*968 NML Capital Ltd v Chapman Freeborn Holdings Ltd & Ors.

No Substantial Judicial Treatment

Court
Court of Appeal (Civil Division)

Judgment Date
23 May 2013

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[2013] EWCA Civ 589
[2013] 1 C.L.C. 968

Court of Appeal (Civil Division).

Jackson , Tomlinson and Floyd L JJ .

Judgment delivered 23 May 2013.

Judgment creditor—Enforcement—Norwich Pharmacal jurisdiction—Vulture fund purchasing sovereign debt of Argentina which was in default—New York judgment against Argentina—Attempt to enforce English judgment obtained on basis of New York judgment—Application for Norwich Pharmacal relief against aircraft broker chartering aircraft for Argentinean president—Whether applicant entitled to disclosure from broker of judgment debtor's bank account details—Broker not mixed up in any wrongdoing so as to give rise to availability of Norwich Pharmacal relief—No real connection between broker's activity and failure to discharge judgment debt—Creditor's appeal dismissed.

This was an appeal concerned with the scope of the Norwich Pharmacal jurisdiction.

The appellant, NML, was a judgment creditor of the Republic of Argentina. The third respondent, Chapman Freeborn, was an aircraft charter broker and part of an international group.

NML had purchased sovereign debt of Argentina on which it had defaulted. It had obtained a New York judgment and brought an English action on that judgment. NML then attempted to enforce the English judgment it obtained.

Argentina had chartered an aircraft through Chapman Freeborn for its president's use on an international tour, rather than use its own aircraft which it thought might possibly be seized by a creditor. During the charter use NML applied for Norwich Pharmacal relief, seeking details of the charter agreement with a view to realising its value to the extent that it had not been fully performed. It also sought information about the bank accounts from which any payment under the charter agreement might have been made.

Chapman Freeborn's evidence, which NML accepted, was that the balance of the charter had no realisable value. However, NML still sought information concerning the bank account on the basis that half of the hire was due after completion of the charter.

The judge accepted that Chapman Freeborn had become innocently caught up in the arrangement of a charter which had, from the Republic's point of view, the objective of avoiding attachment of its assets in order to pay judgment ***969*** debts. However, he refused relief as a matter of discretion. NML appealed. By a respondent's notice Chapman Freeborn contended that it was not mixed up in any wrongdoing so as to give rise to the availability of Norwich Pharmacal relief.

Held , dismissing the appeal:

If the Norwich Pharmacal jurisdiction was not to become wholly unprincipled, the third party had to be involved in the furtherance of the transaction identified as the relevant wrongdoing. The relevant wrongdoing was failure to satisfy the judgment debt and there was no real connection between Chapman Freeborn's activity as a broker and the failure to discharge the judgment debt. Norwich Pharmacal relief was rightly refused on the ground that Chapman Freeborn was not mixed up or involved in wrongdoing by Argentina.

The following cases were referred to in the judgment:

Ashworth Hospital Authority v MGN Ltd [2002] 1 WLR 2033 .
Axa Equity & Law Life Assurance Society plc v National Westminster Bank plc [1998] CLC 1177 .
Campaign Against Arms Trade v BAE Systems plc [2007] EWHC 330 (QB).
Mercantile Group (Europe) AG v Aiyela [1994] QB 366 .
NML Capital Ltd v Argentina [2011] UKSC 31; [2011] 2 CLC 373 .
Norwich Pharmacal Co v C & E Commrs [1974] AC 133 .
R (on the application of Omar) v Secretary of State for Foreign and Commonwealth Affairs [2013] EWCA Civ 118 .
Rugby Football Union v Consolidated Information Services Ltd [2012] UKSC 55 .

Representation

Andrew Onslow QC and Matthew Parker (instructed by Dechert LLP) for the appellant.
Peter De Verneuil Smith (instructed by Taylor Wessing LLP) for the respondent.

JUDGMENT

Tomlinson LJ:

1. This appeal is concerned with the scope of the Norwich Pharmacal jurisdiction – *Norwich Pharmacal v C & E Commrs [1974] AC 133* . It arises in the context of an attempt by a judgment creditor to enforce a judgment against a judgment debtor determined to resist enforcement. If successful, it would, in the words of Longmore LJ in granting permission to appeal to this Court, ***970***

> ‘be the first case in which a bona fide company doing business with a judgment debtor would find itself on the receiving end of a Norwich Pharmacal order merely to assist a judgment creditor in enforcing his or her judgment.’

