Freezing injunctions in Bermuda

Briefing Summary: This briefing note provides an overview of freezing injunctions in Bermuda.

Service Area: Dispute Resolution and Litigation, Commercial Litigation, Corporate Disputes, Fraud and Asset Tracing

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Test for the grant of freezing injunctions

The Bermuda Supreme Court has power to grant a freezing injunction and/or a specific order for the detention, custody or preservation of any property which is the subject of a proprietary claim pursuant to section 19(c) of the Supreme Court Act 1905, which provides that "*an injunction may be granted in all cases in which it appears to the court to be just or convenient that such order should be made.*"

A freezing injunction is not a free standing remedy, but must be brought in aid of execution of an actual or prospective judgment in proceedings that have been or are about to be brought.

The Bermuda Supreme Court can issue a freezing injunction in proceedings brought in Bermuda (whether issued or contemplated), or in relation to proceedings which have been or are to be commenced in a foreign court, which are capable of giving rise to a judgment that may be enforced in Bermuda (under section 19(c) of the Supreme Court Act 1905).

The applicant must show a good arguable case against the defendant and that there is a real risk of dissipation of assets that, unless the injunction is granted, would render a judgment in the applicant's favour likely to be unenforceable (*Griffin Line Trading LLC v Centaur Ventures Ltd and McGowan*, [2020] Bda LR 38). It is not necessary for the plaintiff to show nefarious intent on the part of the defendant, though in circumstances where it can be shown the court will be more disposed to grant freezing relief than in other cases.

The applicant must also satisfy the court that the injunction should be granted on the balance of convenience and that it would be just and convenient to grant the injunction, which includes consideration of the factors discussed below in relation to the Cayman Islands.

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The onus is on the applicant to justify the making of an order under section 19(c) of the Supreme Court Act 1905, whether it is an order for a freezing injunction or preservation of property in support of a proprietary claim. The applicant has a duty of full and frank disclosure to inform the court of all pertinent facts in relation to the application. On the return date, the onus remains on the applicant to justify the continuation of the injunction.

Where the jurisdiction to grant relief in aid of foreign proceedings exists on the principles set out above, there remains a residual discretion to decide whether the relief would properly serve to assist the foreign court. In ***ERG Resources LLC v Nabors Global Holdings II Ltd*** [2012] Bda LR 30, the Bermuda Supreme Court held that the central question for the exercise of this residual discretion is whether it is consistent with modern notions of judicial cooperation and respect for foreign courts to grant the interim relief sought. In determining that question the Bermuda Supreme Court will consider:

- whether an application has been made to the foreign court so its position on interim relief can be ascertained;
- if an application has been refused by the foreign court, whether it was refused on merits grounds or merely because it lacked the jurisdiction to grant such relief; and
- in general terms whether the grant of interim relief by the 'ancillary' court would be justified with a view to assisting the foreign court in its adjudication of the substantive dispute.

Applications against unknown defendants

There is no reported case in which the Bermuda Court has made an injunction against persons unknown. While the Rules of the Supreme Court 1985 prescribe a form of writ that has to be addressed to a named defendant or defendants, it is likely that the Bermuda Court would be prepared to make an order against unknown defendants in an appropriate case based on the strength of recent authority in England and other commonwealth jurisdictions including ***X v Persons Unknown*** [2007] EMLR 10 and the Cayman Islands judgment in ***Ernst & Young Limited & Others v Department of Immigration, Tibbetts and Persons Unknown*** [2015] (1) CILR 151.

Fortifying cross-undertakings in damages

There are limited examples of the Bermuda Court ordering an applicant to fortify its undertaking in damages. In ***Griffin Line General Trading LLC v Centaur Ventures Ltd.***, BM 2022 SC 015 ("***Griffin Line***"), the Supreme Court of Bermuda applied the English principles described by the English Court of Appeal in ***Energy Ventures Partners Ltd v Malabu Oil & Gas Ltd*** [2014] EWCA Civ 1295, that an order for fortification requires: (i) an intelligent estimate of the loss likely to be suffered by reason of the making of the interim order; (ii) an assessment of whether there was a sufficient level of risk of loss to require fortification; and (iii) a determination that the loss had been, or was likely to be, caused by the grant of the interlocutory order.

In addition to finding that the foregoing factors militated against an order requiring fortification, the court in *Griffin Line* also applied the reasoning of the Bermuda Court in *OAO "CT-Mobile" v IPOC International Growth Fund Ltd* [2006] Bda L.R. 53 ("***IPOC***") and the English court in *Orb a.r.l. v Ruhan*, [2016] EWHC 850: that it is wrong in principle to order fortification when, arguably, the plaintiff will be unable to provide security by reason of the very conduct complained of in the proceedings for redress or, in exceptional cases, where the plaintiff would be required to effectively post security to access its own asset.

As pointed out in *IPOC*, the only potential source of derivation from the English Law position set out above arises from the fact that the Bermuda Court will also be required to have regard to section 12 of the Bermuda Constitution, which prohibits the enactment or application of laws in a way which discriminates on the grounds of place of origin, and section 6(8) of the Bermuda Constitution which guarantees the right of access to the court as a part of the right to a fair hearing. While both provisions are derived from the European Convention on Human Rights, they are not identical in operation and there is accordingly the possibility that in certain factual scenarios, the Bermuda Court will reach a different result in an application for fortification from that which might be reached by an English court under the Human Rights Act 1998.

