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Worldwide Freezing Orders

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> "Over the centuries in which the principal form of property was real estate, and physical property, rather than services, dominated the economy, the ability to dissipate and hide assets from prospective creditors was less than it has become in comparatively recent times. Changes in the economy, in technology and in public policy, notably the easing of exchange controls, have transformed the ease and speed with which assets, particularly liquid assets and records, can be moved and hidden. In many cases, all that is now needed is the click of a mouse."
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> — Hon JJ Spigelman AC "Freezing Orders in International Commercial Litigation" (2010) 22 SAcLJ 490.

> "In other areas of law, such as cross-border insolvency, commercial necessity has encouraged national courts to provide assistance to each other without waiting for such co-operation to be sanctioned by international convention. International fraud requires a similar response. It is becoming widely accepted that comity between the courts of different countries requires mutual respect for the territorial integrity of each other's jurisdiction, but that this should not inhibit a court in one jurisdiction form rendering whatever assistance it properly can to a court in another in respect of assets located or persons resident within the territory of the former."
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> — Lord Millet in *Credit Suisse Fides Trust SA v Cuoghi* [1998] QB 818, [1983] 3 WLR 871.

Introduction

Assets can be moved from jurisdiction to jurisdiction with ever-increasing speed and ease. This presents a fundamental problem in litigation. A claimant may have a substantive claim pending in one jurisdiction, or may even have obtained judgment, yet the assets which are the subject of the claim, or which are needed to satisfy the judgment, are located in a different jurisdiction. Unless some methods are available to identify and ascertain the whereabouts of the assets, and then ensure that they remain where they are, there is a risk that the court's judgment will go partly or wholly unsatisfied. That result would not only be disastrous for claimants, but would also frustrate the processes of the courts and seriously inhibit the deterrence of wrongdoing.

Australia, New Zealand and the United Kingdom now all recognise the availability of two basic tools to address this problem:

1) An ability for the court with jurisdiction over the substantive proceeding to grant a freezing order against the respondent over the respondent's assets both inside the jurisdiction and worldwide (referred to hereafter as a "worldwide freezing order").
2) An ability for the court in the jurisdiction in which the assets are located to grant a freezing order over those assets in support of substantive proceedings in another jurisdiction.

The availability of these tools is the result of rapid transformational change, largely driven by the courts, in response to the practical realities of global commerce. For example, in the late-1970s the orthodox view was that a court clearly could not grant a freezing order (then more commonly known as a *Mareva* injunction) over a respondent's local assets in support of substantive proceedings underway in another jurisdiction, because a freezing order was interlocutory in nature and its validity depended on there being an underlying substantive proceeding within the jurisdiction. [1] Now, the courts of Australia, New Zealand and the United Kingdom are empowered to grant a freezing order in support of proceedings in a different jurisdiction against a non-party to those proceedings (such as a third party with control over the assets), when the proceedings may not have even been commenced yet.

Indeed, the United Kingdom High Court has recently gone as far as to grant a worldwide freezing order in support of an arbitral award seated outside of England, where the dispute's only connection to England was that a large portion of the assets to be frozen were located there.[2] In other words, the Court not only froze assets in England in support of a foreign arbitration, it also froze assets worldwide in support of the foreign arbitration. That transcends the division between the two basic tools described above.

The current law

The granting of freezing orders in Australia and New Zealand is now governed by virtually identical rules, although the New Zealand rules are slightly more conservative.[3] Even before the introduction of the new rules, courts in Australia recognised an inherent jurisdiction to make freezing orders in aid of substantive foreign proceedings.[4] The New Zealand courts lagged behind in this respect.[5]

Since 2008 the Australian and New Zealand rules have provided that a court may make an order restraining a respondent from removing any assets located "in or outside [New Zealand/Australia]"[6] or from disposing of, dealing with, or diminishing the value of those assets. The order may be an absolute prohibition on dealing with assets, with exceptions for meeting ordinary living expenses, paying reasonable legal expenses, and conducting transactions in the ordinary course of business. Or, the order may require that the respondent to give the applicant's solicitors a certain number of working day's notice before engaging in transactions above a certain value (sometimes referred to as a

1 *The Siskina* [1977] 3 All ER 803 (HL), applied in New Zealand in *Sundance Spas NZ Ltd v Sundance Spas Inc* [2001] 1 NZLR 111 (HC).

2 *Eastern European Engineering Ltd v Vijay Construction (Proprietary) Ltd* [2018] EWHC 1539 (Comm). See also *ENRC Marketing AG v OJSC "Magnitogorsk Metallurgical Kpmbinat* [2011] FCA 137 where Justice Rares froze assets located in Australia in aid of a pending arbitration in Switzerland

3 The similarities between the Australian and New Zealand rules is the result of the work of a 'Harmonisation Committee convened in 2005 comprised of Australian and New Zealand judges. High Court Rules 2016 (NZ) ("HCR"). Federal Court Rules 2011 (Aus) ("FCR"), which are reflected in the rules of court in most state jurisdictions.

4 *Davis v Turning Properties Pty Ltd* (2005) 222 ALR 676 (NSWSC).

5 *Sundance Spas NZ Ltd v Sundance Spas Inc* [2001] 1 NZLR 111 (HC).

