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Royal Court (Samedi Division).
12th May, 1993

Hughes-v-Clewley.

This Judgment, which was distributed to subscribers on 10th June, 1993, included only the 3 pages of the Judgment on the preliminary point.

The attached 17 page Judgment includes the Judgment on the preliminary point and on the substantive issue, and should be substituted for that distributed on 10th June, 1993.

Subscribers will only be asked to pay for 14 pages of the attached Judgment .

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ROYAL COURT
(Samedi Division)

12th May, 1993

Before: P.R. Le Cras, Esq., Lieutenant Bailiff, and Jurats Herbert and Rumfitt

BETWEEN:	Richard Hughes	PLAINTIFF
AND:	Vail Blygh Clewley	DEFENDANT
AND:	The Registrar of British Ships for St. Helier	PARTY CITED

Application by Defendant to discharge injunctions.

Preliminary Point: whether provisions of Merchant Shipping Act 1988, modifying provisions of Merchant Shipping Act 1894 (as extended to Jersey by Order in Council registered on 12th January, 1895) extend to Jersey.

Substantive issue: whether the Plaintiff is an "interested party" within the terms of s.30 of Merchant Shipping Act 1894.

Advocate N.F. Journeaux for the Plaintiff.
Advocate A.D. Hoy for the Defendant.
The Party Cited was not represented.

JUDGMENT (Preliminary Point).

THE LIEUTENANT BAILIFF: As a preliminary point, Mr. Hoy for Mr. Clewley submitted that Sections 55, 56 and 57 of the Merchant Shipping Act 1988: effectively repealed the 1894 Act registered here under an Order in Council, thus leaving a lacuna.

We do not accept this argument. In our view s. 56(1) of the 1988 Act which reads: ***"Her Majesty may by Order in Council direct***

that any of the provisions of this Act or any instrument made under it shall extend, with such modifications (if any) as may be specified in the Order, to any relevant overseas territory", expressly preserves the 1894 Act, or the Order in Council registering it, in force, *inter alia,* in Jersey, unless, or more likely, until an Order in Council extends the 1988 Act in whole or in part.

Furthermore, to accept Mr. Hoy's argument would, in our view, lead, as we have said, to a lacuna in the administration of the Act which would, we consider, need express wording to achieve.

We therefore find against you on this point, Mr. Hoy.

JUDGMENT (Substantive Issue)

The Plaintiff brings proceedings against the Defendant having transferred his yacht to him against assets which he claims were not as substantial as he was led to believe. He is under the impression that unless he is able to resume ownership of the yacht or to use it as security for damages, he is unlikely to recover the loss which he claims. He has, therefore, sought to secure the yacht pending the result of litigation which he is undertaking in England. He has so secured it under s.30 of the Merchant Shipping Act, 1894, which reads:

> ***"Each of the following courts; namely, ____***
>
> ***(a) in England or Ireland the High Court,***
> ***(b) in Scotland the Court of Session,***
> ***(c) in any British possession the court having the principal civil jurisdiction in that possession; and***
> ***(d) in the case of a port of registry established by Order in Council under this Act, the British court having the principal civil jurisdiction there,***
>
> ***may, if the court thinks fit (without prejudice to the exercise of any other power of the court), on the application of any interested person make an order prohibiting for a time specified any dealing with a ship or any share therein, and the court may make the order on any terms or conditions they think just, or may refuse to make the order, or may discharge the order when made, with or without costs, and generally may act in the case as the justice of the case requires; and every registrar, without being made a party to the proceeding, shall on being served with the order or an official copy thereof obey the same".***

The Defendant takes the preliminary point that the Plaintiff is not an interested party under the terms of the Act and hence cannot rely on the Act.

As authority he produced N.C.N.B. Texas National Bank & Ors. -v- Evensong Company, Limited (The "Mikado") [1992] 1 L.L.R. 163 (a copy of which is attached to this judgment). At first sight the interpretation seems unduly restrictive. Nonetheless, and especially in a statute of this genre, the findings of other courts on a similar issue must have very considerable weight. Put another way, it would be most unsatisfactory, without good grounds, for courts in different jurisdictions, to construe the same words in different ways.

