

Focus on Injunctions in the light of Paraskevaides Full and frank disclosure in the BVI

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In its judgment given on 30 March 2020 in *Paraskevaides v Citco*[1], the Eastern Caribbean Court of Appeal considered a range of issues on appeal from the Commercial Court of the British Virgin Islands arising out of a dispute over ownership of a large Cyprus based international construction company.

Two of the issues addressed are the duty of full and frank disclosure on an ex parte application and the consequences of breach of that duty.

These issues are important for litigants in the BVI because urgent ex parte injunctions are often needed – or said to be needed – at the outset of the international disputes that comprise the BVI Commercial Court's workload.

Background

George Paraskevaides was a highly successful businessman who, together with a partner, set up Joannou & Paraskevaides (Overseas) Limited (JPO). The Paraskevaides shareholding in JPO was held by a BVI company, whose shares were in turn held equally by four further BVI companies, each of which issued one bearer share.

Mr Paraskevaides died in 2007 and the control of JPO then produced a split between his widow Thelma and one child, Christina, on the one hand and the two other children, Leoni and Efthymoulos. Three competing positions developed, one of which was that the bearer shares were settled on a Liechtenstein trust; the other was that they were the subject of an oral declaration of trust made by Mr Paraskevaides to Thelma; and the other was that they might fall into Mr Paraskevaides' estate.

These alternatives had different ramifications for the control of JPO, but the position came to a head when the Cypriot court replaced the administrator of the estate. The new administrator

caused the boards of the four BVI companies to be changed. At this stage Thelma and Christina sought and obtained urgent ex parte relief from Adderley J in the BVI to prevent use being made of these changes to effect change further down the corporate chain to the operating company, JPO. They sought this on the basis that they were two of the four beneficiaries of the oral trust, there being no trustee.

The new administrator applied to discharge the injunction obtained ex parte. Wallbank J found that the claimants had breached their duty of full and frank disclosure on their application to Adderley J and that in at least one instance that had not been innocent. He accordingly discharged the injunction and declined to reimpose it.

Thelma and Christina appealed. The Court of Appeal's judgment on 30 March 2020 came too late for JPO, which is now in liquidation, but its guidance in its detailed judgment is valuable particularly on the breach of duty of full and frank disclosure and its consequences and, at least until any rule change, on service out of an injunction in support of substantive BVI proceedings prior to a claim form being issued.[2]

Full and frank disclosure

Wallbank J discharged the injunction having concluded that the claimants had breached their duty of full and frank disclosure by a series of failures, the effect of which was that an incomplete picture had been presented to Adderley J which inevitably distorted his assessment of the balance of convenience in granting the order. He further concluded that the failure to draw attention to one letter was not innocent because it was mentioned to Adderley J for a different purpose.

The Judge then considered whether or not to reimpose the injunction and declined to do so on the basis that he was not satisfied that the risk of disposal was as stated by Thelma and Christina.

The Court of Appeal agreed that its own statement of the law in *Enzo Addari v Edy Gay Addari* [3] reflects the principles relevant to determining whether there has been a material non-disclosure of fact and the consequences of breach. As Carrington JA (with whom the other members of the Court of Appeal agreed) identified *"The key elements are that the duty is not only to disclose what the party or their legal advisers considers to be material but what one reasonably should expect a court to consider to be material in the exercise of its discretion whether to grant the order being sought"*.

Carrington JA held that the duty to disclose matters known to the applicant is *"more absolute"* than in respect of those matters that should have been known to it.

In principle, the consequences of a non-disclosure of a material fact are clear: the party is to be stripped of any advantage gained from the breach. But whilst the discharge of relief may follow,

it will not always do so; and if it does, the Court may reimpose relief – but only if the non-disclosure was innocent and the balance of convenience demands that a new injunction is granted. Additionally, *"the consequences of non-disclosure are not necessarily as severe if the court finds that the non-disclosure relates to a fact that is of lesser importance to the issues to be determined in order to grant the relief being sought"*. In this regard Carrington JA identified that the court must bear in mind the principle of proportionality on an application to discharge:

"The duty to disclose is meant to operate as an instrument of justice rather than injustice. In exercising the discretion whether to set aside an ex parte order, a judge must therefore give consideration to all the circumstances of the matter including the public interest in ensuring that the duty of disclosure is observed."

Innocence of non-disclosure

The test used by the Court of Appeal was that of Ralph Gibson LJ in *Brink's Mat v Elcomb*: *"a non-disclosure would be innocent if the fact was not known to the applicant or its relevance was not perceived by them"*. [4]

Applying this test the Court of Appeal disagreed with Wallbank J and set aside his finding that the claimants' failure had not been innocent. Instead, it concluded that the non-disclosure arose from an innocent failure to perceive the relevance of the letter on certain issues.

Reimposition of relief

Importantly the Court of Appeal did not interfere with Wallbank J's decision to discharge the injunction, but focused on his decision not to reimpose relief.

The Court of Appeal's conclusion that the non-disclosure was innocent led it to open the door for it to consider in the exercise of its discretion whether the injunction should be reimposed.

The result of the Court of Appeal concluding that it should exercise its discretion was that it considered *"whether the lesser irremediable prejudice lies in the grant or refusal of the injunction"*. It concluded that this led to the regrant of interim protection of the subject matter of the trust.

Conclusion

The result of these aspects of the decision in *Paraskevaides* is that greater clarity has been provided in respect of the duty of full and frank disclosure and the effects of breach of that duty. This is important for a jurisdiction where the Commercial Court is asked to decide so many ex parte applications.

Nicholas Burkill and Nicholas Brookes appeared for the administrator at first instance and in the Court of Appeal, in both instances being led by David Chivers QC.

Nick Burkill is the BVI office head of Dispute Resolution for Ogier. Nicholas Brookes is a managing associate with Ogier in the BVI.

Read our accompanying briefing here: [Focus on Injunctions in the light of Paraskevaides - Service of an injunction outside the BVI prior to the issue of proceedings](#)

[1] *Thelma Paraskevaides & Anor v Citco Trust Corporation Limited & Ors* BVIHCMAP2018/0046 on appeal from the decision of Wallbank J dated 5 July 2018.

[2] In a [separate briefing](#) we consider the Court of Appeal's answer to the problem where an injunction is granted prior to the issue of a claim form but is to be served out of the jurisdiction.

[3] BVI Civil Appeal 21/2005 (23.9.05, unrep)

[4] At [39]

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