

# *Double-Freezing?*

Rajesh Pillai QC

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# Three situations

1. Claim in England and apply for WFO against respondent whose assets already subject to attachment or other freezing order
2. Apply overseas for orders in support of English WFO
3. Apply in England to support a foreign WFO

# 1. Application in England – assets already frozen

D who is already subject of claims by other parties, in other jurisdiction or criminal investigations

Can you still get a freezing order here? In principle, yes.  
There is no special test.

Starting point: English law requirements:

- (1) Good arguable case on the merits
- (2) Assets identifiable
- (3) Risk of dissipation
- (4) Just and convenient to grant the order

# Key considerations

If there are other orders which freeze or attach assets, is there still a risk of dissipation?

Why is the order needed and how would it be effective?

If you have applied without notice, is that appropriate when the respondent must know there are claims against him?

Ensure comprehensive information is before Court

# How to gain an edge

Address Court's likely concerns, to ensure trust and persuade that the order sought is appropriate: three areas to consider

Full and frank disclosure where without notice

## (i) Differences of quantum

- Is value of your claim greater than value of what's already frozen?
  - If so, then you don't have protection by reason of a foreign order that is lower in value
  - Overlapping order assists the aim of WFO: to ensure Court's (eventual) judgment is not rendered valueless by an unjustifiable disposal of assets
- Are different assets going to be caught by the order you seek?
  - Depends on what assets are caught by foreign order
  - Are specific assets identified?
  - What have you identified that the WFO would still bite on?

## (ii) Differences between order you seek and what's in place

- **Territorial scope:** seeking WFO, are other orders restricted by territory?
  - If only applicable in certain region, then may not catch assets you have identified elsewhere
  - Even if WFO, may be subject to different rules and different commercial priorities
- **Nature of underlying claim and orders in other jurisdiction(s)?**
  - Civil freezing or criminal attachment – differences of procedure that apply?
  - Does the foreign criminal procedure recognise a claimant's right to recover damages for a civil wrong and so will it preserve assets against such process, or is it purely as an adjunct to local criminal proceedings?
- **Common law or civil jurisdiction?**
  - If common law, then it may be something similar to freezing injunction tests are applied, but no guarantee

## (iii) Who holds the other orders?

- Order held by commercial third party?
  - Your client has no control over another party's commercial interests
  - They could release on settlement or if weak claim
  - Court has no oversight over assets that may be released without informing your client
- Held by foreign authority (criminal prosecutor/ regulatory body?)
  - No control over foreign authority prosecutions/ attachment
  - Risk to client if proceedings are released from third party order then dissipated
  - Overlapping WFO policed by this Court would prevent this outcome

# Some examples

## *ADCB v Shetty and ors* [2020] EWHC 3423 (Comm)

Fraud claim for \$1bn arising from collapse of NMC Health Plc, a FTSE 100 healthcare business. WFO application in England. Criminal attachment proceedings operated by local prosecutor in UAE and civil orders (including WFO) held by third parties from proceedings in DIFC Court. Also had attachments over specific assets in two other jurisdictions. No order equivalent to the \$1bn WFO sought. Maximum value of other orders was significantly below the English claim. Granted without notice. Challenged on return date.

## *Njord Partners v Astir* [2020] EWHC 1035 (Comm)

Fraud claim for \$48m arising out of loan and guarantee default. Butcher J had previously granted another party a freezing order of \$76m. Court held that didn't prevent dissipation above that limit. Court could not tell if Butcher J order had been served or discharged/would be continued at return date. Granted without notice. Held at return date.

## *Ambey Capital Private v Mascarenhas* [2018] EWHC 3000 (QB)

Two separate claimants brought claims against Mascarenhas alleging different frauds. One set of claimants had a £2m claim and obtained a FO, the other claimant had a £400k claim and FO. Both granted at different times – presumably due to different values, discharged after death and bankruptcy.

## *Khan v Edgbaston Holdings* [2007] EWHC 244 (QB)

SFO had obtained restraint order over assets; six months later the claimant who had fraud claim for obtained FO over same assets. Fact of SFO restraint appears to be no bar for a later FO in claimant's hands. Judgment in default and application to set aside refused.

## *Aeroflot v Leeds, Glushov* [2018] EWHC 1735 (Ch)

Acrimonious claim in fraud by Aeroflot against Berezovsky, Glushov, alleging misappropriation of funds between 1996-98. Discontinued. Russian prosecutors had applied in Switzerland to freeze Defendants' Swiss bank accounts. Russian court decision finding Mr Glushov guilty of embezzlement and allowed Aeroflot to recover monies from the frozen accounts in Switzerland. English court would not rely on that judgment. Swiss authorities took a similar view and notified Aeroflot that the freeze would be lifted. That prompted an application for an overlapping freezing order in England, for protection before Swiss freeze was lifted. Order granted but criticism: should have been on notice to Defendants and undertakings should have been requested – and were given. The same assets were being frozen.

