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You've been served with a freezing order. What are your options?

I. First, what is a freezing order?

Freezing orders do what they say on the tin: they 'freeze' a defendant's assets by preventing that defendant from disposing of or otherwise dealing with them in such a way that might frustrate the eventual enforcement of a monetary judgment against them down the line.

The assets falling within their scope are broad – they not only encompass traditional assets (properties and bank accounts, etc.) but extend to less obvious assets (such as interests in a trust fund or loan facilities). They can also cover assets located outside the jurisdiction, in the form of 'Worldwide Freezing Orders' (WFOs) – known as the so-called "*nuclear option*" [1] in English law, and a helpful way of forcing fraudsters to disclose their assets.

Fundamentally, they are not designed to provide claimants with a form of 'security' for their claim – nor are they intended to operate oppressively. However, their power lies in the potential consequences for those who breach them, with any non-compliance or failure to accurately disclose the location, value, and details of frozen assets, potentially resulting in committal proceedings for contempt of court being pursued against the respondent.

II. How are they made, and what is the process?

Applications for freezing orders (including WFOs) are almost always made on an 'ex parte' basis (without notice to the respondent against whom the order is to be made) and are usually determined at a so-called 'without notice' hearing, with only the applicants' legal team in attendance.

Once the order is made, the judge will typically ask the applicant to arrange a 'return date hearing', where the court will consider the application afresh on the basis of the evidence put forward by all parties to the application. The issue of costs is typically reserved until this return date hearing [2].

Return date hearings occur in very short succession (around seven days after the initial hearing). This run-up period is critical for respondents, and it is vital that there is a delay in instructing legal counsel. As this article will show, return date hearings provide respondents with a key forum in which to air their thoughts on the freezer – and seek its discharge or variation.

III. Discharging a freezing order

If served with a freezer, is important to know what weapons are within your arsenal. Generally, the first port of call should be to consider whether any grounds for discharging the order apply – and there are a number to consider.

IV. Arguing that the order ought not to have been made in the first place

At the return date hearing, a defendant's best bet at discharging the order is to argue, quite simply, that it ought not to have been granted in the first place. This typically involves arguing that the two key requirements of freezing orders have not been made out:

1. there must be an underlying substantive claim [3] capable of being brought in England in respect of which the applicant has a good arguable case against the respondent; and

   the defendant holds assets on which the order could bite [4], and there is a real risk that they may dispose of or deal with them in such a way as to frustrate the enforcement of any ultimate judgment.

Requirement 1 – a good arguable case

Arguing that the applicant in question does not have a 'good arguable case' is not an easy task. The wording has, as one judge acknowledged, become "*befuddled by 'glosses'*" [5] over the years – as a result of which, courts have opted for setting the bar for this test incredibly low, describing it as referring to cases "*more than barely capable of serious argument,* […] *not necessarily one which the judge believes to have a better than 50% chance of success*" [6], or having "*a plausible evidential basis*" [7].

Despite this, applicants have successfully discharged freezers on this basis. In *Greenshores Properties Ltd v Andrews*[8], an order obtained against two of the defendants (D2/3) was discharged as the judge found there to be no evidence whatsoever for the claimants' case that the other defendant (D1) had the authority to act on their behalf in borrowing the sums concerned from the claimant (meaning there was no basis for a proprietary claim against them).

Requirement 2 – a real risk of dissipation

The bulk of a defendant's attention should generally be focused on seeking to discharge a freezer on the second requirement: a real risk of dissipation. Courts have gone to great lengths to confirm the meaning of this requirement – for example:

- What must be threatened is an unjustified dissipation [9]. Freezers should not provide claimants with security – nor should they be aimed at stopping defendants from dealing with assets perfectly legitimately. The 'unjustified' nature of any dissipation risk is the lynchpin of this requirement.

- The 'risk' must be demonstrated with solid evidence. Mere inferences or generalised assertions are insufficient [10], and allegations (or evidence) of dishonesty on the part of the defendant do not automatically justify a conclusion that assets are likely to be dissipated [11].

- Courts will take into account the nature, location, and liquidity of the defendant's assets – and the defendant's behavior in response to the claim or anticipated claim [12]

As Henshaw J put it: "[a] *case that might narrowly pass the former test* [(for a 'good arguable case')] *will not necessarily provide a sufficient foundation for finding there to be solid evidence of a risk of dissipation*" [13]. A good example of this logic is found in *Ivy Technology v Martin* [14], in which the defendant (Mr. Bell) applied to discharge a freezer on the grounds that it did not satisfy either of the two requirements. Whilst failing to convince the court that the claimant did not have a good arguable case, he succeeded in showing that there was no real risk of dissipation.

