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Abuse of process and *res judicata* in asset freezing applications



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Litigation, Cyprus

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Abuse of process and *res judicata* were the main issues examined by the District Court of Larnaca when deciding on a recent interim application to freeze assets.⁽¹⁾

Facts

A company (the applicant in the case) and the owners of a hotel (the vendors) entered into an agreement giving the company – or a third party introduced by it – an option to purchase the hotel within four months at a stipulated price.

Soon after the option agreement was signed, the vendors sought to be released from their obligations under the option agreement so that they could sell the hotel to a third party at a higher price. The option holder immediately rejected the vendors' request and subsequently informed them that it was exercising the option to purchase the hotel.

The vendors refused to honour the option agreement and the option holder filed an action against them claiming, among other things, a declaratory order that it was entitled to proceed with the purchase of the hotel at the stipulated price within four months. The option holder also successfully applied on an *ex parte* basis for an interim order prohibiting the vendors from disposing of the hotel for four months. The interim order was subsequently set aside, as the court found that:

- the exercise of the option meant that the company had to pay the purchase price and complete the transfer immediately; and
- the four-month period no longer applied.

The option holder invited the vendors to complete the transfer of the hotel, but the vendors refused and instead sold the hotel to a third party at a higher price. The option holder then gave written notice terminating the agreement and filed a new action against the vendors for damages suffered, calculated as the difference between the agreed purchase price and the market value of the hotel, which – according to an expert's report produced by the option holder – was higher. The option holder also filed an application for a freezing order covering assets equivalent to the amount of damages being claimed.

The vendors argued that:

- the new action was an abuse of the process of the court, as the same issues could and should have been decided in the first proceedings; and
- the court's judgment in the interim application on the first proceedings constituted *res judicata*.

Decision

The Larnaca District Court dismissed the vendors' arguments and granted an injunction ordering assets to cover the damages claim to be frozen until the case was decided.

On the abuse of process issue, the court accepted the applicant's arguments that:

- part of the facts supporting its claim had occurred after the commencement of the first action; and
- the subject matter of the two actions was different because:
 - the first action concerned the validity of the option agreement and the holder's right to exercise the option; and
 - the second action concerned the vendors' breach of the purchase agreement which resulted from the exercise of the option.

Similarly, on the *res judicata* issue, the court reiterated the different nature and subject matter of the two actions and the fact that part of the facts had occurred after the filing of the first action. The court further noted that an interim judgment does not extend to the final determination of the merits of the case, therefore the *res judicata* concept cannot be relied on.

Finally, as to the requirements for issuing an interim order, the court held that it has only to look at whether:

- the applicant has shown an arguable case with a visible chance of success; and
- without the order, it would be difficult or impossible to do complete justice at a later stage.

Having weighed these factors, it is then for the court to decide whether it is just or convenient to grant the injunction (balance of convenience). The court concurred with the applicant and went on to say that on the face of the evidence adduced by the applicant, these requirements had been satisfied. It therefore issued an order requiring the vendors to preserve an amount equivalent to the damages claimed by the company until the case had finally been decided.

Comment

The court's judgment is in line with well-established legal principles and is logical since the plaintiff would have had no other means of bringing an action for a cause of action that could not have been predicted in the first action.

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Endnotes

(1) *Lerpira Limited v A Costa Kokkinos Developments Limited* (174/2018), dated 2 July 2018.

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