Freezing point

Windrush is a useful reminder of the importance of taking care when drafting freezing orders and consenting to continuation, writes **Gita Chakravarty**

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As the mercury continues to fall, it's a good time to review recent developments in freezing injunctions. Andrew Baker QC set about defrosting an unusual freezing injunction in *Windrush Intercontinental SA v Bitumen Invest A/S* [2016] EWHC 2077 (Comm), which gave rise to a number of interesting practical points, including problems arising out of consenting to the continuation of a freezing order and principles of construction.

The background to the freezing order was a credit agreement for the purchase of a ship. In January 2014 the ship was lost at sea, at which time a significant amount was owed to the claimant under the credit agreement.

One of the main disputes between the parties was whether the claimant had any interest in the significant insurance proceeds paid to the defendant. The parties referred the dispute to arbitration and the tribunal held that the claimant had no interest in the insurance proceeds. The claimant then applied for and obtained an *ex parte* freezing injunction in respect of approximately $500,000 of the insurance award on the basis that it was applying for permission to appeal against the tribunal's decision.

Unusual facts

The circumstances in which the *ex parte* injunction was obtained were unusual: the order was granted over the phone, without sight of the evidence, and, according to Andrew Baker QC, without the claimant having properly set out the defences the defendant might have had.

The claimant had provided in the draft order that if it were refused leave to appeal against the arbitration award, then $412,275 of the total amount frozen would be released. It later transpired that this figure was the likely amount the defendant would be awarded on account of its costs of the arbitration, but the sum should have been stated in GBP rather than USD.

This error was corrected by the judge under the slip rule after some consideration, the importance being that the costs award in GBP was greater than the amount frozen but the award in USD was not. As such, the court held that when the claimant was eventually refused leave to appeal the arbitration award, the subsequent reduction of the frozen amount would have caused the freezing injunction to cease to have any effect on the date when leave was refused.

The clause was particularly odd because the claimant had already agreed to provide security for the defendant's costs in the arbitration and was therefore effectively providing the defendant with double security on account of its costs.

Construction principles

The claimant sought to vary the costs clause at the *inter partes* hearing, arguing for an interpretation which more fairly reflected the amount of security that it must have intended to provide. Andrew Baker QC applied the principles to be followed when construing a freezing order, namely that:

- Orders must be clear and unequivocal;
- They must be construed strictly and in favour of the addressee;
- Where there are two possible constructions, orders should be construed in favour of the contemnor; and
- It is impossible to read implied terms into an injunction.

The judge rejected the claimant's submission that those principles ought only to apply where a defendant is in contempt, noting that the principles do not change depending on the nature of the application. The costs clause was odd, but its language was not unclear or ambiguous.

The defendant too came under fire for pinning its defence on material non-disclosure; it was much too late for the defendant to raise those issues now, having consented to the continuation of the order and thereby electing not to press its non-disclosure claim. The defendant would only be permitted to raise non-disclosure on a later application for discharge if there had been a material change in the relevant circumstances, which there had not. It was penalised in costs.

The case is a useful demonstration of the following points:

- Be very careful what you request *ex parte*: the draft order should be limited to urgent matters and all unusual orders must be drawn to the court's attention;
- Notwithstanding the pressure to draft at short notice, careful attention must be paid to the wording of an order because the order will be construed against you and terms will not be implied to reflect your presumed intention; and
- Be careful about consenting to the continuation of an order made *ex parte*: if you intend to allege material non-disclosure, do so at the earliest opportunity or forever hold your peace. **SJ**