THE LAW QUARTERLY REVIEW

Volume 122 **October 2006**

NOTES

The Remedies Carried by a Freezing Injunction

In *Commissioners of Customs & Excise v Barclays Bank Plc* [2006] UKHL 28; [2006] 3 W.L.R. 1, the claimant Commissioners obtained a freezing injunction against a customer of the bank, and notified the bank. The bank wrote a standard letter to the Commissioners confirming that it would abide by the order and requiring reimbursement of its costs incurred as a result of the order in the sum of £150. Following notification of the freezing order and before the letter had been received, but possibly after it had been sent, the bank through "operator error" made payments out of the account frozen by the injunction. On the next day the Commissioners gave notice of another freezing order obtained against a different customer of the bank, and shortly afterwards the bank again made substantial payments out of the account. Subsequently the bank wrote its standard letter to the Commissioners adding a reference to these payments. The Commissioners made a lower recovery on the judgments obtained against the bank's customers, and sued the bank in negligence for their loss. There was a preliminary issue on whether the bank owed a duty of care.

The House of Lords unanimously decided that there was no duty of care reversing the decision of the Court of Appeal and restoring the order of Colman J. The House considered the three tests for liability for economic loss: (1) "voluntary assumption of responsibility"; (2) the three-fold test stated by Lord Bridge of Harwich in *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605 in high level generalities, described by Lord Walker of Gestingthorpe (at [72]) as labels of limited usefulness, which have led Lord Hoffmann to encourage the development of "lower-level" principles; and (3) an incremental "test" which looks to established categories in which liability has been accepted. The last is reasoning from the case law, and Lord Bingham of Cornhill (at [7]) considered it

> "of little value as a test in itself, and . . . only helpful when used in combination with a test or principle which identifies the legally significant features of the situation."

The speeches show each test providing no more than a helpful channelling for judicial thought.

''Voluntary assumption of responsibility", which was the test favoured by the bank in argument, comes originally from the speeches of Lord Reid and Lord Devlin in *Hedley Byrne* and has had a chequered history, achieving a revival with the powerful support of Lord Goff of Chieveley. It appears to describe particular categories which qualify for liability under the *Caparo* test. In *Hedley Byrne* the bank had a free choice whether to give the requested reference, and because the advice was given commercially and not in a social context, the House of Lords considered that there would have been legal responsibility in the absence of the disclaimer. A defendant may have assumed the task in the hope of profit or in providing a service pursuant to some statutory duty. However, the more remote the facts grounding liability become from those in *Hedley Byrne*, the more the danger that words expressing the concept become stretched into a legal fiction devoid of practical utility. The test involves an objective approach independent of the subjective thoughts of the defendant. The defendant may not have intended to assume any legal responsibility at all, or as in *Smith v Eric S. Bush* [1990] 1 A.C. 831 may have tried to exclude it but failed because its notice was unreasonable and struck down by statute. However, the bank notified of a freezing injunction had no choice but to comply with the order. The Commissioners had not relied on any voluntary conduct of the bank following service of either order. If liability was to be imposed through the bank voluntarily doing something, it would have to spring from the bank's decision to carry on a banking business in the first place. This distinction between a banker taking on a particular task for someone's benefit, and the court imposing a liability for economic loss as an incident of carrying on a banking business, formed an important part of the reasoning of the House rejecting a duty of care. The case on its facts did not qualify as voluntary assumption of responsibility. *Al-Kandari v J.R. Brown & Co* [1988] Q.B. 665 (husband's solicitor accepting deposit of his client's passport for the protection of the wife) and *Dean v Allin & Watts* [2001] 2 Lloyd's Rep. 249 (borrower's solicitor sued by unrepresented lender) in which the solicitor for one party had been held liable to the opposing party, turned on their own facts disclosing the acceptance by the solicitor of a task for the benefit of the other party. The decision of the House that it would not be fair to impose negligence liability suggests that, even if the order had been an interim third-party debt order (garnishee order nisi) attaching the credit balance on an account, the House might have regarded an accidental payment out

made carelessly by the bank's employees shortly after service as justifying a decision not to make the order final because this would likewise have been unfair to the bank. Although Lord Bingham referred to the fact that the injunctions were ex parte and that the bank had had no opportunity to apply to discharge or vary them, one would expect exactly the same result if the bank had had that opportunity. It is one matter to object to the injunction; it is another voluntarily to undertake the task of protecting assets for someone else.