## 2. Application overseas in support of the English WFO

- Usual form of undertaking includes that the WFO cannot be enforced overseas without English Court's permission
- Care to ensure do not mislead any third party recipients of the WFO: to bind such parties, WFO must be recognised and enforceable in the country they are in.
- Double-freeze in the sense that Claimant seeks to support the English WFO with further orders granted by overseas courts.
- Can be important if find assets overseas and there is a risk of dissipation.
- Need local court to enforce its own order against a local defendant. Can overlap with new order against an original defendant – ensure not oppressive (eg no double-disclosure)

To get permission, *Dadourian* guidelines [2006] 1 WLR 2499 must be complied with.

- Core principle is that it must be just and convenient to grant permission, to ensure effectiveness of the WFO, and not oppressive.
- Must be a risk of dissipation.
- Application either made at the same time as the original WFO application (if grounds), or if thereafter, on notice.
- Court will scrutinise the relief sought, evidence of foreign law and practice as the basis for proposed application in the foreign court.
- Relatively little guidance: White Book Vol 2 note 15-87; *Arcadia Petroleum Ltd V Bosworth* [2015] EWHC 3700 (Comm); *Multiple Claimants v Spence* [2021] EWHC 276 (Comm)
- NB – some types of foreign application (eg for disclosure) will not be enforcing the English WFO and so not require consideration of the *Dadourian* principles

- Certain common law jurisdictions have the express power to grant “ancillary” relief by interim injunction in support of a foreign WFO
  - That is without the need for substantive proceedings in that Court.
  - Eg, BVI Court Rules, ADGM laws and Court Rules, DIFC case law (mixed – see Blue Book pp28-29)
- Consider orders against non-parties, under the *Chabra* jurisdiction (*TSB Private Bank Intl v Chabra* [1992] 1 WLR 231): eg where assets held by a third party that are thought to be controlled by the defendant, but there is no cause of action against that third party
  - Well established in the BVI and other Eastern Caribbean jurisdictions
  - See in ADGM the decision in *ADCB v Shetty* [2021] ADGMCFI 0004

- See also *Convoy Collateral Ltd v Broad Idea International* [2021] UKPC 24 that confirmed the power of the BVI Courts to grant injunctions in support of foreign proceedings in this way, but also endorsed an “enforcement” principle at [82]:

“there is no principle or practice which prevents an injunction from being granted in appropriate circumstances against an entirely innocent party even when no substantive proceedings against anyone are taking place elsewhere.”

- Rightly viewed as a step-change as regards the basis for applying for freezing injunctions against those holding misappropriated assets – reflecting the sophistication of international fraud and the tools needed by claimants and the Courts to pursue them.

# 3. Application in England to support foreign WFO

- English Court asked to grant interim injunction in support of a foreign order, where no proceedings before this Court
- Section 25 Civil Jurisdiction and Judgments Act 1982 (CJJA)
- Usual approach is two-stage test: (1) would the facts warrant the relief if the claim were brought in England (i.e. here the freezing injunction test); (2) is it “expedient” to grant the relief sought?
- Note: temptation of English Court to step in given its expertise and powers at its disposal?
- Specific considerations regarding freezing orders: *Ryan v Friction Dynamics Ltd* [2001] CPR Rep 75; *Motorola Credit Corpn v Uzan* [2004] 1 WLR 113; *GFH Capital Ltd v Haigh* [2014] EWHC 3157 (Comm)

- Neuberger J in *Ryan* set out nine principles, applied by Males J in *GFH Capital* at [16]-[20], summarised:
  1. The court should always exercise caution before granting any freezing order: draconian.
  2. S.25 context means the primary forum for litigation is abroad and so English Court may be less apprised of all the facts as compared to dealing with a case in this jurisdiction.
  3. Test remains that order be made unless “inexpedient” (s25(2)). Factors like comity and need to stop international fraud mean Court should not be timid about making an order if good grounds exist.
  4. Applicant must still meet the basic requirements for a freezing injunction.

5. Where the foreign court has refused to grant a freezing order then English Court should be slow to grant a freezing order. But, it may nonetheless be appropriate for the English Court to grant a freezing order under s.25.
6. Existence of a WFO from the principal foreign court does not prevent the English Court from granting a freezing order. Reflects English practice of granting WFOs that the Court envisages may be used to apply for freezing orders in other jurisdictions in respect of assets there. To hold otherwise would involve implying an absolute fetter on a statutory jurisdiction which on its face appears to be intended to give a wide and flexible discretion.
7. Court will want cogent reasons. Overlapping injunctions can lead to a risk of double jeopardy for defendants and the opportunity for forum shopping by a claimant. WFOs should not be enforced oppressively by a multiplicity of applications in different countries

8. Where WFO granted under s.25 and overlaps, sensible to indicate which Court has primary role for enforcing, to limit risk of double-jeopardy.
9. Where an overlapping order is made under s.25, it is in general desirable that it should track the terms of the order made by the foreign court. Avoid inconsistency, uncertainty, extra complication for Defendant in complying, which can be unfair.

# Contact

Rajesh Pillai QC



[rpillai@3vb.com](mailto:rpillai@3vb.com)