Worldwide Mareva injunctions in Singapore: Issues to consider following Bouvier v Accent Delight

The Bouvier judgment clarifies the rules of the game for those seeking to obtain Mareva injunctions in Singapore, including in support of arbitration, and as such, is of paramount importance. In *Yves Charles Edgar Bouvier and Anor v Accent Delight International Ltd and Anor and another appeal* [2015] SGCA 45, the Court of Appeal held that an allegation of dishonesty does not obviate the need to establish a real risk of dissipation of assets, which is key to obtaining a Mareva injunction. In doing so, the Court of Appeal effectively tightened the requirements to be met by an applicant before a freezing order can be granted.

The facts of the case

The appeal had been brought by a Swiss businessman Yves Charles Edgar Bouvier and his co-appellants (the Appellants) against the refusal of the High Court Judge (the Judge) to set aside worldwide Mareva injunctions and ancillary disclosure orders that the Judge had earlier made *ex parte* against them. The cumulative value of the assets subject to the worldwide Mareva injunctions was US$1.1 billion.

The dispute arose out of the acquisition of art masterpieces between 2003 and 2014 by several BVI companies owned wholly by the family trusts of a Russian billionaire Dmitry Rybolovlev (the Respondents). All of the Respondents' art acquisitions had been arranged by Mr Bouvier, who was responsible for locating, negotiating for and obtaining the artworks that the Respondents wished to purchase. The other appellants were MEI Invest Limited, a company that Mr Bouvier controlled, and Tania Rappo, who had introduced Mr Bouvier to Mr Rybolovlev.

The dispute between the parties centered on the relationship between Mr Bouvier and Mr Rybolovlev, and arose when the latter discovered, in late 2014, that Mr Bouvier had secured the artworks at prices that were considerably less than those at which he told the Respondents he had secured them. The mark-ups that Mr Bouvier imposed, beyond the 2% fee on each transaction he arranged allegedly amounted to around US$1 billion. The Respondents therefore brought an action in the Singapore Court against Mr Bouvier and MEI Invest Limited for *inter alia* breach of fiduciary duties, dishonest assistance and conspiracy. The Respondents also concurrently brought an action against Mrs Rappo, who had been drawn

Key issues

- An allegation of dishonesty does not obviate the need to establish a real risk of dissipation of assets.
- A party seeking a Mareva injunction must give notice to the party against whom the injunction is sought, unless giving prior notice would defeat the purpose of the injunction: it is no longer "common practice" to apply for Mareva injunctions *ex parte*.
- The Court of Appeal will lift the injunction if the injunction had been obtained not out of a genuine fear of dissipation of assets but to oppress the party against whom the injunction was made.

into the dispute because she had allegedly received payments from Mr Bouvier upon the completion of each art acquisition, for knowing receipt and conspiracy. In addition, proprietary claims were brought against the Appellants.

In connection with the Singapore proceedings, the Respondents applied *ex parte* to the Singapore High Court for Mareva injunctions and ancillary disclosure orders against the Appellants, which were granted by the Judge. The Appellants applied to set aside the orders. However, the Judge did not set aside either the Mareva injunctions or the ancillary disclosure orders, but attenuated them. It was against these orders that the appeal had been brought.

The main issue before the Court of Appeal was whether the requirements for the grant of Mareva relief had been satisfied. In considering this issue, the Court found that (a) a good arguable case of dishonesty cannot in itself ground an inference of a real risk of dissipation of assets; (b) the fact that Mr Bouvier had allegedly made unsatisfactory asset disclosures was insufficient to lend itself to a real risk of dissipation; and (c) the Respondents had abused the Court's process in obtaining the Mareva injunction because they used the injunction as an instrument of oppression to inflict commercial prejudice on the Appellants.

Issue 1: The Spectramed proviso

In order to obtain Mareva relief from the Court, an applicant generally has to show, *inter alia*, a good arguable case on the merits of its claim, and a real risk that the defendant will dissipate his assets to frustrate the enforcement of an anticipated judgment of the Court.

