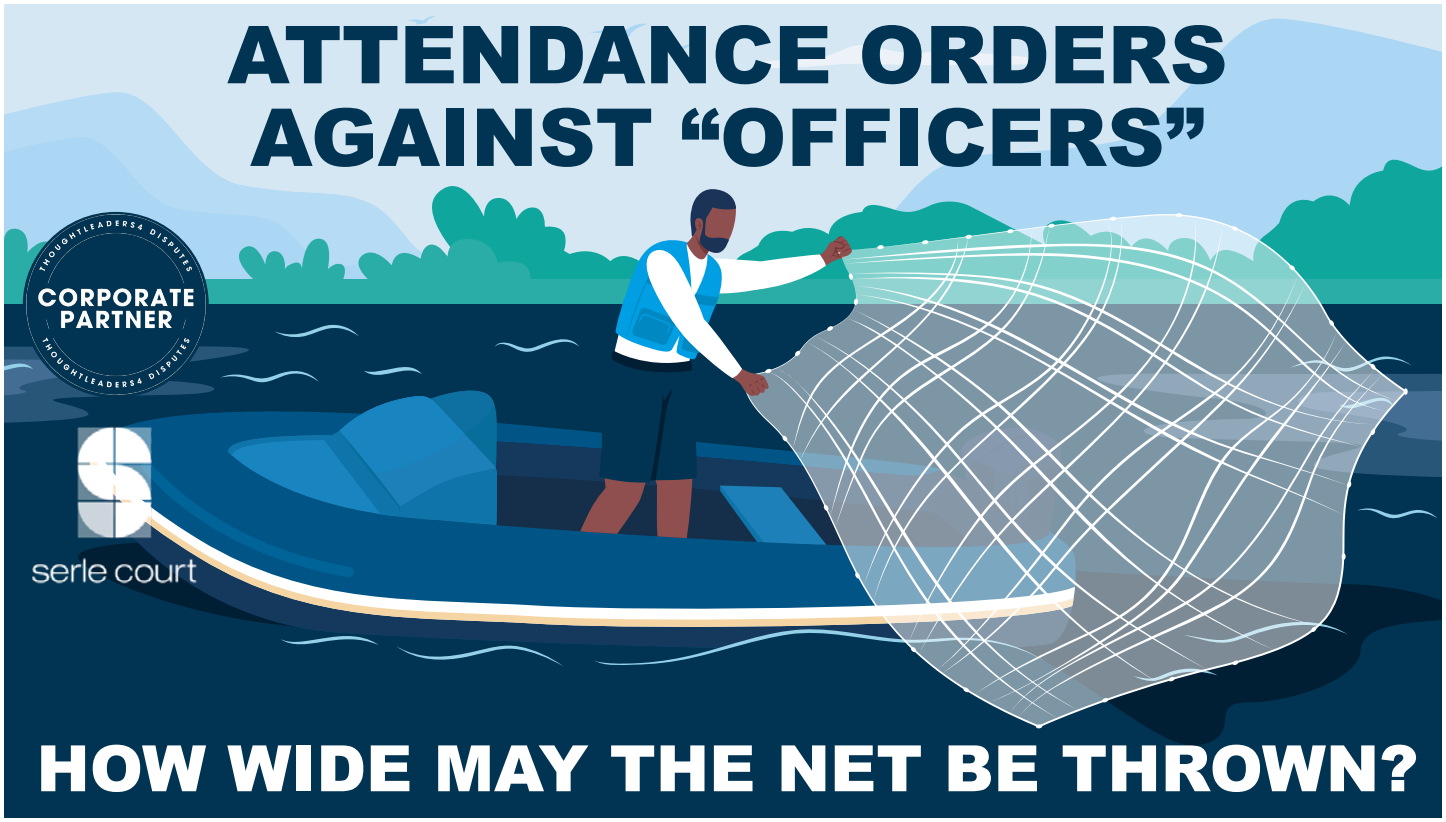
ATTENDANCE ORDERS AGAINST "OFFICERS"



HOW WIDE MAY THE NET BE THROWN?

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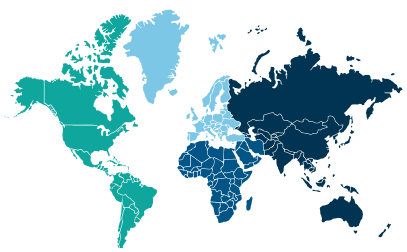
Introduction

Orders that a judgment debtor attend court for examination about their assets or means to satisfy an unpaid judgment debt ("Attendance Orders") are a vital enforcement tool in many common law jurisdictions.

