KINANIS
LAW FIRM

EQUITABLE ESTOPPEL and LACK OF JURISDICTION
for the refusal of injunctive relief

2020

INTRODUCTION

Cyprus has emerged as a centre for resolution of international disputes in recent years given the plethora of multinational companies and high-profile individuals taking advantage of the island's double tax treaties, tax rules and regulations, in combination with the fact that Cyprus is a member of the EU and all judgments of the Cyprus courts are automatically recognized and enforced within the bloc.

As expected, this has led to various forms of forum shopping against defendants domiciled in Cyprus. Such is the case in ***Childescu v Gheorghiu and others Action No. 3300/2019 of the District Court of Nicosia, dd 31/03/2020***, where the claimant, a resident of USA, sued Cypriot defendants in Cyprus in order to attract foreign defendants who were the real targets of her claim.

The attempt was not successful as the Judge, in her well elaborated and reasoned judgment, rejected the application on two grounds:

(1) there was lack of jurisdiction; and
(2) by virtue of the principle of equitable estoppel, article 32(2) of the Courts' Law 14/60 as amended, which states that there must appear to be "a probability that the plaintiff is entitled to relief…," was not satisfied.

Our law firm represented Defendants 3 and 4 in the case.

THE FACTS

The question of jurisdiction arose in the context of an application for interim injunctions against eight respondents. The applicant argued that respondents 1 and 2 conspired, with the active or innocent involvement of the rest of the respondents, to deprive her of a yacht and an immovable property situated in Spain.

The applicant, as alleged, owned the said property in Spain through a corporate structure with various nominee directors and shareholders, and claimed the

beneficial ownership of the Spanish property which was registered under respondent 5, a Spanish company, part of the corporate structure.

The corporate structure was admitted in evidence as follows: respondent 5, the owner of the Spanish property, is wholly owned by respondent 3, a Cyprus company; respondent 3 is wholly owned by respondent 6, a Hong Kong company; and, respondent 6 is wholly owned by respondent 7, a Seychelles company. Respondent 4 held the shares in respondent 3 on trust for respondent 6. Respondents 1 and 2 were appointed by the applicant to manage the corporate structure.

In her application for interim orders, the applicant requested prohibitory freezing orders as to the property in dispute, notification orders, Norwich Pharmacal orders, and Quia Timet orders.

JURISDICTION

The jurisdiction issue was examined from two angles:

(a) the Civil Procedure Rules Order 6(1); and
(b) the Regulation (EU) No 1215/2012 on jurisdiction and the enforcement of judgments in civil and commercial matters.

(a) Civil Procedure Rules

The applicant argued that the court had jurisdiction to try this case, and that service out of the jurisdiction should be allowed under Order 6(1)(c), (g) and (h).

Order 6(1), apart from its procedural character justifying the right to serve a defendant residing abroad, also constitutes a jurisdictional rule as to whether the Cyprus courts can assume jurisdiction over a case if the conditions set therein are met.

Order 6(1)(c) states that service outside the jurisdiction will be allowed if relief is sought against any person domiciled or ordinarily resident in Cyprus.

Order 6(1)(g) states that service outside the jurisdiction will be allowed if any injunction is sought as to anything to be done in Cyprus, or any nuisance in Cyprus is sought to be prevented or removed, whether damages are or are not also sought in respect thereof.

Order 6(1)(h) states that service outside the jurisdiction will be allowed if any person out of Cyprus is a necessary or proper party to an action properly brought against some other person duly served in Cyprus.

The judge, dismissed all three bases for service out of the jurisdiction.

First, the judge held that Order 6(1)(c) was inapplicable since none of the foreign respondents were permanent or temporary residents of Cyprus, and it was irrelevant whether Cyprus respondents were included in the claim form. The inclusion of foreign defendants as necessary defendants is covered by Order 6(1)(h) and not by Order 6(1)(c).

Secondly, the judge held that Order 6(1)(g) was inapplicable since the applicant was not seeking any relief from the Cypriot respondents (3 and 4), and the fact that they were included on the Quia Timet order through merely being part of the corporate structure was not enough.