The Court of Appeal found that whilst the Respondents may have established a good arguable case of dishonesty against Mr Bouvier, the alleged dishonesty was *not* of such a nature that it had a real and material bearing on the risk of dissipation of assets.

This pronouncement by the Court of Appeal is significant as it clarifies the position in Singapore as to whether a finding of a good arguable case of dishonesty or unconscionability on the defendant's part would obviate the requirement of additionally showing a real risk of dissipation, particularly in light of the 2010 decision of *Spectramed Pte Ltd v Lek Puay Puay* [2010] SGHC 112 (*Spectramed*).

In *Spectramed*, the Court held, *inter alia*, that "[i]f there is a good arguable case in support of an allegation that the defendant has acted fraudulently, dishonestly or unconscionably, *it is unnecessary for there to be any further specific evidence on risk of dissipation* for the court to be entitled to take the view that there is a sufficient risk to justify granting Mareva relief…" (emphasis added) (the *Spectramed* proviso).

The Court of Appeal found that the *Spectramed* proviso went too far in that an allegation of dishonesty cannot obviate the need to establish a real risk of dissipation, for three reasons.

First, as a matter of common sense, because "the fact that a defendant might be crooked does not in and of itself establish that there is therefore a real risk that he will bury his spoils to defeat a judgment that may in due course be rendered against him". In particular, the Court found that the *Spectramed* proviso failed to distinguish between different types of dishonest conduct, some of which might more readily support an inference of a real risk of dissipation than others.

Second, the grant of Mareva relief should not be wholly founded upon an unproven allegation of dishonesty. In this regard, the Court pointed out that an allegation of dishonesty made at an interlocutory stage could well eventually be refuted and the Court could not treat such allegations as if they had already been established.

Third, the *Spectramed* proviso was not borne out by the case law cited in support of it or the larger body of jurisprudence dealing with Mareva injunctions. The Court of Appeal undertook a detailed review of the decisions on Mareva relief from Singapore, England, and Australia, before concluding that:

> *"if there is a unifying principle that can adequately rationalise and explain the circumstances in which a court may legitimately infer a real risk of dissipation from nothing more than a good arguable case of dishonesty, it is this – the alleged dishonesty must be of such a nature that it has a real and material bearing on the risk of dissipation."*

In fact, the Court of Appeal pointed out that in the case of *Spectramed* itself, the learned Judge did not base his decision solely on the *Spectramed* proviso, but actually went on to assess the evidence to determine whether it supported the inference that there was a sufficient risk or likelihood of dissipation of assets.

On the facts before it, the Court of Appeal was not convinced that the allegations of dishonesty leveled at Mr Bouvier had a real and material bearing upon the risk of dissipation. The Court found that the ultimate outcome in

the suit turned on the true characterization of the relationship between Mr Bouvier and the Respondents, and that it could be found, on one view, that Mr Bouvier had not been guilty of any fraudulent conduct.

Issue 2: Asset disclosures

The Respondents next tried to argue that there were doubts over how forthright Mr Bouvier had been in his asset disclosures, which had been ordered by the Judge when granting the Mareva injunction. On that basis, the Respondents sought to persuade the Court to draw the necessary inference of a real risk of dissipation.

The Court of Appeal rejected the Respondent's argument in finding that where the Mareva injunction itself was ultimately found not to have been justified on the basis of the material before the court at the time it was granted, it would be inherently unfair to allow the plaintiff to use information that he had obtained through the ancillary disclosure orders to shore up a case for a real risk of dissipation.

The Court further found that there are only 2 narrow situations where ancillary disclosure orders could be relevant to the risk of dissipation: (i) where the defendant refuses to provide any disclosure of his assets at all; and (ii) where the information disclosed by the defendant reveals assets which are so glaringly inadequate or suspicious that the deficiencies cannot be attributed to the urgency with which the disclosures were made or other accounting or valuation inaccuracies.

