# Post-judgment freezing orders – an "enhanced role"

## Introduction

The English Commercial Court recently denied an applicant's attempt to set aside a worldwide freezing order on the basis that there was a risk that the individual would try to hide his wealth if the order was discharged.

Freezing orders, one of the two "*nuclear weapons*" of the law[1], are important and potentially critical tools available to litigants whose adversaries' intention to honour adverse judgments are doubtful.

The case of *FM Capital Partners v Marino*[2] provides a useful reminder of the rationale for, and material benefits of, worldwide freezing orders in the context of high value litigation, and provides useful guidance to the approach the courts will adopt when determining the risk of dissipation of assets for the purpose of assessing whether the order should be continued.

## Background

The high profile judgment earlier this year in *FM Capital Partners* brought to an end long-running litigation concerned with allegations of breaches of fiduciary duty, dishonest assistance and unlawful means conspiracy, or so the parties must have hoped.

Those familiar with the case will recall that the High Court ruled in favour of the alternative asset manager, FM Capital Partners ("**FMCP**"), finding that its former Chief Executive Officer, Frederic Marino, and his associate Yoshiki Ohmura, had acted dishonestly over a number of years, having received secret commissions and paid bribes worth in excess of US$25 million in connection with a portfolio of assets owned by a Libyan sovereign wealth fund, the Libya Africa Investment Portfolio and managed by FMCP. In July 2018, Mrs Justice Cockerill ruled in the High Court that Mr Marino and Mr Ohmura were liable for bribery and, in Mr Ohmura's case, for dishonestly assisting Mr Marino in other breaches of fiduciary duty, and ordered that Mr Ohmura pay FMCP a little over US$9.9 million plus post-judgment interest.

In September 2018, upon FMCP's application, HHJ Waksman QC made a worldwide freezing order ("**WFO**"), without notice, restraining Mr Ohmura's dealings with certain specifically identified assets. The present proceedings related to Mr Ohmura's application to discharge the WFO.

## What is a freezing injunction?

Before turning to consider how the Court dealt with Mr Ohmura's application to have the WFO discharged, it is worth considering briefly what freezing injunctions are intended to achieve. Previously known as "*mareva injunctions*", freezing injunctions are dealt with in CPR 25.1(1)(f) (and Practice Direction 25A), and provide a means by which the subject party is restrained from dealing with or disposing of its assets until the litigation has concluded and the successful party has had the opportunity to enforce the judgment. While they neither provide any security over the frozen assets, nor afford the applicant any priority over an insolvent debtor's other creditors, nonetheless the restrictions they impose on the subject can be highly effective. They aim to ensure, or at least mitigate against the risk, that the subject will not take steps to hide or dissipate the subject assets so as to deny the claimant the option of enforcing or executing a judgment, thereby rendering the claimant's victory pyrrhic only. In the context of a post-judgment order (as in the case of *FM Capital Partners*), a freezing injunction "*acquires an enhanced role as an aid to the execution of the judgment*".

1. *Bank Millat v Nikpour* [1985] *FSR 87*, per Lord Justice Donaldson
2. *FM Capital Partners Ltd v Marino & Others* [2018] *EWHC 2612 (Comm)*

In order to obtain a freezing injunction, the applicant will need to persuade the Court that it has an underlying legal or equitable right (i.e. a cause of action); that it has a good, arguable case; that assets exist that may be the subject of the freezing order; and that there is a real risk of those assets being dissipated. If the relevant assets are located outside the jurisdiction, the Court may award a worldwide freezing order on the basis of its jurisdiction derived from section 37 of the Senior Courts Act 1981.

The subject of the freezing injunction application will usually be required to describe the nature, location and value of the assets that will be captured by the injunction.

## Mr Ohmura's WFO

In *FM Capital Partners*, the requisite elements for granting a freezing injunction were, in HHJ Waksman QC's opinion, satisfied (the fact that FMCP had already obtained judgment against Mr Ohmura – which will commonly not be the case in these scenarios – amply satisfied the cause of action and good arguable case requirements), leading him to grant the WFO that FMCP sought.

The terms of the WFO restrained Mr Ohmura from removing or disposing his assets up to a value of US$11,250,000, including but not limited to various specifically identified items of property, such as a Swiss property; bank accounts belonging to Mr Ohmura and companies owned by Mr Ohmura; his pension; and nine motor vehicles. In addition, Mr Ohmura was required to swear an affidavit containing a schedule of his assets with a value in excess of US$10,000.

