

FREEZING INJUNCTIONS

A PROCEDURAL OVERVIEW AND PRACTICAL GUIDE

By

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Scope of the order

1. A freezing injunction is an interim order '*restraining a party from removing assets located within the jurisdiction out of the country, or from dealing with assets whether they are within the jurisdiction or not*' **CPR r. 25.1(1)(f)**. The order will normally be restricted to assets not exceeding the value of the claim.
2. The purpose of the injunction is to guard against the injustice of a defendant salting away or concealing his assets so as to deprive the claimant from being able to execute judgment if successful at trial - quite simply there may no longer be any assets left to satisfy the judgment debt.

3. Whilst the order is a powerful litigation tool, it is regarded by the courts as draconian in nature and will only generally be granted once a number of onerous conditions have been fulfilled. In essence the claimant must have a strong case and feel there is a serious risk that the defendant will seek to dispose or dissipate his assets before the case can be heard.

Jurisdiction

4. A freezing injunction is a discretionary remedy, and its current form stems from the decision of the Court of Appeal in Mareva Compania Naviera SA v International Bulkcarriers SA¹. The jurisdiction is now set out in section **37(3) of the Supreme Court Act 1981**, regulations **2 to 3 of the County Court Remedies Regulations 1991** (SI 1991/1222) and in **CPR, r. 25.1(1)(f)**.
5. *High Court Jurisdiction*: section 37(1) of the SCA 1981 provides the High Court with a wide discretion to grant interim injunctions on such terms and conditions as the court thinks fit where it appears '*just and convenient*' to do so. Section 37(3) SCA provides that:

'The power of the High Court ... to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction'.

6. *County Court Jurisdiction*: this is more limited and applies only where a High Court or Court of Appeal Judge is sitting in the County Court, in the Patents County Court, before a nominated circuit judge in the Central London County Court Business List, in certain family proceedings or to preserve or detain property which is or may be the subject matter of proceedings.

¹ [1980] 1 All ER 213.

7. Once relief has been granted in the High Court, the case should be transferred to the County Court if it would have otherwise commenced there or had been earlier transferred (reg. 5(1) CCRR).

The Court's discretion

8. Before the court will exercise its discretion to grant an interim injunction, normally four key requirements must be met:

9. *There must be a cause of action justiciable in England and Wales:* often this means that a claimant must have a substantive cause of action which can be brought in England and Wales: see The Siskina².

- The claim may be justiciable here if the defendant can be served the process within the jurisdiction.
- A defendant who is abroad can be sued in England and Wales if either permission has been granted to serve proceedings out of the jurisdiction (**CPR r.6.20**), or he has submitted to the jurisdiction, or where the claim form can be served in another EU or EFTA state under **r.6.19**.
- The **Civil Jurisdiction and Judgments Act 1982 s.25** also empowers the High Court to grant interim relief, including freezing injunctions, where proceedings between the same parties are pending in the courts of another (Brussels or Lugano) Contracting state.

² [1979] AC 210.

10. *There must be a good arguable case*: this is the minimum threshold which the court will consider, although in the recent case of Softwarecore Ltd v Pathan, Pumfrey J used a different test of "triable issue"³. According to Mustill J in Ninemia Corp. v Trave⁴ at first instance, the expression 'good arguable case' means:

*'a case which is more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than 50% chance of success'*⁵.

Beware taking this too literally though! In general, a strong case needs to be demonstrated on the face of the affidavit and exhibits. Other points to note are:

- Anticipatory breach of contract is not sufficient to amount to a good arguable case (Transportation Inc v V.C. Shipping Co Inc⁶).
- The Court may be reluctant to make an order where the substantive claim is one of fraud, although see Softwarecore Ltd v Pathan.
- There may not be a good arguable case where there is an arguable set-off which would greatly reduce or even extinguish the claim entirely.

11. *Whether the defendant has assets within the jurisdiction*: the claimant has to show that there are 'some grounds for believing' that the defendant has assets within the jurisdiction.

