

BVI Commercial Court Decision Serves as Bold Reminder of Duties of Full and Frank Disclosure on Ex Parte Applications

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The Decision

On 9 May 2019, The Honourable Mr Justice Adrian Jack QC (Ag) delivered an oral Judgment in BVI proceedings in the Abyzov/Vekselberg-related litigation. Campbells acts for an independent Cypriot group of parties previously joined as defendants to the Third Ancillary Claim. One of Campbells' clients, ABC Grandeservus Limited ("**ABC**") applied seeking to set aside an Order purportedly made and steps taken by Emmerson International Corporation ("**Emmerson**") as a result of an *ex parte* hearing and Order on 31 December 2018 (the "**New Year's Eve Application**").

The New Year's Eve Application by Emmerson sought a Chabra Order against ABC (and other parties) and also sought consequential relief. Emmerson's New Year's Eve Application was granted (the "**New Year's Eve Order**").

ABC applied to set aside the New Year's Eve Order filed by Emmerson and entered which effectively froze all of ABC's assets along with a subsequent Order joining ABC as a party to other parts of the claim and asserting new and substantive claims against ABC for conspiracy and causing harm by unlawful means (the "**New Claims**").

Mr Justice Jack QC (AG) set aside much of the relief Emmerson said it had been granted in relation to the New Year's Eve Order and the New Claims on the bases of "*extremely serious material nondisclosure and misrepresentation*" in relation to the *ex parte* 31 December hearing. ABC was granted 100{92e447aa5ae4509d19f58c4a2ed7ec0dbb286610ae15b33d823e9409689b2d4a} of its costs as a result.

The Background

The Abyzov/Vekselberg litigation has a long and complicated history in BVI starting in BVI in 2013. The primary claim of the Abyzov parties against the Vekselberg parties is what is said to be a "contractual exit clause" under a Joint Venture Agreement between them. By this clause, the Abyzov parties say they have, as of February 6 2018, a claim in debt for USD893,470,360. ABC is neither an Abyzov nor a Vekselberg company – it is an independent professional corporate administrator in Cyprus. ABC was a corporate director of IES Cyprus – a company

involved in the litigation and separately represented.

Emmerson alleges that, in 2011, the Vekselberg parties stripped IES Belize of almost all of its assets and that all the shares in IES Cyprus were transferred to a company called Starlex. It is further alleged that, in 2015, the shares in IES Cyprus were further transferred to Renova Bahamas and Sunglet. These three companies are alleged to be Vekselberg entities and Emmerson alleged that ABC was involved in an “actionable conspiracy” and used “unlawful means” to harm it by its involvement in the 2011 and 2015 transfers. These allegations are the subject of the Third Ancillary Claim in the proceedings to which ABC was joined, appeared and filed a substantive defence.

Subsequently, the Abyzov parties came to the view that there appeared to be a dissipation of assets from one of Mr Vekselberg’s companies, Renova Holdings Limited. The series of alleged transfers were effected to three trusts governed by Cypriot law. The trustee of these three trusts was ABC. Mr Vekselberg disputes that there was anything inappropriate in any of the 2011, 2015 or 2018 transfers. They are all, he says, legitimate transactions for legitimate commercial purposes.

Based on documents disclosed to Emmerson by Mr Vekselberg, Emmerson decided it would seek Chabra relief against ABC and others and it is that application which was the New Year’s Eve Application which resulted in such significant mischief.

Chabra Relief

A “*Chabra Order*” is a specialized form of freezing injunction. The object of the Chabra Order is to freeze assets held by a third party which may become available for enforcement against a future judgment debtor. In particular, the Respondent to a Chabra Order is (in the jargon) a “non-cause of action Defendant” (or NCAD). In other words, the Applicant for a Chabra Order has no direct claim against the Chabra Respondent. The Applicant’s hope is that he will be able to issue execution against the assets held by the Chabra Respondent on behalf of the putative judgment debtor at a later stage after the Applicant has obtained judgment against the subject Defendant.

It is *possible* to have an ordinary Mareva Injunction and a Chabra Order against the same Defendant where that Defendant holds assets, both as trustee for a putative judgment debtor and assets beneficially for himself. Support for the Mareva aspect would require a separate, direct cause of action against him, but the bases of the two types of injunctions are distinct and separate and must not be confused. As noted by Jack J, such cases are likely to be unusual.

The ex parte New Year’s Eve Application and Subsequent Events

At the *ex parte* New Year’s Eve Application, Emmerson sought a Chabra Order against ABC and further relief consequential to the New Year’s Eve Order. That relief was granted by the presiding Judge who heard the application by telephone. Subsequent to the New Year’s Eve Application, Emmerson took the position that the New Year’s Eve Order entitled it to bring the New Claims.

However, the New Year’s Eve Order eventually entered (and in the “draft” order sent to ABC’s counsel on New

Year's Eve) set out omnibus freezing (Mareva) relief against ABC. Subsequently, Emmerson also filed the New Claims intended to be entirely consequential to the Chabra relief considered at the New Year's Eve Application but which actually referenced an entirely new and substantive personal cause of action against ABC in relation to which Emmerson alleged conspiracy and causing harm by unlawful means – in short, new and substantive claims against ABC close to USD900 million in value.