In this case, the claimants relied on a number of facts when applying for the order: Mr. Bell's arrest in 2015 in connection with an investigation into VAT fraud and money laundering, as well as a confiscation order made against him by the Isle of Man's Deputy High Bailiff. Whilst the court found there to be a strong suspicion that Mr. Bell was involved in criminal activity, a number of factors inclined against a finding that there was a real risk of dissipation: (1) the alleged dishonesty relied upon by was not dissipative in nature – nor did it relate to the concealment of assets; (2) Mr. Bell was never been charged or convicted; (3) the matters relied on were four years old; (4) they were unrelated to the case at hand; and (5) Mr. Bell had substantial assets worth over £100m, including assets in the UK in excess of the value of the claim.

This case underscored the importance of applicants providing solid evidence of a real and current risk of dissipation – one based on objective facts relevant to the issues in the case, not unrelated dishonesty.

V. Arguing that the applicant failed to give full and frank disclosure

The disclosure threshold

In circumstances where applications for freezing orders are made without notice, the applicant has to give a full and fair presentation of the facts to the court, known as 'full and frank disclosure'.

This requires applicants to give a full and fair presentation of all material facts the judge might need to know when dealing with the application ('materiality' to be determined in the eyes of the court, not the applicant [15]). Applicants must draw the court's attention to all significant factual, legal, and procedural aspects of the case [16], the likely defenses to be relied upon by the other side [17], as well as the weaknesses of the application itself [18]. The duty not only applies to facts known when making the application but also requires applicants to proactively make proper inquiries [19].

In short, the duty is expansive, with the ultimate touchstone being a question of whether the court would (objectively speaking) view a particular disclosure as material or not: i.e., something that will influence the judge when deciding whether to make the order or deciding the terms upon which it should be made [20].

Should an applicant fall foul of these requirements, courts are keen to ensure that the applicant is deprived of any possible advantage they might have obtained from securing the freezer – this is where the High Court's seminal judgment in *Fundo Soberano de Angola v dos Santos* comes in.

Popplewell's seminal judgment in *Fundo Soberano de Angola v dos Santos*

For all students of freezing orders, and the disclosure required when obtaining them, the starting point should be Popplewell J's 2018 judgment in *Fundo Soberano de Angola v dos Santos*, when the English Commercial Court discharged a worldwide freezing obtained by Angolan sovereign wealth fund, Fundo Soberano de Angola (FSDEA) and several of its subsidiaries against the Quantum Global group and its beneficial owner, Mr. Jean-Claude Bastos de Morais (each of whom was alleged to have dishonesty conspired to take control of, and subsequently dissipate, funds belonging to FSDEA).

VI. Background to the case

The FSDEA was established by a Decree of President dos Santos on 9 March 2011, replacing the former Fundo Petrolífero de Angola (Oil for Infrastructure Fund) and becoming the second-largest investment fund in Sub-Saharan Africa. By another Presidential Decree, No. 107/13 of 28 June 2013, FSDEA was allocated an initial capital endowment of US$5 billion.

Appointed as the fund's first Chairman was Dr. Armando Manuel, Minister of Finance of Angola from May 2013 to September 2016, and economic advisor during that time to President dos Santos. Succeeding Dr Manuel was the President's son, José Filomeno Dos Santos (or, Mr. dos Santos).

Decree 107/13 permitted FSDEA to appoint external managers and advisers, subject to various conditions being met. Accordingly, on 29 November 2013 (during the Chairmanship of Dr. Manuel), FSDEA entered into a so-called "Investment Management Agreement" (the "**IMA**") with Quantum Global Investment Management AG, which was appointed to manage the fund's endowment ("**Quantum Global**"). Quantum Global formed part of the Quantum group ("**Quantum**") which was itself 95% owned and controlled was owned by Jean-Claude Bastos de Morais ("**Bastos**"): a business partner of Mr dos Santos.

After the resignation of Dr. Manuel as Chairman, and the succession of Mr dos Santos, the fund's assets of US$5 billion were invested in separate portfolios (pursuant to the IMA): US$2 billion was invested in a portfolio of assets (fixed income, bonds, equities, etc) which were to be sufficiently liquid to be realisable within no more than three months ("**the Liquid Portfolio**"). The remaining US$3 billion were invested in Mauritian private equity funds for investment in longer-term projects ("**the Illiquid Portfolio**"), and deposited in holding bank accounts with a US bank, Northern Trust, based in London. Each private equity fund had a Mauritian-incorporated limited partner (subsidiaries of FSDEA) and a Mauritian-incorporated General Partner, owned and controlled by the Quantum Group.