The bank argued that there was no duty because of the general rule that no duty of care is owed by a party to hostile litigation or his representatives to the other party. But this went too far, because although the bank had its own commercial interests which were different from and adverse to those of the claimant, as Lord Rodger of Earlsferry observed, the bank did not represent their customers in the dispute with the Commissioners and were "no more on the companies' side in that dispute than the companies' butchers, bakers, or candle-stick makers". The bank was a non-party caught up in litigation not of its making, notified of a court order which could adversely affect its interests.

The argument of the Commissioners would have imposed a duty for the entirety of a loss on any non-party asset holder, including a grandmother holding cash for her grandson or a friend looking after antique furniture. A High Street bank should act carefully to observe court orders, and it will normally carry liability insurance covering it for employee negligence; but it does appear unfair to impose liability for the loss on a relative or friend of the defendant who happens to make a mistake.

The bank was entitled to its costs incurred as a result of the order. If the bank could charge for its services and chose to do so, as shown by its standard letters written by it shortly after notification of the orders, then it was argued that it should owe a duty of care in providing those services. A court deciding whether to grant an injunction takes into account the likely effects of that injunction on non-parties. If those effects may be severe, the court may refuse the injunction altogether, or grant a different injunction less onerous to the non-party. If the injunction may cause an innocent non-party costs it will normally be fair to require the claimant to bear this as part of the price for the injunction. In freezing injunctions it is part of the standard procedure to require the claimant to undertake to the court to pay any non-party his reasonable costs incurred as a result of the order. There is also a cross undertaking in damages. In non-freezing order cases the practice under the CPR about the cross undertaking is unclear (*SmithKline Beecham Plc v Apotex Europe* [2006] EWCA Civ 658 at [29]) and under review by the Rules Committee.

Banks routinely make an administration charge covering their expenses and loss of employees' time in dealing with a freezing order. The costs covered by the undertaking are those for which the bank would otherwise

be out of pocket, not out of choice, but because of the mandatory effect of the order itself. They would extend to employees' time in putting a block on the account, but would not provide the bank with a premium covering the risk that an employee might make a negligent mistake and there could be liability for millions of pounds. The bank has no cause of action against the claimant for those costs, but if the claimant does not pay them it will be in breach of its undertaking to the court and in contempt. This is not contractual. Nor is the charge the consequence of any voluntary choice by the bank to do something to implement the order. It covers the reasonable costs of what the bank is required to do in order to comply with the order and to avoid the risk of proceedings for contempt. The standard form letter did no more than state financial consequences for costs which flowed from the making of the order itself.

The effect of a freezing injunction on a non-party is that it may be held in contempt of court if either it aids and abets a breach of the order by the person enjoined, or if it knowingly interferes with the administration of justice by frustrating the purpose of the court's order. The case law is not settled on whether reckless disregard of an order may suffice. The "purpose" of the order is to prevent dealings with the assets subject to the order, and so under the latter head a non-party may be held in contempt when the person enjoined has not acted in breach of it or does not even know of the order. A non-party cannot be held in contempt for acting carelessly, and so it followed that on the assumed facts the bank had not acted in contempt of court and had not exposed itself to the jurisdiction of the court to punish a person for contempt. The question whether there might be a civil cause of action for damages for loss caused by a contempt of court did not arise.

