

Procedural Weapons of Mass Destruction: Pre-Judgment Remedies in English and Offshore Fraud Litigation

Imagine if you could make a secret application to have your opponent's global assets frozen and disclosed to you, to limit their weekly personal and legal spend, to have their premises summarily searched, their computers and papers seized, their Gmail, Hotmail, and Yahoo accounts secretly monitored, their passport confiscated, their trust service providers gagged and required to give you disclosure in secret and then, if these draconian orders are breached, have your opponent (or their company directors, trustees or nominees) arrested, fined and imprisoned – all before trial.

The **English Courts** and (to varying degrees) courts in other “offshore” common law jurisdictions outside the USA (such as **Cayman Islands, BVI, Cyprus, Hong Kong, Singapore, Guernsey, Jersey, Isle of Man, Bermuda, ADGM and DIFC**) have developed powerful and innovative remedies such as these to assist victims of fraud and to punish parties that knowingly breach court orders. While they may be familiar to English and offshore civil fraud lawyers, they are likely less familiar to lawyers in other jurisdictions.

In this article, we summarise some of the different types of aggressive and innovative measures that are available in English and offshore civil fraud litigation, including **asset seizures, orders to search premises, email monitoring orders, fines and even imprisonment**. These are effective remedies and deterrents and one of the reasons why victims of international fraud frequently turn to the English and offshore courts, sometimes in preference to US courts. Partly in recognition of these unique, wide ranging, and creative remedies, civil fraud litigation is treated as a separate, specialized practice area in England and offshore.

We also consider how defendant parties faced with such orders can respond to them effectively and minimize their risk exposure.

Worldwide Freezing Orders – the “Nuclear Weapon” of English and offshore litigation

“Worldwide Freezing Orders” (WWFOs for short) are referred to as the “nuclear weapons” of English litigation. They force potential fraudsters to (i) disclose their assets in very short order, wherever they may be, freeze those assets, and ultimately prevent them from being dissipated. WWFOs can be made in support of both English proceedings and foreign proceedings. They can be made against parties domiciled outside England.

Compliance with WWFO's can be extremely time consuming and burdensome. Very frequently the respondent may attempt to breach a WWFO in an effort to conceal assets or in the mistaken belief that there will be no consequences. The Court, however, has developed numerous devices to police compliance. In view of its powerful effect, an application for a WWFO is almost always made without notice, so that the respondent cannot dissipate its assets after it has been given notice of the application.

Assets Covered: the definition of assets for the purposes of the WWFO is broad. In addition to encompassing traditional assets (bank accounts, properties, investments, etc.), it can also extend to less obvious assets: for example, loan facilities, assets owned by wholly owned companies, interests in a trust fund, and assets owned by a trust. It includes assets in which the respondent has a legal or beneficial interest

including cryptocurrency.¹ WWFOs also cover assets acquired during the duration of the order, while it is also possible to freeze assets that the defendant holds as a trustee or nominee for a third party.² A Supreme Court decision recently allowed for freezing of assets which the defendant was empowered to directly or indirectly dispose of – this means that the WWFO can even extend to assets held by a company in which the defendant is the sole creditor and director.³

“John Doe” WWFOs: it is even possible to obtain a freezing order against “persons unknown” in the context of fraud claims, for which it is sufficient to make reference to particular bank account transfers. English courts are also able to grant **John Doe disclosure orders** requiring an unknown trustee of a known trust to disclose its identity, so that it can be added as a defendant to a pending claim and required to comply with a WWFO in the meantime.

Generally No Priority or Security: a WWFO does not give the innocent party any priority or security over the frozen assets in question. Rather, it seeks to preserve the assets so that any subsequent judgment in favor of the applicant can be enforced against the assets so preserved. In certain circumstances, a WWFO may also be made against other parties who appear to hold assets on behalf of the respondent. This is a very effective tool where a respondent controls (directly or indirectly) third parties and uses those third parties to create an artificial separation of ownership of assets. Where however a plaintiff alleges an ownership (proprietary) right over assets, a WWFO can help the plaintiff preserve security over them.

