

Wasted Costs Applied to BVI Duties on an Ex Parte Application

Insights - 20/06/2017

Summary

The BVI Commercial Court has just provided guidance on wasted costs principles and their application to the duties of an applicant's legal practitioner on an ex parte application. This guidance was provided in a judgment delivered on 6 June 2017 in *I U Chong aka Yao Yong & Anor v Greater Achieve Limited & Ors* BVIHC (Com) 2015/0140.

The application for an order that the claimants' legal practitioners, Harney Westwood & Riegels ("Harneys") pay wasted costs arose out of the grant and subsequent discharge of an injunction in proceedings in which the Statement of Claim was subsequently struck out as disclosing no cause of action and for abuse of process.

The court concluded that in only one of the complaints advanced in support of the application was Harneys in breach of its duty to the court but that the causal link between that breach and the applicants' costs was not sufficiently strong; and accordingly the breach did not give rise to a wasted costs order. In reaching this conclusion the court reiterated legal practitioners' duties to the court and the court's jurisdiction to punish and compensate for breach of those duties.

The proceedings and the complaints

The proceedings were part of a wider dispute between the parties relating to Mingyuan Medicare Development Company Limited ("Mingyuan"), a Bermudan company listed on the Hong Kong Stock Exchange and operating in the healthcare sector.

On 23 November 2015 the claimants obtained ex parte relief from the BVI court in proceedings that had been started a few days earlier. By that injunction the first defendant was restrained from exercising any voting rights or passing any resolution in its capacity as a shareholder in

Mingyuan and the seventh defendant was restrained from disposing of certain shares. That injunction was discharged on 15 January 2016 for material non disclosure. Harneys ceased to represent the claimants in February 2016. The claim against the second to seventh defendants was stayed by order dated 28 April 2016 after the claimants failed to comply with an interim costs order; and the Statement of Claim was struck out against the first defendant by order dated 26 June 2016 for not disclosing a cause of action and being an abuse of process. The claim against the eighth defendant, Mingyuan, was not pursued.

By an amended notice of application the first to seventh defendants sought a wasted costs order against Harneys based on six complaints:

- Misleading the court on the ex parte application as to the financial means of the second claimant in relation to the cross-undertaking in damages;
- Failing to explain to the court on the ex parte application the nature of proceedings in Bermuda, which was relevant to the court's decision on the application;
- Failing to disclose a matter on the ex parte application relating to the auditors of Mingyuan not being able to verify the bank account of one of its subsidiaries because \$66m was missing from the subsidiary of which the second claimant was an executive director;
- Failing to inform the court on the ex parte application that the purpose of the Bermudan proceedings was to change the composition of Mingyuan's board in the light of the foregoing issue and the suspension of trading in Mingyuan's shares;
- Failing to draw to the attention of the court on the ex parte application the effect of the first claimant's bankruptcy, which was that he had no ability to bring the claim without the consent of his trustee in bankruptcy and the approval of the Hong Kong court;
- Failings in connection with the preparation of the Statement of Claim which was ultimately struck out.

The applicants did not allege that Harneys "deliberately sought to breach their duties to the court" but did complain that Harneys participated in an abuse of the court's process that could and should have been avoided had they sought proper instructions from the claimants, as was their duty on an ex parte application, and if they had given proper consideration to the documents they had obtained.

Wasted costs jurisdiction in the BVI

Costs incidental to all proceedings in the High Court are, subject to express statutory provisions and rules of court, in the discretion of the judge who "shall have full powers to determine by whom and to what extent costs are to be paid"¹

There are two rules relating to wasted costs that were considered by the court in *I U Chong aka Yao Yong & Anor v Greater Achieve Limited & Ors*: ECSC CPR 64.8 (under which the application was brought) and 64.9. The difference between these rules was found by the court to be that wasted costs is defined in CPR 64.8(2) (a) to include costs incurred by a negligent act or omission as well as by an improper or unreasonable act or omission; and CPR 64.9 does not include a reference to negligence. The court found that these two rules provide separate bases for making costs orders and that CPR 64.8 is the rule that is focused on the legal practitioner's duties to the court.

The court also found that a wasted costs order for negligence lies within the inherent jurisdiction of the court, that jurisdiction in England having been elaborated on by the House of Lords in *Myers v Elman* [1940] AC 282.

The BVI test for a wasted costs order

The court found that there are two questions, conflating the English three part test, to be considered by the court in assessing whether or not to exercise its discretion to make a wasted costs order either under CPR 64.8 or the inherent jurisdiction of the court:

- "First, has there been an improper, unreasonable or negligent act or omission on the part of the legal practitioner?"
- "Second, if so, did such conduct act or omission cause the applicant to incur costs that the court considers it unreasonable for the applicant to pay?"

The Court cited the following principles derived from the Privy Council in *Harley v MacDonald* [2001] UKPC 678 at paragraphs 55 and 57:

"A simple mistake or oversight or a mere error of judgment will not, of itself, be sufficiently serious ... " The conduct must amount to a serious dereliction of duty; there must be 'gross negligence'; "while a mere mistake or error of judgment is not generally sufficient, a gross neglect or inaccuracy ... might suffice. A more precise definition of the level of seriousness is not appropriate. But where negligence or incompetence is alleged the conduct must be put into its proper context." "The essential point is that it is not errors of judgment that attract the exercise of the jurisdiction, but errors of duty owed to the court."

The court followed the meaning of "improper", "unreasonable" and "negligent" identified by the Court of Appeal in *Ridehalgh v Horsefield* [1994] Ch 205, and in particular the "untechnical" meaning of negligence, being a "failure to act with the competence reasonably to be expected of ordinary members of the profession".