In pursuance of his argument, Mr. Hoy contended that the Plaintiff is a mere creditor of the Defendant and is thus outside the definition of "an interested party" in "The Mikado". He

points out, first, that the yacht has been transferred, secondly, that paragraph 9 of the original Order of Justice reads:

> *"The Plaintiff believes that the yacht represents the Defendant's only substantial asset and fears that the Defendant may attempt to sell or dispose of the yacht".*

and thirdly, that the writ issued in England claims damages only and that there is no mention of rescission.

Mr. Journeaux relied on the affidavits, and particularly on the advice of English counsel which we found most helpful. Put bluntly, this is that, as the Plaintiff is pursuing a claim for rescission, he therefore still has a direct interest. In terms, he has been cheated out of his boat which is therefore still his and therefore he is within the definition.

We note, however, that counsel only goes so far as to say that he may seek to rescind the sale and hence may be said to have a direct interest.

Although the Plaintiff is not in precisely the same position as the Plaintiff in "The Mikado", who was at all times a creditor as it would seem, nonetheless the circumstances here are not sufficiently clearcut in our view to bring him into the position of having a direct interest. On the papers before us he appears rather to be in the position of a creditor. It is near the borderline, but in our view the Plaintiff falls on the wrong side of it and the injunction under s.30 must be raised.

We wish to add this. It is a very narrow point, and the Plaintiff may wish to have leave to appeal. We give him leave to do so; and furthermore given the absence in the Defendant's affidavits relative to the facts surrounding the claim, and the consideration that proceedings are likely, it would seem to be nugatory if the Defendant sells or charges the yacht, we order that the injunction should remain until the appeal has been disposed of. We make the usual order.

AUTHORITIES

Preliminary Point

F. de L. Bois: "Constitutional Law of Jersey": s. 9/1-12.

Report of the Commissioners appointed to inquire into the Civil, Municipal, and Ecclesiastical Laws of the Island of Jersey (1861): p.p. vii-viii: (5) Acts of the Imperial Parliament.

Merchant Shipping Act 1894: s.30.

Merchant Shipping Act 1988: ss. 56-7.

s.30 of Merchant Shipping Act 1894

Merchant Shipping Act 1854: ss.62-5.

N.C.N.B. Texas National Bank & Ors. -v- Evensong Company, Limited (The "Mikado") [1992] 1 L.L.R. 163.

QUEEN'S BENCH DIVISION
(ADMIRALTY COURT)

May 15 and 16, 1991

NCNB TEXAS NATIONAL BANK AND OTHERS
- V -
EVENSONG CO. LTD.

(THE "MIKADO")

Before Mr. Justice SHEEN

Practice - Application to set aside - Injunction obtained by plaintiffs restraining defendants from dealing with yacht - Whether plaintiffs an "interested person" - Whether Court had jurisdiction to grant injunction - Merchant Shipping Act, 1894 s. 30 as amended by Merchant Shipping Act, 1988 Schedule 2, s. 29.

On June 12, 1984 the plaintiffs (the successors in title nter alia to Interfirst Bank Dallas NA) lent $25,000,000 to Mr. John Rogers for investment in real estate.

On June 14, 1985 Mr. Rogers entered into a contract for the construction by Japanese builders of a large and luxurious yacht to be named Mikado.

A slump in the real estate market left Mr. Rogers in financial difficulties and in 1986 Mr. Rogers sought to restructure the loan partly repaying it by borrowing from another bank.

Between Aug. 26 and 29, 1986 Mr. Rogers transferred to his wife the majority of his assets including the rights under the building contract for Mikado without consideration therefor. Mrs. Rogers immediately conveyed the transferred property to two revocable trusts, the Rogers' Family Trust and the Evensong Trust set up under the laws of Florida and Maine respectively.

In March 1987 Mrs. Rogers in her capacity as sole trustee of Evensong Trust assigned her rights under the building and fitting out contracts for Mikado to the defendants a body incorporated under the laws of Jersey. Mikado was registered in London as a British ship.

On Dec. 11, 1990 the plaintiff obtained a final judgment against Mr. Rogers in the District Court of Dallas for $16,846,438 plus accrued and daily interest. The plaintiffs also commenced proceedings against Mr. and Mrs. Rogers in Florida alleging that the transfers of property were actually and constructively fraudulent under the laws of Florida.

