

## WORLDWIDE FREEZING ORDERS

### WHAT ARE WORLDWIDE FREEZING ORDERS?

A “freezing order” is a type of prohibitory injunction ordered by a court, obtained by one party (the applicant) against another (the respondent) to restrain the respondent from unjustifiably disposing of, or otherwise dealing with, their own assets.

The purpose of a freezing order is to preserve the respondent’s assets so that the applicant is able to enforce against them were it to succeed in litigation. Such assets commonly include bank accounts, shares, land or property. More recently, courts have also extended relief to cover assets such as cryptocurrency.

A Worldwide Freezing Order (WFO), as the name suggests, can potentially extend to a respondent’s assets located anywhere in the world. An applicant will normally apply for a WFO where the respondent is unlikely to have sufficient assets within the UK to meet the value of its claim. As with freezing orders generally, the effect of a WFO on a respondent can be severe and therefore courts do not routinely order them. Applicants as well as respondents should be aware of the minimum thresholds that have to be met for a WFO to be ordered, and their limitations.

### WHY MIGHT I APPLY FOR A WFO?

#### **Preserving Assets**

The most common reason an applicant might seek to obtain a WFO is to prevent a respondent from deliberately or unjustifiably disposing of their assets and, in doing so, evading the court’s process or judgment.

A WFO can be sought at any phase of a dispute. An application is often made before a legal claim has commenced because the applicant has concerns about the respondent dissipating assets. However, a WFO may also be sought during proceedings and after a trial to preserve a respondent’s assets until judgment has been enforced.

#### **Orders against non-parties**

It is also possible to obtain freezing orders against non-parties to legal proceedings in order to ensure the preservation of assets owned and/or controlled by the respondent. The most common example is against a bank that manages the bank account of a party against whom legal proceedings are underway or are contemplated.

#### **Orders against persons unknown**

English courts are now willing to grant WFOs against “persons unknown” in the context of fraud cases if the description of those persons is sufficient to identify those included and those who would not be (Ion Science Limited & Duncan Johns v Persons Unknown & Others).

## HOW DO I GET A WFO?

A WFO is a draconian remedy. It is therefore important that applicants are aware of what they must establish before attempting to obtain a WFO.

To succeed, an applicant must demonstrate to the court that it has:

- A substantive cause of action against the respondent (i.e. valid grounds for a claim)
- A good arguable case
- Evidence of the existence of assets belonging to the respondent
- Evidence that there is a real risk that the respondent will seek to dissipate such assets
- Evidence that the order is “just and convenient” in the particular circumstances

The court sets a high threshold for establishing these points and is strict in requiring applicants to justify why they need a WFO. Additional factors that a court will consider are:

- The location and nature of the respondent’s assets – the court is less likely to order a WFO for a respondent who has very limited or non-material assets based overseas.
- The level of additional disruption that granting the WFO may cause – for example, if the imposition of a WFO will prevent the respondent from trading, the court may be reluctant to grant such order.
- Any effect that the WFO may have on third parties or other ongoing litigation. For example if a WFO would impede the respondent’s ability to fund other ongoing litigation, this could be grounds not to grant it.

### Disclosure

Applications for WFOs are usually made on a “without notice” basis (i.e. the respondent is not made aware of the application until after it has taken place). As such, the respondent will be unable to make any representations of its own at the application hearing. The court therefore imposes a duty of full and frank disclosure on the applicant. In practice, this means that the applicant must bring all material facts to the court’s attention. This includes any facts that could have an adverse effect on the applicant’s own position, as well as any facts the applicant may not be aware of but could have discovered by making reasonable enquiries. This allows the court to make a fully informed decision as to whether to grant the WFO and is a strict and onerous requirement. An applicant that does not comply with its duty of full and frank disclosure may lose the WFO and be ordered to pay the respondent’s costs of the application regardless of the merits of the position.

### Undertakings

In addition to full disclosure of relevant information, a court will expect the applicant to provide certain “undertakings” (i.e. legally binding promises). The specific nature of the undertakings will depend on the facts of the application, but an applicant will always be required to undertake to pay any damages incurred by the respondent if it is ultimately determined by a court that the applicant is not entitled to a WFO. This is known as a “cross undertaking in damages”.

