All England Law Reports, All ER 1989 Volume 1, Republic of Haiti and others v Duvalier and others

[1989] 1 All ER 456

Republic of Haiti and others v Duvalier and others

CIVIL PROCEDURE

COURT OF APPEAL, CIVIL DIVISION
FOX, STOCKER AND STAUGHTON LJJ
4, 5, 6, 7, 22 JULY 1988

Practice - Pre-trial or post-judgment relief - Mareva injunction - Worldwide Mareva injunction - Pre-trial injunction - Extra-territorial effect of injunction - Protection of third parties - Foreign defendant having foreign assets - Proceedings brought by Republic of Haiti in French court to recover money embezzled by former president - Defendant likely to attempt to frustrate execution of judgment against him - Whether court having jurisdiction to grant Mareva injunction over defendant's foreign assets before judgment - Whether worldwide injunction should be qualified by express proviso protecting third parties - Civil Jurisdiction and Judgments Act 1982, s 25, Sch 1, art 24 - RSC Ord 11, r 1(2).

The Republic of Haiti commenced proceedings in France in July 1986 to recover from a former president of the republic and from his family and associates some $120m alleged to have been embezzled while the president was in power in Haiti. In June 1988 the republic issued a writ in England against the defendants, namely the former president, members of his family, his associates and a bank, and on the same day obtained ex parte a Mareva injunction (i) restraining the defendants from dealing with assets, wherever they might be, which represented the proceeds which were the subject of the French action, (ii) freezing their assets within the jurisdiction except to the extent that they exceeded $120m, (iii) ordering the defendants' solicitors to disclose the nature, location and value of the defendants' assets known to them and (iv) ordering the solicitors not to disclose the making of the order. The defendants, once they were served with the order, applied to have it set aside but the judge refused to do so. The defendants appealed to the Court of Appeal, where the questions arose, inter alia, (i) whether a writ claiming interim relief in aid of foreign proceedings pursuant to s 25[a] of the Civil Jurisdiction and Judgments Act 1982 could be served out of the jurisdiction pursuant to RSC Ord 11, r 1(2)[b] without leave, since under r 1(2) service of a writ out of the jurisdiction without leave was permissible only if the court had jurisdiction to hear and determine the 'claim' made by the writ and there were no proceedings between the parties concerning the same cause of action pending in the United Kingdom or in a state (including France) which was a party to the Convention on Jurisdiction and the Enforcement of Civil and Commercial Judgments 1968 (which had the force of law in the United Kingdom by virtue of s 2(1) of the 1982 Act), (ii) whether the court had jurisdiction to restrain a non-resident defendant from dealing with assets situated outside the jurisdiction (iii) if so, whether the court should exercise its discretion to grant such an injunction, and (iv) the nature of the protection to be accorded to third parties. The defendants contended, regarding the issue of the writ, that an application for interim relief was not a 'claim' and that the English proceedings concerned the same cause of action as the French proceedings and, regarding the issue of the Mareva injunction, that the court ought not to grant an injunction when it had no jurisdiction on the merits, the defendants were resident and the assets were situated outside the jurisdiction and the proper court to make the order was the French court.

[a] Section 25, so far as material, is set out at p 462 *b*, post

[b] Rule 1(2), so far as material, is set out at p 462 *e*, post

øø

Held - The appeal would be dismissed for the following reasons-

(1) RSC Ord 11, r 1(2) was to be construed as giving effect to the United Kingdom's obligation under art 24[c] of the 1968 convention (set out in Sch 1 to the 1982 Act) to make **456** available in aid of the courts of other contracting states such provisional and protective measures as English domestic law would afford if an English court were seised of the substantive action. Accordingly, service of the republic's writ out of the jurisdiction without leave was permissible under Ord 11, r 1(2), since either a claim for interim relief was itself a cause of action or there could be proceedings and a claim without a cause of action. In either case the cause of action in the English proceedings was not the same as the cause of action in the French proceedings (see p 462 *f* to *j* p 463 *h*, p 464 *c* and p 469 *b*, post).

c Article 24 is set out at p 463 *b*, post

øø

(2) The court had jurisdiction to grant a Mareva injunction pending trial over assets worldwide even where the relief was sought in aid of a foreign monetary claim and not a proprietary claim. However, such an injunction ought to be subject to a proviso protecting third parties except to the extent that the order was enforced by the courts of states in which the defendant's assets were situated, but such a proviso should only apply to assets and acts done outside England and Wales and not to individuals resident in England and Wales. Having regard to the plain and admitted intention of the defendants to move their assets out of the reach of courts of law and the vast amount of money involved, an injunction ought to be granted but subject to a suitable proviso to protect third parties (see p 466 *b*, p 467 *a* to *c* and p 468 *d e j* to p 469 *b*, post); *Babanaft International Co SA v Bassatne* [1989] 1 All ER 433 considered.

Notes

For Mareva injunctions, see 37 *Halsbury's Laws* (4th edn) para 362, and for cases on the subject, see 37(2) *Digest* (Reissue) 474-476, *2947-2962*.

For the Civil Jurisdiction and Judgments Act 1982, ss 2, 25, Sch 1, art 24, see 11 *Halsbury's Statutes* (4th edn) 906, 911, 939.

Cases referred to in judgments

Ashtiani v Kashi [1986] 2 All ER 970, [1987] QB 888, [1986] 3 WLR 647, CA.

Babanaft International Co SA v Bassatne [1989] 1 All ER 433, CA.

