

## Litigation - Cyprus

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### Court considers stay of enforcement in *Norwich Pharmacal* orders

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**Facts**  
**Decision**  
**Comment**

In *Penderhil Holdings Limited v Ioanni Kloukina*<sup>(1)</sup> the Supreme Court of Cyprus considered whether and, if so, on what basis a stay of enforcement should be granted pending appeal in *Norwich Pharmacal* orders.

#### Facts

The respondent, Mr Kloukina, had filed an action in the Limassol District Court against the defendants, claiming that one of them had issued post-dated cheques to him for a total amount of €1,073,976.19, which were later proven to be false. The plaintiff also alleged that, by the time those cheques became payable, the defendant that had issued them had deliberately fraudulently transferred all of his property to third parties in order to deprive the plaintiff from receiving the value of the cheques.

Simultaneously with the filing of the action, the plaintiff applied to the court requesting the issuance of *Norwich Pharmacal* and gagging orders, aimed at obtaining information from third parties who were innocently involved in the fraudulent transfers and additionally prohibiting those innocent third parties from informing the key defendants of the existence of the application. The *Norwich Pharmacal* orders were made, but not the gagging orders.

The two groups of defendants (consisting respectively of Defendants 1, 2 and 3 and Defendants 5 and 6) that had been ordered to provide information to the plaintiff under the *Norwich Pharmacal* orders filed identical appeals with the Supreme Court of Cyprus challenging the first instance court's decision to grant the plaintiff's request for such orders. They also applied to the first instance court for a stay of enforcement of the orders until the pending appeal had been heard. The first instance court rejected their request and granted them a short extension in which to comply with the *Norwich Pharmacal* order. Following those developments, as allowed by the Civil Procedure Rules, the defendants applied to the Supreme Court for the same stay of enforcement pending the appeal.

This was the first time that an application of this nature had been made to the Supreme Court and there was therefore no local precedent for the parties or the court to rely on. All parties made reference to English and Irish case law in order to support their arguments.

#### Decision

In its judgment the Supreme Court referred to:

- *X Limited v Morgan-Grampian Publishers Limited*<sup>(2)</sup> and *Camelot Group Plc v Centaur Communications Limited*<sup>(3)</sup>, both of which concerned orders to disclose the identity of a wrongdoer;
- *JSC BTA Bank v Roman Solodchenko*<sup>(4)</sup>, which concerned the stay of an order for disclosure of property;
- *Harrington v Polytechnic of North London*<sup>(5)</sup>, *British Steel Corporation v Granada Television Limited*<sup>(6)</sup> and *Rank Film Distributors Limited v Video Information Centre*<sup>(7)</sup>;
- the judgment of the Irish court in *Megaleasing (UK) Limited v Vincent Barrett*<sup>(8)</sup>; and
- two Cyprus cases adduced by the respondent - *Yukos Finance BV v Halebay Holdings Limited*<sup>(9)</sup> and *Thomas Cook AG v Thomas Cook Services (Cyprus) Limited*<sup>(10)</sup>.

In coming to its decision, the Supreme Court used as a guideline the two general considerations that are relevant in applications for stay of enforcement pending an appeal:

- The court must secure the finality of the judgments of the first instance courts and the consolidation of the rights of the winning party; and
- The right of a party to file an appeal should not be overlooked and should remain effective.

The court stated that each case has different facts which may direct the court to a different conclusion each time as it attempts to balance these two considerations.

On the basis of the facts placed before it in the case in question, the Supreme Court concluded that, *prima facie*, the appellants had filed an arguable appeal. It then considered the potential effects of its decision either to grant or to withhold the requested stay of enforcement pending determination of the appeal. If the court were to grant the requested stay of enforcement and eventually came to dismiss the appeal, the adverse consequences for the respondent would be limited to a delay in receiving the requested information. If, on the other hand, the court were to refuse the stay and the appeal succeeded, then the outcome of the appeal would have no effect since the appellants would already have been forced to disclose the requested information - that is, the respondent would already have the information and the appellants would be unable to bring the situation back to its initial state of affairs.

Accordingly, the court allowed the application for stay of enforcement until final determination of the appeal.

### Comment

There is a risk that the criteria set out by the Supreme Court lean in favour of the parties challenging *Norwich Pharmacal* orders and will lead to such orders losing their strength and importance, by allowing perpetrators of frauds valuable time to cover their tracks and place the funds beyond reach and by depriving victims of fraud of the means to identify and trace the perpetrators. While the right of a party to an appeal is unquestionable, the application of the criteria set out above to secure a stay of the execution of a *Norwich Pharmacal* order pending appeal could easily be exploited by unscrupulous defendants in international fraud cases to thwart justice. A preferable outcome would have been for the court to try the appeal on an expedited basis and, in the meantime, to require the successful appellants to provide a cross-undertaking in damages or some similar form of guarantee, so as to safeguard the victims of the fraud from the perpetrators misusing the time won by the stay.

For further information on this topic please contact [Panayiotis Neocleous](mailto:Panayiotis.Neocleous@neocleous.com) or [Marina Joud](mailto:Marina.Joud@neocleous.com) at [Andreas Neocleous & Co LLC](http://neocleous.com) by telephone (+357 25 110 000), fax (+357 25 110 001) or email ([panayiotisn@neocleous.com](mailto:panayiotisn@neocleous.com) or [marina.joud@neocleous.com](mailto:marina.joud@neocleous.com)).

### Endnotes

- (1) Civil Appeals 319/2011 and 320/2011 dated November 2 2011.
- (2) [1991] 1 AC 1.
- (3) [1999] 1 QB 124.
- (4) [2010] EWHC 2843.
- (5) [1984] 1 WLR 1293.
- (6) [1981] AC 1096.
- (7) [1982] AC 380.
- (8) [1991] 1 Irish Reports 219.
- (9) Action 3578/2008 dated May 15 2009.
- (10) Action 1971/2009 dated December 22 2009.

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