Available in England and Wales, the Dubai International Financial Centre (DIFC) Courts, and other common law jurisdictions, Attendance Orders are of value precisely because the judgment debtor is at risk of committal for contempt if they lie or mislead, and can be cross-examined on answers that are partial or evasive.

However, where the debtor is a corporate entity, although Attendance Orders are typically available against its "officers", creditors seeking an Attendance Order can face additional challenges when seeking to enforce in an international commercial context.



Jurisdictional Limitations

A key challenge stems from the common requirement that an Attendance Order be served personally on the person ordered to attend court (see for example CPR 71.3 and RDC 50.12). This means that difficulties can arise if the company's officers are based abroad rather than being present within the relevant jurisdiction.

In Masri v Consolidated Contractors International Co SAL [2010] 1 A.C. 90 the UK House of Lords applied a presumption against extraterritoriality, holding that CPR 71 did not contemplate this procedure being used against company officers outside England and Wales. This was reinforced by the absence of any provision in the CPR for obtaining permission to serve such an Attendance Order out of the jurisdiction.

The High Court of England and Wales went even further in CIMC Raffles Offshore (Singapore) PTE Ltd v Yantai CIMC Raffles Offshore Ltd [2014] EWHC 1742 (Comm) the High Court, suggesting that an Attendance Order cannot be made unless the Respondent attendee is present within the jurisdiction both at the time the application for the order is made and at the time the order is made.

Who Can Be Ordered To Attend Court?

This raises a related issue as to which individuals are considered an "officer" of a corporate body for the purpose of an Attendance Order. In an international commercial context, significant individuals associated with a company may be located in a number of jurisdictions across the globe.

In a multinational corporate group, the real decision-makers in relation to a corporate entity may not be those formally appointed to its board of directors, but its controlling shareholders or partners, or indeed the directors of a parent company. Similarly, in many Middle Eastern jurisdictions, day to day management decisions are likely to be taken by a General Manager, who may in turn be

acting on the instructions of the majority shareholder and who is responsible to the shareholders or 'partners' in circumstances where the company may not have any registered 'directors'.

While it seems uncontroversial that a director is an "officer", judgment creditors may therefore wish to target other individuals meeting that definition – whether because they are likely to have better information about the company's assets or for the more prosaic reason that they happen to be the individuals present in the jurisdiction in which the creditor wishes to obtain an enforcement order.

In contrast to the Courts' caution about making orders with extraterritorial effect, there is a clear public interest in the effective enforcement of judgment debts. Consistent with the public policy in favour of enforcement, it is to be anticipated that the Courts will afford a broad interpretation to the term "officer" in the context of the relevant enforcement regime (be that CPR 71, RDC 50, or their equivalent).

Outside the specific context of Attendance Orders, the weight of legislative and judicial authority across the common law world supports a broad understanding of the term "officer" in relation to a body corporate.

In the Corporations Act 2001 of Australia, for example, in addition to directors, company secretaries and various others such as administrators, any "person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation" is deemed to be an "officer" (s 9AD(1)(b)(i)).

In the UK Companies Act 2006 and Insolvency Act 1986 (ss. 1173 and 251 respectively) the term is not exhaustively defined but is said to include a "manager", which is likely to include anyone who has taken some part in the management of the company's business, even at quite a low level. In Re A Company [1980] 1 Ch 138, the Court of Appeal of England and Wales (not overruled on this point by Re Racal [1981] AC 374) cautioned against a narrow interpretation, encouraged giving the term "officer" a meaning consistent with the purpose of the provision in which it appeared and held that it could capture anyone exercising a supervisory control in the company's affairs.

Such authorities as there are on the meaning of the term in the context of enforcement of judgments by Attendance Orders, on the whole, also tend in favour of a broad interpretation, consistently with the public policy interest in effective enforcement. In Société Générale du Commerce et De L'Industrie en France v Johann Maria Farina & Co [1904] 1 KB 794, the Court of Appeal of England and Wales held that an "officer" included a former officer of a company for the purposes of making an Attendance Order (commenting that it "might work serious injustice if an officer of a corporation merely by resigning his position could get rid of the responsibility of giving the information that is sought by a plaintiff"). In Vitol SA v Capri Marine Ltd [2009] Bus. L.R. 271 (QBD) the High Court acknowledged the force of this view, although it was ultimately unable to apply Vitol because the wording of the relevant provisions and practice direction had changed in such a way as to clearly exclude former officers.

