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AVOIDING FRUSTRATION AT THE END OF THE RAINBOW:
ASSET PRESERVATION AND DISCLOSURE ORDERS IN OFFSHORE JURISDICTIONS

INTRODUCTION

In modern fraud litigation, obtaining a freezing injunction against the principal defendant to proceedings within the jurisdiction where the substantive proceedings are ongoing (the “**Primary Jurisdiction**”) may not provide adequate protection to the claimant.

Any rogue worth his salt will have appreciated the benefit of using nominees, companies and trust structures, often in offshore jurisdictions, to safeguard assets.

The availability in foreign “**Ancillary Jurisdictions**” of freestanding freezing relief in support of proceedings in the Primary Jurisdiction against both the defendant and third parties will therefore often be of critical significance to a claimant’s prospects of recovery.

Further, identifying the location of a defendant’s assets, and of any third parties holding assets against which a claimant will, if successful, be able to enforce, will often necessitate the obtaining of disclosure orders in a number of jurisdictions from a variety of third parties.

This paper:

- Surveys the availability in England and Wales, the Isle of Man, the Channel Islands, the BVI and Cayman of freezing and disclosure orders in support of foreign proceedings; and
- Discusses ongoing jurisprudential developments in relation to freezing orders against third parties holding assets against which a claimant will, if successful, be able to enforce in England and Wales and the Cayman Islands.

FREEZING AND DISCLOSURE ORDERS IN SUPPORT OF FOREIGN PROCEEDINGS

England and Wales

The common law position

In England and Wales the position established at common law by the House of Lords in *The Siskina* [1979] AC 210 was that a freezing injunction could not exist unless it was ancillary to a substantive cause of action, which cause of action had to be justiciable in England and Wales.

As explained by Lord Diplock, the reason for this was said to be because the Court’s power to grant a freezing injunction¹ “*presupposes the existence of an action, actual or potential, claiming substantive relief which the High Court has jurisdiction to grant and to which the interlocutory orders referred to are ancillary*” ([1979] AC 210 at 254-255).

¹ Which then derived from s.45(1) of the Supreme Court of Judicature (Consolidation) Act 1925 and now resides within s.37(1) of the Senior Courts Act 1981, both of which provide that the Court may grant an injunction or appoint a receiver “*in all cases in which it appears to be just and convenient to do so*”

Statutory provision

To prevent these limitations frustrating the operation of the Judgments Regulation, s.25(1) of the Civil Jurisdiction and Judgments Act 1982 (the “**1982 Act**”) specifically conferred upon the High Court of England and Wales power to grant interim relief in respect of actual or potential proceedings in a Brussels or Lugano convention contracting state so long as such proceedings fell within the scope of the Brussels Convention.

The 1982 Act was amended in 1997² so as to confer upon the High Court of England and Wales power to grant injunctive relief, including the making of freezing and disclosure orders, in aid of proceedings taking place in any foreign jurisdiction whether or not they fell within the scope of any particular convention.

Commenting on the breadth of this jurisdiction, Millett LJ observed that:

“...the position has now been reached, therefore, that the High Court has power to grant interim relief in aid of substantive proceedings elsewhere of whatever kind and wherever taking place” (Credit Suisse Fides Trust SA v Coughi [1998] QB 818 at 825).

As well as granting freezing relief against a defendant to foreign proceedings (a so-called cause of action defendant or “**CAD**”), in appropriate cases the courts of England and Wales may also make freezing orders against a third party holding assets against which any judgment obtained against a CAD is likely to be enforceable (a so-called non-cause of action defendant or “**NCAD**”). The circumstances in which freezing relief will be granted against NCADs are considered in the second part of this paper.

The statutory power of the Court is discretionary and s.25 of the 1982 Act specifically provides that relief may be refused where the Court considers that the fact that it has no jurisdiction other than under the 1982 Act makes it inexpedient to grant such relief.

Factors which have been held to be material include the following:

- Whether the assets sought to be preserved or identified are outside of the Primary Jurisdiction but within the Ancillary Jurisdiction, it being “...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”³;
- The likelihood of the court in the Ancillary Jurisdiction being able to enforce compliance with the order made⁴;
- The extent to which the court in the Ancillary Jurisdiction can be satisfied that it is fully apprised of all material facts (the courts of the Primary Jurisdiction normally being inherently better placed in this regard)⁵;
- In circumstances where a worldwide freezing order has already been granted in the Primary Jurisdiction, whether the injunction sought in the Ancillary Jurisdiction is genuinely necessary (for example to secure assets within the Ancillary Jurisdiction)

² By the Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997

³ *Credit Suisse Fides Trust SA v Coughi* [1998] QB 818 per Millett LJ at 827 C-D

⁴ *Motorola Credit Corp v Uzan (No.2)* [2003] EWCA Civ 752 at paragraph [115]

⁵ *Ryan v Friction Dynamics Ltd* [2001] CP Rep 75

and the extent to which making further ancillary freezing orders will lead to overlap and duplicative costs (which should in any event be mitigated by providing which court is to have priority, the usual order in this regard being that applications should be made in the Primary Jurisdiction).

- Whilst the court in the Ancillary Jurisdiction may grant any remedy which it has jurisdiction to grant, whether or not the same remedy would be available in the Primary Jurisdiction, the Court must consider whether the order sought would conflict or overlap with orders made by the court in the Primary Jurisdiction.

In light of this last consideration:

“Where an application is made for in personam relief in ancillary proceedings, two considerations which are highly material are the place where the person sought to be enjoined is domiciled and the likely reaction of the court which is seised of the substantive dispute. Where a similar order has been applied for and has been refused by that court, it would generally be wrong for us to interfere. But where the other court lacks jurisdiction to make an effective order against a defendant because he is resident in England, it does not at all follow that it would find our order objectionable”⁶

Further, freezing/disclosure orders ought not to be made in the Ancillary Jurisdiction when it is the policy of the courts of the Primary Jurisdiction not to make such orders or where such orders may interfere with the management⁷ of the case in the Primary Jurisdiction⁷.

As well as being applied by the courts of England and Wales in connection with the 1982 Act, these principles are also taken into account by the courts of the Isle of Man in exercising the substantively identical Manx provisions under the Isle of Man High Court Act 1991 and are likely to be taken into account by the Cayman Islands courts as and when the amendments to the Grand Court Law proposed by the Cayman Law Reform Commission take effect (both of which statutory regimes are discussed further below).

