Friends in Need and International Comity: Interim Freezing Orders in Aid of Foreign Proceedings before the DIFC Courts

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Introduction

It is a common feature of financial fraud schemes for the proceeds of the fraud to be scattered across several jurisdictions, frequently through a network of connected entities. For the victims of the fraud, the first step in attempts to salvage their investments will often be to seek a worldwide freezing order in the courts of the country where the defendants and their activities are centred. In many such cases, however, the freezing order in the primary jurisdiction will not be sufficient to effectively prevent dissipation of assets elsewhere, and it may therefore be necessary to approach courts in other jurisdictions, where some of the defendants or their ill-gotten gains are located, with a request that they grant ancillary freezing orders in aid of the main proceedings.

DIFC Court of First Instance Judgment

The DIFC Court of First Instance has recently had the opportunity, for the first time, to affirm its jurisdiction to grant freezing orders in aid of foreign proceedings. The issue arose in *United States Securities and Exchange Commission v Wintercap SA & Others* [2019] DIFC-CFI-003, in which the claimant (the 'SEC'), represented by Al Tamimi & Company, successfully obtained a freezing order in aid of an interim worldwide asset freeze order granted by the US District Court, District of Massachusetts on 16 November 2018 (the 'US Asset Freeze Order').

In the course of the case before the DIFC Court, which was heard over several return dates in January and February 2019, the Court heard argument on the legal basis for its jurisdiction, and how it related to other potentially overlapping elements of the Court's powers of recognition and enforcement of foreign judgments, and to the Court's powers of direct international judicial assistance.
Whist the DIFC Court did not deliver a written judgment, the Court's conclusions on the core matters in issue are confirmed by the terms of the order that was ultimately issued on 4 March 2019 (the 'Final Freezing Order'). It is therefore instructive to consider the arguments advanced by the SEC in the course of the case, and to consider the extent to which these arguments may have found favour with the Court in shaping its Final Freezing Order.

The US and DIFC Court Proceedings

The US proceedings were a securities enforcement action brought by the SEC against a so-called 'microcap' securities fraud scheme, see Securities and Exchange Commission v Roger Knox & Others, US District Court, District of Massachusetts. Record No. 18-CV-12058-RGS.

Under the relevant US statutory provisions, the US federal courts have power to order disgorgement of the proceeds of fraud together with a civil penalty by way of damages against the perpetrators in favour of the SEC. The proceedings are a civil action for compensation as distinct from a regulatory prosecution, see for example SEC v Happ, 392 F. 3d 12 (2004), judgment of US Court of Appeals First Circuit, 10 December 2004.

The Respondents in the DIFC proceedings, which were also each named defendants in the US proceedings, were a Swiss entity controlled by a British individual who at the time of the DIFC proceedings was in custody in Massachusetts (the 'Swiss entity'); a Fujairah entity controlled by the same British individual (the 'Fujairah entity'); and a DMCC entity controlled by a French individual who resided in Germany and was believed, at the time of the DIFC proceedings, to be at large in Europe (the 'DMCC entity').

The assets sought to be frozen in the DIFC proceedings were, respectively, funds and equities held in the name of the Swiss entity by a DIFC licenced financial services provider; funds held in an onshore Dubai bank account of the Fujairah entity; and funds held in an onshore Dubai bank account of the DMCC entity. The two onshore banks and the DIFC financial services provider were each named notice parties in the DIFC proceedings. Neither of the onshore banks had branches within the DIFC.

Source of the DIFC Court's Jurisdiction

In common with many (but not all) common law jurisdictions, the DIFC Court's power to grant a freezing order in aid of foreign proceedings is a feature of its general injunctive jurisdiction and does not derive from any dedicated statutory provisions.

In *SEC v Wintercap* the Court, in its final order, identified the legal basis for its jurisdiction as residing in Article 5(A)(1)(e) of the Judicial Authority Law, Article 32(b) of the DIFC Court Law and Rules 25.1.6(a), 25.1.6(b), 25.1.7 and 25.24 of the Rules of the DIFC Courts ('RDC'). To these could be safely added Article 22(2) of the DIFC Court Law, which essentially repeats and is co-extensive with Article 32(b) in providing for the DIFC Court's general power to grant injunctive relief wherever it considers it appropriate to do so.

