D COURT OF THE CAYMAN ISLANDS
ERVICES DIVISION

CAUSE NO. FSD 138 of 2023 (MRHCJ)

BETWEEN:

MAARIT OVASKAINEN

PLAINTIFF

AND:

JARI OVASKAINEN

DEFENDANT

IN CHAMBERS

Appearances:	Mr. Nicholas Yates KC instructed by Ms Yvonne Mullen of Hampson & Company, for the Plaintiff
	Mr. Paul McGrath KC instructed by Mr. Marc Kish, and Mr. Jordan Constable of Ogier for the Defendant
Before:	The Chief Justice, the Hon. Justice Margaret Ramsay-Hale
Date heard	7 September 2023
Draft circulated:	21 December 2023
Judgment delivered:	29 December 2023

HEADNOTE

Civil Procedure - Writ issued seeking to enforce foreign judgment at common law - freezing order granted ex parte - application to discharge freezing injunction - whether duty of full and frank disclosure breached

DECISION

Introduction

1. This is my judgment on the Defendant's application to set aside a freezing injunction made on the 15 June 2023 freezing his assets in the Cayman Islands. I will refer to the Plaintiff as the wife (W) and to the Defendant as the husband (H).

2. The background to these proceedings is set out more fully in the reasons for my decision to grant the freezing order sought by W (unreported, 20 June 2023). Suffice it to say that the injunction was in aid of enforcement of a prospective judgment of this Court for the payment of a debt due to W as judgment creditor pursuant to a decision of the Swiss Federal Supreme Court which awarded her the sum of CHF 115,871,422 plus interest at 5% per annum from 31 August 2021 in proceedings ancillary to the parties' divorce.

3. The application for a freezing injunction was made *ex parte* and granted for the reasons given by me at [21] through [23] that:

> *"21. I was satisfied that W has a good arguable case that there is a debt due to her which is enforceable by this Court ....*
>
> *22. W's evidence that H mortgaged properties in Switzerland which could have been liquidated in partial satisfaction of [the] judgment made in favour of W and changed his domicile to put himself beyond the reach of the Swiss debt collection process was evidence from which the Court concluded that there was a very real risk that H would dissipate the assets located within the Cayman Islands, were he not restrained from doing so. By the same measure, it was also established that there would have been a substantial risk that advance notice would defeat the purpose of the order if the application had not been made ex parte."*

The Submissions on behalf of H

4. Mr. McGrath KC submits that Mr. Yates KC, who appears for the W, failed to comply with his duty on an *ex parte* application to make full and frank disclosure and to present the application in a fair and balanced way in that he, *inter alia*,

a. misled the Court in material respects;

b. made assertions regarding the alleged "conduct" of H which were not supported by the evidence;

c. failed to make reasonable enquiries before advancing alleged facts in the evidence presented to the Court; and

d. failed to refer the Court to evidence or arguments which were available to H and which might be relevant to the exercise of the Court's discretion.

5. More particularly, Mr. McGrath submits that the Court was misled by Counsel for W in that he had asserted that the agreement the parties had made on divorce, known as a Convention de Divorce, had been set aside by the Court on the ground of H's fraud. This, Mr. McGrath suggests, painted H in *"an unbalanced and inaccurate fashion."*

6. Mr. McGrath submits further that it was neither fair nor balanced to describe the period in which the matter was before the Swiss Courts as an 11-year quest by H to deprive W of her entitlement. H was entitled to challenge W's attempts to reopen their agreement and nothing could be made of the fact that it took 11 years for the Courts to resolve all the issues in the case.

7. Mr. McGrath submits that Mr. Yates' failure to inform the court that H had paid substantial sums to W over the years pursuant to parties' agreement also painted H's character in an unbalanced and unfair fashion and that the Court should have been told that sums amounting to £4.25m had been paid to W for rent, living and education expenses for the parties' sons plus moving costs for W in addition to a capital sum of US$8,381,047.50 which were paid to W on 4 December 2013 under the agreement, instead of highlighting a one-off occasion on which H failed to pay rent and school fees on time or H's failure to pay a sum of CHF 6 million which he agrees he owes to W.

8. With respect to the allegation made by W and advanced by Mr. Yates, that H has been emptying his bank accounts to make himself judgment proof, Mr. McGrath submits it was unsupported by any evidence and ought not to have been made.

