Focus on Injunctions in the light of Paraskevaides Service of an injunction outside the BVI prior to

Insights - 06/05/2020

In its judgment given on 30 March 2020 in *Paraskevaides v Citco*[1], the Eastern Caribbean Court of Appeal considered a range of issues on appeal from the Commercial Court of the British Virgin Islands arising out of a dispute over ownership of a large Cyprus based international construction company.

One of the issues addressed is the problem where the BVI court grants an ex parte injunction prior to the issue of a claim form and where the applicant wishes to serve the injunction out of the jurisdiction.

This was a matter that appeared to have been settled by the Eastern Caribbean Court of Appeal in its earlier decision in *Halliwel Assets Inc et al v Hornbeam Corporation*[2], which decision was distinguished in *Paraskevaides*. This article provides an explanation for this distinction and an understanding of *Paraskevaides* in the context of the Court of Appeal's decision in *Convoy Collateral Ltd v Broad Idea International Limited & Anor*, which was handed down on the same day as *Paraskevaides.*

Background

George Paraskevaides was a highly successful businessman who, together with a partner, set up Joannou & Paraskevaides (Overseas) Limited (JPO). The Paraskevaides shareholding in JPO was held by a BVI company, whose shares were in turn held equally by four further BVI companies, each of which issued one bearer share.

Mr Paraskevaides died in 2007 and the control of JPO then produced a split between his widow Thelma and one child, Christina, on the one hand and the two other children, Leoni and Efthyvoulos. Three competing positions developed, which had different ramifications for the control of JPO, but the position came to a head when the Cypriot court replaced the

administrator of the estate. The new administrator caused the boards of the four BVI companies to be changed. At this stage Thelma and Christina sought and obtained urgent ex parte relief from Adderley J in the BVI to prevent use being made of these changes to effect change further down the corporate chain to the operating company, JPO. This relief was sought prior to the issue of a claim, but on the basis of an undertaking to issue one.

Wallbank J subsequently found that the claimants had breached their duty of full and frank disclosure on their application to Adderley J and that in at least one instance that had not been innocent. He accordingly discharged the injunction and declined to reimpose it. On appeal, the Court of Appeal addressed a number of issues in its judgment delivered on 30 March 2020, one of which is the focus of this briefing.[3]

Service out of the jurisdiction

The issue addressed by the Court of Appeal was that CPR Part 7 addresses service of court process out of the jurisdiction, and is so headed. It only provides for service out of the jurisdiction of claim forms, documents associated with a claim form, and documents in proceedings where a claim form had received this permission.

This issue had previously been considered by the Court of Appeal in *Halliwel Assets Inc et al v Hornbeam Corporation*. That case concerned an application for leave to serve an application for a third party costs order out of the jurisdiction. The Court of Appeal held (as summarised by Carrington JA in *Paraskevaides*) that *"such an application could only be served out of the jurisdiction with permission of the court under CPR 7.14 in the context of proceedings where 'the claim form in the proceedings in which the application is issued must be one which would qualify for service out under one of the gateways contained in CPR 7.3' "*.

This appeared to provide the negative answer to the question whether the court has power to grant leave to serve an injunction out of the jurisdiction where there is no claim form. However the Court of Appeal answered the question in *Paraskevaides* by distinguishing its own decision in *Halliwel* and saying that there is such a power – not under Part 7 dealing with the service of process out of the jurisdiction, but under Part 17, which deals with interim remedies.

The Court of Appeal's conclusion was based on CPR 17.2, which provides that the court may grant an interim remedy before a claim has been made if the matter is urgent or it is otherwise necessary to do so in the interests of justice and provides that if no claim has been issued the application must be made in accordance with the general rules about applications in Part 11. It concluded that *"it would be contrary to the spirit and intendment of the rule that the interim remedy can only be granted before the issue of a claim form when necessary in the interests of justice to say that the order granting the remedy then cannot be served on the respondent until the claim form is issued".*

Importantly, Webster JA found in *Convoy Collateral Ltd v Broad Idea International Limited & Anor*

"the BVI court does not have a common law or inherent power to serve a foreigner outside the jurisdiction with BVI proceedings"[4]. As the Privy Council found in *The Siskina*:

