



**IN THE GRAND COURT OF THE CAYMAN ISLANDS  
FINANCIAL SERVICES DIVISION**

**CAUSE NO. FSD 375 OF 2023(IKJ)**

**BETWEEN:**

**X**

**PLAINTIFF**

**AND**

**Y**

**DEFENDANT**

**IN CHAMBERS**

**Before:** The Hon. Justice Kawaley

**Appearances:** Mr Ben Tonner KC and Ms Sally Bowler of McGrath Tonner, on behalf of the Plaintiff

Mr Barry Isaacs KC of counsel and Ms Nour Khaleq and Mr Corey Byrne of Ogier, on behalf of the Defendant

**Heard:** 1 February 2024

**Date of decision:** 2 February 2024

**Released for publication:** 27 September 2024

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*Injunction to restrain presentation of petition-order that petition not be placed on public register-discharge of ex parte order on grounds of material non-disclosure*

## SUMMARY DECISION

### Background

1. By an Originating Summons dated 13 December 2023, the Plaintiff applied for an injunction restraining the presentation of a winding-up petition by the Defendant based on a Statutory Demand. It emerged before the urgent application was heard the following day that a petition in the Winding-Up Proceedings had already been presented. On 14 December 2023, following relatively short *ex parte* on notice hearing, I granted an Order (the “Injunction”) which most significantly provided as follows:

*“1. The Defendant, Y, be restrained from taking any steps in further prosecution of the Petition which the Defendant is understood to have filed in respect of the Plaintiff company (the ‘Petition’).*

*2. The Petition shall not be placed on the Court’s public register until further Order of this Court.”*

2. The Plaintiff sought a mandatory stay of the winding-up proceedings on the primary legal basis that the Court did not need to consider the merits of the dispute which had been referred to arbitration. Alternatively, it was submitted there was a *bona fide* and substantial dispute. The application was supported by the Affidavit of a partner of the Plaintiff. This averred that there was a *bona fide* and substantial dispute and set out the various complaints relied upon by the Plaintiff for failing to pay the purchase price it agreed (through a Commitment Letter) to pay to the Defendant on behalf of the purchaser under a share purchase agreement (“SPA”). Based on foreign law advice, it was believed that there were grounds for avoiding the SPA on the grounds of misrepresentation and fraudulent conduct. The counter-arguments raised in response in correspondence by the Defendant were not addressed. Nor were the counter-arguments addressed in counsel’s oral or written submissions. It was averred that serious damage would be caused to the solvent Plaintiff if news of a winding-up petition became public.

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3. This is my decision on the Defendant's application to discharge the Injunction. It is rendered in summary form in response to the Defendant's counsel's request for an early decision and will be supplemented by fuller reasons in due course.

### **The inter partes hearing**

#### **The presentation at the ex parte hearing was unfair**

4. An *inter partes* hearing was fixed 1 February 2024. The Defendant invited the Court to discharge the Injunction on the primary basis of an unfair presentation. However it was also contended that an arbitration stay could only be granted if there was a substantial dispute and that an injunction restraining the prosecution of a petition could only be granted if there was a substantial dispute. On either of these three grounds the Injunction should be discharged. At the *inter partes* hearing, it soon became clear that (1) the Court was indeed required to consider whether the dispute was sufficiently serious to warrant granting an arbitration stay and (2) that there were strong counter-arguments to which the Court should have been referred.
5. The Injunction was clearly liable to be set aside on the grounds of an unfair presentation in relation to (1) the law applicable to an arbitration stay and (2) the factual and legal merits of the alleged dispute. I reserved judgment to consider whether I should proceed to (a) set aside the Injunction, (b) decline to set it aside and/or (c) set aside the Injunction, but also permit the Plaintiff to make a fresh application.

#### **Consequences of the unfair presentation**

6. The most important relevant considerations ( applying, *inter alia*, *CEF Holdings-v-Mundey* [2012] EWHC 1524 at paragraph 226) include:
  - (a) the seriousness of the breach of duty to make a fair presentation and the need to deter other litigants from committing similar breaches;
  - (b) the prejudice the applicant will suffer, which will likely be proportionate to the strength of its case, if the injunction is completely discharged with no possibility of renewal; and

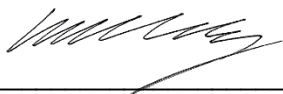
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(c) my own discretionary assessment of what course is appropriate in all the circumstances of the present case.