Lastly, the judge held that Order 6(1)(h) was inapplicable since the applicant was not seeking relief from the Cypriot respondents, and the fact that they were included in the Quia Timet order did not in itself constitute a legal basis for the claim to be heard in Cyprus.

On the basis of the above observations the applicant did not establish any jurisdictional basis to justify the institution of the action and to pursue the interim application in Cyprus.

(b)Regulation (EU) No 1215/2012

Following the Cyprus civil procedure rules, the judge examined Regulation (EU) No 1215/2012 on jurisdiction and the enforcement of judgments in civil and commercial matters (hereinafter the '**Regulation**').

The judge stated that under Article 4 of the Regulation, a person domiciled in a Member State may be sued in that Member State. Regarding this provision, the European Court of Justice (ECJ) held in ***Andrew Owusu v. Jackson and others of the European Court of Justice (Case C-281/02)*** that when a court of a Member State has jurisdiction to hear a case, the court cannot stay the proceedings, even if, under the doctrine of *forum non conveniens*, another court is more appropriate for the case to be heard.

Any exceptions to the general rule in Article 4 exist only if explicitly stated in the Regulation. These exceptions can be found in Sections 2 to 7 of the Regulation, as stated in Article 5.

The judge went on to state that under Article 24(3) of the Regulation *"in proceedings which have as their object the validity of entities in public registers, the courts of the Member State in which the register is kept"* shall have exclusive jurisdiction, regardless of the domicile of the parties.

Article 6 of the Regulation furthermore states that the application of Article 24 extends to circumstances where the defendant is not domiciled in a Member State but the dispute relates to immovable property or as to the validity of public registers as to shares situated in a Member State, giving superior power to Article 24(3).

The question that arose, which was left unanswered by the European Court of Justice in the ***Owusu*** case, was whether non-member state courts would have exclusive jurisdiction to hear the case in similar circumstances, namely, whether Article 24(3) applied to them. If respondent 7 was a company registered in a Member State it is clear that the courts of that Member State would have *exclusive*

jurisdiction to hear the case. The issue in this case, however, since respondent 7 was a company registered in Seychelles, was whether the courts of the Seychelles could have also exclusive jurisdiction to hear the case.

Given that the respondent 7 company registered in the Seychelles was the ultimate holding company in the corporate structure, the main issue of the conspiracy claim was whether respondent 8 was the owner or merely a trustee for the applicant of the shares in that company. Since this was the case, the judge held, inferring by analogy from the provisions of Article 24(3) of the Regulation, that exclusive jurisdiction for the claim to be heard lay with the courts of the Seychelles.

It remains to be seen whether such inference can be upheld once presented for adjudication before the Supreme Court, or whether, in such cases, the doctrine of forum non conveniens will prevail.

In any event, following the above analysis, the court ruled that under the circumstances of the case the Cyprus courts did not have jurisdiction to try this case.

(c) Recent UK Supreme Court case supporting the decision in Childescu v Gheorghiu and others - Vedanta v Lungowe

In the recent UK Supreme Court case of ***Vedanta Resources Plc and Konkola Copper Mines Plc (Appellants) v Lungowe and Ors.*** **(Respondents) [2019] UKSC 20*,*** which is applicable to the facts of the case under consideration, Lord Briggs stated clearly that:

"…it is an **abuse** of EU law to use article 4 of the Recast Brussels Regulation as a means of enabling claimants to establish jurisdiction against an anchor defendant for the collateral purpose of attracting a member state's international jurisdiction against foreign defendants, who are the real targets of the claim."

Lord Briggs went on to state that it would likely be an abuse of EU law if the anchor defendant was sued for the **sole purpose** of attracting jurisdiction as against foreign defendants.

In our case, ***Childescu v Gheorghiu,*** it was clear that the Cypriot respondents were sued for the sole purpose of attracting foreign defendants to the claim. The applicant was not claiming anything from the Cypriot respondents 3 and 4, but merely sued them as part of the corporate structure which included the real targets of the claim.

In the ***Vendanta*** case the UK Supreme Court ruled that there was a real issue against local defendants and ultimately allowed the case to proceed and be tried in UK.

However, in our case under consideration there was no such issue and if the trial was going to continue that would in effect constitute an abuse of EU law.

