BRITISH VIRGIN ISLANDS
EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO: BVIHCV 2009/348

BETWEEN:

BLACK SWAN INVESTMENTS I S.A.

Applicant

and

1. HARVEST VIEW LIMITED
2. SOUTHERN ENTERPRISES LIMITED
3. LUXOR PROPERTIES LIMITED
4. CLOUD AIR LIMITED
5. SABLEWOOD REAL ESTATE LIMITED
6. RIDGEPOINTE OVERSEAS DEVELOPMENTS LTD
7. SHAFORD CAPITAL LIMITED

Respondents

Appearances: Mr David Chivers QC; and Mr John Carrington of McW. Todman & Co for the Applicant

JUDGMENT IN CHAMBERS

[2009: 18, 25 November]

(Freezing injunction in aid of foreign proceedings – whether assets of Respondent sufficiently identifiable - delay)

[1] Bannister J [ag]: The Applicant ('Black Swan') is a company incorporated in the Republic of the Marshall Islands. It is the assignee of a debt allegedly due to a now defunct Belgian bank by a BVI registered company called Hyundai Motors Distributors Ltd ('HBVI'). The debt was incurred before

August 2000 and amounted, it is said, to US$15.4 million. It appears that HBVI carried on its business in Southern Africa, but I understand that there may be issues about that.

[2] I am told that HBVI went into liquidation in the BVI on 1 August 2000, but I do not recall having been shown a copy of the relevant order. I am also told that on 11 November 2000 one Theodor van den Heever ('Mr van den Heever') was appointed in the BVI as liquidator of HBVI and that on the very same day his appointment was recognized by the South African Court. There is in evidence a copy of an apparently unsealed order made in the High Court of South Africa (Witwatersrand Local Div [letters obscured]). I had better set out the terms of that document in full:

> 'IN THE HIGH COURT OF SOUTH AFRICA (WITWATERSRAND LOCAL DIV.)
> JOHANNESBURG 10 November 2000
> BEFORE THE HONOURABLE JUDGE BLIEDEN
> In the Matter between: -
>
> VAN DERN HEEVER THEODOR WILHELM N.O.
>
> 1st Applicant
>
> MARK CHAPMAN N.O. 2nd Applicant
>
> HAVING read the documents filed of record and having considered the matter:
>
> THE COURT GRANTS AN ORDER:-
>
> 1. Recognising the appointment of the First Applicant (in terms of the laws of the British Virgin Islands) as liquidator in the insolvent estate of Hyundai Motor Distributors Limited (in liquidation) on the terms set out herein, within the Republic of South Africa until such recognition is withdrawn by order of this Court.
> 2. Directing that the First Applicant provides security to the satisfaction of the Master of this Court for the proper performance of his administration by virtue of this order and for the herein mentioned Master's costs and damages.
> 3. Declaring that thereafter the First Applicant shall by virtue of this recognition be empowered to administer the said estate in respect of all assets of the said estate which are situation within the Republic of South Africa.
> 4. That service of this order be effected by one publication forthwith in the Government Gazette and in one publication forthwith in each of The Star and the Beeld newspapers.

5. Costs of this application.

BY THE COURT

REGISTRAR
/bbn'

[3] On 31 May 2007 the Belgian bank purported to assign to a company called Africa Edge SARL (Africa Edge) the debt of US$15.4 million and 'all rights title and interests relating thereto including but not limited to any security interests'.

[4] It is not in evidence whether the Belgian bank proved in the winding up of HBVI – although that fact must be within the capacity of Mr van den Heever to establish. Whether it did or not, interest (if any) must have stopped running on the claim on 1 August 2000 when HBVI went into insolvent liquidation.

[5] On 12 December 2008 Africa Edge made an assignment in identical terms to Black Swan, except that the Africa Edge assignment purported to add on an additional sum of US$ 8.7 million said to represent interest 'up to 31 May 2007'. For the reasons given in the preceding paragraph, there was no such interest to assign.

