THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS
(On appeal from the Commercial Division)

BVIHCMAP 2013/0023

TSOI TIN

Appellant

and

[1] TAN HAIHONG

[2] YU HENG INTERNATIONAL INVESTMENTS CORPORATION

Respondents

Before:
Hon. Dame Janice M. Pereira, DBE — Chief Justice

On written submissions:
James Noble, of Messrs. Harney Westwood & Riegels on behalf of the Appellant
Brian Lacy of Maples and Calder on behalf of the First Respondent
No appearance by the Second Respondent.

2014: February 5.

Civil Appeal - Interlocutory appeal - Freezing injunction - Whether person who is not joined or made party to proceedings can have locus standi to appeal - Interpretation of CPR 7.3(5)(b) - Black Swan Jurisdiction - Basis on which an appellate court would disturb the exercise of a trial judge's discretion. Civil Procedure Rules 62.1(2) and 2.4

Mr. T and Mrs. H were married in June 1998. Mrs. H commenced divorce proceedings against Mr. T on 19th October 2012 whereby she claimed a 70% allocation of the matrimonial assets. Since that time Mrs. H has obtained various injunctions or freezing orders in respect of those assets said to be matrimonial assets which under the law of the People's Republic of China are jointly owned. In March 2008, Mr. T acquired and is the registered holder of 1,800 shares in the second respondent company. The Shares are said to represent approximately 50% of the value of the total matrimonial assets so far as known to date by Mrs. H. On 9th August 2013, Mrs. H caused a "Stop Notice" to be issued in respect of the Shares and this was served on the Company. On 27th September 2013,

the Company gave notice to Mrs. H of a proposed transfer of the Shares to a Samoan company called Crystal Touch Holdings Ltd (Crystal Touch"). On 7th October 2013, Mrs. H applied for an injunction to restrain the transfer of the Shares. On 8th October 2013, the learned trial judge directed that Mr. T be served with the application for a hearing on 10th October 2013, and at that hearing Mr. T gave evidence that the Shares did not form part of the matrimonial assets, but rather that they belonged to a third party, one Mr. Zhu who he said controlled Crystal Touch. However, no evidence was tendered before the learned trial judge from any person asserting, confirming or denying Mr. Zhu's ownership or entitlement to the Shares, whether directly or indirectly. The learned trial judge granted an injunction against the Company until a further hearing on 5th November 2013. On 5th November 2013 the learned trial judge ordered that the injunction against the Company be continued until further order. It is from this order that Mr. T appeals.

Held: dismissing the appeal, with costs to be paid by Tsoi Tin to be assessed unless agreed within 21 days.

1. Mr. T is not properly an appellant and therefore without more has no standing, to bring this appeal. CPR 62.1(2) defines an "appellant" as "the party who first files a notice of appeal" and CPR 2.4 says that a party "*includes* both the party to the claim and any legal practitioner on record for that party unless any rule specifies or it is clear from the context that it relates to the client or to the legal practitioner only."

   MA Holdings Ltd. v George Wimpey UK Ltd also called George Wimpey UK Ltd v Tewkesbury Borough Council [2008] 1WLR 1649 distinguished.

2. The contention that a PRC money judgment could not be enforced in any event in BVI having regard to CPR 7.3(5) (b) is not sustainable. This Court has previously ruled that CPR 7.3(5)(b) ought to be accorded a purposive construction and that the words *"and registered in the High Court pursuant to Part 72"* should be ignored as "mere surplusage" so as to give effect to the intention of the framers of the Rules.

   Westburg Anstalt v Profitstar Anstalt BVIHCMAP 2013/0020 followed.

3. Freezing orders are unlike ordinary interlocutory injunctions. The only purpose of a freezing order is to prevent dissipation of assets available to satisfy a money judgment. They do not depend upon there being a pre-existing cause of action and there is no reason in principle why a freezing injunction should be treated any differently to the circumstances in which a claim is issued which seeks only relief ancillary to a foreign judgment or award such as with anti-suit and Norwich Pharmacal claims.

   Mercedes Benz v Leiduck [1996] AC 284 applied and Black Swan Investment I.S.A. v Harvest View Limited and Sablewood Real Estate Limited BVIHCMAP 2013/0020 followed.