Bankers Trust Co v Shapira [1980] 3 All ER 353, [1980] 1 WLR 1274, CA.

Denilauler v Snc Couchet Fr□res Case 125/79 [1980] ECR 1553.

Garland v British Rail Engineering Ltd [1982] 2 All ER 402, [1983] 2 AC 751, [1982] 2 WLR 918, HL.

Joh Verhulst & Zn BV v PVBA Thovadec Plastics (1978) Eur Ct Dig (D series) 1-21-B2, 's-Hertogenbosch District Ct.

Liddell's Settlement Trusts, Re [1936] 1 All ER 239, [1936] Ch 365, CA.

MacKinnon v Donaldson Lufkin & Jenrette Securities Corp [1986] 1 All ER 653, [1986] Ch 482, [1986] 2 WLR 453.

Siskina (cargo owners) v Distos Cia Naviera SA, The Siskina [1977] 3 All ER 803, [1979] AC 210, [1977] 3 WLR 818, HL.

Cases also cited

Bankers Trust International Ltd v Todd Shipyards Corp, The Halcyon Isle [1980] 3 All ER 197, [1981] AC 221, PC.

Company, Re a [1985] BCLC 333, CA.

Cook Industries Inc v Galliher [1978] 3 All ER 945, [1979] Ch 439.

Fothergill v Monarch Airlines Ltd [1980] 2 All ER 696, [1981] AC 251, HL.

Hollandia, The [1982] 3 All ER 1141, [1983] 1 AC 565, HL.

Interlocutory appeal

The defendants, Jean-Claude Duvalier, his wife, Michele Bennett Duvalier, and Simone Ovide, the widow of Fran□ois Duvalier, who were the defendants together with others in proceedings brought in France and England by the plaintiffs, the Republic of Haiti and five of its agencies, La Minoterie d'Haiti, L'Office de l'Assurance des Vehicles contre Tiers, **457** La Loterie de L'Etat Haitien, La Commission de Controle des Jeux de Hasard, La Banque Nationale de CrŽdit, appealed against the order of Leggatt J made on 22 June 1988 whereby he dismissed the defendants' application to set aside the English proceedings under RSC Ord 12, r 8 and discharge the order made by Knox J on 3 June 1988 restraining the defendants from dealing with the assets which were the subject of the French action and from removing from the jurisdiction or dealing with their assets within the jurisdiction except to the extent that they exceeded $120m in value and ordered the defendants, acting by their solicitors, Messrs Turner & Matlin, to disclose to the plaintiffs' solicitors the nature, location and value of the defendants' assets. The facts are set out in the judgment of Staughton LJ.

Steven Gee for the defendants.
Nicholas Strauss QC and *Michael Jones* for the plaintiffs.

Cur adv vult

22 July 1988. The following judgments were delivered.

STAUGHTON LJ (giving the first judgment at the invitation of Fox LJ). Jean-Claude Duvalier, the first defendant in these proceedings, was the President of the Republic of Haiti from 1971 until 7 February 1986. The second defendant is his wife, Michele Bennett Duvalier, and the sixth defendant his mother. She is the widow of Fran□ois Duvalier, who was the president from 1957 until his death in 1971. Those three members of the family are the appellants in this court. All are now resident in France.

The Republic of Haiti started proceedings in the Tribunal de Grande Instance at Grasse in July 1986 five of its agencies were later added as co-plaintiffs. Those proceedings were against various members of the Duvalier family, including Jean-Claude Duvalier, his wife and mother, and their associates. It is said that they were responsible for embezzling sums totalling $120m from the Republic during the presidency of Jean-Claude Duvalier, that is between 1971 and 1986. Indeed it is suggested that this is only the tip of the iceberg and that very much larger sums were involved.

The defendants in the French action altogether deny liability. They observe that it has been a tradition in Haiti for over 180 years for a new government to take legal proceedings against those who were in charge under the previous regime. (One is reminded of the Roman historian who noticed that it was the practice of the later emperors to bring to justice the murderers of the previous emperor but one.) But this appeal is scarcely concerned with the merits of the substantive claims made in France. It is acknowledged that the plaintiffs' evidence demonstrates a prima facie case, or even a good arguable case. Counsel for the plaintiffs goes further: he submits that there is a very strong case, to which the defendants have offered no substantive or detailed answer, either in the French proceedings or in the courts of this country.

Unless it is essential to do so, I do not feel that I should make any comment at this stage on the strength of the plaintiff's case. It is enough that on the affidavit evidence there is a case to answer, or a good arguable case, such as would justify the use of interim protective measures in an English domestic case, and would also justify service out of the jurisdiction if that is permitted by the Rules of the Supreme Court.

What is more striking, and less usual, is the evidence that the members of the Duvalier family have been attempting to conceal their assets, or place them beyond the reach of courts of law. It is unnecessary to set out this evidence in detail, since the conclusion from it is admitted. In the affidavit of Professor Vaisse, a French lawyer acting for the Duvalier family, there is this passage:

'9. The plaintiffs have drawn attention to the fact that assets in the control of the defendants have, when threatened with legal attachment proceedings, been removed **458** from the jurisdictions concerned. It is my understanding that this has occurred. This does not reflect any doubts that the defendants have about the merits of their position. They are simply aware that there is a worldwide campaign being conducted against them by the Haitian Government supported by the United States Government to persecute them by seizing their assets wherever they can be found. This campaign is assisted by the International Press which provokes prejudice against them wherever they go and they have merely sought to frustrate this campaign which I submit is a normal reaction in the circumstances ... '

If those be the true facts, one would suppose that the Duvalier family would welcome an early trial of the case against them by a just court in a country which has, by international law, jurisdiction to try it.

