

# A POWERFUL TOOL IN AID OF ENFORCEMENT

Freezing orders are effective devices for parties seeking to protect assets fraudulently misappropriated particularly as the English courts are willing to be flexible to ensure the injunctions are effective

**ENGLAND HAS LONG BEEN A FAVOURED ANCHOR** jurisdiction for claimants seeking to protect assets fraudulently misappropriated from them being hidden or otherwise moved out of reach before a judgment can be secured to compel their return. The past few years and, in particular, the first half of 2015 have seen further cases clarifying how the English courts will apply their far-reaching powers. This article discusses how the English courts appear to be increasingly willing to adopt a flexible approach to ensure that freezing injunctions are properly effective, while remaining true to the principles that underpin the jurisdiction to grant freezing orders, including that:

- there must be an underlying right to protect (that is, a strong *prima facie* case of fraud);
- the order will preserve the status quo by freezing assets, not place the applicant in the position of a secured creditor; and
- the order must be easily understandable by those against whom it is to be enforced.

## No direct connection with England: the wide reach of the English courts

There have been a number of recent cases where a freezing order has been granted where there is no direct connection with England. In October 2014, in *U&M Mining Zambia Ltd v Konkola* [2014] EWHC 3250 (Comm), the court continued a worldwide freezing order in support of sums awarded by a tribunal in a London-seated arbitration, where the respondent had no assets in the UK. The court accepted that the seat of the arbitration being in London (which affords supervisory powers to the English courts) provided a sufficient connection.

## Making the application

An applicant must prove that: there is an underlying legal or equitable right giving rise to a cause of action; the applicant has a good arguable case; there are assets existing within the jurisdiction of the English courts (or some other connection, as discussed above); and there is a real risk of the respondent's assets being dissipated.

When applying for a freezing order (whether with worldwide effect or restricted to England and Wales) an applicant is under a strict duty to make full and frank disclosure, which includes providing information to the court that may be detrimental to the applicant's position.

The importance of this duty (as well as the general duty not to mislead the court) was upheld in the March decision of *Boreh v Republic of Djibouti* [2015] EWHC 769 (Comm). In *Boreh*, the court set aside a freezing injunction on the ground that a solicitor from the firm representing the applicants deliberately misled the court at the injunction application. The application relied on a conviction of terrorism against the respondent, even though, before the hearing, the applicant's solicitor had become aware of an error that rendered the conviction unsafe. This is hopefully a rare example, but illustrates the importance of the duty of full and frank disclosure and the consequences of failing to discharge that duty.

## Assets covered

Freezing orders granted by the English courts operate *in personam* and will include a prohibition on the respondent(s) removing assets from England and Wales up to a total value of the claim and a prohibition or in any way disposing of, dealing with or diminishing the value of their assets wherever they are up to the same value (if the order sought is to have extra-territorial effect). The prohibition applies irrespective of whether the assets are held in the respondents' names and whether they are solely or jointly owned. The freezing injunction also extends to any assets that the respondent has the power, directly or indirectly, to dispose of or deal with as though they were their own, which specifically includes circumstances where a third party holds or controls the assets in accordance with the respondent's direct or indirect instructions. Any variation from the standard form of order sought must be specifically brought to the attention of the court.

Under the standard form freezing order, a respondent not only has to stop any dealing with the assets, but also give full disclosure as to what assets they have, on oath, at short notice. This can be a powerful tool to help uncover and protect further assets.

In June 2014, the Court of Appeal considered in *Lakatamia Shipping Company Ltd v Nobu Su* [2014] EWCA Civ 636 whether a freezing injunction could apply to underlying assets of non-defendant companies, where the non-defendant companies were directly or indirectly 100% owned by the defendant company. At first instance, the court held that the assets of the non-defendant company were subject to the freezing order, primarily because if the respondent had disposed of the assets of

These recent cases emphasise that the English Courts will adopt a flexible, pragmatic approach when granting and enforcing freezing orders



the non-defendant company, his shareholding in those companies would diminish in value. The assets were covered by the freezing injunction, with a notice requirement included in the order that the company was required to give 14 days' notice before disposing of those assets. The Court of Appeal refused to vary the freezing order to remove the notice provisions, finding that, although the assets were not assets of the respondent, they were "indirectly affected" by the order as their disposal would diminish the value of the shares subject to the freezing order.