The value of a cross undertaking in damages can be substantial and the court may require the applicant to provide security for its obligations under them. The cross undertaking in damages may also apply to non-parties who suffer a loss because of the application for a WFO.

## SCOPE AND ENFORCEMENT

### Limits

A WFO is ancillary to the applicant’s main claim. This means that any order will ordinarily be limited to the approximate value of the claim along with allowances for interest and costs.

A court may issue a general or unlimited order in exceptional circumstances, such as particularly complex claims or where the extent of a respondent’s assets is not known.

### Carve outs

A court will not award a WFO if it deems its terms to be oppressive on a respondent.

Although the purpose of a WFO is to prevent a respondent from subverting the court's process by making unjustifiable disposals of assets, courts will not stop respondents using assets for legitimate means, such as:

- Incurring day-to-day living expenses (the usual range is £700-£1,000 per week but can be more depending on the respondent's ordinary standard of living)
- Carrying out ordinary business transactions (most common when the respondent is a sole trader)
- Incurrence of legal expenses
- Paying other debts as they fall due

### Jurisdiction

Although WFOs extend to assets located worldwide, applicants must be aware that they are unlikely to be easily enforceable on any persons located outside of England & Wales other than the respondent (including their officers or agents), unless the courts of a foreign jurisdiction have formally acknowledged and recognised the WFO in question.

It is therefore advantageous for the applicant to seek overseas advice in jurisdictions where assets are located as to the best way to enforce a WFO. This should be done before the application is made.

The English courts also look poorly on the use of WFOs to "oppress third parties who have control or possession of the respondent's property in foreign countries. As such, applicants should proceed with caution if approaching third parties to warn them of their obligations under a WFO. In the case of *YS GM Margin II and others v Lakhani and others* the court took the view that a suggestion that a third party based outside of the UK would be in contempt of court if it failed to comply with a WFO "went too far".

## PRACTICAL CONSIDERATIONS FOR AN APPLICANT CONSIDERING A WFO

For an applicant a WFO (as with a domestic freezing order) can be a very effective weapon in its armoury. However, with significant challenges in obtaining the order, let alone enforcing it overseas, the applicant needs to think hard about whether a WFO is worth pursuing:

- Are the assets worth it? – Consider whether there are sufficient assets available in the overseas jurisdiction(s) to justify pursuing an order. Not only because the applicant will have to establish this to satisfy the court, but also to inform the applicant as to whether it is a financially justifiable action.
- What will the costs be? – Consider whether you have appropriate funds in place. Seeking a WFO is often a time consuming and therefore costly exercise, potentially requiring the incurrence of legal and court fees in numerous jurisdictions. Are you going to end up spending more money than you stand to gain?
- Can you comply with the court's requirements? – As mentioned above, the court's requirements for disclosure, and the need to provide an undertaking, can be burdensome on an applicant. You should consider whether you are going to be in a position to meet these requirements.
- Will the order be enforceable? – When dealing with WFOs or other out of jurisdiction orders, consider from the outset any possible issues regarding enforcement. Is it worth obtaining an order that you ultimately cannot enforce?

## WHAT DO I DO IF I AM NOTIFIED OF A WFO AS A THIRD PARTY?

First and foremost, do not ignore it! Make sure that you read the terms of the WFO in full and that you understand them. You should always seek legal advice as to whether a WFO is legally enforceable.

If you are within England and Wales and breach a legally enforceable WFO, you could be found to be in contempt of the English courts resulting in:

- Fines
- Confiscation of relevant assets
- Damages claims against you
- Imprisonment

Even if you are not within the jurisdiction of the English courts it is equally important that you consider your position. A WFO is likely to be enforceable against you even if you are outside of England and Wales where:

- You are an officer or an agent of the respondent, or are acting under a power of attorney
- You were served the WFO whilst in England or Wales
- The relevant local courts have formally recognised the WFO

Conversely by complying with a WFO that is not legally enforceable you could be exposing yourself to civil or regulatory claims from the respondent in the relevant local jurisdiction.

## CONCLUSION

WFOs are discretionary remedies and, with the bar set high for justifying their imposition, they are not a frequently used tool in litigation. Nevertheless, as assets become less tangible and therefore more capable of global dissemination, it is likely that their use will increase, aided by recent decisions of the English courts to expand the scope of WFOs in certain circumstances.

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## KEY CONTACTS

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