HOW DEEP IS YOUR FREEZE?

EXTENDING THE SCOPE OF FREEZING ORDERS

By Peter Shaw

Introduction

1. As is well established the purpose of a freezing order is to prevent a defendant from dissipating his, her or its assets pending the determination of the claim. The fundamental requirements are that the claimant is able to show (i) a good arguable case; (ii) that unless restrained that there is a risk that assets will not be available to meet any judgment and (iii) it is just and convenient that the defendant's assets are frozen.

2. The underlying principle is that what is being restrained are the assets of the defendant that would be available to be executed against, or would be available by some process (eg liquidation of the defendant) to be applied in payment of the claimant's ultimate judgment.

3. This raises the question of 'which assets?' Obviously, those in which the defendant is the legal and beneficial owner (eg land, monies in a bank account) cause little difficulty.

4. What is more difficult is the bringing into the scope of a freezing order assets of which the defendant is not the legal and beneficial owner, but over which he or she may have some (or even complete) control. Obvious examples would be:
    a. A trust of which the defendant, whilst not a trustee is a beneficiary;
    b. A company which (whilst not a defendant to the proceedings) is controlled by the defendant in that he or she is the sole or principal shareholder and director;
    c. Property held by a third party in circumstances in which that third party is a nominee for the defendant;

5. Property held by the defendant which may be held on trust for third parties.

TSB Private International Bank v Chabra

6. The starting point in this area is the decision of Mummery J in TSB Private International Bank v Chabra [1992] 1 WLR 231 in which a claim was brought against a defendant, pursuant to a

guarantee. The defendant was the 90% shareholder and director of a company against whom the plaintiff had no cause of action. On the evidence, it was arguable that some of the company's assets were held as nominee or on trust for the defendant. Mummery J considered that there was a good arguable case that although there was no claim against the company, it was little more than the defendant's alter ego.

7. A freezing order was made both against the defendant and the company. The jurisdiction for the order was that, although there was no cause of action against the company, an injunction could be made against it pursuant to section 37 Supreme Court Act 1981 that was ancillary to a cause of action that existed against Mr Chabra.

8. The reasons for making the freezing order against the company were twofold (1) there was a good arguable case that some or all of its assets were in fact beneficially owned by Mr Chabra; (2) the effect of the company disposing of its assets would be to indirectly diminish the value of Mr Chabra's shareholding.

9. Chabra has been considered, reviewed and applied on many occasions.

10. In HMRC v Egleton [2007] 1 AER 606 a winding up petition was brought by HMRC against a company involved in VAT missing trader fraud. Pending the hearing of the winding up petition, HMRC sought a freezing order against individuals who were the directors of the company. In the context of the winding up petition, HMRC asserted no claim against the directors, but contended that in the event of a winding up order.

11. Briggs J (as he then was) held that the jurisdiction to grant freezing orders against third parties was not rigidly restricted by the Chabra requirement to show that, at the time when the order was sought, the third party was already holding or in control of assets beneficially owned by the defendant. The court had jurisdiction to make a freezing order against a third party as the potential debtor of a company against which the claimant had a cause of action since enforcement of a judgment against the company might lead to its liquidation and an action by the liquidator against the third party. There was no need to show a sufficient causal connection between the two claims.

12. Egleton has been followed on numerous occasions. In Algosaibi v Saad Investments Co Ltd (CICA 1 of 2010), Chadwick P in the Court of Appeal of the Cayman Islands summarised the scope of the jurisdiction as follows:

> *'The fact that the potential judgment debtor (the CAD) has substantial control over assets which are held by a party against whom no cause of action is alleged (the NCAD) – say, because the NCAD can be expected to act in accordance with the wishes or directions of the CAD (whether or not it could be compelled to do so) – is likely to be of critical importance in relation to the question whether there is a real risk that the assets will be dissipated or otherwise put beyond the reach of the claimant. But, as it seems to me, the existence of substantial control is not, of itself, enough to meet the first of the two requirements just mentioned. It is not enough that the CAD could, if it chose, cause the assets held by the NCAD to be used to satisfy the judgment. It is necessary that the court be satisfied that there is good reason to suppose either (i) that the CAD can be compelled (through some process of enforcement) to cause the assets held by the NCAD to be used for that purpose; or (ii) that there is some other process of enforcement by which the claimant can obtain recourse to the assets held by the NCAD.'*

Recent authorities

Lakatamia Shipping Co Ltd v Su [2014] EWCA Civ 636

13. In this case C obtained a freezing order, paragraph 2 of which prohibited Ds from disposing of, dealing with or diminishing the value of any of their assets. The order provided:

> *"For the purposes of this order, the defendants' assets include any asset which they have the power, directly or indirectly, to dispose of or deal with as if it were their own. The defendants are to be regarded as having such power if a third party holds or controls the asset in accordance with their direct or indirect instructions."*

14. The issue before the court was whether the freezing order froze the assets of three companies which were not defendants to the proceedings of which the first defendant was a director and directly or indirectly 100% shareholder. Burton J had held that the order applied directly to

freeze the assets of the three companies and imposed a notice requirement on the first defendant of any proposed dealings with certain assets of the non-defendant companies. He reasoned that the order covered assets in the hands of third parties over which the defendants' had direct or indirect control and which they could dispose of or deal with as if they were their own by giving instructions to those third parties. The defendants appealed.