In September 2017 President dos Santos stood down as Angola's President after 38 years, and was replaced by President Lourenço. Then, in November 2017, details of the above-described arrangements, and the accusation of irregularity of the same (which the Court eventually did not accept), were publicly leaked in the "Paradise Papers". As a consequence, the Angolan government commissioned a report from EY regarding the operation of the FSDEA, which was produced on 15 December 2017. In light of the findings in the EY Report commissioned by the Angolan government, Mr dos Santos was removed as Chairman of the FSDEA on 12 January 2018 and a notice of termination of the IMA was served on 16 February 2018 (taking effect on 17 April 2018).

This was considered as part of an alleged campaign by Angola's new president Lourenço to break with the former regime, by replacing the management of twenty-one public companies, including the governor of the BNA and chair of the state oil company Sonangol, Isabel dos Santos. This was alleged to have formed part of a public campaign (described by some as a 'witchhunt') by Lourenço against his predecessor, his family members and their perceived associates.

The Claimants said that they had made repeated attempts to negotiate with the various Quantum entities involved in the arrangement (to obtain information about their investments and the whereabouts of the funds under management), but "*nothing of substance was provided*".

As a result, the Claimants brought a claim against Mr. dos Santos, Mr. Bastos, and the various Quantum / Mauritian entities in conspiracy, dishonest assistance, and knowing receipt, and applied for a without notice WFO on 27 April 2018. The claim was highly significant, particularly in the context of the above-mentioned change in regime. The amount at stake was in excess of 6% of Angola's GDP at the time.

VII. The Claimants' case

Although strongly disputed by the Defendants, the Claimants' case was that Mr. dos Santos – by committing FSDEA to the IMA, could not have acted honestly or consistently with his duties of loyalty to FSDEA. It was argued that Mr dos Santos and Mr. Bastos were parties to a dishonest conspiracy by which Mr dos Santos had set out to benefit his friend by appointing his company to manage FSDEA's endowment without any experience, and contrary to both his fiduciary duties to the fund and also to the fund's investment policy. More specifically, the precise reasons given by the Claimants were that: (1) Quantum Global was said to be manifestly unqualified and unsuitable for such an appointment (having little to no expertise in the field, contrary to the fund's investment policy); (2) the terms of the IMA were highly unfavourable to FSDEA; and (3) the appointment of Quantum Global was in breach of the fund's investment policy on the basis that on 13 July 2011, Mr. Bastos was supposedly convicted in Switzerland on 13 July 2011 for "*repeated qualified criminal mismanagement*" [21].

The Claimants also argued that, by transferring the funds to various bank accounts held by the Mauritian entities at Northern Trust, funds were put totally beyond the reach and control of FSDEA (the Claimants argued that this structure was intended to ensure as such). As regards the Illiquid Portfolio, the Claimants argued that relatively little of these funds were invested in the project – and at least US$2.2 billion remained in the bank accounts in cash, generating nothing other than "*eye-watering*" fees for Quantum Global. Of the projects that were invested in, the Claimants argued that most were controlled by Mr. Bastos.

VIII. The Defendants' case (as later articulated)

The Defendants submitted that the Fund's claim was an attempt by the new regime to attack its predecessor, miring the previous president in damaging allegations concerning fraud and nepotism and that the proceedings were commenced as an attempt to claw back the money whichwhich was legally invested in long term private equity funds against the existing contractual arrangements and the dispute mechanisms contained therein.

IX. The granting and discharge of the WFO

On 27 April 2018, Phillips J granted the WFO which the Claimants applied for against the Defendants, restraining them from disposing of or dealing with their assets up to the value of US$3 billion. The claims in support of which the WFO was granted arise out of what the Claimants contend was a dishonest conspiracy between Mr. dos Santos and Mr. Bastos.

In a judgment given at the adjourned return date hearing [22], the WFO was discharged on the basis that the applicants had committed no less than eight separate breaches of their duty in full and frank disclosure. In the context of such high-profile and high-value allegations of fraud, discharging the WFO was by no means an easy task – and its eventual discharge was significant.

The threshold required

From a legal perspective, the court issued some helpful clarifications concerning the precise threshold required of an applicant in properly discharging their duty of full and frank disclosure.

