

# Africa Edge S.a.r.l.vIncat Equipment Rental Ltd, Haden and Luba Freeport Ltd

<b>Jurisdiction:</b>	Jersey
<b>Judge:</b>	The Deputy Bailiff
<b>Judgment Date:</b>	10 October 2008
<b>Neutral Citation:</b>	[2008] JRC 175
<b>Reported In:</b>	[2008] JRC 175
<b>Court:</b>	Royal Court
<b>Date:</b>	10 October 2008

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## Text

[2008] JRC 175

ROYAL COURT

(Samedi Division)

Before:

M. C. St. J. Birt, **Esq.**, Deputy Bailiff, **sitting alone**.

Between  
Africa Edge S.a.r.l.  
Plaintiff  
and  
Incat Equipment Rental Limited  
First Defendant  
John Keith Haden  
Second Defendant

and

Luba Freeport Limited  
Party Cited

**Advocate J. Harvey-Hills for the Plaintiff.**

**Advocate S. Young for the Defendants.**

### **Authorities**

*Apricus Investments and others v CIS Emerging Growth Limited* [\[2003\] JRC 151](#) .

*Gidrxsime Shipping Co Ltd v Tantomar-Transportes Maritimos Lda* [\(1994\) 4 All ER 507](#) .

*Goldtron Limited v Most Investment Limited* 2002/148 .

*Re Esteem Settlement* [\[2003\] JLR 188](#) .

The Deputy Bailiff

- 1 This is an application by the plaintiff made *ex parte* to amend the order of justice by including a worldwide freezing order with accompanying worldwide disclosure requirements.
- 2 The background is that the first and second defendants had judgment taken against them in the Court of First Instance of Brussels in September 2002 at the instance of Banque Belgoise. According to the papers the defendants appeared and submitted to the jurisdiction of that Court. The claim was based on a loan to the first defendant which had been guaranteed by the second defendant. In September 2002 the Belgian Court of First Instance gave judgment against both defendants for various sums. There was judgment against both defendants for some \$6.6 million and an additional judgment against the second defendant for £1.4 million; interest was to accrue in each case. Subsequently, in May 2007, Banque Belgoise assigned the benefit of the Belgian judgment to the plaintiff in this case. Substantial sums remain owing under that judgment.
- 3 In July 2008 the plaintiff issued an order of justice against both defendants. The essential claim was to enforce the Belgian judgment here against the defendants. The first defendant is a Jersey registered company and the second defendant is a resident of Jersey. The original order of justice also sought injunctions and disclosure orders limited to Jersey assets.
- 4 The particular asset which the plaintiff wished to catch was a claim against a company

called Luba Freeport Limited, which was the subject of proceedings in the Royal Court brought by various members of the Incat Group and judgment was expected shortly. The claim was for several million pounds. Accordingly the injunction restrained Luba Freeport Limited from paying any monies, awarded under any judgment, away. Since then the Court has, in that case, reached its judgment and the effect is that the Incat Group cannot pursue their claim against Luba Freeport Limited until May 2009, but that they will be free to do so thereafter and I am told that they may well have a reasonably strong case. The disclosure made by the second defendant, in particular, in response to the original disclosure order was less than perfect. In particular, there was reference to the fact that he had told the Court, in the Luba proceedings, that he was the beneficial owner of a substantial proportion of the Incat Group. It now transpires that in fact he is a beneficiary under discretionary trusts in Guernsey which own the holding company of the Incat Group, which in turn owns the various subsidiaries. There were also applications by the second defendant for living expenses and legal expenses. It was clear that there were no funds in Jersey with which to provide those, but it is clear that there are funds elsewhere; they may well be in the Incat Group or they may be elsewhere. The second defendant has disclosed some assets elsewhere; in particular, properties.

