serlespeak
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Limiting the prejudice of an over-freeze

THERE MAY SEEM LIKE A WHIFF OF *"THESE £50S ARE TOO BIG FOR MY WALLET"* BUT A FREEZING ORDER CAN CAUSE REAL, UNJUSTIFIED, DIFFICULTIES WHERE OBTAINED AGAINST AN INDIVIDUAL WHOSE ASSETS EXCEED THE APPLICABLE LIMIT; SAY AN INDIVIDUAL WITH $2BN OF ASSETS, AS AGAINST A LIMIT OF $500M FREEZING RELIEF.

Whatever the terms of the freezing order, the reality is that most banks will not permit dealings with assets where a freezing order has been obtained, particularly where the respondent's assets, whilst exceeding that limit in aggregate, are dispersed.

So, what can be done to limit the prejudice of an "over-freeze"?

(1) First, ensure that the terms of the freezing order do clearly provide that the injunctive relief pertains only to sums caught by the limit. The standard wording permits, by way of exception, spending on ordinary living expenses and legal advice and representation so long as "before spending *any* money" the respondent tells the applicant the source. This provision may need to be varied to make plain that this exception does not apply to any surplus where the respondent's unencumbered assets within England and Wales exceed the limit, or similarly if the respondent's unencumbered assets worldwide do so, so long as the value of those assets remains above the limit.

(2) Consider too the extent of asset disclosure that is required to be made. Again, the standard wording provides for disclosure to be made of *all* of the respondent's assets (whether in England and Wales or worldwide) exceeding the limit. Can it really be said that disclosure of all assets is required for the proper purpose of policing the order, or should disclosure be limited to assets up to the limit? If so, what assets should be disclosed? No doubt the applicant will want disclosure of unencumbered assets with clear title in enforceable jurisdictions – whether this is provided for by the terms of the order is another matter.

(3) If viable, the respondent may wish to consider putting up security, either by payment into court or by agreement. Where there are multiple respondents and potentially a joint and several liability to the applicant, it may be possible to agree a pool of assets to be ring-fenced, so as to balance the interests of the respondents as against the applicant; what the applicant is not entitled to is security for his claim, whereas the effect of the order may be to freeze an excess of assets where the limit applies to each respondent.

(4) In any event, consider the delineation of a pool of assets against which the freezing order is to take effect. This should clarify the operation of the freezing order, and prevent unwarranted allegations of breach.

(5) Finally, consider whether there are good grounds to discharge the freezing order. If the respondent is sufficiently wealthy, can it really be said that there is a real risk of dissipation to justify the order? Otherwise, and if the order is to remain, is there sufficient protection under the cross-undertaking in damages or is fortification required? Potentially, any damages claim may be enormous.

RUTH DEN BESTEN has an extensive commercial fraud practice and often advises in respect of injunctive relief. She recently appeared in the *Ras Al Khaimah v Bestfort* litigation, led by Philip Marshall QC.

I am very pleased to welcome you to this new edition of Serlespeak on the subject of fraud. I open the edition below with discussion of the difficulties of enforcing freezing orders against recalcitrant international defendants and some potential solutions. Taking up the theme of enforcement, Kathryn Purkis provides a critique of the new corporate beneficial ownership and control (PSC) register. Ruth den Besten brings the edition back to freezing orders with insight into methods of mitigating the prejudicial effects of a freezing order on a respondent's assets above the order's financial limit. Dan McCourt Fritz further develops the discussion of freezing orders, focussing on the meaning of the standard form exception permitting a respondent to deal with and dispose of its assets in the ordinary and proper course of its business. Finally, James Weale explores recent case law on the extent to which the courts will be prepared to draw adverse inferences from a wrongdoer's failure to produce evidence. **Philip Marshall QC**

International enforcement in fraud cases: some novelties

AS ONCE EXPLAINED BY LORD STEYN (WHEN SITTING AS A LORD JUSTICE IN *GRUPO TORRAS v AL-SABAH* (LATE REPORTED IN [2014] 2 CLC 636)) A FREEZING ORDER ITSELF IS OF LITTLE EFFECT UNLESS ACCOMPANIED BY THE DISCLOSURE OF ASSETS, SO THAT IT CAN BE ENFORCED AND POLICED.

