

UPDATE

The use of notification injunctions as an asset preservation tool in Guernsey

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In *Holyoake and another v Candy and others* [2017] EWCA Civ 92, the English Court of Appeal confirmed that the English courts had jurisdiction to grant freestanding notification orders. This update considers whether a similar jurisdiction exists in Guernsey and the utility of notification injunctions as an asset preservation tool compared to the more conventional freezing injunction.

The difference between a notification injunction and a conventional freezing injunction

A notification injunction requires the respondent (to the injunction) to give notice to the applicant of the fact that it will be disposing of or dealing with its assets. Traditionally notification injunctions have been used in conjunction with a 'conventional' freezing order¹ for the purpose of restraining a respondent from disposing or dealing with assets without first giving the applicant advance warning.² However, the decision in *Holyoake*, confirms the English court's jurisdiction to grant 'freestanding' notification injunctions.

The main difference between a freestanding notification injunction and a conventional freezing injunction is that a notification injunction does not provide a blanket ban on a respondent dealing with its assets. However, notification injunctions should not be viewed as a distinct type of injunction, more a modified form of a freezing injunction, which gives the applicant an opportunity to apply for an order preventing the defendant from disposing of its assets.

Are notification injunctions available in Guernsey?

In England, the court's jurisdiction to grant an injunction is set out in section 37(1) of the Senior Courts Act 1983 (SCA), which provides that:

'The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.'

In *Holyoake*, it was held that this jurisdiction extends to the court granting an order requiring a respondent to give notice of any disposals of or dealing with assets, ie, a notification injunction.

In Guernsey, the court's jurisdiction to grant an injunction is set out in section 1 of the Law Reform (Miscellaneous Provisions) (Guernsey) Law 1987 (the **1987 Law**).

'If proceedings have been or are to be instituted before the Court, the Court may by order, at any time before it makes a final judgment in the proceedings or before the proceedings are otherwise concluded, on the application of any person who is, or as the case may be will be, a party to the proceedings (such person being referred to in this Part of this Law as "**the applicant**"), grant an injunction addressed to

¹ See paragraph 17 of the Court of Appeal Judgment in *Holyoake* in which a conventional freezing order is described as 'an injunction prohibiting a party from disposing, dealing with or diminishing the value of certain assets'.

² See for example *Lakatamia Shipping Co Ltd v Su* [2014] EWCA 636.

another person (such other person being referred to in this Part of this Law as "the respondent") requiring the respondent to do or not to do anything.'

Accordingly, unlike the SCA the 1987 Law confers an express jurisdiction on the Guernsey court to grant an injunction requiring the respondent to do or not to do something. Such an order does not need to be ancillary to a freezing injunction, and unlike the *Holyoake* case there is no need to tread down the path of the application of logic to show that by extension the Guernsey court has jurisdiction to grant a notification injunction under the 1987 Law. But even if there were any doubts as to the unfettered jurisdiction of the Guernsey court to grant freestanding notification injunctions, given that the provisions of section 1 of the 1987 Law are sufficient to grant a conventional freezing order, then it would be a logical extension of that jurisdiction to grant a notification injunction for which the function, operation and machinery are... essentially equivalent to those of a conventional freezing order.³

The applicable test

Under Guernsey law the test for a conventional freezing injunction is:⁴

- a good arguable case;
- a real risk of dissipation; and
- it is just and convenient to grant the relief sought.

In *Holyoake* the English Court of Appeal confirmed that the same threshold test applied to notification injunctions. At first instance it had been suggested that a notification injunction was 'less intrusive' than a conventional freezing injunction, and as such a lower standard of evidence of risk of dissipation was required. However, the English Court of Appeal was quick to quash the notion that an applicant who was struggling to meet the evidential burden for a freezing injunction could seek a notification injunction instead. The court's reasoning, which is set out at paragraph 36 of its judgment, can be summarised as follows:

1. Both types of injunctions are concerned with protecting an applicant against the risk that the respondent will dissipate its assets so as to defeat the enforcement of a possible future judgment. Both injunctions prevent respondents from dealing or disposing with their assets (subject to certain exceptions) and both injunctions are supported by the threat of contempt proceedings for breach.
2. Both forms of injunction involve a draconian interference with the rights of the respondent to deal with their assets, and both carry a reputational stigma.
3. Both affect third parties who knowingly assist the affected applicant breach the order or wish to deal with the assets.
4. The only significant difference between a freezing injunction and a notification injunction is the scope of the exceptions to the prohibition in relation to notified transactions.