1. The duty was fundamentally designed "*to ensure the integrity of the court's process*". In circumstances, where an application is brought without notice, it is imperative that the applicant ensures the court has effectively 'heard both sides', by presenting the other side's likely defenses – and even more imperative that the court can trust the applicant to do so fairly and accurately.

1. The court confirmed that the "*ultimate touchstone*" of such a presentation is whether the application is "*fair in all material respects*" (emphasis added). This requires active signposting of evidence relied upon, and of likely pleaded defenses. It is insufficient to leave it to the court to delve through voluminous material, forming its own position. Applicants must bring all matters to the court's attention through appropriate 'signposting'.

1. Importantly, the duty not only applies to the applicant but also to its solicitors and legal advisers (in respect of which the duty is a "*heavy duty*") – ensuring the applicant is not only aware of the duty and what it means but discharges the duty appropriately. This required active supervision by the solicitors to ensure their client discharged the duty properly. In relying on the Court of Appeal's judgment in *Myers v Elman* [1940] 2 AC 282 at [304], the court emphasised the importance of solicitors ensuring clients are advised as to the meaning of 'relevance' in the context of freezing order applications and issued a salutary reminder of the need to take reasonable investigative steps to ascertain the true position (in other words, not necessarily taking a client's account of events automatically as gospel).

The various breaches

As above, the applicants were said to have breached their duty in eight material respects – these include:

1. giving an unfair account of the process by which Quantum was selected as the investment manager (the claimants sought to suggest that Mr. dos Santos was solely responsible for

Quantum's appointment), its track record, and suitability (the claimants wrongly described it as an "*untested entity*");
2. the transparency and regularity with which it reported to FSDEA;
3. the suggestion that Quantum's use of Mauritian 'Limited Partnership' subsidiary entities was designed to eliminate control and visibility over portfolio funds; and
4. an unfair presentation of the fees charged (wrongly describing them as "*eye-watering*") which were in accordance with market standards.

Another important factor in the court's decision was the supposed "*unfortunate mischaracterisation*" of Mr. Bastos' Swiss criminal conviction. In particular, this conviction was described by the applicants as having given rise to a suspended sentence and a fine – in other words, giving the court the impression that it had warranted a suspended custodial sentence; whereas, upon closer inspection of the material that was made available to the applicant's solicitors, the sanction was a suspended sentence of a fine, i.e. a fine payment of which was suspended and which in the event Mr. Bastos was not required to pay (save in respect of the small sum of CHF 4,500 which was not suspended). It should be noted that all charges against Mr Bastos were eventually dropped by the Swiss prosecutors. Whilst not determinative of the court's decision, this was nonetheless important and underscored the applicants' blatant failure to discharge their duty in full and frank disclosure.

A tall order

Discharging WFOs on the basis of a failure to give full and frank disclosure is far from easy – particularly in circumstances where the applicants have mounted arguable claims of dishonesty – involving considerable sums at stake (in excess of 6% of Angola's GDP in 2018).

This task was made even more complicated by the fact that the applicants in this case had the benefit of a large and experienced team of legal advisers: including the commercial litigation team at international firm, Norton Rose Fulbright and a leading counsel team led by Paul McGrath KC.

In these circumstances, the Defendants had to successfully do what the Applicants had failed to do: appropriately signpost their pleaded defenses, as well as the instances in which full and frank disclosure had not been given. In a compressed procedural timetable (as is ordinary with these types of applications), this was by no means easy – and required round-the-clock input from, and cooperation between, a number of legal teams: Quinn Emanuel for the Quantum entities; Grosvenor Law for JCB; and Joseph Sutton Solicitors for Mr. dos Santos – and their instructed counsel teams, which spanned a number of chambers. It also helped that the Court did not accept many of the Applicants' arguments with respect to dishonesty and/or wrongdoing on the part of Quantum and/or Mr. Bastos. By way of example:

> "*There is no evidence that Mr dos Santos received anything from the investments of the Liquid or Illiquid Portfolio, whether by receipt of part of the fees or otherwise. There is no evidence to suggest that he has any control over the Liquid or Illiquid Portfolio. There is no suggestion or evidence that he has used offshore structures to hold or deal with his own assets.* […]
>
> *There is no evidence to suggest that the use of offshore structures by The Quantum group was anything other than the normal and legitimate way in the group structured itself for tax, regulatory and other proper business purposes; or that Mr Bastos' personal use of such structures was not his normal modus operandi for legitimate personal reasons. […] This applies with equal force to the Mauritian Limited*

> *Partnerships: the evidence is that such structures are not unusual for private equity investments; that they were known about and not disapproved by Deloitte at the time; that the structure was not a matter of criticism by E&Y in their investigations* […]" [23].