15. The Court of Appeal held (dismissing the appeal): The Judge erred in preferring the heretical view that because the sole owner of a company is in a position to control the destiny of its assets, the company's assets are his within the meaning of paragraph 3 of the order. That is wrong. The owner's control does not make the company's assets his assets. Paragraph 3 is only concerned with dispositions of assets belonging beneficially to the defendant, which the company's do not. The first defendant only has power as an agent of the company to procure it to make dispositions of its assets. He has no authority to instruct the company to deal with its assets. Only the company has this authority. (Rimer LJ, paras. 50-51.)

16. If a claimant wishes to freeze company assets of a non-defendant, he must either be prepared to make a sufficient case that the company is just the money-box of the defendant and holds assets to which he is beneficially entitled, and/or it has to make that company a defendant itself under the Chabra jurisdiction.

17. However, even under paragraph 3, the company owner will not be permitted to deplete the assets of a company so as to diminish the value of his own assets in the form of his shareholdings, unless he can bring such dispositions within the order's exception for the ordinary course of business (per Sir Bernard Rix, paras. 41-43).

JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev [2015] EWCA Civ 139

18. In this case D was the founder of C, a Russian bank. The bank's licence was revoked, it was declared insolvent, and a liquidator was appointed at a time when the estimated deficiency was $2.2 billion. The bank and the liquidator (L) were the claimants. The liquidation was recognised in 2014, pursuant to the CBIR 2006. Actions against D were brought in Russia and the UK alleging D misapplied C's money. A freezing order was made by the High Court in 2014; L gave an undertaking in damages limited to $75 million. Para. 7c thereof provided: "any interest under any trust or similar entity including any interest which may arise by virtue of

the exercise of any power of appointment, discretion or otherwise howsoever". On three appeals, two issues arose.

19. First, did the court have jurisdiction to order a member of a class of beneficiaries to disclose the details of the trust and its assets? Second, in what circumstances could the court require an unlimited cross-undertaking in damages from a claimant who acts as a liquidator?

20. The Court of Appeal held: The purpose of a freezing injunction is to prevent an asset beyond the reach of potential judgment creditors. The assets held by trustees under a discretionary trust would not be amenable to execution if judgment was entered against one of a class of potential beneficiaries. Naturally, once a beneficiary receives assets, they are his and can be the subject of execution. This notwithstanding, para. 7c of the order the court had to interpret, which was in non-standard form, distinguished two type of interest. The first was an interest under a trust. The second is an interest which may arise by virtue of the exercise of any discretion. Assuming the first part of para. 7c referred to a vested interest, the second part must refer to an interest of a member of a class of beneficiaries created by a trust in whose favour a discretion could be exercised (per Lewison LJ, para. 24). This was so even though the interest of a beneficiary under a discretionary trust could not be the subject of execution.

21. As for the undertaking, the default position is that it should be unlimited as the price for interfering with the defendant's freedom before any allegation against him are made out. The judge has a discretion here. A defendant need not show the freezing order is likely to cause him loss before an unlimited undertaking is required. An exception to this is where the applicant has no personal interest in the litigation and brings it for others (where there is no substantial creditor willing to underwrite the undertaking). The potential availability of external funds may be relevant. A state-backed entity may be considered to be distinct from an individual professional insolvency practitioner.

JSC BTA Bank v Ablyazov [2015] UKSC 64

22. This appeal arose in the course of long-running litigation between C and R. C had obtained judgments amounting to $4.4 billion, none of which R has satisfied. The questions arose in the context of interpreting a freezing order made by Teare J on 12.11.09 (as subsequently amended).

23. Issues: First, whether R's right to draw down under loan agreements is an "asset" within the meaning of the order. Second, if so, whether the exercise of that right by directing the lender to pay the sum to a third party constitutes "disposing of" or "dealing with" or "diminishing the value" of an asset. Third, whether the proceeds of the loan agreements were "assets" within the meaning of the extended definition in paragraph 5 of the order on the basis that R could directly or indirectly dispose of or deal with the proceeds as if they were his own. The 'assets' were defined in the following terms:

> *"Paragraph 5 applies to all the freezing defendant's assets whether or not they are in its own name and whether they are solely or jointly owned and whether the defendant is interested in them legally, beneficially or otherwise. For the purpose of this order the freezing defendant's assets include any asset which it has the power, directly or indirectly, to dispose of or deal with as if it were its own. The freezing defendant is to be regarded as having such power if a third party holds or controls the asset in accordance with its direct or indirect instructions.*

24. Held (allowing the appeal, per Lord Clarke with whom the rest of their Lordships agreed) the expression "assets" is capable of having a wide meaning. It can include a chose in action (para. 21). There is no real doubt that a right to draw down moneys under a loan agreement could be construed as an asset (37). However, the cases and legal writings on freezing injunctions show that there has been a settled understanding that borrowings were not covered by the standard form of freezing order (34). Clarity is important and so it certainty in the context of penal orders. It is not appropriate for the court to reverse this understanding. So, in respect of the first issue, R's right to draw down money does not qualify as an "asset" (para. 38).

25. In respect of the second issue, given the conclusion in respect of the first issue, nothing R had done amounts to disposing of, dealing with, or diminishing the value of "assets" (para. 38).

26. However, as for issue 3 (whether the proceeds of the loan agreements were "assets" within the meaning of the extended definition in paragraph 5 of the order), this must be answered in the positive. An instruction to pay the lender's money, which is what it was, to a third party is dealing with the lender's assets as if they were his own (para. 40).

27. The whole point of the extended definition of "assets" is to catch rights which would not otherwise have been caught and, in particular, R's "assets" include any asset which they have power, directly or indirectly, to dispose of, or deal with as if it were their own. In this case, R did not own the relevant assets under the loan agreements but had power pursuant to the same directly or indirectly to dispose of or deal with them as if they were his own (para. 48).

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