Injunction Applications in complex cases

Recent cases and some points to think about

1. A glance at any cause list reveals that the Chancery Division and Commercial Court continue to see healthy volumes of international civil fraud and other complex cases. Many of these cases start (and not infrequently end) with injunctions. Injunctive practice continues to evolve to meet the challenges that these cases, and the ingenuity of the parties and the lawyers in them, present. This talk considers 4 areas in which recent decisions in such cases may have an impact on current practice.

(1) Drafting Freezing Orders: *Ablyazov*

2. One of the many gifts of the (still ongoing) *Ablyazov* saga in the Commercial Court is the Supreme Court's decision on the meaning of the key operative paragraphs of the standard form Freezing Order: *JSC BTA Bank v Ablyazov* [2015] UKSC 64, [2015] 1 WLR 4754.

3. The issue considered by the Supreme Court was whether paragraphs 4-5 of the Commercial Court standard form were effective to prohibit the defendant, Ablyazov, from making and drawing down on various loan agreements and thereafter directing the lender to pay the proceeds to third parties.

4. Paragraphs 4 and 5 of the *Ablyazov* Order provided:

"4. Until judgment or further order … the defendant must not, except with the prior written consent of the [defendant]'s solicitors (a) Remove from England and Wales any of his assets which are in England and Wales up to the value of [ ]; (b) In any way dispose of, deal with or diminish any of his assets in England and Wales up to the value of [ ] … (c) In any way dispose of, deal with or diminish any of his assets outside England and Wales unless the total unencumbered value of all his assets in England and Wales exceeds [ ].

5. Paragraph 4 applies to all the defendants' assets whether or not they are solely or jointly owned and whether or not the defendant asserts a beneficial interest in them. For the purpose of this order the defendants' assets include any asset which they have the power directly or indirectly to dispose of or deal with as if it were their own. The defendants are to be regarded as having such power if a third party holds or controls the assets in accordance with their direct instructions."

5. These paragraphs reflected the Commercial Court standard form Freezing Order at the time of the original *Ablyazov* Order. That form is materially the same today, with the corresponding paragraphs being paragraphs 5 and 6. In the current form, the words "*and whether or not the defendant asserts a beneficial interest in them"* appear (in slightly revised form) as optional standard wording in the Commercial Court standard form ("*and whether the Respondent is interested in them legally beneficially or otherwise")*, with a footnote noting that they require specific justification.

6. The standard "example" Freezing Order wording annexed to CPR 25PD is now largely the same as the Commercial Court form, save

that it does not include the words "*and whether the Respondent is interested in them legally beneficially or otherwise*" as an option in paragraph 6. Moreover at the time of the Ablyazov Order the example form did not include the second and third sentences of that paragraph either. (That position changed from October 2005).

7. The Supreme Court decided that under the Commercial Court standard form wording: (1) Ablyazov's rights under the loan agreements were not themselves "assets" for the purpose of paragraph 4 of the Order (upholding the first instance and Court of Appeal decisions on this); but that (2) once called down, the loan proceeds were assets controlled by Ablyazov "*as if they were his own*" within the second and third sentences of paragraph 5, so that directing payment of the proceeds to third parties was prohibited.

8. The Supreme Court's reasoning on the first point was that injunctions fall to be construed strictly, given their penal consequences, and also by reference to their historical context. In the case of a Freezing Order, the historical context revealed that, absent clear wording extending the meaning of "assets", the assets restrained by a Freezing Order are those which might be available to a judgment creditor. This did not include rights to borrow.

9. As for the second part of this decision, the Supreme Court held that the effect of the second and third sentences of paragraph 5 of the standard form (read with the optional wording in the first sentence) was to extend the scope of the Freezing Order to assets held in the name of third parties but controlled by the respondent as if owned,

and that this was apt to cover the proceeds of the loans, once drawn down.

10. The following practical points arise from this.

11. First, unless additional bespoke words are added to the standard form, rights to borrow will not be caught as "assets", nor will other rights which would not be available to a judgment creditor. In complex cases, where respondents may have arranged their affairs so as to hold wealth using sophisticated contractual mechanisms (using rights to borrow, options etc) it may therefore often be appropriate to seek to expand the definition of "assets" to ensure that the overall net asset status quo is more effectively preserved. Nothing in the Supreme Court decision suggests that this would be objectionable as a matter of principle in an appropriate case.

