Worldwide Freezing Orders: Court of Appeal clarifies the standard of proof relating to the existence of assets

Introduction

Freezing orders can be a useful tool for claimants seeking to preserve the defendant's assets until judgment can be enforced. In order to benefit from this equitable remedy, the applicant must show:

(a) a good arguable case that it has a good claim;

(b) a good arguable case that there is a real risk the respondent will dissipate its assets; and

(c) that the respondent has assets that will be captured by the court's order.

It is the third element of this test that has perhaps caused the most uncertainty. However, in the recent case of *Ras Al Khaimah Investment Authority & others v Bestfort Development & others*[1], the Court of Appeal has clarified this test and explained the standard of proof required to show that the defendant has assets that will be caught in the context of a worldwide freezing order ("**WFO**").

Background

In 2006, the applicants were instructed to invest the sovereign wealth of the state of Ras Al Khaimah, one of the United Arab Emirates, in projects in Georgia. The applicants suspected that one of their former directors had conspired to defraud the state, in breach of his fiduciary duties, and subsequently brought proceedings against him in both Georgia and the UAE.

The applicants also applied to the English High Court, under section 25 of the Civil Jurisdiction and Judgments Act 1982, seeking interim WFOs in respect of the assets of 14 limited liability partnerships ("**LLPs**"), which were owned by the former director and registered in England and Wales.

The Judge held that the tests outlined in (a) and (b) above were satisfied, namely that there was a good arguable case that the applicants had a good claim against the director and there was a real risk that the director would dissipate any assets he held in the LLPs.

However, with regard to the test outlined in part (c) above, the applicants could not definitively point to any assets that the LLPs currently held. Their case relied on matters such as the fact that payments had been made by Ras Al Khaimah entities into bank accounts in Latvia in the name of some of the LLPs. Based on this evidence, the Judge held that the LLPs did not have assets that could be caught by a freezing injunction as none of the LLPs were "*likely to have*" assets somewhere in the world. As such, a WFO would "*not bite*".

The Court of Appeal's analysis of the test relating to the defendant's assets

On appeal, as a general principle, Longmore LJ agreed with the approach set out in *Derby & Co Ltd v Weldon (No. 1)*[2], which held that an applicant must "satisfy" the court of the existence of such assets. However, he noted that this did not purport to set out the requisite standard of proof.

As to the standard of proof, Longmore LJ departed from the test applied in the first instance decision, deeming that the test of "likeliness" by itself was inappropriate. While it was not sufficient for an applicant to merely assert that the respondent was apparently wealthy and must therefore have assets somewhere in the world (as was argued by the applicants in this case), Longmore LJ held that:

1 [2017] EWCA Civ 1014

2 [1990] Ch.48

"*since a claimant cannot invariably be expected to know of the existence of assets of a defendant, it should be sufficient that he can satisfy a court that there are grounds for so believing*" [emphasis added].

He stated that this standard of proof is "*not an excessive burden*" but, applying the same logic, in an application against numerous entities, if any (or all) of those entities could provide evidence that they had closed their accounts or had only insubstantial sums in them, it would be right to refuse relief against such entities, as any freezing order would be futile.

Applying the correct test, Longmore LJ held that:

(a) there was indeed evidence that 9 of the LLPs had either closed their accounts or had insubstantial sums in them and so, with respect to these entities, the first instance decision was upheld; and

(b) conversely, with regard to 3 of the LLPs, there were "grounds to believe" that they had (or at least had recently had) not insubstantial assets and there was no evidence that any freezing order against those respondents would be futile. As such, a freezing injunction was issued against these 3 LLPs in respect of their assets anywhere in the world (other than Georgia, where freezing orders were already in place).

Conclusions

In conclusion, the *Ras Al Khaimah* case has provided useful clarification on the approach the court will take when assessing whether a respondent has assets that would be caught by a WFO.

Firstly, the case shows that, in order for an applicant to demonstrate that the defendant has assets that will be caught by the court's order, it must "satisfy" the court of the existence of assets held by the respondent.

Secondly, the case has clarified that, in order to succeed in doing this, the applicant:

(a) must show that there are "grounds for believing" that assets exist which would be caught by a WFO. This is, in the words of the court, "not an excessive burden" and, as illustrated by this case, would likely be achieved by showing that there is money in the accounts of the entities from which the WFO is sought or that the accounts have been recently active;

(b) is, in light of the aforementioned test, not required to definitively identify assets in order to apply for a WFO (which would be an issue as, by their very nature, freezing orders are often needed on an urgent basis); and

(c) must go further than simply demonstrating that the respondent is wealthy and so must have assets somewhere in the world, however likely that is.

If you have any questions or comments in relation to the above, please contact the authors or your usual Mayer Brown contact.

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