

Rogachev v Goryainov: White & Case secure the discharge of an English High Court freezing injunction for non-disclosure

August 2019

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In *Rogachev v Goryainov* [2019] EWHC 1529 (QB) the High Court discharged a freezing injunction for non-disclosure at the return date hearing and refused to grant further injunctive relief highlighting the significance of full and frank disclosure when making a without notice application.

Freezing injunctions are much loved by Eastern European and CIS parties involved in litigation in England and Wales, but as the extensive case law on the discharge of freezing injunctions for non-disclosure shows, not all applicants fully understand their strict obligations to the Court. *Rogachev v Goryainov* serves as a cautionary reminder of an applicant's duty of full and frank disclosure and fair presentation of the facts when making a without notice application.

Applications for freezing injunctions are typically made without notice to avoid the risk that a respondent with notice of the application might dissipate their assets before such dissipation can be restrained by the Court.

With such applications, the applicant is under an obligation to disclose all material matters which the Court might need to take into account in deciding whether or not to grant without notice relief. This notably includes matters which might be adverse to the applicant's case. The respondent is not present to put forward their case so this level of disclosure is considered necessary to attempt to balance the applicant's need for secrecy with the respondent's right to a fair hearing.

In this instance, Mr Justice Morris applied the principles set out in *Alliance Bank v Zhunus* [2015] EWHC 714 (Comm) in finding that the Claimant's conduct as to full and frank disclosure at the without notice hearing in December 2018 "fell well short of what was required".

The Claimant's failure to draw the judge's attention to certain documents and issues along with a narrow presentation of the facts resulted in the discharge of the freezing injunction at the return date hearing where both parties were represented.

Background

The Claimant and Applicant, Mr Andrey Rogachev, is a Russian businessman, founder of the *Pyaterochka* supermarket chain, and owner of *Vernii* retail group. Mr Goryainov, the Defendant and Respondent, is also a Russian businessman and controls Russian real estate group *Gremm Group*.

The Claimant and the Defendant are in dispute as to the nature and extent of their business relationship and the ownership of certain assets, particularly a number of market sites in Moscow.

On 20 and 21 December 2018, the Claimant sought and was granted a worldwide freezing injunction against the Defendant at a without notice hearing before Mr Justice Stewart (the “**Freezing Injunction**”). The Freezing Injunction was granted in support of a claim relating to, *inter alia*, a Moscow market site, the ownership of which is in dispute between the Claimant and Defendant: Volgogradsky Prospect 177 (the “**Market**”). The Freezing Injunction specifically restrained the sale proceeds of the Market in the event that it had been sold.

The Judgment

Discharge of the Freezing Injunction

Following a two-day return date hearing, Mr Justice Morris discharged the Freezing Injunction on the basis of the Claimant’s non-disclosure.

“The facts which were not disclosed or not fairly presented were centrally important to key issues (of knowledge, delay and risk of dissipation) which fell to be decided by Stewart J.”

In reaching his decision, Mr Justice Morris deemed the Claimant to have fallen short of the following principles from *Alliance* at the without notice hearing:

- **The Claimed failed to show utmost good faith by identifying the crucial points for and against the application.** Whilst the Claimant did include certain documents in the exhibit to his affidavit sworn in support of the application, this was not sufficient. Proper disclosure meant specifically taking the judge to particular passages in material documents. In this instance, the Claimant failed to take the judge to a notice which indicated that he was aware that the Defendant was seeking a buyer for the Market several months earlier. This would have impacted Mr Justice Stewart’s view on the extent of the Claimant’s knowledge.
- **The Claimant did not fulfil his duty to investigate the facts fully.** The sale of the Market was advertised on a Russian property website from April 2017. Whilst there was no evidence to suggest that the Claimant had actual knowledge of the advert, had the Claimant complied with his duty to fully investigate the facts, he would have been unable to suggest that the Defendant was acting “clandestinely” in seeking to sell the property.
- **The Claimant failed to draw the judge’s attention to weaknesses in his case.** The Claimant did not correct the judge’s misapprehension that he had discovered the sale in mid-November, when the true position was that he discovered the sale at the end of September at the latest. This meant that the judge thought there was a five week delay before the Claimant made the application when there had in fact been at least an 11 week delay. That the true position could be found in the Claimant’s affidavit and skeleton argument was not sufficient, it was necessary for the Claimant to have corrected the judge’s evident misapprehension.
- **The Claimant was not full and frank in his presentation of certain facts.** The judge did not have the full picture at the without notice hearing as the Claimant failed to highlight the fact that three out of the five markets involved in the dispute between the parties were under his control. In addition, details about the breakdown negotiations between the parties were not dealt with in sufficient detail. Accordingly, the Court was not aware of the Defendant’s potential counterclaim and may have been under “a false impression of a heightened risk of dissipation”.

Application for a further freezing injunction

It is well-established that to make out a freezing injunction the applicant has to show (i) a good arguable case against the respondent on the underlying claim; (ii) a real risk of dissipation of assets by the respondent; and (iii) such an order must be just and convenient.

Mr Justice Morris refused to grant the injunction afresh on the basis that the Claimant did not have a good arguable case for a monetary claim. As the Market had not been sold and was within the Defendant’s control, any rights that the Claimant might have to the Market were proprietary rights and the Claimant could not

establish any loss, with the result that he did not have a good arguable case for damages or other monetary compensation which might justify a freezing injunction.

Application for a proprietary injunction

The requirements for a proprietary injunction are similarly well established, namely the applicant has to show that (i) there is a serious issue to be tried; (ii) the balance of convenience is in favour of granting the injunction; and (iii) it is just and convenient to do so.

Mr Justice Morris found that the balance of convenience was not in favour of granting the injunction in this instance. The Claimant failed to show how any loss he might sustain from the sale of the Market could not be adequately compensated by damages. Mr Justice Morris concluded that damages were an adequate remedy for the Claimant and, therefore, the balance of convenience was not in favour of granting the injunction.

Comment

Rogachev v Goryainov illustrates the high standard of full and frank disclosure and fair presentation of the facts that the Court expects from applicants at without notice hearings. The Claimant's failures resulted in the Freezing Injunction being discharged and an order for the Claimant to pay the Defendant's indemnity costs.

These proceedings showcased the capabilities of White & Case's Moscow and London offices working across languages and jurisdictions to achieve a successful outcome for a Russian client in the English High Court. White & Case is uniquely positioned to assist Russian parties in the English Courts as its Moscow office has a number of Russian speaking English qualified disputes lawyers with experience of High Court litigation.

It raises a number of important lessons for those considering a without notice freezing injunction application:

- Pay careful consideration to the complexities of the claim to ensure that the legal test and supporting factual bases for an injunction are clearly made out.
- Prioritise the fair presentation of the facts over the presentation of a compelling case.
- Make the application promptly. Delay detracts from the likelihood of the judge finding there to be a real risk of dissipation.
- Ensure the applicant has thoroughly investigated the facts they rely on as well as facts potentially harmful to their case.
- Explain to international clients in particular their obligations under English law and make sure they understand the consequences of non-compliance.

If you have any queries about this case or freezing injunctions more generally, please contact a member of White & Case's Moscow or London commercial disputes team.

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