Ancillary injunctions against respondents out of the jurisdiction

By way of contrast with the position in certain offshore jurisdictions (as to which see further below), orders may be obtained under s.25(1) of the 1982 Act in support of foreign proceedings in the Primary Jurisdiction against persons who are out of the jurisdiction of the courts of England and Wales. The procedure for service out on such persons is governed by Practice Direction 6B of the Civil Procedure Rules.

The fact that the respondent is not within the jurisdiction remains a discretionary factor that the court must take into account in considering whether to grant relief in aid of foreign proceedings.

However this did not deter Gloster J in *RBS v FAL Oil Co Ltd* [2012] EWHC 3268 (Comm) from granting a worldwide asset freezing injunction and ancillary disclosure orders against a defendant in the UAE with no assets in England and Wales in support of litigation being conducted in the UAE courts.

⁶ *Coughi*, [1998] QB 818 per Millett LJ at 829

⁷ *Motorola Credit Corp* at paragraph [115]

- The rationale behind the order was that assets other than in England and Wales were likely to be identified and/or safeguarded by the making of a worldwide freezing order;
- Further, such an order was not inexpedient given that the defendant companies had a relationship with an English branch of the claimant bank and an operating presence in England and Wales;
- Gloster J also considered that little credence ought to be afforded to “*self-serving assertions*” that such an order would be futile because the directors of the defendants would avoid England if the orders were sought were made - the directors had previously travelled to England for the purposes of their companies’ business and “*...other than the bare assertion that the directors will not do so, the court has had no explanation whether convincing or otherwise, as to why it was necessary in the past for them to visit England but will cease to be so in the future*”.

The Isle of Man

The position at common law

As was recognised by Deemster Doyle in *Re Secilpar S.L.* (2003-05) MLR 352, the Isle of Man High Court declined to follow *The Siskina*. As a result freezing and disclosure orders in support of foreign proceedings have long been available at common law in the Isle of Man.

Furthermore, it was recognised in *Lakeland Oil & Gas v Transtema Power and Transdanubia* [2008] CP 2008/128 that freezing orders may be made against NCADs applying the same principles as have been developed in England and Wales. These are considered in the second part of this paper.

Statutory provision

Notwithstanding the common law jurisdiction to grant injunctions in support of foreign proceedings, the Isle of Man has also enacted s.56B of the Isle of Man High Court Act 1991 which is in substantively identical terms to s.25 of the 1982 Act. The factors influencing the Manx court’s discretion will therefore be the same as those considered above in relation to the 1982 Act.

As in England and Wales, claims for injunctions in support of foreign proceedings under s.56B of the Isle of Man High Court Act 1991 may be served out of the jurisdiction pursuant to r.2.41(b) and (d) of the Manx rules of court.

Jersey

Freezing Orders

Jersey also declined to follow *The Siskina*, the Royal Court holding in *Solvalub v Match Investments* [1996] JLR 361 that freezing relief could be granted in aid of foreign proceedings even if no relief other than a freezing order was sought from the courts of Jersey.

This was said to be desirable, and an acceptable departure from the jurisprudence of England and Wales, because:

"If the Royal Court were to adopt the position that it was not willing to lend its aid to courts of other countries by temporarily freezing the assets of defendants sued in those other countries, that in my judgment would amount to a serious breach of the

duty of comity which courts in different jurisdictions owe to each other. Not only is that so, but the consequence of such an attitude would be that Jersey would quickly become known as a safe haven for persons wishing to evade liabilities imposed on them by the courts to which they are subject. This is exactly the reputation which any financial centre strives to avoid and Jersey so far has avoided with success."

Furthermore, it was held in *Krohn GmbH v Varna Shipyard* [1997] JLR 194 that under rule 7(b) of the Service of Process (Jersey) Rules 1994 the Royal Court has power to order service of an application for freezing relief out of the jurisdiction even where such relief is sought solely in connection with foreign proceedings.

This was subsequently affirmed by the Royal Court in *State of Qatar v Sheikh Khalifa bin Hamad al Thani* [1999] JLR 118 where service of an application for freezing relief was permitted against a respondent in circumstances where neither applicant nor respondent had any connection with Jersey other than the fact that the Respondent had assets located there.

It should be noted, however, that the Royal Court in *Solvalub* cautioned that the power to permit service out should be exercised with caution.

Like England and Wales, Jersey permits the granting of freezing orders against NCADs. Although the author is not aware of any reported decision in which the principles applicable to such relief in Jersey have been discussed in detail, it is understood that the Royal Court is highly likely to follow the developments in England and Wales and Cayman discussed below.

Disclosure orders

In principle, disclosure orders may be obtained in Jersey in support of foreign proceedings. Further, in the context of a disclosure application the Jersey Court of Appeal followed the lead of the Royal Court in *Solvalub* and stressed that "*Jersey's reputation as a major financial centre might suffer if it were not willing to assist victims of wrongdoing to obtain redress*" (*Macdoel Investments Limited & Ors v Federal Republic of Brazil* [2007] JLR 201).

Notwithstanding this, in the recent case of *Viken Securities & Ors v New World Trustees (Jersey) Limited* [2011] JRC028 the Royal Court emphasised the exceptional nature of *Norwich Pharmacal* relief. It also had regard to the earlier Royal Court decision of *New Media Holding Company LLC v Capital Fiduciary Group Limited* [2010] JLR 272 in which it was held that *Norwich Pharmacal* relief would not be granted where it was in effect being used to obtain pre-action disclosure against a defendant (something for which no provision is made in the Jersey civil procedure code).

In light of these considerations, the application before the Royal Court in *Viken* for disclosure in support of foreign proceedings failed because in the view of Deputy Bailiff Bailhache QC:

"I consider that the plaintiffs have sufficient information to be aware of the putative defendants to claims which they might wish to bring; are sufficiently aware of the nature of what those claims might be; and in reality are bringing this application as a convenient mechanism for pre-action discovery which would strengthen their hand procedurally. Indeed, in my judgment, to grant the orders sought would perhaps give them an unfair advantage in the proceedings. It was not contended before me that it was necessary that the orders should be made in order to enable tracing actions to be taken elsewhere. It was suggested that Mareva relief might be sought, but it is not

clear how the production of the documents now requested would substantially help in that respect” (paragraph [12]).