This is because traditionally freezing orders against a defendant based within the jurisdiction have been made effective by notification to third parties, usually banks, holding liquid assets for the defendant and by appropriate entries on registers of property. Where a worldwide freezing order is involved, the traditional route of ensuring that the protection is effective is by obtaining ancillary orders in the foreign jurisdictions where assets are held. This may later be followed by recognition of the English freezing order itself where possible (in the European Union this will usually be after it has been continued following an "on notice" return date). Where disclosure is not provided in breach of the court's orders, whilst committal is possible, this is only likely to be effective whilst the defendant remains in the jurisdiction. Obtaining an "unless" order which will result in a judgment in default of compliance is also an option. It can prove effective but there are also risks, since some jurisdictions may be reluctant to enforce a judgment obtained in such circumstances.

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The dilemma of how to deal with the recalcitrant defendant who will not comply with orders for disclosure that are central to making freezing relief effective has taxed several claimants over the years. The decision in *JSC VTB Bank v Skurikhin* [2015] EWHC 2131 (Comm) provides an illustration of how some of these difficulties can be addressed. There the claimant had obtained judgments on guarantees in Russian proceedings which it had then enforced by way of a common law action in England. The proceedings had been accompanied by freezing orders with standard asset disclosure provisions. The principal defendant, Mr Skurikhin, failed to comply with his disclosure obligations. The claimant then brought committal proceedings. These proved to be ineffective given that Mr Skurikhin remained outside the jurisdiction. The solution to the problem of effective enforcement of the protective relief obtained, which was now supporting the execution of judgment, was found in the use of receivership orders. Fortunately for the claimant bank, there was an English limited liability partnership in which Mr Skurikhin appeared to have an interest that held valuable properties in Italy. The members of the LLP were Swiss fiduciaries and a Hong Kong company they controlled, who asserted that the beneficial owner was a Liechtenstein foundation. The court nevertheless concluded, at an interlocutory hearing for the appointment of receivers by way of equitable execution, that on the evidence it was satisfied *"that it is more likely than not that Mr Skurikhin does either have a right to call for the assets of the [foundation] to be transferred to him, or has* de facto *control of those assets"*. On this basis receivers were appointed.

The *VTB v Skurikhin* case, however, did not involve any consideration of the issue of recognition of the receivers abroad. This did arise in *Ras Al Khaimah Investment Authority v Bestfort Development LLP* [2015] EWHC 3383 (Ch), where an attempt was also made to obtain the appointment of receivers in aid of proceedings in Georgia and the United Arab Emirates, but pre-judgment. There the application was made under section 25 of the Civil Jurisdiction and Judgments Act 1982. The court concluded that an order appointing receivers in these circumstances would not be recognised under the EU Judgments Regulation (1215/2012) in Latvia, where certain assets, namely bank accounts, were alleged to be. The court also refused to grant orders for the provision of powers of attorney designed to circumvent the obstacles to enforcement under the Regulation, although it was accepted that the court had power to make an order for the execution of a power of attorney in an appropriate case.

It seems therefore that a receivership order may be an effective route of enforcement so long as there is an established procedure for recognition of such an order in the state in which assets are located. That will not always be the case. The best route to enforcement therefore remains one of ensuring the defendant or his assets are amenable to more direct enforcement. In an international case this may mean seeking orders restraining departure from the jurisdiction before the disclosure process is completed satisfactorily. Any other course will depend on a careful check at an early stage on the precise international recognition procedures in place.

PHILIP MARSHALL QC specialises in complex fraud litigation and has appeared in some of the most significant claims of recent years including *BTA Bank v Ablyasov, Constantin Medien v Ecclestone* and *Orb v Ruhan*. His practice is international covering several offshore jurisdictions.

Beneficial ownership registers and enforcement: home and away

THE NEW UK CORPORATE BENEFICIAL OWNERSHIP AND CONTROL ("PSC") REGISTER, BEING OPEN TO PUBLIC SCRUTINY, MAY BE ATTRACTIVE TO THOSE ADVISING THE VICTIMS OF FRAUD, AS WELL AS POLITICALLY APPEALING.