Through finely crafted witness statements and skeleton arguments (as well as persuasive oral submissions), the Defendants managed to convince the court that the Applicants' failures had been "*serious and substantial*", and went to "*the heart of the Claimant's case*" in dishonesty. The breaches (taken together) went far beyond "*the odd accidental slip*" – had a fair presentation of the facts been given, this would "*have put a very different complexion on the application*" and lead the court to conclude that there was no good arguable risk of dissipation.

Although Popplewell J concluded that there was not any deliberate breach on the part of the Claimants' legal team he stated that he was unable to reach the same conclusion with regards to the personnel at FSDEA itself – Popplewell confirmed that it was "*less clear whether*" there was any deliberate breach on the part of FSDEA personnel, and that whilst it was "*impossible to identify whether any individual was aware of the duty and deliberatley failed to comply with it*", there was at least "*a high degree of cupalability in the failures*" (see paragraph [84] of the judgment). The failures were serious and there was "*a high degree of culpability in the failures*" – something which the Defendants were able to successfully convince the court of.

Popplewell's judgment was resounding – and would have made uncomfortable reading for the applicants and, particularly, their legal team. Such was the success of the Defendants' discharge application, that the Claimants' requested expedited appeal to the Court of Appeal was dismissed.

X. A cautionary note

However, respondents would be ill-advised to place too much reliance on Popplewell's *FSDEA* judgment. As explained above, to set aside a WFO on the basis that full and frank disclosure was not given requires round-the-clock work and a well-drafted legal argument – particularly where the applicant has the benefit of an all-star legal team, and where the judge is not entirely convinced of dishonesty on the part of an applicant's in-house legal team. Creative signposting is required to convince the court that the threshold required for appropriate disclosure was not met.

For example, in *Thai-Lao Lignite (Thailand) Co Ltd & another v Government of the Lao People's Democratic Republic & another* [24], the court considered the claimant's failure to (*inter alia*): (i) draw attention to possible countervailing arguments; (ii) give a fair presentation of how the relief was justified; and (iii) identify the state immunity conferred on the bank. The court ultimately concluded – quite differently from Popplewell J above – that none of these were of sufficient materiality to warrant an immediate discharge, and were, in any event, not deliberate. Likewise, in *Wells v Chave* [25], the court held that the applicant's "*relatively small*", but non-innocent, breach of this duty was insufficient "*material*" and discharge would therefore be disproportionate.
Respondents should have a keen eye to the materiality of any purported non-disclosures, and be wary of overplaying their hand.

XI. Pointing to some delay brought about by the applicant

Freezing injunctions are 'equitable remedies' in English law, meaning that a number of 'equitable maxims' apply to them. One of these maxims is "*delay defeats the equity*" – which can apply to two kinds of delay.

First kind of delay – arranging the return date hearing

The purpose of an initial freezing injunction is to 'hold the ring' for a short period until the return date. Courts have been keen to emphasise the importance of acting "*expeditiously*" once an initial freezing order is granted so any delay in arranging that hearing can be a ground for discharging the order. For example, in *Fagbolagun v Alade* [26], the without notice freezing order required the claimant to liaise with the court's listing office to fix a return date hearing as soon as possible. The claimant not only failed to do this but also refused to do so when invited by the defendant's solicitors. Whilst the court set aside the order for other reasons, the judge said: "[e]*ven if I had not set it aside, I would have discharged it for non-compliance*".

Second kind of delay – in prosecuting the underlying proceedings

Freezing orders do not exist in a vacuum – they relate to underlying substantive proceedings. Once a freezing order is obtained, the claimant "*is bound to get on with the trial of the action—not to rest content with the injunction*" [27], meaning any delay by the claimant in prosecuting the proceedings could potentially give rise to an inference that the freezing order was obtained with some ulterior, improper motive – and not, as it should be, in support of the underlying proceedings. This can give rise to a discharge of the freezer, as the party subject to the injunction should not be left in limbo by the claimant to the proceedings [28].

