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FREEZING INJUNCTIONS: FOUR KEY PRINCIPLES

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The Supreme Court rarely has cause to consider freezing injunctions. In JSC BTA Bank v Ablyazov [2015] UKSC 64 it did. In doing so it provided guidance of broad application as to the proper construction of freezing orders, and particular guidance as to the current Commercial Court standard form order. Its reaffirmation of a restrictive approach to the interpretation of such orders is a salutary reminder as to the need for care in their drafting.

THE FACTS

1. The appellant bank (the "**Bank**") obtained judgments against Mr Ablyazov in the combined sum of US\$4.4m. It subsequently obtained a Freezing Order against Mr Ablyazov (the "**Order**"). Mr Ablyazov then entered into a number of loan agreements (the "**Agreements**"). He drew down fully under those agreements and paid the proceeds to various third parties.
2. The Bank applied for a declaration that the loan sums were "assets" for the purposes of the Order, relying in particular on the following wording taken from the current Commercial Court standard form order:

"[Each restriction as to disposing of, dealing with or diminishing the value of assets] applies to all the respondents' assets whether or not they are in their own name and whether they are solely or jointly owned and whether or not the respondent asserts a beneficial interest in them. For the purpose of this Order the respondents' assets include any asset which they have power, directly or indirectly, to dispose of, or deal with as if it were their own. The respondents are to be regarded as having such power if a third party holds or controls the assets in accordance with their direct or indirect instructions."

“ASSETS”

3. The application was refused at first instance. The Court of Appeal upheld that decision, in part because of the archetypal status of rights to draw down loan sums as “choses in action”. It decided that the right to draw down a loan did not qualify as an asset, when considered in light of the terms of the Agreements, the purpose of a freezing order and the fact that the Order itself did not use the term “choses in action” which, in the freezing order context, have not historically been considered to fall within the term “assets”. In its judgment, the Court of Appeal coined a new term: “the flexibility principle” – to the effect that:

“the jurisdiction to make a freezing order should be exercised in a flexible and adaptable manner so as to be able to deal with new situations and new ways used by sophisticated and wily operators to make themselves immune to the courts’ orders or deliberately to thwart the effective enforcement of those orders”.

4. The Bank appealed again. The issue was ultimately a simple one of interpretation. According to the Supreme Court, the proceeds of the Agreements were “assets” within the extended definition in the Order. It matters not whether rights to loan proceeds are “choses in action” - the key question is whether under the terms of a loan agreement the defendant has the power to deal with the proceeds of any such agreement as if they were his own. If so, they will be caught under the Commercial Court standard form (above). The wording was not (as per Beatson LJ) primarily designed to catch assets which the defendant claimed to hold on trust. Whilst a different conclusion may have been reached under older versions of the Commercial Court standard form of order, the standard form has moved on.

FREEZING ORDERS: FOUR GENERAL PRINCIPLES

5. In the course of giving its judgment, the Supreme Court affirmed certain principles applicable to the correct construction of all freezing orders.
6. First, a restrictive, rather than expansive, approach should be adopted in their interpretation. There are policy reasons for this stemming from the draconian consequences of breach and the corresponding need for certainty. Here, Beatson LJ's reasoning was approved in the Supreme Court.
7. Second, the court confirmed the application of the "enforcement principle": that the purpose of freezing orders is to prevent individuals from dissipating assets that may become the subject of enforcement proceedings, but not to give a claimant security for his/her/its claim.
8. Third, the construction of a freezing order must take into account the relevant context in which that order was made, including the development of the various iterations of the Commercial Court standard form order: *"the approach of the courts has thus been to approach the language of the forms of order cautiously but to recognise that the forms have gradually been extended"*.
9. Fourth, whilst not doubting that the "flexibility principle" may guide the decision as to whether or not to make a freezing order, such a principle has no role to play in their proper construction and is not *"a justification for the expansive interpretation of an order which has already been made"*.

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