*Lakatamia* broadens the relief available for claimants in appropriate cases and evidences the potential willingness of the courts properly to protect assets subject to the order, irrespective of whether they are legally owned by the respondent.

The Court of Appeal had previously considered what qualifies as an asset in 2013 in *JSC BTA Bank v Ablyazov (No 10)* [2013] EWCA Civ 928. Here, the applicant sought to argue that a contractual right to draw down under an unsecured loan facility qualified as an "asset" and so was subject to a freezing injunction. The Court of Appeal held that such a right did not qualify as an asset. The purpose of a freezing injunction is to preserve assets that could ultimately be subject to enforcement, although the jurisdiction to grant a freezing order should be able to adapt to new situations, and so operate in a flexible manner. In addition, as breach of a freezing injunction has penal consequences (including, in extreme cases, the potential for imprisonment), the court held that a strict interpretation of the terms of the freezing injunction must be adopted.

In February, the Court of Appeal in *SC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2015] EWCA Civ 139 applied *Ablyazov No 10*. This decision concerned whether trust assets were subject to disclosure obligations in the freezing order. The respondent, Mr Pugachev, had disclosed that he was one of a number of beneficiaries under a trust based in New Zealand, and at first instance the court ordered him to swear an affidavit identifying details of assets subject to the trusts, and the name of the trustees and beneficiaries of the trusts. Mr Pugachev sought to overturn this order in the Court of Appeal. The court noted that assets in a discretionary trust would potentially be available for enforcement, but that this was at the discretion of the trustees. Again, the court noted that these assets were not strictly the assets of Mr Pugachev. However, the Court of Appeal, upholding the order, noted that it had jurisdiction to make freezing orders and to make whatever ancillary orders are necessary to make the freezing order truly effective. In the circumstances, providing this information would serve to make the order effective and required only information, so was unobtrusive.

### How long will it last?

A freezing injunction will be granted only in aid of proceedings in support of a real cause of action. It is an aid to enforcement, rather than an end itself. In January, the Court of Appeal considered in *JSC Ukrsibbank v Polyakov* [2015] EWCA 67 when a freezing order must come to an end. The claimant, a Ukrainian bank, had commenced proceedings in Ukraine relating to personal guarantees Mr Polyakov had made with respect to certain loans. The bank obtained a worldwide freezing order in support of the Ukrainian proceedings.

The claim in Ukraine was dismissed at the final appeal stage on the ground that the guarantee given by Mr Polyakov was unenforceable. The freezing order had been maintained during the various appeal stages but now there were no live proceedings in the Ukraine. However, a third party to the claim in the Ukrainian proceedings was due to appeal the decision given in favour of Mr Polyakov, and the bank requested that the freezing injunction be maintained until that appeal was heard. The Court of Appeal held that the bank had failed to demonstrate that it had a good arguable case that the third-party appeal in Ukraine would lead to the bank obtaining a judgment against Mr Polyakov. In particular, the third-party appeal was out of time, and it was questionable that the third party was independent from the bank in bringing the claim. The court held that the applicant bank had failed to establish a good arguable case, and the injunction was discharged.

Where judgment is successfully obtained, a freezing order will usually be continued to aid enforcement. However, an application for its continuance must be specifically made to protect against dissipation post-judgment.

### Conclusion

These recent cases emphasise that the English Courts will adopt a flexible, pragmatic approach when granting and enforcing freezing orders. Parties considering applying for a freezing order can take comfort in the fact that the courts will adopt measures to ensure that freezing orders are effective, and capture assets, potentially even when they are not legally owned by the respondent, so long as the order contains clear wording to this effect, amendments being made to the standard form order where necessary. The jurisdiction to make freezing orders is, however, an aid to enforcement, not a freestanding right and the courts will not grant freezing injunctions where they are not supported by a good arguable case.

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