6 HCR32.2(2) and FCR7.32(2).

"notification injunction"). The requirements to be applied to the making of either form of order are the same.[7]

The respondent to the application for a freezing order will often be the defendant in the substantive proceeding. However, such orders may also be made against third parties.[8] An order may be sought against a third party on the basis that they have direct control over the assets in question, for example against trustees or a company on the basis that there is a good arguable case that the trust or company assets are effectively owned by the defendant, and should therefore be available to meet a judgment sum.[9] As I will return to later, the latter situation raises interesting issues that do not appear to have been fully explored by the courts.

The court is also empowered to make ancillary orders, such as an order requiring that the respondent disclose the location and value of assets.[10]

The basic requirements for the making of a freezing order are that:

(a) Judgment has been given in favour of the applicant in the substantive proceeding, or the applicant has a good arguable case on the merits.

(b) There is a real risk of dissipation of assets such that the judgment or prospective judgment will be wholly or partly unsatisfied.

If the freezing order is sought in support of foreign proceedings, the applicant must also satisfy the court that there is a sufficient prospect that the overseas judgment will be registered or enforced by the court making the freezing order. This reflects the jurisprudential justification for the making of a freezing order in support of foreign proceedings, at least in Australia.[11] That is, that the freezing order is made not so much in support of the foreign proceedings, but in anticipation of the registration of the judgment in Australia and the enforcement of that judgment by Australian courts. As was explained by the Supreme Court of Western Australia (upheld by the High Court):[12]

> Where proceedings for substantive or final relief are pending in the court in which an application for a *Mareva* order is made and *Mareva* relief is granted, the *Mareva* relief is ancillary or incidental to the jurisdiction of the court in relation to the proceedings for substantive or final relief. The *Mareva* relief is also ancillary or incidental to the prospective invocation of the court's enforcement processes in relation to the prospective judgment, and immediately prevents the court's processes from being abused or frustrated by, and immediately protects the administration of justice from, a presently existing danger.

It is worth noting that, in Australia the rules expressly permit the application for a freezing order against the local third party to be served on the defendant outside the jurisdiction without leave of the court.[13] It appears that leave is still required in New Zealand and England.[14] However, the point has little

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7 HCR 32.5, FCR7.35 and *Candy v Holyoake* [2017] EWCA Civ, [2017] 3 WLR 1131 at [35]–[36].

8 HCR32.4 and FCR7.34..

9 See *TSB Private Bank International SA v Chabra* [1992] 1 WLR 231 (Ch); *Westpac Banking Corp v Gill (No 1)* (1987) 2 PRNZ 52 (HC); and *Cardile v LED Builders Pty Ltd* (1999) 162 ALR 294 (HCA).

10 HCR32.3 and FCR7.33.

11 See *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* [2014] WASCA 178, (2014) 320 ALR 289, upheld in *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* [2015] HCA 36, (2015) 325 ALR 168.

12 *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (WASCA), above n 11, at [206]. See also Lord Nicholls' dissent in *Mercedes Benz AG v Leiduck* [1996] AC 284 (PC) at 306.

13 FCR 7.37.

14 HCR 6.27–6.28 and 7.81(3)(d); and Civil Procedure Rules, r 3.1(5).

practical significance given that the order can be sought and enforced against the local third party without service on a substantive defendant who is outside the jurisdiction.

For obvious reasons, applications for freezing orders are often made without notice to the respondent (with the attendant obligations where ex parte relief is sought), so that the prospect of an application does not precipitate the removal or diminishing of assets that the application seeks to prevent. However, the court will set a "return date" at which the respondent will have an opportunity to argue that the freezing orders should not be continued.

Plainly, the making of a freezing order has serious consequences for the respondent. Described as a "nuclear weapon",[15] it may significantly impede the respondent's business and will inevitably have reputational consequences. Therefore the applicant is generally required to provide an undertaking as to damages. In certain circumstances the applicant may be required to fortify the undertaking, for example by providing a guarantee in favour of the respondent up to a certain level.[16]

The law in the United Kingdom is substantially the same as Australia and New Zealand. Unlike New Zealand and Australia, which now have detailed rules on freezing orders, the principles to be applied are still found in the common law. However, the power of the courts to grant freezing orders has been given statutory endorsement by general provisions that empower the court to make orders in support of its own proceedings,[17] and which give the court powers to make interim orders in support of foreign proceedings.[18] One difference between England and Australia and New Zealand is that our rules provide for freezing orders to be granted in relation to a prospective cause of action, that is a cause of action that has not yet accrued.[19] The English courts appear to have rejected that possibility.[20]

In Australia and the United Kingdom the inherent jurisdiction of the courts to make freezing orders or ancillary orders remains, meaning that the courts could theoretically develop new forms of order or associated relief so long as it does not conflict with the existing rules.[21] It is less clear that this applies in New Zealand.[22]

In Singapore, it is clear that a worldwide freezing order may be available in accordance with the same general approach that prevails in England, Australia and New Zealand.[23] However, it adheres to the old view that the courts do not have the jurisdiction or power to grant a freezing order over local assets in support of foreign court proceedings, where the court lacks *in personam* jurisdiction over the defendant.[24] The practical difficulties this causes are recognised, however it has been said that reform "is a matter that has to be left to a higher court or to the legislature".[25]

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15 For example Pippa Rogerson *Collier's Conflict of Laws* (4th ed, Cambridge University Press, Cambridge, 2001) at 207.