2. The appellant, NML Capital ('NML'), is a judgment creditor of the Republic of Argentina. The third respondent, Chapman Freeborn Airchartering Limited ('Chapman Freeborn'), is an English company, part of a group of companies specialising in aircraft charter broking for commercial and private users of both cargo and passenger aircraft ('the group'). The group has an international reputation, with associated group offices in 26 countries. Its clients include a number of sovereign states, NGOs (including relief organisations such as the UN), heads of state and a range of companies and wealthy individuals. The group is widely regarded as a leading aircraft charter broker but operates in a highly competitive price-sensitive global market, with many of its competitors being based outside the UK. Chapman Freeborn is the UK group operating company for aircraft charter broking.

3. The circumstances in which NML became a judgment creditor of Argentina are described by Lord Phillips in his judgment in *NML Capital Ltd v Argentina [2011] UKSC 31; [2011] 2 CLC 373* . Those are the proceedings in which NML obtained an English judgment against the republic. Paragraph 1 of the speech of Lord Phillips reads, in relevant part, as follows:

> 'The appellant ("NML") is a Cayman Island company. It is an affiliate of a New York based hedge fund of a type sometimes described as a "vulture fund". Vulture funds feed on the debts of sovereign states that are in acute financial difficulty by purchasing sovereign debt at a discount to face value and then seeking to enforce it. This appeal relates to bonds issued by the Republic of Argentina in respect of which, together with all its other debt, Argentina declared a moratorium in December 2001. Between June 2001 and September 2003 affiliates of NML purchased, at a little over half their face value, bonds with a principal value of US$ 172,153,000 ("the bonds"). On 11 May 2006, NML, as beneficial owner, obtained summary judgment on the bonds for a total, including interest, of US $ 284,184,632.30, in a Federal Court in New York. NML brought a common law action on that judgment in this jurisdiction and succeeded before Blair J in the Commercial Court. That judgment was reversed by the Court of Appeal, which held that Argentina is protected by state immunity …'

4. The Supreme Court held that Argentina was not protected by state immunity. NML turned its attention to enforcement of the English judgment, after many unsuccessful attempts to enforce the New York judgment.

5. In late December 2012 the Chapman Freeborn group received a tender enquiry from the Office of the Argentinean President, ('the Office'), which enquiry was also made to other potential charter brokers. The Chapman Freeborn group had previously ***971*** sub-chartered an aircraft to the Office. Sub-chartering is the normal method by which the group deals with its customers, including sovereign states and NGOs. The group is typically approached by potential customers wishing to charter aircraft by way of enquiry and then contacts operators of aircraft with a view to matching the customer's requirements to a suitable aircraft. Relevant issues include the itinerary and schedule, availability and price. Although the group companies act as broker, the standard practice is for a group company to enter into back to back contracts as principal. The group company enters into a charter contract with the operator and then into a corresponding sub-charter with the customer. It follows therefore that any change or alteration to the sub-charter can only take place if the operator agrees to amend the head charter.

6. On receipt of the enquiry from the Office, Chapman Freeborn in turn made enquiries of several aircraft operators in order to establish the availability of suitable aircraft and price. The Office stipulated a number of requirements including the class of aircraft, routing, schedule, catering and crew expertise. Chapman Freeborn reverted to the Office with a number of potential solutions, one of which was accepted.

7. Chapman Freeborn duly entered into a sub-charter contract with the Office on 29 December 2012 and on 3 January 2013 entered into a charter agreement with the operator, which is registered in the European Union. Attached to both contracts is a flight programme which is very specific given the need for, inter alia, pre-flight permissions, airport scheduling, re-fuel planning and crew rostering. The fully inclusive contract price in the sub-charter was US$880,000. The price payable by Chapman Freeborn to the operator was US$770,000. The balance of US$110,000 is Chapman Freeborn's broking fee. The unique itinerary, given the routing, started in Argentina on 10 January 2013 and involved visits to Cuba, the UAE, Indonesia, Vietnam and refuelling stops in the Canaries and the Seychelles. Return to Argentina was scheduled for 22 January 2013. By 15 January 2013, a date the significance of which will become apparent hereafter, the flights to Cuba and the UAE had already taken place.

