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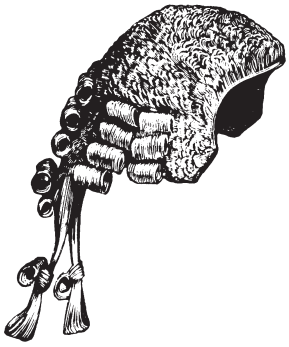
RECENT GUIDELINES RELATING TO WORLD FREEZING ORDERS (MAREVA INJUNCTIONS)



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"Recent Guidelines Relating To World Freezing Orders (Mareva Injunctions)" was published recently in **"The Guardian", "Vanugard" and "This Day" Newspapers — all of Nigeria.**

RECENT GUIDELINES RELATING TO WORLD FREEZING ORDERS (MAREVA INJUNCTIONS)

By Abayomi Akinjide, M.A. LL.M (Cantab)

The English Court of Appeal has had the opportunity to set out guidelines to apply about the exercise of discretion when an application is made for permission to enforce a world wide freezing order ("WFO") in a foreign jurisdiction. This was done recently in the case of Dadourian Group International Inc (D) -v- Simms and Ors (S) (2006) 1 ALL.E.R. (Comm) 709. The importance of this case lies in the guidelines that have been set out by the Court; nevertheless the facts briefly stated are as follows:

D had obtained a WFO against S. The terms of the Order included the usual provision that the Order could not be enforced in a foreign jurisdiction without the permission of the Court. D had obtained permission to enforce the Order against property of S in Switzerland and S challenged the decision.

I have set out in full the eight guidelines developed by the Court together with a condensed version of the Court's commentaries which accompany each of the guidelines. The eight guidelines are referred to as the Dadourian Guidelines as referred to by the Court itself in the Judgment, named after the successful Respondent in the Appeal. As the Nigerian courts have not developed guidance in this area, the Dadourian Guidelines will be of great importance to this area of practice in Nigeria.

The Court did not need to set out the cases which showed how the Courts developed the WFO jurisdiction. It was sufficient for the Court to refer to the case of Derby & Co Ltd -v- Weldon (1990) 3 ALL.E.R. 264 where the Court held that a Freezing Order could be made in respect of assets which were outside the jurisdiction. There was, however, little discussion in that case about the circumstances in which the Court would give its permission.

The guidelines are set out below and in the paragraphs that follow below there is set out commentary on each of the guidelines in turn.

Guideline 1: The principle applying to the grant of permission to enforce a WFO abroad is that the grant of that permission should be just and convenient for the purpose of ensuring the effectiveness of the WFO, and in addition that it is not oppressive to the parties to the English proceedings or to third parties who may be joined to the foreign proceedings.

Guideline 2: All the relevant circumstances and options need to be considered. In particular, consideration should be given to granting relief on terms, for example terms as to the extension to third parties of the undertaking to compensate for costs incurred as a result of the WFO and as to the type of proceedings that may be commenced abroad. Consideration should also be given to the proportionality of the steps proposed to be taken abroad, and in addition to the form of any order.

Guideline 3: The interest of the applicant should be balanced against the interest of the other parties to the proceedings and any new party likely to be **joined** to the foreign proceedings.

Guideline 4: Permission should not normally be given in terms that would enable the applicant to obtain relief in the foreign proceedings which is superior to the relief given by the WFO.

Guideline 5: The evidence in support of the application for permission should contain all the information (so far as it can reasonably be obtained in the time available) necessary to make the judge to reach an informed decision, including evidence as to the applicable law and practice in the foreign court, evidence as to the nature of the proposed proceedings to be commenced and evidence as to the assets believed to be located in the jurisdiction of the foreign court and the names of the parties by whom such assets are held.

Guideline 6: The standard of proof as to the existence of assets that are both within the WFO and within the jurisdiction of the foreign court is a real prospect, that is, the applicant must show that there is, a real prospect that such assets are located within the jurisdiction of the foreign court in question.

Guideline 7: There must be evidence of a risk of dissipation of the assets in question.

Guideline 8: Normally the application should be made on notice to the respondent, but in cases of urgency, where it is just to do so, the permission may be given without notice to the party against whom relief will be sought in the foreign proceedings but that party should have the earliest practicable opportunity of having the matter reconsidered by the court at a hearing of which he is given notice.

The guidelines together with commentary:

Guideline 1: The principle applying to the grant of permission to enforce a WFO abroad is that the grant of that permission should be just and convenient for the purpose of ensuring the effectiveness of the WFO, and in addition that it is not oppressive to the parties to the English proceedings or to third parties who may be joined to the foreign proceedings.