[6] On 10 March 2009 Black Swan applied in the High Court of South Africa (South Gauteng High Court, Johannesburg) for an order under s 424 of what I understand to be a part of the South African Companies Act 61 of 1973 dealing with insolvency (although commentary to which I have been referred suggests that the provision is capable of being operated whether or not the company in question is currently subject to a recognized insolvency regime). Section 424 is in the following terms:

'424 Liability of directors and others for fraudulent conduct of business

(1) When it appears, whether it be in a winding-up judicial management or otherwise, that any business of the company was or is being carried on recklessly or with intent to defraud creditors

> of the company or creditors of any other person or for any fraudulent purpose, the Court may, on the application of the Master, the liquidation, the judicial manager, any creditor or member of contributory of the company, declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct.'

[7] Black Swan's application is for an order that an individual called Muller Rautenbach ('Mr Rautenbach') be made personally liable to pay to the Applicant the whole of the US$ 15.4 million debt plus, for good measure, the imaginary interest of US$ 9.7 million.

[8] The basis of Black Swan's application under section 424 is that Mr Rautenbach owns assets in South Africa through nominees (as I understand it, this allegation is made with a view of founding jurisdiction); that HBVI had carried on business in South Africa; that with the knowledge and under the direction of Mr Rautenbach, that business was carried on fraudulently; that as a result of the assignments to which I have referred Black Swan is a 'proven' creditor of HBVI for the principal and interest mentioned above; that by his alleged nefarious activities Mr Rautenbach has defrauded various creditors of HBVI, including the Belgian bank; and that as a result Mr Rautenbach is liable to Black Swan as cessionary of the Belgian bank for all the debts due from HBVI the Bank, including the US$ 9.7 million 'interest'.

[9] The state of the South African proceedings is that Mr Rautenbach is challenging the jurisdiction of the South African Court, but has yet to file a defence.

[10] On 9 October 2009 I dismissed an application in support of the South African proceedings made by Mr John Carrington on behalf of Black Swan for the appointment of a receiver of 8 companies which were said to be wholly or partly owned or controlled by Mr Rautenbach. I summarized my reasons, which in the first instance were given orally, in a note made on the same day. Although it will involve some repetition of what has gone before, I think that I had better set it out here in full:

[1] The Applicant is the assignee of a debt allegedly due to a now defunct Belgian bank by a BVI registered company called Hyundai Motors Distributors Ltd ('HBVI'). The debt was incurred before August 2000 and amounted to US$15.4 mio.

[2] Hyundai BVI went into liquidation in the BVI in August 2000. It is not in evidence whether the Belgian Bank proved in the winding up. Whether it did or not, the amount of any claim must be limited to the principal sum of US$15.4 mio. The US$9 mio or so of interest cannot on any footing be the subject of of a claim by the Applicant.

[3] On 10 November 2000 the South African court made an order recognizing the BVI liquidator and directed that he be empowered to administer the estate of HBVI situate in SA.

[4] On 31 May 2007 the Belgian Bank purported to assign to a company called Africa Edge SARL the debt and 'all rights title and interests relating thereto including any security interests'.

[5] On 12 December 2008 Africa Edge made an assignment in identical terms to the Applicant.

[6] On 10 March 2009 the Applicant applied in the SA court for an order under s 424 of the SA insolvency legislation that an individual called Muller Rautenbach be made personally liable to pay to the Applicant the whole of the debt plus, for good measure, some US$9 mio accrued after HBVI went into liquidation.

[7] Mr Rautenbach has indicated an intention to defend the proceedings on various grounds, including forum and that he had never acted as a director of HBVI.

[8] I am invited on behalf of the Applicant to appoint a receiver over the assets of 8 BVI registered companies alleged to have been wholly or partly owned or controlled by Mr Rautenbach. The grounds for the application is that Mr Rautenbach is a dishonest individual likely to spirit away the assets of these companies to frustrate any order obtained in the SA court on the s 424 application.

[9] I have to say first that I am wholly unpersuaded that the assignments to which I have referred conveyed to the Applicant any interest in the potential fruits of a judgment obtained under the SA s 424. By the time the first assignment was made, the Belgian Bank had no more than a right of proof in HBVI's liquidation. That was all it could assign. The position might have been different if the assignment had been made before HBVI went into liquidation.

[10] Even if that is wrong, it seems to me that it is now far too late for the Applicant to seek equitable relief from the Court in respect of events which took place over 9 years ago. Were the Belgian Bank to have approached this Court now and asked for orders identical to those sought by the assignee, there can be no doubt that they would have been refused on the grounds of delay. The Applicant can be in no better position.