The ***Vendanta*** case, which is one of the most recent cases of the UK Supreme Court on the subject, in effect justifies the reasoning and decision of the judge in ***Childescu v Gheorghiu.***

ILLEGALITY – EQUITABLE ESTOPPEL

In examining whether the provisions of art 32 of the Courts' Law No.14/60 are met, the judge finally turned to the question of illegality.

The judge noted that the applicant, by alleging and admitting that she was the ultimate beneficial owner of the respondent companies, and to that extent, by purposely failing to inform the appropriate persons and knowingly concealing this information from the service provider and relevant bodies such as banks, was acting illegally and in breach of Anti-Money Laundering Law No. 188(I)/2007, EU Directive 2018/843 and various other provisions of the Cyprus Criminal Law. Such deliberate concealment constituted a serious illegality.

The judge stated the relevant case law with respect to the principle of *ex turpi causa non oritur action* (from an illegal or immoral act there cannot be any legal rights), and then went on to state that since the applicant committed such serious illegalities and offences, she was estopped from proceeding with the action. In addition, because of her illegal behavior, the applicant could not pursue the present application for equitable interim injunctions.

Equitable estoppel and the doctrine of *ex turpi causa non oritur action* essentially deprived the applicant of her rights and consequently restricted (estopped) her from claiming the property under dispute.

In addition, the applicant could not succeed in the application for equitable relief, based on her illegal acts, due to the maxim that *one who comes to equity must come with clean hands.*

The Equitable Estoppel principle, which was approved by the court, was one of the arguments put forward by our law firm in defending respondents 3 and 4.

Consequently, as per the Court's judgment, the second condition set out in art. 32 of the Courts' law No.14/60, namely that "…*there appears to be "a probability" that the plaintiff is entitled to relief …,"* was not satisfied. In effect, the judge ruled that the applicant did not have any probability of success in the action due to her illegal conduct and the action was doomed to fail.

The judge, rightly and as she was obliged to do, following Cyprus Supreme Court cases, such as ***Chloi Constantinou v. Athina Apla Civil Appeal 55/2010 dd 03/04/2015***, which accepted the principle established in the UK House of Lords case of ***Tinsley v Milligan 1994 1 A.C 340,*** came to the conclusion that Cyprus courts have rejected claims for remedies where the claimant was a direct participant to a an illegal or criminal act. To that extent she cited the following passage from the book *Street on Torts 11th edition pages 106 - 109*:

"For their Lordships, ex turpi was not a wholly 'discretionary' defence. If a claim in tort arises from participation in criminal conduct, no cause will lie against the

claimant's fellow miscreants. And, similarly, when the harm complained of derives entirely from his own conviction for a criminal offence, any claim must also fail."

In effect, the strict approach in handling such issues, as confirmed in ***Tinsley v Milligan,*** was rightly followed by the judge, as this is the current law applicable in Cyprus.

New approach in the UK rejecting Tinsley v. Milligan

In the recent case of the UK Supreme Court of ***Patel v Mirza 2016 UKSC 42,*** an English contract law case concerning the scope of the illegality principle relating to insider trading under section 52 of the Criminal Justice Act 1993, it was unanimously held that ***Tinsley v Milligan*** was no longer representative of the law, and that a person who satisfies the requirements for unjust enrichment should not prima facie be prohibited from recovering his property even though the person, in our case under consideration, the applicant, was involved in an illegal act.

The UK Supreme Court held unanimously that the plaintiff could recover the money – subject matter of the illegal act – and the test in ***Tinsley v Milligan*** was overruled.

Lord Toulson considered the state of the law concerning illegality, stating that "the law should be coherent and not self-defeating, condoning illegality by giving with the left hand what it takes with the right hand".

Thus, the prior test in ***Tinsley v Milligan*** is inconsistent with the coherence and integrity of the UK legal system.

The Court, under the principle established in ***Patel v Mirza*** should consider whether the public interest would be harmed by the enforcement of the illegal agreement, taking into account:

1. the purpose of the prohibition which has been transgressed, and whether the purpose would be enhanced by the denial of the claim;

2. any other relevant public policy on which the denial of the claim may have an impact; and
3. whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts.