Guernsey

In Guernsey the making of orders in support of foreign proceedings, including freezing and disclosure orders, is governed by s.1(7) of the Law Reform (Miscellaneous Provisions) Guernsey Law 1987 (the “**1987 Law**”) which provides that:

“An injunction may in exceptional circumstances be granted notwithstanding that proceedings have not been and are not to be instituted before the court”

In *Garnet Investments Limited v BNP Paribas (Suisse) SA & Ors* (2009-10) GLR 1 Vos JA noted that s.1(7) of the 1987 Law posed a stricter hurdle for the obtaining of such relief than that set by s.25 of the 1982 Act. He nevertheless declined to “lay down restricting guidelines as to when such circumstances will exist” because “[t]he requirement for exceptional circumstances seems to me to be saying no more than that, in a case where the substantive proceedings in aid of which the injunction is sought are not in Guernsey, there must be some additional exceptional factors which make it appropriate for the injunction to lie” (paragraphs [90]-[92]).

Notwithstanding the lack of clarity in this guidance, it is tolerably clear from *Garnet* that relief will be granted where there are proceedings on foot abroad and a good arguable case that assets in Guernsey are at real risk of dissipation (paragraph [107]).

Notwithstanding this, the court may still exercise its discretion not to grant relief where the defendant has substantial disposal assets in the Primary Jurisdiction sufficient to meet any judgment that may be obtained against it (paragraph [115])

As for disclosure orders, whilst the exceptional circumstances test must still be satisfied, claimants seeking disclosure in Guernsey may be comforted by the *obiter* view of the Guernsey Court of Appeal in *Systems Design Ltd v Equatorial Guinea (President)* 2005-06 GLR 65 at paragraph [55] that:

“The jurisdiction to make orders based on Norwich Pharmacal principles in aid of proceedings in other countries is, we consider, one available to the Courts of Guernsey, just as much as the jurisdiction to make Mareva freezing orders and Anton Piller orders. Such jurisdiction is essential given the role of financial service provision on this Island. For the reasons stated in paragraphs 41 and 42 of this Court’s judgment in Tracey et al v Seed International Ltd (18 December 2003, Civil Appeal 341, Judgment 55/2003, unreported) the ability to make orders relating to money, documents or information in Guernsey in support of proceedings in other jurisdictions is a necessary factor given the successful development of Guernsey financial services. Frequently litigation relating to assets in Guernsey is current in another jurisdiction, especially in England. The Guernsey Courts must ensure that Guernsey does not become a safe haven for those who may wish to evade financial liabilities.”

As with Jersey, the author is not aware of a reported case in Guernsey where the principles applicable to freezing relief against NCADs have been discussed. Again, it is understood to be very likely that the developments in England and Wales discussed in the second part of this paper will be followed.

Although the author is unaware of any case in which permission to serve an application for a freezing order in support of foreign proceedings against a CAD or NCAD out of the jurisdiction has been granted, there is nothing on the face of r.8 of the Royal Court Civil Rules 2007 to preclude this and it is understood that the Royal Court of Guernsey is likely to follow the example of the Royal Court of Jersey in this regard.

BVI

Freezing Orders

In the BVI there is no statutory jurisdiction permitting the grant of interim relief in support of foreign proceedings.

For some time it was also thought that such relief was not available at common law and that the decision of the House of Lords in *The Siskina* was the last word on the subject⁸.

In *Black Swan Investments ISA v Harvest View Limited & Ors* BVIHCV 2009/399, Bannister J disagreed on the basis of Lord Nicholls dissenting speech in *Mercedes Benz AG v Leiduck* [1996] AC 284 (an appeal to the Privy Council from Honk Kong).

As noted by Bannister J at paragraph [7] of his judgment, it was the view of Lord Nicholls that because the respondent to the injunction sought in *The Siskina* had been resident out of the jurisdiction, the House of Lords had not distinctly considered the questions:

- (1) Whether there was jurisdiction to grant an ancillary injunction in support of foreign proceedings; and
- (2) Whether an application for such an injunction (without underlying proceedings in England and Wales) could be served on a respondent out of the jurisdiction.

In Lord Nicholls's view, when the question of jurisdiction to grant an ancillary injunction was considered in isolation, both the interests of justice and the manner in which the jurisprudence pertaining to freezing orders had evolved since the *The Siskina* clearly indicated that the court did have jurisdiction.

Further, according to Lord Nicholls once it is recognised that the purpose of a freezing order is simply to preserve assets for a subsequent process of enforcement in the event that a claimant succeeds in the substantive dispute:

"It is difficult to see any reason in principle why...where the defendant is within the territorial jurisdiction of the court, the court should decline to give such interim relief as might have been given had the court been determining the substantive dispute. It would be odd if the court should adopt the attitude of drawing back and declining to give any relief, whatever the circumstances, unless the court were seized of the whole dispute. That would be a pointlessly negative attitude, lacking a sensible basis...a writ may be issued claiming only interim relief ancillary to a final order being sought from some other court or arbitral body. So be it. If the consequence is that in such a case, where the court is seized only of a claim for interim relief, that claim must bear the burden of being labelled a cause of action if intervention by the court is to be justified, let that be so." [1996] AC 284 at 311

⁸ *Alfa Telecom Turkey v Telisonera* HCVAP 2008/12 (Eastern Caribbean Supreme Court); *Sibir Energy Plc v Gregory Trading SA* BVIHCV 2005/174 (BVI High Court)

Bannister J agreed and therefore held that, where a respondent is subject to the jurisdiction of the BVI court, there is power to make a freezing order in support of foreign proceedings even though the applicant has not initiated substantive proceedings in the BVI and has neither the intention nor the ability to do so. According to Bannister J:

"...it seems to me that...there are sound policy reasons why important offshore financial centres, such as Jersey and the BVI, should be in a position to grant orders in aid where necessary. The business of companies registered within such jurisdictions is invariably transacted abroad and disputes between parties who own them and others are often resolved abroad. It seems to me that when a party to such a dispute is seeking a money judgment against someone with assets within this jurisdiction, it would be highly detrimental to its reputation if potential foreign judgment creditors were told that they could not, if successful, have resort to such assets unless they were to commence substantive proceedings here in circumstances where, in all probability, they would be unable to obtain permission to serve them abroad – thus presenting them with an effective brick wall or double bind..." (paragraph [15])

Having recognised that he had power to grant an order in these circumstances, Bannister J was satisfied that such relief should be afforded to the applicant in support of proceedings in South Africa against an individual (in relation to whom no proceedings had been, or could be, commenced in the BVI) so as to freeze the assets of two BVI companies which were said to be wholly owned or controlled by the defendant to the South African proceedings.

