

Free-Standing Freezing Orders: A Cayman View



Introduction

The question as to whether a freezing order (or *Mareva* injunction) may be awarded in a jurisdiction where there are no related substantive proceedings has been a controversial subject in the offshore world in recent years. Traditionally such “free-standing” injunctions would not be granted. More recently certain offshore jurisdictions, whether by the development of case law or by statute, have performed a volte face and determined that such injunctions can be awarded in aid of related foreign proceedings. These jurisdictions have determined that such free-standing injunctions should be awarded in certain cases. In the Cayman Islands the position is less certain. The moves made in other jurisdictions and recent judicial comment in the Cayman courts suggests that the Cayman courts may ultimately come to determine that free-standing injunctions are permissible in the Cayman Islands. However, strictly, the traditional position has not been officially overturned. Whilst it is our view that it is reasonably likely that the Cayman Islands will follow in the footsteps of the other jurisdictions (particularly Jersey, the Isle of Man and the BVI), this cannot yet be guaranteed.

The Traditional Position

Historically the position was clear. The Cayman Islands courts did not have the power to grant free-standing injunctive relief in the absence of substantive proceedings, or at least a cause of action, in the

jurisdiction. This reflected the decision of the English House of Lords in the leading case, *The Siskina*¹. That decision was followed by a majority of the Privy Council in *Mercedes Benz A.G. v Leiduck*².

In Cayman the Grand Court upheld these decisions in the case of *Bass v Bass*³. Sanderson J held that: “*The law of the Cayman Islands is presently that it cannot grant a free-standing Mareva injunction absent a cause of action in the Cayman Islands*”. On the facts, no action arose in the Cayman Islands and no injunction could be awarded.

Developments in Other Jurisdictions

In other offshore jurisdiction there has been a recent trend against the perceived harshness of the traditional position.

In Jersey, the Court of Appeal took a different view in the case of *Solvalub Limited v Match Investments*⁴. The Court approved and developed the dissenting judgment of Lord Nicholls in *Mercedes Benz* and held that a free-standing injunction could be awarded in certain situations. The decision recognized that “If the Royal Court were to adopt the position that it was not willing to lend its aid to courts of other countries by temporary freezing of assets of defendants sued in those other countries, that in my judgment would amount to

¹ [1979] AC 210

² [1996] 1 AC 284

³ 2001 CILR 317

⁴ 1996 JLR 361

a serious breach of duty of comity which courts in different [jurisdictions] owe to each other.”

The Isle of Man takes a similar approach, albeit that it is now enshrined in statute. Section 56B(1) of the High Court Act 1991 provides that “The High Court shall have power to grant interim relief where proceedings have been or are about to be commenced in a country or territory outside the Island”. Exceptions to the rule are then set out. This statutory provision is a supplement to the Manx common law, which had already held that free standing *Mareva* injunctions could be awarded prior to the enactment of Section 56B.

Most recently, the BVI courts have granted free-standing injunctive relief in aid of foreign proceedings in the case of *Black Swan Investment I.S.A. v Harvest View Limited*⁵. Bannister J held that the reasoning of Lord Nicholls in *Mercedes Benz* was “compelling”. He concluded that “there are sound policy reasons why important offshore financial centres, such as Jersey or the BVI, should be in a position to grant such orders in aid where necessary. The business of companies registered within such jurisdictions is invariably transacted abroad and disputes between parties who own them and others are often resolved abroad. It seems to me that when a party to such a dispute is seeking a money judgment against someone with assets within this jurisdiction, it would be highly detrimental to its reputation if potential foreign judgment creditors were to be told that they could not, if successful, have resort to such assets unless they were to commence substantive proceedings here”.

Developments in the Cayman Islands

Unlike the jurisdictions referred to above, there has been no clear steer either from the Cayman Islands legislature or the courts as to how an application for a free-standing injunction would currently be treated.

The most recent reported judgment of note is the February 2010 decision of Henderson J in the case of *Deloitte & Touche, Inc v Felderhof & ors*⁶. The case did not involve an application for a free-standing

injunction. Instead an application had been brought in the Cayman Islands for a worldwide *Mareva* injunction in circumstances in which there was a cause of action in the Cayman Islands, and a writ was served after the injunction was awarded. However no statement of claim was then served and, per Henderson J, “no real effort was made to advance the litigation in the Cayman Islands”. Proceedings were instead pursued in Ontario, Canada. Henderson J held that it was “clear” that the Cayman Grand Court “has jurisdiction to issue *Mareva* Injunctions in aid of foreign proceedings even though the parties have no intent to litigate the substance of their dispute in this jurisdiction”.

