Freezing injunctions in the Caribbean

Lois Horne reviews a case where the Privy Council delivered a 'ground-breaking' judgment on injunctions

IN BRIEF

- An injunction can be granted even in the absence of an underlying cause of action.
- Privy Council restates the test for freezing injunctions.

On 4 October 2021, an enlarged seven-member Board of the Privy Council delivered its judgment in *Convoy Collateral Ltd v Broad Idea International Ltd* [2021] UKPC 24. The judgment of Lord Leggatt, with whom the majority of the Board agreed, contains a detailed rationalisation of the court's powers to grant freezing orders and interim injunctions generally. In the words of Sir Geoffrey Vos (who was in the minority on these points), Lord Leggatt's judgment amounts to 'a ground-breaking exposition of the law of injunctions'. Although Lord Leggatt's comments were strictly speaking obiter dicta, he expressly said that they represent the law in all jurisdictions 'where courts have inherited the equitable powers of the former Court of Chancery' (which obviously includes England & Wales) and they are likely to be highly persuasive.

Background

Convoy Collateral Ltd (CCL) brought proceedings in Hong Kong claiming damages and other substantive relief against Dr Cho, who was resident in Hong Kong. Dr Cho owned 50.1% of the shares in Broad Idea International Ltd (Broad Idea), a BVI incorporated company, which was not a party to the Hong Kong proceedings.

CCL also applied in the BVI for freezing injunctions against both Dr Cho and Broad Idea (claiming that Broad Idea was the 'money-box' of Dr Cho). In the case of Dr Cho, this required permission to serve out of the jurisdiction. No such permission was required to obtain a freezing order against Broad Idea as proceedings could be served within the BVI. However, Broad Idea argued that the BVI court had no jurisdiction to make a freezing injunction in circumstances where no substantive claim was brought against it in the local court and the freezing injunction was sought in support of foreign proceedings.

The Court of Appeal of the Eastern Caribbean Supreme Court (the Court of Appeal) held that there was no jurisdictional gateway permitting service of the freezing order out of the jurisdiction on Dr Cho and that the BVI court had no power to grant a freezing order against Broad Idea.

CCL appealed to the Privy Council. In recognition of the importance of these issues, the Privy Council hearing was expedited and a seven-member Board appointed.

The Privy Council decision

The Privy Council upheld the Court of Appeal's conclusion that the relevant BVI procedural rules did not permit service of a claim for a freezing order out of the jurisdiction on Dr Cho. This was primarily because the House of Lords, in *The Siskina (Owners of cargo lately laden on board) v Distos Cia Naviera SA* [1979] AC 210, [1977] 3 All ER 803 (The Siskina), and the Privy Council, in Mercedes Benz AG v Leiduck [1996] AC 284, [1995] 3 All ER 929, PC had previously reached this conclusion when interpreting materially the same provisions as the relevant BVI procedural rules. Although not strictly bound to follow those two previous decisions, the Board was unwilling to depart from them. As Lord Leggatt said: 'The common law does not operate on a principle of third time lucky.'

The Privy Council also upheld the decision not to make a freezing order against Broad Idea. However, this was because CCL could not show that a freezing order should be made on the facts of this particular case. Importantly, the Privy Council disagreed with the Court of Appeal's finding that the BVI courts did not have 'subject matter jurisdiction' to make a freezing order otherwise than in support of proceedings claiming substantive relief in the BVI. The rest of this article deals with the Privy Council's consideration of this issue.

Injunctions: powers v practice & procedure

In *The Siskina*, Lord Diplock made comments suggesting that the court's power to make an injunction was dependent on the existence of an underlying cause of action, which the court asked to make the injunction has jurisdiction to decide. Most famously, he said: 'A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action.'

The Siskina was decided in 1977. Since then there has been a number of cases where qualifications and exceptions have been made to Lord Diplock's comments. Nonetheless the majority in the Privy Council took the view that *The Siskina* has impeded the development of the common law. Lord Leggatt said the restraints imposed by *The Siskina* were 'not merely undesirable in modern day international commerce but legally unsound'. He added that the 'shades of *The Siskina* have haunted this area of the law for far too long and they should now finally be laid to rest'.

In reaching this conclusion, Lord Leggatt drew an important distinction between the court's power to grant an injunction and the principles and practice governing the exercise of that power. He said that, where a court's power to grant an injunction is based on what is 'just and convenient' (as it is in England and the BVI), that power is unlimited, subject to any relevant statutory restrictions, provided that the court has personal jurisdiction over the party against whom the injunction is sought. However, this broad power to grant an injunction will only be exercised where to do so accords with practice and principle. Importantly, the principles and practice that govern the exercise of the broad power to grant injunctions can and do change over time.