In January 1981 the plaintiffs learned that Mikado was being offered for sale by yacht brokers in the South of France. The plaintiffs therefore obtained ex parte an injunction pursuant to s. 30 of the Merchant Shipping Act 1894 as amended by the Merchant Shipping Act 1988, Schedule 2, s. 20 prohibiting until further order any dealing with the vessel or any share therein. Section 30 as amended provided inter alia:

Each of the following courts, namely:

(a) In England and Wales or in Northern Ireland, the High Court ...

(c) In any British possession the court having the principal civil jurisdiction in that possession: and

(d) In the case of a Port of Registry established by Order in Council and under this Act, the British court having the principal civil jurisdiction there, may, if the court thinks fit (without prejudice to the exercise of any other power of the court), on the application of any interested person make an order prohibiting for a time specified any dealing with a ship or any share therein ...

The defendants applied to set aside the order pursuant to R.S.C., O.12, r.8(1)(f) on the grounds that:

(1) The claim of the plaintiff in this section did not fall within any of the cases within O.11, r.1(1) of the Rules of the Supreme Court, 1965 and the Court had no jurisdiction to give leave for the service of the originating summons out of the jurisdiction.

(2) Having regard to all the circumstances of the case it was not a proper case for service out of the jurisdiction within O.11, r.4 of the Rules of the Supreme Court, 1965, and the Court in its discretion should refuse to grant leave.

(3) The plaintiff had not interest sufficient to make any claim or application under s. 30 of the Merchant Shipping Acts 1894-1988.

(4) The defendant had sustained damage by reason of the aforesaid order obtained by the plaintiff which the plaintiff ought to bear.

Held, by Q.B. (Adm. Ct.) (SHEEN, J.) that (1) mere creditors were not covered by the expression "an interested person" in s. 30 and the plaintiffs were not "interested persons" within the meaning of s. 30; the order made on the ex parte application should not have been made:

McPhail v. Hamilton (1878) 5 R. 107, Roy v. Hamiltons and Co., (1867) 5 M. 573 and Beneficial Finance Corporation Ltd. v. Price, [1965] 1 Lloyd's Rep. 556, considered and applied.

(2) s. 30 gave the applicant a substantive right of relief; it was not relief which was ancillary to any other cause of action; s. 30 conferred a power to be exercised as original jurisdiction; the Court was the only Court which had power to make the order sought by the plaintiff; the application came within the wording of O. 11, r. 1(1)(b):

(3) since the power given to the Courts by s. 30 was not ancillary to some other cause of action, if the plaintiff had been an "interested person" the Court would have had jurisdiction to give leave to serve the originating summons out of the jurisdiction and as a matter of discretion that would have been a proper case for doing so but that had not arisen.

This was an application by the defendant, the Evensong Co. Ltd., for an order that the order made on the ex parte application by the plaintiffs, NCNB Texas National Bank (as successor in title to Interfirst Bank Dallas N.A. and First Republic Bank Dallas N.A.) giving the plaintiff leave to issue the originating summons and serve the same on the defendant out of the jurisdiction and an injunction restraining the defendant from dealing with the vessel Mikado be discharged and that the service of the originating summons be set aside.

Mr. Jeremy Cooke, Q.C. (instructed by Messrs. Richard Butler) for the plaintiff; Mr. W. Blackburne, Q.C. and Mr. Richard Morgan (instructed by Messrs. Nabarro Nathanson) for the defendant.

The further facts are stated in the judgment of Mr. Justice Sheen.

JUDGMENT

SHEEN, J: The Court has before it an application by the defendant for an order that the order herein dated Mar. 8 1991 made on the ex parte application of the plaintiff, giving the plaintiff leave to issue the originating summons herein and serve the same on the defendant out of the jurisdiction and an injunction restraining the defendant, its agents or servants or otherwise howsoever from dealing within the jurisdiction with the vessel Mikado, whether by sale, mortgage, charge or other disposition of any interest therein or of any shares therein, except with the prior consent in writing of the plaintiff, be discharged and that service of the originating summons be set aside and other relief be granted to the defendant arising out of the plaintiff's undertaking as to damages.

The grounds of the defendant's application are:

(1) That the claim of the plaintiff in this action does not fall within any of the cases within Order 11 rule 1(1) of the Rules of the Supreme Court 1965 and the court has no jurisdiction to give leave for the service of the originating summons out of the jurisdiction.