If one changed the facts so that a claimant had a proprietary claim against a defendant in respect of a credit balance on a bank account, perhaps a claim that the funds were obtained from it by fraud, then the claimant could make a substantive claim against both the defendant and the bank for return of its property. A freezing injunction might then be obtained against the defendant and the bank covering the account, because otherwise the bank might pay its customer, leaving the claimant with no effective remedy. The test for contempt in the case of a party enjoined by the order is very different from the case of a non-party. In general breach of the order with notice of it will expose a party enjoined by the order to being held in contempt. If the bank made a mistake would the claimant be left without a remedy?

There is a general principle in English law that a person is not allowed to take advantage of his own wrong, and this principle has been applied between contracting parties and between lessor and lessee (*Alghussein v Eton College* [1988] 1 W.L.R. 587). Perhaps it might be argued that the bank could not set up as against the claimant its "wrong" in parting

with the funds in contempt of court, and that the rights between them would stand to be adjusted on the footing that the bank still retained the claimant's money. However, such an argument would have the consequence that however excusable the bank's mistake it would be liable for the full amount paid out of the account. Lord Bingham referred to the case law which holds that contempt of court is not in itself a civil "wrong" actionable by the claimant in tort or which infringes his private rights. Although Lord Denning M.R. had said in *Chapman v Honig* [1963] 2 Q.B. 502 at 512: "no contemnor can enforce rights resulting from his own contempt", that was in the course of a dissenting judgment. It is suggested that the bank would be free to show that it had paid the money away even though it was relying on its own contempt of court to resist liability.

Another route would be through imposing a condition requiring restoration of funds on an order made under the contempt jurisdiction of the court. Lord Bingham referred to *Z Bank v D1* [1994] 1 Lloyd's Rep. 656, in which D1 had claims against a foreign bank, the Z Bank, and obtained a Mareva injunction against it. The bank broke the injunction, and was in contempt of court in making payments out of its frozen London bank accounts over a period of five months. Colman J. held that the contempt involved a high degree of negligence on the part of the Z Bank and gave leave to issue a writ of sequestration of its assets unless it paid into the accounts sufficient to bring them up to the credit balance which would have been there had the payments out not been made. This procedural route allows a graduated response taking into account the gravity of the contempt and the extent of its consequences, but will only work when an effective penalty can be imposed on the contemnor by the English court and he chooses to make the refunds. In *Z Bank v D1* the culpability of the contempt justified a punishment of sufficient gravity that it could be used to compel restoration. However, restoration and punishment fulfil different purposes, restoration may be called for without punishment, and it is suggested that there should be a procedure enabling them to be dealt with separately.

A further possible approach is that the court has jurisdiction, as part of its jurisdiction to ensure that its orders are obeyed, to intervene by injunction requiring a person to undo the consequences of a contempt of court for which he is responsible. In *Esso Petroleum v Kingswood Motors* [1974] Q.B. 142, a petrol service station had been conveyed by the defendant in breach of contract to a third party who had tortiously induced that breach. Bridge J. granted a mandatory injunction requiring the third party to convey back the service station to the defendant on the ground that prior to the transfer the court could have restrained it and after the transfer it had power to require the third party to undo the consequences of its tort. It may well be that a contempt of court causing

loss to someone does not in itself create a cause of action in tort in favour of that person, although the contempt might provide an ingredient of some other cause of action, such as the wrongful means required for an economic tort or breach if there is a relevant contract. However, there is ample precedent for a court granting an injunction to prevent a contempt of court, on the application of a person who would be affected by that contempt, on the ground that the threatened contempt would interfere with the due administration of justice: *Arlidge, Eady and Smith on Contempt* (3rd edn.), para.6-1. It is a short step to reason that after the contempt has been committed the court has jurisdiction over a contemnor to require the effects to be reversed. If one slightly changed the facts in the *Esso Petroleum* case and there had been an injunction in place restraining the defendant from transferring the service station of which the third party had had notice, the transfer would have frustrated the purpose of that injunction. It is suggested that the court could on the application of *Esso* have ordered the third party to convey the property back because he had interfered with the administration of justice by frustrating the purpose of the original injunction.

