BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL
(CIVIL DIVISION)

CIVIL APPEAL NO. 26 OF 2006

BETWEEN:

HINCH INVEST AND FINANCE S.A.

Appellant

and

ANSIS SORMULIS

Respondent

Before:

The Hon. Mr. Michael Gordon, QC	Justice of Appeal
The Hon Mr. Denys Barrow, SC	Justice of Appeal
The Hon Mr. Hugh A. Rawlins	Justice of Appeal

Appearances:

Mr. John Carrington for the Appellant
Mr. Paul Webster Q.C. with Ms Willa Liburd for the Respondent

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2007: February 15;
November 26.

JUDGMENT

[1] GORDON, J.A.: On 18th August 2006, the respondent filed both an amended statement of claim and an application for an interim injunction. The application for the interim injunction was heard inter partes on the 20th September 2006 and on 21st September 2006 the trial judge gave an oral ruling granting the interim injunction. At the request of the parties (I suspect principally the appellant) the trial judge gave full written reasons for her judgment on 25th September 2006.

[2] The facts giving rise to the application for and grant of an interim injunction can be shortly stated. The respondent alleges that some time in 2001 he sought to

purchase a shelf International Business Company (IBC) which was a bearer share company. He tasked Mr. Rudolf Meroni, a Swiss lawyer, who, though a party to the proceedings in the High Court, is not a party to this appeal (he having not been served with the proceedings), with the commission of acquiring the shelf company. The shelf company purchased by Mr. Meroni was Hinch Invest and Finance SA, the appellant. The transaction would appear to have taken place in July 2001.

[3] It is the respondent's case that he funded the purchase and operation of the appellant acting always through Mr. Meroni and that he had invested a considerable sum of money in so doing. It is admitted that the respondent was never in physical possession of the bearer shares which had been issued by the appellant. According to the respondent, the relationship between himself and Mr. Meroni deteriorated in the autumn of 2005. It is the case of the respondent that in December 2005 he asked Mr. Meroni to deliver the bearer shares issued by the appellant to him, but this was never done. Notwithstanding the alleged failure of Mr Meroni, the respondent says he injected a further US$300,000.00 working capital into the appellant under a loan agreement dated 6th April 2006.

[4] Due to the deteriorating relations between the respondent and Mr. Meroni the respondent asked that Mr. Meroni arrange for the appellant to give to a Mr. Jakob Hirschbaeck of London a power of attorney to manage the affairs of the appellant. This was apparently done. However, the respondent alleges that in May 2006, Mr. Meroni instructed the directors of the appellant to issue a power of attorney in favour of Mr. Meroni and/or Dr. Stefan Schmid, and/or Adrian Kunzler and thereby prevented him from exercising control over the appellant. This would appear to have taken place between the 17th and 19th of May 2006. On the 23rd of May 2006 the respondent says that he instructed the directors of the appellant to revoke the latter power of attorney and that they (the directors) forwarded the revocation of the power of attorney to Mr. Meroni under cover of a letter dated 23rd May 2006. The letter of transmission which was exhibited with the affidavit of the respondent

accompanying the application for the interim injunction was addressed to Meroni & Schmid and is worthy of repetition in full:

> "Dear Dr. Meroni,
>
> HINCH INVEST &FINANCE S.A., B.V.I. ("the Company")
>
> We have received written instructions from the beneficial owners of the Company requesting that the Directors of the Company refrain from taking further instructions from you and that all powers of attorney issued in your favour by the Company be revoked.
>
> Pursuant to the above said we hereby give you notice that the Directorship Agreement dated 23rd June, 2000 entered into by your Company and our Company is terminated with immediate effect.
>
> Enclosed please find Consent Actions of the Board of Directors revoking with immediate effect the power of attorney dated 17th May, 2006 issued to you, Mr. Künzler and Dr. Schmid.
>
> Kindly send to us by courier all the corporate documents in your possession pertaining to the Company.
>
> We should be grateful if you would kindly acknowledge receipt of this letter.
>
> Best regards"

[5] It is the respondent's case that on 31st May 2006, Mr. Meroni, without instructions from the respondent, caused the entire board of the appellant to resign as of the 25th May 2006 and prior to their resignation to revoke the power of attorney in favour of Mr. Jakob Hirschbaeck as of the 23rd May 2006 and, further, caused a company known as Eurocom International Limited, a company under the control of Mr. Meroni to be appointed the sole director of the appellant. The respondent alleges that since the matters referred to in this paragraph took place, Mr. Meroni has refused to acknowledge the respondent as the beneficial owner of the appellant.

