

Applying a gold standard? Discharging and continuing WFOs (Harrington and Charles v Mehta)

This analysis was first published on Lexis®PSL on 05/12/2022 and can be found [here](#) (subscription required).

Dispute Resolution analysis: The claimants alleged that the defendants had committed a substantial US\$1bn fraud in relation to the misappropriation of the proceeds of bullion. The claimants obtained a worldwide freezing order (WFO) on an ex parte basis, and subsequently sought to continue the order. Meanwhile, the defendants argued that it should be discharged on the basis of multiple alleged breaches of the duties of full and frank disclosure and fair presentation. Although there was a breach, the WFO was not discharged. Of particular interest is why this occurred. In continuing the WFO, the court focused on the test for a good arguable case, seeking to bring clarity to the position following a spate of recent caselaw on the subject. Written by Jon Felce, partner at Cooke, Young & Keidan LLP.

Re Harrington and Charles Trading Company Ltd (in liquidation) and other companies; Harrington and Charles Trading Company Ltd (in liquidation) and others v Mehta and others [2022] EWHC 2960 (Ch)

What are the practical implications of this case?

As to discharging a WFO for a failure of full and frank disclosure and fair presentation:

- take sufficient and considerable care to comply with the duties, or else orders may be discharged.
- in deciding whether to apply to discharge, and how to frame any such application, be mindful that:
 - a breach of the duties does not necessarily result in discharge
 - although there is no general rule that an innocent breach will not cause discharge (or that a deliberate breach will), it seems likely that a distinction will be drawn between inadvertent and innocent breaches and those that are deliberate or reckless
 - firing a mass of arrows (to use the judge's words) does not mean that many (or any) will hit

As to establishing a good arguable case:

- it is important to ensure that all material evidence is included to the extent possible
- there appears to be some uncertainty as to the application of the test on issues of law or construction, which will depend on the nature of the issue
- in cases where fraud is alleged:
 - where there is good reason to believe that a fraud has occurred, defendants challenging a WFO should seek to rely upon something more than technical points of substantive law or evidence
 - where fraud is alleged based upon inferences from primary facts that do not directly establish fraud or dishonesty, a claimant will need to demonstrate that an inference of dishonesty is more likely than one of innocence or negligence

- manage clients' expectations: succeeding on the point at the ex parte hearing will have no bearing upon the decision when there is full argument and evidence from all parties

What was the background?

The case involves an alleged US\$1bn fraud in which four defendants are said to have been complicit. The claimants argued that there was misappropriation of the proceeds of bullion advanced to two companies, and that most of the proceeds have ended up in entities owned and/or controlled by the four defendants.

In May 2022, the court granted a WFO against the four defendants. The claimants subsequently applied for the WFO to be continued to trial, while the defendants applied to discharge the WFO on the basis of material non-disclosure and unfair presentation when the WFO was obtained. Between them, the defendants relied upon several grounds of alleged non-disclosure/unfair presentation, including in relation to jurisdiction, merits, quantum, overseas proceedings and procedural grounds.

The court concluded that there was one failure of disclosure or fair presentation by the claimants when obtaining the WFO. The question was whether that one failure justified the discharge of the WFO. The general rule is that breaches of the duty should lead to the discharge of the order obtained in breach, however the court has jurisdiction to continue or re-grant the order (albeit such jurisdiction should be exercised sparingly).

Having addressed that question, the court considered whether the WFO should be continued, focusing on that part of the test concerning whether there was a good arguable case given the volume of recent caselaw in that regard.

What did the court decide?

Notwithstanding the breach of duty, the WFO should not be discharged:

- this was an isolated breach, rather than a series of failures
- the breach was not deliberate or reckless, but a wrong judgment call, the claimants having gone to considerable trouble to address their duties
- the disclosure, if it had been made, would not have led to a different outcome at the ex parte hearing
- excusing the failure would not undermine the principle that the jurisdiction to continue/re-grant orders made in breach should be exercised sparingly
- discharge would cause an injustice to the claimants and carry the principle supporting the breached duties too far

For the continuation application and the test for good arguable case, the judge took account of the three limbed test as reformulated by Lord Sumption in *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34, finding that there was no distinction between that test in jurisdictional challenges and WFOs:

- the claimant must supply a plausible evidential basis
- if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so
- if the nature of the issue and the limitations of the material available at the interlocutory stage are such that no reliable assessment can be made, there is a good arguable case if there is a plausible (albeit contested) evidential basis for it

Further, it was entirely proper, when applying the test, to adopt the yardstick of considering who has the better of the argument, both on a particular issue and on the relevant case as a whole. In the event, the judge concluded that there was a good arguable case, and therefore he continued the WFO.

Case details:

- Court: Chancery Division
- Judges: Edwin Johnson
- Date of judgment: 22 November 2022

Jon Felce is a partner at Cooke, Young & Keidan LLP. If you have any questions about membership of LexisPSL's Case Analysis Expert Panels, please contact caseanalysiscommissioning@lexisnexis.co.uk.

Want to read more? Sign up for a free trial below.

FREE TRIAL

The Future of Law. Since 1818.