12. Secondly the Supreme Court's analysis means that a key consideration when drafting a Freezing Order will be whether the optional words in the Commercial Court form should be added. For example, the Supreme Court decision confirms that without these words the extension to the definition of "assets" in the second and third sentences did not include trust assets held by the respondent as trustee (referring to the decision of the Court of Appeal in *Solodchenko* [2011] 1 WLR 1695 on this point).

13. And of perhaps even greater practical significance, without those additional optional words, assets held by wholly owned and controlled shell companies will not be covered even if there is a good arguable case that they are controlled by the respondent. That

is the effect of *Lakatamia Shipping v Su* [2015] 291 (CA) and *Group Seven Limited Allied Investment Corp* [2014] 1 WLR 735 (Hillyard J). Both these cases concerned a form of Order which included the second and third sentence of paragraph 6, but not the optional Commercial Court wording in the first (i.e. the current CPR 25PD example). These cases establish that under that wording, the assets of a shell company are not caught even if they are controlled by the respondent. However applying the Supreme Court decision in *Ablyazov* it seems that the position will be different if the optional Commercial Court wording is included as well.

14. Thirdly, the effect of the *Ablyazov* decision is that considerable care must be taken when drafting what is now paragraph 7 of the standard form i.e. "*This prohibition includes the following assets in particular: …*":

    (1) A common practice has been to err on the side of inclusivity and list within this paragraph a variety of possible "assets" of the respondent, including items which fall outside the *Ablyazov* concept of "assets", and in some instances, assets which are beneficially owned by third parties.

    (2) Is it sufficient to include, for example, rights under loan agreements or options in the paragraph 7 list without expanding the definition of "*the Respondent's assets*" in paragraphs 5 and 6 ? Is that on its own sufficient to expand the definition of "*the Respondent's assets*"?

(3) The logic of *Ablyazov* suggests that it is not. Unlike paragraph 6 ("*For the purpose of this order the Respondent's assets include …*"), paragraph 7 is not expressed so as to expand the definition of "*the Respondent's assets*"; but rather to specify what particular "assets" fall within the earlier prohibition.

(4) It follows that absent the introduction of additional wording in paragraph 6, if paragraph 7 lists items which are not in fact "assets", then there is an inconsistency and the order is unclear. That should be avoided, and practitioners should in each case consider carefully whether and to what extent the asset definition in paragraphs 5-6 needs to be expanded rather than simply deploying an "over-inclusive" list in paragraph 7.

(5) In short, the expansion of a standard form Freezing Order to cover "assets" which are outside the *Ablyazov* concept should be done unequivocally by altering the standard form of paragraphs 5-6 and should be justified. For example in the case of assets beneficially owned by third parties, it will typically be necessary to explain why the requirements established by the *Chabra* line of authorities are satisfied (or inapplicable). This should not be evaded by simply adding a third party's assets as particular assets in paragraph 7.

15. Lastly, although it is concerned with the terms of a Freezing Order, the Supreme Court's decision in *Ablyazov* provides some more general guidance as to the construction of injunctions. Lord Clarke rejected the so-called "flexibility principle" i.e. the notion that

freezing orders should be construed flexibly so as to combat *"wily operators"* who seek to thwart them. He reaffirmed that, given the penal consequences, the correct approach was the construe the Order strictly in accordance with its terms. He added to this that an Order must be construed in its context including its *"historical context"* (para 21). What that means is that for those Orders where standard or example forms exist (Freezing Orders and Search Orders), it will be necessary for practitioners to be aware of the historical origins of the different provisions and then to consider whether they are fit for the purpose or need to be supplemented or adapted with bespoke wordings.

(2) The shadow of the Siskina: *Kazakhstan Kagazy v Zhunus; Holyoake v Candy*

16. Recent cases have continued to explore the long-standing *Siskina* requirement for an accrued cause of action as a condition of the jurisdiction to grant a Freezing Order.

17. In *Kazakhstan Kagazy v Zhunus* [2017] 1 WLR 1360, the Court of Appeal has confirmed that the Siskina requirement for an accrued cause of action does not mean that a Freezing Order is unavailable in a case where contribution proceedings have been brought. The Court held that it sufficed that the defendant had the right to commence proceedings claiming the substantive relief even if strictly the cause of action was contingent and had yet to accrue. Freezing Orders were available to prevent such proceedings being frustrated.