However…

Arguing on the basis of delay is far from a surefire way of successfully securing a discharge. For example, in *BCS v Terry*[29] and *Svendborg v Awada* [30], the delay did not provide automatic grounds for the discharge of the order, and courts in both cases emphasised the regard that should be had to the reasons for the delay, the conduct of the parties and the balance of prejudice. Further, in relation to the second kind of delay above, the delay must be significant, with courts in the past have considered even a delay of up to two months as insufficient grounds for discharge [31] (although this was admittedly context-specific, as the freezer was secured by an insolvent company).

XII. You've failed to discharge the order. What are your options now?

Apply to vary the order

A number of ways exist in which respondents can try to vary the terms of the order to minimise its effect. However, the return date hearing is not always the best time at which to do so – instead, applications for variation frequently occur down the line – once the effect of a freezer is more clearly known to the court and the parties.

(1) Varying the order to decrease the 'maximum sum' of frozen assets

This maximum sum is usually calculated by reference to the number of damages, interest, and costs for which the claimant can demonstrate a 'good arguable case' of being awarded against the respondent.
Therefore, if a respondent wishes to reduce this sum, they will need to satisfy the court that the claimant's underlying claim is not worth as much as they say it is – or that the assets over which the order operates are in fact work vastly in excess of what the claimant thinks it is worth. Proving either of these points is not an easy task and will usually require expert evidence from the respondent.

(2) Apply to vary the carve-out for expenses

Courts are reluctant to let freezing orders operate oppressively, which is why the standard provision is usually made for carve-outs concerning the respondent's ordinary living expenses (in the case of an individual) or ordinary course of business (in the case of a business).

In the case of businesses, the carve-out usually does not give a sum. Instead, the order will simply state that disposals are permitted 'within the ordinary course of business'. This does not give respondents an opportunity to vary the order – instead, the respondent should ensure that they have regard to this requirement and continue to liaise with their solicitors to ensure it is obeyed. This is particularly important given courts have confirmed that this carveout should be narrowly construed [32], with a two stage-analysis to be conducted for each transaction in question: (1) whether the payment or disposal is in the "ordinary course of business" (naturally depending on the respondent's type of business and how it is carried on); and (2) whether it is "proper" (in other words, whether it is made in good faith, "*in accordance with acceptable standards of commercial behaviour*" [33] and in respect of a liability properly incurred [34]).

In the case of individuals, however, this carve-out is usually given a sum – one which respondents can apply to increase should they see fit. For example, in *Vneshprombank LLC v Bedzhamov and others* [35], the defendant was permitted to spend £80,000 per month for so-called 'reasonable living expenses and, viewing this as insufficient, applied to increase it to £310,000. The Court of Appeal held that on the facts of the case, this was appropriate, and emphasised a freezer's central purpose: to do no more than necessary to prevent defendants from taking steps outside the ordinary course which would render any judgment unenforceable. Subject to this, defendants should be entitled to do as they wished with their own money.

Try to replace them with undertakings or security

Another option is to approach the claimant to consensually seek the freezing order's discharge by offering to provide them with alternative security – usually via payment of an appropriate sum into court.

Such offers can be attractive to claimants (as freezing orders are not designed to offer security) whilst also remaining valuable to respondents (who will not have a freezing injunction hanging over their heads). Any such undertakings are enforceable by committal proceedings for contempt of court.

Another option is for the respondents in question to provide the applicant with undertakings on the same or equivalent terms as the freezer. Offering to do this can put claimants in a tricky position – as freezing injunction applications are usually made at the early stages of litigation, it is important for the claimants not to appear unreasonable, or in any way seeking to wield the freezer oppressively over the respondent.

In a domestic context, these operate broadly similar to a freezing injunction (which is why respondents would generally prefer to seek the order's replacement with security, as opposed to with undertakings), although it can be harder to convince courts to substitute worldwide freezing orders with undertakings, given their extraterritorial effect is not entirely clear (as acknowledged in *Hutchcroft v Barrett*, in which the court refused to replace the WFO with an undertaking on this basis [36]). That said, this is far from a hard-and-fast rule, and courts have made orders replacing WFOs such undertakings in the past [37].

Once undertakings are given, they will generally only be varied or discharged if there is good reason to do so – for example, if there is a significant change of circumstances (as in *Emailgen Systems v Exclaimer Ltd and Another* [38]). Discharging them can, however, be difficult and courts will not look kindly on respondents who agree to give such undertakings, only to seek to resile from them by seeking their discharge (as was made plain in *PJSC National Bank Trust & Another v Mints* [39]).

