Easter Term
[2019] UKPC 24
Privy Council Appeal No 0016 of 2019

JUDGMENT

Emmerson International Corporation (Appellant) *v* Renova Holding Ltd (Respondent) (British Virgin Islands)

From the Court of Appeal of the Eastern Caribbean Supreme Court (British Virgin Islands)

before

Lord Reed
Lord Wilson
Lord Carnwath
Lady Black
Lord Sales

JUDGMENT GIVEN ON

20 May 2019

Heard on 1 May 2019

Appellant
Philip Marshall QC
Robert Weekes
Colleen Farrington

(Instructed by Blake Morgan LLP (Oxford))

Respondent
Paul McGrath QC
Arabella di Iorio
Michael Bolding
Andrew McLeod
(Instructed by DLA Piper (UK) LLP (London))

LORD SALES:

1. This appeal concerns a short point of statutory construction in respect of section 30(4) of what is now called the Eastern Caribbean Supreme Court (Virgin Islands) Act (it was originally promulgated in 1969 as the West Indies Associated States Supreme Court (Virgin Islands) Ordinance). The question is whether leave to appeal to the Court of Appeal of the Eastern Caribbean is required in respect of a variation of a disclosure order made in conjunction with, and as part of, a freezing order.

2. Section 30(4) provides:

> "No appeal shall lie without the leave of the judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a judge except in the following cases -
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> (i) where the liberty of the subject or the custody of infants is concerned;
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> (ii) where an injunction or the appointment of a receiver is granted or refused;
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> (iii) in the case of a decree nisi in a matrimonial cause or a judgment or order in an Admiralty action determining liability;
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> (iv) in such other cases, to be prescribed by rules of court, as may in the opinion of the authority having power to make such rules of court be of the nature of final decisions."

Factual background

3. The relevant factual background can be shortly summarised. The appellant ("Emmerson") and the respondent ("Renova") are vehicles for Russian businessmen. Emmerson has a substantial claim against Renova in respect of what Emmerson maintains was a fraud committed by Renova and others in relation to a joint venture between them concerning businesses in Russia.

4. On 19 November 2018 Emmerson applied *ex parte* to Wallbank J in the High Court in the British Virgin Islands for a freezing order in relation to certain assets of Renova. The draft order placed before the court included provisions restraining Renova, until the return date or further order of the court, from dealing with specified assets in the form of shareholdings in companies outside the jurisdiction (para 4) and from taking steps to increase its liabilities (para 5) (together, "the restraining provisions"). The draft order was an elaborate and carefully worked out document which, as is usual, included provision requiring disclosure of information. This was in the form of an order requiring Renova to provide information, within 21 days of service of the order, in relation to the specified assets and the chains of ownership through which they were held by Renova (para 7) and to swear and serve an affidavit within the same time-frame to verify that information and exhibit relevant documentation (para 8) (together, "the disclosure provisions"). The judge made the freezing order as set out in the draft and in due course it was served on Renova.

5. On 4 December 2018 Renova issued an application to discharge or vary the freezing order and to extend time for compliance with the obligations under the disclosure provisions pending determination of its discharge application. Renova's application for an extension of time was heard by Wallbank J on 12 December 2018. The hearing was conducted under some pressure of time.

6. By an order made that day ("the variation order") the judge granted Renova a short extension of time and imposed a confidentiality club in relation to the information and documents to be provided by Renova pursuant to the disclosure provisions. The variation order provided that pending the hearing of Renova's discharge application such information and documents could only be given to and retained by certain identified lawyers acting for Emmerson, who could not (without further order of the court) share such information or documents with any other person. The effect of this was that Emmerson's legal team could not share the information and documents to be provided by Renova with anyone from Emmerson, their client, in order to obtain instructions on them or to obtain assistance from their client in preparing any response to Renova's discharge application with reference to them. The variation order included a further provision for liberty to Emmerson to apply on notice to Renova for permission for Emmerson's lawyers to share such information and documents with their client. However, in the course of the hearing the judge indicated that such permission would not lightly be granted. Mr Marshall QC, for Emmerson, told the Board that it was only in the course of the reply by Renova's counsel that the judge suggested that a confidentiality club might be imposed and that he did not invite submissions from Mr Marshall in relation to that suggestion before announcing the order to be made, including the provision for the confidentiality club. It does not appear that Mr Marshall asked the judge for leave to appeal.

7. Emmerson is concerned that the imposition of such a restrictive confidentiality club will severely hamper it in being able to respond effectively to Renova's discharge

application, the hearing of which is also to be treated as the return date for the freezing order. Emmerson therefore appealed to the Court of Appeal. It maintains that it was entitled to do so as of right, on the basis that the case falls within the scope of section 30(4)(ii).

8. The Court of Appeal, however, disagreed. It held that the variation order was an interlocutory order which did not fall within the scope of that statutory provision. As Emmerson did not have leave to appeal, the court held that the appeal was not properly brought and therefore dismissed it without examination of the merits. It is unclear why the court did not itself consider whether to grant leave to appeal.

9. Emmerson now appeals to the Board, the issue being whether it enjoyed an entitlement to appeal as of right by virtue of section 30(4)(ii).