The court did identify one exception to the above, and that was in respect of a 'simple order requiring notice to be given of a proposed disposition of a specific property'.⁵ In such a case, the Court of Appeal observed that the test might differ (because the notification being given is not blanket but specific to an identifiable asset), leaving the door open to arguments that in such cases the evidential requirements may be less stringent; however, it seems unlikely that if the evidential burden is lower, an applicant would receive the full protection of the modified freezing injunction.

The Guernsey practice in relation to freezing injunctions has to a large extent followed the practice which has developed in England and Wales;⁶ as such it stands to reason that if the Guernsey courts were prepared to grant a notification injunction, the same threshold test would apply in Guernsey as it does in England. This would ensure that the same safeguards which are afforded to respondents on the making of a freezing order are extended to respondents prohibited from dealing with their assets by reason of a notification injunction.

³ See paragraph 36 of the Court of Appeal's judgment in *Holyoake*.

⁴ As confirmed by the Court of Appeal in *Seed International v Tracey* [2003-04] GLR 98 at para 18.

⁵ See paragraph 35 of the Court of Appeal's judgment in *Holyoake*.

⁶ See generally *Garnet Investments Ltd v BNP Paribas (Suisse) SA and others* 2007-08 GLR 442.

Notification orders versus freezing injunctions

Given that the same threshold test applies in the case of either injunction, the temptation for some applicants may be to discard the usefulness of a notification injunction in favour of a freezing injunction. After all if you've met the test for a freezing injunction, why not inconvenience your opponent with the more onerous order of the two?

In some cases the decision may be taken out of the applicant's control. As stated above, one of the factors a court will consider before it grants an injunction is whether it is satisfied that it is just and convenient to grant the relief sought. With the advent of the freestanding notification injunction, it is possible that a court may decide that the level of intrusiveness of a conventional freezing order is inappropriate and not just in the circumstances, but recognising the risk that an applicant's judgment may otherwise go unsatisfied, it would be open to a court to modify the nature of the relief sought and grant a notification injunction instead.

Judicial intervention aside, to view a notification injunction as the lesser of the two remedies available to an applicant overlooks the potential of a notification injunction as an asset preservation tool. Had the injunction not been set in the case of *Holyoake*, the injunction as granted was in many respects more onerous than a conventional freezing injunction. For example it did not contain an exception for transactions in the ordinary course of business, and it did not employ a value cap as you would typically see in a conventional freezing order, which meant that regardless of maximum conceivable value of the applicant's claims in the underlying proceedings, the notification injunction affected the respondent's total global assets (without the applicant having to first satisfy the court that it was just to make an extra-territorial order).

It remains to be seen whether a future applicant in Guernsey could obtain a notification injunction on the same terms as were granted at first instance in *Holyoake*, but that does not diminish the value of these injunctions and the benefits of these should not be underestimated: (a) notification injunctions give applicants the best vantage point from which to observe how a respondent deals with its assets (potentially) over a prolonged period of time; (b) this in turn means that it will be easier for an applicant to decide when best to apply for a conventional freezing order or post-judgment freezing order to protect its judgment; (c) because the respondent must put the applicant on notice of the potential sale of its assets, the applicant may decide to apply to the court to vary the order to prevent that specific transaction from taking place (ie, to preserve a specific pool of assets for enforcement purposes); and (d) notification injunctions come with penal notices and extend to third parties on notice. Respondents who fail to treat these orders as seriously as they would a freezing order do so at their own peril.

In the right circumstances, notification injunctions can be a powerful asset preservation tool and we keenly await the first reported judgment of such an injunction being granted in Guernsey.

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