

Valbonne Estates Ltd v City Value Estates Ltd

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Introduction

1. This article considers the recent Court of Appeal decision upholding the dismissal of a pre-action interim injunction obtained without notice for failure to give full and frank disclosure. In particular, the court considered the proper exercise of the court's discretion to continue or re-grant an injunctive relief.

Background

2. The Appellant, Valbonne Estates Ltd ("**Valbonne**"), and the Respondent, Cityvalue Estates Ltd ("**Cityvalue**"), are owned by the same ultra-orthodox Jewish community.
3. In January 2015, the parties exchanged contracts for Valbonne to purchase a property known as Beckton Arms, Beckton Road, London E16 1PY ("**the Property**") from Cityvalue. However, the purchase was not completed and a dispute arose as to whether the contract had been rescinded.
4. In 2018, the parties referred the dispute to arbitration before the Beth Din of the Union of Orthodox Hebrew Congregations (the "**Beth Din**"). During the arbitration process, Valbonne learnt that Cityvalue entered into an option agreement with a non-Jewish buyer, UHL, to purchase the Property for over £2 million in 2017.
5. The Beth Din made three arbitration awards in relation to the dispute:
 - a. The first award decided that Valbonne was entitled to complete the purchase on the condition that it must provide the completion funds within 28 days (the "**First Award**"). But Valbonne failed to transfer the funds on time;
 - b. The second award, which was given orally, asked Valbonne to transfer the completion funds of £500,000 to the Beth Din and that Cityvalue would provide Valbonne with a TR1 transferring the Property to it (the "**Second Award**"). Cityvalue confirmed to Valbonne that it would honour the award provided that the purchase funds were transferred to the Beth Din on time, but it did not disclose that

- it already signed a TR1 in favour of UHL. Valbonne duly transferred the funds, but the transfer of the Property did not take place; and
- c. Upon learning about Cityvalue's signed TR1 in favour of UTL, the Beth Din returned the funds to Valbonne at its request and issued a third award stating that it did not have power to enforce '*anything in this matter*' (the "**Third Award**").
6. On 10 December 2020, Valbonne obtained a pre-action injunction on a without notice basis against both Cityvalue and UHL restraining them from dealing with Property. In his witness statement in support of Valbonne's application, Mr Halpert, a director of Valbonne, stated that Valbonne had sought amendments to the First Award without disclosing the existence of the Second and Third Awards. Valbonne also failed to disclose that Cityvalue already signed a TR1 in favour of UHL. In addition, as required by Mann J, Valbonne's solicitor made and filed a witness statement with the court later on 10 December 2020. It described the Second Award, enclosed purported translations of the First and Second Awards, but did not mention the existence of the Third Award.
7. On the return date of 18 February 2021, Bacon J upheld Cityvalue and UTL's allegations that there had been material breaches of the duty of full and frank disclosure by Valbonne, which were neither inadvertent nor accidental, namely that:
- a. The evidence in relation to the Second Award was "*comprehensively inaccurate*", the purported translation of the Second Award was a "*complete fabrication*", and there was no evidence that the Second Award was in terms set out by Valbonne;
 - b. Valbonne failed to disclose the return of the purchase funds from the Beth Din, which was a "*highly material matter to take into account in determining whether to grant the order sought*";
 - c. Valbonne failed to disclose that it and the Beth Din were informed, prior to its application, that the Property had already been sold to UHL, which was also material; and
 - d. Valbonne's assertions as to connections between Cityvalue, UHL and others were made without any evidential basis which was also material.
8. In all those circumstances, the judge refused to continue or re-grant the injunction which was obtained at the without notice hearing.
9. Valbonne was granted permission to appeal in respect of the judge's discretion not to re-grant the injunction.

The decision

10. The Court of Appeal had only one issue to resolve: whether the lower court's refusal to continue or re-grant injunctive relief was wrong.
11. The court has a wide discretion regarding the conditions on which it may grant or continue an injunction. In order to determine whether the lower court's decision was outside the generous ambit of proper exercise of the court's discretion, Valbonne must satisfy the court that the judge exercised her discretion in a way that "*no judge who was properly instructed as to the law within regard to the relevant facts would have reached the relevant conclusion*": *Re MTI Trading Systems Ltd* [1997] BCC 400 at 404D-F.
12. The Court of Appeal confirmed that the principles set out in *Tugashev v Orlov & Ors* [2019] EWHC 2031 (Comm) to which the judge referred in her judgment applied in the current case: if material non-disclosure is established, the court will order the injunction to be discharged unless there is an overriding consideration of the interest of justice. Such consideration will examine (1) the importance of the facts not disclosed to issues before the judge, (2) the need to encourage proper compliance with the full and frank disclosure duty and to deter non-compliance, (3) whether or not and to what extent the failure was culpable, and (4) the injustice to a claimant which may occur if an order is discharged, although a strong case on merits will never be a good reason for material non-disclosure.
13. The Court of Appeal also confirmed that the "*two-fold purpose*" principles of the "*rule that an ex parte injunction would be discharged if it was obtained without full disclosure*" set out in *Brink's Mat v Elcombe* [1988] WLR 1350 applied in the current case: the first is to deprive the wrongdoer of an advantage improperly obtained, and the second is to serve as a deterrent to others.
14. Valbonne argued that the judge had failed to consider the overall justice of the matter but looked back too much and erred in over-emphasising Valbonne's culpability for material non-disclosure and that payment of costs or payment into account of £500,000 would be a more appropriate sanction against Valbonne's material non-disclosure.

15. The Court of Appeal found that the judge's decision was well within the generous ambit of proper exercise of the court's discretion:
- a. The judge was entitled to take the four instances of non-disclosure and inaccurate representation, all of which were in relation to substantial matters which the judge found might well have affected the outcome of the injunction hearing in a material way, as her starting point that the injunction should be discharged. That could not be characterised as looking back overly much;
 - b. The judge's finding in relation to the Second Award rendered Valbonne's arguments hopeless.
 - c. The fact that the judge did not mention those alternatives did not lead to the conclusion that she failed to take into account of something relevant or that her exercise of discretion was not within the generous ambit afforded to her;
 - d. The judge was entitled to take the view on the evidence before her that the sale of the Property to UHL had been completed and, accordingly, on the face of it, the continuance or re-grant of the injunction was of no practical effect; and
 - e. The judge was entitled to take the view that Valbonne's claim to a proprietary interest in the Property remained unclear.

Conclusion

16. Caution should be taken by practitioners when making an application for a without notice injunction that the applicant is subject to a serious and ongoing duty of full and frank disclosure. This duty requires the applicant to disclose all material matters, factual and legal, to the court.
17. The Court of Appeal's decision confirms that where the court is satisfied that there have been material breaches of the applicant's duty of full and frank disclosure when an injunction is obtained without notice, the applicant must demonstrate a high level of injustice in order to persuade the court not to set aside the injunction or re-grant it, and the pleadings must be clear.

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