Pricing the promise

Established in 1975

If a Claimant thinks his Defendant will move money or assets so as to defeat enforcement of a judgment, with sufficient proof and on certain terms the courts here will make an order preventing that. Four decades on, the famous *Mareva* injunction is now called a Freezing Order, and while its rationale is the same it is an ever-developing topic which frequently spotlights key issues. A recent example is the damages that can be awarded to a Defendant who has suffered loss because of it.

Familiar, and formality?

A Freezing Order is usually based initially on just one side's account - *ex parte*, in the old language - as the Defendant is not by advance warning given the chance to do what the Claimant seeks to stop. In return for being taken at his word the Claimant must agree in essence that if the Order should not have been made, or his underlying claim fails, he will meet any losses that the Defendant incurs as a result of the Order, a promise that continues while it remains in force.

Its usual form is "If the court later finds that this order has caused loss to the [Defendant], and decides that the [Defendant] should be compensated ... , the [Claimant] will comply with any order the court may make". Well known as a cross-undertaking in damages, for a long time this standard feature was largely unremarked and its potential significance rarely fully considered. A recent litigation series has altered that, and an imminent Court of Appeal decision is likely to cement that change in parties' and practitioners' minds alike.

Recovery

Sometimes a successful Defendant has, or makes, no claim. Perhaps he can show no loss, or is just glad to have won the case or simply to have got the restriction removed. Sometimes, however, a Defendant will seek compensation for losses said to be due to the Freezing Order. What is the court's approach in assessing what would have happened, and the ambit of a damages award?

Principles

In *Fiona Trust v Privalov ([2016] EWHC 2163 (Comm))* major claims based on serious corruption allegations largely failed, and the Defendant urged that two Freezing Orders had locked up funds that would otherwise have been used profitably. The Claimant retorted that this was the dishonest and hindsight invention of a proven liar.

Males J distilled the following:

1. if the court enforces a cross-undertaking, damages are assessed as if the Claimant had breached a contract not to restrict the Defendant in the terms of the Order; so

2. the usual principles of causation, mitigation and remoteness apply, though with some flexibility - the breach of contract analogy is not exact, so the remedy mechanism cannot be identical; thus

3. the Freezing Order must have been an effective cause of a loss of a type within the parties' reasonable contemplation, and the Claimant must establish any failure to mitigate; however

4. a "liberal assessment" is adopted. This does not mean that a Defendant is compensated for losses that he has not incurred. Rather, it acknowledges that the appraisal may be imprecise. Following an unexpected Order - and possibly one to which the Claimant was not entitled - a Defendant might be unable to say how exactly the funds would have been used, so the court must not require unrealistic precision, or over-analyse a Defendant's evidence or methodology;

5. damages can be awarded for loss of profits even if the Defendant might have made a loss. The court will ask whether he has proved his claim on balance of probability, or (in loss of chance matters) he has shown a real and substantial chance that the activity would have been profitable. If so the court will make the best assessment possible, with suitable discount to reflect uncertainties.

   Applying these principles the Judge awarded the Defendant several times the amount recovered by the Claimant at trial.

Court of Appeal

A Freezing Order usually expressly permits transactions "*in the ordinary and proper course of business*".

The Claimant's appeal does challenge the approach to assessing damages. Instead, it attacks causation and mitigation, with arguments based on the above wording and the interpretation of the Orders themselves, and as to whether the Defendant should have applied to vary them - to permit the trading whose fetter founded his claim - and the possible outcome of any such application.

Commentary

Whatever the result of the appeal, parties need to be aware that:

1. a cross-undertaking in damages is not a formality - it is a serious obligation and a potentially large liability;

2. a Defendant seeking to recover under it needs to prove loss, but the courts recognise that precision may be impossible, and (in allowing commensurate leeway) may be unmoved by detailed challenge to evidence, methods and in some cases credibility;

3. great care must be taken with the precise wording of the Order, or issues may later arise as to what the Defendant was permitted to do or could and should have challenged;

4. exchanges, long before trial, on potential damages due to a Freezing Order are likely to become more common.

We will issue further commentary following the Court of Appeal's decision.

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