In effect, there might now be cases where a more lenient approach will be adopted and the person who was deprived of his property, even if through an illegal act in which he or she was involved, might be entitled to claim and recover his property from the person who unjustly benefited from that illegal act.

It remains to be seen whether the Cyprus Supreme Court will depart from ***Tinsley v Milligan*** as followed **in *Chloi Constantinou v. Athina Apla Civil Appeal 55/2010 dd 03/04/2015*** and ***Christodoulou v. Vraets (2009) 1 Α.Α.Δ. 802***, and follow the new principle adopted in ***Patel v Mirza*****.**

In our case, ***Childescu v Gheorghiu***, the applicant was rightly estopped from pursuing her application for interim orders due to their equitable nature and the requirement of coming to court with clean hands. She could not benefit from her own illegality.

However, as per the recent decision in ***Patel v Mirza*****,** the applicant in ***Childescu v Gheorghiu*** would not have been automatically barred from claiming remedies at common law against the holder of the property, in the appropriate court and jurisdiction if the principles of ***Patel v Mirza*** were accepted. The facts of the case would have been tested under the new principle established as indicated above.

In this respect, any claims may be raised against the holders of the property, based on the case of ***Patel v Mirza***, provided the conditions raised therein are met and the forum to which the case is brought accepts such principles.

Having in mind the criminal nature of the acts involved and the seriousness of the illegalities in the present case under consideration, it is doubtful that the principles in ***Patel v Mirza*** would have given any redress to the applicant in this case.

Final Observations

The interesting case of ***Childescu v Gheorghiu*** re-establishes that the inclusion of innocent local defendants in court actions in Cyprus in order to drag foreign defendants under the Cyprus courts' jurisdiction, will not suffice. Cyprus Courts under such circumstances do not have jurisdiction and will reject the action and any pending interim applications.

It also establishes one very serious consequence in cases where real beneficiaries are not disclosed to service providers for various reasons and "Muppet show" beneficiaries are used. In these cases, the real owners might lose their properties/assets and at the same time might not have any right to claim them back if the principles established in ***Tinsley v Milligan*** are followed, as was done in this case.

If the principles established in ***Patel v Mirza*** are eventually followed by our Supreme Court, a more lenient approach might be used in appropriate cases where the facts justify it.

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Author

Giorgos Kinanis
Trainee Lawyer
Kinanis LLC
Giorgos.Kinanis@kinanis.com
Litigation@kinanis.com

OUR FIRM

We are a Law Firm with offices in Cyprus and Malta and a representative office in Shanghai China comprising of more than 50 lawyers, accountants and other professionals who advise, international and local clients.

The Firm has been offering legal and consulting services since 1983 evolving from a traditional law firm to an innovative cutting-edge multidisciplinary law firm combining exceptional expertise in law, tax, vat and accounting.

From its establishment the Firm's focus has been heavily business oriented and always abreast with the latest global developments and innovations. Drawing from our pool of experienced professionals we provide our clients' businesses full legal and accounting support on an everyday basis as well as customized solutions in today's global financial and legal challenges.

We consider ourselves as 'traditional pioneers' and our motto is to foresee and anticipate any issues that may potentially impact our clients' business and to offer effective advice and solutions proactively.

Kinanis LLC
Lawyers' Limited Company
12 Egypt Street, 1097, Nicosia
P.O. Box 22303, 1520 Nicosia, Cyprus
Tel: + 357 22 55 88 88 – Fax: + 357 22 66 25 00
E-mail: KinanisLLC@kinanis.com - Web site: www.kinanis.com

Kinanis
Civil Partnership, Law Firm
Kinanis Fiduciaries Limited
Suite 20, The Penthouse, 4th Floor, Ewropa Business Centre,
Dun Karm Street, Birkirkara, BKR 9034, Malta
Tel: + 356 27 54 00 24, Fax: + 356 27 54 00 25
E-mail: malta@kinanis.com - Website: www.kinanis.com

Kinanis (China) Limited
China Representative Office
Room 909, 9/F, Building No.390-408,
Beijing East Road, Huangpu District,
Shanghai. 200001, China
Tel: + 86 18 410 072 690
E-mail: china@kinanis.com - Website: www.kinanis.com