- 5 The plaintiff now applies for a worldwide injunction, both in terms of a freezing order and a disclosure order. The application has been made *ex parte* but on notice. However I accept that the notice was short. Mr Young's firm received the papers during the course of yesterday; I think they received a draft of the amended order of justice and the accompanying affidavit in the morning of yesterday and the final papers towards close of business. The advocate dealing with it has at the last moment had to appear in another case and Mr Young has therefore had to appear at short notice. Furthermore the second defendant is apparently travelling in Africa. Nevertheless Mr Young has appeared and put forward what points he can.
- 6 I am going to consider first whether it is right to grant a worldwide freezing injunction on an *ex parte* basis. This is a judgment which was taken as long ago as 2002 and the plaintiff has had the benefit of that since May 2007. Notwithstanding the points put forward by Mr Harvey-Hills I am not convinced that the urgency of obtaining a worldwide Mareva injunction, or freezing injunction, is such that I ought to grant it *ex parte*. A worldwide injunction is a drastic remedy and the Court must clearly be satisfied that it is essential and that it is essential to grant it *ex parte*. In the particular circumstance of this case I am not convinced that the *ex parte* element is necessary and therefore I think that it should be dealt with on an *inter partes* basis. I emphasise that I say nothing about whether at that stage, if I am the judge, the Court is likely to grant a worldwide freezing order or not; that will be a matter for decision after argument. But I think that the defendants should have the opportunity of putting forward their case, notwithstanding the point made by Mr Harvey-Hills that the second defendant, in particular, is a Jersey resident and therefore this Court is the appropriate Court to grant a worldwide injunction. Those are all matters for consideration in due course.
- 7 However I do think that it is proper, on an *ex parte* basis, to widen the current injunction. It is

clear, from what we know, that the main Jersey asset is the claim against Luba Freeport Limited and that is owned by one or more companies within the Incat Group. That group is owned by the two Guernsey trusts. It is clear that Mr Haden is a beneficiary of those trusts and from the way he spoke when he gave evidence, he clearly regards himself as being an important beneficiary of that trust, in that he spoke of being the beneficial owner. In the circumstances, in order to protect the position in Jersey, I do consider it reasonable and proportionate to extend the injunctions so as to ensure firstly that Mr Haden does not dispose of any of his interest in the trust, and secondly that full information about the trusts is forthcoming. I am, therefore, going to grant an injunction to address both those aspects.

- 8 The remaining part of the application refers to an application for worldwide disclosure. On this aspect I have been referred to a number of cases. The first one is *Apricus Investments and others v CIS Emerging Growth Limited* [2003] JRC 151. The significance of that case is that it made clear that this Court adopts the principles set out in the judgment of Coleman J in *Gidrxsime Shipping Co Ltd v Tantomar-Transportes Maritimos Lda* (1994) 4 All ER 507. That judgment was also approved and applied by this Court in the case of *Goldtron Limited v Most Investment Limited* 2002/148. It is clear that the approach of the Court is rather different post-judgment to pre-judgment. Furthermore, Coleman J made it clear that, even in cases where a court was not minded to grant a worldwide Mareva injunction, it nevertheless had jurisdiction to order worldwide disclosure in aid of execution. Two of the relevant passages quoted were as follows, first of all at page 519:-

**" Where, by contrast, one has the position that a judgment has already been obtained or an award made and where a Mareva injunction in aid of execution is justified, the jurisdiction to make a disclosure order arises both as a power ancillary to and in support of the injunction and, independently of the injunction, as a power in support of the execution of the judgment or award.** It follows that whereas it may on the facts of the case in question be inappropriate to extend the Mareva injunction to assets outside the jurisdiction-and it is clear from the two authorities cited that such extensions are likely to be rarely justified-very different considerations may apply to disclosure orders in aid of execution. That being so, there is, in my judgment, **a very firm jurisdictional basis for an order, made post-judgement or post-award, which includes both a Mareva injunction confined to assets within the jurisdiction and a disclosure order in respect of worldwide assets"**.