(2) Having regard to all the circumstances of the case it is not a proper case for service out of the jurisdiction within Order 11 rule 4 of the Rules of the Supreme Court 1965, and the court in its discretion should refuse to grant leave.

(3) The plaintiff has not interest sufficient to make any claim or application under section 30 of the Merchant Shipping Acts 1894-1988.

(4) The defendant has sustained damage by reason of the aforesaid order obtained by the plaintiff which the plaintiff ought to bear.

Before I consider the submissions of Counsel on this application I must give a brief summary of the facts which are the background to this litigation. On June 12, 1984 Interfirst Bank, Dallas, N.A. lent the sum of $25,000,000 to Mr. John Burton Rogers for investment in real estate. A slump in the real estate market left Mr. Rogers in financial difficulties. In 1986 Mr. Rogers sought to restructure the loan. He repaid part of the loan by borrowing from another bank. Meanwhile on June 14, 1985 Mr. Rogers had entered into a contract for the construction by Japanese builders of a large and luxurious yacht to be named Mikado.

Between Aug. 26 and 29, 1986 Mr. Rogers transferred to his wife, Alice Corr Rogers the majority of his assets without consideration therefor. The total value of the

assets thus transferred was almost $23,000,000. Those assets included the rights under the building contract for the yacht Mikado, including rights to valuable equipment, launches, letters of credit and other forms of equity under the building contract, and also the fitting-out contracts for the yacht. Mrs. Rogers immediately conveyed the transferred property to two revocable trusts, the Rogers Family Trust and the Evensong Trust, set up under the laws of Florida and Maine respectively, Mrs. Rogers is the sole trustee of the trusts. Mr. Rogers acts as manager of the trusts through his position as president and chief executive officer of Rogers Investment Corporation, which manages the trusts.

In March, 1987 Mrs. Rogers, in her capacity as sole trustee of the Evensong Trust, assigned her rights under the building and fitting out contracts for Mikado to the Evensong Co. Ltd., the defendant in these proceedings, which is the current registered owner of the vessel. The defendant company is a body incorporated under the laws of Jersey. Mikado is registered in London as a British ship.

After the rights under the building contract had been transferred to Mrs. Rogers, she used the proceeds of sale of other transferred property to fund the remaining stage payments under the building contract. On July 22, 1987 the Hitachi Zosen Corporation of Japan, which built the yacht, executed a bill of sale in favour of the defendant company in consideration of payments totalling $4,122,722.52. However, the total cost of Mikado with all its fitments amounted to $8,366,227. On Aug. 3, 1987 Mikado was registered at the Port of London in the ownership of the Evensong Co. Ltd., then having its place of business in Grand Caymen. On Nov. 8, 1990 the principal place of business of the Evensong Co. Ltd. was recorded in the register as Rutland House, Pitt Street, St. Helier, Jersey, Channel Island. There are three shareholders of the defendant company, who appear to hold their shares in trust for Mrs. Rogers.

On Dec. 11, 1990 the plaintiff obtained final judgment against Mr. Rogers in the District Court of Dallas County, Texas for the principal sum of $16,846,438 and accrued interest of $5,449,245.41 plus additional interest at the daily rate of $4961.62.

On Apr. 10, 1989 the plaintiff commenced proceedings in Florida against Mr. and Mrs. Rogers as individuals and against Mrs. Rogers in her capacity a sole trustee of the Rogers Family Trust and the Evensong Trust alleging that the transfers of property from Mr. Rogers to his wife were

actually and constructively fraudulent under the laws of Florida.

It is alleged in the Florida proceedings that Mr. Rogers gratuitously conveyed his property to his wife for the purpose of placing his assets beyond the reach of his creditors. Meanwhile Mr. Rogers continues to enjoy the full use of Mikado and other residences and property.

Under the law of Florida the legal title to property which has been fraudulently transferred never passes from the transferer. It is, therefore, the plaintiff's case that Mikado has at all times remained in law in fact the property of Mr. Rogers. There is evidence before the Court that under the law of Florida a creditor will have established a prima facie case of fraudulent transfer and be entitled to a presumption of fraud upon showing that the transfers were made from one family member to another without consideration and that the debtor continues to retain the benefit and control over the assets transferred.