16 See for example *Energy Ventures Partners Ltd v Malabu Oil & Gas Ltd* [2014] EWCA Civ 1296.

17 Senior Courts Act 1981, s 37.

18 Senior Courts Act 1981, s 37; Civil Jurisdiction and Judgments Act 1982, s 25; and Civil Procedure Rules, r 25.1.

19 FCR7.35(1)(b)fr and HCR32.5(1)(b).

20 *The Veracruz* [1992] 1 Lloyd's Rep 353 (CA); and The Capaz Duckling [2007] EWHC 1630 (Comm), [2008] 1 Lloyd's Rep 54. But see *Kazakhstan Kagazy Plc v Zhunus* [2016] EWCA Civ 1036.

21 FCR7.36 and Lord Collins of Mapesbury (ed) *Dicey, Morris and Collins on the Conflict of Laws* (15th ed, Sweet & Maxwell, London, 2012) at [8-006].

22 See HCR 32.9.

23 For a recent summary see *Bouvier v Accent Delight International Ltd* [2015] SGCA 45.

24 *PT Gunung Madu Plantations v Mashun* [2018] SGHC 64. See Jeyaratnam 1 SLR(R) 1000; *Multi-Code Electronics Industries (M) Toh Chun Toh Gordon [2009]* 1 SLR(R) 1000

25 At [54].

New Zealand, Australia, England and Singapore have standard form freezing orders in similar terms, which applicants can populate with the relevant information and adapt to meet their purposes.[26]

Enforcement issues

Whilst the principles to be applied to the making of freezing orders are now relatively clear and well-settled, their enforcement is another matter. Particular problems arise where there is an international aspect. The territorial reach of the court making the freezing order is necessarily limited, whereas respondents and assets may be scattered across multiple jurisdictions. Questions of enforcement might arise in practice in a number of different ways, for example:

- When advising a claimant or prospective claimant about the tools available to preserve assets overseas to satisfy a judgment or court order, and in turn making the appropriate applications in the courts. The issue might arise in the context of large-scale global fraud, breach of trust in a joint venture, or a relationship property case.
- When advising a bank that holds an account for a person against whom a worldwide freezing order has been made in another jurisdiction as to whether they are bound by the terms of that order, or whether they are free to follow the account-holder's request that the funds be transferred elsewhere.
- When advising a secured creditor of a person against whom a worldwide freezing order has been made about the impact of that order on their security.
- When advising the trustees of a trust whether a worldwide freezing made out of a different jurisdiction prevents them from transferring the trust assets to new trustees.
- Or, when instructed to take steps within the jurisdiction to ensure the effectiveness of a worldwide freezing order made by a court overseas.

Often, you will be confronted with the issue in circumstances of urgency. You may have a client who has recently discovered they have a right of action and who is chasing assets around the globe that could be moved at any moment by a highly organised and well-resourced defendant. Or you may be advising a third party in control of assets whether they are obliged to follow an urgent instruction by the owner to move them. A good grasp on the fundamentals of enforcement is highly valuable in these circumstances.

The basics

The starting point is that a freezing order operates *in personam*; it restrains the owner or third party holder of the assets from dealing with them. It does not give the applicant for the order a proprietary interest in the frozen assets, or give the applicant a security in those assets where none existed before. Therefore, the making of the freezing order itself does not affect existing securities or priorities in the frozen assets, and a defendant will normally be allowed to make payments to his or her creditors in the ordinary course of business.

If a respondent breaches the order, they will be held in contempt of court. This is punishable by imprisonment, fine or the seizure of assets. There will also inevitably be reputational and commercial consequences. The freezing order may also be accompanied by orders forbidding the respondent from leaving the jurisdiction or requiring them to give up their passport, to ensure that enforcement can be

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[26] HCR, Form G 38 (NZ); J L B Allsop, Chief Justice "Freezing Orders Practice Note (GPN-FRZG)" (25 October 2016), Annexure A (Aus); and Civil Procedure Rules "Practice Direction 25A – Interim Injunctions", Annex (updated 30 November 2017) (UK); and "Supreme Court Practice Directions" (Singapore) updated 30 May 2019, Appendix A, Form 7.

effective in the event of a breach.[27] In the United Kingdom the courts have recognised an ability to strike out a respondent's defence if they breach the freezing order,[28] although that is of questionable value if all of the respondent's assets have been dissipated.

The usual position is that third parties with notice of the freezing order are also bound by its terms and may be held in contempt if they act inconsistently with the order, or aid the respondent to breach it. That is explicit at the outset of the standard form orders in Australia and the United Kingdom. However, if the third party is located overseas, in a jurisdiction other than the one in which the freezing order was made, how can they be held in contempt of a foreign court? More fundamentally, what is the basis for the court's assertion of jurisdictional reach over third parties in other jurisdictions?

These concerns were aired in the decision of the United Kingdom Court of Appeal in *Babanaft International Co SA v Bassatne*.[29] As expressed by Nicholls LJ:[30]

> It would be wrong for an English court, by making an order in respect of overseas assets against a defendant amendable to its jurisdiction, to impose or attempt to impose obligations on persons not before the court in respect of acts to be done by them abroad regarding property outside the jurisdiction. That, self-evidently, would be for the English court to claim and altogether exorbitant, extraterritorial jurisdiction.

