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Peter Olaoye Olalere, Esq[1]

EFFECTS OF WORLDWIDE FREEZING ORDER ON WORLDWIDE WEB TRANSACTIONS AND ASSETS: EXTRATERRITORIAL AND EQUITABLE CONSIDERATIONS

INTRODUCTION:

A freezing order or injunction (formerly called a mareva injunction) is an interim court order, originated as an equitable remedy from the decisions of English courts, which restrains a party from handling or disposing of assets within jurisdiction until rights of parties to an action are determined. If the claimant can demonstrate that there is an arguable case based on an underlying cause of action and there is a real risk that the defendant will dissipate assets, a freezing order may be granted over assets held by the defendant. This will also include any assets held by a third party on behalf of the defendant. However, the court will only grant an injunction if it is just and convenient to do so. Prior to 1975, there was no such injunction by that name in the firmament of injunctions. The position of the law at the time was aptly captured by Cotton, L. J in the case of **Lister v. Stubbs**[2] when the court said rather bluntly and with a sense of finality that: *"You cannot get an injunction to restrain a man who is alleged to be a debtor from parting with his property"*

That position changed when, in 1975 the Court of Appeal in England, in the cases of **Nippon Yusen Kaisha v. karageorgis**[3] and **Mareva Compania Naviera S. A. v. International Bulkcarriers S. A.**[4] developed an exception to the generally known position as stated above by Cotton, L. J. That exception is what is now known as a Freezing Order (Mareva Injunctions)

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1 *Senior Associate with the Dispute Resolution Department of S. P. A. Ajibade & Co., Lagos Office, Nigeria.*
2 (1890) 45 Ch. D. 1 at 14.
3 (1975)1 WLR 1093.
4 (1975)2 L.R. P. 509 at 510-511.

and the principle of law on which it is predicated is that: *"where a plaintiff can show a good arguable claim to be entitled to money from a defendant and there is a real risk that the defendant will remove assets from the jurisdiction, or dispose of them so as to render them un-available or untraceable, the court may grant an injunction to restrain the defendant from disposing off the assets or removing them from the jurisdiction."*

Lord Denning MR properly premised the legal basis for granting the mareva injunction on Section 25(8) of the Judicature Act 1873 which provides that *"a mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the court in all cases in which it shall appear to the court to be just or convenient" (emphasis provided).* This was the law as received in Nigeria and applied in the case of **Sotuminu v. Ocean Steamship (Nig.) Ltd**[5] and as applicable in other common law jurisdictions.

Worldwide Freezing Order (WFO):

Generally, courts operate within their statutory jurisdiction and that is why issuance of WFO with extraterritorial effect is an exception. **A** WFO allows a defendant's assets located across the world to be frozen, rather than those limited to the jurisdiction where the order is issued. The 'assets located across the world' in this context include intellectual assets located virtually or electronically on the World Wide Web. WFO also originated from England via the provision of section **37(3) English Senior Courts Act (formerly Supreme Court Act) *1981*** and since enacted, the jurisdiction has been exercised in favour of deserving cases such as **Ashtiani v. Kashi**[6]**; Republic of Haiti v. Duvalier**[7] **and Babanaft International Co. S. A. v. Bassatne & Anor**[8]**.**

In Nigeria, just like in most common law jurisdictions, the jurisdiction to grant WFO exists, by virtue of the States High Court Laws and High Court Rules, to grant WFO in deserving cases.[9] Nigerian courts are generally inclined to granting freezing orders that have effect on assets within jurisdiction but it appears instances where they grant a WFO with extraterritorial effects outside Nigeria are not as common. This later instances are now growing with cases filed by the Economic Financial Crimes Commission (EFCC) in the fight against corruption in Nigeria

5 [1992] 5 NWLR (Pt. 239) 1 at 25-26 Paras. H-D. See also Akingbola v. Chairman, E.F.C.C. (2012) 9 NWLR [Pt. 1306] p. 475.
6 (1986) 2 All ER 970
7 (1981) 1 All ER 456
8 (1989) 1 All ER 433
9 See section 13 of the Federal High Court Act Cap. F12. LFN 2004; section 16 of High Court of Lagos State Law, Ch. H5 Laws of Lagos State 2015 which empowers the Federal High Court and the High Court of Lagos State, respectively, to grant injunctions in all cases that appear just or convenient to do so.

