

ADVISORY | INDUSTRY INFORMATION

Eastern Caribbean Court of Appeal grants unless orders in respect of orders of the BVI Commercial Court

The Eastern Caribbean Court of Appeal (the "**Court of Appeal**") has confirmed it has jurisdiction to grant unless orders in respect of orders of the British Virgin Islands ("**BVI**") Commercial Court and the sanctions for failure to comply with an unless order can include the striking out of appeals.

Walkers has secured a further victory for its client, Ms. Zhao Long, in a complex dispute regarding the ownership of shares in a significant PRC pharmaceutical company ("**Lunan**") in a judgment of the Court of Appeal granting unless orders (being orders that unless a party fulfils certain obligations by a specified date, they will be penalised by a sanction imposed in that order.) In this case, the sanction will be the striking out of appeals.

Walkers has already secured victories recorded in two judgments from the BVI Commercial Court.

- In July 2021, the first judgment confirmed Ms Zhao Long's interest as a beneficiary of a trust holding a BVI company ("**Endushantum**") which in turn held valuable shares in PRC companies, including Lunan itself (the "**PRC Shares**" and the "**Trial Judgment**").
- In March 2022, the second judgment concerned an ancillary claim brought by Endushantum (Ms Zhao Long having gained control of that BVI company following the Trial Judgment) to seek restitution of the PRC Shares (the "**Ancillary Claim Judgment**").

Please see Walkers' client advisories on the Trial Judgment [here](#) and on the Ancillary Claim Judgment [here](#).

The orders following the Trial Judgment included substantial interim costs orders (the "**Costs Orders**") against Lunan and the orders following Ancillary Claim Judgment compelled Lunan to cause its admitted privies (two Hong Kong companies) to reconvey the PRC Shares that had been dissipated (the "**Re-Conveyance Orders**").

The Trial and Ancillary Claim Judgments were appealed but Lunan did not comply with the Costs and Re-Conveyance Orders following those judgments and did not obtain stays of those orders. In addition, Ms Zhao Long through

Endushantum succeeded in obtaining an anti-suit injunction from the Commercial Court (the "**Anti-Suit Injunction**") against Lunan barring it from continuing proceedings in the PRC. In granting the Anti-Suit Injunction, the Commercial Court found that the PRC proceedings sought to re-litigate issues that had been determined in the Trial Judgment and the Ancillary Claim Judgment (which issues were res judicata) and that therefore the pursuit of the PRC Proceedings undermined the Commercial Court's jurisdiction. The Anti-Suit Injunction was not complied with.

Ms Zhao Long caused Endushantum to apply to the Court of Appeal for orders that unless Lunan complied with the Re-Conveyance Orders and Anti-Suit Injunction, the appeal of the Ancillary Claim Judgment would be struck out. Ms Zhao Long also applied to the Court of Appeal for orders that unless Lunan complied with the Costs Orders, the appeal of the Trial Judgment would also be struck out. Lunan in response had made applications for a stay of execution of the Ancillary Claim Judgment and an extension of time to comply with the Costs Order and the anti-suit injunction.

The Court of Appeal has ruled that unless the orders following the lower court's Trial and Ancillary Claim Judgments and the Anti-Suit Injunction are complied with within a specified period, the appeals will be struck out. The reasoning for this is explained further below.

Key takeaways

This latest judgment in the proceedings provides helpful guidance on the circumstances in which the Court of Appeal may exercise its jurisdiction to grant unless orders:

- The Court of Appeal confirmed it has jurisdiction to grant unless orders in respect of orders of the Commercial Court and the sanctions for failure to comply with an unless order can include the striking out of appeals.

- While there is a general rule that a court will not hear an application for his own benefit by a person in contempt unless and until he has first purged his contempt, there is an established exception to that general rule where the purpose of that application is to appeal against, or have set aside, on whatever ground or grounds, the very order disobedience of which has put the person concerned in contempt.
- That exception is itself subject to qualifications including: (i) there may be cases where an appeal by a party in contempt against the very order, disobedience of which has placed him in contempt, can be shown to be, for one reason or another, an abuse of the process of the court; and (ii) cases where disobedience to the order impedes the course of justice. In such cases, the exception may be disapplied.
- The approach endorsed by the Court of Appeal was to ask whether, in the circumstances of an individual case, the interests of justice are best served by hearing a party in contempt or by refusing to do so.
- The court is required to carefully consider the factual circumstances of the case to determine whether the interests of justice are best served by hearing or refusing to hear a party in contempt, and not merely refuse to hear him because he is in contempt; or entertain him because he is appealing the very order that has placed him in contempt. The peculiar circumstances of the case must be analysed to determine what the interests of justice dictate.

The Court of Appeal's ruling on the facts

As regards the Costs Order and the Anti-Suit Injunction, as those were not subject to appeal, the Court of Appeal could apply the general rule that an appeal by a party in contempt should not be heard unless and until that party has first purged his contempt.

The reasons advanced by Lunan for its purported inability to comply with the Anti-Suit Injunction and the Costs Order were found by the Court of Appeal to be unsatisfactory. The Court of Appeal understood that PRC Courts were not in a position to recognise the BVI judgment and court orders (whilst appeals were ongoing, even if stayed), whilst the Court of Appeal was being asked to defer to those proceedings by permitting Lunan to continue to disregard the Anti-Suit Injunction orders of the Commercial Court so as not to impede its prospects in the PRC proceedings. That was found to be a completely untenable expectation. The Anti-Suit Injunction was found to hold the ring pending the determination of the appeal and nothing placed before the Court of Appeal was persuasive that the time for compliance with it should be extended. Similarly, the Court of Appeal was not persuaded that there was a proper basis on which the time for complying with the Costs Order should be extended. Accordingly, both applications are dismissed.

As regards the Re-Conveyance Orders, the Court of Appeal had to consider whether the interests of justice were best served by hearing or refusing to hear a party in contempt

where that contempt related to an order that was subject to an appeal.

The Court of Appeal found that Lunan's breach of the Re-Conveyance Order was deliberate, and the explanations proffered related to its desire to not compromise its position in parallel legal proceedings in the PRC; and not because it is impossible to comply. Further, Lunan had no assets in the BVI and had signaled that it did not intend to comply with the BVI court orders even if the appeal goes against it, while at the same time seeking to secure the advantage of being able to maintain their appeals. This constituted an abuse of the process of the court and an impediment to justice as, assuming the respondents were successful on appeal, it would be a pyrrhic victory only as there was no prospect of Lunan complying with the orders at first instance and, given that the shares are located in the PRC and the BVI court orders in the instant proceedings were not presently recognised, there was uncertainty as to whether those BVI court orders would be recognised in the PRC.

These particular circumstances, made this a case where the Court of Appeal deemed it in the interests of justice to disapply the general exception described above (that generally a court will hear an application for his own benefit by a person in contempt where the purpose of that application is to appeal).

Conclusion

The case demonstrates the Court of Appeal's willingness to exercise its extensive case management powers to deal with appeals justly, including, in circumstances where justice requires, where a party has failed to comply with orders that are the subject of the appeal in the absence of a stay.

The Walkers team representing Ms Zhao Long includes BVI based Oliver Clifton, Meena Azmayesh and Yegâne Güley, and Hong Kong based John Crook and Vivian Kwan. Walkers instructed Tom Lowe KC of Wilberforce Chambers.

Further information

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