Therefore, the Court held, the effectiveness of such orders should depend on their recognition and enforcement by the local courts, and this should be made clear in the terms of the orders to avoid any impression that the English court was making an unwarranted assumption of extraterritorial jurisdiction.[31]

Lord Nicholls acknowledged that it was unattractive to make an order that third parties overseas were bidden to ignore.[32] This essentially meant that the effect of the worldwide freezing order was to "hold the ring for the time being"[33] by binding the respondent personally (and third parties within the jurisdiction with notice), and further others would need to be sought from other courts in order to bind third parties in other jurisdictions. Nonetheless, this was preferable to making no order at all.

Following that decision, and some refinement in subsequent cases, the following term (often referred to as the *Babanaft* proviso) is now found in standard form orders in England and Australia. The Australian term states:[34]

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27 *Bayer AG v Winter* [1986] 1 WLR 497 (CA), applied in *O'Neill v O'Keeffe* [2002] 2 IR 1 For New Zealand see *Worldwide Holidays Ltd v Wang* [2017] NZHC 738 at [23].

28 *Derby & Co Ltd v Weldon (Nos 3 & 4)* [1990] Ch 65.

29 *Babanaft International Co SA v Bassatne* [1990] Ch 13 (CA). cf *Philip Alexander Securities and Futures Ltd v Bamberger* [1996] CLC 1757, discussed by Caroll, *Anti-Suit Injunctions in Australia in aid of an arbitration agreement* (2018) 46 ABR 275. In *Bamberger* the Court declined to grant an anti-suit injunction where it was evident that the German court would not recognise or enforce it. The *Bamberger* case demonstrates that unless effective steps are available against a defendant in the jurisdiction, a worldwide freezing order will be futile if the primary assets are held in a jurisdiction where the local Court is likely to ignore it!

30 At 44.

31 At 32 per Kerr LJ.

32 At 44.

33 At 41 per Niell LJ.

34 Freezing Orders Practice Note, above n 26, Annexure A at cl 16.

16 Persons outside Australia

(a) Except as provided in subparagraph (b) below, the terms of this order do not affect or concern anyone outside Australia.

(b) The terms of this order will affect the following outside Australia —

(i) you and your directors, officers, employees and agents (except banks and financial institutions);

(ii) any person (including a bank or financial institution) who:

(A) is subject to the jurisdiction of this Court; and

(B) has been given written notice of this order, or has actual knowledge of the substance of the order and of its requirements; and

(C) is able to prevent or impede acts or omissions outside Australia which constitute or assist in a disobedience of the terms of this order; and

(iii) *any other person (including a bank or financial institution), only to the extent that this order is declared enforceable by or is enforced by a court in a country or state that has jurisdiction over that person or over any of that person's assets.*

(Emphasis added.)

The English, New Zealand and Singaporean standard orders are in similar terms.[35]

Therefore, while on its face the standard form freezing order would appear to apply to third parties overseas, its specific terms state that third parties overseas are only bound to the extent that the order is declared enforceable or is enforced by a court in a country or state that has jurisdiction over that third party.

Enforcing a worldwide freezing order

The next question then becomes, in what circumstances will the overseas court declare the freezing order enforceable? Again, I will confine my analysis to New Zealand, Australia and the United Kingdom. All three countries have regimes permitting the registration and enforcement of overseas judgments.[36] However, generally speaking, those regimes only apply to final money judgments.[37] They usually do not apply to freezing orders or other orders of an interim nature.[38] Therefore, enforcing a freezing order against third parties in those jurisdictions is not as simple as registering the worldwide freezing order or asking the local court to enforce it.

Certainly in New Zealand, and seemingly too in Australia, the position is that it is necessary to make a fresh application for a freezing order against the third party under the local rules. That is, the local

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35 Practice Direction 25A – Interim Injunctions, above n 26, Annex at cl 19; HCR Form G38, cl 11; and "Supreme Court Practice Directions", above n 26, Form 7 at cl 9.

36 The Trans-Tasman Proceedings Act 2010 (Aus and NZ) (**TTPA**) provides for a streamlined process for enforcing judgments between Australia and New Zealand.

37 Note that the TTPA provides for enforcement of non-money judgments that are final and conclusive. In Europe there is the Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters 2007 which extends to enforcement of non-money non final judgments.

38 An interlocutory freezing order is not 'final and conclusive'. Refer discussion in the TTPA context in *LFDB v SM* [2015] FCA 725 at [94]-[101]

Australian or New Zealand court will not simply declare the worldwide freezing order enforceable locally; it will consider afresh, although possibly with some reliance on the assessment of the overseas court, whether a freezing order should be made against parties within the jurisdiction under the local rules.[39]

For example, in *Yos v Heng*, a decision of the New Zealand High Court, the Federal Magistrates Court of Australia had already made an order freezing Mr Heng's assets pending relationship property proceedings, including assets held in two New Zealand bank accounts.[40] The bank accounts were held with ANZ National Bank Ltd and Westpac Bank Ltd. The banks refused to comply with the Australian order until such time as it had been registered in New Zealand. Miller J held that, given that an interim order of this nature could not be registered in New Zealand, the applicant, Ms Yos, had to apply to the New Zealand court for a freezing order in support of the substantive proceeding in Australia under the New Zealand rules.[41] However, in making the required assessments under the New Zealand rules, such as whether Mr Yos had a "good arguable case", Miller J relied to some extent on the existence of the Australian order, finding "the [Australian] Court would not have granted the order if the applicant had not shown a good arguable substantive claim".[42] An order was made against the banks restraining the banks from paying out the funds.

