

Commercial Injunctions Update: November 2006

Some Interesting Recent developments

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The effect of Paragraph 6 of the example Order (Chapter 3)

The meaning of the example orders can be of great practical importance. Paragraph 6 of the example freezing injunction was modified after *Federal Bank of the Middle East v Hadkinson* [2000] 1 WLR 1695 in which an attempt by a complainant in contempt proceedings to take a short cut and avoid having to prove that the defendant had dealt with assets which he owned beneficially, failed. It reads:

6. Paragraph 5 applies to all the Respondent's assets whether or not they are in his own name and whether they are solely or jointly owned. For the purpose of this order the Respondent's assets include any asset which he has the power, directly or indirectly, to dispose of or deal with as if it were his own. The Respondent is to be regarded as having such power if a third party holds or controls the asset in accordance with his direct or indirect instructions.

In *Raja v van Hoogstraten* [2004] 4 AER 793 at paras. 96-98 <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2004/968.html&query=Raja+v+van+Hoogstraten+&method=all> the Court of Appeal questioned whether paragraph 6 of the example order, besides extending the restraint imposed by paragraph 5 also extends the meaning of “all his assets” in the disclosure order in paragraph 9. The second sentence of paragraph 6 commences with the words “For the purpose of this order..” which appear to make the extended meaning applicable to the entire order including the disclosure order in paragraph 9. The court considered that the extension could work well enough for the restraint. However if written into the disclosure order, it would require disclosure of assets which the defendant does not own but where a third party might in practice act in accordance with the defendant’s instructions if such instructions were to be given. The court considered that this produced material uncertainty about what had to be disclosed, particularly for one who had in fact made arrangements to divest himself of, or avoid, ownership of assets. This objection is not simply one of language but questions on grounds of uncertainty whether a mandatory order can properly be made for disclosure, where what has to be disclosed depends upon what third parties might in practice do in certain hypothetical circumstances.

Section 25 CJJA relief (Chapter 6)

The Commercial Court has decided a number of cases concerning the enforcement of judgments against the Republic of Congo. One of the cases concerns the jurisdiction of the English courts to grant free standing interim relief in aid of proceedings in another jurisdiction, in this case proceedings to enforce the English judgment in Switzerland.

In *Kensington International Limited v Republic of Congo* Friday 26th May 2006 (Cresswell J) interim relief granted under section 25(1) of the Civil Jurisdiction and Judgments Act 1982 was upheld against a third party in support of Swiss attachment proceedings against that third party founded on an English judgment. The jurisdiction to grant interim relief against third parties in aid of execution of a judgment is not limited to injunctions directed to preserving particular assets which exist and are presently amenable to execution, and permits relief for the purpose of preventing collusive arrangements or transactions designed to evade enforcement of the judgment, in this case a threatened pre-payment for an oil cargo.

The cross-undertaking in damages (Chapter 11).

In *SmithKline Beecham Plc v Apotex Europe Limited (No 3)* The Times June 9th 2006, [2006] EWCA Civ 658 <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2006/658.html&query=SmithKline+Beecham+Plc+v+Apotex+Europe+Limited+&method=all> , an undertaking instead of an interim injunction and subsequently an interim injunction were obtained by the claimant in a patent infringement action against defendants which subsequently failed on the merits. Manufacturers in Canada who were not defendants and who had not provided the undertaking in the first order and were not respondents to the interim injunction in the second order sought to recover for losses caused to them by the undertaking and then the interim injunction. The cross undertaking in damages only protected the defendants against loss to them. At first instance an argument seeking insertion of a wider undertaking applying to “any other party served with or notified of the order” as required in support of an injunction under the then Practice Direction to part 25, PDA para 5.1(1) unless the court otherwise ordered, was rejected. That read:

Orders for injunctions

5.1 Any order for an injunction, unless the court orders otherwise, must contain:

- (1) an undertaking by the applicant to the court to pay any damages which the respondent(s) (or any other party served with or notified of the order) sustain which the court considers the applicant should pay,

The first order was not an order for “an injunction” and so para 5.1(1) did not apply. As for the second order, at the time it was made there was no example order which contained it and in practice applicants were not offering the required undertaking and Chancery judges and associates were not insisting upon it. Therefore it could not be said that the undertaking had been “accidentally” omitted from the order when this was a deliberate choice by the claimants acceded to by the court. There is a *dictum* by the judge at para 37, to the effect that “..if a limited cross-undertaking is offered and accepted by the court, there is in general no room for implying some further offer of an undertaking beyond that which is expressly offered and accepted.” However this dictum which relied on *Tucker v New Brunswick Trading*

