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GUIDE

Freezing Orders in the British Virgin Islands

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What is a Freezing Order?

A freezing order is an interlocutory injunction which restrains a defendant from disposing of, dealing with or diminishing his assets. Its primary purpose is to prevent the dissipation or concealment of assets that would otherwise be available to satisfy a judgment or award.

The Jurisdiction of the Courts of the British Virgin Islands to Grant Freezing Orders

In the British Virgin Islands (the **BVI**), the jurisdiction to grant a freezing order derives from two provisions of the Eastern Caribbean Supreme Court (Virgin Islands) Act (the **Supreme Court Act**).

Section 24(1) of the Supreme Court Act (which is in similar terms to section 37 of the Senior Courts Act 1981 of England and Wales) provides that:

> '*... an injunction may be granted or a receiver appointed by an interlocutory order of the High Court or of a Judge thereof in all cases in which it appears to the Court or Judge to be just or convenient that the order should be made and any such order may be made either unconditionally or upon such terms and conditions as the court or Judge thinks just.*'

Section 24A(1) provides that:

> '*The High Court or a judge thereof may grant interim relief where proceedings have been or are about to be commenced in a foreign jurisdiction.*'

Section 24A of the Supreme Court Act is in similar terms to section 25 of the Civil Jurisdiction and Judgments Act 1982 of England and Wales (the **CJJA**). The provision came into force on 7 January 2021, having been enacted following a decision of the Eastern Caribbean Court of Appeal which had held that section 24 did not confer jurisdiction on the BVI Courts to grant free-standing freezing orders in aid of foreign proceedings.[1] The Court of Appeal's decision has since been overturned by a decision of the Judicial Committee of the Privy Council[2] (link to our update here), so the two provisions now operate alongside and in harmony with each other.

However, the Eastern Caribbean Civil Procedure Rules (the **CPR**) do not currently contain an equivalent provision to that found in paragraph 3.1(5) of the Civil Procedure Rules of England and Wales, Practice Direction 6B, which allows service out of the jurisdiction of a claim form where a claim is made for an interim remedy under section 25(1) of the CJJA. Accordingly, whilst the BVI Courts do have jurisdiction to make free-standing freezing orders in support of foreign proceedings, it can only do so against parties over which it has personal jurisdiction, such as BVI incorporated companies.

[1] *Broad Idea International Limited v Convoy Collateral Limited* (Appeal No BVIHCMAP2019/0026, 29 May 2020).

[2] *Convoy Collateral Limited v Broad Idea International Limited* [2021] UKPC 24.

In addition, BVI Courts have jurisdiction under section 43(2) of the Arbitration Act, 2013 to make freezing orders in support of arbitral proceedings *which have been or are to be commenced* in the BVI or in a foreign jurisdiction. The interim relief provisions of the BVI Arbitration Act are less restrictive than the equivalent English legislation which provides that the English Court will act only after a request has been made to the tribunal for relief, or the tribunal is powerless to act. There are no such limitations on the BVI Court's jurisdiction.

The BVI Court has power to grant a worldwide freezing order, as well as one restricted to the BVI.

The Requirements to Obtain a Freezing Order

Generally speaking, an applicant for a freezing order must establish that:

1. It has a good arguable case against the respondent; and
2. that there is a real risk that the respondent will dissipate its assets outside of the ordinary course of business.

Strictly speaking, an applicant must also show that the order sought is just and convenient, although in practice, this requirement will usually be satisfied if it can show a good arguable case and a real risk of dissipation.

Good Arguable Case

An applicant for a freezing order is required to establish a good arguable case, being one which is more than barely capable of serious argument and yet not necessarily one which the court believes to have better than 50 per cent chance of success at trial.

This is a relatively low threshold. It is likely to be satisfied as a matter of course where an applicant has already obtained a judgment on the merits.

To the extent that a free-standing freezing order is sought in support of foreign proceedings, the applicant will be required to establish a good arguable case:

1. in relation to the merits of the foreign proceedings; and
2. that any judgment or award obtained in the foreign proceedings will be enforceable against the respondent in the BVI.