8. NML got to hear of this arrangement, although not of course the details, on or by 14 January 2013. It was no secret. On 8 January 2013 there appeared in the Argentine newspaper Clarin an article attributing to the Office confirmation that the Government would not use the Presidential plane TO1 for President Kirchner's forthcoming tour of Asia ‘out of fear of it being seized by hedge funds’. To replace it, ‘a plane was leased from a British company’.

9. NML took the view that the unexpired portion of the charter might have some realisable value. Accordingly, on 14 January 2013 NML made a without notice application to Cooke J in the Commercial Court for Norwich Pharmacal relief. It sought details of the charter agreement with a view to realising its value to Argentina to the extent that it had not been fully performed. It also sought information about the bank accounts from which any payment under the charter agreement might have been ***972** made. It pointed out that such information might assist it in identifying other potential assets, such as bank accounts, against which it could pursue enforcement remedies.

10. Cooke J made the order as sought but set the time limit for compliance so as to enable the respondents the opportunity to appear in order to object to the making of the order.

11. On 15 January Chapman Freeborn appeared at very short notice in order to object. From its evidence it was clear that the seven day balance of the charter had no realisable value, and this was accepted by NML. NML held out however for information concerning the bank account. US$440,000 had been paid, and the balance of a further US$440,000 was due 10 days after completion of the charter. Cooke J had therefore to decide whether it was appropriate to compel disclosure of the account or accounts from which those sums had been or presumably would be paid.

12. There was and is no suggestion that Chapman Freeborn either knew or suspected that the Office was entering into the sub-charter agreement with a view to avoiding the impounding of a state owned aircraft so as to protect it from execution in order to satisfy, albeit only in part, the judgments obtained against Argentina in respect of its sovereign debt.

13. The judge had before him, as did we, extensive evidence as to the efforts made by Argentina to frustrate enforcement of the judgment entered against it in New York. There was also evidence to the effect that Argentina is able to meet the

judgment but that it is determined not to do so. Its Minister of Finance has recently been reported as saying that Argentina will not pay the vulture funds.

14. Although describing it as 'somewhat uncharted territory' the judge accepted that Chapman Freeborn had become innocently caught up in the arrangement of a charter which had, from the Republic's point of view, the objective of avoiding attachment of its assets in order to pay judgment debts and 'that that element of the criteria which apply to the exercise of [the Norwich Pharmacal] jurisdiction is made good'. The judge also apparently accepted that the Norwich Pharmacal jurisdiction is available post judgment in aid of execution. The judge had no need to give detailed consideration to either of these points as he was satisfied that relief should be refused on discretionary grounds. He concluded that the commercial interests of Chapman Freeborn would be damaged by its compliance with such an order becoming known, and that such damage would extend not just to its business relationship with the Republic of Argentina but possibly to its business relationship with other international customers as well. Against that was to be weighed the potential benefit which would accrue to NML. As to that, the judge considered that the evidence before the court demonstrated no more than that there must be some form of bank account from which payments to Chapman Freeborn had been made and would presumably be made in the future. There was no evidence of there being in the bank account substantial sums against which NML could execute. The judge concluded that the potential benefit ***973*** thus demonstrated was insufficient to justify the invasion of Chapman Freeborn's interests and business relationships. He also doubted whether it was the purpose of the Norwich Pharmacal jurisdiction to require, as a matter of course, of a third party dealing with a judgment debtor, disclosure of information in its hands showing the whereabouts of the bank accounts of the judgment debtor.

15. NML appeals to this court on the basis that the judge exercised his discretion on a flawed basis. The judge it is said:

(i) failed to take into account the strong public policy in enforcing judgments;
(ii) wrongly took into account the commercial interests of Chapman Freeborn, which are irrelevant, alternatively attributed greater weight to these interests than either the evidence or an objective evaluation justified;
(ii) wrongly placed on NML a burden to show 'a clear possibility' of there being substantial funds in the relevant bank account against which it could levy execution;
(iv) erred in approaching the matter on the basis that there might not be funds, or substantial funds, in the bank account; and
(v) erred in approaching the matter on the basis that NML's interest was limited to identifying funds in the specific account from which Chapman Freeborn had been or would be paid.