Co of London (1890) 44 Ch D 249 overlooked that that case concerned the effect of an express undertaking and was not about implying an undertaking based on silence. It also was not a decision about an undertaking which it is mandatory to give under the rules of court absent contrary order by the court. There is the possibility that where there is an abuse of the process of the court through disregarding the mandatory requirement of the rules, the court has jurisdiction to treat the required undertaking as having been given because the court will not permit the claimant to take advantage of its own abuse of the process of the court: see *The Undertaking in Damages* [2006] LMCLQ 181 (Steven Gee QC).

On appeal the slip rule point was not argued and the non parties sought to obtain compensation in “restitution”, an argument which failed because the claimant had not received something under either order which they were bound to restore to the non-parties. The Court of Appeal held that there was no cause of action for restitution and no unjust enrichment because the claimant had not received anything from the non-parties under either order and the jurisdiction to order restitution consequential on an order being set aside or having been wrongly made was limited to restoring benefits transferred to and received by it as a result of the wrongly made order. It has been suggested that although there was no “wrong” in obtaining interim injunction the Court of Appeal might have found room for a restitutionary claim based on unjust enrichment because the injunction was predicated on there being a good claim for patent infringement and subsequently it was held on the merits that the claim failed therefore removing “the basis” for the original injunction, which had resulted in the enrichment, which it was therefore unjust for the claimant to retain¹.

The court also held that there was no room for an estoppel argument based on what had passed between the parties to vary the undertaking. Since the undertaking is given to the court and breach of the undertaking would be a contempt of court it cannot be varied by the dealings between the parties, at para 107: “An estoppel cannot create an agreement. No doubt if there were an actual binding agreement by which the parties agreed that the Canadian companies should be defendants for all purposes, not only for the future but retrospectively, the Court would give effect to it. But that would be by reason of the express agreement -- an agreement that the existing order should be varied. And even then there is no way, supposing

¹ There is an interesting commentary on the reasoning concerning restitution in “Restitutionary Perplexity: election, wrongs, property, *et cetera*” [2006] LMCLQ 295 (Chee Ho Tham).

there had been past infringement by the newly added party, that that party could be a contemnor by reason of those past acts. Even an express agreement cannot change the meaning of the order. All an express agreement can do is lead the court to varying its order with effect for the future.”

The difficulties of the former para 5.1(1), were discussed in The undertaking in damages [2006] LMCLQ 181 (Steven Gee QC) which was referred to by the Court of Appeal in *SmithKline Beecham Plc v Apotex Europe Limited (No 3)* The Times June 9th 2006, [2006] EWCA Civ 658 para 2, and the provision has been amended with effect from 2nd October 2006. Under the 42nd update of the CPR , the following changes have been made http://www.dca.gov.uk/civil/procrules_fin/contents/practice_directions/pd_part25.htm :

“PRACTICE DIRECTION SUPPLEMENTING PART 25

(a) For paragraph 5.1(1), substitute-

“an undertaking by the applicant to the court to pay any damages which the

respondent sustains which the court considers the applicant should pay.”.

(b) After paragraph 5.1, insert-

“5.1A When the court makes an order for an injunction, it should consider

whether to require an undertaking by the applicant to pay any damages

sustained by a person other than the respondent, including another party to

the proceedings or any other person who may suffer loss as a consequence

of the order.”.

The effect of these changes is that for all injunctions the order should contain an undertaking in damages protecting the respondent who is the person enjoined, and the court “should consider” whether to require an undertaking in damages protecting anyone else. Whilst this removes the problems of

language in the former para 5.1(1) it does not meet the problem that on the without notice application the court may not be able accurately to foresee who might be adversely affected by the order, nor does it address what happens if the applicant and the court overlooked this or, for one reason or another, including fault of the applicant's representatives, the position was not dealt with on the without notice application: see *The undertaking in damages* [2006] LMCLQ 181 (Steven Gee QC). The change cuts down the width of protection under the undertaking made compulsory, absent contrary order, by the new paragraph 5.1(1), because under the former wording it was mandatory to have an undertaking in damages which gave protection for a co-defendant served with the order², whereas under the new wording other than for a respondent there is no mandatory protection at all. Paragraph 5.1A gives no guidance as to how a court hearing a without notice application should approach whether to require protection for non-respondents. In freezing injunction cases an undertaking protecting everyone including non-parties is part of the example order whereas it is not part of the example order for a search order. It is suggested that the practice ought to be that unless it is clear on the without notice application that the contemplated injunction or search order will not affect others, the court should require an undertaking in damages protecting them, absent good reason to the contrary. This will then provide the court with the jurisdiction to arrive at a just result for them at a later stage of the proceedings.