Apply for fortification of the claimant's cross-undertakings

Claimants who seek freezing orders are usually required to provide a "cross-undertaking" to the court that, if the freezer is subsequently found to have resulted in a loss to the respondent or has been improperly obtained, they will compensate the respondent and/or any third party in respect of that loss.

If a respondent is concerned about the ability of the claimant to pay these damages, it is possible to apply to 'fortify' the undertaking, by requiring the claimant to make a payment into court or their solicitor's client account.

Such applications usually require the court to estimate the harm that the defendant might suffer from the freezing order.
However, this is not always possible – particularly if the order does not relate to a specific asset. In these circumstances, courts will be keen to see clear evidence that there is a general risk of loss – one that directly flows from the granting of the order and itself warrants fortification [40] - as one academic put it, "*assertion of risk is insufficient, there must be some real evidence, which objectively establishes that risk*" [41].

Applying for fortification is therefore not always easy, but it can be a valuable tool within a respondent's toolkit, particularly given the sums are capable of fortifying not only future losses incurred as a result of the order, but also past losses before the fortification was given. [42]

XIII. What happens once you've obtained a freezing order?

The substantive proceedings

Once an applicant has obtained a freezing order, it will need to ensure it complies with the various undertakings prescribed therein. These are generally minimal, and will involve an undertaking to (for example) ensure service of all the relevant evidence on the Respondent's(/s') solicitors – e.g., the witness statement made in support of the freezing order, the order itself, etc. Apart from that, the obligations are relatively minimal: the Applicant should ensure it pursues the claim diligently, without undue delay, and may wish to take preventative steps to protect frozen assets (for example, if the order affects land, the applicant may wish to protect the land by registering a restriction at His Majesty's Land Registry). The Applicant will also need to ensure they comply with their ongoing disclosure obligations (for example, if they become aware of any information which renders incorrect what the court was initially told, or if there is a material change in circumstances of which the court should be informed).

Apart from that, the bulk of the work will fall on the Respondent's(/s') desk: they will need to ensure processes are put in place to ensure the freezing order is complied with and that the undertakings are abided by going forward.

Costs

In terms of the costs position, costs are generally awarded against the applicant if the eventual order that is sought is refused by the Court (or subsequently overturned, as it was in *FSDEA*). However, the costs position after a grant of relief is far less predictable. It had originally been thought that the appropriate position was to defer or reserve the issue of costs until a later stage, or trial (see *Picnic of Ascot v Kalus Derigs* [2001] Fleet Street Reports, p. 2). However, the effect of Spencer J's judgment in *Bravo and others v Amerisur Resources Plc* [2020] EWHC 2279 (QB) was to confirm that, even though freezing order applications are often not preceded by pre-action correspondence, respondents are nonetheless in principle liable for the costs of the application from the moment it has been granted ex parte (in other words, whilst it may be appropriate to reserve costs – as happened in *Picnic of Ascot* – this approach is not always appropriate, particularly with freezing injunctions, where the balance of convenience is not a consideration taken into account by the court).

In short, the decision in *Bravo v Amerisur* suggests that the court may be less likely to reserve the costs of an application for a freezing order than for other interim injunction applications, given that freezing orders are less susceptible to significant re-evaluation at trial. The court hearing the application may take the view that the trial judge will not be in any better position to determine the costs, and therefore it is not appropriate to reserve the costs.

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Quinn Emanuel's London office has vast experience of working with clients in both successfully obtaining, and discharging, (worldwide) freezing orders, and has represented clients in a number of the seminal cases cited in this article.

- From a defendant perspective, this includes Essar Global Fund Limited, Dmytro Firtash, and Quantum Global, in respect of whom Quinn Emanuel successfully secured the discharge of freezing orders obtained by ArcelorMittal USA LLC, VTB Bank (PJSC) and FSDEA respectively. The firm is also representing Boris and Igor Mints in a pending appeal to discharge Return Date Undertakings given in lieu of a worldwide freezing order.

- From a claimant perspective, Quinn Emanuel has successfully represented a range of clients in securing (worldwide) freezing orders, including Avonwick Holdings Limited, Vitali Gaiduk, and others (who secured a freezing order worth over US$20 million over the assets of Mr. Taruta and Dargamo Holdings Limited) and Navigator Equities Ltd (who secured a worldwide freezing order worth £87.5 million over the assets of Mr. Oleg Deripaska).

Should you have any further questions related to this article or freezing orders more generally, please do not hesitate to reach out to Matthew Bunting at matthewbunting@quinnemanuel.com or any other partner in the London office.