It is, however, necessary to enlarge on that admission by referring to some features of the evidence which are striking. First, the plaintiffs' evidence exhibits extracts from a book *Les Banques Suisses et l'Argent* written by a French lawyer, Ma”tre J-P Carteron. This is said to treat the concealment of funds within the Swiss banking system. It points to the advantage of using a fiduciary as the legal owner of the assets to be concealed, rather than the beneficial owner himself, and the added advantage of choosing a lawyer as the fiduciary: 'Le secret de sa profession [translated 'his professional secrecy'] protegera totalement l'identitŽ du client.'

There is evidence that Ma”tre Carteron, between 1984 and 6 February 1986 (which was when the Duvalier family left Haiti), received approximately $500,000 in Switzerland from Haitian government funds. There is also evidence of 13 telexes or telephone calls from the Ministry of Finance or the National Palace in Haiti to Ma”tre Carteron's number in Geneva, the last telephone call being on 6 February 1986.

Furthermore there is evidence that the Duvalier family made use of the idea, whether or not derived from Ma”tre Carteron's book, of employing a professional lawyer as intermediary. Some documents have been disclosed pursuant to an order of Knox J (to which I shall refer later) by Messrs Turner & Co, an English firm of solicitors in which Paul Turner and John Stephen Matlin are partners. Among other things, Turner & Co were asked to identify bank accounts-

'from which or to which any moneys which belong to any of the 1st to 10th defendants (whether directly or indirectly) or which are reasonably apparent or believed by Turner & Co. to be moneys in which one or more of the 1st to 10th defendants is or are beneficially interested or otherwise held by a nominee or trustee, have been transferred.'

The answer listed 17 accounts, at eleven different banks, in seven different countries. Eleven of the accounts were in the name of Turner & Co or the partners of the firm.

A second striking feature emerges from documents which the plaintiffs have obtained by proceedings in Jersey. These tend to show that Mr Matlin arranged for the deposit with the Hongkong and Shanghai Banking Corp (CI) Ltd, via their correspondent in Toronto and for the credit of 'Messrs. Turner & Co No 2 Clients' Account' of Canadian treasury bills worth in excess of Can $40m. Turner & Co, in answer to the order for disclosure of the first to tenth defendants' assets, wrote:

'Canadian Government Treasury Bills have been held by us on occasion. They have all been encashed.'

I should also refer to the evidence which tends to show, as Professor Vaisse admits, that assets threatened with attachment have been removed from the jurisdictions concerned. I can summarise that evidence by saying that it leads to one of three possible conclusions: (1) the Duvalier family or their advisers have somehow obtained advance notice of the plaintiffs' efforts at attachment, or (2) assets are moved so regularly and so frequently that it is no coincidence if some have been moved just before attachment took effect, or (3) it is coincidence.

459

It should be emphasised as to all this evidence that no wrongdoing on the part of Turner & Co or its partners is alleged on behalf of the plaintiffs. Furthermore Mr Matlin has said in an affidavit that he has never heard of Ma”tre Carteron, or read his book; nor was he even aware of it until it was referred to in the plaintiffs' evidence. He says that he is not aware of any elaborate and co-ordinated scheme to conceal funds.

The English proceedings

On 3 June 1988 the Republic of Haiti and the five other plaintiffs in the French action made an ex parte

application to Knox J, sitting as a vacation judge of the Commercial Court. In the writ issued that day they were named as plaintiffs, and the first to tenth defendants were members of the Duvalier family or their associates. None of those defendants had an address within the jurisdiction. The eleventh defendants were Barclays Bank plc of Lombard Street, London EC3.

The order made by Knox J can be summarised as follows, so far as is material: (1) the plaintiffs undertook to notify the defendants of the terms of the order by 4 pm on 6 June, and to notify Mr Matlin forthwith, (2) the first to tenth defendants were restrained from dealing with assets which represented the proceeds of the payments which are complained of in the French action, (3) the first to tenth defendants were restrained from removing from the jurisdiction or dealing with their assets within the jurisdiction save in so far as they exceed $120m in value, (4) the first to tenth defendants were ordered, acting by Messrs Turner & Matlin, to disclose to the plaintiffs' solicitors by 10 am on 6 June information known to Mr Turner or Mr Matlin as to the nature, location and value of those defendants' assets, (5) the defendants were ordered, in particular by Messrs Turner & Matlin, not to disclose the making of the order for the time being and (6) there was leave to serve out of the jurisdiction and substituted service.

Notice that not only was the order made in the absence of the defendants and without their knowledge; it was also not to be communicated to them until after their solicitors had complied with that part of it relating to disclosure of information. In those respects it was in line with current English practice. While there may not be much point in making an order that a defendant himself disclose documents or provide information ex parte, since he will have to know of the order before he complies with it, the situation is different where information or documents are sought from some third party (see *Bankers Trust Co v Shapira* [1980] 3 All ER 353, [1980] 1 WLR 1274) or even the solicitors as in this case, or when there is to be a compulsory search by an Anton Piller order. That is why particular caution is needed in making such orders.