It immediately became apparent that the New Year's Eve Order (intended to be a Chabra Order but which was in fact a Mareva Injunction) effectively shut down ABC's business. After about ten days of negotiation between ABC's counsel and Emmerson's counsel to try to fix the extraordinary problems created, the Mareva-type Order was scaled back by agreement to a Chabra-type Order – enabling ABC to return to carry on its business. However, after the New Year's Eve Order was made and the New Claims against ABC were filed, Emmerson took the position that it was entitled to maintain the New Claims flowing from the extraordinarily broad wording of its own New Year's Eve Order.

ABC disagreed and applied to the BVI Court to set aside what Emmerson had done.

Setting aside what Emmerson did

After two days of the court hearing, in relation to the Mareva-type Order entered by Emmerson, Mr Justice Jack found that there was extremely serious nondisclosure in the New Year's Eve Application in relation to ABC. The Judge found that:

1. there was barely any mention of ABC. There was no explanation that ABC has a business managing non-Vekselberg related assets (although from the historical pleadings it was clear that Emmerson knew that very well). The fact that the injunction would shut down ABC's business was not brought to the Court's attention;
2. there was no attempt to differentiate ABC from the other parties who were Emmerson's other targets on that day. The facts relating to each of those targets were materially different yet no distinctions were made; and
3. the form of injunction in the entered Order was not a Chabra Order. It covered *all* of ABC's assets, including those beneficially owned by ABC and those beneficially owned by other clients of ABC.

The Judge stated that had these matters been drawn to the Judge's attention during the New Year's Eve Application, he would have refused to make the injunction in the form entered and he would have been careful to ensure that only Chabra relief was granted.

Submissions that the mistake had been "innocent" were rejected in their entirety by the Judge.

The Judge also noted with disapproval the complete lack of any expression of remorse by Emmerson. The Judge noted that:

When the matter was raised with [Emmerson] immediately after the injunction was served on Campbells,

[Emmerson] replied in a letter of the 6th of January 2019; ... they agreed there to vary the injunction as against ABC, but does not include even the most perfunctory apology for the terms in which the order was obtained in the first place. Where mistakes of this gravity are made, it would be normal to see some display of contrition. I regret that I do not see any in this case.[2]

The Judge went on to find serious nondisclosure and indeed positive misrepresentations (rarely occurring in BVI or indeed in any other jurisdiction).

The Judge was similarly critical regarding the New Claims against ABC. He said:

In this case, the factual matrix is that Emmerson was seeking Chabra relief against ABC. That comes from the application at page 92 which I have already read and that is what the Amended Claim Form which was submitted to the Court sought.

Now I recall that the hearing on the 31st of December 2018 was ex parte and that the Emmerson team drew up the order which was then approved by the Court. I find it a spectacularly unattractive argument that Emmerson can take advantage of drafting facilities of their own team to bring a claim which was never in contemplation of the Court when the order was made.[3]

Of importance in setting right the mischief caused and the “new claim” filed against ABC, Justice Jack said:

... you don't have a billion dollar claim for conspiracy and fraud to a Chabra application made over a telephone afternoon call without giving any notice of it.

There was no evidence put before the Court by Emmerson to support a personal claim. On the contrary, the evidence was all directed at Chabra relief which is relief against a non cause of action defendant. I don't accept that [the Judge who heard the 31 December application] was intending to allow a personal claim to be brought against ABC. Such an application was never before him, and he never applied his mind to it. If he had, he would no doubt have given a judgment explaining his reasoning.

The order I make, therefore, is that the purported amendments to the First Ancillary Claim and the Statement of Claim attaching to that are disallowed.[4]

The Judge awarded ABC its full costs.

The Reminder

This decision serves as an excellent reminder for practitioners to be meticulous, careful and candid when seeking extraordinary relief at ex parte hearings.

Further, in the regrettable event that a mistake is made, acknowledge it immediately, take steps to fix it and, importantly, show remorse. It is not a sign a weakness to admit fault and apologise – in fact it is precisely the opposite. Failure to show remorse may be a factor to be taken into account when determining costs awards and

such costs may increase against parties found to be in the wrong having taken the wrong approach and which failed to show remorse for their errors.

The decision remains subject to the Order being entered and Emmerson has applied for leave to appeal.

The successful applicant, ABC Grandeservus Limited, is represented in BVI by Campbells' BVI team of Brian Child (Partner) and Charlotte Walker (Associate). Brian Doctor QC (Fountain Court Chambers) was leading silk for the hearing in BVI on 7 and 8 May 2019.

[1] Whilst a significant part of this summary is taken *verbatim* from the Oral Judgment of 9 May 2019, any errors are solely the responsibility of Campbells (BVI) Limited.

[2] Transcript of the Oral Judgment, page 24 lines 7-16

[3] Transcript of the Oral Judgment, pages 30-31 lines 17-21 and 1-3

[4] Transcript of the Oral Judgment, pages 32-33 lines 22-25 and 1-14