The CPR Form PF 39 Ch http://www.hmcourts-service.gov.uk/courtfinder/forms/pf39ch_1004.doc which was issued in October 2004 uses a form of undertaking based on the former para 5.1(1) and needs to be amended.

Undertaking (1) in the example freezing injunction covers only "the Respondent" and not a co-defendant who is not enjoined. Undertaking (7) reads:

"The Applicant will pay the reasonable costs of anyone other than the Respondent which have been incurred as a result of this order

² It had been the ordinary practice of the court for over a hundred years before the CPR to require an undertaking in damages protecting co-defendants regardless of whether they were personally enjoined or whether they were served with the order: *Tucker v New Brunswick Trading Co of London* (1890) 44 Ch D 249.

including the costs of finding out whether that person holds any of the Respondent's assets and, if the court later finds that this order has caused such person loss, and decides that such person should be compensated for that loss, the Applicant will comply with any order the court may make."

In *Harley Street Capital Limited v Tchigirinski (No 1)* [2005] EWHC 2471 (Ch) at para 14 the judge considered the possibility that an interpretation of undertaking (7) was that the cross-undertaking in damages was limited so that "'such person" in references to "loss"³ means a person who finds out that he is holding some of the respondents' assets, or possibly a person who has incurred cost by reason of the order who, by reason of having incurred cost, is then entitled to recover also the loss under the cross-undertaking." The judge rejected this suggestion and agreed with the view expressed in *Commercial Injunctions* that the second limb of undertaking (7) applies to enable the court to order compensation for any innocent sufferer of loss. The judge said: "...the underlying principle is that a cross-undertaking in damages, as the *quid pro quo* for the court making an interim order without having determined the facts or the claimant's entitlement to it, is given not to identified respondents, but to the court to enable the court, if it thinks fit, to compensate any innocent sufferer from an interim injunction which ought not to have been granted...."

³ The judge rejected the submission that "loss" in the second limb meant only "costs": *Harley Street Capital Limited v Tchigirinski (No 1)* [2005] EWHC 2471 (Ch) at para 15.

Loss of assets caused by breach of a freezing injunction:
Commissioners of Customs & Excise v Barclays Bank
(Chapter 20)

The House of Lords has decided an interesting case about the potential liabilities of banks notified of a Mareva injunction who then part with cash caught by the order. In *Commissioners of Customs & Excise v Barclays Bank* [2006] UKHL 28 <http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKHL/2006/28.html&query=Custo+and+Barclays&method=all> , the House of Lords decided that the facts disclosed no voluntary assumption of responsibility by the defendant's bank to the claimant and that there was no duty of care owed. The case is reviewed in *The Remedies Carried by a Freezing Injunction* (2006) 122 LQR 535 (Steven Gee QC). There was no duty of care because the respondent's bank had not assumed any task for the applicant but was acting under compulsion to comply with the freezing injunction least otherwise it might be in contempt of court. The standard letter of the bank seeking reimbursement of costs under the applicant's undertaking to the court was only working out under the order financial consequences of the bank having to incur administration costs in order to comply with that order. The order itself did not impose a duty of care, and the applicants' remedies against the bank were confined to those carried by the order.

Search Orders/Privilege against self incrimination (Chapter 17)

Privilege against self incrimination has been of great importance both on search orders and the disclosure orders made ancillary to freezing relief. A first instance Chancery decision has now radically altered the potential ambit of the privilege based on an argument grounded on the Human Rights Act. It remains to be seen whether the decision will be upheld in the appellate courts.