The Evidential Position

In the course of submissions the SEC accepted that the legal and evidential burden upon the applicant was the same as in any freezing order case. In the present case, it was submitted on the basis of the witness statements and exhibits before the Court, including the terms of the US Asset Freeze Order – the mandatory elements of which had not been complied with – that the necessary threshold had been met. In particular, notwithstanding the US Asset Freeze Order, the SEC had highlighted a number of features of the fraudulent scheme and its operation to date that pointed to a real and continuing serious risk of dissipation of the funds known to be in the UAE should the ancillary freezing order not be granted. It was also just and convenient to grant the ancillary relief, given the protection of investors and the compensatory purpose of the US proceedings, as well as the considerations of comity in this case relevant to the granting of a freezing order over assets located in onshore Dubai.

In so submitting, the SEC agreed that the DIFC Court should not extend any binding or determinative weight to the reasoning and conclusions of the Massachusetts Court in arriving at the separate US Asset Freeze Order. The DIFC Court had to independently assess and weigh the

evidence before it.

The Order relating to Funds located in the DIFC

The bulk of the funds sought to be frozen in the SEC case were funds located in the DIFC, namely funds and equities to the value of over USD 7.1 million held in the name of the Swiss entity by a DIFC licenced financial institution, which was the First Notice Party in the case.

Following argument on behalf of the SEC on an ex parte basis at the first interim hearing, on 17 January 2019 the Court granted an initial freezing order in respect of the assets of the Swiss entity within the DIFC to the threshold value of the funds and equities. In the Final Freezing Order that ultimately issued on 4 March 2019, the Swiss entity was additionally ordered not to in any way dispose of, deal with or diminish the value of its assets wherever located up to the same value.

In the event, the First Notice Party cooperated with the SEC in providing up to date information on the funds and assets it managed and held on behalf of the Swiss entity. This information resulted in a valuation of USD 5.66 million for the Swiss entity's relevant assets, which the SEC accepted, and in the circumstances the need for an information order as against the Swiss entity fell away in the Final Freezing Order.

The Order relating to Funds located outside the DIFC

As is apparent from the model RDC 25 Schedule A Freezing Order, and from decided cases, the DIFC Courts may grant a freezing order in relation to funds and assets located outside the DIFC when satisfied that it is appropriate to do so, see for example *Bocimar International NV v Emirates Trading Agency LLC* DIFC CFI-008-2015, judgment of 28 January 2016 and Amended Freezing Order dated 8 February 2016; *DNB Bank ASA v Gulf Eyadah Corporation & Another* DIFC CA-007-2015, judgment of 25 February 2016; *Akhmedova v Akhmedov & Another* DIFC CA-003-2018, judgment of 19 June 2018.

Additional and different considerations may arise where the freezing order sought is in aid of foreign proceedings. In such cases, there may be special considerations, arising from the threefold relationships and interests in play as between the jurisdiction of the main proceedings, the jurisdiction of the requested court, and the jurisdiction of the place where the affected entities and/or relevant assets are located. In general, it is clear that, in the absence of some underlying independent connection to the jurisdiction of the requested court, it will only be in exceptional circumstances that the requested court will extend its ancillary order in aid of foreign proceedings to assets located in a third country.

In the leading English case, *Motorola Credit Corporation v Uzan (No.2) at [147]*, Potter LJ set out five particular considerations for the court to have in mind in considering whether it is inexpedient to make a worldwide freezing order in aid of foreign proceedings.

Although made in the context of the equivalent statutory jurisdiction in England, these considerations (considered below) have been recognised as providing valuable guidance on the limits of ancillary freezing orders in aid of foreign proceedings in those common law, including offshore financial, jurisdictions where the question has since been examined.

At the interim ex parte stage in SEC v Wintercap the DIFC Court did not hear detailed submissions on the Motorola test and, in the event, the Court decided for the purposes of the initial interim order to limit the freezing order to assets located in the DIFC.