When this matter was last before the Court it appeared that the plaintiff had a very strong case in Florida proceedings. But in fact the case was heard on May 3, 1991 and on May 8 the Judge granted the defendant's motions for summary judgment and dismissed the plaintiff's amended complaint, but gave leave to make a further amendment. That is not the end of the Florida proceedings. The plaintiff has decided to take further steps, the details of which I need not recite.

In January, 1991 the plaintiff learned that Mikado was being offered for sale by yacht brokers in the South of France. The plaintiff feared that Mikado would be sold or mortgaged in order to raise funds for Mr. Rogers or for his wife. Accordingly the plaintiff sought and obtained ex parte an order pursuant to s. 30 of the Merchant Shipping Act, 1894, as amended, prohibiting until further order any dealing with the vessel or any share therein. The plaintiff was and is seeking to preserve the status quo pending the determination in Florida of its right to levy execution on Mikado. The plaintiff does not, however, seek to prevent a sale of Mikado. If a good price can be obtained the plaintiff would consent to a sale of Mikado on terms that the proceeds of sale are paid into an account in which they can be securely retained to await the outcome of the Florida action. It is not disputed that the defendant company has been attempting to sell Mikado since the latter part of 1990. Mikado is being marketed through a French company, Solidmark France S.A.R.L.

The order made ex parte on Mar. 8, 1991 was made pursuant to s. 30 of the Merchant Shipping Act, 1894 as amended by s. 20 of schedule 2 of the Merchant Shipping Act, 1988 (hereinafter "s. 30"). In its amended form it provides:

> *Each of the following courts, namely:*
>
> *(a) In England and Wales or in Northern Ireland, the High Court,*
>
> *(b) In Scotland, the Court of Session,*
>
> *(c) In any British possession the oourt having the principal civil jurisdiction in that possession; and*
>
> *(d) In the case of a Port of Registry established by Order in Council and under this Act, the British court having the principal civil jurisdiction there.*
>
> *may, if the court thinks fit (without prejudice to the exercise of any other power of the court), on the application of any interested person make an order prohibiting for a time specified any dealing with a ship or any share therein, and the court may make the order on any terms or conditions they think just, or may refuse to make the order, or may discharge the order when made, with or without costs, and generally may act in the case as the justice of the case requires; and every registrar, without being made a party to the proceeding, shall on being served with the order or an official copy thereof obey the same.*

The defendant company makes its application pursuant to O. 12, r. 8(1)(f). It is an application for the discharge of an order made to prevent any dealing with property of the defendant.

It seems to me that the first question is whether the plaintiff was entitled to make an application under s. 30. Such an application can be made only by "any interested person". Has the plaintiff a sufficient interest in Mikado within the meaning of those words to seek an order prohibiting any dealing with the yacht?

Mr. Blackburne submitted (a) that "an interested person" is someone with a proprietary interest in a ship, and (b) that those words in s. 30 do not include a creditor seeking execution. He submitted that as the plaintiff bank has no proprietary interest in Mikado its application must fail. Mr. Blackburne relies upon two decisions of the Court of Session upon the meaning of identical words in s. 65 of the Merchant Shipping Act, 1854. In Roy v. Hamiltons and Co., (1867) 5 M. 573 at p.575 the Lord President said that "the petitioner was a personal creditor of the

owners or part-owners of a ship, and nothing more". He furthe said that the petition was: "an attempt to make use of thi section of the Act not contemplated by it, in the interest of person not within its meaning, and in a manner and for a purpos inconsistent with the section". He said that s. 65 is intended t deal with the case of a ship or a share therein coming to b vested in an unqualified person. Lord Deas said: I am of opinio that the expression "interested person" in s. 65 refers only t that kind of interest which may arise or be affected by or i relation to proceedings under the powers conferred by ss. 62, 6 and 64, which are confined to cases of transmission of a ship, o a share of a ship, by succession to a party deceased ....