16. By a respondent's notice issued after permission to appeal had been given by Longmore and Aikens L JJ Chapman Freeborn seeks to support the judgment not just on the basis that the judge's exercise of discretion was both unimpeachable and correct but also on the grounds that:

(i) the Norwich Pharmacal jurisdiction does not apply to the enforcement of judgements; alternatively
(ii) Chapman Freeborn was not mixed up in any wrongdoing so as to give rise to the availability of Norwich Pharmacal relief.

17. The last point is potentially dispositive and I propose to consider it first.

18. It was the submission of Mr Andrew Onslow QC for NML that merely by trading with a judgment debtor in circumstances where the judgment debtor is choosing to use his funds to pay the trader rather than to discharge his judgment debt, a trader becomes mixed up in the judgment debtor's wrongdoing, viz his failure to satisfy the judgment debt, and that Norwich Pharmacal relief is thus available, albeit subject to the discretionary consideration that it must be necessary and proportionate to grant it. The formulation of that proviso is derived from paragraph 36 of the speech ***974*** of Lord Woolf CJ in *Ashworth*

Hospital Authority v MGN Ltd [2002] 1 WLR 2033 at 2042. Ashworth is also authority for the proposition that it is immaterial whether the relevant wrong doing is tortious, as in Norwich Pharmacal itself, or contractual.

19. Mr Onslow submitted that he did not however on the present facts need to satisfy the court as to the full width of his submission. He submitted that the wrongdoing relied upon by NML is Argentina's persistent refusal to pay its judgment debts and its taking of deliberate steps to evade enforcement. The chartering of an aircraft to avoid attachment of the presidential plane is part of that wrongdoing. If Argentina had deliberately removed its assets from the English or another amenable jurisdiction in order to avoid execution against them that would, he submitted, constitute wrongdoing and the position in the present case is, he suggested, in substance no different. Chapman Freeborn was, albeit innocently, involved or mixed up in this wrongdoing. That was the purpose of chartering a plane for the presidential trip rather than using the presidential aircraft.

20. The classic exposition of the Norwich Pharmacal jurisdiction is to be found in the speech of *Lord Reid, [1974] AC 133* at p 175. He there said:

> '[the authorities] … seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should cooperate in righting the wrong if he unwittingly facilitated its perpetration'.

21. In *Ashworth, [2002] 1 WLR 2033* at p 2042, Lord Woolf CJ said:

> '35. Although this requirement of involvement or participation on the part of the party from whom discovery is sought is not a stringent requirement, it is still a significant requirement. It distinguishes that party from a mere onlooker or witness. The need for involvement (the reference to participation can be dispensed with because it adds nothing to the requirement of involvement) is a significant requirement because it ensures that the mere onlooker cannot be subjected to the requirement to give disclosure. Such a requirement is an intrusion on the third party to the wrongdoing and the need for involvement provides justification for this intrusion.'

22. There has been some discussion in the authorities of the question whether facilitation of the wrongdoing is required, as opposed to involvement or participation. The point is discussed, albeit obiter, by Maurice Kay LJ in paragraphs 36–40 of his ***975** judgment in *R (on the application of Omar) v Secretary of State for Foreign and Commonwealth Affairs [2013] EWCA Civ 118* . He noted that in Norwich Pharmacal itself only Lord Reid and Lord Cross of Chelsea had spoken of facilitation, Lord Morris and Viscount Dilhorne having spoken of involvement and Lord Kilbrandon of the significance of not being merely a bystander. Founding on the speech of Lord Woolf in Ashworth as set out above, which attracted the support of the whole House, Maurice Kay LJ, with whom Lord Judge CJ and Richards LJ agreed, concluded that facilitation need not be established.

23. Hoffmann LJ in *Mercantile Group (Europe) AG v Aiyela [1994] QB 366* at page 374 stated as the first requirement for Norwich Pharmacal relief that the third party must have become mixed up in the transaction concerning which discovery is required. The transaction must of course be identifiable as wrongdoing. In *Axa Equity and Law Life Assurance Society v National Westminster Bank plc [1998] CLC 1177* the bank had advanced a loan to a company the existence of which had been concealed from further lenders to the company by a fraudulent director of the borrower company. The relevant 'transactions' for Norwich Pharmacal purposes were the falsification by the company of a copy of a letter from the bank to the company recording the loan and the alleged failure of the company's auditors properly to ascertain the company's liabilities. This court found an insufficient connection between the bank lending the money and either of the two 'wrongful' transactions. As Morritt LJ put it,

> 'The only connection with the relevant transaction was as a banker to the company and author of a letter giving information to the company at its request which was both factual and accurate.'