The existence of this jurisdiction (and also of the BVI court's jurisdiction to appoint a receiver in aid of foreign proceedings) was confirmed by the BVI Court of Appeal in *Yukos CIS Investments Ltd & Anr v Yukos Hydrocarbons Investments Limited & Ors* HCVAP 2010/028⁹.

In giving the majority judgment of the BVI Court of Appeal, Kawaley JA also provided further guidance as to when it would be appropriate to make such an order:

- Establishing justice and convenience will ordinarily require “*at a minimum*” proof of a good arguable case that the applicant will obtain a judgment from the Primary Court in the substantive proceedings enforceable against the defendant (paragraph [139]);
- Whilst the jurisdiction is not confined to orders in support of foreign proceedings where the claimant is seeking a monetary judgment (contrary to indications to this effect in *Black Swan*¹⁰), there must be a prospect that the applicant will be able to execute the judgment obtained in the Primary Jurisdiction against local assets sought to be frozen either because:

⁹ See too the very recent re-endorsement of this jurisdiction in the judgment of the Eastern Caribbean Supreme Court dated 5 February 2014 in *Tsoi Tin v Tan Haihong & Anr* BVIHCMAP 2013/0023 per Pereira CJ at paragraph [12].

¹⁰ It will be noted that in the passage from paragraph [15] of Bannister J's judgment quoted above he only confined his observations on the availability of ancillary freezing orders to those where the claimant sought injunctive relief in support of a monetary judgment. However it is likely this was simply because the recognition of non-monetary judgments is more restricted within the BVI: enforcement at common law generally requires a final and conclusive monetary judgment whilst the only judgments of the High Court of England and Wales that may be registered are final conclusive judgments for a specified sum of money (see the Reciprocal Enforcement of Judgments Act 1922). As such fresh BVI proceedings will need to be commenced in respect of non-money judgments with reliance placed upon the doctrine of issue estoppel to counter any attempt by the defendant to re-litigate that which has already been determined by the foreign courts. Such BVI proceedings will only be permissible if the BVI recognises the cause of action relied upon and the BVI courts have jurisdiction.

- The judgment obtained in the Primary Jurisdiction is a monetary judgment enforceable against such local assets; or
- The court of the Primary Jurisdiction has made a proprietary judgment in respect of such local assets which affords the applicant control of them¹¹ (paragraph [139]);
- So long as the judgment is enforceable against local assets, there is no need for the cause of action pursued in the Primary Jurisdiction to have a local BVI equivalent (paragraph [148]);
- An important discretionary factor will often be the failure to seek, or refusal of, equivalent interim relief in the Primary Jurisdiction (paragraph [140]);
- Interim relief may be granted against third parties to the proceedings in the Primary Jurisdiction who are resident in the BVI, albeit that this will almost always require the applicant demonstrating the ability:

“to either (a) enforce the relevant foreign judgment against the third parties’ assets, or (b) assert a local cause of action likely to result in a local judgment enforceable against third parties to the foreign litigation who are within the territorial jurisdiction of the local court” (paragraph [149]).

The requirement that the anticipated judgment of the Primary Court in the substantive proceedings must be one which is capable of enforcement against local assets was recently considered further by Bannister J in *Osetinskaya v Usilett Properties* [Claim No. 0037 of 2013]¹²:

- Amongst other relief, the applicant sought an order from the BVI court against a BVI company preventing it from giving effect to dealings with its shares or from dealing with any of its property;
- This application arose out of proceedings commenced against two individuals in Cyprus who were alleged to have wrongfully transferred a hotel in Finland to the BVI company;
- The applicant feared that the shares of the BVI company or the hotel itself might be transferred onwards and therefore sought an order in the terms described above;
- It was argued on behalf of the BVI company that, insofar as the Finnish hotel was concerned, the relief sought did not concern local assets;
- Bannister J disagreed, holding that whilst Kewaley JA in *Yukos* had made reference to a requirement that the freezing order relate to local assets, “[w]here those assets are shares situate within the jurisdiction which provide the alleged foreign wrongdoers with 100% control of a BVI registered company, it will usually be just and convenient to prevent the shares from being rendered worthless by restraining the company from disposing of its property, whether that property is

¹¹ For this reason the applicant in *Yukos* failed because the effect of the judgment of the Primary (Dutch) Court would only have been to give them control of a parent company rather than to allow them to enforce directly against the shares of its BVI subsidiaries.

¹² See the judgment dated 25 July 2013 available at <http://www.eccourts.org/natali-osentinskaya-v-golante-management-ltd-and-usilett-properties-inc/>

situate in the BVI or abroad, at any rate whether the evidence shows that it is a non-trading single asset holding company”;

- In Bannister J’s view this could be regarded either as implicit within the *Black Swan* jurisdiction of the BVI court¹³, or as part of (or an extension of) the *Chabra* jurisdiction (discussed further in the second part of this paper).

The *Black Swan* jurisdiction is therefore an extremely valuable tool for claimants who wish to preserve BVI assets for the purposes of enforcing any judgment ultimately obtained in the Primary Jurisdiction because:

- It is available against both (1) CADs; and (2) NCADs holding assets against which a foreign judgment obtained against a CAD may be enforced or against whom ancillary proceedings may be brought in the BVI; and
- In the context of BVI incorporated holding companies, ancillary freezing orders may be sought preventing them from disposing of their property wherever in the world it is situated so long as this is necessary to prevent the shares in such companies (which are clearly assets within the jurisdiction) from being rendered worthless.

Rule 7.3(2)(b) of the Rules of the Eastern Caribbean Supreme Court (the “ECSC Rules”) permits service out where a claim is sought “for an injunction ordering the defendant to do or refrain from doing some act within the jurisdiction”. Further, the ECSC Rules do not contain the prohibition contained in the Cayman Islands Grand Court rules (discussed below) prohibiting service out where a claim seeks only injunctive relief. In these circumstances it would seem that a CAD may be served out of the jurisdiction with proceedings which solely seek injunctive relief in aid of foreign proceedings against such CAD.