In McPhail v. Hamilton (1878) 5 R. 107 Lord Shand said:

> *"I think that the expression an "interested person" in tha section of the Act must refer to a person having some direc interest in the ship or shares of a ship which are th subject of the application and does not cover the case o mere creditors who have no more immediate interest in th ship or shares of a ship belonging to their debtor than i any other property or right, real or personal, which thei debtor may possess".*

Sections 24 to 29 of the Merchant Shipping Act, 1894 dea with the transfer of British ships, the declarations required o the transferee, the documents required by the Registrar, th requirements when the property in a ship is transmitted on death, bankruptcy etc., the appropriate order when the property in registered ship is transmitted to a person not qualified to own British ship, and the transfer of a ship by order of the Court Then comes s. 30, which I have set out in full. Those section are the successors of ss. 55-65 of the Merchant Shipping Act 1854, but with significant changes. The effect of those changes wa considered in detail in the lucid judgment of Mr. Justice Moffit in Beneficial Finance Corporation Limited v. Price [1965] Lloyd's Rep. 556. Mr. Justice Moffitt, who was a Judge of th Supreme Court of New South Wales, had to consider the submissio that s. 30 is limited in its application to making orders in ai of the exercise of jurisdiction under the preceding sections, bu particularly those relating to the sale under Court supervision o ships or interests therein passing by transmission to persons no entitled to own a British ship. His conclusions on this aspect o the case are set out in the report on pp. 560-561. It i unnecessary for me to set out verbatim that part of his judgment He considered and referred to the Scottish authorities upon whic Mr. Blackburne relies. And, after considering them, he said:

> *"Section 65 of the 1854 Act and section 30 of the 1894 Act i general follow each other except in procedural matters bu with the important exception that whereas the phraseology i the 1854 Act necessarily ties section 65 to the earlie*

sections there is a significant variation in the 1894 Act where there are substituted words with no such tie".

Later on the same page he said:

"Although the scheme of the sections when the Act was revised in 1894 was to some degree retained, use in section 30 of the significantly different words "a ship or any share therein" must be taken to have been a deliberate generalising of the power in favour of a view such as that expressed by Lord Shand. This view is further confirmed by the rearrangement of some of the other sections, in particular section 29 which correspond with the old section 63, ... and commences, "where any court, whether under the preceding sections of this Act or otherwise." Then comes section 30 with the change to which I have referred. It seems clear, therefore, that the Scottish authorities are not applicable to section 30 of the 1894 Act (and see now La Blanca and El Argentino (1908) 77 L.J. (P) 91). I therefore reject the submission that section 30 should be limited as submitted and find the words of Lord Shand quoted in McPhail v. Hamilton appropriate".

As set out above Lord Shand was of opinion that mere creditors are not covered by the expression "an interested person".

In Roy v. Hamiltons Lord Deas said (at p. 577):

"The petitioner sets forth that he is a creditor of the owners of these ships; and undoubtedly, as a creditor, he is interested in them, as he is in all the property belonging to his debtors. But the question, to my mind, is whether he has that kind of interest which is within the meaning of section 65 of the statute. It appears at first sight to be very improbable that the interest of a creditor is the kind of interest contemplated in that section, and that the right there given should be given to any creditor, not only of an owner, but of any part-owner of a ship".

Section 30 was enacted after the powerful expressions of opinion of Judges of the Court of Session as to the meaning of the words "any interested persons".

In Beaman v. A.R.T.S., [1949] 1 K.B. 550 at p. 567 Lord Justice Somervell said:

"Where a word has been construed judicially in a certain legal area, it is, I think, right to give it the same meaning if it occurs in a statute dealing with the same general subject matter unless the context makes it clear that the word must have a different construction".

That canon of construction applies with even greater forc when construing a phrase which is repeated by Parliament after i has already been judicially construed. Section 30 of the 1894 Ac replaced s. 65 of the 1854 Act with some alterations. But th phrase "any interested person" was retained in the later Act afte its meaning had been made clear by the Court of Session. I hol that the plaintiff is not an "interested person" within th meaning of s. 30 and that, accordingly, the order made on the e parte application should not have been made.

In case it be held by a higher Court that I have given a meaning to the words "any interested person" which is too narrow I will deal with the first two points taken by Counsel on behalf o the defendants. They can be dealt with together. Their substanc is that the Court had no jurisdiction to make the order becaus the plaintiff has no cause of action against the defendant whic is being pursued in this Court, thereby enabling the Court t grant the remedy of an injunction.