In *Kea Trust Company Ltd v Pugachev*, two New Zealand trustees appeared to regard themselves as bound by a worldwide freezing order made against former Russian oligarch Mr Pugachev by the England and Wales High Court in support of Moscow proceedings, which was later extended to cover the trust assets.[43] The original trustees sought directions on the validity of their removal and as to whether they could transfer the trust assets to new trustees without inadvertently breaching the worldwide freezing order out of England. The Court made directions that until served with an order varying the freezing order to permit the transfer, the assets were to remain in the original trustees' names.[44] Given that the original trustees accepted that they were bound by the worldwide freezing order, it appears that the issue of enforcement the English order was not given any scrutiny. The trustees, who included a well-regarded New Zealand lawyer, were also taking a highly cautious approach given the level of scrutiny into Mr Pugachev's affairs. Yet, given that no order had been made by a New Zealand court constraining the trustees, it is difficult to see how the English order could practically have been enforced against them had they breached it.

The issue of enforceability arose in Australia in *Davis v Turning Properties Pty Ltd*, a case pre-dating the current rules.[45] The applicants had already obtained a worldwide freezing order from the Supreme Court of the Bahamas, which had jurisdiction over the substantive dispute. That freezing order covered all assets held by the defendants in their own names "or in the names of any other holding or associated companies, and in particular in the name of Turning Properties Ltd", an Australian-based company. The applicants sought either (a) an order that the worldwide freezing order out of the Bahamas be given full force and effect in New South Wales or, (b) alternatively, an order out of the

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39 Section 30 of the Trans Tasman Proceedings Act 2010 (NZ) provides that a New Zealand court may give interim relief in support of civil proceedings in Australia. For relief to be granted, a party to the Australian proceeding must apply for it (s 31), and the New Zealand court will grant or decline the application in accordance with New Zealand law (s 32(1)). These powers simply reinforce the jurisdiction to grant freezing orders in support of foreign proceedings under the High Court Rules (s 32(2

40 *Yos v Heng* HC Wellington CIV-2009-485-2346, 1 December 2009.

41 At [3].

42 At [9].

43 *Kea Trust Company Ltd v Pugachev* [2015] NZHC 1960. Although it appears they had been represented in the England application for a freezing orders.

44 *Kea Trust Company Ltd v Pugachev* [2015] NZHC 2412 at [55]

45 *Davis v Turning Properties Pty Ltd* [2005] NSWSC 742, (2005) 222 ALR 676.

New South Wales court against Turning Properties Ltd freezing the Australian-based assets. It was common ground that the legislation permitting registration and enforcement of foreign judgments did not enable the Bahamas freezing order to be enforced in New South Wales. The Court noted that this appeared to be the first Australian decision dealing directly with an order of a New South Wales court made in aid of a foreign freezing order. An order was ultimately granted, not as a matter of merely enforcing the Bahamas order, but because the requirements for the making of an order under New South Wales law were met.

In *PT Bayan Resources TBK v BCBC Singapore Pte Ltd*, the respondent argued that a freezing order could not be made in Western Australia in support of foreign proceedings *unless* the foreign court had first made a worldwide freezing order.[46] That argument was rejected by the Western Australia Supreme Court, upheld by the High Court, which found that the jurisdiction to grant a freezing order in support of foreign proceedings is not qualified or restricted by a precondition that the applicant for relief must have previously sought a freezing order against the defendant in the foreign court in which the substantive proceedings are pending.[47] Rather, the court has an inherent power, regulated by the Supreme Court Rules, to make freezing orders in relation to an anticipated judgment of a foreign court.

Therefore, in order to effectively enforce a worldwide freezing order made overseas affecting third parties in Australia or New Zealand, it is necessary to apply for freezing orders against third parties in the local courts. This raises important questions of strategy. For example, if you are targeting specific assets held or controlled by third parties and you know where they are, there may not be any value in applying for a worldwide freezing order from the court with substantive jurisdiction over the dispute. It may well be more efficient, in terms of time and cost, to apply straight to the court in the jurisdiction where the assets are held for freezing orders in respect of those assets.

Likewise in England there is generally no process for simply registering and enforcing a worldwide freezing order made by a foreign court. As with New Zealand and Australia, an application must be made in England and the courts will consider the merits of that application in accordance with the local law. The jurisdiction to grant an order in support of foreign proceedings, and its rationale, was discussed by Lord Millett in *Credit Suisse Fides Trust SA v Cuoghi*:[48]

> Where a defendant and his assets are located outside the jurisdiction of the court seised of the substantive proceedings, it is in my opinion most appropriate that protective measures should be granted by those courts best able to make their orders effective. In relation to orders taking direct effect against the assets, this means the courts of the state where the assets are located; and in relation to orders in personam, including orders for disclosure this means the courts of the state where the person enjoined resides.

Lord Bingham (concurring) said:[49]

> It would be unwise to attempt to list all the considerations which might be held to make the grant of relief under section 25 inexpedient or expedient, whether on a municipal or worldwide basis. But it would obviously weigh heavily, probably

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46 *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* [2014] WASCA 178, (2014) 320 ALR 289 at [96].

47 At [239] and [242]. Upheld on appeal in *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* [2015] HCA 36, (2015) 325 ALR 168.

48 *Credit Suisse Fides Trust SA v Cuoghi* [1998] QB 818 (CA) at 827.