4. It is sufficiently clear on the facts and circumstances of this case as to why the judge was satisfied, in the interest of justice, that the Shares should be preserved and why no fortification was ordered in respect of Mrs. H's cross undertaking. Indeed the order of the learned trial judge does nothing more than maintain the status quo. It must also be remembered that Mr. T disclaims any beneficial interest in the Shares. It cannot be said that the trial judge's decision in the circumstances of the matter as placed before him, exceeds the generous ambit within which reasonable disagreement is possible, and is in fact plainly wrong. Accordingly, the threshold for warranting an appellate court's interference has not been met.

Dufour v Helenair Coproration Ltd (1996) 52 WIR 188 followed; Bellenden (formerly Satterthwaite) v Satterthwaite [1948] 1 All ER 343 and G-v-G [1985] 2 All ER 225 applied.

JUDGMENT

[1] PEREIRA, CJ: This is said to be an interlocutory appeal brought by Tsoi Tin ('Mr. T") against the decision of the trial judge (Bannister J, QC (Ag.)) of 5th November 2013 in which he continued a freezing injunction against the second respondent ('the Company"). The relevant part of the order for the purposes of this appeal is in these terms:

> "Until further order, the Respondent,[the Company] whether by itself or by its servants, agents, directors, officers, partners, employees, affiliates or attorneys be restrained from directly or indirectly disposing of, or diminishing the value of, or transferring, selling, or otherwise dealing or making any payment by way of dividend, interest or otherwise, or registering any transfer of, any or all of the shares of the Respondent registered in the name of Tsoi Tin (also known as Cai Tian and formally known as Cai Shaowu)."

The applicant for this injunction, being the first respondent herein (hereinafter called "Mrs. H" merely for ease of reference), was required to provide a cross-undertaking in damages not only to the Company but also to Mr. Tin.

[2] It may be immediately stated that Mr. T was not named or joined as a party to the proceedings below, either at the instance of Mrs. H or the court, neither did Mr. T of his own volition seek joinder as a party. However, it is common ground that Mr. T and Mrs. H are husband and wife who are engaged in a matrimonial dispute in the People's Republic of China (''PRC"). The Company took no part whatsoever

in the proceedings below and does not appear on this appeal. The learned trial judge did permit Mr. T to be heard.

The Background

[3] The background to this matter may be succinctly stated thus:

(a) Mr. T and Mrs. H were married in the PRC on 1st June 1998.

(b) Sometime in March 2008, Mr. T acquired and is the registered holder of 1,800 shares ('the Shares") in the Company.

(c) Mrs. H and Mr. T are embroiled in divorce proceedings in the PRC brought by Mrs. H on 19th October 2012. In those proceedings Mrs. H is claiming a 70% allocation of the matrimonial assets and has obtained various injunctions or freezing orders in respect of those assets said to be matrimonial assets. It is not disputed that as a matter of PRC law, assets, including shares, acquired during the course of a marriage are jointly owned.

(d) The Shares are said to represent approximately 50% of the value of total matrimonial assets so far as known to date by Mrs. H.

(e) On 9th August 2013, Mrs. H caused a "Stop Notice" to be issued in respect of the Shares and this was served on the Company.

(f) On 27th September 2013, the Company gave notice to Mrs. H of a proposed transfer of the Shares to a Samoan company called Crystal Touch Holdings Ltd (Crystal Touch"). The 14-day notice period under the Stop Notice expired on 11th October 2013.

(g) On 7th October 2013, Mrs. H applied for an injunction to restrain the transfer of the Shares. On 8th October 2013, the learned trial judge directed that Mr. T be served with the application for a hearing on 10th October 2013. On 10th October, an injunction was

granted against the Company until further hearing on 5th November 2013.

(h) In his evidence and during the hearing, Mr. T asserted that the Shares did not form part of the matrimonial assets, but rather that they belonged to a third party, one Mr. Zhu who he said controlled Crystal Touch. No evidence was tendered before the learned trial judge from Mr. Zhu or any person on behalf of Crystal Touch asserting, confirming or denying Mr. Zhu's ownership or entitlement, whether directly or indirectly to the Shares.