However not only is there no provision in the ECSC Rules permitting service of a claim seeking injunctive relief against a NCAD outside of the jurisdiction, it is clear from *Black Swan* and *Yukos* that an essential aspect of the jurisdiction to grant interim relief against NCADs in support of foreign proceedings is that they are already subject to the jurisdiction of the BVI court. Although there appears to be no reported case on the subject, it would seem from this that an application for a freezing order against a NCAD may not be served out of the jurisdiction.

Disclosure orders

In *JSC BTA Bank v Fidelity Corporate Services Ltd & Ors* HCVAP 2010/035 it was accepted by the BVI Court of Appeal that the BVI High Court has jurisdiction to grant disclosure orders in support of foreign proceedings in accordance with *Norwich Pharmacal* principles (i.e. that a wrong has been committed, that the respondent is mixed up in it and that the order is necessary) (paragraph [18]). The BVI Court of Appeal proffered the following further guidance:

- It is no barrier to the availability of such relief that the wrong has been committed abroad and that redress is only being sought in respect of such wrong in foreign proceedings;

¹³ One of the effects of the order granted in *Black Swan* having been to prevent a BVI company dealing with real property it owned in South Africa – see paragraph [11] of Bannister J’s judgment in *Osetinskaya*.

- Further, and of especial significance for those who provide offshore corporate services, the Court of Appeal overturned the first instance decision of Bannister J and held that the respondent service providers who had incorporated and administered, and served as the registered agents and offices for, certain BVI companies said to have been used as a vehicle of fraud facilitated the commission of such fraud and therefore were sufficiently mixed up in it so as to justify the making of a disclosure order against them (paragraph [27]);
- In this regard, the Court of Appeal considered it to be highly material that the nature of the functions performed and duties owed by such corporate service providers (including due diligence requirements) made it inherently likely that they would have information disclosing the instructing or controlling minds behind the companies alleged to have been used for the purposes of the fraud (paragraph [28]).

Cayman

Freezing Orders: The position at common law

In *Deloitte & Touche, Inc v Felderhof & Ors* 2011(2) CILR 36 the Cayman Islands Court of Appeal made clear that at common law:

- The Courts of the Cayman Islands can grant freezing relief against a CAD in aid of proceedings pending in a foreign jurisdiction against such CAD even where no such proceedings are on foot in the Cayman Islands (or, as in *Felderhof*, where the Cayman Islands' proceedings have been stayed) - all that must be shown is there is a good arguable case that the foreign proceedings will lead to a judgment enforceable in the Cayman Islands (paragraphs [51]-[52]);
- The courts of the Cayman Islands can also grant freezing relief against NCADs owning property which is likely to be available to satisfy any judgment against a CAD obtained in foreign proceedings so long as there are substantive proceedings on foot within the courts of the Cayman Islands against the CAD (albeit that it matters not that such proceedings have been stayed) (paragraphs [53]-[55]);

However until recently it was not clear that a freezing order could be obtained against a NCAD in the absence of substantive proceedings in Cayman against a CAD. This was so because of the decision of Cresswell J in *VTB Capital Plc v Universal Telecom Management & Ors* 2012 (1) CILR 7.

- In *VTB Capital* the Claimant had originally sought freezing relief in the Cayman Islands against a Mr Malofeev, a CAD to the substantive proceedings that had been commenced by VTB Capital in England, as well as against two Cayman corporate NCADs which it was claimed were owned by Mr Malofeev;
- In an earlier decision of Cresswell J (upheld by the Court of Appeal (2011 (2) CILR 421)) it had been held that O.11, r.1(1) of the Grand Court Rules did not permit service out of the jurisdiction where the proceedings to be served were solely concerned with interim relief in connection with foreign proceedings – according to Chadwick P at paragraph [27] to do so required an amendment to the Grand Court law and that was to be left to the legislature;

- In light of this, the claimant had been unable to serve, and therefore to proceed further with, its application for a freezing order against Mr Malofeev himself, there being no possibility of the claimant being able to advance substantive proceedings against Mr Malofeev in the Cayman courts.
- In these circumstances there was no CAD capable of being brought before the Cayman Court;
- However the two Cayman corporate NCADs could be served within the jurisdiction;
- The question was whether or not the court had jurisdiction to grant a freezing order against them;
- Cresswell J at first instance noted both the utility of such relief and the fact that it was available in the BVI under the *Black Swan* jurisdiction;
- However he ultimately decided that such relief was precluded in Cayman by the decisions of the Cayman Islands Court of Appeal in *Algozaibi & Bros Co v Saad Invs. Co. Ltd* 2011 (1) CILR 178 and *Felderhof*;

On 4 June 2013 the Cayman Islands Court of Appeal (with Chadwick P presiding and giving the judgment of the court) (unreported; CICA 1 of 2012) held that Cresswell J was wrong and that the courts of the Cayman Islands do have such jurisdiction, albeit that on the facts of VTB Capital the requirements for such relief were not made out.

As Chadwick P explained at paragraphs [35] to [41] of his judgment:

- Cresswell J had misconstrued certain passages in *Algozaibi* and *Felderhof* which established no more than that freezing relief would not be granted against a NCAD unless the claimant might be able to invoke some process of enforcement which would lead assets of the NCAD becoming available to satisfy a judgment against the CAD (in relation to which see further below) and a risk of dissipation of such assets;
- Neither case stood for the proposition that such process of enforcement must be a judgment obtained against the CAD in the Cayman Islands;
- As such the Cayman Court does have jurisdiction to grant freezing relief against a NCAD even where no CAD is before the jurisdiction of the court.

Chadwick P then went on to set out certain guidelines for the granting of such relief as follows (paragraph [47]):

- The person against whom freezing relief is sought must be subject to the jurisdiction of the Court;
- Whilst there is no requirement that the substantive claim against the CAD should be pursued in the court in which the freezing order is sought, the substantive claim against the CAD must be founded upon a cause of action recognised by the court in which the freezing order is sought¹⁴;

¹⁴ N.b. this requirement is arguably inconsistent with Chadwick P's (*obiter*) view in *Felderhof* that where a freezing order is sought in support of foreign proceedings against a CAD "the real question is not whether the cause of action pleaded in the [foreign proceedings] would be justiciable here: the real question is whether a

- There is no requirement that freezing relief should also be sought against the CAD in the court in which a freezing order is sought against an NCAD, neither need the CAD to be subject to the jurisdiction of the court seized with the application for freezing relief against the NCAD.

