

UPDATE

Enforcement of foreign judgments - how not to get frozen out

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Enforcement of foreign judgments against BVI registered companies is a common occurrence. It is often the case that in tandem with any such enforcement proceedings, an application is made to freeze the assets of the subject of the foreign judgment. The recent Court of Appeal case of *Lucita Angeleve Walton Anors v Leonard George De La Haye* highlights the many issues that can arise.

Facts

Mr De La Haye and Mrs Walton are siblings and children of Mrs Evelyn De La Haye (deceased) who was a resident of Jersey. Mr De La Haye obtained judgment in the Royal Court of Jersey against his sister in the sum of £414,949.62. In February 2014, he filed an application in the BVI High Court for the common law enforcement of that judgment (the **Jersey judgment**). In short, the Jersey Court held that Mrs Walton was to repay to the moveable estate of her late mother the sum of £386,219.08. This amount represented moneys that she had received from her mother while still alive, which the court found were 'advances' that ought to be repaid, in the form of money that she had taken from her mother's account after her death; a small sum that she had taken from her mother and spent on herself, and the sum of £150,000 that Mrs Walton had caused to be transferred to the British Virgin Islands in trusts, as defined in section 83A(13) of the Trustee Act.

Costs were assessed in the amount of £28,730.54, with interest accruing.

Having commenced proceedings in the BVI to enforce the Jersey judgment, Mr De La Haye applied for a freezing injunction over Mrs Walton's assets in the jurisdiction. He also made an ex parte application for an order that the Waltons disclose all assets in which Mrs Walton held a beneficial interest.

The application was granted and the judge stipulated that the order was to expire on 12 March 2014, unless continued by a further order of the court. Mr De La Haye subsequently applied to continue the ex parte order pending the satisfaction in full of the Jersey judgment.

Mrs Walton made an application seeking the following relief.

- That the ex parte freezing injunction be discharged.
- That the requirement of the ex parte order requiring Mrs Walton to disclose all of her assets in the BVI be stayed pending determination of the application to discharge the freezing order.
- That in the event that the discharge application failed, Mr De La Haye be required to fortify his undertaking in damages by the payment of US\$10,000, in default of which the injunction would stand discharged.
- That costs be awarded to the Waltons.

Mr De La Haye then applied for partial summary judgment to be entered on his claim and for his costs of the proceedings. By consent, the parties agreed that the freezing order should continue until the *inter partes* hearing of the discharge application and the summary judgment application.

In seeking to obtain the discharge application, Mrs Walton contended that Mr De La Haye had failed to make material disclosures in obtaining the ex parte order. It was also alleged that he had misrepresented facts to the judge at the ex parte hearing. It was further argued that the judge should have discharged the injunction since Mr De La Haye had failed to provide his correct address and, at the very least, the judge should have required him to fortify his undertaking as to damages.

All three applications came before a different judge of the BVI High Court, who found that there was sufficient basis to allow the continuation of the ex parte order, pending the satisfaction of the Jersey judgment. Consequently the judge refused to discharge the ex parte application, finding that there were no material non-disclosures or misrepresentations. Mr De La Haye was not required to fortify his undertaking either. The judge also granted partial summary judgment on the claim. Mrs Walton appealed on 12 grounds, which the Court of Appeal crystallised as follows.

- Whether the judge erred in failing to discharge the injunction on the basis of material misrepresentations/non-disclosures.
- Whether the judge erred in holding that there was a serious risk of dissipation.
- Whether the judge erred by refusing to order that Mr De La Haye fortify his undertaking as to damages.
- Whether the judge erred in granting partial summary judgment to Mr De La Haye.

Appeal

The Court of Appeal held that the appeal was essentially concerned with the exercise of discretion by the judge. It found that the law in this area is well settled. The appellate court only had a limited role in an appeal from the exercise of discretion by a court of first instance. The principles found in *Hadmor Productions Ltd v Hamilton* applied. The Court of Appeal in this case held that:

- a court is entitled to discharge any ex parte order, without going into the merits of the claim, if there is proof that in obtaining the order the party was guilty of material non-disclosure. However, it is not for every omission that an ex parte order will be discharged. The test is whether the facts not disclosed are of sufficient materiality to justify immediate discharge without examination of the merits. The innocence or deliberateness of the non-disclosures is relevant, but not decisive;
- it is for the applicant to bring to the attention of the court any adverse facts or arguments. However, a failure to do so is not necessarily fatal; unless it was deliberate and material it may not result in an outright discharge of the order;
- in reviewing the exercise of a discretion by a judge, an appellate court does not seek to pull apart every *obiter* statement which a judge makes in rendering a decision;
- the danger of assets being removed from the jurisdiction is only one facet of the 'ploy' of a defendant to make himself judgment proof by taking steps to ensure that there are no available or traceable assets on the day of judgment to avoid execution. A court has the jurisdiction to grant a freezing order where there is a risk of a judgment which a claimant seems likely to obtain being defeated in this way. It was clearly open to the judge to exercise her discretion and to conclude that on the evidence before her the Respondent was attempting to dissipate her assets and had no intention of honouring the Jersey judgment;
- there was no evidence to prove that Mr De La Haye's undertaking was worthless and the judge was entitled to exercise her discretion and not order that he fortify any undertaking;
- summary judgment should only be granted by a court in cases where it is clear that the claim on its face obviously cannot be sustained, or is in some way an abuse of the process of the court. What must be shown is that the claim or defence has no real prospect of success. In the current case, the Walton's defence only addressed the sole disposition of £150,000 to be held on BVI trusts as defined in section 83A(13) of the Trustee Act and did not address the entirety of the Jersey judgment;
- section 83A(13) of the Trustee Act does not operate to prevent enforcement of all foreign judgments that concern heirship rights as being contrary to public policy. The BVI statutory scheme clearly indicates that it is only where there is a disposition in relation to a BVI trust, which also concerns the foreign judgment, that the local legislation takes precedence over the foreign judgment.

Conclusion

The case confirms already well established principles concerning the exercise of a judge's discretion and the limited circumstances under which the Court of Appeal will interfere with that discretion. It further touches on section 83A of the Trustee Act and clarifies the way in which it applies to the enforcement of foreign judgments.

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