But it is – arguably – structurally flawed, and fitness for its overall purpose of preventing civil and criminal financial abuses through unidentifiable shell companies, is thereby delimited. This is because it relies on self-declaration without verification, and therefore, self-defeatingly, on the probity of company owners. So argues Professor Jason Sharman, incoming Professor of International Relations at Cambridge, in *Solving the Beneficial Ownership Conundrum: Central Registries and Licensed Intermediaries* (2016), an article commissioned by Jersey Finance, who seek to put the case for the retention of their own model.

Sharman is co-author of *Global Shell Games* (2014), an extensive quantitative and qualitative field study investigating AML compliance rates worldwide. One of its conclusions is that, contrary to public opinion, offshore jurisdictions were *"significantly more likely"* to comply with international rules on AML than the OECD countries: for example, in the field study, Jersey and Cayman had 100% compliance rates; with BVI and Isle of Man not far behind. The UK scored 51%, putting it in 68th place of 129 countries – lower on the scale than, e.g. Libya or Russia. The reason for this poor showing is explained in the 2016 article with reference to the tolerance of bearer share companies until 2015, intermediaries facilitating "one-off" transactions being exempt from due diligence, under a loophole in the 3rd European AML Directive, and the underfunded HMRC being ultimately responsible for regulation and enforcement. I would add size as another factor: it is much easier to monitor and enforce against 120 providers than it is 23,000.

Sharman has concluded that, generally, a regulatory system which imposes obligations on its licensed intermediaries and scrutinises their performance, produces good results. He surmises this may be equally true of beneficial ownership registers. As to these, in Jersey:

- The regulator itself has since 1989 collected information on ultimate beneficial owners, via licensed trust and company service providers (TCSPs). Applications for incorporation emanate from TCSPs (unless made by a Jersey resident individual), and sufficient verified information has to be given on all persons with at least 10% interest or control, or consent to incorporate will be withheld – so too if either the beneficial owners do not pass international and local database checks, or if the intended corporate activity is a "sensitive activity" as defined.
- The information is to be kept current by the TCSPs updating the regulator in advance. TCSPs are subject to inspections, and risk fines and other sanctions – ultimately loss of licence – for non-compliance.
- The information is available to tax and law enforcement authorities. It may yet become available to others with a "legitimate interest", if that new element of the 4th European AML Directive is adopted after consultation. As yet, "legitimate interest" is undefined, but there is every reason for it to include persons with a *prima facie* case that the entity in question houses assets to which they have a beneficial claim.

Thus in Jersey there has long been a central register meeting all international requirements (and a central register only became a prevailing norm via the 4th Directive in 2015). Any jurisdiction where intermediaries may be thus utilised, could have something similar but many do not.

The government would still prefer all offshore territories to move towards open registers. But transparency is not universally valued, particularly not in places where wealth is set to be generated in future, and so the price of fully open registers is competitiveness. Surely a greater priority should be to ensure that registers – wherever they are – are as robust as possible, and open to potential civil claimants as well as the authorities. In the UK this would mean greater policing of the system, but if the statistics for losses due to illegalities are even half right, this could easily be made self-funding.

KATHRYN PURKIS returned to practice at Serle Court earlier this year, after 9 years of practice in Jersey. She has extensive experience of fraud and asset tracing work and offshore enforcement issues.

Be you never so high, the law is above you

THE LAW HAS LONG PREVENTED A WRONGDOER FROM ESCAPING LIABILITY BY FAILING TO PRODUCE EVIDENCE, A PRINCIPLE ENCAPSULATED BY THE MAXIM *OMNIA PRAESUMUNTUR CONTRA SPOLIATOREM*. TWO RECENT CASES HAVE CLARIFIED THE EXTENT TO WHICH INFERENCES MAY BE DRAWN.

The principle that inferences may be drawn against those who suppress or destroy evidence is of long-standing. In the well-known case of *Armory v Delamirie* (1722) 1 Stra 505, a chimney sweep found a jewel and took it to a jeweller for valuation but the jeweller refused to return it and offered only a nominal sum. The chimney sweep sued in trover. Pratt CJ concluded that the jury *“should presume the strongest against him, and make the value of the best jewels the measure of their damages”*. Two High Court cases in 2015 explored the scope of the presumptions and inferences in the light of authority subsequent to *Armory*. Those cases confirmed the willingness of the courts to apply inferences to the fullest extent possible against a wrongdoer.