(i) On 5th November 2013, after considering the evidence filed on behalf of both Mrs. H and Mr. T, and hearing submissions on their behalf, the learned trial judge ordered that the injunction against the Company be continued until further order. It is from this order that Mr. T has launched this appeal.

The Appeal

[4] Mr. T, attacks the judge's decision on two main limbs namely, (a) the jurisdiction to grant the injunction, and (b) the exercise of the judge's discretion to granting the relief. However, Mrs. H has raised a primary objection to Mr. T bringing this appeal as she says he has no locus standi to do so as he is not a party to the proceedings and therefore cannot be an '*appellant'.* It is therefore necessary to first treat with this objection, which can be dispositive of this appeal.

Locus standi

[5] Counsel for Mrs. H says that Mr. T chose, for reasons he has not explained, not to be joined as a party, but rather to attend the hearings on 10th October and 5th November 2013 through his legal practitioners, from the safe distance of being merely an interested person resident outside the jurisdiction, and that the learned judge heard submissions on his behalf on that basis and in that capacity. This is

borne out by the transcript of the proceedings of 10th October 2013[1] in which the learned judge stated as follows:

> "So I can't make an order against him [Mr. T.] at all, although I am quite happy to listen to him as an interested person."

Reliance is also placed on CPR 62.1(2) which defines an "Appellant" as meaning *"the party who first files a notice of appeal"* (my emphasis), and CPR 2.4 which says that a "*party" includes both the party to the claim and any legal practitioner on record for that party unless any rule specifies or it is clear from the context that it relates to the client or to the legal practitioner only."* (My emphasis).

[7] Counsel for Mr. T, counters by relying on the full text of CPR 2.4 and placing reliance on the word ''*includes"* contained therein. I do not consider that the reliance placed on the full text of CPR 2.4 assists Mr. T's case any. Taken in its natural context it really does no more than to include in the term "party" a legal practitioner on record for that party. The fact remains that Mr. T is not "a party" to the proceedings having not been so named or joined, either on his own application which was open to him[2], or of the court's own initiative which is perfectly understandable having regard to the fact that Mr. T is not resident in the jurisdiction.

[8] Counsel for Mr. T also relies on a decision of the English Court of Appeal in MA Holdings Ltd. v George Wimpey UK Ltd.[3] There, the court was construing the English CPR 52.1(3)(d) which defines "appellant" as meaning "*a person who brings or seeks to bring an appeal."* The English CPR 52.1(3)(e) defines "respondent" as:

> "(i) a person other than the appellant who was a party to the proceedings in the lower court and who is affected by the appeal; and
> (ii) a person who is permitted by the appeal court to be a party to the appeal."

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[1] See Record of Appeal Tab. 5 p. 28.
[2] See CPR 19, which deals, among other things, with addition or joinder of parties.
[3] Also known as George Wimpey UK Ltd v Tewkesbury Borough Council [2008] 1WLR 1649.

Dyson LJ who delivered the judgment of the court in speaking of the definition "appellant" contained in that rule, said at paragraph 17 as follows:

> "I see no reason not to give the definition its plain and ordinary meaning. The word "person" in rule 52.1(3)(d)is not qualified by the words"" who was a party to the proceedings in the lower court". If it had been intended to restrict an "appellant" to a person who was a party in the lower court, one would have expected the draftsman so to provide expressly, especially as he has done so in relation to a "respondent" in the definition in rule 52.1.(3)(e)(i)."

[9] It becomes immediately apparent that the definitions in the English CPR with which Lord Dyson was there dealing is differently worded to, and may be said to be more expansive, than the definition contained in our CPR. The English CPR speaks of a "person". Our CPR speaks of a "party" which is then defined in CPR 2.4 as a "party" (or a legal practitioner of that party) to the claim. The "claim" could only be a reference to the proceedings in the lower court. I can see no good reason for expanding the natural and ordinary meaning of the definition as used in our CPR to encompass the meaning of the definition "appellant" as accorded under the English CPR. Had the framers of CPR so intended they could have done so by incorporating similar language as contained in the English CPR. Accordingly, MA Holdings does not assist Mr. T.

