

Cayman Calling: Freezing Injunction's Longer Reach

In *Batista*^[1], the Grand Court has clarified that the scope of the statutory jurisdiction to grant a freezing order in support of foreign proceedings may extend to a person outside the jurisdiction, whether or not that person has assets within the Cayman Islands (although on the facts there were assets in the Islands). This potentially far-reaching ancillary relief is justified by the international nature of some frauds. In this regard, the statutory powers of the Cayman Court are now broadly similar to those of the English Court.

Background

Eike Batista Da Silva is a Brazilian national who was once one of the ten richest people on the planet. He now faces criminal, civil and regulatory action in Brazil as a result of alleged impropriety concerning OGX, an oil exploration company he controlled. Mr Batista is said to have artificially inflated the value of OGX, in part through alleged fraudulent representations about the company's exploration successes. The commodities crash, and Brazil's ensuing economic troubles, led to the uncovering of these alleged improprieties – but not before Mr Batista had apparently started to dissipate assets, including the proceeds of the alleged fraud, to offshore and other jurisdictions including the Cayman Islands, Bermuda and Switzerland, in an attempt to evade creditors.

The Applicants were bondholders of apparently worthless bonds issued within the OGX structure.

The Respondents were Mr Batista and certain Cayman Islands companies he allegedly controls (“**Cayman Companies**”), as well as a service provider to the companies.

The Applicants intended to bring substantive claims against Mr Batista and the Cayman Companies in Florida, alleging, amongst other things, fraud and conspiracy to commit fraud. No substantive claims were to be brought in the Cayman Islands.

By their Application in the Grand Court, the Applicants sought a worldwide freezing order (“**WFO**”) against Mr Batista and the Cayman Companies, as well as discovery from the service provider aimed at identifying what had become of Mr Batista's dissipated assets.

Statutory Power

The power to order a WFO in support of foreign proceedings arises in the Cayman Islands under section 11A of the Grand Court Law (2015 Rev). The power is similar to the English power under section 25 of the Civil Jurisdiction and Judgments Act 1982.

WFO – Jurisdiction

When can the Court consider its discretion to grant a WFO?

In order for the Court to be able to consider its discretion to order a WFO under section 11A, there must be:

1. Foreign proceedings (actual or prospective);
2. Which give rise to a judgment enforceable in the Cayman Islands

As the Applicants intended to bring proceedings in Florida, there was no issue with the first part of the gateway.

On enforceability, part of the relief sought in the USA included ‘treble damages’. Damages in the Cayman Islands are compensatory and not punitive (except within very limited situations). So, a question arose as to whether, for the purposes of the second issue, a judgment for treble damages would be enforceable at common law. There was no English or Cayman Islands case law on point, but the learned judge simply accepted, for the purposes of the application, that such a judgment would be enforceable.

Territorial jurisdiction

Another jurisdictional point was whether the Cayman Court could grant a WFO under section 11A against a respondent outside of the jurisdiction. Mrs Justice Mangatal held that there was such a power, and that the earlier Cayman Islands case of *Johnson & Johnson v Stephen Medford* (unrep., 29 June 2015) was not authority to the contrary.

WFO – Discretion

Mrs Justice Mangatal drew on the judgment of Smellie CJ in *Johnson & Johnson* for the principles in relation to exercising the discretion under section 11A.

In short, it was important to address the usual test for any freezing injunction, namely whether there was a “**good arguable case**” (i.e. the merits of the substantive claims to be brought in Florida) and whether there was a “**risk of dissipation**” of assets such that, if the relief was not granted, there was a real risk that judgment for the plaintiffs in Florida would remain unsatisfied.

It was also necessary to decide whether granting the WFO would be **just and convenient**, which was akin to a test of **expediency** (the term used in the English statute). The jurisdiction was not one that should be exercised only in exceptional circumstances, and the Court should not be timid to grant relief where appropriate.

Good arguable case / risk of dissipation

In terms of the principles, the Court reiterated that a good arguable case means “... *one which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per*”

cent chance of success” (*Ninemia* [1984] 1 All ER 398).

As to the risk of dissipation, the Court explained that:

- There must be ‘solid evidence’ of a real risk of the judgment remaining unsatisfied unless the respondent is prevented from dealing with assets within the jurisdiction (i.e. within the Cayman Islands).
- ‘Solid evidence’ was judged on a case-by-case basis.
- It was possible in principle to *infer* a risk of dissipation. The risk would more readily be inferred where the respondent was a holding company without any substantial physical presence or operations within the jurisdiction.
- If there was a good arguable case of fraudulent or dishonest behaviour by the respondent, then there is authority to support the Court assuming the risk of dissipation
- The timing of the application for a WFO is relevant only to the question of whether there was a real risk of dissipation. Delay may suggest that the applicant did not consider there to be a real risk.