The court concluded that "A legal practitioner's failure to give full and frank disclosure on an ex parte application is an established basis for a Wasted Costs Order".²

BVI duties on ex parte application

The court approved the duty expressed by Gee³ and found it to rest on legal practitioners: "On an ex parte application, those acting for the applicant have a personal responsibility to take reasonable steps to ensure that there is full and frank disclosure to the court on the application"⁴ and found that duty to be a heavy one, extending "not only to material facts known to the applicant, but to additional facts that he would have known had he made proper inquiries". The applicant is under a duty "to present fairly the facts so disclosed".⁵

The applicant is required to identify to the court any relevant legal point, and must refer to any obvious answer to the claim or to an obvious defect in the cause of action. The applicant must identify defences which can reasonably be expected to be raised. They should be fairly summarised in the affidavit, outlined in the skeleton argument and specifically drawn to the attention of the court at the hearing. Merely setting out the relevant information in an exhibit is not enough.⁶

The court provided the following warning:

"What should be clear to legal practitioners acting for an intended ex parte injunction applicant is that they owe a duty to the court to a) probe their client diligently to seek to bring about full and frank disclosure by the client, b) push a client that is not forthcoming for material and information that is important to a fair and full understanding of the situation to which the intended injunction relates (and to consider withdrawing if it is not forthcoming without a sound explanation) and c) assess critically materials and information provided by the client and stand back to do a 'reality check' on information and conclusions provided by the client".⁷

Findings on the complaints

The court did not accept the complaints made against Harneys in the application.

- It accepted uncontroverted evidence from Harneys that "it would not have made representations [at the ex parte hearing as to the second claimant's wealth] without proper instructions". By the date of the wasted costs hearing Harneys were no longer acting for the claimants and were presumably therefore unable to adduce more specific evidence without breaching privilege. In any event, however, the discharge of the injunction was not based on this matter and so there was no necessary causal connection between any breach of duty and the costs incurred by the applicants.
- Justice Farara, who discharged the injunction, found that the failure to disclose correctly and fully the Bermuda proceedings was "part of 'egregious breaches of duty of full and frank disclosure on the part of the Claimants'".⁸ The court on the wasted costs application found

however that "it is difficult to see what [evidence complained of as missing] could have added" to what was before the court and drawn to the court's attention.

- Justice Farara had found that the failure to disclose the missing \$66m from one of the companies of which the second claimant was an executive director was part of the Claimants' "egregious" conduct. Whilst the court on the wasted costs application concluded that Harneys' conduct "was wanting such as to open the possibility of a Wasted Costs Order" the court did not consider that the "extent of Harneys' neglect in relation to this alleged failing was of a magnitude to exercise the Court's discretion in favour of making a Wasted Costs Order". Further the court was concerned that the causal connection between the alleged failing and the costs incurred by the applicants was not sufficiently clear, and whether Justice Farara would not have granted the injunction in any event had he been made aware of the true position was also not sufficiently clear.
- Justice Farara had not focused on the complaint that the purpose of the Bermudan proceedings was to change the composition of Mingyuan's board in the light of the foregoing issue and the suspension of trading in Mingyuan's shares. The court concluded that this complaint was insufficiently distinct from the second and third complaints. Accordingly, whilst the court found that if Harneys had appreciated the response of the defendants to the proceedings that was said to underlie this complaint, it would have been under a duty to disclose it to the court on the ex parte application, it was not negligent to have failed to identify the point.
- The court determined that it was negligent of Harneys not to have informed the court on the ex parte hearing that the effect of the first claimant's bankruptcy was that he had no entitlement to sue. However, the court found that the causal link between that negligence and the applicants' costs was not sufficiently strong and accordingly the negligence did not give rise to a wasted costs order.
- The court considered the defects in the Statement of Claim, both in the context of an argument that these gave rise to a duty to disclose them to the court on the ex parte application and an argument that the pursuit of doomed proceedings raises the wasted costs jurisdiction. One defect identified by the court was the failure to obtain permission to bring a double derivative claim: the court found this to be "somewhat troubling" but did not find it to be conduct that crossed the line to open the possibility of a wasted costs order. The court was also "mindful that Harneys ceasing to represent the claimants in February 2016 meant that opportunities to remedy the defects may have been hampered before that time and certainly were lost after that time".

Conclusion

The court accordingly dismissed the application:

"While this Application is being dismissed, the Court is mindful that Harneys has a responsibility for the facts giving rise to the Application and the grounds upon which it was based, even though at the end of the day this Court has found that they fall somewhat short of leading this Court to make a Wasted Costs Order".⁹

After hearing submissions on the costs of the application, the court made no order as to costs. None of the duties identified by the court on ex parte applications are new; and it is not new that those duties to the court were identified as those of legal practitioners for applicants for ex parte relief. It is however unusual for those duties to be examined in the context of a wasted costs application. Whilst the court identified that wasted costs applications should only be made sparingly and only in the most egregious cases, the court's judgment contains no criticism of the fact that the wasted costs application was made. It is an important reiteration of legal practitioners' duties to the court and of the court's jurisdiction where those duties are breached.

[¹] Section 50(1) Supreme Court of Judicature (Consolidation) Act 1925, incorporated into BVI law by section 7 Eastern Caribbean Supreme Court (Territory of the Virgin Islands) Act.

[²] Citing Ridehalgh at p 234D and Gee, Commercial Injunctions (6th ed) at 9-015 to 017

[³] Supra at 9-015

[⁴] At §75

[⁵] At §76

[⁶] At §§77-78

[⁷] At §289

[⁸] At §175

[⁹] At §306

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