[11] I might add that the evidence of connection between Mr Rautenbach and certain of the respondent companies is itself so stale as to make it unreliable as a basis now for making an order of the type sought as against them.

[12] I might also add that I have considerable doubts about whether the South African Court's order of 10 November 2000 was more than a recognition order which gave the BVI liquidator permission to get in the South African assets of HBVI and to distribute them in accordance with BVI law. I doubt very much whether the order operated to wind up HBVI in SA. But that is a matter for the South African Court.

> [13] I also have misgivings about whether this Court, which is the Court of the primary liquidation of HBVI, should be lending its aid in support of a claim in another jurisdiction the consequence of which, if successful, would be to put money from the pocket of Mr Rautenback into that of a particular creditor, rather than into the general pool of assets available to all creditors.
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> [14] However, I should make clear that the reason why I have exercised my discretion not to grant the relief sought in this application is delay. I should say that I am not making an imputation of delay against the present Applicant or their legal advisers. The delay to which I refer is the lapse of time since the liquidation of HBVI, which made an application of this sort, even if it is otherwise arguable, unsustainable long before the present proceedings were contemplated.
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> [15] This application is dismissed accordingly.'

[11] On Wednesday 18 November 2009 I entertained a renewed application in this matter. It was made by Mr David Chivers QC (leading Mr John Carrington) and relied upon some new evidence of fact. In addition, it relied upon expert evidence of South African law (which I gave permission to Mr Chivers to adduce) provided by Mr MJ Fitzgerald SC of Huguenot Chambers, Cape Town. Mr Chivers QC made clear to me at the outset of the hearing that Black Swan was not renewing its application for the appointment of a receiver. Instead, it was asking from relief by way of freezing order, with an upper limit of US$27,144,766. This sum exceeds the total claim (US$25,058,017) of Black Swan in the section 424 proceedings and includes, obviously, the amount of interest that is alleged to have accrued (on what basis is unclear) since the winding up of HBVI.

[12] Mr Chivers QC took me carefully through the points of concern which I had briefly expressed in my note of judgment. He relies upon sections of Mr Fitzgerald's report dealing with the nature of the property capable of being assigned by a creditor after the debtor company goes into liquidation. Mr Fitzgerald will forgive me, I am sure, when I say that what he says on that topic does nothing to settle my doubts on the point. But it seems to me that Mr Fitzgerald's evidence does establish that

the South African Court would not be troubled by them – at any rate not until it had had the point properly taken before it. For the purposes of ancillary interlocutory relief, it seems to me that that is sufficient for Black Swan's purposes.

[13] As to my concern that some of the evidence adduced to establish a proprietary connection between Mr Rautenbach and certain of the companies whose assets I was invited to freeze was stale (some of it goes back to 1996), Mr Chivers QC said that was the best that could be obtained and that one should assume continuity in such matters except where the contrary was shown. I found this submission rather surprising in light of the fact that one of the principal reasons why I was being asked to freeze the assets of these companies was because of Mr Rautenbach's supposed predilection for transferring assets at a moment's notice in order to keep one jump ahead of creditors or anyone else who might have got him in their sights.

[14] I also raised doubts at the hearing about the justice of freezing the assets of companies in which Mr Rautenbach had only limited direct interests. In particular, shareholdings in some of the companies are alleged to be held by trustees of trusts of which there are beneficiaries other than Mr Rautenbach and others are said to be in the names of individuals other than Mr Rautenbach himself. Mr Chiver's answer to that was twofold: first, the existence of other interests did not count, because, in effect, Mr Rautenbach is such an overbearing character that none of the trustees or other shareholders would stand up to him if he wished to dissipate the assets of companies in which they were interested; secondly, that a freezing order did not inhibit the use of assets, merely their dissipation. As to the first argument, that seems to me to ignore the fact that I should not be injuncting the use of property in which others than Mr Rautenbach have an interest (although admittedly indirect only) on the grounds that he was liable to wrest it from them anyway. That amounts to a submission that the property might as well be injuncted, for all the benefit they might derive from it. I am not prepared to accept that argument. The second answer is good as far as it goes, but overlooks the fact that the US$27 million threshold is to be spread over all the companies whose property is injuncted. Mr Chivers QC does not explain how trustees holding shares in one company, but none in any other, would be able to establish to their satisfaction whether dispositions in all of the other injuncted companies, taken together with the figures in their

own balance sheet, had or had not infringed the limit set by the Court. The result would simply be perplexity and stalemate.

