ALERTER

Commercial Court rejects discharge application and continues £30m freezing order in cross-border proceedings

Arnold Ayoo

In *BSADE v Kam* the Commercial Court considered whether to continue or discharge a £30m freezing injunction granted, without notice, to aid enforcement of a Hong Kong judgment.

The Defendant ("D") applied to discharge the injunction and argued that the Claimant ("C"): (i) did not have permission from the Hong Kong Court to apply for a freezing order in England - and doing so was in breach of an undertaking; (ii) had failed in its duty of full and frank disclosure/fair presentation by not properly drawing the court's attention to the issue.

The Commercial Court rejected the discharge application. In doing so, Mr Justice Butcher found that there was a fairly presented bona fide argument that C was not in breach of any undertaking given to the Hong Kong Court, and in those circumstances, it was not appropriate for the English Court (as opposed to the Hong Kong Court) to determine that there was a breach of the foreign court order. The freezing order was "eminently justified" and was continued.

Arnold Ayoo (instructed by Reed Smith LLP) acted as sole counsel for the successful Claimant, both at the without notice hearing (before Mr Justice Robin Knowles CBE) and the return date (before Mr Justice Butcher).

THE BACKGROUND

The proceedings in Hong Kong

C's case in the underlying Hong Kong proceedings was that D fraudulently induced it into transferring two sums: HK$220,548,682 ("Sum A") and subsequently HK$32,500,000 ("Sum B") to entities owned and/or controlled by D or otherwise at her direction. C expected to acquire an interest in a limited partnership and was told that its funds would be invested in projects, but it did not become a partner and the funds disappeared.

C commenced proceedings in the Hong Kong Special Administrative Region Court of First Instance ("**HKCFI**") on 5 October 2022 claiming fraud, dishonest assistance, and conspiracy to injure by unlawful means and sought recovery of Sum A and Sum B or damages.

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The HKCFI granted a freezing order on 13 January 2023 ("**the HK Mareva**") in relation to Sum A. C gave various undertakings in the Mareva which included that "*the Plaintiff will not without the leave of the Court begin proceedings against the defendant in any other jurisdiction…*" ("**the Undertaking**").

In Hong Kong, D subsequently breached a series of injunctions and disclosure orders and ultimately an unless order was made, requiring her to pay a sum of HK$170,962,682 (which was frozen by a proprietary injunction) into court. D did not comply with that order, so her defence to the claim, insofar as it related to Sum A, was struck out. As such, C obtained judgment for HK$220,548,682 (c.£22m) plus interest ("**the HKCFI Judgment**").

Subsequently, C was granted a release from the Undertaking to enforce the HCKFI Judgment anywhere in the world ("**the Release**").

The proceedings in England

In England, C issued a Part 7 Claim for recognition and enforcement at common law of the HKCFI Judgment ("**the Enforcement Action**").

C was, however, concerned that once D learned of the Enforcement Action, she would dissipate her assets in this jurisdiction. Hence, pending determination and any subsequent enforcement, C sought (by a Part 8 Claim) a domestic freezing injunction and ancillary disclosure orders in support of the foreign proceedings under s.25 of the Civil Jurisdiction and Judgments Act 1982 ("CJJA") and CPR 25.4 ("**the Freezing Injunction Application**").

THE LAW

Freezing injunctions to support foreign proceedings

The Court's statutory power comes from s.25 CJJA.[1] In accordance with s.25(3), the Court's power under s.25(1) is extended such that it can grant interim relief[2] in aid of substantive proceedings of any kind and taking place in any jurisdiction.[3] The procedural power comes from CPR 25.4(1)(a) which applies where "*the remedy is sought in relation to proceedings which are taking place, or will take place, outside the jurisdiction*". In exercising the power, there is a two stage test:

i. First, the court should consider whether the facts would warrant the relief sought if the substantive proceedings had been brought in England. Where, as here, the relief sought is a freezing order, the court will consider the usual test for a freezing order.
ii. Second, in accordance with s.25(2) CJJA, the court may refuse to grant the relief if, in the opinion of the court, the fact that the court has no independent jurisdiction in relation to the subject matter of the proceedings makes it inexpedient for the court to grant it. To that end, Potter LJ in *Motorola Credit Corp v Uzan (No. 2)* [2004] 1 W.L.R.113 at [115] set out five principles (as applied by Bryan J in *Gill v Kaur* [2025] EWHC 156 (Comm) at [50]).[4]