24. Both Lord Judge in Omar and Lord Kerr in *Rugby Football Union v Consolidated Information Services Ltd [2012] UKSC 55* emphasised the need for flexibility in the development of the Norwich Pharmacal principle – see per Lord Judge at paragraph 2 and per Lord Kerr, with the concurrence of the rest of the Supreme Court, at paragraph 15. The essential purpose of the Norwich Pharmacal remedy is of course to do justice – if authority is needed for that proposition see per Lord Kerr at paragraph 17.

25. This notwithstanding, it is in my judgment clear that if the Norwich Pharmacal jurisdiction is not to become wholly unprincipled, the third party must be involved in the furtherance of the transaction identified as the relevant wrongdoing. King J put it well in Campaign Against Arms Trade v BAE [2007] EWHC 330 (QB) at paragraph 12 when he said:

> 'The third party has to have some connection with the circumstances of the wrong which enables the purpose of the wrongdoing to be furthered.'

26. It follows that it is important to analyse with some care in what precisely lies the alleged wrongdoing. There is nothing inherently wrong in chartering an aircraft, ***976*** unless it be said that any trading by a judgment debtor which involves using his assets for that purpose rather than satisfying a judgment debt is in itself wrongdoing. However I reject that proposition. It would lead to a jurisdiction of absurd width. It is no answer to that objection that the exercise of the jurisdiction would be subject to discretionary considerations. It would be absurd and exorbitant if parties were exposed to the risk of having to defend applications for discovery on the basis of no more than having traded with a person who turns out to have been at the relevant time a judgment debtor. It would encourage speculative litigation.

27. The present case is in my judgment completely different from one in which assets are removed from a jurisdiction for no purpose other than to insulate them from execution in satisfaction of a judgment debt. Such a transaction would arguably be in itself for relevant purposes wrongful. So too the transfer of assets between persons or companies for a similar purpose, as in the case of transfers of money to Mrs Aiyela by Mr Aiyela and companies which he controlled as arguably had occurred in the Mercantile Trust case. The evidence in that case demonstrated that that was arguably done for the purpose of frustrating

execution against Mr Aiyela's assets. Mrs Aiyela was, in the words of Steyn LJ, mixed up in her husband's attempt to make himself judgment proof – see at page 376G.

28. I agree with Mr De Verneuil Smith that the provision by Chapman Freeborn of chartering services did not further the failure to discharge the English judgment. In my judgment there was no real connection between Chapman Freeborn's activity as a broker and the failure to discharge the judgment debt. There was no obligation on the Republic of Argentina to transfer its assets into places where execution could be levied against them. It was neither a breach of contract nor a tort nor, in my judgment, any other species of wrongdoing for Argentina to choose not to use the presidential aircraft for the trip in question. As Jackson LJ put it in the course of the argument, since attachment of the aircraft would lead to its sale in order to satisfy the judgment debt, the highest that the case for NML can really be put is that the relevant wrongdoing consists in failing to sell the aircraft in order to use the proceeds to discharge the judgment debt. There is no connection between Chapman Freeborn's activity as chartering broker and the Republic's failure to sell the aircraft. In truth however the relevant wrongdoing here in my judgment lies simply in the failure to satisfy the judgment debt. That is the transaction in which NML must show that Chapman Freeborn has become involved or mixed up. There is however simply no connection between the activity of Chapman Freeborn and this transaction, let alone actual involvement in it.

29. Mr De Verneuil Smith gave some telling examples. Argentina wishes to purchase a commodity which is readily available in several jurisdictions. Rather than purchase it in London, where the commodity might be susceptible to attachment for enforcement purposes before shipment, it purchases it in country Y where no such procedures are available. Is the seller in country Y to be regarded as mixed up in wrongdoing? Manifestly not. An English judgment debtor has a secret stash of cash ***977** and wishes to spend it rather than hand it over to the judgment creditor. He spends the bulk of the money at The Ritz and gives the rest to a benevolent fund. Are the hotel and the charity involved in wrongdoing? Manifestly not.