It will be noted that although aimed at granting relief in similar circumstances to those catered for by the *Black Swan* jurisdiction in the BVI, the test propounded by Chadwick P in *VTB Capital* appears to be different to that set out by the BVI Court of Appeal in *Yukos*. In particular:

- It would appear that in Cayman it is not a requirement for the obtaining of freezing relief that it be sought in connection with a judgment which ultimately will be enforceable against local assets so long as the order sought concerns a respondent subject to the jurisdiction of the courts of the Cayman Islands;
- It may be necessary in Cayman, but is not necessary in the BVI, to show that the cause of action being pursued in the foreign proceedings would be justiciable in the domestic court¹⁵.

Disclosure Orders

Following the first instance (Henderson J) and Court of Appeal decisions in *Gianne v Miller and Condoco Grand Cayman Resorts Limited* (2006 CILR Note 26; 2007 CILR Note 10), the position in Cayman is that:

- Disclosure orders may be obtained in support of foreign proceedings in the absence of Cayman proceedings¹⁶: in *Gianne* a wife was able to obtain information pursuant to a Cayman *Norwich Pharmacal* order for the purposes of demonstrating in Californian divorce proceedings that her former husband had failed to disclose certain Caymanian real estate assets;
- Disclosure orders will be granted even where statute permits a foreign court to request assistance with the obtaining of evidence from the Cayman Islands courts¹⁷ - in this regard, disclosure orders may be available where they might not be available in England and Wales (cf. *Mitsui v Nexen* [2005] EWHC 625 in which the availability of the information through other means was fatal to the application for *Norwich Pharmacal* relief);
- Further, disclosure orders are not confined to situations where the information is needed in order to commence proceedings - the position is the same as that which pertains in England whereby (*per* Lightman J in *Mitsui v Nexen* at paragraph [19]) relief may be obtained “*where the identity of the wrongdoer is known but where the claimant requires disclosure of crucial information in order to be able to bring its claim or where the claimant requires a missing piece of the jigsaw*”.

judgment [obtained against the CAD in the foreign proceedings] *could be enforced against him in the Cayman Islands*”.

¹⁵ See footnote 14 above: there were indications in the judgment of Chadwick P in *Felderhof* that there is no such justiciability requirement in Cayman.

¹⁶ Or (as was the case in *Gianne v Miller*), a *Norwich Pharmacal* order obtained at a time when Cayman proceedings are ongoing will not be discharged simply because the Cayman proceedings are dismissed.

¹⁷ As was provided for in the circumstances that pertained in *Gianne v Miller* by the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978 extending the effect of the UK Evidence (Proceedings in Other Jurisdictions) Act 1975 to the Courts of the Cayman Islands.

A matters stand O.11, r.1.1(b) of the Grand Court Rules does not permit service out of applications for disclosure orders.

Interim orders in support of foreign proceedings: proposed statutory amendment

As noted above, in the first decision of the Cayman Islands Court of Appeal in *VTB Capital*, Chadwick P. held that the Cayman courts have no power to order service out of proceedings which seek only freezing relief (or solely seek any other injunctive relief) in support of foreign proceedings. In Chadwick P's view, legislative intervention was needed to confer such a power. In reaching this conclusion Chadwick P. noted that the Cayman Islands Law Reform Commission (the "LRC") was considering this very issue.

The LRC has now issued its final report. This recommends both that the grant of interim relief in support of foreign proceedings (including freezing and disclosure orders) be placed upon a statutory footing, and that the rules of the Grand Court be amended so as to permit service out of application for such relief. In particular:

- Having considered a range of statutory regimes governing the grant of interim relief in support of foreign proceedings from across the common law World, the LRC recommended that a new section 11A be inserted into the Grand Court Law (2008 Revision) ("GCL") based upon the Hong Kong High Court Ordinance 2009;
- This would permit the Grand Court to appoint a receiver or grant other interim relief (save for a warrant for the arrest of property or the obtaining of evidence) in relation to foreign proceedings which have been or are about to be commenced and which are capable of giving rise to a judgment which may be enforced in the Cayman Islands;
- Further, s.11A(4) of the revised GCL would make explicit that interim relief may be granted notwithstanding that:
 - o The subject matter of the foreign proceedings would not otherwise give rise to a cause of action justiciable in the Cayman Islands; and/or
 - o The interim relief sought is not ancillary or incidental to any proceedings in the Cayman Islands;
- In addition s.11A(8) of the revised GCL will expressly provide for rules to be made permitting an application for the appointment of a receiver or other interim relief to be served out of the jurisdiction.

As noted in the Final Report, although the Hong Kong Ordinance and the 1982 Act are very similar, and have as their common object the facilitation of foreign interim relief, the main reasons for the LRC recommending that the Hong Kong model be followed were that:

- The 1982 Act provides for executive intervention in the form of an order in council restricting the types of interim relief available and/or making different provision for different classes of proceedings in different jurisdictions whereas the view of the LRC was that "*the grant of interim relief should fall solely within the purview of the Grand Court*"; and
- The Hong Kong statute expressly provides that interim relief is only to be granted where the foreign judgment would be enforceable within the jurisdiction (which

the LRC considered to be desirable) whereas the 1982 Act contains no such express limitation.

Notwithstanding that the proposed new s.11A does not follow precisely, and is not expressly derived from, the 1982 Act it nevertheless seems very likely that the Cayman courts will have regard to the jurisprudence that has developed in England and Wales in relation to the 1982 Act, and in particular the guidance (discussed above) as to when it will be inexpedient to make an interim order in support of foreign proceedings, in exercising their discretion thereunder.

THE CRITERIA FOR GRANTING FREEZING RELIEF AGAINST NCADS

Since the decision of Mummery J (as he then was) in *TSB Private International Bank S.A. v Chabra & Anr* [1992] 1 WLR 231, it has been possible to obtain freezing relief against NCADs holding assets on trust for CADs so as to ensure that such assets remain available to satisfy any judgment ultimately obtained by the claimant against the CAD.

