

The price of an interlocutory injunction

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In its recent judgment, [1] the Judicial Committee of the Privy Council (JCPC) provided guidance in relation to the correct approach in assessing loss flowing from an interlocutory injunction.

The JCPC also confirmed that the relevant period of loss for the purposes of the assessment is from the date of injunction to the date of judgment on the substantive dispute, when the injunction is effectively discharged.

Background

Ennismore Fund Management Ltd (EFML) managed Cayman Islands-based funds that invested in small capital companies (Small Caps) trading on European markets. Fenris Consulting Limited (Fenris) entered into a consultancy agreement with EFML pursuant to which Fenris was to act as an investment manager for EFML. The fee arrangement included a discretionary bonus, half of which was paid in cash, and the other half was invested in Fenris' name in shares in EFML funds (Retained Bonuses). The Retained Bonuses were subject to a right of claw back by EFML if Fenris' investment portfolio made a loss compared with the previous year.

Fenris earned Retained Bonuses in 2005 and 2006 which were invested in EFML funds, ESCHF and EVF, respectively. Fenris did not earn bonuses in 2007 or 2008 because the portfolio managed sustained losses. EVF was placed in voluntary liquidation in January 2009. Fenris made a request for redemption and its shares in ESCHF were redeemed on 2 March 2009.

EMFL issued proceedings seeking declaratory relief to establish the status of the Retained Bonuses and obtained an ex parte freezing injunction on Fenris' shares and proceeds of redemption. In order to obtain the injunction, EFML gave the court the standard cross-undertaking in damages, that if the injunction caused loss to Fenris and the court decided that Fenris should be compensated for that loss, EFML would comply with any order the court may make. The shares were converted to cash and were placed into a bank account held jointly by the parties' attorneys, but remained subject to the freezing order dated 27 February 2009.

Judgment was given in favour of EMFL on 16 February 2012 by Foster J. Fenris appealed but its application for a stay of execution pending the appeal was refused. Accordingly, the judgment sum was paid out of the joint bank account to EFML. Fenris was successful on appeal to the Court of Appeal (**CoA**) and the order of Foster J was set aside. On appeal by EFML, the CoA decision was upheld by the JCPC. The judgment sum was returned to Fenris on 25 May 2016 – over seven years after Fenris' shares were frozen.

Fenris then commenced an inquiry into damages resulting from the injunction. Fenris' pleaded case was that by reason of the injunction, it had been deprived of the opportunity it would otherwise have taken of investing in the period 27 February 2009 to 25 May 2016 all of the money frozen by the injunction, in the total sum of €2.3 million. Fenris pleaded that it would have adopted the same investment strategy as had been employed before 2007/2009, investing in Small Caps and that its investment would have led to a return of 10.5% above the HSBC Smaller European Return Index, which EFML had used for the purposes of comparison with its own returns.

At first instance, McMillan J found that the undertaking and therefore, the loss, endured until 25 May 2016 when EFML repaid to Fenris the money it had received pursuant to the order of Foster J, and assessed the loss at €5,354,601.07 plus interest. EFML appealed.

The CoA set aside McMillan J's findings on causation, re-assessed the loss and substituted an award of €558,034.89 which reflected the loss incurred between the 16 May 2009 (a few months after the injunction) and 16 February 2012 (the date of Foster J's judgment). Fenris appealed to the JCPC.

The question for the JCPC was whether having set aside McMillan J's conclusion on causation (which was not appealed by EFML) the CoA erred in its assessment of loss, including the duration of the period of loss.

The JCPC's judgment

Duration of loss

The JCPC rejected the submission that damages need not be restricted to losses sustained during the period for which the injunction was in force. Notwithstanding that the enjoined party was kept from using the funds during the period that Foster J's order was subject to appeal, it was held that once a party is liable to satisfy a judgment, it would not be compensated for being deprived of the opportunity to avoid the consequences of that properly obtained judgment.

It was held that Foster J's order at trial totally eclipsed the freezing injunction as the cause of Fenris' inability to take the opportunity of using the proceeds of the Retained Bonuses to invest

in Euro Small Caps. The JCPC noted the long established principle that the courts do not compensate a litigant who succeeds on appeal for losing at first instance and said that the remedy is interest, not damages. Accordingly, the duration of loss from 16 May 2009 to 16 February 2012 was upheld.

Assessment of loss

The JCPC confirmed that the approach to assessment of loss on an inquiry into damages was analogous to that adopted a claim for breach of contract. The issue in this case was what loss flowed from the lost opportunity. The JCPC upheld the CoA's reversal of McMillan J's findings on causation, having rejected Fenris' submissions that it would have invested in Euro Small Caps and made its own assessment reflecting its finding that Fenris would have made a more risk averse investment.

The JCPC clarified that even if it is established that loss stems from being prevented from investing as a result of an injunction, it is still incumbent on the enjoined party to establish on the balance of probabilities that it would have acted (invested) in a particular way.

Conclusion

Although this decision was fact specific, the judgment is helpful in demonstrating how an inquiry into damages flowing from an injunction will be approached. It also establishes the inconsequential effect of a successful appeal on the duration of loss by limiting the end point to the date of the first instance decision, notwithstanding that it was overturned on appeal.

[1] *Ennismore Fund Management Ltd (Respondent) v Fenris Consulting Ltd (Appellant) (Cayman Islands)* [2022] UKPC 27

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