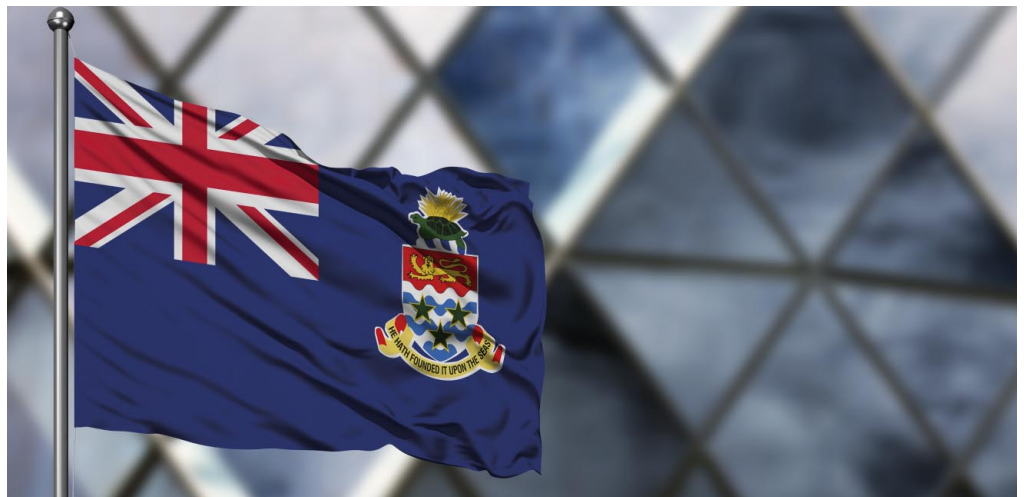


Demystifying offshore: Injunctions in aid of foreign proceedings

The authors run through the relevant principles governing freestanding injunctions



As every insolvency professional knows, injunctions (in particular freezing injunctions) remain a powerful tool in the armoury. The ability to ensure that assets are not dissipated whilst litigation is pursued can often make the difference between successful liquidations that gather and distribute recoveries and those that do not.

Professionals can take comfort from the fact that, in each of the British Virgin Islands (BVI), Cayman Islands, Guernsey and Jersey (the CDOTs)¹, injunctions in aid of foreign proceedings are widely available in appropriate cases, including freezing injunctions².

There have been some interesting recent developments in this area. In the BVI, the famous longstanding *Black Swan*³ jurisdiction to grant freestanding freezing injunctions in aid of foreign proceedings was

overturned by the Court of Appeal, has subsequently been considered by the Privy Council (whose decision is awaited), and put on a solid statutory footing for all future cases⁴. In Jersey, the court has recently considered and approved the appointment of receivers as part of its armoury to ensure that its judgments are enforced and executed⁵.

In light of these developments, it seems timely to remind ourselves of the relevant principles governing such injunctions and when they are commonly available.

Jurisdiction

Along with the BVI, Cayman and Guernsey also have statutory jurisdiction⁶ to grant interim relief in aid of foreign proceedings, whilst the Jersey courts have inherent jurisdiction to do so⁷.

A freestanding freezing injunction may be obtained in any of the CDOTs pending determination of substantive proceedings which have been or

are to be commenced in a foreign jurisdiction. One relevant factor will be whether those foreign proceedings are capable of giving rise to a judgment which could be enforced in the CDOT in question. This is a strict requirement in the BVI and Cayman, and a relevant factor in Guernsey and Jersey.

The test in all CDOTs is whether the applicant has a good arguable case in the substantive proceedings and whether it would be just and convenient to grant such an injunction (including whether, in the absence of an injunction, any ultimate award is likely to go unsatisfied). In addition, the Guernsey courts may grant an injunction in support of foreign proceedings only in 'exceptional' circumstances⁸. It was noted in a Guernsey Court of Appeal decision that this means that the court must exercise appropriate caution before granting such an order⁹.

Generally, there will be assets

within the jurisdiction that need to be protected, and it must be shown that an injunction is necessary to prevent asset dissipation. The courts in the CDOTs will consider the adequacy of the assets located within their respective jurisdictions when determining the utility of granting the order. An applicant may also be able to obtain a worldwide freezing order against assets outside of the jurisdiction if there are insufficient assets in the CDOT itself to satisfy a freezing order made there.

