

Litigation - Cyprus

Advance-fee fraud: tracing and recovering assets through the courts

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Provisional measures

Leon Brener case

Comment

Advance-fee fraud is a classic form of white collar crime,⁽¹⁾ in which the targeted victim is persuaded to advance money to the criminal in the hope of realising a significantly larger gain.

Provisional measures

Tracing and recovery of stolen assets is a priority for victims of fraud. In this respect, the Cyprus courts offer a wide variety of provisional measures, including:

- freezing orders to prevent the alienation of assets;
- *Norwich Pharmacal* disclosure orders to identify wrongdoers and the current location of alienated assets;
- gagging orders to prevent 'tipping-off' of so-far unidentified wrongdoers and co-conspirators, thus limiting the potential for alienation of assets; and
- search orders to obtain and prevent the destruction of evidence.⁽²⁾

Application may be made for these provisional measures on an *ex parte* basis, without notice to the respondent, provided that an element of extreme urgency can be demonstrated. In addition, the applicant is under a strict obligation to make a full and frank disclosure of all material facts to the court.

The Courts of Justice Law 1960 empowers courts to grant interim orders, such as those listed above, "in all cases in which it appears to the Court just or convenient so to do", provided that the following conditions are satisfied:

- A serious question arises to be tried at the main hearing;
- There appears to be a probability that the plaintiff is entitled to relief; and
- It would be difficult or impossible to complete justice at a later stage without granting an interlocutory injunction.

Orders against third parties

The Supreme Court has confirmed the power of courts in Cyprus to issue provisional measures against co-defendants against which no direct cause of action lies, provided that the claim for the relevant order is ancillary and incidental to the claimant's cause of action against the primary co-defendant, as outlined in *Commercial Litigation Pre-emptive Remedies*⁽³⁾ under the heading "Involvement in Wrongdoing", which states:

"banks have often been held to be innocently involved in wrongdoing and Norwich Pharmacal orders have been made against them in a number of cases. This arises particularly where there has been a fraud which had led to loss, and the applicant wants to know the identity of the perpetrator in order to issue proceedings. Norwich relief can be obtained in such circumstances in order to identify the wrongdoer and prevent any further fraudulent activity."

The theory behind the availability of disclosure orders against third parties derives from the leading English decision of *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133:

"[The authorities] seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration. I am the more inclined to reach this result because it is clear that if the person mixed up in the affair has to any extent incurred any liability to the person wronged, he must make full disclosure even though the person wronged has no intention of proceeding against him. It would I think be quite illogical to make his obligation to disclose the identity of the real offenders depend on whether or not he has himself incurred some minor liability."

Worldwide effectiveness of provisional measures

The Supreme Court has also confirmed the power of courts to issue asset-freezing orders with worldwide effect.

Furthermore, EU legislation has introduced legal bases under which Cyprus courts may issue provisional measures in support of court and arbitration proceedings in another European member state and *vice versa*. In determining the most appropriate jurisdiction, in relation to orders taking direct effect against the assets, the courts of the state where the assets are located would generally be regarded as the most appropriate to issue such orders, whereas in relation to orders *in personam*, including orders for disclosure, the courts of the state where the person enjoined resides would be preferred.

Leon Brener case

The recent *Leon Brener* case,⁽⁴⁾ which concerned a classic advance-fee fraud, is a good illustration of the powers of Cyprus courts in assisting victims of fraud.

Facts

The plaintiff filed an action against 12 legal and natural persons of various nationalities before the Limassol District Court. Some of these, such as the bank concerned, were innocent third parties which were involved in the proceedings in order to give a basis for disclosing information that would assist in the tracing of fraudulently alienated assets.

The sixth defendant resided in France and Florida with his wife, the 12th defendant. The plaintiff claimed that the sixth defendant was the ultimate beneficial owner of many of the defendant companies, including the 10th defendant (which owned immovable property in Florida) in which the shares were registered in the names of the sixth and 12th defendants. According to the claims of the plaintiff, the sixth defendant was the person who controlled and managed the fifth, ninth, 10th and 11th defendants (companies incorporated in Gibraltar, the British Virgin Islands and the Marshall Islands), and was the mastermind of the fraudulent scheme against him, as well as the beneficiary and controller of the Cyprus bank account of the fifth defendant.

The plaintiff briefly alleged that he was the victim of fraud orchestrated against him, as a result of which he was persuaded to make payments into an account with Bank of Cyprus Public Company Limited (following a discovery order, the action was withdrawn against the bank and the Cypriot introducers) in the name of the fifth defendant.

In 2002 the plaintiff was approached by a company that offered to sell him shares in a company named RAKE, with the intention that these should subsequently be resold to RAKE itself. The result was the signing of an agreement and, thereafter, a series of agreements and offers followed with respect to payments and purchases of shares. A few months later, excuses of alleged freezing of payments due to the need to pay capital gains taxes started to be presented to the plaintiff. At this stage, the plaintiff was induced to make various further payments allegedly connected to "capital gains taxes", "bonded courier fees", "purchase of additional shares", "purchase of rubies" and "payment of withholding taxes". In total, the plaintiff was induced to pay the fifth defendant a total of more than \$6 million during the period from February 2002 to March 2004.