9. Equally, with respect to the allegation that H has concealed his assets to make himself judgment proof, Mr. McGrath argues that W has failed to provide even the most basic of factors particularising what is a serious allegation, such as identifying (i) what assets (ii) what is said to have been done to those assets and (iii) any basis for saying that such conduct was carried out by H with an intention to make himself judgment proof. Mr. McGrath invites the Court to draw the inference that W deliberately raised the allegation that H had concealed assets, knowing it was untrue or reckless as to the truth of the allegation.

10. With respect to the allegation that H had deliberately mortgaged properties to remove all the equity to make himself judgment proof, Mr. McGrath asserts that the true position was that the last mortgage taken out in respect of a Swiss property was taken in 2015, some 5 years prior to the first Swiss Judgment. No mortgage was taken over any Swiss properties following any of the Swiss decisions, the last being the decision of the Supreme Court dated 10 January 2023. In the premises, he submits, there was no evidence that any mortgage had been taken out with the purpose or intention of defeating the Swiss Judgment. The allegation that H had embarked upon a process of deliberately mortgaging his properties to thwart enforcement was untrue and created the wrong impression that there was a real risk of dissipation. Up to and until the judgment of the Supreme Court in 2023, H was at liberty to deal with his properties as he saw fit.

The Law

11. Mr. McGrath submits that the freezing order should be discharged in the circumstances where W failed in her duty of full and frank disclosure and not re-granted as there is no evidence on which the Court could find that there was any risk of an unjustified dealing in assets. He grounds his submission with respect to the discharge of the Order in the authorities which establish that the obligation of full and frank disclosure is owed to the court itself, the purpose of which is to secure

the integrity of the court's process and to protect the interests of those potentially affected by the Order sought.

12. In *Tugushev v Orlov* [2019] EWHC 2031 Carr J as she then was summarized the principles applicable on *ex parte* application for a freezing order. These include:

> *"ii) ...The court must be able to rely on the party who appears alone to present the argument in a way which is not merely designed to promote its own interests but 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;*
> *iii) Full disclosure must be linked with fair presentation. The judge must be able to have complete confidence in the thoroughness and objectivity of those presenting the case for the applicant. Thus, for example, it is not sufficient merely to exhibit numerous documents;*
> *...*
> *v) Material facts are those which it is material for the judge to know in dealing with the application as made...,;*
> *vi) ...The primary question is whether in all the circumstances its effect was such as to mislead the court in any material respect;*
> *...*
> *ix) 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;*
> *x)...Immediate discharge (without renewal) is likely to be the court's starting point, at least when the failure is substantial or deliberate. It has been said on more than one occasion that it will only be in exceptional circumstances in cases of deliberate non-disclosure or misrepresentation that an order would not be discharged;*
> *...*
> *xii) The court nevertheless has a discretion to continue the injunction (or impose a fresh injunction) despite a failure to disclose. Although the discretion should be exercised sparingly, the overriding consideration will always be the interests of justice...;*

xiii) The interests of justice may sometimes require that a freezing order be continued and that a failure of disclosure can be marked in some other way, for example by a suitable costs order. The court thus has at its disposal a range of options in the event of non-disclosure."

13. *In re OJSC Ank Yugraneft* [2008] EWHC 2614 to which Mr. McGrath also referred, Christopher Clarke J made the following observations which are also relevant to this application:

"104. The Court will look back at what has happened and examine whether, and if so, to what extent, it was not fully informed, and why, in order to decide what sanction to impose in consequence. The obligation of full disclosure, an obligation owed to the Court itself, exists in order to secure the integrity of the Court's process and to protect the interests of those potentially affected by whatever order the Court is invited to make. The Court's ability to set its order aside, and to refuse to renew it, is the sanction by which that obligation is enforced and others are deterred from breaking it. Such is the importance of the duty that, in the event of any substantial breach, the Court strongly inclines towards setting its order aside and not renewing it, so as to deprive the defaulting party of any advantage that the order may have given him. This is particularly so in the case of freezing and seizure orders.

105. As to the future, the Court may well be faced with a situation in which, in the light of all the material to hand after the non-disclosure has become apparent, there remains a case, possibly a strong case, for continuing or re-granting the relief sought. Whilst a strong case can never justify non-disclosure, the Court will not be blind to the fact that a refusal to continue or renew an order may work a real injustice, which it may wish to avoid.