leading the way. Some of the recent occasions where the WFO has been granted include the case **of EFCC vs. Akingbola** wherein the Federal High Court on the 31st December 2009 granted a WFO on assets in Lagos, Accra in the Republic of Ghana, England, and Dubai in the United Arab Emirate and the case of **EFCC vs. Deziani**, **Aluko & Omokore** where the Federal High Court granted a WFO on assets in Nigeria, Canada, Switzerland, England and the USA. As Nigeria operates within the global digital age where assets are not only kept physically outside jurisdiction but where intellectual and other assets are often located virtually or electronically on the World Wide Web, it is safe to predict that the Nigerian courts will equally continue to grant WFO in deserving cases even where the assets are in the virtual space. This article reviews essentially the Nigerian Court's readiness/willingness to issue WFO in respect of such assets located or being traded on the World Wide Web and those which are intellectual assets. Will the Nigerian court readily grant a WFO in favour of such cases?

The English courts are likely to issue a WFO in cases where the defendant does not have sufficient assets within the jurisdiction to cover the claim. Whenever a freezing order extends to overseas assets, the risk of oppression to the defendant increases, as there is a prospect of having to defend multiple proceedings across several jurisdictions.[10]

In order to minimize this risk in the UK, all WFOs should state that the claimant must ask the permission of the English court before enforcement is attempted in another jurisdiction. When permission is sought, the Court will weigh up the benefit to the Claimant against the cost and inconvenience to the defendant of having to defend multiple claims. A WFO may require a defendant to retain assets of a certain value within the jurisdiction. This may impact on the defendant's use of worldwide assets and may even mean that assets have to be transferred into the jurisdiction where the WFO is sought to meet the cap specified. It appears that English courts are willing to go further and order defendants to specifically transfer assets into the jurisdiction, depending on the circumstances of each case.

World Wide Web (www) and WFO

There is a bigger problem/risk against the Claimant that has made the granting of WFO more pertinent in deserving cases; and it is the fact that business transactions are now conducted on the World Wide Web (**WWW).** The advent of the world-wide web and the speed at which the technology has taken over the present way of doing business and manners and forms of keeping or tracing assets globally particularly as it affects a third party through whom a

[10] See https://www.european-law-firm.com/news/worldwide-freezing-orders-how-far-will-the-english-courts-go accessed on 19th January 2018.

defendant may be carrying out the business, the WFO has been and is being redefined to ensure that the claimant is not left empty-handed when the final decision is made within a different jurisdiction.

A recently decided case by the Supreme Court of Canada illustrates clearly that the courts in such advanced jurisdictions are moving with the technology-driven transactions of the World Wide Web with a willingness to adapt to its unique nuances in resolving disputes. The Supreme Court of Canada (by a panel of 9 - comprising McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ. - with 7 giving the majority decision and 2 dessenting) was called upon to decide the application of WFO to the intrigues, peripatetic and sometimes secretive/maneuvering manners in which modern business is conducted and assets kept using the technology of the world wide web in the recent case of: **Google Inc. *v.* Equustek Solutions Inc.**[11]

Facts of the Google Inc. *v.* Equustek Solutions Inc., Case:

"E is a small technology company in British Columbia that launched an action against D. In this action, E claimed that D, while acting as a distributor of E's products, began to re-label one of the products and pass it off as its own. D also acquired confidential information and trade secrets belonging to E, using them to design and manufacture a competing product. D filed statements of defence disputing E's claims, but eventually abandoned the proceedings and left the province. Some parts of D's statements of defence were subsequently struck out.

Despite court orders prohibiting the sale of inventory and the use of E's intellectual property, D continues to carry on its business from an unknown location, selling its impugned product on its websites to customers all over the world. E approached Google and requested that it de-index D's websites. Google refused. E then brought court proceedings, seeking an order requiring Google to do so. Google asked E to obtain a court order prohibiting D from carrying on business on the Internet saying it would comply with such an order by removing specific webpages.

An injunction was issued by the Supreme Court of British Columbia ordering D to cease operating or carrying on business through any website. Between December 2012 and January 2013, Google advised E that it had de-indexed 345 specific webpages associated with D. It did not, however, de-index all of D's websites. De-indexing webpages but not entire websites proved to be ineffective since D simply moved the objectionable content to new pages within

[11] 2017 SCC 34 (Sup Ct (Can)).

its websites, circumventing the court orders. Moreover, Google had limited the de-indexing to searches conducted on google.ca. E therefore obtained an interlocutory injunction to enjoin Google from displaying any part of D's websites on any of its search results worldwide. The Court of Appeal for British Columbia dismissed Google's appeal to reverse the world wide interlocutory injunction[12]".