49 At 831–832.

> conclusively, against the grant of interim relief if such grant would obstruct or hamper the management of the case by the court seized of the substantive proceedings ... or give rise to a risk of conflicting, inconsistent or overlapping orders in other courts. It may weigh against the grant of relief by this court that the primary court could have granted such relief and has not done so, particularly if the primary court has been asked to grant such relief and declined. On the other hand, it may be thought to weigh in favour of granting such relief that a defendant is present in this country and so liable to effective enforcement of an order made in personam, always provided that by granting such relief this court does not tread on the toes of the primary court or any other court involved in the case. On any application under s 25 this court must recognise that its role is subordinate to and must be supportive of that of the primary court.

It was held in *Motorola Credit Crop v Uzan (No 2)* that, for an English court to grant interim relief in support of foreign proceedings that applicant must establish that such relief would be granted if the substantive proceedings were brought in England.[50] Therefore, a judge is required to make a decision on English procedures and the approach of the English court to the evidence "rather than a simple acceptance of the decision of the foreign court in interlocutory proceedings decided on the principles applicable, the evidence the available, and the levels of proof required in that jurisdiction". In that case, the New York court with substantive jurisdiction had no power to make a freezing order in respect of the defendants' assets worldwide, such jurisdiction not having been recognised there. However, the New York could had made a preliminary ruling that the evidence prima facie established that the plaintiff had a strong case. Whilst an English judge is required to make his or her own assessment of the "good arguable case" requirement for making a freezing order, and cannot treat the foreign court's assessment as final, Potter J reasoned:[51]

> Where there is available to the judge on an application under s 25 a reasoned judgment of a foreign court at an interlocutory stage upon the merits or arguability of the defendant's claim, that judgment will inevitably form the judge's starting point in relation to the question of 'good arguable case' and, depending on the apparent cogency of the reasoning and the force of any arguments raised by the defendant, is likely to prove conclusive.

Therefore, much like in New Zealand, an English court will have regard to the factual assessments of the foreign court (if any are available) in determining whether the local requirements for the making of a freezing order are met. Conversely, if a foreign court has been requested to issue a freezing order and has declined to do so, that may tell against the English court stepping in to grant a worldwide freezing order, but is not determinative.[52] The English courts will have regard to whether the making of the order will be efficacious and whether it will interfere with the management of the case in the primary court, such as whether the order is inconsistent with an order in the primary court or overlaps with it. The potential for orders to give rise to disharmony or confusion and/or the risk of conflicting or overlapping orders in other jurisdictions will also be a consideration.[53]

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50 *Motorola Credit Corp v Uzan (No 2)* [2003] EWCA Civ, [2004] 1 WLR 113 at [102]–[105].

51 At [105].

52 *Refco Inc v Eastern Trading Co* [1999] 1 Lloyd's LR 159; and *Motorola Credit Corp v Uzan (No 2)* above n 50.

53 *Motorola Credit Corpn v Uzan (No2)*, above n 50, applied recently in *United States of America v Abacha* [2014] EWHC 993 (Comm).

In *Ryan v Friction Dynamics Ltd* the Chancery Court specifically considered how the court should exercise its power to grant a freezing order in aid of foreign proceedings where the foreign court has granted the equivalent of a worldwide freezing order.[54] An order had been made by a United States court that effectively functioned like a worldwide freezing order. The claimants decided to seek a freezing order in the United Kingdom in respect of cash held by companies there because, when the defendant was served with the US order he "intimated in clear terms that his lawyers had assured him that, although the 1998 order appeared to extend outside the United States and in particular to the British assets of the defendants, it did not in fact do so". When the US order was varied, the claimants sought an equivalent variation to the order in the United Kingdom. Lord Neuberger acceded to the request, observing:

> 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. Any inconsistency could lead to uncertainty and extra complications for a defendant, which would be unfair.

Therefore:

> If the s 25 domestic order does not properly reflect the terms of the worldwide order made by the court of primarily jurisdiction and it should do so, then the sooner it is varied accordingly the better.

His Lordship referred statements by Jacob J in the earlier decision of *The State of Brunei Darussalam v Prince Jefri Bolkiah*:[55]

> It seems to me where the court is acting as an ancillary court, exercising its jurisdiction under s 25, very great weight should be attached to the order of the primary court.

Therefore, while the worldwide freezing order made by the court with substantive jurisdiction may not be enforceable against third parties in the United Kingdom per se, the courts will regard it as a powerful indication that equivalent orders should be granted in the United Kingdom.

Strategy

The enforcement issues outlined above raise important questions of strategy. If acting for a claimant, one of the most important strategic decisions is which of the two tools described at the outset of this paper to deploy. Should a worldwide freezing order be sought out of the court with jurisdiction over the substantive dispute? Or, will it be more effective to go straight to the jurisdiction/s in which the assets are held and make applications for freezing orders there? Is there value in doing both? A whole array of considerations will bear on that decision. Precision is essential. Applications for freezing orders are often required in circumstances of urgency. If the respondent gets wind of the steps being taken, it can precipitate the dissipation that the order seeks to prevent. The strategy selected must offer the greatest chance of effective enforcement without delay.

If the defendant is firmly located in the jurisdiction of the substantive dispute, and holds significant assets there, there is every value in applying for a worldwide freezing order from the local court. The

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54 *Ryan v Friction Dynamics Ltd* [2001] CP Rep 75 (Ch).

55 *The State of Brunei Darussalam v Prince Jefri Bolkiah*, The Times, September 5 2000.

order will be able to be enforced against the defendant personally, and any local third parties with notice of it.