In *Gulati v MGN Ltd* [2015] EWHC 1482 (Ch), the court sought to determine the level of damages payable to victims of phone hacking carried out within the Mirror Group. The court’s task, however, was rendered more difficult by the routine destruction of incriminating evidence by those involved in the hacking. The following principles may be distilled from the judgment of Mann J and his survey of previous authority:

(1) Adverse inferences may be drawn in relation to any relevant factual determination, whether going to liability or the quantum of damages;

(2) Any inferences must be made in the context of the actual evidence and must be realistic; and

(3) Where the destruction of evidence is deliberate the destroyer’s evidence may be disregarded, albeit the court is not bound to accept evidence which it does not believe or reject evidence which appears truthful.

Subject to the above limitations, however, Mann J (at paragraph 99 of the judgment) was prepared to draw wide-ranging inferences as to the extent of the phone hacking which in fact took place and the defendant’s knowledge of it (Mann J’s conclusions of fact and law were upheld on appeal [2015] EWCA Civ 1291 (see paragraph 107 of the appeal judgment)).

In *Keown v Nahoor* [2015] EWHC 3418 (Ch), the defendant accountant had fraudulently misappropriated sums from the claimant’s business. The defendant had failed to provide bank statements or any other documents showing the full extent of the sums received. As a consequence, the court only had documents in relation to one year out of the five year period for which the defendant was retained. In those circumstances, however, the court was prepared to extrapolate and infer that similar sums had been misappropriated for the duration of the defendant’s retainer (paragraphs 33-38 of the judgment).

Gulati and *Keown* demonstrate the extent to which the courts are prepared to assist parties who would otherwise be unable to prove their case by reason of the wrongdoers’ suppression or destruction of evidence.

JAMES WEALE acted for the successful claimant in *Keown v Nahoor.*

Chambers news

People

We are pleased to welcome James Weale to Serle Court, who joined us as a new tenant earlier this year from 3 Stone Buildings and we are delighted that Kathryn Purkis has returned to Serle Court to practise at the Bar full-time, following a 9 year period at Collas Crill in Jersey, where she was a litigation advocate and managing partner. We are also delighted that our three current pupils, Charlotte Beynon, Eleni Dinenis and Sophia Hurst have accepted offers of tenancies and will become members of Chambers in October 2016.

Our congratulations go to Nicholas Lavender QC, who is to be appointed as a High Court Judge, assigned to the Queen's Bench Division, and who will take his seat on the bench later this year. We also congratulate Lance Ashworth QC, who has been appointed to sit as a Deputy High Court Judge in the Chancery Division.

Conferences and seminars

We hosted successful Property Law seminars in London, Bristol and Norwich, where Christopher Stoner QC, Andrew Francis, Andrew Bruce, Tom Braithwaite and Amy Proferes discussed the impact of Supreme Court decisions on property law in 2015. We also hosted a Commercial Law seminar in Bristol, where Richard Walford, David Drake and Suzanne Rab spoke on topical issues in Commercial Law.

We are hosting two major conferences later this year and the programmes for these events have now been published. On 20th September, the Serle Court Litigation Conference will be held at Merchant Taylors' Hall, in London, where The Right Honourable Lord Justice Briggs will provide the keynote address. The conference will include panel sessions and breakout sessions; confirmed speakers are: Frank Hinks QC, Elizabeth Jones QC, Conor Quigley QC, Philip Marshall QC, Christopher Stoner QC, Daniel Lightman QC, Prof. Jonathan Harris QC (Hon.), Andrew Francis, Will Henderson, Richard Walford, Kathryn Purkis, Andrew Bruce, David Drake, Giles Richardson, Tom Braithwaite, Constance McDonnell, Jennifer Haywood, Ruth den Besten, Jonathan Fowles, James Mather, Gareth Tilley, Sophie Holcombe, Emma Hargreaves, Zahler Bryan, Amy Proferes, Suzanne Rab, Adrian de Froment and Oliver Jones.

This will be followed by the Serle Court International Trusts and Commercial Litigation Conference being held on 14th November in New York. This conference is the first of its kind being hosted by Serle Court and will bring together clients from London, New York, the Channel Islands and Cayman Islands, BVI and Bermuda. Speakers from Serle Court include: Frank Hinks QC, Dominic Dowley QC, Philip Jones QC, Lance Ashworth QC, John Machell QC, Hugh Norbury QC, Daniel Lightman QC, Richard Wilson QC, Prof. Jonathan Harris QC (Hon.), Will Henderson, Timothy Collingwood, Dakis Hagen, Matthew Morrison, James Mather, Gareth Tilley, James Weale, Emma Hargreaves, Zahler Bryan and Amy Proferes.