Obtaining a freestanding injunction

The procedure to obtain an injunction in each of the CDOTs is fairly straightforward. An applicant is typically required to file an application and supporting affidavit evidence, together with a draft order. In all CDOTs, an application may be made *ex parte* where giving notice to the intended respondent would likely lead to the dissipation of the assets in advance of the application. There is the normal obligation of “full and frank” disclosure. An applicant is also required to give an undertaking as to damages, which may have to be fortified by way of a payment into court, so it is normally helpful for the applicant to provide evidence as to its ability to meet that undertaking.

Enforcing a freestanding injunction

Once an order granting an injunction has been served on a defendant, if he fails to comply with that order he could be found guilty of contempt of court and may have further proceedings issued against him.

In cases where there may be a high risk of dissipation and non-compliance with a court order (or when an injunction is not effective), the courts of the CDOTs also have the power to appoint interim receivers in support of an injunction in order to ensure the proper management

and preservation of the respondent’s assets.

Considerations for third parties

In all of the CDOTs, a litigant may also seek a freestanding injunction against a “non-cause of action defendant” (NCAD), including professional service providers or companies owned by the defendant¹⁰. To obtain an injunction against an NCAD in the BVI, there must be substantive proceedings against a primary defendant and it must be shown that the NCAD is holding assets for the defendant which must be amenable to enforcement in the BVI in the event of judgment against the defendant in the foreign proceedings. The applicant must also show that there is a real risk of dissipation of those assets.

Similarly, in Cayman and Jersey, it must be shown that there is a good arguable case that the NCAD is in possession of assets that actually belong to the defendant against whom the cause of action is being brought, or which would otherwise be amenable to eventual enforcement action against that defendant. Whilst it does not appear that Guernsey has specifically considered the issue, we expect Guernsey to also follow the English line of authority, the Chabra¹¹ jurisdiction, to find that the courts have the power to make such an order.

Responding to the order

A defendant should comply with the terms of any injunction order and obtain legal advice as soon as possible. The order will often be subject to an exception that the defendant can dispose of assets in the normal course of business, or for normal living expenses, and other terms that may allow the defendant to continue some dealings with the assets or that the order will come to an end if the defendant provides adequate security to the beneficiary of the order. Legal advice should explain

what may or may not be done in compliance with the order, as well as identify any grounds to discharge, vary or set aside the order, including whether the duty of “full and frank” disclosure was complied with by the applicant when the freezing order was made *ex parte*.

A defendant will ordinarily have an opportunity to be heard by the court at the *inter partes* return date of the application granting the injunction. If it is ultimately found that the order should not have been granted, the defendant is likely to be able to recover both its costs and also to enforce the undertaking in damages provided by the applicant upon application for the injunction.

Conclusion

Depending on the complexity of the dispute, decisions in substantive proceedings may take months, if not years, to be resolved. The CDOTs have long understood that in order to remain competitive financial centres it is necessary to meet the increasing complexity of corporate dealings and commercial relationships and litigation. For this reason, they continue to be very open, flexible and pragmatic when it comes to meeting the needs of overseas litigants, including in relation to interim injunctions. ■

Footnotes:

- 1 Crown Dependencies and Overseas Territories
- 2 Including proprietary injunctions, mandatory and prohibitory injunctions, and search orders. Norwich Pharmacal, Bankers Trust and Anton Pillar orders are also available.
- 3 See *Black Swan Investment L.S.A v Harvest View Limited and Sablewood Real Estate Limited* Claim No. BVIHCV 2009/399.
- 4 s.24A, Eastern Caribbean Supreme Court (Virgin Islands) Act.
- 5 *Representation of Roberts & Os* [2021] JRC 008
- 6 s.11A, Grand Court Act (2015 Revision); s.1(7) Law Reform (Miscellaneous Provisions) (Guernsey) Law, 1987.
- 7 *Solihub Ltd v Match Investments* [1996] JLR 361.
- 8 s.1(7), 1987 Law Reform (Miscellaneous Provisions) (Guernsey) Law, 1987.
- 9 *Garnet Investments Ltd v BNP Paribas and the Government of the Republic of Indonesia* (Court of Appeal, 2/2009).
- 10 See *TSB Private Bank International SA v Chabra* [1992] 1 WLR 231.
- 11 *Ibid*



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