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When will the court grant freezing orders in support of foreign proceedings?

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Dispute Resolution analysis: in light of the recent Commercial Court decision in ICICI v Diminico, Andrew Harris and Duncan Hope, partners at DWF's Manchester office, and Adam Solomon and Nicholas Goodfellow, counsel at Littleton Chambers, analyse the English court's jurisdiction to grant freezing orders in aid of foreign proceedings.

Background

ICICI Bank UK Plc v Diminico NV [2014] EWHC 3124 (Comm); [2014] All ER (D) 207 (Oct)

The Commercial Court recently handed down an important decision under s 25 of the Civil Jurisdiction and Judgments Act 1982 (the CJJA 1982) concerning applications for domestic and worldwide freezing order (WFO) relief, and ancillary disclosure orders.

The claim was brought in support of Belgian proceedings in which ICICI Bank UK Plc (the Bank) claims sums in excess of US$25 million against Diminico NV (Diminico), a distributor of diamonds based in Belgium, whose March 2013 accounts disclose a turnover of approximately US$300 million, yet only retains credit balances in Belgium of approximately EUR 2,600.

Principles

Popplewell J conducted an extensive review of the case law in this area, and summarised the principles applicable when the court is asked to grant a freezing order in support of foreign proceedings under CJJA, s 25. These principles warrant citation in full (although the words in square brackets have been added by the authors, to deal with an obvious error in the judgment):

- (1) it will only be appropriate [in exceptional cases] to exercise jurisdiction to grant a freezing order where a defendant has no assets here and owes no allegiance to the English court by the existence of in personam jurisdiction over him, whether by way of domicile or residence or for some other reason. Protective measures should normally be left to the courts where the assets are to be found or where the defendant resides or is otherwise subject to in personam jurisdiction
- (2) where there is reason to believe that the defendant has assets within the jurisdiction, the English court will often be the appropriate court to grant protective measures by way of a domestic freezing order over such assets, and that is so whether or not the defendant is resident within the jurisdiction or for some other reason is someone over whom the English court would assume in personam jurisdiction
- (3) where the defendant is resident within the jurisdiction, or is someone over whom the court has in personam jurisdiction for some other reason, a worldwide freezing order may be granted applying the discretionary considerations which were explained in the *Cuoghi*, *Motorola* and *Banque Nationale* cases

- (4) where the defendant is neither resident within the jurisdiction nor someone over whom the court has or would assume in personam jurisdiction for some other reason, the court will only grant a freezing order extending to foreign assets in exceptional circumstances. It is likely to be necessary for the applicant to establish at least three things:
  - (a) that there is a real connecting link between the subject matter of the measure sought and the territorial jurisdiction of the English court in the sense referred to in *Van Uden*
  - (b) that the case is one where it is appropriate within the limits of comity for the English court to act as an international policeman in relation to assets abroad; and that will not be appropriate unless it is practical for an order to be made and unless the order can be enforced in practice if it is disobeyed; the court will not make an order even within the limits of comity if there is no effective sanction which it could apply if the order were disobeyed, as will often be the case if the defendant has no presence within the jurisdiction and is not subject to the in personam of the English court
  - (c) the court will only grant worldwide relief if it is just and expedient to do so, taking into account the discretionary factors identified at paragraph 115 of the *Motorola* case. They are:
  - (i) whether the making of the order will interfere with the management of the case in the primary court, eg where the order is inconsistent with an order in the primary court or overlaps with it
  - (ii) whether it is the policy in the primary jurisdiction not itself to make worldwide freezing/disclosure orders
  - (iii) whether there is a danger that the orders made will give rise to disharmony or confusion and/or risk of conflicting, inconsistent or overlapping orders in other jurisdictions, in particular the courts of the state where the person enjoined resides or where the assets affected are located
  - (iv) whether at the time the order is sought there is likely to be a potential conflict as to jurisdiction rendering it inappropriate and inexpedient to make a worldwide order, and
  - (v) whether in a case where jurisdiction is resisted and disobedience may be expected the court will be making an order which it cannot enforce

Discussion

Domestic relief

Applying principle (2) cited above, Popplewell J granted freezing order relief in this jurisdiction on the basis of evidence that Diminico had bank accounts here, and the inference that could be drawn as to the presence of assets in this jurisdiction, even if such accounts were overdrawn.

