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Legal Update
March 2018

How "sharp are the teeth" of a freezing order? English Commercial Court addresses the disclosure obligations under a worldwide freezing order

Introduction

Freezing orders can be potent weapons in the arsenal of litigant financial institutions in circumstances where the defendants they are pursuing may seek to dissipate their assets or put those assets beyond the reach of the claimant institution, thereby nullifying the value to the claimant of a successful award. A freezing order will provide some "in principle" comfort to the claimant in such circumstances but, in practical terms, what has, in fact, been "frozen"? What is the monetary value of the order, and to what extent must the order now be policed? Put simply, does the order have any "teeth"? The English Commercial Court recently considered the extent of the defendant's obligations to disclose its assets in the context of worldwide freezing orders, providing useful guidance to those considering applying for such orders.

Background

There can be few more disheartening outcomes for the victor of long, hard-fought, expensive litigation than, having obtained a favourable judgment, discovering that its adversary is – or has deliberately made itself – impecunious, such that the victory, in monetary value terms, is purely pyrrhic.

Freezing orders – governed by CPR 25.1(1)(f) (and Practice Direction 25A) in the context of High Court litigation – provide a means by which the claimant party can mitigate against the risk of the defendant deliberately seeking to put its assets out of reach, such that the claimant is unable to enforce a judgment. A freezing order is an interim injunction that restrains the subject party from disposing of, or dealing with, its assets, and is usually granted in order to preserve the defendant's assets until the litigation has concluded and the claimant (assuming it is successful) has had the opportunity to enforce that judgment.

Freezing orders, described by Lord Justice Donaldson as one of the two "*nuclear weapons*" of the law (the other being the so-called Anton Piller Order or more commonly referred to as a search order)[1], are rightly considered to be draconian remedies, and will only be granted where the court is persuaded that it is just and convenient to do so. When considering an application for a freezing order, in addition to the court's regard to equitable principles, the applicant must demonstrate (i) that it has an underlying legal or equitable right (that is, a cause of action); (ii) that it has a good arguable case; (iii) that assets exist that may be the subject of the order; and (iv) that there is a real risk of those assets being dissipated.

Most types of assets can be frozen, regardless of where they are located. In the context of litigation in the English courts, if the relevant assets are located outside of the jurisdiction (as they commonly are), a worldwide freezing order ("**WFO**"), under section 37(1) of the Senior Courts Act 1981[2], will be the appropriate remedy. The power to make freezing orders also carries with it the power to make whatever ancillary orders are necessary to make the freezing order effective, and it has become the "*usual practice of the court to order disclosure of information about assets as an ancillary order in aid of a freezing injunction*"[3].

1 *Bank Millat v Nikpour [1985] FSR 87*
2 The court's jurisdiction to grant freezing orders in respect of assets outside the jurisdiction was recognised in *Derby & Co Limited and others v Weldon and others (No 6) [1990] 3 All ER 263*
3 See Gee on Commercial Injunctions, 23

It has long been the case that the subject of the freezing order, whether in the domestic context or in the context of WFOs, will be required to prepare an affidavit describing the assets that will be, or are, captured by the WFO, often within a relatively short timeframe (perhaps seven days), including the nature, location and value of the assets. The rationale for this disclosure obligation is self-evident; the applicant will wish to know what, precisely, is being frozen, and what value can be attributed to such assets (asset disclosure orders provide, in Lord Woolf's memorable characterisation, "*the teeth which are critical to the freezing order*"[4]). The *extent* of the disclosure obligation under such orders, however, is less evident, and it was this issue – specifically in the context of a WFO – that was recently considered by the Commercial Court.

The PSJC Commercial Bank Privatbank v Kolomoisky case[5]

The claimant bank, Commercial Bank Privatbank ("**CBP**"), was pursuing the defendants on the basis of various allegedly fraudulent transactions by which the defendants had, it seemed, obtained some US$1.9 billion from the bank. The funds had been provided in the first instance – by way of sham loan agreements – to certain Ukrainian borrowers, and were then onwardly transferred – by further sham agreements – to the defendants, in exchange for the supply of vast quantities of commodities and industrial equipment.