18. More radical inroads into the *Siskina* principle may develop as a result of the interlocutory decisions in *Holyoake v Candy* [2016] 3 WLR 357 (Nugee J); [2017] EWCA Civ 92. Some commentators have suggested that these decisions might herald a new breed of quia timet "notification" injunction available even against parties where there is no accrued (or contingent) cause of action.

19. In *Holyoake* a "notification" injunction (to "*restrain [the respondents] from disposing, dealing or otherwise engaging in transaction with their assets in the sum of or to the value of more than £1m without first giving the Claimants' solicitors 7 days advance notice in writing*") was originally sought by the claimants as against the defendants as a less intrusive form of restraint than a Freezing Order.

20. Nugee J at first instance held that the Court had jurisdiction to make such an Order under s.37 SCA 1981 (para 8). He held that the general principle was that a party seeking such an injunction would need to show that the threatened transfer would invade a legal or equitable right or breach an obligation. A case where there was a threat to deal with assets to frustrate a future judgment was one example of this, as "*a defendant must be regarded as owing an obligation to a claimant not to dissipate his assets for the purpose of, or with the effect of, rendering any judgment that may be given liable to be one that goes unsatisfied*" (para 8(5)). However the Judge considered that there could be other examples of a threatened invasion of a legal or equitable right: where the claimant asserts a proprietary right to the asset which it seeks to restrain (a tracing claim), or where the defendant might dispose of an asset at an undervalue in breach of

contract. In these cases, the threat is not of dissipation as such, in the sense of putting the asset or its proceeds beyond the claimant's reach. Nugee J suggested that an order in those circumstances to restrain the defendant from dealing with that asset is not a freezing order, but nonetheless might be granted as a free-standing "notification order".

21. As for the threshold for granting such an order, Nugee J held that it would not be sufficient merely to satisfy the *American Cyanamid v. Ethicon* conditions. A notification order was still an invasive form of order, and hence required a claimant to demonstrate, in accordance with the principles applying to freezing injunctions, a good arguable case (of invasion of rights) and a risk of dissipation. On the latter however, the Court suggested that a lower degree of risk may suffice (para 47): *"[it is]…also relevant that the proposed notification injunction is less intrusive than a freezing order; I take the view that this is relevant to the degree of risk which needs to be shown before the Court can be persuaded to intervene."*

22. The Court of Appeal allowed an appeal against Nugee J's notification injunction decision. Gloster LJ gave the judgment of the Court. She held that order sought and made in the High Court in *Holyoake* rendered it, in effect, a modified version of a freezing order rather than a separate species of injunction (per Gloster LJ at paras 35, 39). Accordingly, the approach to risk of dissipation required in applications for freezing applications was: "…*no different in respect of notification injunctions of the type under consideration in the present case.*". In that respect the Court found that the Judge erred by

suggesting that a lower degree might suffice (and hence allowed the appeal).

23. However Gloster LJ's judgment was limited to notification orders of the "wide" type granted in *Holyoake*. She did not demur from the more general parts of Nugee J's analysis, including the proposition that notification orders might be made on a "free-standing" basis in circumstances outside the classic Freezing Order situation.

24. It follows that the Court of Appeal decision leaves open the possibility that there may be circumstances where a quia timet notification injunction might be made on the broader ground of some threatened invasion of right other than a threat to frustrate a future judgment in respect of an accrued cause of action. Practitioners might in the future consider such an order as a possible line of recourse in cases where there is a potential issue satisfying (the remnants of) the *Siskina* condition.

25. A further practical point arises from the Court of Appeal's decision in *Holyoake*. Since a notification injunction may be an alternative to a Freezing Order, and may (depending on its terms) be less intrusive, the Court suggested (see Gloster LJ ar para 45) that it may sometimes be appropriate for applicants to apply for that form of relief <u>rather than</u> seek a full Freezing Order:

"The conclusion that all variants of freezing order must satisfy the same threshold in relation to risk of dissipation should not be taken to suggest that parties need only contemplate the most onerous form of a freezing order, under what would be a misapprehension that the intrusiveness of

relief is immaterial. On the contrary, the intrusiveness of relief will be a highly relevant factor when considering the overall justice and convenience of granting the proposed injunction. Hence, even if there is solid evidence of a real risk of unjustifiable dissipation, an applicant should consider what form of relief a court is likely to accept as just and convenient in all the circumstances, including the scope of exceptions to the prohibition on dispositions."

(3) Making full and frank disclosure; Applications to discharge for non-disclosure.

