

## ancillary proceedings: new guidelines

Ancillary orders abroad have long been a common occurrence in cases of international fraud in order to ensure that English worldwide freezing orders are enforced locally in the jurisdiction in which assets are located. The case of *Canada Trust v Stolzenberg* [2002] 1 AC 1 was not untypical in having such ancillary proceedings in France, Germany, Switzerland, the Netherlands Antilles and British Virgin Islands. Within the European Union and EFTA states the process is facilitated by the provisions for the grant of protective measures, without substantive proceedings, in Article 31 of the Council Regulation No 44/2001 and Article 24 of the Lugano Convention respectively.

Of course the existence of multiple proceedings can, however, be oppressive to a defendant who may have limited resources available to fight on a number of fronts particularly where he has heavy disclosure obligations in England or is already engaged in a number of interlocutory hearings before the English Courts. Hence, since the decision in *Derby & Co Ltd v Weldon* [1990] Ch 48 it has become standard form in cases of worldwide freezing injunctions for the applicant to give an undertaking not to commence proceedings abroad to enforce the freezing order without the permission of the court.

Detailed guidance on the approach of the court to such applications, however, was lacking until the recent decision of the Court of Appeal in *Dadourian Group International Inc v Simms* [2006] EWCA Civ 399. The

Court has now set out eight, non-exclusive, guidelines on the exercise of discretion in this area: (1) the grant of permission to enforce abroad had to be just and convenient for the purpose of ensuring the effectiveness of the worldwide freezing order and not oppressive to the parties to the English proceedings or third parties who might be joined to the foreign proceedings; (2) all relevant circumstances and options needed to be considered, including extending the usual cross-undertaking to cover third party costs to third parties abroad, as well as the proportionality of the steps proposed abroad; (3) the interests of the applicant had to be balanced against the interests of other parties including third parties likely to be joined; (4) permission should not normally be given where the proceedings abroad would result in the grant of relief superior to that given by the English freezing order; (5) the evidence should enable the judge to make an informed decision, including evidence of the applicable law and practice of the foreign court, evidence of the proposed proceedings, evidence of the location of assets and the names of the parties in whose names the assets are held; (6) the applicant must show that there is a real prospect that there are assets within the compass of the worldwide freezing order and located within the jurisdiction of the foreign court in question; (7) there must be evidence of a risk of dissipation of the assets in question; and (8) normally the application should be made on notice to the respondent but in cases of urgency, where it is just to do so, permission may be given without notice although

the other party should then be given the earliest practicable opportunity to have the matter reconsidered.

Much of this guidance is not revolutionary. What is distinctly new is the particular emphasis now placed on protection for third parties. Their position will need to be considered much more carefully than has commonly been the case hitherto with the cross-undertaking in costs potentially having to be extended to cover them in most cases. However, Arden LJ, who gave the judgment of the Court, noted at paras 38-39 the earlier observations in *International Credit and Investment Co Ltd v Adnam* [1998] BCC 134, that the use of shadowy offshore trusts and companies in jurisdictions where secrecy is highly prized was a common theme in cases of international fraud. She thus observed that "less weight needs to be given to the interests of a third party who is not independent of the parties against whom the [worldwide freezing order] was obtained".



**Philip Marshall QC** acted for the claimants in *Canada Trust v Stolzenberg* and has regularly represented both claimants and defendants in complex international fraud claims involving ancillary proceedings abroad.

## chambers: news

Legalease launched the Legal Marketing Awards in April to celebrate excellence in the provision and implementation of strategic marketing solutions for the benefit of legal practice. Serle Court was pleased to have been nominated for the Best Marketed Chambers award and was delighted to be Highly Commended by the judges.

Ann McAllister has been appointed as the first full time deputy adjudicator and recorder to the HM Land Registry and as a result she left Serle Court at the end of March. We are delighted for Ann but we are also sad to see her go after many happy years in chambers. Ann has contributed enormously to the development of Serle Court during this time and in particular to our growing expertise and reputation in the field of property.

We ran a very successful roadshow in Manchester in March at the Lowry Hotel. The seminars covered commercial, company and property subjects. They were presented by nine barristers to over sixty local solicitors.

Finally, we are delighted that Matthew Morrison has returned from an eight month secondment at Quin & Hampson in the Cayman Islands to start his tenancy.