Risk of Dissipation

An applicant for a freezing order must demonstrate that there is a real risk of dissipation of assets. This is established by showing that:

(a) there is a real risk that a judgment or award will go unsatisfied, in the sense of a real risk that, unless restrained by injunction, the respondent will dissipate or dispose of his assets other than in the ordinary course of business; or

(b) that unless the respondent is restrained by injunction, assets are likely to be dealt with in such a way as to make enforcement of any award or judgment more difficult, unless those dealings can be justified for normal and proper business purposes.

The BVI Courts have applied the test as stated by Gloster LJ in the English Court of Appeal decision in *Holyoake v Candy*,[3] as follows:

> '*... the threshold in relation to conventional freezing orders is well established. There must be a real risk, judged objectively, that a future judgment would not be met because of unjustifiable dissipation of assets. But it is not every risk of a judgment being unsatisfied which can justify freezing order relief. Solid evidence will be required to support a conclusion that relief is justified, although precisely what that entails in any given case will necessarily vary according to the individual circumstances.*'

[3] *Holyoake v Candy* [2017] 3 WLR 1131.

As regards how the risk is to be assessed, the BVI Courts have followed the approach stated by Males J in *National Bank Trust v Yurov*,[4] where he said:

> *'As has been said many times, the purpose of a freezing order is not to provide the claimant with security but to restrain a defendant from evading justice by disposing of assets otherwise than in the ordinary course of business in a way which will have the effect of making itself judgment proof. It is that concept which is referred to by the label 'risk of dissipation'....*
>
> *Based on these authorities, the defendants advance seven propositions which the bank does not dispute and which I accept. They were as follows:*
>
> *a. The claimant must demonstrate a real risk that a judgment against the defendant may not be satisfied as a result of unjustified dealing with the defendant's assets.*
>
> *b. That risk can only be demonstrated with solid evidence; mere inference or generalised assertion is not sufficient.*
>
> *c. It is not enough to rely solely on allegations that a defendant has been dishonest; rather it is necessary to scrutinise the evidence to see whether the dishonesty in question does justify a conclusion that assets are likely to be dissipated.*
>
> *d. The relevant inquiry is whether there is a current risk of dissipation; past events may be evidentially relevant, but only if they serve to demonstrate a current risk of dissipation of the assets now held.*
>
> *e. The nature, location and liquidity of the defendant's assets are important considerations.*
>
> *f. Whether or to what extent the assets are already secured or incapable of being dealt with is also relevant.*
>
> *g. So too is the defendant's behaviour in response to the claim or anticipated claim.'*

Delay in making an application for a freezing order is not itself a bar to relief, but is one factor which the court will take into account in evaluating whether there is a risk of dissipation. If, notwithstanding delay in making the application, the court is satisfied on the evidence that there remains a real risk of dissipation, it should still grant an order.

Other Matters

Application Made With or Without Notice?

Given the nature of a freezing order, it is usual for the application to be made without notice to the respondent in the first instance. However, the BVI Courts have stressed that there must be good reason for making an application without notice.

Rule 17.3(2) of the CPR gives the court the discretion to grant an interim remedy (such as a freezing order) on an application made without notice if it appears to the court that there are good reasons for not giving notice. Rule 17.3(3) requires that the evidence in support of an application made without notice must state the reasons why no notice was given.

Therefore, on an application made without notice to the respondent, the court must be satisfied of either one of two factors:

1. there is cogent evidence to support the proposition that giving advance warning would lead to the assets being 'spirited away', thereby frustrating the enforcement of a prospective judgment and ultimately defeating the purpose of the injunction; or
2. time constraints genuinely do not permit the giving of notice and even in those very rare instances, the applicant should endeavour to give shorter notice, at least by email and/or telephone.

These considerations are reflected in rule 17.4(4) of the CPR, which empowers the court to grant an application without notice. Rule 17.4(4) provides that:

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[4] *National Bank Trust v Yurov* [2016] EWHC 1913 (Comm).

'*The court may grant an interim order under this rule on an application made without notice for a period of not more than 28 days (unless any of these Rules permits a longer period) if it is satisfied that:*

(a) in a case of urgency no notice is possible; or
(b) *that to give notice would defeat the purpose of the application.*'

In practice, if the court is willing to grant a freezing order on an application made without notice to the respondent, it will list a further short hearing within 28 days of the making of the order so as to comply with the requirements of rule 17.4(4). If, after receiving notice of the freezing order, the respondent makes an application to set it aside, a substantive return date to reconsider whether the order was properly made will be listed at the short hearing. Otherwise, if there is no opposition, the freezing order will likely be continued until trial or further order of the court.