On 6 June 1988 the solicitors applied to Knox J to vary or discharge his order. He declined to do so. The time limits for compliance with the order and notification of it to the defendants were extended. On 7 June the solicitors appealed to this court. Their appeal was heard in camera, and did not feature in the cause list. It would seem from the judgment of Lord Donaldson MR that the principal points argued were: (i) whether the relief sought was within s 25 of the Civil Jurisdiction and Judgments Act 1982, (ii) whether an English court should make an order for the disclosure of information about assets abroad, except in connection with a tracing claim, (iii) whether the plaintiffs' affidavits were sufficient in point of form and (iv) whether the solicitors could rely on legal professional privilege.

The Court of Appeal rejected the solicitors' arguments on all four grounds. I need say nothing about their reasons on grounds (i) and (iii), since those arguments were not repeated before us; nor need I consider ground (iv), since a further claim for legal professional privilege is, by agreement, to be remitted to a Commercial judge. (Counsel for the plaintiffs accepts that the affidavit on its face appears to assert a valid claim for privilege in respect of a limited class of information.) As to ground (ii), Lord Donaldson MR said in terms that he was not happy to accept the suggested limitation on the disclosure of information about assets abroad, viz that it should only be ordered in **460** connection with a tracing claim. But he found on the evidence before the court that the French action was in the nature of a tracing claim.

The appeal was allowed only to the extent that the time limits were again varied. In all other respects it was dismissed.

On 7 and 8 June 1988 Phillips J made three orders permitting the plaintiffs to use certain information provided by Turner & Co for the purpose of legal proceedings in some other jurisdictions. This was necessary because the plaintiffs had given an undertaking to Knox J, although not recorded in his order, that they would not use the information disclosed pursuant to his order without the leave of the court. Counsel instructed by Turner & Co on behalf of the defendants appeared before Phillips J; it does not seem that the defendants themselves were aware by then that the order of Knox J had been made. That again would be in line with English practice and common sense, since the intention was to obtain Mareva orders abroad, or information as to the new location of assets by order of foreign courts.

Thereafter the defendants were informed of the English proceedings. They were served with a summons on behalf of the plaintiffs seeking disclosure of further information and documents relating to the assets of the first to tenth defendants. That was met by a summons on behalf of the first and second defendants to set aside the proceedings under RSC Ord 12, r 8, in effect for want of jurisdiction. Those applications came before Leggatt J, inter partes but in chambers. On 22 June 1988 he made the order from which this appeal is brought.

By that order Leggatt J, so far as is material for present purposes, (1) dismissed the application to set aside the English proceedings under Ord 12, r 8, (2) upheld the order of Knox J which restrained the first to tenth defendants from dealing with assets, wherever they might be, which represented the proceeds of the

payments complained of in the French action, (3) upheld the order of Knox J which restrained the first to tenth defendants from removing from the jurisdiction or dealing with their assets within the jurisdiction, up to a limit of $120m and (4) ordered that the first to tenth defendants acting by Messrs Turner & Matlin do within 24 hours permit inspection of documents, and disclose information, relating to their assets wherever they may be.

The issues

These are as follows. (a) Can the writ be served without leave on the first to tenth defendants out of the jurisdiction pursuant to RSC Ord 11, r 1(2)? (b) If not, can leave be granted for service out of the jurisdiction pursuant to RSC Ord 11, r 1(1)(*b*)? (c) Should there be a restraint on dealing with assets which are out of the jurisdiction? (d) Discretion. (e) The *Babanaft* proviso (see *Babanaft International Co SA v Bassatne* [1989] 1 All ER 433). (f) Privilege. I shall consider those issues in turn.

(A) Service without leave

The crucial feature of this case is that the plaintiffs do not seek any substantive relief in England. They seek only information as to where the assets of the Duvalier family are, and a temporary restraint on dealing with those assets. It is said that these remedies are sought in aid of the French action; and so in a sense they are. But whether further proceedings will be confined to France, and to the tribunal at Grasse, is at the very least doubtful. To the extent that the information already disclosed, and to be disclosed under the order of Leggatt J, reveals assets in other jurisdictions, there may well be other proceedings of an interim nature, and possibly also seeking substantive relief.

Until the Civil Jurisdiction and Judgments Act 1982 came into force, an English court would not have entertained a claim of this limited nature. The plaintiffs would not have had a cause of action: see *Siskina (cargo owners) v Distos Cia Naviera SA, The Siskina* [1977] 3 All ER 803 at 824, [1979] AC 210 at 256, where Lord Diplock said:

> 'A right to obtain an interlocutory injunction is not a cause of action. It cannot **461** stand on its own ... the High Court has no power to grant an interlocutory injunction except in protection or assertion of some legal or equitable right which it has jurisdiction to enforce by final judgment ... '

That conclusion is now superseded by s 25(1) of the Civil Jurisdiction and Judgments Act 1982:

> 'The High Court in England and Wales or Northern Ireland shall have power to grant interim relief where-(*a*) proceedings have been or are to be commenced in a Contracting State other than the United Kingdom ... '

Counsel for the defendants does not dispute that there can now be English proceedings in which only interim relief is sought, if the requirements of that subsection are met. But he contends that there is no means of effecting service of such proceedings out of the jurisdiction, should that be necessary. If right, this is a curious result, since s 25(2) expressly confers a discretion to refuse that relief if-

> 'the fact that the court 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.'