12. 'Assets' can include motor vehicles, ships, aircraft, objects d'art, jewellery, shares, securities, trade goods, office equipment, choses in action as well as money. Points to note in relation to particular assets are:

³ (2005) LTL 1/8/2005.

⁴ [1983] 1 WLR 1412.

⁵ [1983] 2 Lloyd's Rep 600 at p.605.

⁶ [192] 1 Lloyd's Rep 353.

- Bank accounts: if the defendant has a bank account in England, the court is likely to infer the presence of assets within the jurisdiction *even* if that account is overdrawn (Third Chandris Shipping Corp v Unimarine SA⁷. The claimant must give the best possible particulars of the account that is to be frozen (ie. branch and account number). If the defendant holds a bank account jointly with someone who is not a party to the action, the account nonetheless may be frozen, although this must be specifically covered by the wording of the order (SFC Finance v Masri⁸).
- Land: can be the subject of a freezing injunction, although this will be rare as it will be difficult to show ‘a real risk of disposal’. If granted the order cannot be registered as a land charge, although it may be registered as a caution (Stockler v Fourways Estates Ltd⁹).
- Third Parties: assets in the name of a third party will not generally be included in a freezing order unless the claimant establishes a good arguable case that the assets are beneficially owned by the defendant. This can potentially include where the assets are owned by a third party who is a limited company: TSB v Chabra¹⁰.
- Worldwide freezing injunctions: a freezing injunction will not normally extend to assets outside the jurisdiction. However, in an exceptional case, the court may make an order affecting assets both here and abroad. Such an order will not be made where there are sufficient assets within the jurisdiction to satisfy any judgment. Very rarely an order may be made even if there are no assets in England: Derby v Weldon (no.2)¹¹.

⁷ [1979] QB 645.

⁸ [1985] 1 WLR 876.

⁹ [1984] 1 WLR 25.

¹⁰ [1992] 1 WLR 231.

¹¹ [1989] 1 All ER 1002, CA.

- Typically exceptional cases fall into 3 ‘categories’: where the defendant has acted dishonestly or fraudulently on a large scale, where the defendant has the ability to transfer large sums of money around the world quickly and where the defendant can hide assets behind companies or in countries where they are unlikely to be found.
- To avoid the problem of the English courts trying to assume an exorbitant jurisdiction over third parties outside the jurisdiction, the terms of the order should state that it shall not affect third parties unless, and to the extent that, it may be enforced by the courts of the state where the assets are locate.

13. *Is there a real risk that the defendant may dispose of or dissipate those assets before judgment can be enforced if unrestrained?:* what is required ‘is a good and arguable case for a risk of dissipation’ (Neuberger J in Customs & Excise v Anchor Foods Ltd¹²).

14. A real risk of disposal of assets may be established by reference either to previous conduct which tends to show a lack of probity or to a course of dealing which shows that a defendant may seek to make himself ‘judgment proof’. How can risk be assessed? Factors relevant to risk can include:

- evidence that the defendant has already taken steps to remove or dissipate assets.
- whether there are past incidents of debt default by the defendant.
- whether the evidence supporting the substantive cause of action discloses dishonest/or a suspicion of dishonesty on the part of the defendant.
- evidence of dishonesty outside the cause of action such as previous convictions, inland revenue or benefits prosecutions.

¹² [1999] 1 WLR 1139.

- any history of breach, non-compliance or disregard of court orders by the defendant.
- whether judgments of the English courts are enforceable where the defendant's assets are located (i.e. if the assets are in an EU country).
- whether the defendant is domiciled or incorporated in a tax haven or country which has lax company law.

15. *The overall discretion*: it should be borne in mind that in its discretion the court can still refuse a freezing injunction even if the key requirements are made out. Two examples are Rasu Maritima SA v Perusahaan (modest assets and large claim) and Sions v Price (low value claim)¹³.