Discussion

10. Mr Marshall QC, for Emmerson, makes two principal submissions: (a) the disclosure provisions in the freezing order, as varied by the variation order, constitute in themselves an injunction within the meaning of section 30(4)(ii), and would have done even if they stood alone as occurred in *Maclaine Watson & Co Ltd v International Tin Council (No 2)* [1989] Ch 286; further or in the alternative, (b) the freezing order is an injunction within the meaning of section 30(4)(ii) and the disclosure provisions, as varied by the variation order, are an inherent and non-severable part of that order.

11. Since the Board considers that Mr Marshall succeeds on the second of these submissions, which is perhaps more straightforward in terms of legal analysis, it does not need to decide on the merits of the first submission.

12. Mr McGrath QC, for Renova, accepts that parts of the freezing order constitute an injunction for the purposes of section 30(4)(ii), but submits that these are limited to the restraining provisions and other provisions in that order which directly qualify the obligations contained in the restraining provisions. He contends that the disclosure provisions, as varied, do not constitute an injunction for the purposes of section 30(4)(ii), so Emmerson had no right to appeal in relation to the variation order without leave of the court. Mr McGrath says that the restraining provisions and the disclosure provisions had different functions. Only the restraining provisions had operative effect as an injunction (as that term is used in section 30(4)(ii)), whereas the disclosure provisions were merely directed to requiring Renova to provide information and hence were more akin to procedural rules which require disclosure in the course of litigation, which cannot be regarded as being in the nature of an injunction.

13. The Board disagrees. As Mr Marshall submits, the restraining provisions and the disclosure provisions were both inherent and necessary ingredients of the operative part of the freezing order and it is the operative part of the freezing order, read as a whole, which constitutes an "injunction" as that term is used in section 30(4)(ii). The restraining provisions and the disclosure provisions both have the same purpose, namely to protect Emmerson against the potential dissipation of assets by Renova. They are intended to operate together as parts of an interlocking protective regime constituted by the freezing order as a whole. Both parts are necessary to secure the protection which the freezing order is intended to provide. Since the basis for the grant of a freezing order is the risk of improper dissipation of assets by the defendant to whom the order relates, the restraining provisions may be rendered nugatory unless the defendant is compelled pursuant to provisions in the freezing order to provide information about the location and control of its assets so that the applicant for the order can serve it on third parties to prevent such dissipation or can use it as the basis for taking action in other jurisdictions to safeguard assets or execute against them: see *Grupo Torras SA v Al-Sabah* [2014] 2 CLC 636 (note), at 643 per Steyn LJ. The objective of the freezing order, to provide effective protection for the applicant against dissipation of assets by the respondent, would be undermined if either the restraining provisions or the disclosure provisions were removed from that order; neither can be regarded as severable or discrete from the operative injunctive effect of the freezing order taken as a whole. (In that regard, the restraining provisions and the disclosure provisions of the freezing order are different from the paragraph of the order which made provision in relation to costs, reserving them to the judge who would hear the application on the return date; the Board reserves its opinion as to the effect of section 30(4) in relation to such a provision).

14. The provisions of the freezing order, as varied, governing the confidentiality club are an inherent part of the disclosure provisions and cannot be separated out from those provisions. Mr McGrath did not contend otherwise at the hearing.

15. Section 30(4) is a provision which governs the procedure to be adopted in particular cases. Such a procedural provision needs to be given a practical interpretation, readily comprehensible by litigants, which allows parties to know clearly where they stand in relation to the procedure which they need to follow. In the Board's view, this militates strongly against the construction urged by Mr McGrath, which would require a party to go through an exercise of parsing a single order with interlocking parts, like the freezing order in this case, to break it down into separate paragraphs or subparagraphs, and then asking of each paragraph or subparagraph whether it should be characterised as "an injunction" or not. Not only would such an exercise be unduly complicated, it would be likely to give rise to considerable uncertainty as to how different parts of a single, unified order were properly to be characterised. That would undermine the object of a procedural provision such as that in issue on this appeal, which is to provide clarity for litigants as to how to bring their cases before an appropriate tribunal.

16. In the Board's opinion, applying section 30(4)(ii) in this case, if the original freezing order had included provision for a confidentiality club it would have been a straightforward matter to say that such provision was part of an "interlocutory order … made … by a judge … where an injunction … is granted …". Accordingly, if Emmerson had been aggrieved by such provision at that stage it would have had a right to appeal without leave. For the purposes of application of section 30(4)(ii) it makes no difference that the confidentiality club was imposed later on by way of a variation of the terms of the freezing order, since the effect of such a variation is that a new injunction in different terms is put in place: see *Atlas Maritime Co SA v Avalon Maritime Ltd (No 2)* [1991] 1 WLR 633, CA (a decision on section 18(1)(h) of the Supreme Court Act 1981 (UK), a provision in materially identical terms to section 30(4)(ii)). The Board would add that if the respondent to a freezing order was aggrieved about the contents of such an order, including in relation to matters such as whether it made provision for a confidentiality club or not, or the ambit of such a club, and it was not possible for it to secure satisfactory relief in respect of that by exercising its right to go back to court pursuant to the liberty to apply, that too would be a case where the respondent would have a right of appeal without leave by virtue of section 30(4)(ii). Again, it could readily be seen to be a case in which an interlocutory order had been made "where an injunction … is granted".

17. For these reasons, the Board will advise Her Majesty that this appeal should be allowed.