Power to effect service out of the jurisdiction must be found in the Rules of the Supreme Court: see Ord 6, r 7. The primary contention of counsel for the plaintiffs, which the judge accepted, is that it is to be found in Ord 11, r 1(2):

> 'Service of a writ out of the jurisdiction is permissible without the leave of the Court provided that each claim made by the writ is either:-(*a*) a claim which by virtue of the Civil Jurisdiction and Judgments Act 1982 the Court has power to hear and determine, made in proceedings to which the following conditions apply-(i) no proceedings between the parties concerning the same cause of action are pending in the courts of any other part of the United Kingdom or of any other Convention territory, and (ii) either-the defendant is domiciled in any part of the United Kingdom or in any other Convention territory ... '

Counsel for the defendants submits first that a 'claim' must mean a cause of action, and that an application for interim relief only is therefore not a claim which the court can 'hear and determine', by reason of *The*

Siskina. I do not accept that argument. Since the enactment of s 25, *either* a claim for interim relief is itself a cause of action *or* there can be proceedings and a claim without a cause of action. Which solution one chooses is merely a matter of semantics; there is no need to make such a sterile choice, and I do not do so.

Second, counsel for the defendants submits that the condition in Ord 11, r 1(2)(*a*)(i) is not satisfied because the English proceedings concern the same cause of action as the French proceedings. Curiously, the Supreme Court Rule Committee used the word 'concerning' in that condition, in contrast to the word 'involving' in RSC Ord 6, r 7(1)(*b*) and in art 21 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels, 27 September 1968; EC 46(1978); Cmnd 7395). But I cannot see anything in the distinction.

The answer to counsel's second argument, so far as English domestic law is concerned, emerges from what I have already said in connection with his first point. Either a claim for interim relief does not involve or concern any cause of action, or it is based on a new and distinct cause of action created by s 25. Whichever be right, the condition in Ord 11, r 1(2)(*a*)(i) is satisfied because any cause of action with which the English proceedings are concerned or involved is not the same as that with which the French action is concerned or involved.

Taking a wider view, I must refer to arts 21 and 24 of the convention. Article 21 is in Title II, section 8, headed 'Lis Pendens-Related Actions'. It reads:

462

> 'Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own motion decline jurisdiction in favour of that court ... '

Article 24 is in section 9, headed 'Provisional, including protective, measures':

> 'Application may be made to the courts of a Contracting State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter.'

It is plain as can be that RSC Ord 11, r 1(2)(*a*)(i) was intended to reflect art 21 of the convention, so that two contracting states should not simultaneously try a dispute between the same parties involving the same cause of action. It is equally plain that art 24 deals with provisional and protective measures as a different topic, not impinging on art 21: see the decision of the Dutch court in *Joh Verhulst & Zn BV v PVBA Thovadec Plastics* (1978) Eur Ct Dig (D series) 1-21-B2. Yet if the argument of counsel for the defendants is correct, RSC Ord 11, r 1(2)(*a*)(i) would prevent the United Kingdom giving full effect to art 24 in England and Wales if a substantive action has already been commenced in another contracting state between the same parties.

Lord Diplock said in *The Siskina* [1977] 3 All ER 803 at 827, [1979] AC 210 at 260:

> '... as art 24 of the convention indicates, this is a field of law in which it has not been considered necessary ... to embark on a policy of harmonisation.'

This is because art 24 expressly refers to 'measures ... available under the law of that State', and does not attempt to lay down what those measures must be. However, it seems to me that the convention *requires* each contracting state to make available, in aid of the courts of another contracting state, such provisional and protective measures as its own domestic law would afford if its courts were trying the substantive action. That would be harmonisation of jurisdiction, although not of remedies.

If that be the right construction of the convention, I refer to the words of Lord Diplock in *Garland v British Rail Engineering Ltd* [1982] 2 All ER 402 at 415, [1983] 2 AC 751 at 771:

> '... it is a principle of construction of United Kingdom statutes, now too well established to call for citation of authority, that the words of a statute passed after the treaty has been signed and dealing with the subject matter of the international obligation of the United Kingdom, are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the obligation and not to be inconsistent with it.'

Applying the same principle to the Rules of the Supreme Court, I would construe Ord 11, r 1(2) as giving effect to the obligation of the United Kingdom in England and Wales to make available in aid of the courts of other contracting states such provisional and protective measures as our domestic law would afford if our courts were seised of the substantive action.

Accordingly, I agree with the judge that this was a case where service out of the jurisdiction without leave

was authorised by Ord 11, r 1(2). It is agreed that the action, begun by writ, ought properly to have been begun by originating summons: see Ord 5, r 3. However, it is also agreed that nothing turns on that point in the present case. Order 11, r 9(1) provides that Ord 11, r 1 shall apply to the service out of the jurisdiction of an originating summons; consequently there may be service without leave where Ord 11, r 1(2) would allow a writ to be served without leave. Rule 9(5) provides that r 4(1)(*b*), which requires an affidavit that in the deponent's belief there is a good cause of action, 'shall, so far as applicable, apply in relation to an application for the grant of leave under **463** this Rule ... ' If, which I have refrained from deciding, that would otherwise be an obstacle to a claim for interim relief only, it does not apply where no grant of leave is necessary.

(B) Service out of the jurisdiction with leave

This issue raises an alternative argument on behalf of the plaintiffs. It is said that leave to serve out of the jurisdiction was properly given under Ord 11, r 1(1)(*b*) ('an injunction is sought ordering the defendant to do or refrain from doing anything within the jurisdiction'). If the plaintiffs had succeeded only on this ground, there would have been some necessary limitation on the orders sought; the injunctions which relate to dealing with assets should at the least have been confined to acts done within the jurisdiction. That might have been a severe impediment to the efficacy of the relief granted. Before Leggatt J counsel for the plaintiffs conceded that the case was within r 1(1)(*b*). That concession was withdrawn in this court.