The grant of permission to take proceedings abroad to enforce a WFO is a discretionary exercise. Justice is most likely to be achieved if judges have the maximum flexibility as to the circumstances in which, and the terms on which, an order will be made.

A primary reason for giving permission to enforce a freezing order abroad is that in the particular case under consideration it is the way in which the WFO is most likely to be rendered effective to safeguard the position of the applicant in relation to assets which exist, or are thought to exist in the relevant jurisdiction. Those assets must of course be ones to which the WFO applies. Issues often arise about ownership of such assets. In some cases issues as whether property held by third parties is in fact owned by the defendant may also more easily be determined and managed by the courts of the jurisdiction where that asset or third party is located than in the English courts.

A court that grants a WFO must control the proliferation of foreign proceedings to enforce the WFO as the grant of the WFO might otherwise become oppressive.

If the dispute is more properly fought out in the English courts, it would be possible to follow the procedure laid down by Lloyd LJ, with whom Sir George Waller agreed, in SCF v Masri [1985] 1 WLR 876, (1985) 2 Lloyds Report 211 as follows:

"(i) Where a plaintiff invites the court to include within the scope of a Mareva injunction assets which appear on their face to belong to a third party, e.g. a bank account in the name of a third party, the court should not accede to the invitation without good reason for supposing that the asserts are in truth the assets of the defendant. (ii) Where the defendant asserts that the assets belong to a third party, the court is not obliged to accept that assertion without inquiry, but may do so depending on the circumstances. The same applies where it is the third party who makes the assertion, on an application to intervene. (iii) In deciding whether to accept the assertion of

a defendant or third party, without further inquiry, the court will be guided by what is just and convenient, not only between the plaintiff and the defendant, but also between the plaintiff, the defendant and the third party. (iv) Where the court decides not to accept the assertion without further inquiry, it may order an issue to be tried between the plaintiff and the third party in advance of the main action, or it may order that the issue await the outcome of the main action, again depending in each case on what is just and convenient."

However, it is possible that the foreign court will have some similar process.

Guideline 2: All the relevant circumstances and options need to be considered. In particular consideration should be given to granting relief on terms, for example terms as to the extension to third parties of the undertaking to compensate for costs incurred as a result of the WFO and as to the type of proceedings that may be commenced abroad. Consideration should also be given to the proportionality of the steps proposed to be taken abroad, as well as the form of any order.

If a third party is not to be joined to the English proceedings, the court is likely to want to consider whether he should have the benefit of an extension of the costs undertaking. (In an appropriate case, security may be required to be given to support any such extension.) It may be that third parties should also be given liberty to apply in the English proceedings for the purposes of an application to revoke the permission. These terms will help reduce the risk of oppression to the third party as a result of the grant of permission. But the court may conclude that the question of what safeguards should be given to protect the interest of a third party should be left to be dealt with by the foreign court in accordance with its normal practice.

Consideration should also be given to the option of refusing to give permission and leaving the claimant to litigate the matter in England. This will often be possible even if it means that a new party has to be joined to the proceedings.

Likewise the court must be astute to see that there is a real prospect that something will be gained by starting proceedings abroad.

Guideline 3: The interest of the applicant should be balanced against the interest of the other parties to the proceedings and any new party likely to be joined to the foreign proceedings.

So far as the claimant is concerned, he is at first sight entitled to take reasonable steps to ensure that the WFO provides him with effective safeguards against dissipation and to take steps in foreign courts where it is necessary to do so to obtain that safeguard.

On the other hand, so far as the defendant is concerned there is the risk of oppression from a multiplicity of suits and the costs which the foreign proceedings will generate. How serious this is depends on such matters as what litigation is contemplated and the other pressures on the defendant from the English litigation.

In the case of the third party, once the court reaches the conclusion that the claimant has shown proper grounds for bringing some proceedings against the third party, the court should weigh up the inconvenience to him of being sued in this jurisdiction as against the inconvenience to him of being sued in the foreign jurisdiction in which the claimant proposes to sue him. However, less weight needs to be given to the interest of a third party who is not independent of the parties against whom the WFO was obtained.

Guideline 4: Permission should not normally be given in terms that it would enable the applicant to obtain relief in the foreign proceedings which is superior to the relief given by the WFO.