The duty of full and frank disclosure

At any without notice hearing, there is a duty of full and frank disclosure. The guidance set out in *Tugushev v Orlov* [2019] EWHC 2031 (Comm), highlights (among other things) that: (a) an applicant who seeks relief from the Court on a without notice basis has a duty to make full and accurate disclosure of all material facts and to draw to the Court's attention significant factual, legal and procedural aspects of the case; (b) an applicant must present the argument and evidence in a fair and even-handed manner, drawing attention to evidence and arguments which it can reasonably anticipate the absent party would wish to make; and (c) if material non-disclosure is established, the Court will be astute to ensure that a claimant who obtains injunctive relief without full disclosure is deprived of any advantage he may thereby have derived. Immediate discharge (without renewal) is likely to be the Court's starting point, at least when the failure is substantial or deliberate.

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THE WITHOUT NOTICE HEARING AND SUBSEQUENT DISCHARGE APPLICATION

At the without notice hearing on 11 March 2025, Knowles J granted C a freezing injunction covering D's assets in England and Wales to the value of £30m together with an ancillary asset disclosure order ("**the Freezing Injunction**").

C sought the continuation of the Freezing Injunction at a return date on 28 March 2025. D, however, sought to discharge it ("**the Discharge Application**"):

i. D alleged that C did not fully and frankly disclose, or present fairly, the fact that (as D contended) it was subject to the Undertaking (in Hong Kong) not to institute proceedings in another jurisdiction without leave. D argued that (a) the Freezing Injunction, though allied to the Enforcement Action, was not "enforcement" of the HKCFI Judgment and therefore was not covered by the Release given by the HKCFI; (b) C required leave but did not obtain it - therefore its pursuit of the Freezing Order was a breach of the Undertaking given to the HKCFI; (c) neither C's affidavit in support nor C's oral submissions at the without notice hearing properly dealt with the Undertaking.

ii. C's answer was that it specifically obtained independent, expert, foreign law evidence on that very issue; that the Court was directed (in C's skeleton and the reading list) to consider the specific paragraphs of that statement which analysed the issue, and the Court indicated/ formally recorded that it had considered it.

THE JUDGMENT

At the return date on 28 March 2025, Mr Justice Butcher rejected the Discharge Application and continued the Freezing Injunction. In doing so, he found that there was no breach of the duty of full and frank disclosure or fair presentation and any defect in presentation would not have justified a discharge:

(1) **Inappropriate for the English Court to determine that a party is in breach of a foreign court order [22-24]**: The Judge considered it inappropriate for the English Court to find that C was in breach of the Hong Kong court's order. Matters concerning the interpretation of a court's own orders, and undertakings given to that court, were matters for that court. The Judge noted the risk of conflicting decisions if the English court made a ruling on breach and the Hong Kong Court took a different view. The Judge concluded that there was a bona fide argument that no breach had occurred, based on C's foreign law evidence ("**Cherry 1**"), which set out that the Hong Kong court had granted permission to enforce the judgment broadly and that a freezing order in aid of enforcement was "part and parcel" of that enforcement.