Issue 3: The Mareva relief as an abuse of the Court's process

Significantly, the Court of Appeal also found that the Respondents used the injunction as an instrument of oppression to inflict commercial prejudice on the Appellants, and discharged the injunction.

The Court found that the Respondents had delayed in making their application for a Mareva injunction and ancillary disclosure orders against the Appellants. The Court found that the necessity to prevent Mr Bouvier from dissipating his assets, if there was one, should have crystallized by 22 November 2014, i.e. when parties met and discussed the New York Times article where it would have been clear to the Respondents that the price they had paid Mr Bouvier for a particular painting was about US$50 million in excess of the amount reported by the New York Times.

The Court also found it unacceptable that the Respondents had failed to comply with the Supreme Court Practice Directions in failing to give notice of the *ex parte* Mareva application and in failing to explain why no notice had been given or for in failing to contend that this was a case where giving prior notice would defeat the very purpose for which the application was being made. The Court of Appeal rejected the Respondents' solicitors' argument that it was the practice *not* to give notice whenever a Mareva injunction was sought and stated that such a practice, if true, "made a mockery of the Court's Practice Directions and was not to be unthinkingly encouraged".

Further, the Court found that the breadth of the Mareva injunction against Mr Bouvier was unjustifiably wide and included entities of which only some were wholly owned by Mr Bouvier.

Finally, the Court noted that the Mareva injunction was put into wider circulation than necessary for its efficacy, and had been sent to the international press, and information was disseminated in a misleading manner. The Court found that the cumulative picture painted by the Respondents' conduct was that the Mareva injunction had been obtained by the Respondents not out of a genuine fear that the enforcement of an anticipated judgment of the court would be frustrated, but rather, to oppress the Appellants.

The impact of Bouvier v Accent Delight

In *Bouvier v Accent Delight*, the Court of Appeal set the principles for obtaining worldwide Mareva injunctions in Singapore. First, the applicant must establish a real risk of dissipation of assets. Second, a case of dishonesty does not obviate the need to additionally establish the risk of dissipation of assets. Third, counsel must adhere judiciously to the Supreme Court Practice Directions when seeking Mareva injunctions, and use *ex parte* applications sparingly and only in cases when such use is justified. Fourth, the courts will analyse the conduct of plaintiffs subsequent to obtaining the Mareva injunctions and will lift the injunctions if the injunctions are used dishonestly, misleadingly, and with the purpose of inflicting commercial prejudice on the defending party.

The decision of the Court of Appeal in lifting the worldwide Mareva injunction against the Appellants is likely to have wide-ranging ramifications for parties beyond the shores of Singapore. In this regard, it is understood that subsequent

to the Court of Appeal's decision, parties agreed, by consent, that the injunction against the Appellants' assets in Hong Kong be discharged: see *Accent Delight International Ltd and anor v Yves Bouvier and anor* HCMP 573/2015.

The Bouvier judgment brings Singapore in line with that of England and Wales and Hong Kong, where a case of dishonesty does not automatically lead to the establishment of the risk of dissipation of assets, and where the courts take a similarly stringent approach when it comes to parties' conduct.

Authors

Nish Shetty
Partner

T: +65 6410 2285
E: nish.shetty
@cliffordchance.com

Olga Boltenko
Senior Associate

T: +65 6661 2085
E: olga.boltenko
@cliffordchance.com

Priscilla Lua
Associate

T: +65 6661 2086
E: priscilla.lua
@cliffordchance.com

Clifford Chance Asia
Clifford Chance Asia is a Formal Law Alliance between Clifford Chance Pte Ltd and Cavenagh Law LLP
12 Marina Boulevard, 25th Floor Tower 3,
Marina Bay Financial Centre, Singapore 018982

500986-4-7344-v0.5

www.cliffordchance.com
www.cavenaghlaw.com.sg

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Casablanca ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Jakarta* ■ Kyiv ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Riyadh ■ Rome ■ São Paulo ■ Seoul ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C.