In the event we do not need to decide the point. Rule 1(1) contains a provision that the writ 'is not a writ to which paragraph (2) of this rule applies'. But I have held that para (2) does apply, and that the writ can be served without leave.

Leggatt J, before whom the point was conceded, would if necessary have held that there was power to grant leave under r 1(1)(*b*). That involves the conclusion that s 25 of the 1982 Act has had a greater impact on *The Siskina* than I have so far accepted. In that case Lord Diplock rejected the submission that r 1(1)(*i*), the predecessor of r 1(1)(*b*), comprehended a claim for an injunction that was interlocutory only (see [1977] 3 All ER 803 at 824, [1979] AC 210 at 256). For my part I would not express any view on the question whether s 25 has superseded that aspect of the decision of the House of Lords. It does not arise in this case.

(C) Restraint on dealing with assets which are out of the jurisdiction

In the light of recent authority, counsel for the defendants conceded that the court has power to restrain a defendant who is not resident here from dealing with his assets which are out of the jurisdiction. He desires only to keep the point open in case this dispute goes further. Nevertheless, I consider that, as the issue goes to the jurisdiction of this court and is of considerable general importance, we ought to examine it. In doing so it is necessary to travel over some ground which is also relevant to discretion.

It may be that the powers of the court are wider, and certainly discretion is more readily exercised, if a plaintiff's claim is what is called a tracing claim. For my part, I think that the true distinction lies between a proprietary claim on the one hand, and a claim which seeks only a money judgment on the other. A proprietary claim is one by which the plaintiff seeks the return of chattels or land which are his property, or claims that a specified debt is owed by a third party to him and not to the defendant.

Thus far there is no difficulty. A plaintiff who seeks to enforce a claim of that kind will more readily be afforded interim remedies in order to preserve the asset which he is seeking to recover, than one who merely seeks a judgment for debt or damages. But if the asset has been converted into some other form of property, the question of tracing arises. If the defendant stole the plaintiff's peas, sold them and bought beans with the proceeds, the plaintiff claims that the beans are his property. Or if the defendant misappropriated the plaintiff's credit balance with bank X, and established a credit with bank Y from the proceeds, the plaintiff claims that the debt due from bank Y is his property. In that last case, if the proceedings are brought by the plaintiff against the defendant only, the relief claimed can be no more than a declaration, and an injunction against interference with the plaintiff's property. Ultimately the right must be enforced against the debtor, in my example bank Y.

With that introduction I turn to consider whether the claim which the plaintiffs seek to enforce in France is a proprietary claim. New evidence has emerged since this dispute was last before the Court of Appeal, when the proceedings were ex parte so far as the **464** defendants were concerned. In form the claim in the French action is for damages in tort. But process is available there to attach specific assets held by the defendants, which would result in the plaintiffs having priority over other creditors. The plaintiffs have in

fact made use of that process in respect of two assets, a flat in Paris and a chateau in France. They have not yet sought any proprietary remedy in respect of other assets of the Duvalier family in the French proceedings, because they do not know what or where those assets are. The very object of the English proceedings is to find out. When they are discovered, I do not doubt that the plaintiffs will seek to assert any proprietary remedy that may be available, whether in France or some other jurisdiction.

In that state of affairs I would not go so far as to say that the action in France, in aid of which these proceedings are said to be brought, is itself a proprietary or tracing claim. It does not presently assert ownership of any of the assets expected to be revealed by orders in the English proceedings. But I am confident that ownership will be asserted when and where the assets are found. This is then something of a hybrid situation; and one should perhaps consider it on the basis that interim relief is sought in aid of a monetary claim only, without any claim to ownership of the Duvaliers' assets.

The law on this topic has developed in recent years; and in particular a distinction has emerged between pre-judgment and post-judgment restraint. Our courts are more willing to restrain a defendant from dealing with his assets after, than before, judgment has been given against him. (In passing, I would say that an injunction granted after judgment should normally, in my view, be of limited duration; the plaintiff should be encouraged to proceed with proper methods of execution; perpetual injunctions restraining a defendant from dealing with his assets until the crack of doom are undesirable.) This, of course, is a pre-judgment case.

The decision of this court in *Ashtiani v Kashi* [1986] 2 All ER 970, [1987] QB 888 was concerned with a Mareva injunction, pre-judgment, over assets within the jurisdiction, coupled with an order for disclosure of assets worldwide. The injunction was discharged. Both Dillon and Neill LJJ considered that a Mareva injunction should be limited to assets within the jurisdiction, if there is no proprietary or tracing claim. But I think that they regarded this limitation as arising from settled practice, rather than from any restriction on the powers of the court. There are indications in both judgments to that effect. Nicholls LJ agreed with both judgments.

The problem was extensively reviewed by this court in *Babanaft International Co SA v Bassatne* [1989] 1 All ER 433. That was a post-judgment case, and what was said as to injunctions before judgment was obiter. The court upheld a worldwide injunction on dealing with assets, subject to a proviso which I shall consider later.

There were some features in the *Babanaft* case that are similar to those in the present case. The judgment was against two individuals, whom Kerr LJ described as 'unusually peripatetic in their lifestyle and elusive in the way they do business and hold assets', for $15m (at 436). He said (at 436):

> 'All "their" assets appear to be held in the names of a large network of companies incorporated in many countries in which they or members of their families hold bearer shares.'