Legal Test for WWFOs: in order to obtain a WWFO in England, the applicant must demonstrate to the Court that: (i) it has a cause of action, i.e., an underlying legal or equitable right that has been breached; (ii) the English Court has jurisdiction; (iii) it has a good arguable case against the potential fraudster – i.e., a case “*which is more than barely capable of serious argument and yet not necessarily one which the judge believes to have a better than 50 per cent chance of success*”; (iv) there is a real risk that, without the WWFO, the fraudster will seek to dissipate assets beyond the reach of the innocent party—the court may infer a risk of dissipation from the parties’ previous conduct, particularly if there is evidence of fraud or if the assets could easily be transferred to third parties; and (v) under the circumstances, it is just and convenient for the order to be granted. Out of all these conditions, risk of dissipation is often the most difficult to prove – the mere existence of a strong claim for a substantial amount is not sufficient. The courts will consider, objectively, whether there is a risk of dissipation, taking into account all the circumstances.

Burdensome Compliance: once a WWFO is obtained and served, the respondent is required to give disclosure of his *worldwide* assets over a defined *de minimis* amount, for example USD 5,000. This disclosure must be given in an extremely limited timeframe—often a matter of days. This makes compliance both burdensome and time-consuming, particularly where the respondent holds assets around the world in complex structures.

The information provided must include (among other things) the value of the assets; their location; and whether or not the assets are individually or jointly owned. In addition, within a further few days, the information must be verified by a sworn affidavit from the respondent to the Court. The obligation to provide the information is on-going and newly acquired assets must also be disclosed on a rolling basis. There is very rarely sufficient time to apply to set aside a WWFO before the deadline for asset disclosure.

¹ *JSC BTA Bank v Ablyazov* [2015] UKSC 64; *Vorotyntseva v Money-4 Ltd (T/A Nebus.com) and others* [2018] EWHC 2596 (Ch).

² *JSC BTA Bank v Ablyazov* [2015] UKSC 64.

³ *Lakatamia Shipping Company Ltd v Nobu Su and others* [2014] EWCA Civ 636.

It is therefore a draconian *ex parte* remedy which can put a defendant on the back foot before the litigation has even commenced.

WWFO's typically also limit a defendant's ability to spend funds on living expenses above a specified amount and legal defense costs.

Non-Compliance with a WWFO: failure to comply with a WWFO (including third parties, such as banks, trustees and company directors, that are placed on notice of the terms of the WWFO) is a serious offense. It may result in imprisonment, fines or asset seizures. If the disclosure provided by the respondent is deficient, there are a number of steps that the applicant can take to further increase pressure on the respondent: so called "sanction based litigation".

Contempt of Court – Imprisonment: when a respondent has failed properly to comply with its obligations pursuant to a WWFO, it may be open to the applicant to issue contempt proceedings. These can be brought on an urgent basis soon after a respondent has breached its obligations, the purpose being to seek relief from the Court in an attempt to secure compliance with the order and to secure available assets. Sanctions are severe. In recent years, for instance, there have been many instances of respondents being given prison sentences of up to two years for breaches of WWFOs. Border authorities keep records of parties in contempt of court, who are liable (if they are in transit through England) to be arrested and immediately taken to court for sentencing and imprisonment. Every year, there are stories of unwary fraud defendants who are imprisoned after they are caught in deliberate breach and they fail to escape the long arm of the law.

Debarring Orders: the Court is also increasingly issuing so-called "Debarring Orders" if it is satisfied that the defendant has failed to comply with a WWFO. The plaintiff victim obtains an "unless order", which requires the respondent to properly comply with the WWFO, failing which the defendant will be barred from defending the claim against it. While this can be seen as a draconian measure, the English Courts have traditionally considered that the overriding interest of justice includes orders of the court being respected and obeyed.

Receivership Orders: the courts of some jurisdictions, including in particular BVI and Cayman, can sometimes be persuaded to appoint provisional liquidators or receivers to preserve assets which are at risk of dissipation.

Third-Party Disclosure Orders: a plaintiff's priority is invariably to position itself so that it can recover the assets that were taken from it as quickly as possible. If a defendant complies fully with a WWFO, the innocent party will learn not only the location of the defendant's assets but will also know that they are frozen by the WWFO. If, however, the defendant has been less than honest with its asset disclosures, the innocent party must locate the fraudulent proceeds as a priority. This can be far from straightforward, with potential fraudsters becoming increasingly sophisticated in hiding funds, often by means of complex corporate structures spread across numerous offshore jurisdictions.

