BROADHURST
ATTORNEYS-AT-LAW LLC

Asset Tracing & Recovery: Recognition and Enforcement of Foreign Judgments in the Cayman Islands

Broadhurst LLC have recently obtained local recognition of a New York judgment to obtain a post-judgment Mareva Order freezing a debtor's assets worldwide as well as a Banker's Books Order requiring the disclosure of a Defendants' historical banking records.

Although these decisions do not initially appear out of the ordinary, this worldwide freezing order is the first reported case of a freezing injunction being awarded in the Cayman Islands at the post-judgment stage and establishes the relevant legal test to be met.

In addition, it is the Court's refreshing application of the Confidential Information Disclosure Law to the Banker's Books application that will be of wider value across the financial services industry to those seeking to obtain, or required to make, the disclosure of confidential information.

Both decisions will also be useful to practitioners seeking to enforce a judgment against willfully evasive judgment debtors, particularly where the judgment creditor must first identify and trace assets that may no longer be located within the jurisdiction.

The Proceedings

In September 2015 the Plaintiff obtained a judgment against the Defendants in the Supreme Court of New York for approximately $20m plus interest and costs (the "NY Judgment").

When the Defendants failed to satisfy the NY Judgment and assets previously held in the United States vanished, as evidence existed that the Defendants had previously held at least one bank account in the Cayman Islands, the Plaintiff instructed Broadhurst to assist with recovery.

Ex-parte proceedings to recognize the NY Judgment in the Cayman Islands were subsequently issued and the Plaintiff successfully obtained the Court's permission to serve the Defendants outside the jurisdiction. Once served, the Defendants applied to set aside the order permitting leave to serve outside the jurisdiction, contending that the Grand Court did not have jurisdiction because the bank account had since been closed and the Defendants did not have any other assets in the Cayman Islands against which a judgment could be enforced. The Plaintiff countered that the applicable test was not whether assets were within the jurisdiction but whether the Plaintiff could secure a legitimate benefit from recognition of the judgment in the Cayman Islands.

The Honourable Justice Kawaley (Acting) agreed with the Plaintiff's argument that where the main thrust of the recognition proceedings is to enable the tracing of assets, recognition of a foreign judgment will not be precluded simply because the Defendant no longer has assets in the jurisdiction.

Thereafter, the Plaintiff applied for a post-judgment injunction freezing the Defendants' assets worldwide ("Worldwide Freezing Order"); and a disclosure order requiring the Defendants' former bankers within the jurisdiction to provide all records relating to any bank accounts held ("Banker's Books Order").

Worldwide Freezing Order

Although the principles governing the grant of ex parte freezing injunctions are well settled under Cayman law, there was previously no authority establishing the legal test to grant a freezing order over worldwide assets at the post-judgment stage.

Bankers Books Order

In order to verify the origin and destination of payments into and from a bank account, the Plaintiff sought third party disclosure from the Bank pursuant to section 8 of the Evidence Law (2011 Revision) (the "Law") to include all of the Defendant's historical banking records (the "Bankers Books Order").

Section 8 provides as follows:

> "*8. (1) On the application of any party to a legal proceeding a court may order that such party be at liberty to inspect and take copies of any matter in a banker's book for the purpose of such proceeding, and an order under this section may be made with or without summoning the bank or any other party, and shall be served on the bank three clear working days before the same is to be obeyed unless the court otherwise directs.*
>
> *(2) Any order made under subsection (1) shall be without prejudice to the Confidential Information Disclosure Law, 2016, and for the purposes of that Law compliance with such an order by a bank or officer thereof shall, for the purposes of this Law, be deemed to be giving in evidence of the matter in the banker's book to be inspected thereunder.*"

As to whether the grounds for making a Banker's Books Order had been made out by the plaintiff, Kawaley, AJ concluded that an applicant must demonstrate both that banker's books are relevant to the enforcement process and admissible in the enforcement proceedings, and where the relevant account belongs to a party to the proceedings,

that (a) it is not possible or convenient to obtain the documents from that party, and (b) that there are good grounds for seeking an order ex-parte.

His Lordship was satisfied on the facts of the case that the chances of the Defendants providing the disclosure sought or consenting to the same were slim, and therefore that requirement (a) had been met. With respect to requirement (b), he was also satisfied that where the Grand Court Rules expressly permitted an application for a Banker's Books Order to be made ex parte, a lower bar had to be met to justify not giving notice of the application to the Defendants at the post-judgment stage. Having regard to the nature of the relief sought and the facts of the present case, that bar had been met by the Plaintiff.

The Confidential Information Disclosure Law 2016 (the "CIDL")

One fundamental difficulty with an application pursuant to Section 8 is that even if the grounds for making the order are met the power to make the order is subject to the provisions of the CIDL, section 4 of which states that, any person intending or required to give disclosure of confidential information in connection with any proceedings must apply to the Grand Court for directions before giving that evidence, unless they have the express consent of the owner of the information or disclosure is sanctioned by some other law. This was confirmed in *Ferrostaal AG-v-Jones and others*[1] where a Banker's Books Order was refused because the plaintiff had not previously applied for directions pursuant to an earlier version of the CIDL[2].