In *O Limited v Z* [2005] EWHC 238 (Ch) <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Ch/2005/238.html&query=search+order+and+privilege+against+self+incrimination&method=all> a search order was made against an ex-employee, no claim was made to the privilege against self incrimination and the material obtained under the search order included paedophile pornography, possession of which could be a criminal offence. Once a witness has answered a question under compulsion without claiming the privilege it is lost. The judge also decided that once the material had been handed over by the defendant under the search order to the supervising solicitor, the privilege against self incrimination was lost “by an objective view of Z’s behaviour”. In that case the order had been formulated on the basis of the then practice direction and example order, and preceded on the assumption that privilege against self incrimination would not arise because of the exclusionary effect of section 72 of the Supreme Court Act 1981⁴. No-one had foreseen the possibility of child pornography.

In *C plc v P* [[2006] 3 WLR 273 <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Ch/2006/1226.html&query=search+order+and+self+incrimination&method=all>], a search order was made in an action for breach of confidence and copyright infringement which did not specifically make provision about materials which might be incriminating or about the possible application of privilege against self incrimination. The defendant did claim the privilege through his solicitors informing the claimant’s solicitors and the supervising solicitor, before allowing the search to proceed under the order. The judge held that on the facts the act of handing over the materials did not result in the loss of the privilege. It is understandable that the judge wished to avoid a result where, although the defendant had asserted the privilege before the search commenced, through the defendant’s compliance with a mandatory court order which made no

⁴ Under paragraph 8.4 of the then Practice Direction.

provision for the assertion of the privilege, the privilege was lost. However because the privilege is limited to conduct of the defendant providing information, once that information had passed from the defendant and been provided to the supervising solicitor and the independent computer expert, it is considered that no privilege against self incrimination could be asserted in respect of what happened to the materials held by them. They did not hold it to the order of the defendant nor were they subject to his control. In addition it is considered that the defendant could enjoy no enforceable private right of confidentiality over the pornography which would prevent it being disclosed to the police or a prosecutor.

The judge then went on to hold that the effect of the Human Rights Act 1998 was that privilege against self incrimination did not apply to “free standing evidence not brought into existence by [the defendant] under compulsion” of the court (e.g computer discs or pre-existing documents). Leaving aside that Act, it is well established by decisions at the highest level that the common law privilege does apply to excuse the defendant from having under compulsion to produce such materials. The judge held that he could “modify” privilege against self incrimination to produce this result. It is to be expected that this conclusion will in due course be considered at an appellate level. It is suggested that the actual result of the case can be justified because the common law privilege simply did not apply. Whilst the privilege has been judicially criticised on repeated occasions, one would have expected that “modification” of the privilege would be a matter for Parliament. It is open to doubt whether the present procedures for dealing with child pornography under the criminal law, including search warrants, provide inadequate protection to members of the public. If those procedures are not themselves unreasonable the criminal authorities will in addition be tipped off of a potential infringement through a defendant invoking the privilege in a civil case and this would provide additional protection to the public over and above that under the criminal law. On this analysis the judge’s reasoning would not seem justifiable.

The Practice Direction supplementing part 25 provides:

7.9 There is no privilege against self incrimination in:

- (1) Intellectual Property cases in respect of a 'related offence' or for the recovery of a 'related penalty' as defined in section 72 Supreme Court Act 1981;
- (2) proceedings for the recovery or administration of any

property, for the execution of any trust or for an account of any property or dealings with property in relation to offences under the [Theft Act 1968](#) (see section 31 [Theft Act 1968](#)); or

- (3) proceedings in which a court is hearing an application for an order under Part IV or Part V of the Children Act 1989 (see section 98 [Children Act 1989](#)).

However, the privilege may still be claimed in relation to material or information required to be disclosed by an order, as regards potential criminal [proceedings](#) outside those statutory provisions

This takes into account the observations in *O Limited v Z* and supersedes the former para 8.4 of the Practice Direction and the former note 8 to the example search order which provided that no reference should be made to the privilege against self incrimination in cases within section 72 of the Supreme Court Act 1981. The words “..the privilege may still be claimed in relation to material ...required to be disclosed by an order” are inconsistent with the “modification” part of the judgment in *C plc v P*.

The Dadourian Guidelines (Chapter 22)

In *Derby & Co Limited v Weldon (No 1)* [1990] Ch 49 at p. 59, Nicholls LJ referred to the undertaking provided in that case by the plaintiff, the purpose being to retain control over enforcement of the Mareva injunction abroad. One concern is that the plaintiff might use the order to obtain an order abroad which gave him security for the claim which was not a purpose of Mareva relief, another is that the defendant should not be burdened with having to deal with foreign enforcement proceedings which might be oppressive or unfair because of the need to deal with multiple sets of proceedings instead of a single set of proceedings in England.