The decision in Google Inc. *v.* Equustek Solutions Inc.:

The Supreme Court (Côté and Rowe JJ. dissenting) dismissed the appeal and upheld the worldwide interlocutory injunction against Google. *Per* McLachlin C.J. and **Abella**, Moldaver, Karakatsanis, Wagner, Gascon and Brown JJ. The issue before the court is whether Google can be ordered, pending a trial, to globally de-index D's websites which, in breach of several court orders, is using those websites to unlawfully sell the intellectual property of another company.

The court reiterated that the decision to grant an interlocutory injunction is a discretionary one and **courts are** entitled to a high degree of deference. Interlocutory injunctions are equitable remedies that seek to ensure that the subject matter of the litigation will be preserved so that effective relief will be available when the case is ultimately heard on the merits. Their character as "interlocutory" is not dependent on their duration pending trial. Ultimately, the question is whether granting the injunction is just and equitable in the circumstances of the case.

It was held that the test for determining whether the court should exercise its discretion to grant an interlocutory injunction against Google has been met in this case: there is a serious issue to be tried; E is suffering irreparable harm as a result of D's ongoing sale of its competing product through the Internet; and the balance of convenience is in favour of granting the order sought.

Google does not dispute that there is a serious claim, or that E is suffering irreparable harm which it is inadvertently facilitating through its search engine. Nor did Google suggest that it would be inconvenienced in any material way, or would incur any significant expense, in de-indexing D's websites. Its arguments are that the injunction is not necessary to prevent irreparable harm to E and is not effective; that as a non-party it should be immune from the injunction; that there is no necessity for the extraterritorial reach of the order; and that there are freedom of expression concerns that should have tipped the balance against granting the order.

[12] Supra

The law is that injunctive relief can be ordered against someone who is not a party to the underlying lawsuit. When non-parties are so involved in the wrongful acts of others that they facilitate the harm, even if they themselves are not guilty of wrongdoing, they can be subject to interlocutory injunctions. It is common ground that D was unable to carry on business in a commercially viable way without its websites appearing on Google. The injunction in this case flows from the necessity of Google's assistance to prevent the facilitation of D's ability to defy court orders and do irreparable harm to E. Without the injunctive relief, it was clear that Google would continue to facilitate that ongoing harm.

Comments and Analysis:

Where it is necessary to ensure the injunction's effectiveness, a court can grant an injunction enjoining conduct anywhere in the world. The problem in this case is occurring online and globally. The Internet has no borders — its natural habitat is global. The only way to ensure that the interlocutory injunction attained its objective was to have it apply where Google operates — globally. If the injunction were restricted to Canada alone or to google.ca, the remedy would be deprived of its intended ability to prevent irreparable harm, since purchasers outside Canada could easily continue purchasing from D's websites, and Canadian purchasers could find D's websites even if those websites were de-indexed on google.ca.

The court's further reasoning was that Google's argument that a global injunction violates international comity because it is possible that the order could not have been obtained in a foreign jurisdiction, or that to comply with it would result in Google violating the laws of that jurisdiction, is speculative. If Google has evidence that complying with such an injunction would require it to violate the laws of another jurisdiction, including interfering with freedom of expression, it is always free to apply to the British Columbia courts to vary the interlocutory order accordingly. To date, Google has made no such application. In the absence of an evidentiary foundation, and given Google's right to seek a rectifying order, it is not equitable to deny E the extraterritorial scope it needs to make the remedy effective, or even to put the onus on it to demonstrate, country by country, where such an order is legally permissible.

D and its representatives have ignored all previous court orders made against them, have left British Columbia, and continue to operate their business from unknown locations outside Canada. E has made efforts to locate D with limited success. D is only able to survive — at the expense of E's survival — on Google's search engine which directs potential customers to D's websites. This makes Google the determinative player in allowing the harm to occur. On

balance, since the world-wide injunction is the only effective way to mitigate the harm to E pending the trial, the only way, in fact, to preserve E itself pending the resolution of the underlying litigation, and since any countervailing harm to Google is minimal to non-existent, the interlocutory injunction should be upheld.

It is necessary to state that while the decision of the majority is undoubtedly sound and based on commercial reality and peculiarities of this particular case, the two **Dessenting** justices per (Côté and Rowe JJ.) also have compelling reasons in support of their dissenting decision to the effect that judicial restraint should have been exercised in this case.[13] This further shows the intricacies involved in the application of this very important equitable order of court, the WFO and balancing the competing interests of the Claimant and Defendant equitably particularly in applying same to business transactions being conducted online, covering foreign jurisdictions.