106. As with all discretionary considerations, much depends on the facts. The more serious or culpable the non-disclosure, the more likely the Court is to set its order aside and not renew it, however prejudicial the consequences. The stronger the case for the order sought and the less serious or culpable the non-disclosure, the more likely it is that the Court may be persuaded to continue or re-grant the order

> *originally obtained. In complicated cases it may be just to allow some margin of error. It is often easier to spot what should have been disclosed in retrospect, and after argument from those alleging non-disclosure, than it was at the time when the question of disclosure first arose."*

14. The circumstances in which the Court will exercise its power to sanction applicants who breach their duty of candour was recently illustrated by Doyle J in *In the Matter of Juan Enrique Rassmuss Raier* (Unrep) Grand Court, June 2023.

15. The applicable principles for the re-grant of the order after discharge were summarized by Alan Boyle QC sitting as a deputy judge of the Chancery Division in *The Arena Corp Ltd v Schroeder* [2003] EWHC 1089 (Ch) at para 213.

Discussion

16. Whatever the details of the decision on W's application to set aside the agreement the parties made on divorce, the facts are that W applied to set it aside on the ground of fraud (*"le dol"* in French) on the basis that there had been a material non-disclosure by H with respect to his assets and the Swiss Court ultimately set aside the agreement and made a substantial order in favour of W.

17. For this reason, I have not rehearsed Mr. McGrath's submissions which were intended to show that H did not lie about or fail to disclose his assets in 2011 when he gave his disclosure or in 2012 when the agreement was made, as the truth of the position in 2011 or 2012 with respect to H's disclosure was not material to the application for the order, but part of the background only. What was material was that there was a judgment of the Swiss Court that remained unsatisfied.

18. That I was not told that H had already paid significant sums to W under the agreement was not a material breach of W's duty of candour, as it does not bear upon the question which I had to decide, which was whether there was a real risk of dissipation. The fact that H, then or now, continues to act consistently with an agreement which is no longer effective, while refusing to pay the judgment of the Swiss Court, is not evidence which undermines W's position that there is a risk that H will dissipate the assets in this jurisdiction as to make them unavailable for future judgment.

19. I accept it was not made clear in the *ex parte* application that the properties were mortgaged before judgment was given for W by the Swiss Court and I accept that the date on which the properties were mortgaged was a material consideration, but I do not consider that there was any material breach of W's disclosure obligation in the circumstances where she was not privy to the details of H's financial affairs after 2013, including the status of the mortgages.

20. More to the point, H confirms that the Geneva property is mortgaged to its full value and does not controvert W's evidence that there is no equity in the other Swiss property. H does not explain how it is that the loans have not been amortised over the intervening years, so that the properties remain mortgaged to the hilt despite the massive payouts he received for his shares in a successful game development company in 2013 and 2014, save to say that he was not precluded from using his assets as he saw fit before the handing down of the January 2023 judgment.

21. The fact is that there are no assets in Switzerland against which W can enforce the judgment of the Court.

22. H has not controverted W's evidence that H had effectively made an application to the Court to suspend the enforcement of the judgment by filing an appeal which he then withdrew once he had changed his domicile and thus put himself beyond the reach of the Swiss debt collection process. H says he changed his domicile for tax and other personal reasons but did not deal in his evidence with the coincidence of his decision to retire to the Cayman Islands and W's efforts to enforce the Swiss judgment. The inference to be drawn is that he deliberately put himself beyond the reach the Swiss debt collection process commenced by W by changing his domicile to the Cayman Islands. That was and remains cogent evidence that, without the order, there is a real risk that the assets in this jurisdiction would be dissipated.

23. The summons to set aside is dismissed with costs.

Variation of Order:

24. While that disposes of the application, it is convenient to deal here with Hs's letter application, made while this judgment was pending, to vary the terms of the Interim Order to allow for his legal expenses which currently stand at $130,000, more or less, to be paid.

25. I have considered the submission made by H that, as a rule, a defendant is entitled to spend frozen funds on legal representation in order to defend himself and W's response, and say as follows:

(i) that the entitlement is to spend a "reasonable sum" and I do not consider the putative costs of moving the application to set aside this court's interim order to be reasonable;
(ii) in seeking access to frozen assets, the burden is on H to show that no other assets are available for that purpose: see *Tasarruf Mevduati SigortaFonu v Merrill Lynch* [2008] CILR Note 12;
(iii) H has not offered any evidence which would suggest that he does not have any assets at his disposal;
(iv) that H has instituted defamation proceedings against W in the United States supports the inference that he does has assets available to fund legal expenses.

26. In rejecting the application, I also take into account that these are proceedings to enforce a judgment rendered in ancillary proceedings in which the Court found that H had substantial assets which should be shared with W.

27. The application to vary the Order is dismissed.

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Hon. Justice Margaret Ramsay-Hale
CHIEF JUSTICE
29 December 2023