re Securities & Inv. Ed* on September 16 1997 in which reference was made to *Solvalub*) and from statute, in particular section 56B of

[1] Lord Nicholls, dissenting in *Mercedes Benz A.G. v Leiduck [1996] 1 AC 284* as referred to by His Honour Deemster Doyle in *Re Secilpar S.L* 2003 – 05 MLR 352

[2] 1996 JLR 361

the High Court Act 1991 ("the Act") which provides as follows:

> *(1) The High Court shall have power to grant interim relief where proceedings have been or are to be commenced in a country or territory outside the Island.*
>
> (2) *On an application for any interim relief under subsection (1) the High Court may refuse to grant that relief if, in the opinion of the Court, the fact that it has no jurisdiction apart from this section in relation to the subject-matter of the proceedings in question makes it inexpedient for the Court to grant it.*
>
> *(3) In this section 'interim relief' means interim relief of any kind which the High Court has power to grant in proceedings relating to matters within its jurisdiction, other than-*
>
> *(a) a warrant for the arrest of property; or*
>
> *(b) provision for obtaining evidence.*

It is recognised in the judgment delivered by His Honour Deemster Doyle, on 3 August 2004 *In re Secilpar S.L.* that "the Manx courts had declined to follow *Siskina* and had held prior to the coming in to operation of section 56B that they had power to grant free standing Marevas just as they had power to grant Norwich Pharmacal relief prior to section 56B. Section 56B supplemented rather than restricted the existing jurisdiction".

To comply with the statutory test therefore, the following criteria must be satisfied to fall within section 56B of the Act.

Proceedings have been or are to be commenced in a foreign jurisdiction

This will be a question of fact and will usually be easy to determine.

The judgment delivered by His Honour Deemster Doyle in the case of Lakeland Oil & Gas and Transtema Power and Transdanubia on 16 April 2009 confirmed, in answer to the question whether the Isle of Man court had power to grant a freezing order to assist parties engaged in arbitration proceedings in other jurisdictions such as England and Wales that the Isle of Man court "had jurisdiction to grant the [freezing] Order. Such jurisdiction exists under sections 42 and 56B of the High Court Act 1991 and under the common law or the inherent jurisdiction of the court (See for example *Secilpar* judgment delivered 3rd August 2004, and *In re Securities & Inv Bd* 1996-98 MLR N 13.See also the Jersey Court of Appeal case *Solvalub Ltd v Match Investments* 1996 JLR 361). There is no need for substantial legal proceedings within this jurisdiction."

If there is no ground to grant the relief sought other than section 56B, is it expedient to grant the relief sought?

This is a criteria set out in s56B of the Act, the court is required to consider the expediency of the application if the only jurisdiction that the court has to grant the freestanding injunction is by virtue of this section. His Honour Deemster Doyle has said that there is jurisdiction to grant the free standing relief under s56B, s42 of the Act, the common law or the inherent jurisdiction of the court. Circumstances where the only jurisdiction of the court to grant the free standing relief would be s56B would therefore appear to be few and far between. However, in practice the expediency of the relief sought is something that the court will or should consider in any application for interim relief and the factors as listed below should always be addressed in an application for freestanding relief. This should be the case whether the application for such relief is made under s56B of the High Court Act or otherwise. If the court is not persuaded of the expediency of the injunction an opposing advocate can

use these factors to argue that the injunction should be discharged.

The factors that the court should bear in mind are[3];

a. whether the making of the order would interfere with the management of the case in the primary court,

b. whether it was the policy in the primary jurisdiction not itself to grant the relief sought,

c. whether there was a danger that the orders made would give rise to disharmony or confusion and/or risk of conflicting, inconsistent, or overlapping orders in other jurisdictions,

d. whether at the time the order was sought there was likely to be a potential conflict as to jurisdiction, and

e. whether, in a case where jurisdiction was resisted and disobedience to be expected, the court would be making an order which it could not enforce.

Section 56B will not apply to:

(a) a warrant for the arrest of property; or

(b) provision for obtaining evidence

This restriction will not be problematic where the relief sought is the freezing of assets (as is commonly the case) however it can cause problems when the relief is for the disclosure of information as in the case of *Norwich Pharmacal*. The question being, when will the provision of information become "obtaining evidence"? This point was discussed by Deemster Doyle in *Secilpar*. After hearing detailed submissions by the Advocates in the case, the Deemster ruled that seeking information regarding the beneficial owners of various entities and documents confirming that information was not evidence, but was information. The restriction of s56B(3) did not therefore apply. The distinction appears to be that the information can be sought to assist with the preservation of assets. Section 56B can be used to obtain information which will enable the party seeking the information to then right a wrong by bringing separate proceedings.

The trend therefore in the Isle of Man is clearly to assist foreign proceedings where it is possible to do so and both the case law in the Isle of Man and statute have made it clear that this is the position the court in the Isle of Man should take, not the "unfortunate"[4] decision in the *Siskina*.

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[3] *Mototola Credit Corp v Uzan and others* (No 2)[2004] 1WLR 113

[4] Professor Collins Essays in International Litigation and the Conflict of Laws 1994 at page 215