Summary and Conclusion:

1. With the e-commerce platforms taking over the retail market in Nigeria, it is important that the Nigerian courts gets ahead of the game by being abreast of developments across other common law jurisdictions and be ready when called upon to grant WFO in deserving cases. The experience of this writer is that some of our courts are reluctant to even facilitate the issuance of **Letters Rogatory**[14] to request for and obtain evidence or relevant documentation from outside jurisdiction. The current trend around the world is to issue WFO in deserving cases to ensure that a person operating internationally is not allowed to easily defeat the judicial process and Nigerian courts need to follow the good trend.

2. In light of the huge developments in IT, development of apps, boom in the online business and internet related business transactions in Nigeria, with a suggestion that Lagos has the potential to be the next Silicon valley, it is high time our judges are trained to be IT/internet natives who understand current issues and are willing to push

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[13] See their dissent in Google Inc. *v.* Equustek Solutions Inc., 2017 SCC 34 (Sup Ct (Can)). Other grounds identified in the dissenting decision include: the finality of the effects of the Google order; that being a non-party to the action the exception to the technical rule that the extant order should extend to Google was absent in the case, as the order was neither in the nature of a Mareva Injunction nor a Norwich Order and Google was not disobeying said order by its terms as handed down; the order was mandatory in nature and not shown to be a preferred route in the face of more effective alternatives.

[14] "*A document issued by one court to a foreign court, requesting that the foreign court take evidence from a specific person within the Jurisdiction or to serve processes on an individual or corporation within the foreign jurisdiction."* Black's Law Dictionary 9th ed. p. 988. Letters Rogatory are also known as Letters of Request.

the boundaries whenever deserving cases requiring issuance of WFO come before them for adjudication.

3. It is suggested that the legislature in Nigeria should also enact similarly-worded provisions of section **37(3) English Senior Courts Act (formerly Supreme Court Act) *1981*** *to the effect that the jurisdiction to grant a Mareva injunction was exercisable irrespective of whether the restrained party was domiciled, resident or present within jurisdiction in our laws to enable the Nigerian courts also give WFO in cases deserving of same. The current provisions of the States High Court Laws and the various High Court rules of court empowering our courts to issue injunction in deserving cases are not as robust as that of the English Senior Courts Act.*

4. It is heartening that WFO has gone beyond just the defendant but can be issued against third parties holding the assets or aiding the business of the defendant and the courts are keeping up with the speedy demand of modern business methods via the World Wide Web as exemplified in the case of **Google Inc. *v.* Equustek Solutions Inc.** Thus the claim for WFO may be brought against the third party facilitating the business of the party that should have been the defendant within jurisdiction. i.e. the horizon of accountability without liability has been widened[15]

5. From the above analysis of the case reviewed, the definition of the assets on which the court can grant WFO has been expanded to cover not only visual and virtual assets but also intellectual property assets (like trade secrets, software applications/solutions) located or globally traded online.

6. Judging from previous efforts at adapting to changes to deliver justice amongst litigants and the judicature on injunctions in Nigeria, the writer is optimistic that the Nigerian Court will also issue WFO wherever applicable to curb the intrigues, peripatetic and sometimes secretive/maneuvering manners in which modern business is conducted using the aid of the world wide web technology.

Although, the courts even in England, are always reluctant to grant a WFO over assets outside jurisdiction because of the cross territorial jurisdictional effects; nonetheless in deserving cases, WFO is a potent instrument in support of justice delivery. As stated by an author, *'the effectiveness of a legal system in any country can only be determined by its ability to provide*

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[15] *See generally M. Husovec, Injunctions Against Intermediaries in the European Union: Accountable But Not Liable? (Cambridge: Cambridge University Press, 2017).*

adequate remedies towards ensuring real justice to the successful party in any case and in any given situation'.[16] To build an effective legal system that will continue to support businesses by providing appropriate remedies to the deserving litigant, the Nigerian courts must not shy away from adopting modern solutions and granting WFOs where necessary.

For further information on this review and area of law please contact **Olaoye Olalere** at:
S. P. A. Ajibade & Co., Lagos by telephone (+234 1 472 9890), fax (+234 1 4605092) mobile (+234 815-979-4216), email (oolalere@spaajibade.com).

www.spaajibade.com.

[16] Afe Babalola, *Injunctions and Enforcement of Orders* (Intec Printers Limited, 2003) p. 135.