On the first and subsequent return dates the SEC contended that this geographic limitation was unwarranted, that it was contrary to the practice of the DIFC Court and to the model wording of freezing orders as set out in Schedule A to RDC Part 25, and that it deprived the Court's order of substantial effect. It was argued that under Article 5(A)(1)(a) of the Judicial Authority Law the Court had jurisdiction over the claim or action as one to which a DIFC entity was party, i.e., subject matter jurisdiction over the action as a whole. In this regard, it was pointed out that the funds at issue including the funds held by the onshore Dubai banks were the fruits of a complex international fraud in which the Respondents and the persons and entities who controlled them were core co-conspirators.

In addition, it was pointed out that the SEC investigation had unearthed significant movements of funds, being the proceeds of the fraud, by way of transfers into and out of the DIFC and into and out of onshore Dubai accounts in the name of the Respondents, to and from connected entities, during the previous 18 months. It was therefore a matter of reasonable inference that the funds paid into the onshore UAE accounts were and remained intimately connected to and were indistinguishable from the totality of the funds under inquiry in the US proceedings.

In these circumstances, it was submitted that all of the funds were controlled in common by the Respondents and by persons and entities who controlled the Respondents, and it was argued that it would therefore be artificial, contrary to the established practice of international commercial courts in respect of complex frauds, and inimical to efforts at recovery by and on behalf of the victims of those frauds, for the DIFC Court to limit the scope of its order in the manner adopted in the interim order.

It was not a requirement for establishing jurisdiction in respect of the non DIFC entities' funds that the banks in which the funds were held should have branches in the DIFC. The banks were not respondents in the DIFC proceedings, nor even third parties with any independent interest in the proceedings, but simply named notice parties who, in their capacity as banks, were known to hold funds in the name and to the account of the Fujairah and DMCC entities.

It was further submitted on behalf of the SEC that none of the five considerations identified by the English Court of Appeal in *Motorola Credit Corporation v Uzan (No. 2)* told against the making of an order that would extend to the accounts in onshore Dubai. In particular it was noted that:

1. The making of an order would not interfere with the management of the case in the US District Court of Massachusetts – on the contrary it was by way of ultimate assistance to the US Court;
2. It was not the policy or the practice of the US District Court of Massachusetts to itself decline to grant the type of relief sought – on the contrary, it had done so;
3. There was no danger that the order sought in respect of the onshore accounts would give rise to disharmony or confusion and/or risk of conflicting, inconsistent or overlapping orders in onshore Dubai. In the first place, the Dubai Courts would be called upon to give effect to the same US Asset Freeze Order as the DIFC Court; and secondly, in the event of any parallel proceeding that risked a conflict, the mechanism of the Joint Judicial Committee ('JJC') would be available to resolve the conflict. In this last regard, it was submitted that the consideration that the JJC might resolve any such conflict of concurrent jurisdiction in favour of the courts where the funds were located was not a reason for the DIFC Court – absent any actual or even threatened or suggested onshore proceedings – to decline jurisdiction in the first place;
4. There was no likely potential conflict as to jurisdiction rendering it inappropriate or inexpedient to make an order in the terms sought; and
5. In the event of disobedience of the order the DIFC Court would not later be adjudged to have made an order which could not be enforced. This was because the DIFC Court's order could be enforced under the special execution mechanism between the DIFC Court and the Dubai Courts; and through the special enforcement mechanisms available for enforcement of DIFC Court orders in Fujairah including under Article 221 of the Federal Civil Procedures Law.

The Court's Final Order

Ultimately, in its final order, having heard the above and other submissions on the requested scope of its eventual order, the Court modified the freezing order by extending it in terms to the Fujairah entity's funds held in its identified Dubai bank accounts.

In a further modification of its original order, the Court ordered that the Swiss entity and the Fujairah entity should not dispose of, deal with or diminish the value of their assets up to the value of their respective frozen thresholds whether they were in or outside the DIFC.

Both entities were also ordered to provide information within 10 working days in respect of their assets: (a) within the DIFC; and (b) in the UAE exceeding USD 5,000 in value whether in their own names or whether solely or jointly owned, giving the value, location and details of all such assets (subject to the usual procedural terms and safeguards as set out in the RDC Part 25 Schedule A Freezing Order).