Undertaking (10) reads:

[(10) The Applicant will not without the permission of the court seek to enforce this order in any country outside England and Wales [or seek an order of a similar nature including orders conferring a charge or other security against the Respondent or the Respondent's assets].]

The words in brackets in undertaking (10) in the example freezing order go wider than controlling direct enforcement of the Mareva relief, because if adopted they preclude the claimant from seeking abroad an order of a similar nature including an order conferring a charge or other security. In practice before *Dadourian Group International Inc v Simms* [2006] 1 WLR 2499 <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2006/399.html&query=search+order+evans-lombe&method=all> the undertaking was adopted in worldwide freezing injunctions and leave to bring foreign proceedings was readily given usually on a without notice application, so as to avoid notifying the defendant of what was about to be done abroad in case he took steps to defeat it, at which the applicant set out what he wished to do, why and how the anticipated relief abroad might be expected to help him in the litigation. In *Dadourian Group International Inc v Simms* there were proceedings which included allegations of fraud in which worldwide freezing injunctions were granted, which incorporated undertaking (10) including the words in brackets. Permission had been granted to bring proceedings in Switzerland to enforce the injunction or to obtain an order of a similar nature including seeking a charge or other security. On appeal it was argued that permission should be set aside when the non-party alleged assets abroad could be brought before the English court. It

was also argued that an applicant for permission must show at least a good arguable case that there were relevant assets in Switzerland. The Court of Appeal dismissed the appeal and the judgment at para 25 lays down the “Dadourian guidelines” for granting permission for the claimant to bring foreign proceedings within the undertaking.

These guidelines were laid down in a case where there was no proprietary claim, the freezing injunction was pre-judgment and based on the Mareva jurisdiction, and the actual steps taken abroad, although not the permission under appeal, were limited to enforcement of the worldwide freezing injunctions.

“Guideline 1: The principle applying to the grant of permission to enforce a WFO abroad is that the grant of that permission should be just and convenient for the purpose of ensuring the effectiveness of the WFO, and in addition that it is not oppressive to the parties to the English proceedings or to third parties who may be joined to the foreign proceedings.

Guideline 2: All the relevant circumstances and options need to be considered. In particular consideration should be given to granting relief on terms, for example terms as to the extension to third parties of the undertaking to compensate for costs incurred as a result of the WFO and as to the type of proceedings that may be commenced abroad. Consideration should also be given to the proportionality of the steps proposed to be taken abroad, and in addition to the form of any order.

Guideline 3: The interests of the applicant should be balanced against the interests of the other parties to the proceedings and any new party likely to be joined to the foreign proceedings.

Guideline 4: Permission should not normally be given in terms that would enable the applicant to obtain relief in the foreign proceedings which is superior to the relief given by the WFO.

Guideline 5: The evidence in support of the application for permission should contain all the information (so far as it can reasonably be obtained in the time available) necessary to make the judge to reach an informed decision, including evidence as to the applicable law and practice in the foreign court, evidence as to the nature of the proposed proceedings to be commenced and evidence as to the assets believed to be located in the jurisdiction of the foreign court and the names of the parties by whom such assets are held.

Guideline 6: The standard of proof as to the existence of assets that are both within the WFO and within the jurisdiction of the foreign

court is a real prospect, that is the applicant must show that there is a real prospect that such assets are located within the jurisdiction of the foreign court in question.

Guideline 7: There must be evidence of a risk of dissipation of the assets in question.

Guideline 8: Normally the application should be made on notice to the respondent, but in cases of urgency, where it is just to do so, the permission may be given without notice to the party against whom relief will be sought in the foreign proceedings but that party should have the earliest practicable opportunity of having the matter reconsidered by the court at a hearing of which he is given notice.”

This was followed by a commentary by the court on each guideline. In practice the granting of permission involves taking into account the particular facts, what the effects may be of granting permission including effects on non-parties, and considering what order would be just bearing in mind that the court can require further undertakings from the applicant as the price of giving permission. For example an undertaking might be required that the applicant will compensate a non-party foreign bank for its costs and expenses caused to it by the making of the contemplated foreign court order, alternatively the court might leave this aspect to be resolved under the rules applied by the foreign court. The guidelines are not a straight jacket, and need to be applied with common sense: *Freeze Framework* Legal Week Vol. 8 No 25 (Robert Hunter).