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COURT OF APPEAL CONFIRMS THAT "WAREHOUSING" IS NOT ALWAYS AN ABUSE OF PROCESS

Jan 24, 2020

SUMMARY

On 24 January 2020, the Court of Appeal delivered its judgment in *Aljawharah Bint Ibrahim Abdulaziz Alibrahim v Asturion Fondation* ([2020] EWCA Civ 32) in relation to the question of whether "warehousing" constitutes an abuse of process that should result in a strike out. Lord Justices Arnold, Leggatt and the Senior President of Tribunals (Sir Ernest Ryder) unanimously upheld the High Court judgment of HHJ David Cooke ([2019] EWHC 274 (Ch)) and dismissed Ms Alibrahim's appeal.

Background

The case concerns a dispute regarding a high value London property. The property was owned by the Asturion Fondation, a Liechtenstein foundation established to hold and manage properties on behalf of members of the Saudi Royal family. In 2011, a member of Asturion's board transferred the property to the Defendant for no consideration, along with other properties in Germany, France and Spain. Asturion alleges that these transfers were invalid and in 2015 issued proceedings in England to recover the London property. Proceedings were also commenced in France and Spain, however the German property had already been sold by the Defendant to a third party before any steps could be taken to recover it.

Following the commencement of the proceedings and filing of the Reply in 2015, Asturion's solicitors (BCLP) provided the Court with the necessary agreed set of directions, list of issues, directions questionnaire and disclosure report. Due to an oversight by the Court, there was no order for directions and no listing of the CMC, as would ordinarily have been the case. The parties continued to exchange some correspondence concerning amendments to the pleadings and, in the background, the overseas proceedings were continuing. Notably, Ms Alibrahim and her son had commenced proceedings in Liechtenstein to remove Asturion's board, a matter that may have had a significant impact on the efforts to recover the properties.

There were no steps taken to further advance the English proceedings or to list a CMC. In August 2017, Ms Alibrahim's solicitors accused Asturion of having abandoned the English proceedings. This was refuted by Asturion. Ms Alibrahim proceeded to successfully apply for the English claim to be struck out. HHJ David Cooke overturned the first instance decision of Deputy Master Cousins, holding that whilst the Deputy Master had been entitled to find that Asturion had taken a unilateral decision to place the claim on hold pending the resolution of the Liechtenstein proceedings, that decision was not in and of itself an abuse of process and (even if it was) was not sufficiently serious to warrant a strike out of the claim.

Court of Appeal decision

The Court of Appeal's decision provides important clarification that a unilateral decision by a claimant not to pursue a claim for a period of time (commonly known as "warehousing"), while maintaining an intention to pursue it down the line, **may** constitute an abuse of process **but** does not automatically result in one. In considering this test, the court must have regard to: (i) the claimant's intention and why it is that they have decided to pause the proceedings; and (ii) the length of the delay. Taking these factors into account, the court should then consider whether or not the conduct of the claimant is abusive. It is not the case that such conduct will always amount to an abuse.

In relation to an application to strike out proceedings on the ground of abuse of process by "warehousing", the court should first determine whether the conduct is an abuse of process and then exercise its discretion regarding whether to strike out the claim.

The Court of Appeal held that both parties had been slow to progress the claim and that the Master had wrongly characterised Asturion as being solely responsible for the delay. Whilst Asturion should have applied for a stay whilst the position in Liechtenstein was resolved, the fact that it did not do so did not automatically result in an abuse of process and the Judge was entitled to conclude that it was not one. Further, even if there had been found to have been an abuse of process, the Court of Appeal noted that other sanctions are available which would have been more appropriate in the circumstances, such as costs sanctions.

BCLP represents the Asturion Fondation in the ongoing English proceedings. The BCLP team is led by London partner Graham Shear and includes senior associates Helen Armstrong and Rebecca Wardle. David Mumford QC and James Kinman of Maitland Chambers were instructed as counsel.

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