In order to protect against the risk of having extended its jurisdiction in an impermissibly exorbitant way, and following the example that had been set some years before in Bocimar above, the DIFC Court took the precaution of stipulating in the Final Freezing Order that, in respect of assets located outside the DIFC, nothing in its order should prevent any third party from complying with any orders of the courts of the country or state where those assets were situated, provided that reasonable notice of any application for such an order would be given to the SEC's legal representatives; or from complying with what it reasonably believed to be its sole obligations under the law of that country or state, or under the proper law of any contract between itself and any of the Respondents.

In respect of the DMCC entity, no eventual freezing order was made as it had been indicated on its behalf in a direct communication to the Court from one of its promoters, and the SEC had accepted, that it now held no funds or assets greater than USD 5,000 in value within the UAE. In those circumstances it was accepted that the need for a DIFC Court freezing order fell away.

Yet, notwithstanding that a freezing order was no longer required, the Court in its final order, following submissions by the SEC on the potential frustration of the Court's process, maintained its order as against the DMCC entity for the provision of information. In doing so, the Court directed the DMCC entity to identify the date or dates when the funds in the DMCC entity's specified onshore bank account fell below USD 5,000 in value following the institution of the DIFC Court proceedings, as well as the precise destination(s), recipient(s) and account(s) to which such funds were transferred.

Conclusion

The order made in SEC v Wintercap is an important precedent confirming the jurisdiction of the DIFC to grant freezing orders in aid of foreign proceedings. In the absence of a written judgment, however, some caution must be exercised in drawing definitive conclusions from it for the future.

What can be said with certainty is that the Court identified and affirmed the legal basis of its jurisdiction as recited in its final interim order of 4 March 2019. It can also be said with confidence that the Court had no hesitation in granting the freezing order in respect of the Swiss entity's funds located in the DIFC and that it eventually agreed that this was an appropriate case in which, exceptionally, to extend the freezing order to the identified account of a non DIFC entity located in an onshore Dubai bank that had no branch within the DIFC.

Further, the Court was content, on the particular facts, to grant the order preventing dissipation of assets below the relevant thresholds as against both the Swiss entity and the Fujairah entity on the usual worldwide terms.

It is also of interest that the DIFC Court, once satisfied as to its freezing order jurisdiction, was prepared to grant information orders as against the Respondents to the proceedings even though they were already subject to the primary disclosure obligations of the US Asset Freeze Order.

At the same time, it has to be borne in mind that this was an international securities enforcement action prosecuted by the world's foremost financial regulator; that the entity that had no funds in the DIFC was an UAE rather than a truly international entity; that its funds were located in onshore Dubai and were therefore amenable to the special enforcement mechanism as between the DIFC Courts and the Courts of Dubai; that the Court further included special safeguards in its Final Freezing Order to guard against exorbitant jurisdiction; and, last but not least, that the Court's attention had been drawn by the SEC to specific features of the evidence that arguably brought the case within the category of cases where the DIFC Court in any event had an underlying jurisdiction over the subject matter of the dispute.

A further practical advantage that stood to the benefit of the claimants here was that the DIFC Court accepted, in line with comparative international practice, that as a law enforcement body charged with tackling international fraud the SEC ought not be required to give the usual undertakings as to damages in support of the freezing orders sought.

Notwithstanding these points of caution, the SEC case serves as a useful reminder that in appropriate cases, as an ancillary remedy in support of primary proceedings elsewhere, claimants may have available to them a distinct and stand-alone injunctive remedy to freeze assets in the DIFC, and potentially in onshore Dubai and other UAE Emirates, without the need to commence full substantive proceedings and without having to bring a recognition and enforcement action.

Al Tamimi & Company's DIFC International Litigation Group regularly advises on the enforcement of foreign judgments, arbitral awards and complex multi-jurisdictional disputes. For further information please contact Patrick Dillon-Malone (p.malone@tamimi.com), Diego Carmona (d.carmona@tamimi.com) or Rita Jaballah (r.jaballah@tamimi.com).