7. The breach of duty in this case was serious because it deprived the Court of the ability to apply the correct legal test to the question of an arbitration stay and there was a complete failure to identify points which should have been addressed which undermined the Plaintiff's case as to the existence of a genuine dispute. This justifies discharging the Injunction, even though I am satisfied the non-disclosure which occurred was not intentional. The Plaintiff's case based on the material presently before the Court is not sufficiently strong to make it unjust on these grounds to deny the Plaintiff any opportunity to make a fresh application in the present proceedings. The case appears to be weak. The Plaintiff assumed the burden of establishing a *prima facie* case that presentation of the Petition was an abuse of process (Plaintiff's Submissions at the *ex parte* hearing, paragraph 25). It has failed to discharge that burden, even at the end of the *inter partes* hearing.
8. However, there is an important consideration which would make it unjust to deny the Plaintiff an opportunity to renew its application in the Winding-Up Proceedings. The Commitment Letter and the SPA are both governed by foreign law. The Defendant has filed expert evidence on foreign law which the Plaintiff could not with reasonable diligence respond to in time for yesterday's hearing. The Plaintiff's counsel objected to the admission of expert evidence without leave and I was myself surprised by the dispositive responsive submission that, in Originating Summons proceedings, leave to adduce expert evidence was not required (GCR Order 38 rule 36 (2)).
9. It is not possible for me to conclude that the Plaintiff's case is so weak that a renewed application should not be permitted without relying to a material extent on the expert evidence to which the Defendant's counsel referred. This would be fundamentally unfair. It is also not possible for me to make any positive findings that the dispute is not a serious one without relying, to a material extent, on the foreign law expert evidence which the Defendant has relied. Where arbitration proceedings are pending, it would be wrong in principle to decline to grant a stay under section 4 of the Foreign Arbitral Awards Enforcement Act without a positive finding that "*there is not in fact a dispute between the parties*". This is a fundamental "*threshold issue*" (see e.g. *Re BPGIC Holdings Limited*, FSD 248/2023 (MRHCJ), Judgment dated 20 November 2023 (unreported)).

**Disposition**

10. The Injunction is discharged and the application may not be renewed on the present proceedings. This decision is essentially based on the Plaintiff's breaches of its duty to make a fair presentation when applying for the Injunction at an *ex parte* hearing. Taking into account my provisional views as to how serious the dispute referred to arbitration appears to be. I make no positive findings as to whether or not the dispute referred to arbitration is a substantial one.
11. This decision is accordingly without prejudice to the right of the Plaintiff, the Respondent in the Winding-Up Proceedings, to apply in those proceedings for similar injunctive relief. The merits of the referred dispute are governed by foreign law, and the Plaintiff has not been afforded an opportunity in the present proceedings to respond to the Defendant's expert evidence. On balance, I accept there is a sufficient risk of damage to the Plaintiff from publication of the Petition to continue the restraint on publication I imposed on 14 December 2023, leaving the matter to be reviewed afresh by the assigned Judge in the Winding-Up Proceedings.
12. I accordingly make the following Order (subject to hearing counsel on the papers as to its precise terms, if required):
  - (1) Paragraphs 1 and 2 of this Court's Order's 14 December 2023 Order are set aside, without prejudice to paragraphs (2) and (3) below;
  - (2) The Petition shall not be placed on the Court's public register until further Order of this Court made in Winding-Up Proceedings;
  - (3) The Plaintiff is at liberty to renew its application for an injunction restraining the further prosecution of the Petition in the Winding-Up Proceedings;
  - (4) Unless either party applies by letter to the Registrar to be heard as to costs, the Plaintiff shall pay the Defendant's costs of the present application to be taxed, if not agreed, on the indemnity basis.



**THE HONOURABLE MR JUSTICE IAN RC KAWALEY**  
**JUDGE OF THE GRAND COURT**

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