The two main competing arguments in *Ferrostaal* were as follows:

(1) The plaintiff argued that section 8 of the Law took precedence over the Confidential Relationships Preservation Law ("the "CRPL") (an earlier enactment of the CIDL), and that there was no need for the plaintiff to apply for directions under that law before an order under section 8 of the Evidence Law could be made. Alternatively, the Court had sufficient material before it to make a directions order if that was required; and

(2) The Attorney General argued that as section 8 expressly provided that it was "subject to" the CRPL, Section 8 mandated compliance with section 3A and there was no question of a conflict between the two statutes.

[1] 1984-85 CILR 143
[2] Confidential Relationships (Preservation) Law 1976; Confidential Relationships (Preservation) Amendment Law 1979 (the "CRPL")

Kawaley IJ concluded that two relevant findings were made in *Ferrostaal.*

The first was on the question of who was required to apply for directions pursuant to the CRPL (where it was engaged).

Accepting the interpretation contended for by the Attorney General and citing Hull J, the judge concluded that the second finding was as follows:

> "*If a party to proceedings in <u>any</u> court (including this court) wishes to obtain an order for inspection under s. 8, he must first make an application under section 3A of the Confidentiality Law to this court. The substantive modification as I see it is this, that he must have the intention of using in the proceedings the information he seeks.*"[3]

However Broadhurst argued that the decision in *Ferrostaal* had been determined on old, far more restrictive law with regard to obtaining and disclosing confidential information, and should be distinguished from the present case for the following reasons:

a. At the time of the application in *Ferrostaal*, the CRPL provided that it was a criminal offence for a party to willfully attempt to obtain or disclose confidential information except in accordance with that law, however pursuant to the CIDL this is no longer a criminal offence; and

b. The CIDL now provides a person disclosing confidential information on wrongdoing with a defence to an action for breach of the duty of confidence as long as the person making the disclosure acted in good faith and in the reasonable belief that the information was substantially true. This defence was not available at the time of the *Ferrostaal* application.

The Decision

As he was satisfied that the grounds to make the order had been established, and with regard to the application of the CIDL, giving due deference to Ferrostaal, Kawaley IJ granted the Banker's Books Order in slightly different terms to those requested. He directed that the bank provide the disclosure within 21 days, but that the Plaintiff and the Bank had liberty to apply for directions with respect to the implementation of the Order, if necessary. Due to the ex-parte nature of the Plaintiff's application, it was also ordered that the Plaintiff first must seek the Court's confirmation that the requirements of the CIDL had been met before seeking to enforce the order. Such an order will not bite unless the bank is either satisfied that their client's consent had been obtained or were comfortable to provide the disclosure without consent, in the absence of directions from the court under the CIDL.

[3] *Ferrostaal AG-v-Jones and others* [1984-85 CILR 143] (at 152)

In arriving at his decision His Lordship made the following findings:

a. Section 3 of the CIDL is indicative of a legislative policy shift from protecting the misuse of confidential information by persons generally (through criminal sanctions) to enforcing confidentiality obligations imposed on persons who are in receipt of confidential information through civil sanctions;

b. The pertinent confidential relationship is that between the bank and the Defendants. Therefore, it was impossible to envisage any meaningful directions being given under section 4 without the participation of the bank. It was also difficult to see why the Court should require such directions to be sought at the outset of the section 8 application in all of the circumstances of the present case;

c. the Plaintiff in the present case was broadly correct to contend that it was, in the first instance at least, for the bank to decide whether it was content to allow inspection without directions or for it to apply for directions from the Court;

d. If the bank forms the view that the Defendants have expressly or impliedly consented to inspection in the circumstances, it is difficult to see what legislative imperative requires the Plaintiff, a third party, to seek directions under section 4 before even a conditional order under section 8 is initially made;

e. The question of when, or if, directions have to be sought under section 4 is merely a case management question. It makes no sense to require an application for directions under section 4 to be made in each and every case because there may be many scenarios in which the need for directions will not even arise;

f. The scope of confidentiality has evolved in the Cayman islands over the last 30 years with a drift towards greater transparency, at the public policy level at least. There no longer appear to be criminal sanctions imposed for non-compliance with the confidentiality law; and

g. Accordingly, he felt obliged to proceed in light of modern more flexible case management standards and adopt a less formal approach than might have been considered routine 35 years ago. It was considered that the Grand Court today "*has a positive duty to manage civil litigation in an efficient manner under the overriding objective*". However, it was also noted that a more formal approach to an application for a Banker's Books order may well be appropriate in other cases, particularly at the pre-judgment stage.

Whilst the Court was careful in the present case to include a degree of conditionality in the Banker's Books Order, there can be no doubt that this decision redefines the procedure for obtaining confidential information in the

Cayman Islands and provides a clear example of when a willfully evasive judgment debtor cannot rely on the CIDL to create an additional barrier to disclosure of its banking records.

For further details on this decision please see Banco International De Costa Rica S.A. v Banana International Corporation et al, FSD 222 of 2017, 7 August 2018.

Questions around administration of recovery of debts can often be complex. It is advisable to seek that assistance of a legal professional who can give advice and support. Broadhurst LLC has a wide range of experience and we would be delighted to assist you through the process.

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