

A worldwide freezing order (WFO) was refused in *Arcelormittal USA LLC v Ruia and others* [2020] EWHC 740 (Comm) because the application failed on all grounds of the test. The claimant had not shown it had a good arguable case, nor that it was entitled to the US\$1.5 billion claimed, nor that there was a solid risk of dissipation.

The WFO would be gravely detrimental to the respondent's business and its main lender, there had been eight months' delay in bringing the application, and it was sought against persons and assets out of the jurisdiction for which particular caution is needed.

Purpose of WFO

The purpose of a freezing order is not to provide the claimant with security, it is to restrain a respondent from evading justice by disposing of, or concealing, assets otherwise than in the normal course of business in a way that will have the effect of making it judgment proof. A cautious approach is appropriate before deployment of what has been called one of the court's nuclear weapons.

Background

The claimant alleged a conspiracy by companies and directors in the respondent's corporate group to dispose of assets with the intention of defeating enforcement. There was no doubt the group had disposed of assets and moved them among companies, but the court found it was for an existing and ongoing restructuring plan. This undermined both the conspiracy claim and the prospect of dissipation.

Third parties' rights would be affected by the WFO and the court held that those rights should always take precedence over the desire of a claimant to secure assets for enforcement. Particular caution is needed in making a WFO over persons and assets outside the jurisdiction.

Considerations for WFO

Henshaw J summarised the considerations on applications for WFO, which fall into three categories – the merits of the claim, the risk of dissipation, and whether the WFO is just and convenient.

Merits

- The claimant must show a good arguable case, which means a case that is more than barely capable of serious argument, and yet not necessarily one that the court believes to have a better than 50% chance of success
- The elements of the cause of action must be examined; here, conspiracy must be clearly pleaded and clearly proved by convincing evidence

Dissipation

- An applicant must establish a real risk of unjustified dissipation of assets demonstrated by solid evidence
- Dissipation means putting the assets out of reach of a judgment whether by concealment or transfer
- Mere inference or generalised assertion is not sufficient
- The risk of dissipation must be established separately against each respondent
- The use of offshore structures is relevant but does not itself equate to a risk of dissipation
- If the respondent is not threatening to change the existing way of handling their assets, it will not be sufficient to show that such continued conduct would prejudice the claimant's ability to enforce a judgment
- Dishonesty alone is not enough; the dishonesty must justify a conclusion that assets are likely to be dissipated
- There must be a current risk of dissipation; past events may be evidentially relevant, but only if they demonstrate a current risk of dissipation of the assets now held
- The nature, location and liquidity of the defendant's assets are important considerations
- Any security or other limitations on dealing with the assets is relevant
- The respondent's behaviour in response to the claim or anticipated claim is relevant
- Each case is fact specific and relevant factors must be looked at cumulatively
- A good arguable case on the merits that involves wrongdoing relevant to dissipation will indicate powerfully there is a risk of dissipation
- Objective facts must be shown, not mere unsupported expressions of fear
- A respondent's failure to dissipate assets despite knowing of the claim for a substantial time can powerfully rebut a suggestion of a real risk of dissipation

Just and Convenient

There is no exhaustive list of factors to be considered. Some are:

- The balance of prejudice between the parties
- Whether an order would interfere unacceptably with the interests of third parties
- Whether an order might destroy the defendant's business
- A freezing order does not prevent a secured creditor from enforcing its security
- The existence of an undertaking by the claimant to pay damages
- Unexplained delay between the time the application should have been, and when it was, brought
- Delay, relevant to the overall assessment of (a) the credibility and weight of the applicant's evidence; (b) whether during the delay the respondent has dissipated assets; and (c) whether the delay has caused any prejudice to the respondent

Messages From the Judgment

Apply for a freezing order as soon as the facts emerge. Ensure you have all the evidence to show a good arguable case. Justify the amount claimed. Have very solid evidence of likely dissipation. Show more than the respondent is dishonest or that it is conducting business as usual. Limit the effect of the order on third parties and on the respondent's general business. Have a stronger case generally for orders sought against people and assets out of the jurisdiction. Be prepared to give an undertaking as to damages or fortification (security for the undertaking).

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