Applications for the preservation of assets

It was formerly the case that the court would only grant a freezing injunction if the defendant had assets in the jurisdiction; however, that is no longer the case. In *Utilicorp United Inc and Another v Renfro and Others* [1994] Bda LR 79, SC at 26, Ground J (as he then was) acknowledged that in appropriate cases the Bermuda Court had jurisdiction to make worldwide freezing injunctions (for example, see *Griffin Line Trading LLC v Centaur Ventures Ltd and McGowan*, [2020] Bda LR 38).

The court may in an appropriate case make a freezing injunction against a co-defendant against whom the plaintiff has no cause of action where such injunction is ancillary and incidental to the claim against the "main" defendant. For example, where there is evidence that assets vested in the co-defendant may in fact belong to the main defendant.

The Bermuda Supreme Court has jurisdiction to appoint a receiver for the purposes of preserving the assets of a defendant subject to a freezing order. The statutory jurisdiction arises under section 19(c) of the Supreme Court Act 1905 and will be exercised where it is just and convenient to do so. It is a particularly effective means for securing assets in the hands of third parties which are beneficially owned or due from third parties to the defendant.

There is no requirement to show that the situs of an asset in the form of a debt owed to the judgment debtor is within Bermuda provided that the court has personal jurisdiction over the judgment debtor (*Masri v Consolidated Contractors Int'l Co SAL [2010] Bda L.R. 21*).

The court may grant a preservation order under Order 29 r. 2(1) of the Rules of the Supreme Court 1985, where the assets which are sought to be preserved are the very subject matter of the cause or matter. In those circumstances, the court is not seeking to restrain a party from dissipating its own assets but is merely seeking to preserve the subject matter of the claim pending identification of the rightful owner. The applicant need not prove dissipation of assets, but must satisfy the court that (i) there is a serious issue to be tried on the merits; (ii) the balance of convenience favours granting injunctive relief; and (iii) it is just and convenient in all the circumstances to grant the order (***Dawson-Damer v Lyndhurst Limited***, [2019] SC (Bda) 8 Civ).

Under the Bermuda International Conciliation and Arbitration Act 1993 the Bermuda Court will enforce an interim award for the preservation of assets handed down by a tribunal in a New York Convention State, including an interim award restraining the defendant from dealing in its assets in a form substantially the same as a freezing order. The Bermuda Court will also grant a world-wide freezing order in support of a final award granted by a tribunal in a New York Convention State on the same principles that it will grant relief in support of a judgment of the Supreme Court.

The Bermuda Supreme Court has been willing to grant interim injunctive relief in respect of a foreign arbitration, even where the curial law of the arbitration was also foreign, if for practical reasons the application for relief could only sensibly be made in Bermuda. Such circumstances include applications for asset preservation orders made prior to the convening of the tribunal relating to assets within the jurisdiction to which any order of the court in the country where the arbitration is to be seated would not automatically have force. While there is no public reported decision on the point, the Bermuda Court has adopted the approach of the English High Court in ***U&M Mining Zambia Ltd v Konkola Copper Mines plc*** [2013] 1 C.L.C. 456 in this regard.

Applications for security costs

The Bermuda Supreme Court will order security for costs where a plaintiff is ordinarily resident out of the jurisdiction, but only to the extent necessary to mitigate any additional difficulty in enforcement flowing from the plaintiff's residence abroad. In so doing, the court can take into account varying degrees of difficulty of enforcement which may objectively arise in deciding at what level security should be fixed. At the lower end of the scale would be jurisdictions where reciprocal enforcement legislation exists (e.g. applicable Commonwealth countries). At the higher end would be jurisdictions where enforcement would be so difficult as to border on impossible. In cases at the higher end, the implications of foreign enforcement might mean that security for the full amount of the defendant's costs might be required (***Texuna International Ltd.-v-Cairns Energy Plc.*** [2004] EWHC 1102). The court will also consider any delay in bringing a security for costs application and, in doing so, may deprive a tardy applicant of security for some or all of his past costs, or restrict the security to future costs (***Griffin Line*** citing ***Re Bennet Invest Ltrf*** [2015] EWHC 1582).

There is no statutory provision by which the court may order security for costs against a company solely on the basis that it is insolvent; however, in all cases where a party is resident abroad, inability to pay any eventual costs order may be taken into account. However, where a plaintiff is so impecunious that requiring security would stifle a claim, security will not be ordered.

In *Artha Master Fund LLC v Dufry South America* [2011] Bda L.R. 17, the court suggested that distinctions between the English Human Rights Act 1998 and the Bermuda Constitution Order give rise to the possibility that the English practice of only ordering the additional costs of enforcement on the basis of the English Court of Appeal decision in *Nasser v United Bank of Kuwait* [2002] 1 WLR 1868 is overly narrow in the Bermuda context and the automatic grant of full security may be permissible under Bermuda law. However, there has not yet been a reported case that has tested this approach.