Under English law a WFO only operates in personam and does not give the claimant any interest in the assets which fall within its scope. In many foreign jurisdictions, however, orders designed to fulfill a broadly similar purpose may give the person who obtains them priority over other creditors in the event of insolvency. In principle the permission given to the applicant should not enable him to obtain relief in the foreign proceedings unless it is equivalent to the relief obtained in the English proceedings and no more. If the only form of relief available in the foreign court is one which is more extensive than the WFO, the court may be less willing to grant its permission to take proceedings abroad. In an appropriate case, however, it may do so. The applicant should bear in mind that it may be necessary to provide evidence of the range of orders available under foreign law in order that the court can make a properly informed choice as to whether to grant permission to seek a superior form of relief abroad (see guideline 5 below).

Guideline 5: The evidence in support of the application for permission should contain all the information (so far as it can reasonably be obtained in the time available) necessary to enable the judge to reach an informed

decision, including evidence as to the applicable law and practice in the foreign court, evidence as to the nature of the proposed proceedings to be commenced and evidence as to the assets believed to be located in the jurisdiction of the foreign court and the names of the parties by whom such assets are held.

Scrutiny of this evidence is another way in which the English court exercises control over the enforcement of the WFO. The party seeking permission should file evidence describing the nature of the proceedings which it proposes to commence in the foreign jurisdiction if permission is granted, including details of the names of the parties whom it is proposed to sue and (so far as known) details of the property against which it is desired to enforce the WFO.

The evidence supporting the application for permission should also describe the relevant law and practice of the foreign court. This should cover such issues as whether the foreign court would be likely to grant the order to be sought, on what basis the foreign court would allow proceedings against a third party who was holding assets alleged by the claimant to belong to the defendant and whether its procedures would grant the defendant (and the third party) the right of access to court, and of a fair trial on any issue in dispute, guaranteed by the European Convention of Human Rights. That is relevant to the question of oppression. The evidence should also , where practical, cover issues such as how long the proceedings are likely to take and, if costs are to be sought against any party, what they are likely to be. It may also be desirable for the evidence to set out the range of other orders that the foreign court may make in the circumstances, particularly where the court is being asked to permit the applicant to seek abroad a form of relief which is superior to that conferred by the WFO (as to this, see guideline 4 above).

The evidence should also cover the extent to which the foreign court is likely to be familiar with a WFO. Clearly the more familiar the foreign court is with a WFO, the more predictable the result of the foreign proceedings will be.

In some cases there may be evidence that the defendant is present within the jurisdiction of the foreign court. In such cases the court can more readily give permission for proceedings in that jurisdiction of a kind that would enable the foreign court to exercise its personal jurisdiction over the defendant.

The evidence about the practice of the foreign court will be relevant to the court's assessment of the risk of inconsistent judgments.

Guideline 6: The standard of proof as to the existence of assets that are both within the WFO and within the jurisdiction of the foreign court is a real prospect, that is, the applicant must show that there is a real prospect that such assets are located within the jurisdiction of the foreign court in question.

The court will need to satisfy itself that the proceedings in the foreign court are necessary and justified. For this purpose, the claimant does not in our judgment have to show that assets are likely to exist but merely that there is a real prospect that such assets exist. This is a sufficiently high test because of the safeguards which the court can impose in other ways to protect the interests of the persons against whom an action may be taken by the claimant in the foreign proceedings. It may appear more logical that the court should not permit a claimant to seek to enforce a WFO against assets whose ownership is disputed prior to resolution of that dispute, but, where there is a risk that the assets will be spirited away in the meantime and of the claimant going unpaid, logic has to give way to that course of action which appears to the court to be most likely in practice to be productive of justice between all the affected parties. That is likely to involve the taking of immediate steps to hold the position until the dispute as to ownership is resolved.

Guideline 7: There must be evidence of a risk of dissipation of the assets in question.

The court needs to be satisfied that there is a risk of dissipation of the assets in relation to which the claimant wishes to bring the foreign proceedings. However, if there is a real prospect that the assets are beneficially owned by the defendant, this burden is likely to be discharged by the evidence already filed in the English proceedings.

Guideline 8: Normally the application should be made on notice to the respondent, but in cases of urgency, where it is just to do so, the permission may be given without notice to the party against whom relief will be sought in the foreign proceedings but that party should have the earliest practicable opportunity of having the matter reconsidered by the court at a hearing of which he is given notice.

If an order is made without notice, the order should be made on the basis that an application should be made on notice to renew it, and that will expire unless renewed. Nevertheless, the order giving permission should be served immediately unless the court gives permission otherwise. To defer service may prevent or hinder a party from applying to discharge the order or from appealing to a higher court, and so such an order should only be made for good reason and for the shortest practicable period.

General caveat

The Court pointed out that the guidelines should not be treated as exclusive of any other matter which in the particular circumstances of an individual case needs to be considered. Judges will obviously be alert to such matters, and the advocates should draw such matters to their attention and include them in their submissions.

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