This approach allows the court to modify existing practice where this accords with

principle and is necessary to provide an effective remedy. As Lord Leggatt said: '[S]uch flexibility is essential if the law and its procedures are to keep abreast of changes in society.' Examples (outside the granting of freezing orders) of practice developing so as to allow the granting of novel types of injunction include the making of website blocking orders and the granting of Norwich Pharmacal Orders and Bankers' Trust orders (none of which requires there to be a cause of action against the respondent to the order). According to Lord Leggatt, these examples 'show that there is no principle or practice which prevents an injunction from being granted in appropriate circumstances against an entirely innocent party even when no substantive proceedings against anyone are taking place anywhere'.

Freezing orders—the enforcement principle

This would have been sufficient to justify the conclusion that the BVI court could in principle grant a freezing order against Broad Idea (if the factual basis for such an order had been established).

However, Lord Leggatt did not stop there. Noting that both the law and society have changed since *The Siskina* and that, at that time, a 'satisfactory theoretical foundation' for the granting of freezing orders had yet to be found, he went on to provide just such a foundation.

According to Lord Leggatt, a freezing order is different from other types of interim injunction. An 'orthodox' interim injunction usually grants the applicant the relief that they are seeking in the main proceedings—albeit on a temporary and provisional basis. A freezing order does not do this. Rather, the purpose of a freezing order is to ensure that there are sufficient available assets against which the claimant can enforce any judgment which they subsequently obtain or have already obtained. Lord Leggatt described this as the 'enforcement principle'.

This is important because it shows that the interest, which a freezing order is intended to protect, is the ability to enforce any judgment which the claimant obtains (or has already obtained). It follows, according, to Lord Leggatt, that there is no reason to link the power to grant a freezing order to a substantive cause of action, which is relevant only insofar as it provides evidence that a judgment will be granted. What matters is the question of whether the applicant has (or is likely to have) a judgment that it will be able to enforce using the process of the court where the freezing order is sought.

Strikingly, this means that a freezing order can be obtained before a cause of action has even arisen, provided that the applicant can establish with a sufficient degree of certainty that proceedings will be brought (for example, in circumstances where a breach is threatened but has not yet occurred) and will result in an enforceable judgment.

The enforcement principle also explains the basis and scope of the power to grant freezing injunctions against a third party against whom there is no claim for substantive relief (known as 'Chabra' injunctions). Such an injunction can in principle be made where the respondent holds assets against which a judgment, made against the defendant to the claimant's substantive claim, could be enforced (for example, because the defendant is the beneficial owner of those assets).

Nor does it matter that the judgment to be enforced is that of a foreign court—provided that the foreign judgment would be enforceable in the jurisdiction where the freezing order is sought.

The test for a freezing order

These conclusions led Lord Leggatt effectively to restate the test for the granting of a freezing order. He summarised the position as being that the court can grant a freezing injunction against a party, over whom the court has personal jurisdiction, provided that:

i) the applicant has been granted or has a good arguable case for being granted a judgment or order for the payment of a sum of money that is or will be enforceable through the process of the court;
ii) the respondent holds assets against which such a judgment could be enforced; and
iii) there is a real risk that, unless the injunction is granted, the respondent will deal with such assets (or take steps which make them less valuable) other than in the ordinary course of business with the result that the availability or value of the assets is impaired and the judgment is left unsatisfied.

Comment

It is worth noting that, in England, s 25 of the Civil Jurisdiction and Judgments Act 1982 (CJJA 1982) provides a statutory basis for the granting of interim relief in support of foreign proceedings and the CPR (para 3.1(5) of CPR PD 6B) permit service out of the jurisdiction of claims for such injunctions. Furthermore, the BVI legislature has now enacted legislation in similar terms to s 25 CJJA 1982 (although no provision has been made in the BVI to provide a specific gateway for stand-alone freezing injunctions to be served out of the jurisdiction). However, the consequences of this judgment extend beyond those issues.

Lord Leggatt's judgment provides, in the words of Sir Geoffrey Vos, a 'juridical foundation for the entire law of freezing and interlocutory injunctions'. An important feature of the judgment is that it emphasises the need for the law to adapt so that the courts can provide an effective remedy in novel situations. As society continues to develop at a rapid pace, parties would be well-advised to refer back to this case when seeking the court's assistance to combat wrongdoing, and fraud in particular. NLJ

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