[6] It is in those circumstances that the respondent sought an interim injunction against the appellant and Rudolf Meroni in the following terms:

> "That each of [Hinch Invest and Finance SA] and [Rudolf Meroni] be restrained until further order of this court from-
>
> 1. in any manner whatsoever, whether by themselves or by their servants, agents or otherwise from, inter alia transferring or delivering the bearer share certificates representing the entire issued share capital of the First Defendant to any person other than the Claimant, issuing any additional shares in, or taking any steps to sell, transfer, charge, mortgage or otherwise dispose of the assets of the First Defendant and any of its subsidiaries including but not limited to Regina Developments Limited, a company incorporated under the laws of British Virgin Islands ("Regina") and any subsidiary of the First Defendant or of Regina;
> 2. In any manner whatsoever whether by themselves, their servants, agents or otherwise from holding out any person other than the Claimant as a shareholder of the First Defendant or otherwise being entitled to represent the First Defendant in any way;
> 3. In any manner whatsoever, denying that the Claimant is the holder of the entire issued and outstanding share capital in the First Defendant; and
> 4. Further and other relief as the Court deems fit."

[7] The learned trial judge made an order granting the interim injunction in almost the exact terms requested by the respondent save that paragraph 1 of the prayer was amended to apply to the Second Defendant only. The trial judge had this to say at paragraph 5 of the judgment:

> "During the hearing learned Queen's Counsel for Mr. Sormulis surprisingly indicated that having regard to the written submissions of Hinch he would not pursue his claim for relief in terms sought in paragraph 4(2) above[1]. However, I note that for completeness that immediately before I delivered my oral ruling learned counsel sought leave to rely on and argue for this relief. I denied leave at that late state as I felt it would prejudice Hinch who was taken completely off guard but in the interests of saving costs granted leave to use the supporting Affidavit if an application were made subsequently.

[1] At paragraph 4(2) of the judgment the trial judge set out the prayer of the appellant as seeking "[an] injunction prohibiting Hinch from taking steps to issue any additional shares or to sell, transfer, charge, mortgage or otherwise dispose of its assets and that of its subsidiaries;"

[8] The appellant filed a Notice of Appeal appealing on a number of grounds against the decision of the trial judge. A subsequent Amended Notice of Appeal was filed by leave of the court. As I understand the burden of the appellant's case it is that the trial judge wrongfully exercised her discretion in the granting of the interim injunction in that she acted: under a mistake of law; in disregard of principle; under a misapprehension of the facts of the case; taking into account irrelevant considerations and acted unreasonably. The errors catalogued in the written argument of the appellant are taken directly from Quillen and others v Harney, Westwood & Riegels (No. 2)[2] a decision of this court.

[9] The so-called errors of the learned trial judge resolved themselves into three main arguments, the first of which was that no cause of action was shown to exist against the appellant. The appellant based its argument on two cases, Palm Island Resorts Limited v Arts Friends Limited[3] and The Siskina[4]. The former case, Palm Island Resorts is a decision of this court in which Alleyne JA, as he then was, delivered the leading judgment with which Redhead JA concurred. The third judge, whilst agreeing with the decision of Alleyne JA arrived at his conclusion by a very different route. Learned counsel for the appellant sought help and sustenance from the judgment of Georges JA.

[10] The Siskina, a case commonly cited for the proposition that there can be no interim injunction granted against a party without an underlying cause of action against that party, is of greater assistance to the appellant. However, the issue is whether the raw proposition in The Siskina, as expressed above is the applicable law in this jurisdiction. In Commercial Injunctions[5] the learned author says the following:

> "The English requirement [of an underlying cause of action] is based on *The Siskina* and Lord Diplock's analysis of the remedy as an interlocutory injunction granted under what was section 45 of the Supreme Court of

[2] (1999) 58 W.I.R. 147 at page 150
[3] Civ. App. No. SVGHCV 005/2002 delivered 6th March 2003
[4] [1977] 3 All ER 803
[5] Steven Gee, 5th edition at page 19

> Judicature (Consolidation) Act 1925. Under that analysis the injunction could only be granted in proceedings against the defendant based on a cause of action – the remedy was only ancillary to that cause of action. That analysis has been rejected as the source for jurisdiction in *Cardile*[6] and logically its constraints do not apply to preventing abuse of the process of the court or interfering with the due administration of justice. It is no less a frustration of possible future process of the court or an interference with the due administration of justice whether a man disposes of his assets to defeat a future judgment moments before his debt becomes due or moments afterwards."