(2) **It was expedient to grant the freezing order notwithstanding the alleged Undertaking issue [25-30]:** The Judge then turned to the issue of whether the freezing order was inexpedient under the *Motorola* principles. D argued that the order risked disharmony and confusion between jurisdictions. The Judge rejected this, finding no real risk of interference with the Hong Kong Court's management of the case, nor any significant danger of overlapping or conflicting orders. He emphasised that D could still apply to the Hong Kong Court to seek a ruling on the alleged breach, and if that court determined there was a breach, the English Court could reconsider the freezing order.

(3) **No breach of duty of full and frank disclosure [32-39]:** Butcher J restated the *Tugushev* guidance (above) and emphasised the dicta of Carr J:

> ***"… it is necessary for a sense of proportion to be kept. … The question is not whether the evidence in support of the application could have been improved. The primary question is whether in all the circumstances its effect was such as to mislead the court in any material respect."***

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Set against that, there was no breach: (a) the reading list was properly limited in scope; (b) Cherry 1, one of only two main pieces of evidence, specifically addressed the potential conflict between the Hong Kong court's order and the freezing order, including the Undertaking; (c) Cherry 1 was explicitly referenced in the skeleton argument which directed attention to it; and (d) Cherry 1 clarified the alleged issue regarding the undertaking and expressed her view that permission was not required to bring the present application, which was part and parcel of the "enforcement" of the HKCFI Judgment.

KEY TAKEAWAYS

The Judgment contains a number of helpful takeaways:

(1) In cross-border proceedings, a party who wishes to rely on an alleged breach of a foreign court order as a basis for discharging interim relief in this jurisdiction should seek a determination of the issue of alleged breach from the foreign court who made the order, at least where the party who is alleged to be in default is able to identify a bona fide argument to the contrary supported by expert evidence;

(2) When complying with the duty of full and frank disclosure, if an argument is not mentioned orally it should be signposted properly in a skeleton and directed in pre-reading, within a properly confined reading list.

ENDNOTES

[1] White Book (2024) commentary at 25.2.4: *"The Civil Jurisdiction and Judgments Act 1982 s.25 (see Vol.2 para.5-29) enables the High Court to grant "interim relief" in cases proceeding in courts other than the courts of England and Wales. In such circumstances, an order is sought "where there is no related claim" in the sense that there is no claim made over which the English court has jurisdiction.*

[2] S.25(7) CJJA: "…*relief of any kind which that court has power to grant in proceedings relating to matters within its jurisdiction, other than—(a) a warrant for the arrest of property; or (b) provision for obtaining evidence*".

[3] See White Book (2024), Vol 2 at 15-5: " …*with effect from IP completion day, the Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997 (SI 1997/302) has been amended to extend the court's power under s.25(1) in relation to "(a) proceedings commenced or to be commenced otherwise than in a 2005 Hague Convention State"; and "(b) proceedings whose subject-matter is not within scope of the 2005 Hague Convention". Accordingly, the position is retained post-Brexit that the High Court can continue to grant interim relief in aid of substantive proceedings elsewhere of whatever kind and wherever taking place*".

[4] (i) first, whether the making of the order would interfere with the management of the case in the primary court, e.g. where the English order would be inconsistent with an order in the primary court or would overlap with it; (ii) second, whether it was the policy of the court in the primary jurisdiction not itself to make the order in question (in that case, worldwide freezing/disclosure orders) (iii) third, whether there was a danger that the orders made would give rise to disharmony or confusion and/or the risk of conflicting, inconsistent or overlapping orders in other jurisdictions, in particular the courts of the State where the person to be enjoined resided or where the assets affected were located; (iv) fourth, whether at the time the order was sought there was likely to be a potential conflict as to jurisdiction making it inappropriate and inexpedient to make a worldwide order; (v) fifth, whether, in a case where jurisdiction was resisted and disobedience was to be expected, the court would be making an order which it could not enforce.

ABOUT THE AUTHOR

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Arnold has a heavy commercial/civil fraud practice and is ranked by the directories in commercial dispute resolution, company law and insolvency. He is Standing Counsel to the Competition and Markets Authority and frequently appears unled in the High Court.

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