Decision

Considering the evidence and assessing the witnesses that testified, the district judge accepted the evidence of the plaintiff, saying that he made a good impression as a truthful person. The judge noted that the core statements of the plaintiff relating to the fraudulent acts and the manner in which money was alienated effectively remained undisputed.

On the issue of negligence on the part of the plaintiff, the judge stated that negligence is irrelevant in cases of fraud and noted that:

"the plaintiff acted outside the logical boundaries of trust. He does not deny this. However this does not change the facts that there was an orchestrated fraudulent plan against him for many years as a result of which large amounts of money were alienated from him."

However, the district judge had also to consider whether the sixth and 10th defendants could be held liable for misappropriation and fraud on the basis of the evidence given by the plaintiff. Simultaneously, the judge assessed the evidence of the sixth defendant, who:

"did not convince of anything reliable... furthermore there are certain elements of his version of the story that make me believe that his innocence and alleged non-involvement to the events are empty words."

The judge went on to say that:

"It cannot be anticipated - not even in the most relaxed contractual customs - to accept as being ordinary, the version advanced by the sixth defendant who during his answers was extremely careful to maintain this version, which is clearly questionable, and which as I explained, has no foundations."

As to ability to reach a conclusion of existence of dishonesty, the district judge referred to the English case of *Royal Brunei Airlines v Tan*, where it was said that:

"In most situations there is little difficulty in identifying how an honest person would behave. Honest people do not intentionally deceive other to their detriment. Honest people do not knowingly take others' property unless there is a very good and compelling reason, an honest person does not participate in a transaction if he knows it involves a misappropriation of trust assets to the detriment of the beneficiaries. Nor does an honest person in such a case

deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know and then proceed regardless."⁽⁵⁾

The court issued disclosure orders against a series of Cyprus-based innocent third parties, including the bank and the Cypriot intermediaries. Moreover, the court noted that the initiation of legal proceedings in jurisdictions where the alienated assets were located did not constitute parallel proceedings that could be considered as an abuse of the court process and, in any event, any amount collected pursuant to such foreign proceedings was disclosed by the plaintiff and would be subtracted from the amount claimed in the Cyprus action.

Comment

In *Leon Brener*, the plaintiff did not react until years after the initiation of the fraudulent scheme, as a result of which a substantial part of the money had already been further alienated and scattered in other jurisdictions. However, the case demonstrates that even in such an event it is still possible to trace, freeze and recover alienated assets. Nevertheless, the primary conclusion that may be drawn is that the sooner a victim of fraud reacts and requests the assistance of the court, the better his or her prospects of freezing and recovering the alienated assets.

In practice, fraudsters are usually reluctant to appear in court to oppose freezing orders that may have been issued on the basis of an application made by victims of fraud. Immediately upon the filing of an action, Cyprus courts have the power to issue provisional measures for the purpose of freezing assets to prevent their alienation or obtaining information that may assist in the identification of fraudsters and the tracing and recovery of assets.⁽⁶⁾

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Endnotes

⁽¹⁾ 'White collar crime' broadly encompasses a variety of non-violent crimes that are frequently committed in commercial situations for financial gain. According to an April 1997 report of the US Bureau of International Narcotics and Law Enforcement Affairs on Nigerian advance-fee fraud, variants of advance-fee fraud letters and faxes are confidence schemes limited only by imagination. However, they usually fall into the following categories:

- transfer of funds from over-invoiced contracts;
- contract fraud (cash-on-delivery of goods and services);
- conversion of hard currency (black money);
- sale of crude oil at below market prices;
- purchase of real estate;
- disbursement of money from wills (benefactor of a will);
- threat scams or extortion; and
- clearinghouses (for further details see *Asset Tracing & Recovery: The Fraudnet World Compendium*, Erich Schmidt Verlag publications).

⁽²⁾ See C Stamatiou and P Neocleous, "Cyprus: Freezing orders, ship arrest warrants, anti-suit injunctions, disclosure orders and *Norwich Pharmacal* relief in aid of court or arbitration proceedings in Cyprus and overseas", [2010] ICCLR 54.

⁽³⁾ Loose leaf edition, Sweet & Maxwell, p A3-1037.

⁽⁴⁾ Action 5225/2005, *Leon Brener v Bank of Cyprus Public Company Ltd*, District Court of Limassol, July 15 2010. For a detailed review of the *Leon Brener* case, see C Stamatiou and P Neocleous "Commercial Fraud Tracing of Assets", [2011] ICCLR, Issue 9, p N-29.

⁽⁵⁾ (1995) 2 AC 378.

⁽⁶⁾ See C Stamatiou and P Neocleous, "Cyprus: Freezing orders, ship arrest warrants, anti-suit injunctions, disclosure orders and *Norwich Pharmacal* relief in aid of court or arbitration proceedings in Cyprus and overseas", ICCLR 2010 21 (2).

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