Full and Frank Disclosure

If the application is made without notice to the respondent, the applicant will be under a duty to make full and frank disclosure to the court of all material facts. The principles underlying the duty of an applicant to make full and frank disclosure on a without notice application for an injunction have been summarised by the BVI Courts as follows:

(i) A person applying for an order upon an application made without notice must make full and frank disclosure of all material matters relevant to the decision whether or not to grant the application.

(ii) The test of materiality is whether the matter might reasonably be taken into account by the judge in deciding whether or not to grant the application.

(iii) Materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers.

(iv) The duty of candour is a heavy one. The duty of disclosure extends not only to material facts known to applicant, but to additional facts that he would have known had he made proper inquiries. The applicant is under a duty to present fairly the facts so disclosed. The rationale for the duty is that the court is being asked to grant relief in the absence of the defendant and wholly on the information provided by the claimant. Other parties do not have the opportunity to collect or supplement the evidence which has been put before the court. Observance of the duty is essential to secure the integrity of the court process and to protect the interest of those potentially affected by whatever order the court is invited to make.

In order to enable the respondent to decide whether there has been compliance with the duty of full and frank disclosure, the applicant will be required to take a note of any without notice hearing and such note must be served on the respondent.

Failure to comply with the duty will not necessarily lead to an automatic discharge of a freezing order made on a without notice application. The court has a wide discretion when a party seeks to discharge an order on the basis of material non-disclosure. On the proof of material non-disclosure, the court has a discretion whether to discharge the without notice order, or to continue the order, or to make a new order on terms. The court may well refuse to discharge an injunction on the basis of material non-disclosure where had the facts been disclosed the injunction could properly have been granted.

The most obvious matters that will need to be disclosed on any without notice hearing are any potential defences upon which the respondent is likely to wish to rely.

Cross-Undertaking in Damages and Fortification

An applicant for a freezing order will usually be required to provide an undertaking to the court to pay any damages which the court considers the applicant should pay should it turn out that the order should not have been made. This requirement is reflected in rule 17.4(2) of the CPR which provides that:

'*Unless the court otherwise directs, a party applying for an interim order under this rule must undertake to abide by any order as to damages caused by the granting or extension of the order.*'

The court may require an applicant to fortify its undertaking by a payment into court or by the provision of other appropriate security in the absence of sufficient evidence of its financial standing to meet any liability on its undertaking.

Ancillary Disclosure Orders

A freezing order will usually contain ancillary orders relating to disclosure of the respondent's assets. The purpose of the ancillary asset disclosure order is to ensure the effectiveness of the freezing order or, in a case where a judgment has already been obtained, to aid in the enforcement of that judgment.

The standard form of freezing order will usually require the respondent to disclose all of its worldwide assets above a certain value within a matter of hours or days of service of the order, and to provide an affidavit verifying its assets disclosure within a further short period of time.

Receivership Orders

The BVI Court also has jurisdiction under sections 24 and 24A of the Supreme Court Act to appoint a receiver in support of a freezing injunction. This is obviously a much more intrusive interim remedy than a freezing order, and will usually only be appropriate where a freezing order is insufficient on its own and there is a measurable risk that if it is not granted the respondent will act in breach of the freezing order or otherwise seek to ensure that its assets will not be available to satisfy any judgment which may in due course be given against it.

Failure to Comply with the Terms of a Freezing Order

Failure to comply with the terms of a freezing order, including any ancillary asset disclosure orders, is a contempt of court which may be punishable by imprisonment in the case of individuals, or by sequestration of assets in the case of a company. The BVI Court has inherent jurisdiction to make a committal order with extraterritorial effect against a contemnor who resides outside the BVI.

Unlike the position in England and Wales where there is a maximum sentence of two years' imprisonment for contempt of court, the position in the BVI governed by the common law where the normal order where a contemnor is in continuing breach of an injunction is simply that the contemnor be committed to prison indefinitely.

Contacts

A full list of contacts specialising in BVI litigation and dispute resolution can be found here.