[11] I find the logic in Cardile compelling. Indeed, Lord Goff of Chieveley and Lord Browne-Wilkinson in Channel Tunnel Group v Balfour Beatty Ltd[7] both expressed reservations on the strictures placed on injunctive relief by The Siskina. In the same case Lord Mustill who gave the lead judgment also expressed his discomfort with the strictures of what is referred to as the Siskina principle. After rehearsing the argument in the Siskina line of cases he said the following:

> "My Lords I cannot accept this argument. I prefer not to engage the question whether the law is now firmly established in terms of Lord Brandon's statement or whether it will call for further elaboration to deal with new practical situations at present unforeseen. For the present purposes it is sufficient to say that the doctrine of *The Siskina,* put at its highest, is that the right to an interlocutory injunction cannot exist in isolation, but is always incidental to and dependant on the enforcement of a substantive right, which usually, though not invariably takes the shape of a cause of action"

[12] The allegation in this case is that Mr. Meroni is the physical holder of the bearer shares in the appellant and that Eurocom International Limited, a company under Mr. Meroni's control, is the sole director. If the respondent were to succeed in his case against Mr. Meroni and if in the meantime the appellant were, for example, to issue a large number of shares so as to dilute the disputed shares to the position of a minority, then there would certainly be "a frustration of possible future process of the court." In this case, the appellant has been joined as a defendant and has,

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[6] Cardile v LED Builders Property Ltd (1999) 198 C.L.R. 380 (Australia)
[7] [1993] 1 All ER 664

in fact, filed a defence and I find is a proper party to be joined in search for ancillary relief.

[13] The second main argument of the appellant revolved around the Articles of Association of the appellant and in particular Article 3.3 and 3.7 which I reproduce hereunder:

> "3.3 Subject to the provisions of the Act and of these Articles the bearer of a bearer share certificate shall be deemed to be a member of the Company and shall be entitled to the same rights and privileges as he would have had if his name had been included in the share register of the Company as the holder of the shares.
>
> 3.7 The bearer of a bearer share certificate shall for all purposes be deemed to be the owner of such shares comprised in such certificate and in no circumstances shall the Company or the Chairman of any meeting of the members of the Company ….. or any authorized person be obliged to enquire into the circumstances whereby a bearer share came into the hands of the bearer thereof or to question the validity or authenticity of any action taken by the bearer of a bearer share certificate……."

[14] I understood learned counsel for the appellant to be arguing that in the face of the Articles of Association, and in the light of the respondent's admission not only that he was never in possession of the share certificates but that the certificates were in the hands of Mr. Meroni the ineluctable conclusion which ought to have been drawn by the court was that there was no serious issue to be tried. I am afraid that I cannot agree. The simple answer to the argument of the appellant is that whilst the Articles of Association of a company are in the nature of a contract between the company and a shareholder, the rights and obligations so governed do not exclude the overseeing jurisdiction of the court. To hold otherwise would be to drive a stake through the heart of the concept of a trust.

[15] The trial judge went to the heart of the matter when she posed this question: "However, are the Regulations [Articles of Association] conclusive of the rights of ownership in bearer shares as between the holder and a third person who has

come to the court for relief?"[8] From what I have said above it is clear that I agree with the answer that the trial judge found for herself, that they are not.

[16] The third main issue taken by the appellant with the judgment being appealed from is that the trial judge wrongly exercised her discretion in the context of the American Cyanamid v Ethicon Ltd[9]. The main string to the bow of the appellant is that where a quia timet injunction is granted, the court must be satisfied, on the basis of the evidence adduced, that there is a threatened invasion of rights. With respect to learned counsel for the appellant, where there is an allegation by a claimant that a person in a position of trust for his benefit acts in such a way as denies the existence of that trust, then a court is perfectly entitled to draw the inference, as did the claimant/respondent that there was a threat to his alleged rights.

[17] I can find no wrong principle used by the trial judge in exercising her discretion in favour of granting the interim relief as prayed for such as would permit this court substituting its own discretion for that of the court of first instance. In the circumstances I would dismiss the appeal with costs to the respondent to be agreed or, in the absence of agreement, to be the subject of separate written submissions by the parties.

Michael Gordon, QC
Justice of Appeal

I concur.

Denys Barrow, SC
Justice of Appeal

I concur.

Hugh A. Rawlins
Justice of Appeal

[8] At paragraph 23 of the judgment
[9] [1975] AC 396