[15] This point has to some extent been defused because after the hearing a message was sent to me indicating that the only respondent companies whose assets it is now sought to freeze are the first respondent (Harvest View Limited), which on any footing is wholly owned by Mr Rautenbach and whose assets appear to consist of cash; Sablewood Real Estate Limited ('Sablewood'); and Ridgepointe Overseas Developments Limited ('Ridgepointe') Mr Shore, in his second affidavit sworn in these proceedings, says that the shares in Sablewood are held by Sefta Nominees Limited on behalf of the Sinai Trust. He says that a letter dated 26 January 1996, which he exhibits, shows that the Sinai Trust was set up for Mr Rautenbach. That letter does indeed support what Mr Shore says, but it was written nearly fourteen years ago and, in my judgment, forms a very flimsy basis for supposing that Sablewood is now owned or controlled by Mr Rautenbach. As for Ridgepointe, Mr Shore asserts on the basis of a letter dated 1 August 1999 that it is owned as to 70% by the Sinai Trust; he omits to mention that the same letter says that the remaining 30% is held on trust for others. Mr Shore makes mention of an entry in a document emanating from HM Treasury in the UK which includes a company named as Ridgepointe Overseas Developments Limited in a list of persons subject to financial sanctions under Commission Regulation (EC) No 77/2009. The list notes under 'other information' that this company is 'owned by Billy Rautenbach'. I do not think that any of this material can be relied upon as evidencing that Ridgepointe is wholly owned by Mr Rautenbach.

[16] The final point is the question of delay. Mr Chivers QC makes two points. He says, first, that Mr van den Heever did not conclude his investigations until 2005, so that the delay should start to run only from that point. Since he does not say when it would or should have first been obvious to the Belgian bank that (if indeed they were) they had been defrauded by Mr Rautenbach, I do not get much help from that.

[17] Secondly, Mr Chivers QC relies upon a passage from Spry on Equitable Remedies, 7th Ed, at pages 488 to 493. The passage in Spry seeks to elide the well known principles which require detriment or prejudice to be shown before the Court will deprive a claimant of a *right* on the

grounds of delay, with those which preclude him from obtaining a grace or favour on such ground. One of the cases relied upon by the editors of Spry, Societe Francaise d'Applications Commerciales et Industrielles v Electronic Concepts Limited[1] seems to me to show that there is no principle that delay is never an answer to an application for an interim injunction unless the respondent can show detriment or prejudice. The true principle is that an applicant seeking interim relief, particularly where that is sought without notice, must come to the court promptly and, if he does not (even where the delay is as short as two or three months), he must be able to explain why he has not (see the cases mentioned in Commercial Litigation Pre-Emptive Remedies[2]). It is true that the absence of prejudice to a respondent may, in a proper case, enable the court to *overlook* otherwise unacceptable delay, but the converse is not made out on the authorities: it is not the law that no amount of delay will debar a claimant from seeking interim equitable relief unless the respondent can demonstrate that it has caused him prejudice – and certainly not where an application is made without notice, when by definition the respondent is unable to speak to any prejudice which the delay may have caused him.

[18] Even if, which I do not think is the case, interim relief may be refused on the grounds of delay only where it can be shown that the respondent has been prejudiced as a result, it seems to me that it is self-evidently prejudicial now for the allegedly injured Belgian bank, through its sub-assignee, to seek to restrict the activities of companies over which (for the purposes of this part of the argument) it has to be supposed that Mr Rautenbach has enjoyed uninterrupted freedom of action for nearly a decade. If, therefore, it had been necessary for the Court to identify prejudice in deciding to refuse this application there is, in my judgment ample evidence to support such a finding.

[19] Accordingly, and while I am grateful to Mr Chivers QC for his very helpful submissions, I refuse this application on the same grounds as I gave for refusing the earlier one.

[1] [1976] 1 WLR 51, at 56B-D
[2] Thomson/Sweet & Maxwell, 3rd Ed at pages A1-1071 ff

Commercial Court Judge

25 November 2009