[1] *Bank Mellat v Nikpour* [1985] FSR 87.
[2] This approach was confirmed in *Bravo and others v Ameriseur Resources plc* [2020] EWHC 2279 (QB).
[3] *Fourie v Le Roux and others* [2007] UKHL 1.
[4] *JSC BTA Bank v. Ablyazov* [2013] EWCA Civ 928; *Ras Al Khaimah Investment Authority v. Bestfort Development LLP* [2017] EWCA Civ 1014, para. 39 (Longmore L J).
[5] *Kaefer Aislamientos Sa de CV v. AMS Drilling Mexico SA de CV and others* [2019] 2 All ER 979, at para. 59.
[6] *Ninemia Maritime Corp v Trave Schiffahrts GmbH & Co KG (the Niedersachsen)* [1983] 1 WLR 1412.
[7] *Kaefer Aislamientos Sa de CV v. AMS Drilling Mexico SA de CV and others* [2019] 2 All ER 979.
[8] *Greenshores Properties Ltd v Andrews and others* [2013] EWHC 3399 (QB).
[9] [2018] EWHC 2199 (Comm), para [86].
[10] See *Tugushev v Orlov et al* [2019] EWHC 2031 (Comm) at [49]: "*A cautious approach is appropriate before deployment of what has been called one of the court's nuclear weapons", and "the risk is not to be inferred lightly. Bare or generalised assertion of risk by a claimant is not enough.*"
[11] *National Bank Trust v Yurov* [2016] EWHC 1913 (Comm) at [70].
[12] *National Bank Trust v. Yurov* [2016] EWHC 1913 (Comm) §§ 69-70 per Males J.
[13] *ArcelorMittal v Ruia and Ors* [2020] EWHC 740 (Comm).
[14] [2019] EWHC 2510 (Comm).
[15] See, for example, *Brink's Mat v Elcombe* [1998] 1 WLR 1350.
[16] *Alliance Bank v Zhunus* [2015] EWHC 714 (Comm).
[17] *Banca Turco Romana SA v Cortuk* [2018] EWHC 662 (Comm).
[18] *Integral Petroleum SA v Petrogat FZE* [2021] EWHC 2092 (Comm) at [23].
[19] *Brink's Mat v Elcombe* [1998] 1 WLR 1350.
[20] *Alliance Bank v Zhunus* [2015] EWHC 714 (Comm)
[21] The details of which are helpfully set out in the following Swiss article (which can be translated readily into English): https://interaktiv.tagesanzeiger.ch/2017/paradise-papers/angola-bastos/?openincontroller.
[22] [2018] EWHC 2199 (Comm).
[23] See [2018] EWHC 2199 (Comm), paras. 15, 56, 87 – 88. See further detail set out in paras. 57-77.
[24] [2013] EWHC 2466 (Comm).
[25] [2014] EWHC 2444 (Ch).
[26] *Fagbolagun T/A Baganton Properties Services v Alade* [2016] EWHC 3542 (QB).
[27] *Lloyds Bowmaker v Brittania Arrow* at page 188.
[28] *Town & Country Building Society v Daisystar Times*, October 16, 1989, [1989] 8 WLUK 43.
[29] BCS Corporate Acceptances v Terry [2017] EWHC 1176 (QB).
[30] [1992] 2 Lloyd's Rep 244 .
[31] *TAG Capital Ventures Ltd v Potter* [2012] EWHC 3323 (Ch).
[32] [2018] EWCA Civ 3040.
[33] [2019] EWCA Civ 891.
[34] See the endorsement of this two-staged test in *Michael Wilson v Emmott* [2015] EWCA Civ 1028 at [19]-[21] (as endorsed more recently in *Kolomoisky* [2018] EWCA Civ 3040 at [15].
[35] [2019] EWCA Civ 1992.
[36] *Hutchcroft v Barrett* [2021] EWHC 3704 (QB).

[37] As an example, see *PJSC National Bank Trust & Another v Boris Mints and Ors* [2019] EWHC 2061 (Comm).
[38] [2013] EWHC 167 (Comm).
[39] [2020] EWHC 204 (Comm).
[40] *Sinclair Investment Holdings v Cushnie* [2004] EWHC 218 (Ch).
[41] Gee on Commercial Injunctions, paragraph 11-029; and affirmed in *Brainbox Digital v Blackboard Media* [2017] EWHC 2465.
[42] See *Alta Trading UK Ltd and others v Bosworth and others* [2021] EWHC 1126 (Comm).