> "*The general rule is that the jurisdiction of the English court over persons is territorial. It is restricted to those upon whom its process can be served within the territorial limits of England and Wales. To this general rule there are some exceptions. These are now to be found in Order 11 of the Rules of the Supreme Court ...*"

In *Convoy Collateral* the Court of Appeal considered the issue of service out of an application for a free-standing injunction in support of foreign proceedings. As is apparent from the first instance judgment of Adderley J[5], no claim form was issued in the BVI, reliance presumably being placed on CPR 8.1(6), which provides:

> *"A person who seeks a remedy –*
>
> *(a) before proceedings have been started; or*
>
> *(b) in relation to proceedings which are taking place, or will take place, in another jurisdiction;*
>
> *must seek that remedy by application under Part 11."*

Webster JA held:

> *"The injunction sought by Convoy is to restrain a foreigner who is not and has not submitted to the jurisdiction from dealing with his assets within the jurisdiction. Convoy needed to satisfy the court that it had power under CPR7.3(2) to order service of the application for a freestanding injunction on Dr Cho outside the jurisdiction."*

Webster JA's conclusion was that *"the court does not have jurisdiction to grant a free standing Mareva injunction in support of foreign proceedings against a person who is not subject to the court's jurisdiction."* He rejected the submission that CPR 7.3(2) should be construed to allow service of an application for a free standing injunction on a person outside the jurisdiction: *"rule 7.3(2) allows the court to permit service of claim forms outside the jurisdiction, but not applications for freestanding injunctive relief".*

These judgments give rise to the question "does service out require a claim form or doesn't it?" The underlying distinction between *Convoy* and *Paraskevaides* therefore requires some analysis: what these cases together do is interpret the interaction between rule 17.2 and part 7, while setting down a strict ringfence for matters that fall within Part 7 generally. Together they make the following clear.

1. Where proceedings are to be brought by way of a form of process which is <u>not</u> capable of being brought by a claim form – for example a freestanding Notice of Application – then Part

7 cannot be engaged and service out will not be permitted (*Convoy*).

2. Where proceedings are to be brought by a claim form falling within Part 7, permission to serve out can be given before that claim form is issued, as long as there is an undertaking to provide a claim form (*Paraskevaides*).

While *Paraskevaides* attempts to accommodate the importance of rule 17.2 and the need sometimes to obtain an injunction before a claim is formulated, it leaves a dilemma for the court on which there is no guidance. When considering permission to serve out, the court is asked to give leave where a claim form, with formulated causes of action, does not yet exist. This is crucial as it is these features that the court tests against the gateways in Part 7. One would expect that to rationalise this process going forward, the Court will require litigants to be able at least to articulate the causes of action for the prospective claim form, for it remains a requirement to meet the test in rule 7.5(1) that an affidavit must confirm the deponent's belief that the claimant has a claim with a realistic prospect of success.

Conclusion

The result of this aspect of the decision in *Paraskevaides* is to provide a route to service out of urgent international injunctions with prospective claim forms. However, in order to accommodate both the orthodox approach in *Convoy* and the lack of a claim form to test against the Part 7 gateways, there needs to be further guidance, most conveniently in the CPR, as to the criteria to be adopted when applying *Paraskevaides.*

Nicholas Burkill and Nicholas Brookes appeared for the administrator at first instance and in the Court of Appeal, in both instances being led by David Chivers QC.

Nick Burkill is the BVI office head of Dispute Resolution for Ogier and in 2019 was appointed by the Chief Justice to be a member of the ECSC Rule Review Committee.

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Read our accompanying briefing here: Focus on Injunctions in the light of Paraskevaides - Full and frank disclosure in the BVI

[1] Thelma Paraskevaides & Anor v Citco Trust Corporation Limited & Ors BVIHCMAP2018/0046 on

appeal from the decision of Wallbank J dated 5 July 2018.

[2] BVIHCMAP 2015/0001 (12.10.15, unrep)

[3] In a separate briefing we consider the Court of Appeal's guidance on the duty of full and frank disclosure on ex parte applications and the effect of breach.

[4] BVIHVMAP2016/0030 (30.3.20) at [12]

[5] BVIHC(COM)2018/0019 (17.4.19) at [15]

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