There are early signs that the Courts of the DIFC have adopted a similarly pro-enforcement attitude to the interpretation of "officer" in the context of Attendance Orders. In Bocimar International N.V. v Emirates Trading Agency LLC [2015] DIFC CFI 008 (18 August 2016) it is recorded that the Chairman, Managing Director and Licensed Manager of the judgment debtor's parent company had been ordered to attend Court under RDC 50.

The Court's interpretation of "officer" in the context of Attendance Orders therefore appears to have been consistent with the broad approach adopted in other contexts across the common law world, such as in s 9AD(1)(b)(i)) of Australia's Corporations Act 2001.

Recently, in China State Constructing Engineering Corporation (Middle East) (L.L.C) v Zaya Living Real Estate Development L.L.C. [2023] DIFC ENF 316 (10 July 2024), the DIFC Court of First Instance gave a rare grant of permission to appeal against its own decision to enable the DIFC Court of Appeal to set a precedent on the breadth of interpretation of the term "officer" in the context of RDC 50, and specifically whether it could extend to a majority shareholder who had held themselves out as being the 'CEO' and who was likely to have involved in corporate decision-making at high level.

Conclusion

The outcome of that appeal will no doubt be closely watched by the creditors of corporate judgment debtors seeking to increase their recovery prospects. However, it can be seen that by affording a broader meaning to the term "officer", courts across the common law world can promote the public policy of effective enforcement while drawing some of the sting out of the jurisdictional limitations of Attendance Orders.

HOLDING THE PURSE STRINGS

WHEN THIRD-PARTY ASSETS ARE CAPTURED BY A FREEZING ORDER

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Following a first-of-its-kind decision in the High Court, there is now clarity that asset freezing orders can apply to third-party assets which are not directly legally or beneficially owned by a respondent, where it can be shown that the respondent has control over the assets and intends to dissipate them in order to frustrate a future judgment.

Freezing Order and Third Party Corporate Assets

A domestic freezing order will only apply to a respondent's assets held within the jurisdiction.

In respect of third-party corporate assets, even when the respondent is a shareholder, it is difficult to advance that the respondent is the owner of such assets for the purposes of Mareva relief.

Indeed, it was described by Hildyard J in Group Seven Limited v Allied Investment Corporation Limited and Others [2013] EWHC 1509 (Ch) as contradictory to "settled principles of company law". This default position is undeniably derived from the Salomon principle – that the company is a separate legal entity from its shareholders. This is complicated further where the individual in question does not own the shares or control the interested company solely.

Background to Mold v Holloway (1), Jacques (2) (As Yet Unreported)

The Claimant company brought a claim against of its two former directors (the Defendants) for breaching their statutory and fiduciary duties. Prior to issuing the claim, the Claimant successfully obtained a freezing order in August 2023 against the Defendants (the Freezing Order).

The Defendants' held shares in a number of other companies (the Third Party Companies). However, their shareholdings in the Third Party Companies did not exceed more than 50%, save for one exception. As a result, and in light of the principles set out above, the assets of the Third Party Companies were assumed to be sufficiently separate from the Defendants to fall outside of the scope of the Freezing Order.

As this is the typical approach to third party assets, the Claimant accepted this proposition in August 2023, and a number of variations were agreed by consent so as to allow the Third Party Companies (and their bank accounts) to operate without restriction.

In January 2024, however, the Claimant received anonymous text messages and phone calls threatening to denude the Third Party Companies of their assets. The Claimant was always of the view that these communications were from the Defendants. The Claimant

contended that the Defendants carrying out such threats would devalue the Third Party Companies, and therefore the Defendants' shares in them, with the purpose of frustrating any future judgment in the Claimant's claim against them. The Claimant believed that the communications showed the Defendants in fact exercised control over the Third Party Companies' assets.

The Application To Vary The Freezing Order

The Claimant therefore promptly applied to the High Court requesting an order vary the Freezing Order under section 37 of the Senior Courts Act 1981. The order sought would extend the Freezing Order to include the assets of the Third Party Companies, despite the companies being owned by the Defendants jointly with other shareholders.

It was submitted by the Claimant that there had been a material change of circumstances since the Freezing Order was granted in August 2023. When the order was first granted, the Claimant had not apprehended the Defendants' willingness and ability to deal with the assets of the Third Party Companies in such a way as to: (i) negatively affect the value of their shares in the Third Party Companies; and/or (ii) defraud their creditors by dissipating assets for the purposes of section 423 of the Insolvency Act 1986.