However, if there is reason to doubt the effectiveness of enforcement by those channels, the strategic considerations may be different. For example, the defendant may be located in a different jurisdiction, his or her present whereabouts may be unknown, or he or she may be in the jurisdiction but is liable to abscond. In those circumstances the chances of being able to hold the defendant in contempt may be dubious or even fanciful. Strategy will necessarily be driven by the ability to enforce freezing orders against third parties with control of the assets. The location of the assets will therefore drive the choice of forum for applying for the freezing order.

If there is reliable information as to the existence of assets held by third parties in other jurisdictions, it may well be more efficient to go straight to that jurisdiction (or jurisdictions) and an application for the local court to freeze the assets. Any application for a freezing order in the court with substantive jurisdiction may just slow things down, as unless exceptionally there is a regime for enforceability of the freezing order in other jurisdictions where the assets are held, fresh applications will be needed in the courts there. The application in the substantive court may just alert the defendant to the prospect of further orders in the jurisdictions where the assets are held, and give them an opportunity to move them out of the claimant's reach. The standard undertakings given by an applicant of a freezing order in the United Kingdom and Australian include:[56]

> (10) The Applicant will not without the permission of the court seek to enforce this order in any country outside England and Wales [or seek an order of a similar nature including orders conferring a charge or other security against the Respondent or the Respondent's assets].

This enables the court granting the order to monitor whether the defendant is being harassed by a multiplicity of proceedings. Although there is no reason to think the courts would not act quickly in granting permission to enforce the order overseas if the circumstances justified it, the requirement for permission may be a further source of delay.

Interesting issues arise in relation to enforcement of freezing orders against banks with branches in multiple countries. It has been suggested that, if the defendant has an account with the foreign branch of an English bank, and the English branch is served with the worldwide freezing order, it will be required not to allow withdrawals from the foreign branch.[57] Therefore, when seeking to enforce a freezing order against assets held in an account with a bank that operates internationally, the location of the head office and any overseas branches will be an important consideration.

If the location of assets is unknown, the first step will be to seek an ancillary order requiring the prospective defendant to make disclosure about the value and locations of his or her assets to the court with jurisdiction over the substantive dispute. In those circumstances, there is little to lose in applying for a worldwide freezing order out of the substantive court as well. That may at least go some

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56 Practice Direction 25A – Interim Injunctions, above n 26, at sch B, cl (10). The standard Australian undertaking is in more or less in the same terms: "Freezing Orders Practice Note (GPN-FRZG)", above n 26, sch A at (7). In *Akcine Bendrove Bankas Snoras v Antonov* [2018] EWHC 887 (Comm) it was held that there was no breach of this undertaking where the overseas orders in Switzerland and Lithuania had been obtained in support of independent substantive proceedings in Lithuania. The undertaking was not engaged where the jurisdiction of the foreign court to make the order did not depend upon or derive from the making by the English Court of the freezing order.

57 *Dicey, Morris and Collins on the Conflict of Laws*, above n 21, at [8-023].

way in preserving the position. Assets in the substantive jurisdiction will be frozen, and a cautious and relatively trustworthy third party holding assets in other jurisdictions may abide by the order notwithstanding it could not technically be enforced against them. Once disclosure is made and the whereabouts of the assets are known, applications can be made in the courts in the jurisdictions where the assets are held. Furthermore, the position appears to be that the local court will have some regard to the fact that the court with substantive jurisdiction has made an order. The presence of a worldwide freezing order out of the court with substantive jurisdiction may enhance the prospects of success for applications in the local courts where the assets are held. Therefore, while it may not be directly enforceable in other jurisdictions, the worldwide freezing order still has value.

Resourcing considerations will obviously be a factor. It may be less expensive and more efficient to apply for a freezing order out of the court with substantive jurisdiction over the dispute. The court in the substantive jurisdiction may already be familiar with the facts and circumstances of the case, depending on the stage of proceedings at which the freezing order is sought, and the evidence supporting aspects of the application may well already filed.

What and whose assets are within the scope of a freezing order?

The rationale for a freezing order is to preserve assets of a defendant so that they are available to meet a judgment. What are the "defendant's assets" for this purpose and when are orders available against third party trustees or companies where those parties are not defendants to the substantive proceeding?

The prolific use of trust and company structures to conduct business and protect assets raises interesting questions about the scope of freezing orders. There appears to be growing willingness from the courts to "trust bust". In *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* the English High Court considered that Mr Pugachev had retained such a high degree of control over five discretionary New Zealand trusts that he could not be said to have divested beneficial ownership of the trust assets.[58] The assets were therefore available to meet judgment against him. The trust assets had earlier been the subject of a freezing order by the Court of Appeal.[59]

Given that the freezing order was issued on the basis that there was a good arguable case that Mr Pugachev had retained beneficial ownership, could he himself have been held in contempt for breaches of the order by the trustees? An ability to hold Mr Pugachev in contempt for breaches of the order by the trustees would have been redundant in that case, because he absconded from England in breach of court orders. However, if he had remained in the jurisdiction, he could have been an effective source of enforcement of the orders against the trustees.