And later on he went on to say, on page 521:-

**" In my judgment, quite different considerations apply in the case of a post-judgment or post-award disclosure order.** In such cases it is just and convenient that the judgment or award creditor should normally have all the information he needs to execute the judgment or award anywhere in the world".

In my judgment this is particularly applicable where the judgment debtor is a resident of Jersey, in other words this is the home jurisdiction so far as the debtor is concerned and it is therefore, in my judgement, very often the appropriate Court to make a worldwide disclosure order because it has *in personam* jurisdiction over that defendant.

- 9 I consider that this case is akin to a post-judgment or post-award case. It is true of course that there is no judgment in Jersey as yet, but there was a judgment in Belgium as long ago as 2002, to which both defendants submitted. It is therefore a case where, applying normal principles of private international law, one would expect that judgment to be capable of enforcement in this jurisdiction without reinvestigation of the merits. I am told that some application has been made in Belgium to set aside or challenge the judgment, but for the moment it seems to me the Court must proceed on the basis there is a valid judgment.
- 10 Accordingly I do consider that this is a case where the sort of principles that I have just described in the *Gidrxsime* case are applicable. In my judgement, given the history of this matter, given the fact that the Belgian judgment has been outstanding so long but that payment has not been made, and given the inadequate disclosures initially made, it is proper to require the defendants to give disclosure of their worldwide assets, even in advance of any decision on whether a worldwide freezing order should be given. It seems to me that in a post-judgment case it is right, as Coleman J said, that a creditor should normally have all the information he needs to execute the judgment or award anywhere in the world. The disclosure of the information will then enable the plaintiff, if so advised, to institute proceedings where there are other assets.
- 11 Returning to the question of the injunction, I have already indicated that I regard the position of the trusts in Guernsey somewhat differently. I must address the point which Mr Young raised, which is that *prima facie* the assets in the Guernsey trusts will not be available to meet the judgment against Mr Haden and therefore it would be wrong to freeze them. Of course the freezing of the trust assets themselves will be a matter for decision by the Royal Court of Guernsey; this Court is not being asked to freeze the assets of the trusts, I am only being asked to restrain the defendant from either procuring disposal of the trust assets or disposing of any interest he may have. Nevertheless I do think it important to remind oneself of what was said in *Re Esteem Settlement* [2003] JLR 188, in particular at paragraph 96. It is clear from that paragraph and the authorities referred to earlier in that case that the courts do, on occasion, grant a freezing injunction in respect of trust assets where there is a claim against a settlor or a beneficiary, because at that stage it is not known whether there will be some ground for attributing the assets in the trust to the alleged debtor. For example he may have put the assets in there at a time when he was insolvent, or the trust may be a sham, or other matters. In this case this judgment was taken some time ago and the guarantee was entered into as long ago as March 1998. I do think it entirely proportionate that the information about the trusts should be forthcoming and that the limited freezing order which I have described should be granted at this stage. Of course it will eventually be a matter for the Guernsey Court as to whether any judgment can be enforced against the trust assets. For these interlocutory purposes I consider that what I am being asked to order is proper and reasonable.
- 12 I therefore propose to grant an order broadly in the terms of the draft, although we shall need to consider the exact wording. Taking paragraph 1, which is the disclosure of information, broadly speaking I am content to grant an order along those lines although, in

deference to the position on the trusts and the jurisdiction of the Royal Court of Guernsey, I am not sure that I will grant an order for disclosure of any letter of wishes at this stage. As to paragraph 2, which deals with disposal of assets, I am prepared to widen that so as to catch the Guernsey trust assets in the manner which I have described, namely that he must not procure the disposal of them, nor must he dispose of any interest of his own. I will hear argument on the exact wording but I am not willing to widen that at this stage to a general worldwide injunction; that will be a matter for an *inter partes* hearing.

*[Advocate Young seeks leave to appeal]*

13 Leave to appeal is granted.

*[Submissions are made with regard to costs]*

14 Costs are awarded in the cause.