The application was not made pursuant to the Chabra jurisdiction (TSB Private Bank International SA v Chabra [1992] 2 All ER 245).

The application was instead predicated on the Claimant's proposition that the form of order should not depend on whether the Defendants legally or beneficially owned the company assets, but rather on whether the Defendants exercised control over the companies and their assets.

In support of this proposition, the Claimant pointed to the following authorities:

1. **Motorola v Hytera [2020] EWHC 980(Comm)[1]:** the court noted that an injunction may be granted over corporate assets so as to preserve the value of the shareholding against which a future judgment could be enforced. This is despite the company itself remaining a third party to the proceedings and retaining separate legal personality to the respondent.

2. **Group Seven Ltd v Allied Investment Corp [2014] 1 WLR 735[2]:** the court held that an injunction may be appropriate to preserve assets for later enforcement of a judgment debt, so long as the corporate is wholly owned and controlled by the respondent, and is deemed a 'pocket or wallet' of the respondent.

3. **JSC BTA Bank v Ablyazov [2015] UKSC 64[3]:** the Supreme Court determined that the extended definition of assets in paragraph 6 of the Commercial Court's standard form freezing order applies to assets over which the respondent has control, regardless of these assets being owned legally or beneficially by the respondents. Lord Clarke noted that "the whole point" of the extended definition is to catch assets which otherwise would not be caught. The extended definition of 'asset' in paragraph 6 reads as follows:

   Paragraph 5 applies 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 power if a third party holds or controls the asset in accordance with his direct or indirect instructions.

However, further application of Ablyazov in respect of third party corporate assets did indicate an alignment with the view of the Court of Appeal in Group Seven, with the expectation that such corporate assets are wholly owned by the respondent. In FM Capital Partners Ltd v Marino [2018] EWHC 2889 (Comm)[4], the Commercial Court observed that

1 https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Comm/2020/980.html
2 https://www.bailii.org/ew/cases/EWHC/Ch/2013/1509.html
3 https://www.bailii.org/uk/cases/UKSC/2015/64.html
4 https://www.bailii.org/ew/cases/EWHC/Comm/2018/2889.html

the freezing order could be applied to assets of a third-party corporate entity, provided that: (i) the company is wholly owned or controlled by the respondent; and (ii) the company assets are in essence the respondent's assets. In the present case, the Defendants were neither the sole director(s) nor the sole shareholder(s) of the Third Party Companies.

The Decision

In Mold the High Court was willing to extend the freezing order to encompass the assets of the Third Party Companies, notwithstanding that they were not wholly owned by the Defendants. This therefore indicates a departure from the restrictive interpretation of Ablyazov put forward in FM Capital Partners.

The test for extending freezing orders to third-party assets, including corporate assets, continues to be one of control. The judge put it simply as "whether there is good reason to suppose that the assets are, in fact, owned by the respondent." However, contrary to FM Capital Partners, the Defendants in the proceedings were deemed capable of exhibiting control over the company and the company assets, despite not being the sole shareholder or the sole director of the companies, and despite there being no evidence of beneficial ownership.

In respect of the authority cited by the Claimant, it was said that although asset freezing orders will generally be reserved for assets over which a respondent has a legal or beneficial interest, the judge noted that freezing orders can also extend to assets owned by corporate entities where such entities are effectively "no more than a pocket or a wallet for the defendant."

The unique factor in the present case related to the evidence obtained by the Claimant indicating that the Defendants would denude assets in the companies without regard to their obligations to those companies.

In so acting the Defendants would be acting on their own behalf – not as agents of their respective companies – and so would be exercising direct personal control over the corporate assets. On that basis the assets of the Companies fell within the extended definition in paragraph 6 and satisfy the requisite control for the purposes of Ablyazov.

The Court was further satisfied that there had been a material change of circumstances warranting an amendment to the previous Freezing Order, as the Claimant had not anticipated the Defendants' willingness to breach their fiduciary duties or to defraud creditors by dissipating assets at the time the Freezing Order or its subsequent variations were granted.

This decision marks a significant shift from FM Capital Partners and allows applicants a more flexible tool against individuals who exhibit control over company assets, which on paper do not appear as their own, but thereafter intend to dissipate those assets to circumvent any award in the applicant's favour.