

Serle Court International Trusts and Commercial Litigation Conference 2018

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**Freezing Orders: A Return to Orthodoxy?**

***FM Capital Partners v Marino and others* [2018] EWHC 2889 (Comm)**

Introduction

Following the Supreme Court’s decision in *JSC BTA Bank v Ablyazov (No 10)* [2015] UKSC 64 there had been debate as to proper interpretation and application of the “extended definition” (as described by Christopher Clarke J in *JSC BTA Bank v Ablyazov (No 5)* [2012] EWHC 1819 (Comm))in standard form freezing injunctions. In particular, could it bite on the assets of a non-defendant company of which the respondent to such an order was a 100% beneficial owner and director? The recent decision of Peter MacDonald Eggers QC, sitting as a Deputy High Court Judge, provides welcome clarification and an affirmation of orthodox company law principles.

Application to vary the Freezing Order

The third defendant, Mr Ohmura, was made the subject of a freezing order including the extended definition after being found liable for dishonest assistance in the first defendant’s breach of fiduciary duty and bribery at trial. He sought to challenge the terms of the freezing order, in particular:

* Within the the extended definition had been added ‘*a body corporate*’; and
* The order made specific reference to the assets of three non-defendant companies (‘**NDCs**’) in which Mr Ohmura was (directly or indirectly) 100% beneficial owner and of which he was a director along with his sister.

Mr Ohmura said that those references ought to be removed as the assets of the NDCs properly belonged to the NDCs as legal persons not to Mr Ohmura.

Conflicting Authorities: Ownership v Control

As a matter of orthodox company law, Mr Ohmura appeared to have the better of the argument. Indeed, the Court of Appeal confirmed as much in *Lakatamia Shipping Co Ltd v Su* [2014] EWCA Civ 636. Rejecting Beatson J’s first instance ruling that the assets of such NDCs fell within the extended definition by virtue of the respondent’s control of them *qua* shareholder as ‘*heretical*’, the Court of Appeal held that a freezing order was only meant to cover assets belonging to the Respondent. All the extended definition was designed to do was bring in assets held by a third party as trustee to the Respondent’s instructions. As Sir Bernard Rix confirmed, it was not right to say that a 100% shareholder-director was “instructing” the company when he *qua* director caused it to dispose of assets; rather, he did so as the company’s agent. The appeal was ultimately dismissed, however, on the basis that it was appropriate to impose notice requirements that covered a respondent’s dealings *qua* director (subject to ordinary business exceptions) as those could diminish the value of the shares which were relevant assets.

The extended definition was considered again by the Supreme Court in *Ablyazov (No 10)*. That case did not involve NDCs; rather, the Respondent had, subsequent to the freezing order being made, entered into certain agreements for the provision of loans. The terms permitted him to use those funds at his sole discretion and to direct the lender to pay those monies to third parties. Lord Clarke, delivering the judgment of the court, held that as matter of settled principles applicable to freezing orders, a chose in action in the form of the right to draw down lending was not an “asset” per se. Crucially, however, Lord Clarke found it could fall within the extended definition. This was because the ‘*whole focus*’ of that extension was to cover assets that did *not* belong to the Respondent (legally or beneficially) but which he controlled and a power to dispose of.

Reconciliation and Return to Orthodoxy

In *FM Capital*, therefore, the Deputy Judge was faced with an argument that *Lakatamia* was overruled and that the “control” thesis of the Supreme Court meant that assets of the NDCs could fall within the extended definition. This also squarely raised the issue of separate legal personality and whether it would be appropriate for a freezing order to effectively pierce the corporate veil (especially where there was no compelling evidence the companies were mere foils for Mr Ohmura).

The Deputy Judge was able to reconcile the two cases and reach a conclusion that affirmed orthodox company principles:

1. The judge held that the *ratio* of *Lakatamia* was, in fact, rather narrow. All that been required to dispose of the appeal had been the finding that the notice requirements were appropriate to preserve value in the shares of the NDCs. The Court of Appeal’s comments on Beatson J’s ‘*heretical*’ findings and the proper construction of the extended definition were, therefore, effectively *obiter*.
2. There was a clearly an inconsistency between the Supreme Court’s control-based construction of the extended definition and that of the Court of Appeal focussing on ownership. Clearly the approach of the Supreme Court had to be favoured.
3. That did not, however, in the judge’s view mean the assets of the NDCs fell within the extended definition. The remainder of the Court of Appeal’s judgment concerning how, as a matter of orthodoxy, a director did not give instructions to a company but rather acted as its servant remained good law. Acting in such a manner did not qualify as ‘*control*’ even under Lord Clarke’s broader reading: the director-shareholder was only an organ of the company.

Following *Lakatamia*, however, the Deputy Judge held it would be appropriate to impose notice requirements concerning dealings with the NDCs so as to preserve the value in the Respondent’s shares.

Discussion

This judgment is to be welcomed as bringing clarity to this area of law, which is particularly important given the ever-changing means respondents adopt to circumvent the effectiveness of freezing orders. The Deputy Judge subjected the case law to careful analysis and the conclusion he reached is attractive as being consistent with importance attributed to separate legal personality by the Supreme Court in *Prest v Petrodel* [2013] UKSC 34. It is also pertinent to recall that Lord Clarke was not addressed on the specific issue of NDCs and their assets in *Ablyazov (No 10)*.

Claimants and their advisers should not, however, be overly disheartened by this outcome. First, it simply restores the understanding of the scope of freezing injunctions as previously understood. Secondly, the Court of Appeal in *Lakatamia* made clear that a freezing order with the extended definition could in ‘*exceptional circumstances*’ cover assets of NDCs, if the NDCs were shown to be non-trading ‘*pockets or wallets*’ of a respondent. Thirdly, the specific issue of NDCs falls within the *Chabra* jurisdiction and this perhaps offers a better forum in which to discuss the proper boundaries of such orders.

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