As early as 1999 the High Court of Australia (“HCA”) in *Cardile v Led Builders Pty Ltd.* (162 ALR 294 at paragraph [57]), had suggested that freezing orders against NCADs ought to be available even where it could not be shown that the assets were held by the NCAD on trust for the CAD. In particular, the HCA considered that that such relief may be appropriate where:

“(i) the third party holds, is using, or has exercised or is exercising a power of disposition over, or is otherwise in possession of, assets, including ‘claims and expectancies’ of the judgment debtor or potential judgment debtor; or

(ii) some process, ultimately enforceable by the courts, is or may be available to the judgment creditor as a consequence of a judgment against that actual or potential judgment debtor, pursuant to which, whether by appointment of a liquidator, trustee in bankruptcy, receiver or otherwise, the third party may be obliged to disgorge property or otherwise contribute to the funds or property of the judgment to help satisfy the judgment against the judgment debtor”

As noted by Briggs J (as he then was) in *Revenue & Customs Commissioners v Egleton* [2006] EWHC 2313 (Ch) at paragraph [29]:

“It will readily be apparent that the literal application of the second limb of the principle set out in [the HCA decision in Cardile] is potentially of extremely wide application. It appears to contemplate that jurisdiction exists to make a freezing order against any potential debtor of an individual or company against whom the claimant has a cause of action, upon the footing that since enforcement of a judgment against the debtor may lead to its liquidation or (if an individual) bankruptcy, and since a liquidator or trustee in bankruptcy may then be able to pursue claims against third parties, then jurisdiction exists to enable the plaintiff to seek a freezing order against any such third parties, always assuming that the other discretionary considerations, such as a risk of dissipation of assets, are satisfied”

However Briggs J ultimately concluded that it would be unduly restrictive to limit the circumstances in which such injunctions could be granted to those where it was shown that assets were held beneficially for the CAD by the NCAD and, therefore, that:

“...once the relatively clear [Chabra] boundary line is breached, there is no wider boundary which has any sufficient clarity to serve as a workable condition to the existence of jurisdiction, than the broad confines of the second limb of the principle [expounded by the HCA in Cardile]” (paragraph [40]).

That this is also the law in the Cayman Islands has been affirmed by the Cayman Islands Court of Appeal in its decisions in *Algosaibi* (paragraphs [17]-[32]) and *Felderhof* (paragraph [55]).

Further, both Briggs J and the Cayman Islands Court of Appeal in *Algosaibi* rejected an additional “*causation*” limitation suggested on the jurisdiction to grant freezing orders against NCADs suggested by Aikens J in *C Inc Plc v L* [2001] 2 All ER (Comm) 446. This was to the effect that a freezing order against a NCAD would only be granted where the right held by the CAD against the NCAD which would enable the assets of the NCAD to be used to satisfy the judgment against the CAD arose from the right that the claimant has against the CAD (see Briggs J at paragraph [42] in *Egleton* and Chadwick P. at paragraph [32] in *Algosaibi*).

However in *Algosaibi* the Cayman Islands Court of Appeal rejected a further relaxation of the preconditions for the grant of freezing relief against NCADs which appeared to have been countenanced by Henderson J at first instance. This relaxation would have permitted a freezing order to be made against a NCAD “*simply because the NCAD has become mixed up in an attempt by the CAD make himself judgment-proof*” or because it could be said that the CAD had substantive, as opposed to legally enforceable, control over assets in the possession of the NCAD. As stated in the judgment of Chadwick P. at paragraphs [42]-[43]:

“It is necessary to keep in mind the basis upon which a court exercises the Mareva jurisdiction. It is to ensure that the effective enforcement of its judgment (when obtained) is not frustrated by the dissipation of assets which would be available to the claimant in satisfaction of that judgment. It is trite law that the jurisdiction is not exercised in order to provide the claimant with a security for his claim which he may otherwise have. But, as it seems to me, it is equally plain, as a matter of principle, that the jurisdiction is not exercised in order to give the claimant recourse to assets which would not otherwise be available to satisfy the judgment which he may obtain. The court needs to be satisfied of two matters before granting Mareva relief. First, that there is good reason to suppose that the assets in relation to which a freezing order is imposed would become available to satisfy the judgment which the claimant seeks; and, second, that there is good reason to suppose that, absent such relief, there is a real risk that those assets will be dissipated or otherwise put beyond the reach of the claimant.

*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 (a) 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 (b) that there is some other process of enforcement by which the claimant can obtain recourse to the assets held by the NCAD.

Chadwick P.'s conclusions in this regard were endorsed by Popplewell J at first instance in the Commercial Court case of *PJSC VAB v Maksimov & Ors* [2013] EWHC 422 (Comm). However, Popplewell J added at paragraph [7(5)] that substantial control is nevertheless relevant for two reasons:

“First, evidence that the CAD exercises substantial control over the assets may be evidence from which the Court will infer that the assets are held as nominee or trustee for the NCAD as the ultimate beneficial owner. Secondly, such evidence may establish that there is a real risk of dissipation of the assets in the absence of a freezing order, which the claimant will have to establish in order for it to be just and convenient to make the order. But the establishment of substantial control over the assets by the CAD will not necessarily be sufficient: a parent company may exercise substantial control over a wholly owned subsidiary but the principles of separate corporate personality require the assets to be treated as those of the subsidiary not the parent. The ultimate test is whether there is good reason to suppose that the assets would be amenable to execution of a judgment obtained against the CAD”

In line with these principles, the Courts have been satisfied that freezing relief was appropriate against NCADs where:

- It is to be inferred from the substantial control exercised by the CAD that assets are in reality held by a NCAD on trust or as a nominee for the CAD (*Maksimov* at paragraph [37]);
- Where a NCAD appears to be beneficially entitled to, or able to exercise control over, a corporate structure which there is a good arguable case to suggest is in reality a device for holding assets of the CAD (*JPSPC 4 v Schools* [2013] EWHC 4156 (Ch) at paragraphs [30]-[35]);
- Where the CAD has a debt or other receivable owing to it by, or a claim or potential claim against a NCAD (*Parbulk II AS v PT Humpus Intermoda Transportasi TBK* [2011] EWHC 3143 at paragraph [56]¹⁸);
- Where certain corporate NCADs held monies in accounts in their name for the sole purpose of paying them to the CAD subject only to a prior right to payment from such accounts held by the CAD's bankers in the event of a default by the CAD, which default was unlikely to arise (*Yukos v Rosneft* [2010] EWHC 784 (Comm) per David Steel J at paragraph [26]-[28]);
- Where the claimant would be entitled to appoint a liquidator, trustee in bankruptcy, receiver or otherwise able to enforce the rights of the CAD against the NCAD – examples of such rights would include:
 - The rights of a corporate CAD against director NCADs;

¹⁸ N.b. the views of Gloster J set out below that if a less intrusive order may be expected adequately to secure the receivable the court will favour making it over fully fledged freezing relief.