The judge below had found that they would be likely to take any step open to them to frustrate the execution of the judgment.

I do not attempt to summarise the reasoning of Kerr LJ. He concluded (at 440):

> 'I therefore proceed on the basis that in appropriate cases, though these may well be rare, there is nothing to preclude our courts from granting Mareva-type injunctions against defendants which extend to their assets outside the jurisdiction.'

Neill LJ said (at 449):

> 'I was a party to the decision in *Ashtiani v Kashi* and I remain of the opinion that it **465** accurately reflected the way in which the jurisdiction to grant Mareva injunctions had been exercised and developed in England ... I am satisfied, however, that the court has *jurisdiction* to grant a Mareva injunction over foreign assets, and that in this developing branch of the law the decision in *Ashtiani v Kashi* may require further consideration in a future case.' (Neill LJ's emphasis.)

Nicholls LJ declined to express any opinion on the pre-judgment position.

For my part, if the point had not been conceded before us, I would have agreed with the view expressed by Kerr LJ, for the reasons given in his judgment, that there is jurisdiction to grant a Mareva injunction, pending trial, over assets worldwide; and that cases where it will be appropriate to grant such an injunction will be rare, if not very rare indeed.

(D) Discretion

This arises in two ways. First, the judge had to consider whether it was just and convenient to grant an

injunction, in terms of s 37(1) of the Supreme Court Act 1981. Second, he ought to have refused interim relief under s 25(2) of the Civil Jurisdiction and Judgments Act 1982 if the fact that the court had no jurisdiction apart from that section made it 'inexpedient' to grant relief.

Counsel for the defendants advanced different arguments on discretion in relation to the order restraining dealings with assets abroad on the one hand, and the order for disclosure of information on the other. As to the first of those orders, he observes that the English courts have no jurisdiction on the merits, none of the first to tenth defendants are resident here, there is no judgment against them, the assets concerned are mainly if not wholly outside the jurisdiction, and the proper court to make such orders is either the French court at Grasse or the court(s) having jurisdiction where the assets are located.

I can see considerable force in that last point. It is supported by the judgment of the Court of Justice of the European Communities in *Denilauler v Snc Couchet Fr□res* Case 125/79 [1980] ECR 1553 at 1570 (para 16) where it was said:

> 'The courts of the place or, in any event, of the Contracting State, where the assets subject to the measures sought are located, are those best able to assess the circumstances which may lead to the grant or refusal of the measures sought ... '

But the plaintiffs, when they launched the English proceedings, did not know where the assets were located. One of their objects was to find out. The proceedings were started here because it was here that the information is available. There is a case to be made for any injunction over assets abroad to be of limited duration. This would preserve the plaintiffs' position until there had been a reasonable opportunity, after discovering where the assets were, to apply for some interim relief in the jurisdiction(s) where the assets are. But although the question of a time limit was raised by the court in the course of the argument, no application was made that one should be imposed.

Counsel for the defendants also argued that it was wrong in principle to order persons not resident in this country as to what they should or should not do out of the jurisdiction, and relied on the judgment of Hoffmann J in *MacKinnon v Donaldson Lufkin & Jenrette Securities Corp* [1986] 1 All ER 653, [1986] Ch 482. That case was actually concerned with an order against a bank which was not a party to the action. There have been many cases where parties out of the jurisdiction have been subjected to an injunction as to their conduct abroad, for example as to commencing or continuing proceedings there, or bringing children back to this country: see *Re Liddell's Settlement Trusts* [1936] 1 All ER 239 at 248, [1936] Ch 365 at 374, where Romer LJ said:

> 'The moment that a person is properly served under the provisions of R.S.C. Ord. XI, that person, so far as the jurisdiction of a court is concerned, is in precisely the same position as a person who is in this country.'

466

Counsel argues that even though substantive relief may be granted in such cases, interim relief should not be. I can see no ground for drawing that distinction.

It is beyond question that the injunction granted by Knox J and upheld by Leggatt J was a most unusual measure, such as should very rarely be granted. But this case is most unusual. It is not the nature or strength of the plaintiffs' cause of action which puts them in that category. What to my mind is determinative is the plain and admitted intention of the defendants to move their assets out of the reach of courts of law, coupled with the resources they have obtained and the skill they have hitherto shown in doing that, and the vast amount of money involved. This case demands international co-operation between all nations. As the judge said, if ever there was a case for the exercise of the court's powers, this must be it. Or to quote Kerr LJ in *Babanaft International Co SA v Bassatne* [1989] 1 All ER 433 at 444: '... some situations ... cry out, as a matter of justice to plaintiffs, for disclosure orders and Mareva-type injunctions covering foreign assets of defendants even before judgment'; and I think that this is such a case. If the Duvalier family have a defence to the substantive claim, and feel that they are being persecuted, then their remedy as I have said is to co-operate in securing an early trial of the dispute. It is not to secrete their assets where even the most just decision in the world cannot reach them.

As to discretion in connection with the information order, the objection of counsel for the defendants is as to the use which the plaintiffs may make of the information obtained. It gave an undertaking to Knox J, as I have said, not to use the information without leave of the court; and it has three times applied for and obtained that leave. But it is said that the court would have no sanction which could be imposed if the plaintiffs were to break that undertaking in the future. This was not taken into account by the judge; but he can scarcely be blamed for that, as the point was not raised before him.