[10] Based on the foregoing, I conclude that Mr. T is not properly an appellant and thus has no standing without more, to bring this appeal and the same ought to be struck out. Assuming however, that he is a party to the proceedings,[4] I propose to deal in short order with the two main prongs of Mr. T's challenge to the learned trial judge's decision. I do so also bearing in mind that Mr. T claims to be an interested person notwithstanding that he disclaims any beneficial interest in the Shares, which he says belongs directly or indirectly to Mr. Zhu from whom nothing has been heard.

[4] The learned Judge in delivering his ruling on 5th November stated at pg. 50 of the transcript stated that Mr. T "*is not actually a formal party to these proceedings…"*

The jurisdictional challenge

[11] Mr. T argues that the judge did not, or did not sufficiently consider whether he had the jurisdiction to make such an order even having regard to the Black Swan[5] jurisdiction exercised by the court. This was the basis that a PRC judgment could not be enforced in any event in BVI having regard to CPR 7.3(5) (b) as this rule permits service out for the purposes of enforcement only in respect of foreign judgments capable of being registered under CPR 72[6] and a PRC judgment does not so qualify. This Court has however ruled in Westburg Anstalt v Profitstar Anstalt[7] that this provision ought to be accorded a purposive construction and that the words *"and registered in the High Court pursuant to Part 72"* should be ignored as "mere surplusage" so as to give effect to the intention of the framers of the Rules.

[12] Furthermore, as pointed out by Lord Nicholls in Mercedes Benz v Leiduck[8] and referred to by Bannister J in Black Swan[9], freezing orders are unlike ordinary interlocutory injunctions. The only purpose of a freezing order is to prevent dissipation of assets available to satisfy a money judgment. They do not depend upon there being a pre-existing cause of action and there is no reason in principle why a freezing injunction should be treated any differently to the circumstances in which a claim is issued which seeks only relief ancillary to a foreign judgment or award such as with anti-suit and Norwich Pharmacal claims. I agree with these observations and regard this as sufficient to dispose of this point.

The exercise of discretion

[13] The basis on which an appellate court would disturb the exercise of a trial judge's discretion is well established and has been stated and re-stated by a number of

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[5] See: BVIHCV2009/399 Black Swan Investment I.S.A v Harvest View Limited and Sablewood Real Estate Limited in which the court held (per Bannister J) that the court had jurisdiction to grant a freezing injunction in aid of a foreign money judgment.

[6] CPR 72 deals with judgments which may be registered for the purposes of enforcement pursuant to any enactment in a Member State/ Territory which provides for reciprocal enforcement of judgments.

[7] BVIHCMAP 2013/0020 decided by the Court of Appeal on 5th December, 2013.

[8] [1996] AC 284.

[9] Supra note 5 at para. 11.

decisions of this court. The decision of this court most often cited is Michel Dufour and Others v Helenair Coproration Ltd. and Others[10] in which Floissac CJ stated the principle thus:

> "We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate court is satisfied (1) that in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of the error, in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong."[11]

[14] In Bellenden (formerly Satterthwaite) v Satterthwaite[12] Asquith LJ, in language approved by the House of Lords[13] in G v G[14] expressed it this way:

> "… We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere."[15]

[15] I have considered the evidence available to the learned trial judge, I have also had regard to his reasoning contained in the transcript of the proceedings[16] for continuing the injunction. It is sufficiently clear there as to why the judge was satisfied, in the interest of justice, that the Shares should be preserved and why no fortification was ordered in respect of Mrs. H's cross undertaking. Indeed the order of the learned trial judge does nothing more than maintain the status quo. It must also be remembered that Mr. T disclaims any beneficial interest in the Shares. It cannot be said that the trial judge's decision in the circumstances of the matter as placed before him, exceeds the generous ambit within which

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[10] (1996) 52 WIR 188.
[11] Ibid at pp. 189-190.
[12] [1948] 1 All ER 343.
[13] Now the UK Supreme Court.
[14] [1985] 2 All ER 225.
[15] Supra note 12 at p. 345.
[16] See the Transcript of the Proceedings, November 5th 2013 pp. 50 -52.

reasonable disagreement is possible, and is in fact plainly wrong. Accordingly, the threshold for warranting an appellate court's interference has not been met.

Conclusion

[16] For all the reasons above given, the appeal is dismissed with costs to be paid by Tsoi Tin to be assessed unless agreed within 21 days.

Dame Janice M. Pereira, DBE
Chief Justice