In order to enable victims of frauds to trace the flow of funds from source to their current location, the English Courts have developed a number of different forms of disclosure orders ("Disclosure Orders"), which can be used to obtain information from third parties as to the whereabouts of the stolen assets. In many cases, Disclosure Orders are obtained **against trust/corporate service providers and banks** that the respondent is known to have accounts with. The trustees or banks can be required to provide the applicant with banking records held in relation to the respondent, including (but not limited to) client opening information, bank account statements and copies of checks. Critically, they can be ordered to

provide the information in a very short time frame (usually a matter of days) and to provide it not just in relation to the known bank accounts of the respondent but also in relation to any other account held by that individual. The innocent third party can therefore effectively “trace” the flow of funds through various accounts.

Gagging Orders: when seeking Disclosure Orders is the innocent party can request a “gagging order” from the Court. The gagging order prevents the disclosing party from “tipping off” the fraudster (who is likely to be a valuable customer of the disclosing party) to the fact of the application or resulting disclosure. This allows victims to stay ahead of a fraudster seeking to dissipate assets or avoid orders of the English or offshore courts. It maximizes innocent parties’ prospects of locating both where funds have flowed since the fraudulent scheme took place and where they presently are.

Email Monitoring Orders: more recently, in addition to Disclosure Orders against banks and trustees, the Courts have been willing to grant Disclosure Orders against Internet and email providers, such as Yahoo. Such an order allows victims of fraud to secretly access and review electronic communications in relation to a fraud that had been committed. This order was obtained in the *JSC BTA Bank v. Ablyazov* litigation and had devastating consequences as it effectively granted the Court a private window into the fraudster’s activities. This type of order is demonstrative of the extent to which courts are increasingly prepared to help victims who are faced with a recalcitrant opponent which repeatedly ignores the court’s orders.

Passport Seizure: if an individual defendant is considered a flight risk, the Court is sometimes prepared to order the respondent to hand over his/her passport to the applicant’s solicitors, preventing him/her from fleeing the jurisdiction.

Enforcement Abroad of WWFOs: to avoid abuse and the potential for conflicting orders from multiple courts, it is generally the English court’s practice to require the plaintiff to seek specific permission to enforce or recognize a WWFO abroad (or to apply for similar relief in another jurisdiction). In practice, WWFOs are often given effect by service on banks or trust providers who have a presence in England or offshore, or by the obtaining (with permission) of parallel freezing or attachment orders where banks and providers have a presence.

Search and Seize Orders: plaintiffs are in sufficiently serious and urgent cases able to seek Search and Seize Orders from the English Court. Search orders are a form of mandatory injunction, which require a defendant to allow the applicant’s representatives, under the supervision of an independent “supervising solicitor” appointed by the court, to enter the defendant’s premises and to search for, copy, remove, and detain documents, information, or material. The purpose of a search order is to allow applicants to preserve evidence or property which is, or may be, the subject of an action. Under certain circumstances, search orders can even be issued with regard to **premises located abroad**. Where search orders are considered by the court to be too invasive, “doorstep” or “delivery up” orders have been issued, requiring the applicant to hand over relevant documents at his/her doorstep or to the court respectively.

Responding to WWFOs – Defense Strategies

Defendants who receive WWFOs need to move quickly. It is a rare case where a Defendant is able to get before the court and set aside a WWFO before having to give asset disclosure. Defendants are therefore best advised to focus their resources on short term compliance with an order before turning defense into attack by applying to set aside or vary the WWFO.

- **Set aside applications:** the most common ground to set aside a WWFO is where a plaintiff fails to give “full and frank disclosure” at the *ex parte* stage, for example by failing to disclose material points which operate in a defendant’s favour in relation to the claim or the alleged risk of dissipation of assets, or where (even if proper disclosure was given) the court is not satisfied on the return date, having heard from the defendant, that the claim is sufficiently strong or the risk of dissipation so great as to justify the continuation of the order.
- **Security payments:** another common defense strategy is to require a plaintiff, particularly an impecunious one or based overseas, to make a substantial payment into court or provide a bank guarantee. Failure to make such a payment or guarantee by the mandated deadline results in the automatic discharge of the WWFO, with a defendant then having a right to seek damages for losses suffered as a result of the WWFO. In 2021, for example, we obtained an order for a defendant client requiring an overseas plaintiff bank to provide GBP 10 million of cash security, which it failed to do, resulting in the immediate discharge of the freezing order and the release of GBP 100m of London real estate assets which had previously been frozen.
- **Variation applications:** finally, defendants often apply to vary WWFOs to allow them to increase their permitted weekly expenditure on living or legal expenses and to carve out certain assets from the scope of the WWFO, particularly where a plaintiff is obviously “oversecured”.

If you have any questions about the issues addressed in this Client Alert, please do not hesitate to contact us.