Kerr LJ in the *Babanaft* case did not agree that, as a general rule, such an undertaking should be required. But Neill and Nicholls LJJ differed from Kerr LJ on that point; and Nicholls LJ said that normally the court will need to be satisfied that it has a sufficient degree of control over the plaintiff to secure compliance with the undertaking (see [1989] 1 All ER 433 at 455).

It is difficult to see how, as a matter of law, the court *could* ensure that it had that degree of control over the Republic of Haiti, short of requiring a bank guarantee in a very large sum which could be called on in the event that the undertaking was broken. But I doubt if the court should make such a demand on a foreign sovereign state, or assume that it would be at all likely to break an undertaking given to the court. The republic has complied scrupulously with its undertaking in the past. And if it were to come about that the undertaking were broken in the future, I would expect that foreign courts, particularly those in the European Community, would take that into account in exercising any discretion they may have in proceedings between the republic and the Duvalier family. I do not consider that, in this case, the discretion to order disclosure of information ought to have been exercised against the republic because it is not in law subject to the control of the English courts.

(E) The Babanaft proviso

This is, as Nicholls LJ said in the *Babanaft* case [1989] 1 All ER 433 at 452, a troublesome point. The proviso in fact imposed by the Court of Appeal on the injunction restraining dealing in assets was as follows:

> 'Provided always that no person other than the defendants themselves shall in any wise be affected by the terms of this order ... or concerned to enquire whether any instruction given by or on behalf of either defendant or by anyone else, or any other act or omission of either defendant, or anyone else, whether acting on behalf of either defendant or otherwise, is or may be a breach of this order ... by either defendant.'

It is plain from the judgments that the proviso was intended to apply (and may in fact **467** have applied, for we do not have a full copy of the order) to dealing in assets abroad, not those within England and Wales.

Kerr LJ would have preferred to add 'unless ... [the order] is enforced by the courts of the states in which any of the defendants' assets are located' (at 447). It is not clear to me precisely what benefit that addition will confer on the republic; until the order is so enforced it will not operate on third parties, and after the order is so enforced the addition may well not be needed. But it may encourage the courts of other countries to enforce the English order; and if it has that effect it is in my opinion desirable. I would add that I doubt if Kerr LJ was concerned about the formal drafting of his order. It ought to apply to each asset severally, if a court of the state in which *that* asset is located has enforced the English order.

Neill LJ acknowledged that in other cases 'a less widely-drafted proviso may be appropriate so as to limit the protection of third parties to acts by them outside the jurisdiction' (see at 450). Nicholls LJ expressed a similar view. But he did not think it right to attempt to distinguish between third parties who are resident or domiciled or present within the jurisdiction and those who are not (at 453-454).

We first have the question whether *any* proviso should be added to the order of Leggatt J. In my opinion there should be some proviso, firstly because counsel for the plaintiffs acknowledges that there should be, and secondly because we ought not to differ, even on a matter of discretion, from a recent and considered decision of another division of this court.

Secondly, I would include the addition proposed by Kerr LJ, with some alteration in the drafting.

Thirdly, I consider that the proviso should only apply to assets outside England and Wales, and to acts done outside England and Wales.

Fourthly, I regret that I differ from Nicholls LJ in the circumstances of this case, and consider that the proviso should not apply to individuals (i e natural persons) who are resident in England and Wales. If it so happens that there is a bank account in the Channel Islands or the Isle of Man, which can be operated on the signature of an English resident, whether a solicitor with Turner & Co or another firm, or anybody else, I would find it offensive that he should be free to cross the channel and sign away the money. I have some qualms about limiting this category to natural persons as opposed to corporations. But this should avoid one problem that troubled Nicholls LJ, which was whether the court should distinguish between an overseas bank which has a London branch and one that has not. And a corporation can only act by a natural person, unless its computer is programmed to take action without instructions from anybody.

I realise that these conclusions will involve formidable problems in drafting. The orders already made are long enough in all conscience; and as I have frequently observed in the past, Mareva injunctions are served

on and have to be understood by persons who are not lawyers (in this case not even English-speaking), who must obey instantly on pain of imprisonment. It is to be hoped that counsel can prepare a draft order which is precise but intelligible. For example, as an aid to comprehension it might be preferable to replace 'out of the jurisdiction' with 'outside England and Wales'. One solution may be to prepare a separate order dealing with foreign assets, so that there is no need for it to contain a mass of material relating to disclosure and English assets.

(F) Privilege

It is agreed, as I have said, that the claim for privilege against disclosure of certain classes of documents and information should be remitted to a Commercial judge. The order should identify these classes, so that it will operate forthwith in all other respects.

Conclusion

I would vary the order of Leggatt J (i) by inserting the undertaking as to the use of information that was given to Knox J, (ii) by inserting a proviso in the order for disclosure **468** of assets outside England and Wales, of the kind which I have described, and (iii) by excepting disclosure of the material for which privilege is claimed. The order of Leggatt J should remain in full force and effect until the variations have either been agreed and approved by this court, or else settled by this court.

In all other respects I would dismiss this appeal.

STOCKER LJ. I agree and wish to add nothing further.

FOX LJ. I also agree.

Appeal dismissed subject to variation of order. Leave to appeal to the House of Lords refused.

Solicitors: *Watson Farley & Williams* (for the defendants); *Slaughter & May* (for the plaintiffs).

Sophie Craven Barrister.

02306569