In more recent times it has become established that an injunction can be granted against a person without any substantive cause of action against him where the injunction is ancillary to and in support of a cause of action against the defendant. In Australia the doctrinal basis for Mareva orders is focused on the due administration of justice, and the court taking steps to protect the integrity of its own process and to avoid it being frustrated. As against a person, who is in contempt of court, an order requiring restoration of the position can be viewed as ancillary to the cause of action against the defendant on which the original injunction was based, and as an order made by the court in support of, and to avoid frustration of, its own process. On this analysis a bank which is itself enjoined by an injunction and pays money out in breach of that injunction might be made subject to an order to restore part or all of the credit balance without any need to show in addition a cause of action in the claimant against the bank in respect of the contempt. On the facts of *Z Bank v D1* an order to restore the credit balance would be capable of being enforced throughout the EU.

A further step in the analysis could be that because there is jurisdiction to "entertain an application for an injunction" requiring steps to be taken restoring the position, the court has in addition a discretionary jurisdiction under s.50 of the Supreme Court Act 1981, derived from but in wider language than Lord Cairns' Act, to award damages in addition to or instead of that injunction. This would be consistent with there being no cause of action at common law. The words of s.50 do not require the actual or threatened commission of a wrong actionable at common law, and "damages" is a word which can be used of a remedy when there is no "cause of action", for example when a defendant incorrectly enjoined

(2006) 122 L.Q.R., October © Sweet & Maxwell and Contributors

seeks "damages" under a cross undertaking given to the court. It seems that if at the date of issue of the claim form an application for an injunction might as a matter of jurisdiction have been entertained from the claimant, the court can as a substitute award him "damages". Like Lord Cairns' Act, s.50 has no requirement that it must be wise to grant the injunction.

It may be that there would be an important difference between the position of non-parties given notice of an injunction, the standard practice for freezing orders based on the Mareva jurisdiction, and persons enjoined because they hold assets subject to a proprietary claim, or even though there is no cause of action against them, for example the wife in *Mercantile Group (Europe) AG v Aiyela* [1994] Q.B. 366. The difference would reflect the different formulations of what conduct by a non-party or a person enjoined can be punished for contempt.

The lack of an asset arrest jurisdiction has had the consequence that most of the modern procedures about freezing assets have had to be achieved through development of the law of injunctions. Lord Hoffmann said that you

> "cannot derive a common law duty of care from an order of court. The order carries its own remedies and its reach does not extend any further."

The Mareva jurisdiction has brought the problem of whether and in what circumstances there should be a responsibility to replace funds lost when an injunction is broken, a problem not addressed by the legislature or the CPR. The result has been to leave it to the courts to work out solutions about what remedies are carried by the order. There should be clear rules, and everyone should know in advance what they are. The existence of the rules might encourage observance of court orders. It would be fair to those potentially affected. Rules could allow a proportional response. They might avoid unwelcome technical differences according to whether the order was notified to a non-party or enjoined him, and could enable the court to draw a distinction between an asset holder such as a bank which holds assets for reward, which will normally hold professional indemnity cover and which can be expected to conduct itself to a professional standard in ensuring that it does not facilitate breach of a court order, and other categories. If this distinction had been open Lord Walker (at [75]) would have been slow to conclude that there could never be liability for carelessness, a view which suggests that there is an important question of policy which could usefully be considered. Rules could avoid uncertain litigation up to the House of Lords over millions of pounds in which a party is asking for the remedies to be defined with retrospective effect. It is suggested that the litigation in *Commissioners of Customs & Excise v Barclays Bank* should prompt the making of rules by the Rules Committee, who could usefully consider the practices and experiences of

other jurisdictions, clearly setting out what a court may do to reverse the effects of a breach of a freezing injunction rather than leaving the courts to resolve the uncertainties and to develop machinery to fill the gaps.

STEVEN GEE.*

* Q.C.

Assumption of responsibility; Bankers duties; Breach of injunction; Contempt of court; Duty of care; Economic loss; Freezing injunctions; Third parties

(2006) 122 L.Q.R., OCTOBER © SWEET & MAXWELL AND CONTRIBUTORS