The WFO excepted from its operation an amount of £1,000 per week for Mr Ohmura's living expenses as well as a reasonable sum for legal advice and representation; and assets dealt with or disposed of in the ordinary and proper course of business, provided that two working days' notice was given to FMCP of his intention to carry out such a transaction.

## Should the WFO be discharged or continued?

Last week, Peter MacDonald Eggers QC, sitting as a Deputy Judge of the High Court, handed down his judgment on Mr Ohmura's application to discharge the WFO.

Mr Ohmura's application was based on the following submissions:

1. There was no risk, said Mr Ohmura, of him dissipating his assets; the WFO had been granted in part on the basis of what HHJ Waksman QC considered to be a highly suspicious transaction whereby Mr Ohmura had very recently transferred his interest in the Swiss villa to his former wife. Since then, Mr Ohmura had adduced evidence (he argued) that this was a legitimate transfer;

2. Once the transfer of the Swiss property fell away as a justification for the WFO, FMCP's delay in seeking the WFO was fatal to the application; no application had been made at any time before Mrs Justice Cockerill's judgment in July 2018, notwithstanding that FMCP were aware of the potential sale, as the property had been on the market since May 2018; and

3. FMCP had taken no steps to enforce the July 2018 judgment and, furthermore, the WFO had the potential to have a significant adverse impact on Mr Ohmura's companies, given that the companies' banks may close the companies' accounts when the banks learned of the WFO.

In response to these submissions, FMCP argued that there was "*solid evidence*" of a risk of dissipation of assets given that, amongst other factors, Mr Ohmura's liability was based on dishonesty; the trial court had rejected Mr Ohmura's evidence as "*unsatisfactory, not credible and in some instances a deliberate evasion*"; Mr Ohmura had the *wherewithal* to dissipate his assets using fronting companies; and there was reason to believe that his disclosure of assets was incomplete.

Mr Macdonald Eggers QC, having summarised and considered the judicial approach to determining the existence of a risk of dissipation of assets, was satisfied that there was, and remained, a real risk that Mr Ohmura would dissipate his assets to avoid the enforcement or execution of the judgment against him. His views were founded, in summary, on the fact that Mr Ohmura:

1. had been found guilty of dishonest conduct which specifically entailed the surreptitious transfer of property using fronting companies with a view to keeping such transactions secret;
2. was an experienced banker who was found by the trial court to have carried out financial transfers and transactions and used corporate structures to achieve such surreptitious ends;
3. had been found to have created false and sham documents to achieve such ends; and
4. was "*willing to disguise his role in such dishonest conduct by evidence which the Court found not to be credible and to be a deliberate evasion of the truth*" and, in circumstances where he was prepared to engage in such conduct whilst giving oral testimony under oath, it was "*difficult to ignore the risk of [him] engaging in similar conduct after judgment has been entered*".

Turning to FMCP's assertion that Mr Ohmura had not given complete disclosure of the relevant assets, as required by the WFO, Mr Macdonald Eggers QC was "*not convinced that there [was] any evidence that Mr Ohmura [had] not satisfactorily complied with the order for disclosure, save in one respect*"; namely by not providing an estimate of his shareholding in certain companies identified in the order, notwithstanding Mr Ohmura's counsel's position that the information was "*speculative and of little assistance*".

Finally, addressing Mr Ohmura's reliance on the delay in FMCP applying for the WFO, Mr Macdonald Eggers QC was unpersuaded that any such delay afforded a reason to decline to continue the WFO, on the basis that he could not discern any prejudice to Mr Ohmura by such delay. While he saw how delay in seeking relief might be relevant to the exercise of the Court's discretion in granting or refusing a freezing order, the judge had "*difficulty in understanding its relevance to assessing the risk of dissipation in most cases*".

In these circumstances, the WFO was continued until further order, given that there was a "*real risk of dissipation of assets on the part of Mr Ohmura, meaning that there is a real risk that the judgment against Mr Ohmura may not be satisfied because of an unjustified or unjustifiable disposal of or dealing with Mr Ohmura's assets*".

## Key points to note

Litigants with reason to doubt their adversaries' intentions to honour adverse judgments should consider whether it is appropriate to seek a freezing injunction at an early stage in order to protect their chances of making a recovery in the event they prevail in the litigation. In doing so, however, they should have regard both to the tests to be satisfied, and the approach of the courts to assessing whether those tests are satisfied.

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

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

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