The practice is to seek orders against the third party holder of the assets directly.[60] The making of orders against assets of third parties against whom there is no cause of action is known as the *Chabra* jurisdiction.[61] This jurisdiction has been extended to the making of a freezing order against a third party based on prospective enforcement process the plaintiff may have available to it to exercise the rights of the defendant over the third party for example, by appointment of a liquidator, trustee in bankruptcy, or receiver and through that means to require the third party to disgorge assets to meet

58 *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2017] EWHC 2426 (Ch).

59 *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2015] EWCA Civ 906.

60 See for example the indications in *Lakatamia Shipping Company Ltd v Su* [2013] EWHC 1814 (Comm) that the standard wording makes it clear that "the Respondent's assets" can include assets of a foreign trust that are beneficially owned by the defendant, or are under his or her effective control.

61 *TSB Private Bank International SA v Chabra* [1992] 1 WLR 231 (Ch);

the judgment.[62] The common law extension is now reflected in the Australian and New Zealand Rules of Court.[63]

The standard wording of the English and Australian freezing orders contain words to the effect that the order:[64]

> [A]pplies to all the Respondent's assets whether or not they are in his own name and whether they are solely or jointly owned. For the purpose of this order the Respondent's assets include any asset which he has the power, directly or indirectly, to dispose of or deal with as if it were his own. The Respondent is to be regarded as having such a power if a third party holds or controls the asset in accordance with his direct or indirect instructions.

In *JSC BTA Bank v Ablyazov*[65] the UK Supreme Court clarified that the extended definition above is designed to capture assets that are <u>not</u> legally or beneficially owned by the defendant but over which he or she has control. It was held that the right to draw down on a loan agreement was caught by the expanded meaning of asset on the basis that the defendant had the power directly or indirectly to dispose of, the funds as if they were his own.[66]

The question arises whether assets of a company owned or controlled by the respondent are caught by the extended wording. The English courts have held that the doctrine of separate corporate legal personality means that it will generally be inappropriate to include company assets within the scope of a freezing order against the defendant. In *FM Capital Partners Ltd v Marino* the High Court approved earlier authority to the effect that "the mere fact that a director/shareholder is entitled to exercise control over the company's affairs does not mean that the director/shareholder is entitled to the company's assets". [67] While the extended definition captures assets under the respondent's control, a director or shareholder of a company, who exercises control to dispose of or deal with a company's assets is acting as an organ or agent of the company and is not acting in his or her own right.[68]

The Court in *Marino* acknowledged that there may exceptionally be cases where a freezing order extended to the assets of a company in which the defendant is the sole director or shareholder on the basis that in truth the company's assets are the respondent's assets, that is "a non-trading body corporate which [the respondent] wholly owns and controls, which does not have any active business, and which is in truth no more than a pocket or wallet of the respondent".[69]

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62 *Cardile v LED Builders Pty Ltd* [1999] HCA 18 at [57]; Refer discussion in *Cruz City 1 Mauritius Holdings v Unitech Ltd* [2014] EWHC 3704 (Comm),

63 See eg r 32.5(5) of New Zealand High Court Rules and discussion in *Yos v Heng*, supra; FC Rule 7.35

64 Practice Direction 25A – Interim Injunctions, above n 26, at Annex at (6). The Australian wording is more or less the same: "Freezing Orders Practice Note (GPN-FRZG)", above n 26, Annexure A at (7)(1).

65 *JSC BTA Bank v Ablyazov* [2015] UKSC 64 the Commercial Court wording was in issue which was materially the same as that set out above

66 By the terms of the loan agreement, the loan proceeds were to be applied "at the borrower's sole direction"

67 *FM Capital Partners Ltd v Marino* [2018] EWHC 2889 (Comm), citing *Group Seven Ltd v Allied Investment Corporation Ltd* [2013] EWHC 1509 (Ch), [2014] 1 WLR 735.

68 This may be an unduly narrow interpretation of "control" in the context of the extended definition given the rationale in *Carlide* for orders against third parties.

69 *Group Seven Ltd v Allied Investment Corporation Ltd*, above n 67, at [80]. Refer also *AKhmedova v Akhmedov* [2018] EWFC 23; *Petrodel Resources Ltd v Prest* [2013] 2 AC 415

Where the respondent exercises control over the assets of a company in which he or she is the only or principal shareholder, that conduct may have the effect of diminishing the value of the respondent's shareholding in the company. Because the shareholding is an asset which is captured by the freezing order the defendant's conduct in respect to the company may be enjoined on that basis, at least where the respondent is exercising such control other than in the ordinary course of business of the company.[70]

Conclusion

The *in personam* nature of a freezing order means having (and keeping) someone within the jurisdiction in which the order is made, be it the respondent or a third party, is essential to effective enforcement. While on its face a worldwide freezing order applies to the defendant's assets overseas, third parties with control of the defendant's assets in other jurisdictions will not be bound by the terms of the order even if they have notice of it.

Rather, steps must be taken in the local court with jurisdiction over the third party to ensure effective enforcement. At least in England, New Zealand and Australia, that will generally involve a fresh application for orders to the local court. As noted earlier, a Singapore Court would not countenance such an order, at least where the Court does not have *in personam* jurisdiction over the defendant.

Where assets are held through trust or company structures, their inclusion within the scope of a freezing order is justifiable only on the basis that the assets may ultimately be available to satisfy a judgment against the defendant. That turns on the Court's readiness to characterise the trust or company assets as in substance the defendant's; or as assets the defendant has the power, directly or indirectly, to dispose of or deal with as if they were his or her own.

70 Refer discussion in *FM Capital v Marino* at [24] et seq