30. Accordingly, I would uphold Cooke J's refusal of Norwich Pharmacal relief on the ground alone that an essential prerequisite to the availability of the relief is not made out. Chapman Freeborn is not mixed up or involved in wrongdoing by the Republic of Argentina. Its conduct is in no real sense connected with the relevant wrongdoing. At the very least, the connection is remote and insufficient.

31. This conclusion renders it unnecessary to consider whether Norwich Pharmacal relief is available post judgment in aid of execution. I agree with Mr De Verneuil Smith that the decision of this court in Mercantile Trust v Aiyela does not compel the conclusion that it is. The disclosure order there made was ancillary to a Mareva injunction, now known as a freezing injunction, and the court's jurisdiction to grant it was derived from section 37(1) of the Supreme Court Act 1981 and the court's ancillary power to ensure that such an order is effective. Mr De Verneuil Smith submitted that Hoffmann LJ was wrong to say in Aiyela , at page 374, that the exercise of this jurisdiction against third parties was discussed in Norwich Pharmacal . By the same token, he submitted that Steyn LJ was also wrong to say that the court derived its jurisdiction to make a disclosure order against Mrs Aiyela by analogy with Norwich Pharmacal relief. I do not need to discuss this further, save to observe (1) that the Norwich Pharmacal jurisdiction is an equitable jurisdiction, as appears clearly from the speeches in that case and (2) that the starting point of the exercise of Mareva or freezing injunction relief in aid of enforcement is that the respondent has, or arguably has, within its control assets of the judgment debtor against which the judgment creditor can enforce. The control of such assets raises wholly different considerations from mere trading with a judgment debtor.

32. Whether the Norwich Pharmacal jurisdiction should be available post judgment in aid of execution is a wider question. I am not convinced by the further argument of Mr De Verneuil Smith that vindication of rights is complete when judgment is obtained and that the equitable jurisdiction is then spent. However, if Norwich Pharmacal relief *is* available post judgment in aid of execution it will only, I consider, be available in very particular and restricted circumstances. It could not be enough to engage the jurisdiction merely to trade with the judgment debtor. Lord Reid spoke of the essence of the jurisdiction being that justice requires that the innocent party mixed up in wrongdoing should co-operate in righting the wrong if he unwittingly facilitated its perpetration. Leaving on one side the debate as to facilitation, it seems to me unlikely that the jurisdiction could

be engaged short of involvement in something which in itself and necessarily amounts to what Sir Thomas Bingham MR in Aiyela described as ‘wilful evasion’ by the judgment debtor. Non-satisfaction of a judgment debt is not wilful evasion of it.

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33. It is also unnecessary to consider whether Cooke J was sufficiently aberrant in the exercise of his discretion as to entitle this court to interfere. I should however take this opportunity to emphasise that Cooke J was in my view obviously correct to take into account the commercial interests of the Respondents. That this is a legitimate indeed vital consideration emerges clearly both from the speech of Lord Cross in Chelsea in Norwich Pharmacal and from the judgment of Sir Thomas Bingham MR in Aiyela . It is also no answer to this point that no honest trader would think any the less of a trader complying with an order of the Court. The interests of a company such as Chapman Freeborn would be damaged by virtue of it being amenable to the jurisdiction of courts willing to grant such intrusive relief against traders engaged in bona fide commerce. Indeed the more I listened to the argument directed to attacking the judge's exercise of his discretion, the more I became convinced that Norwich Pharmacal type relief in aid of execution should, if it is available at all, be available only in respect of involvement in conduct which necessarily amounts to wilful evasion of execution. Anything short of that has the potential to involve the English court in the paralysis or at the very least serious inhibition of international trade. Whatever the limits of a permissible jurisdiction, it must be obvious that trading activity such as that of Chapman Freeborn in this case falls very far short of anything which could sensibly engage a jurisdiction of this nature.

34. I would uphold the judge's refusal of relief and dismiss the appeal.

Floyd LJ:

35. I agree.

Jackson LJ:

36. I also agree.

(Appeal dismissed) ***979**