Henderson J followed the decision of an earlier Cayman Court of Appeal judgment in *Telesystem International Wireless Inc. et al v CVC/Opportunity Equity Partners LP et al*⁷. In *Telesystem* proceedings for substantive relief were started in the Cayman courts but stayed in favour of proceedings in another jurisdiction, Brazil. Nevertheless it was held that a *Mareva* injunction could be granted in Cayman and could remain in force. In *Felderhof*, somewhat confusingly Henderson J referred to the decision of Sanderson J in *Bass v Bass* (referenced above) and stated that “in light of the *Telesystem* decision [*Bass*] can no longer be regarded as good law”. Unfortunately this statement is less helpful than it first appears since the facts of *Bass* are fundamentally different from the facts of *Telesystem* (and, for that matter, *Felderhof*); the former relates to a free-standing injunction and the latter does not. It is accordingly hard to follow how *Telesystem* can overrule *Bass* on this point. However Henderson J has apparently given an indication of his own view of *Bass*, namely that it is not good law.

Practical Implications

The upshot of this analysis is that it is not possible at this stage to give a simple answer as to whether a Cayman court would grant a free-standing *Mareva* injunction in support of foreign proceedings. Other, broadly comparable, jurisdictions have determined that such injunctions should be within the armoury of categories of relief available to their courts. Moreover they have reached this view with careful analysis of policy considerations, concluding that the ability to

⁵ BVIHCV 2009/399

⁶ Cause No 845 of 1997

⁷ 2002 CILR note 22

grant these injunctions would further the interests of justice and improve the reputation and standing of the jurisdiction. Henderson J has implied that he does not consider the position expressed in *Bass* to be reliable. Accordingly, there is some justification for the view that the Cayman courts would welcome the opportunity of settling this opaque area of law in favour of the grant of free-standing injunctions. However there has not to date been an express revocation of the traditional position in Cayman and it remains unclear which route the Cayman courts will choose when next an application for a free-standing injunction is listed before them.

Practically, the decisions in *Telesystem* and *Felderhof* do provide one solution that will be relevant in certain cases. Where the option arises to litigate in Cayman as well as in another jurisdiction, it could be possible to obtain a *Mareva* injunction in Cayman, issue a writ to start proceedings (before or after obtaining the injunction) and then stay proceedings in Cayman in order to pursue the litigation elsewhere. The courts have already established that this approach can be permissible. However for this to be a practicable option there must be a justiciable cause of action that arises in the Cayman Islands and not merely assets within the jurisdiction. There may also be challenges in obtaining permission to serve a foreign defendant outside the jurisdiction. It will not therefore be available in all cases.

Comment

Once, the Cayman court looked almost exclusively to England as a ‘mother’ jurisdiction for guidance in matters of common law. Today there is an increasing trend for offshore courts to look to each other for jurisprudence, and to strike their own collective path away from English precedent. The key question for the Cayman Grand Court is whether to follow the recent trends in the BVI and Jersey, or to maintain consistency with the traditional English line of case law. We consider that when the next case reaches the Grand Court, with the right facts on the right day, there is at least a fair chance that the BVI/Jersey position will be followed. Such an approach would acknowledge the reality that many defendants resident

elsewhere keep assets in the Cayman Islands; and that the Cayman Islands is accordingly just the type of jurisdiction in which free-standing injunctions would be most useful. Our view is that, on balance, judicial freedom to grant free-standing injunctive relief would be beneficial to the Cayman Islands as a jurisdiction and we would welcome this development in Cayman Islands law.

In the meantime, and even if the Court takes a different view, in many cases all will not be lost. If a cause of action can be found in the jurisdiction the option will remain to issue a writ to allow the imposition of an injunction, with no requirement to pursue the Cayman litigation further.

Should you have any questions or requests for further information, please contact:

Rupert Coe
Associate, Litigation & Insolvency
Cayman Islands
rcoe@applebyglobal.com

Bahrain
Bermuda
British Virgin Islands

Cayman Islands
Guernsey
Hong Kong

Isle of Man
Jersey
London

Mauritius
Seychelles
Zurich