Books and awards

Prof. Jonathan Harris QC (Hon.) has been appointed as the new joint general editor of *Dicey, Morris and Collins, The Conflict of Laws* working alongside Lord Collins of Mapesbury. Described as the foremost authority on private international law, Jonathan has become the first new general editor since 1987 and only the fifth general editor since the book was first published in 1896.

We are pleased to have been named as finalists in the Chambers of the Year – Exceptional Achievement category at this year's Halsbury Legal Awards: *"celebrating the rule of law".*

LinkedIn

We have 4 discussion groups on LinkedIn to enable Serle Court members and clients to discuss topical issues in Partnership and LLP Law, Fraud and Asset Tracing, Contentious Trusts and Probate, and Competition Law; please join us.

Edited by JONATHAN FOWLES

Out of the ordinary?

IN *EMMOTT v MICHAEL WILSON & PARTNERS, LTD* [2015] EWCA CIV 1028 THE APPELLANT COMPANY (MWP) AND ITS SOLE DIRECTOR (MR WILSON) APPEALED AGAINST ORDERS MADE BY ANDREW SMITH J IMPOSING FINES ON MWP AND COMMITTING MR WILSON FOR CONTEMPT OF COURT.

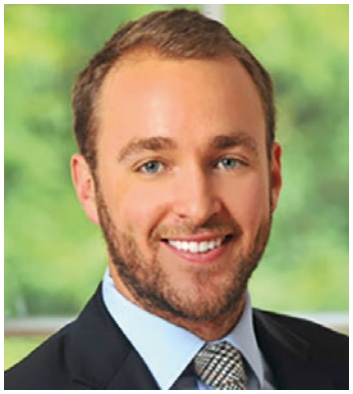
The orders were premised on the judge's findings that (1) MWP had breached a worldwide freezing order by making two payments to related companies (in part repayment of a secured loan and in respect of rent arrears), and (2) Mr Wilson had culpably caused or wilfully permitted MWP to make the payments in breach of the order.

The Court of Appeal allowed the appeals on the ground that it had not been proved that either of the payments breached the freezing order: the respondent had failed to establish that the payments fell outside the standard form exception permitting MWP to deal with and dispose of its assets in the ordinary and proper course of its business. In so holding, Lewison LJ (with whom Black and Gloster LJJ agreed) said that to come within the exception a disposal or other transaction had to satisfy the separate and cumulative requirements of being (a) in the ordinary course of business and (b) in the proper course of business. These are highly fact sensitive questions, which will depend on what business is carried on by a particular respondent, and how it is carried on.

The Court accepted the submission that, when assessing whether a transaction is in the ordinary course of business, it is not helpful to substitute approximate synonyms such as "routine" or "recurring". A transaction which is neither of those may well be within the ordinary course of business: by way of example, a payment made to compromise a claim might be within the ordinary course of business even though it *"is not something that happens every day"* – see *Normid Housing Association v Ralphs* [1989] 1 Lloyds Rep 274 at 276.

Certain payments are obviously within the exception (e.g. the payment of rent for office premises as it falls due), and can be made by the respondent to a standard form freezing order without hesitation. However, where it seems arguable that a proposed transaction might fall outside the exception the safest and best course is for the respondent/defendant to request the claimant to consent to it. In default of such consent, an application should be made to the court seeking a declaration that the relevant transaction comes within the exception, alternatively a variation of the freezing order to permit it.

This approach has two principal advantages. First, it avoids the risk of contempt proceedings. Second, if the proposed transaction is not permitted and the respondent suffers loss by reason of not entering into it, then if the freezing order is subsequently found to have been wrongly granted the respondent will have a clear claim under the claimant's undertaking. A respondent who silently declines to enter into a transaction because it might breach a freezing order and later brings a claim under the undertaking may have difficulties with both causation and remoteness.



DAN MCCOURT FRITZ acted for the successful appellants in *Emmott v Michael Wilson & Partners, Ltd,* led by Nicholas Lavender QC (for MWP) and Lance Ashworth QC (for Mr Wilson).

serle court

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