In December 2017, the court (Mr Justice Nugee) had granted a WFO precluding certain of the defendants from removing assets from the jurisdiction up to a value of US$2.6 billion. As is usual, the WFO imposed certain disclosure obligations on the subject defendants, in the following terms:

> "*...the respondent must by 4 pm on the 10th working day after service of this order and to the best of his ability inform the applicant solicitors in writing of all his assets exceeding £25,000 in value as at the date of this order, giving the value, location and detail of all such assets*" (emphasis added; this form of words is found in the standard form freezing order in CPR Practice Direction 25A).

CBP considered that the responsive disclosure provided by the relevant defendants was inadequate, on the basis that it failed to provide sufficient (or indeed any) information regarding various identified choses in action (which were covered by the WFO and included a right to sue third party debtors), thereby rendering CBP unable to analyse whether it needed to take further steps to police the WFO. CBP therefore applied for an ancillary asset disclosure order compelling additional disclosure from the defendants in relation to eight different categories of information (including a list of specific details regarding the relevant assets) in order to comply with the terms of the WFO.

The defendants' position was that the disclosure they had provided was sufficient to be able to identify all relevant debtors and that, improperly, CBP was seeking excessively wide-ranging disclosure that went to the substance of the claim.

The issue before Joanna Smith QC, sitting as a Deputy Judge of the High Court, was therefore whether the additional disclosure sought by CBP went beyond what was required by the terms of the WFO. What was the extent of the information necessary to satisfy the "*value, location and detail*" requirement of the WFO?

The judge noted that the purpose of the asset disclosure order was only to give effect to the WFO; it should not be made if it extended beyond information necessary to police the WFO and, specifically (quoting Lord Woolf) "*should not be made for the purposes of enabling the claimant to investigate the issues in the substantive claim*".

Having regard to these factors, the judge held that the court had jurisdiction to make an asset disclosure order where that order was required to enable the claimant to identify the nature and extent of the defendant's interest in the assets, and to assess what further steps are necessary to protect the claimant's position. The judge ordered the disclosure sought in respect of most of the eight categories of information, but considered that CBP's request for disclosure of various underlying transactional documents pertaining to the allegedly sham transactions

4 Motorola Credit Corporation v Uzan [2002] EWCA Civ 989 at 37
5 *PSJC Commercial Bank Privatbank v Kolomoisky and others [2018] EWHC 482 (Ch)*

(specifically, loan agreements and trade receivables contracts) went beyond what was required in the context of the choses in action; disclosure was not necessary to enable CBP to asses the extent and nature of the defendants' interests in those assets.

The following, however, were deemed to fall within the "*value, location and detail*" requirement:

1. Dates upon which the contracts were entered into and details of the nature of the goods and services subject to those contracts; and
2. Details of whether payments had been made to the defendants by their debtors or when such payments were due together with details of any security in respect of outstanding payments.

Also of note, the judge held that confidentiality of information sought did not, of itself, entitle a litigant to withhold disclosure.

Key points to note

The judgment provides valuable guidance as to what the courts will consider to be covered by the defendants' disclosure obligations in the context of WFOs. Perhaps the principal point to note for prospective WFO (or any freezing order) applicants is that the court will have little sympathy with wide-ranging disclosure applications designed to enable claimants to investigate the substance of the claim. WFOs, and ancillary asset disclosure orders, are not a broad disclosure mechanism, but they do serve a valuable purpose in assisting claimants to obtain some comfort that their potential victory will be more than merely pyrrhic.

If you have any questions or comments in relation to the above, please contact Ian McDonald, Susan Rosser or James Whitaker, or your usual Mayer Brown contact.

Ian McDonald
Partner, London
imcdonald@mayerbrown.com
T: +44 20 3130 3856

Susan Rosser
Partner, London
srosser@mayerbrown.com
T: +44 20 3130 3358

James Whitaker
Senior Associate, London
jwhitaker@mayerbrown.com
T: +44 20 7398 4627