On the facts, Mrs Justice Mangatal held that there was plainly a good arguable case of fraud, and she was also satisfied as to the risk of dissipation of assets.

Expediency

Relying on previous Cayman Islands and English authority (in particular *Motorola v Uzan (No 2)* [2003] EWCA Civ 752), Mrs Justice Mangatal held that, in circumstances where the respondent was non-resident or non-domiciled in the Islands, key over-arching issues to address were:

- The availability of injunctive relief from another jurisdiction; and
- The enforceability of the WFO if granted by the Cayman Court, in circumstances where the respondent, with only ‘tenuous’ links to the jurisdiction, might flout the order

The Court should consider if relief is available in the primary court, or in the jurisdiction of the respondent’s residence, or in some other jurisdiction. For example, questions of comity require the Court to consider if granting the relief in the Islands would interfere with, be inconsistent with, or otherwise overlap with an order made by another court. In particular:

- If relief is within the power of the foreign court and may be or has been obtained, then any injunctive relief in the Cayman Islands is likely to be limited in scope to assets within the Islands;
- If the relief is within the power of the foreign court but has been refused by the foreign court, that will be a factor to be taken into account, but it does not *necessarily* mean that the Cayman Court will decline to grant the WFO; and
- If relief is not available in other jurisdictions, then that is a factor that weighs in favour of granting the relief in the Cayman Islands.

In terms of enforceability, it will be inexpedient to grant a WFO if there is no prospect of it being enforced or successfully policed: the Court will not make an order in vain. If there are significant assets within the Cayman Islands, that tends to suggest that any WFO ordered by the Cayman Court would be capable of enforcement.

However, Mrs Justice Mangatal made clear that a WFO will not be refused merely because the non-resident respondent has no assets within the jurisdiction. In the case of international fraud, the English – and now the Cayman Court – has stated that in principle a WFO may still be granted, within the limits of comity, notwithstanding the absence of assets within the jurisdiction.

On the facts, the relief sought was not available elsewhere. Neither the Brazilian Court or the US Court had the civil jurisdiction to order a WFO as a pre-judgment remedy in support of the Florida claim. Although there was a criminal freezing order in place in Brazil, it (i) related only to Brazilian assets (ii) was intended to achieve different ends, and (iii) as the civil plaintiff had no control over when the criminal freezing order might be discharged or varied, absent a parallel civil freezing order the plaintiff would be at risk.

In terms of enforceability, Mr Batista had significant assets within the Cayman Islands, through his shareholding in the Cayman companies and so, on the facts, it could not be said that a WFO would be made in vain.

Disclosure

Mrs Justice Mangatal found that she was entitled under both section 11A and the *Norwich Pharmacal* jurisdiction to make an order for discovery against the innocent service provider.

Commentary

Over the last 30 years, common law jurisdictions have strengthened their powers to grant freezing orders in support of foreign proceedings, and some have also widened the territorial scope of that power. England, Jersey, Guernsey, the Isle of Man, and the BVI have enlarged that jurisdiction either through legislation or as a development of the common law.

In *VTB Capital v Malofeev* [2011 (2) CILR 420], the Court of Appeal of the Cayman Islands had previously confirmed the power to grant a freezing injunction in support of foreign proceedings, but denied that there was the territorial jurisdiction to permit service on a respondent out of the jurisdiction because of the proper construction of O.11 r1(1)(b).

Since then, section 11A has been introduced by the legislature, as well as O.11 r1(1)(n) which relates specifically to section 11A. It appears now to be clear that the Cayman Court has the power to order a WFO in support of foreign proceedings, and that the territorial scope extends to a non-resident respondent. If the context is an international fraud, the Court may be persuaded to order the WFO even if the respondent does not have any assets in the Islands. In these respects, the statutory power under section 11A of the Grand Court Law (2015 Rev) is very similar to a statutory power granted to the English Court.

The Cayman Court also has a power to grant a WFO against a respondent against whom *no* cause of action is contemplated (i.e. no foreign proceedings against the respondent). The scope of this *Chabra* jurisdiction in the

Cayman Islands, however, appears to be narrower than that in England, following the Cayman Islands Court of Appeal's decision in *Algosaibi v Saad* [2011 (1) CILR 178].

It has not expressly been decided whether the jurisdiction of the Cayman Court extends to ordering a freezing injunction against a non-resident in support of a foreign *arbitration*. The English Court has that power, by virtue of section 44 of the Arbitration Act 1996; and it is likely that the Cayman Court does too, under section 54 of the Arbitration Law.

[1] *Meridien Trust Company Limited & Anor. v Eike Batista Da Silva & Ors.* FSD 172 of 2016 (IMJ) (unrep. 11 November 2016)



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