26. The duties of applicants (and their representatives) on Without Notice applications for injunctions are well-known, and remain as summarised by Ralph Gibson LJ in *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350 at 1356-7. See also the summary in *Pugachev* [2014] EWHC 4336 (Ch) per Mann J at paras 68-77.

27. However, there has been a recent emphasis on maintaining *"a due sense of proportion":* see e.g. *Kazakhstan Kagazy v Arip* [2014] 1 CLC 451 at para 36) and *National Bank Trust v Yurov* [2016] EWHC 1913 (Comm). In the latter case, Males J stated"… *unless both parties exercise restraint, there is a danger that applications for the grant or discharge of freezing orders may become unmanageable. Thus the claimant must disclose all material facts, which will include making the court aware at the without notice stage of the issues which are likely to arise and the possible difficulties in the case, but need not extend to a detailed analysis of every possible point which may arise …"*

28. This emphasis on proportionality is helpful in complex cases, where the need to proceed with speed so that any injunction can be effective will often limit the extent of the inquiries can be performed. It reflects and develops principle 4 in *Brink's Mat*, namely that the extent of the inquiries which will be held to be proper "*must depend on all the circumstances of the case*". Of course it does not dilute the importance of the duty. However, applicants for urgent injunctive relief would be well advised to make it clear in their application any limits on their ability to make inquiries arising from the urgency of the situation.

29. The Courts have also emphasised the same requirement of a "*sense of proportion*" in relation to applications to discharge injunctions for material non-disclosure. Two procedural points are of note.

30. First, there is a need for a clear and concise statement of the grounds on which discharge is sought. Lengthy and unfocussed evidence with multiple criticisms is deprecated. The concise statement should either be in the application notice or in the evidence (in which case it must be succinct): see *Yurov* supra at paras 14-15.

31. Secondly, respondents seeking to discharge for material non-disclosure or contemplating doing so must be wary of the Return Date. A presently unresolved issue is whether if the Return Date is effective, it is incumbent on the respondent to advance any discharge case then, or face being barred from advancing the case absent change of circumstances pursuant to the principle in *Chanel*

ltd v Woolworth [1981] 1 WLR 485. The strict view of this is to be found in *Orb v Ruhan* [2016] 850 per Popplewell J at para 13 and also in an interlocutory decision of Etherton C in *Holyoake v Candy* [2016] EWHC 1718. However a contrasting approach is to be found in *Woodhouse v Consignia* [2002] EWCA Civ 275, in which the Court of Appeal held that the *Chanel* rule may not apply with full rigour in an interlocutory context. In a later decision in *Holyoake v Candy* [2016] EWHC 3065 Nugee J drew attention to this tension between these authorities at paras 14 to 18. So too did Popplewell J in *Phoenix v Cochrane* [2017] EWHC 418. However the issue remains unresolved.

32. That being so, a safe practice for any respondent with a substantial discharge application to advance is either to ensure that the return date is not effective (for example by adjourning it by agreement) or to seek directions for the making of any discharge application which explicitly preserve the right to apply on existing grounds, rather than only on changed circumstances.

33. Lastly, in relation to material non-disclosure, the decision of Flaux J in ***Republic of Djibouti v Boreh*** [2015] EWHC 769 serves as a reminder that deliberate material non-disclosure is in a different category. In that case, Flaux J found that the applicant's solicitor had deliberately misled the Court about the date of a phone call, thus giving the impression at a Freezing Order application that there was an arguable case that the respondent had been complicit in terrorist activities. The Court had no hesitation in these circumstances in discharging the Freezing Order. It subsequently

refused permission to the applicant to seek a Freezing Order outside the jurisdiction.

(4) Enforceability of injunctions in the European Union: *Cyprus Popular Bank*

34. In *Cyprus Popular Bank v Vgenopoulos* [2016] EWHC 1442 (QB), Picken J held that a without notice worldwide freezing order obtained in Nicosia, Cyprus, only became fully effective and enforceable in England and Wales, when the two month period for appealing a registration has expired.

35. That decision is under appeal. However its practical implications will include (1) the need for those seeking to register freezing foreign freezing injunctions to seek domestic freezing order relief from the English Court (if available) pending the two month period; and (2) the need (assuming this decision correctly determines the enforceability regime in the European Union), to consider seeking in any English worldwide freezing order application permission to bring injunctive applications elsewhere in the European Union (applying the *Dadourian* criteria).

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23 May 2017