- The rights to set aside transfers to NCADs by CADs as shams, transactions defrauding creditors, preferences, or transactions at an undervalue under local or foreign law;
- The rights of a trustee in bankruptcy to appoint a liquidator in respect of corporate NCADs ultimately owned or controlled by the CAD

(HCA in *Cardile* at paragraph [57]; *Egleton* per Briggs J at paragraphs [48]-[51]¹⁹; *Basra v Poole* per Warren J at paragraph [9]²⁰; *Algoasibi* per Chadwick P. at paragraph [92]; *Felderhof* per Chadwick P. at paragraphs [10] and [54]-[55]);

- Where the claimant would be able to obtain an order from the court requiring a power of revocation in respect of trust assets held by a NCAD to be assigned to it by a CAD (*TMSF v Merrill Lynch Bank & Trust Co (Cayman) Ltd* [2011] UKPC 17²¹; *JSC VTB Bank v Skurikhin & Ors* [2012] EWHC 3116 (Comm) – see also *Blight v Brewster* [2012] EWHC 165)

Conversely freezing relief will not be granted against NCADs in the following situations:

- Where the CAD has substantive control of, but no beneficial interest in, a discretionary trust (this was a specific example given by Chadwick P in *Algoasibi* at paragraph [50] as to when freezing relief against a NCAD will not be granted);
- Where execution against the assets held by the NCAD depends upon an order of a foreign court and it is unlikely that the foreign court will make such an order (*VTB Capital (CICA 1 of 2012)* at paragraphs [53]-[55])²²;
- Where execution against the NCAD would involve an impermissible piercing of the corporate veil (*Linsen International Limited v Humpuss Transportasi Kimia* [2011] EWCA Civ 1042).

Furthermore, freezing relief will not be granted in circumstances where there is no evidence that the NCADs against whom such relief is sought have any assets, there being no risk of dissipation of assets that might be available to meet the judgment of the claimant in such cases. It will therefore be necessary to persuade the court that a putative NCAD either has assets of which there is a real risk of dissipation, or will be the recipient of such assets in the future (albeit that where there is an arguable case of fraud the court will treat any assertion

¹⁹ In paragraphs [48]-[51] of his judgment in *Egleton* Briggs J stressed that in circumstances where the hearing of a winding up petition is imminent, it may only be appropriate to grant a freezing order for such time as will enable the office holder to be appointed and consider whether or not to continue such relief. He added that it would normally be appropriate to seek the appointment of a provisional liquidator rather than to obtain a freezing order and that cogent reasons would for departing from this course.

²⁰ At paragraph [10] of his judgment in *Basra* Warren J stressed the importance of clearly formulating the basis upon which it is alleged assets of the NCAD will become available to meet the liability of the CAD in an application for freezing relief against a NCAD.

²¹ In his judgment in *Algoasibi* Chadwick P. suggested at paragraph [53] that a freezing order would not be able against a NCAD in these circumstances. However his judgment was handed down before the successful appeal to the privy council in *TMSF* which overturned the decision of the Cayman Islands Court of Appeal and held that a receiver by way of equitable execution could be appointed over a power of revocation held by the CAD in that case. Given this development it would not seem that freezing relief ought to be available in such circumstances.

²² In *VTB Capital* the claimant would only have been able to enforce an English judgment against shares in a Cayman entity by the appointment of a receiver over the BVI company which held such shares. Cresswell J at first instance was not satisfied that the BVI court would make such an order when considering whether to grant freezing relief and by the time the Court of Appeal came to give judgment the BVI court had expressly refused to grant such relief.

to this effect with considerable caution) (*Algoasibi*, per Chadwick P. at paragraphs [70]-[71] and [87]).

Finally, it is to be noted that the court will generally try to make an order which causes the minimum degree of disruption to the third party necessary to safeguard the asset in question. Thus as Gloster J noted in *Parbulk II AS v PT Humpus Intermoda Transportasi TBK* [2011] EWHC 3143 at paragraph [56]:

*“In circumstances where a defendant/judgment debtor (i.e. a cause of action defendant (“CAD”), against whom it is appropriate to make a freezing order at the suit of a claimant, has a debt, or other receivable owing to it by a third party NCAD, or a claim, or potential claim, against a third party NCAD, the English court has jurisdiction...to grant a freezing order against the third party NCAD, in appropriate circumstances, to restrain the NCAD from dissipating its assets up to the amount of its debt to, or the claim by, the CAD or judgment debtor. Such an order is doing no more than protecting the right, or contingent right, of the claimant (whether by a third party debt order, charging order, appointment of a receiver or liquidator etc.) to obtain satisfaction of its judgment debt against the defendant by means of attachment, or other collection, of the proceeds of the latter's receivable from, or claim against, the third party. **Whether the court grants such an order against the third party will be a matter for the exercise of its discretion, depending on the particular circumstances of the case. Normally, if there is no reason to doubt the propriety of the third party, it may well be sufficient, for example, to injunct the defendant from collecting the receivable, otherwise than by instructing the third party to pay it into a designated account. In other circumstances, it may be appropriate, at an interlocutory stage, to appoint a receiver over the receivable/claim against the third party in order to enable the receiver to collect it and pay it into court, or an escrow account, or otherwise preserve the receivable/claim from dissipation by the defendant/judgment debtor. But if, for example, the circumstances show collusion, or impropriety, or some participation, on the part of the third party, in attempts by the defendant/judgment debtor to render itself judgment proof, then it may be appropriate for a freezing order to be granted against the third party itself.”***

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