Interestingly, a disclosure order ancillary to the domestic freezing order was made relating to all of Diminico's bank accounts in England and Wales, since March 2011. Whilst at first blush such relief would seem to go further back than one might expect in support of a freezing order granted in August 2014, as the judge himself suggested in argument, it was held that this was justified on the basis that such disclosure may assist in identifying the location of current assets in this jurisdiction. This decision demonstrates that significant disclosure may be ordered, which may appear to go further than is immediately required in order to support the terms of the freezing order.

Worldwide relief

Given the position set out in principle (4) above, WFO relief was not pursued at the hearing of the claim. Popplewell J refused an application for disclosure in relation to worldwide assets, on the basis that such an order would be ancillary to the freezing relief sought, and therefore dealt with applying effectively the same principles. Whilst the presence of assets in this jurisdiction warranted domestic freezing relief and ancillary disclosure orders, the absence of any other 'real connecting link' with this jurisdiction was determinative against the worldwide application.

Republic of Haiti v Duvalier [1990] 1 QB 202 (CA)

As this case makes clear, the circumstances in which such relief can be obtained against a party resident outside the jurisdiction are 'exceptional'. The high water mark in the case law is probably the Court of Appeal case of *Duvalier*, not referred to by the court in judgment in *ICICI*. In *Duvalier*, the court made a worldwide order against a non-resident defendant in support of a fraud claim in France.

Whilst it is clear that the Court of Appeal in *Duvalier* considered that the case was 'most unusual' and one where it was appropriate to act as an international policeman in relation to assets abroad (principle 4b), the existence of a 'real connecting link' with this jurisdiction (principle 4a) is difficult to see. It has been suggested that this 'went to the very edge of what is permissible' and is perhaps only justified on the basis that the defendant had solicitors in England, and the relevant information relating to the defendant's worldwide assets was in England (see Dicey, Morris & Collins, The Conflict of Laws 15th Edition at [8-040]). We agree that this case certainly touches the boundary of the CJJA 1982, s 25 discretion.

One uncertain point from the *ICICI* principles is how the policy of the 'primary court' as regards WFOs (principle 4cii) bears on the court's discretion:

- *Rosseel NV v Oriental Commercial and Shipping (UK) Ltd [1990] 3 All ER 545*

  on the one hand, cases such as *Rosseel* suggest that where a similar order has been sought before the primary court and refused, it would be generally wrong for the English court to interfere.
- on the other hand, it would seem that when considering the issue of whether it is appropriate for the English court to act as an 'international policeman' the inability of the primary court to assist, is likely to weigh in favour of the English court needing to intervene. If the primary court could provide such assistance, why else would the English court need to assume this role?

We suggest that in view of this dichotomy, this factor is probably one that is of marginal significance, and that the other *Motorola* factors, such as the potential for conflicting orders between jurisdictions, are likely to weigh more heavily.

Blue Holding (1) PTE Ltd and another v United States of America United States of America v Abacha and others [2014] EWCA Civ 1291; [2014] All ER (D) 112 (Oct)

One factor of particular significance, is whether the foreign proceedings (in respect of which the CJJA 1982, s 25 relief is sought) would be enforceable in this jurisdiction. On this point see the very recent Court of Appeal decision of in *Abacha*, (decided after the ICICI case) where it was held that section 25 relief was inexpedient because the foreign proceedings would not be enforceable here. Whilst the Court of Appeal observed there would be 'rare cases' where section 25 relief would be sought and not result in enforcement in this jurisdiction, the short point is that there must be 'some utility' in the grant of the injunction: see paras [62]-[64] of the judgment.

European dimension

This landscape could shift in the near future, in view of the European Account Preservation Order ('EAPO') which will be applied by those Member States which have opted in from 18 January 2017. The EAPO provides a basis for a claimant to freeze monies in a defendant's bank accounts across participating Member States. Whilst the UK has not opted in, where an application is made for a WFO here, and the applicant is resident in another Member State which has opted in, the English court may well consider whether the availability of measures under the EAPO to such a claimant is a factor which renders it inexpedient to grant a WFO. In such cases, much will depend on the specific facts and in particular whether the need for extra-territorial restraint is truly worldwide or alternatively limited to states covered by the EAPO. The limitation of the EAPO to assets in bank accounts, may however, limit the impact on the English Court's discretion.

Andrew Harris and Duncan Hope of DWF and Adam Solomon of Littleton Chambers were instructed on behalf of the claimant in this case.