The relevant rules of the Supreme Court are rules 1 and 4 of Order 11, which provides:

> 1(1) Provided that the writ does not contain any clai mentioned in order 75, r. 2(1) and is not a writ t which paragraph (2) of this rule applies, service of a writ out of the jurisdiction is permissible with the leave of the court if in the action begun by the writ - (b) an injunction is sought ordering the defendant t do or refrain from doing anything within the jurisdiction ...
>
> 4(1) An application for the grant of leave under rule 1(1) must be supported by an affidavit stating - (a) the grounds upon which the application is made, (b) that in the deponents belief the plaintiff has a good cause of action, (c) in what place or country the defendant is, or probably may be found ...
>
> (2) No such leave shall be granted unless it shall be made sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction under this order.

It was submitted by Mr. Blackburne that this Court had n jurisdiction to grant the relief obtained by the plaintiff e parte. Mr. Blackburne submitted that the order obtained by the plaintiff is in aid of proceedings out of the jurisdiction, as is clear from the affidavit of Mr. David Walker Smith, who said the proceedings are an attempt by the plaintiff to prevent asset currently held by the defendant, which is in turn controlled b Mrs. Rogers, from being further dissipated, thereby furthe prejudicing the plaintiff's position if it is ultimatel

successful in the Florida proceedings. it is not disputed that the object of the plaintiff's application to this Court is for a holding order in aid of the Florida proceedings. The plaintiff wants to lock the stable door before the horse has bolted, which, as Lord Templeman has said, is also the concern of any Court of equity.

Mr. Blackburne relied upon the decision of the House of Lords in The Siskina, [1978] 1 Lloyd's Rep. 1: [1979] A.C. 210, and in particular upon a passage in the speech of Lord Diplock (at p. 6, col. 1; p. 256) in which he said in relation to O. 11, r. 1:

> *"To come within the sub-rule the injunction sought in the action must be part of the substantive relief to which the plaintiff's cause of action entitles him; and the thing that it is sought to restrain the foreign defendant from doing in England must amount to an invasion of some legal or equitable right belonging to the plaintiff in this country and enforceable here by a final judgment for an injunction".*

Mr. Blackburne also drew my attention to the decision of the Court of Appeal in Perry v. Zissis, [1977] 1 Lloyd;s Rep. 607. In that action the plaintiffs had obtained an interlocutory judgment in a Court in California. The plaintiffs were aware of certain assets of the defendant in England. Accordingly the plaintiffs commenced proceedings by an originating summons claiming an order that the defendants be restrained from disposing of their assets within the jurisdiction until three days after the final determination of the action in California. Leave was obtained to serve the originating summonses out of the jurisdiction. The defendants applied for the action to be set aside on the ground of want of jurisdiction. The Court of Appeal held that there was no cause of action which justified the bringing of the action, for although an English judgment creditor could apply for the appointment of a receiver, the foreign judgment creditor was not entitled to that form of execution.

In answer to these submissions Mr. Cooke contends, and in my judgment correctly, that s. 30 gives the applicant a substantive right of relief. It is not relief which is ancillary to any other cause of action. In contradistinction to a Mareva injunction, an application under s. 30 does have a life of its own. It is not parasitic. In Beneficial Finance Corporation, Mr. Justice Moffitt, said (at p. 559):

> *"...Section 30 confers a power to be exercised as original jurisdiction ..."*

I agree.

This Court is the only Court which has power to make th order sought by the plaintiff. The application comes fairly an squarely within the wording of par. (b) of r. (1) of O. 11.

As the power given to the Court by s. 30 is not ancillary t some other cause of action I hold that if the plaintiff had bee an "interested person" the Court would have had jurisdiction t give leave to serve the originating summons out of th jurisdiction, and as a matter of discretion I would have held tha it is a proper case for so doing. That, however, has not arisen.

Authorities

Beaman v. A.R.T.S., (C.A.) [1949] 1 K.B. 550.

Beneficial Finance Corporation Ltd. v. Price, [1965] 1 Lloyd's Rep. 556.

McPhail v. Hamilton, (1876) 5 R. 107.

Perry v. Zissis, (C.A.) [1977] 1 Lloyd's Rep. 607.

Roy v. Hamiltons and Co., (1867) 5 M. 573.

The Siskina, (H.L.) [1978] 1 Lloyd's Rep. 1; [1979] A.C. 210.