16. *Applications after judgment*: where the application is being made after judgment, the claimant will only need to show that the defendant has assets within the jurisdiction and that there is a real risk of disposal. An undertaking in damages is not usually required unless permission to appeal has been given.

Procedure

17. The application can be made at any stage in proceedings, even before a claim form has been issued, or after judgment in aid of execution.

18. The application should normally be without notice (and may be refused if advance warning has been given).

19. The application notice should be supported by evidence in the form of an affidavit (**PD 25, para 3.1**). A draft order, based on the standard order in Appendix 2 of **PD 25**, and claim form should be attached to the application and the former be available on disc wherever possible.

¹³ [1978] QB 244] and (1988) The Independent, 19 December 1988.

20. The affidavit should be concise, attach only the most relevant exhibits and must make full and frank disclosure of all material facts, including those *going against* the grant of the order.
21. All the papers should, wherever possible, be delivered to the court at least 2 hours before the hearing (**PD 25, para 3.1**).
22. Where possible a skeleton argument should be drafted demonstrating how the requirements for granting the order are made out (ALG Inc v Uganda Airlines¹⁴).
23. In urgent cases the application may be supported by evidence in draft or referred to orally on instructions, but in such cases the applicant will be required to confirm on affidavit all the evidence presented at the hearing: Flightwise Travel Services v Gill¹⁵.
24. The order must provide for a return date – usually 5 to 7 days, sometimes less – the respondent must be fully informed of the case against him before this date. The respondent should have a copy of all documents referred to, be told of the arguments used and of any relevant observations of the judge.

Drafting the order

25. Standard forms of worldwide and domestic freezing injunctions can be found in appendix 2 of **PD 25**.
26. *Undertakings*: in the order the claimant must give the following undertakings:
 - The usual undertaking as to damages. This should be supported by a bank guarantee for a fixed amount, which the claimant undertakes to obtain within a certain period of time.

¹⁴ The Times, 31 July, 1992.

¹⁵ [2003] EWHC 3082 (Ch).

- To notify the defendant forthwith of the application (if it has been made without notice) and to serve a copy of the affidavit and order.
- To inform third parties (such as banks) to apply to the court for directions or for variation of the order.
- To indemnify any third party in respect of expenses reasonably incurred in complying with the order.
- In urgent cases the claimant should give an undertaking to issue a claim form in terms of the draft used on the application and to swear and file affidavits relied upon if this has not already been done.

27. Where the claimant is publicly funded and cannot give a valuable undertaking in damages, this is not itself necessarily a bar to granting relief: Allen v Jambo Holdings Ltd¹⁶.

28. *Terms of the order*: the amount to be frozen should not exceed the maximum extent of the claimant's claim against the defendant (taking into account interest and 'some costs': Fourie v Le Roux¹⁷) The defendant should be free to deal with the balance as required. This can be expressed as a maximum sum, over general assets or in relation to a specific item.

29. Where the claim is unliquidated the amount the claimant is likely to recover, on a good arguable case, needs to be calculated.

30. Any dispute as to whether the defendant is the owner of certain assets can be tried as an issue between the claimant and defendant and any third party: SFC Finance v Masri.

¹⁶ [1980] 1 WLR 1252.

¹⁷ Para. 78-79 [2005] EWCA Civ 204.

31. The effect of a freezing order should not be to place undue pressure on the defendant to settle the claim on unfavourable terms, nor does it place the claimant ahead of other creditors.

32. *Provisos*: to ensure the just operation of the injunction certain provisos must be incorporated into the order:

- Living expenses: if the defendant is an individual, the order should make provision for ordinary weekly or monthly living expenses. These will be assessed by taking into account the defendant's lifestyle. 'Unused' living expenses cannot be used for other purposes and use may amount to a breach of the order.
- Trade expenses and debt: if the defendant is a trader or a company, the order should make provision for the defendant's ordinary and proper business expenses. The order should also make provision for legitimate dealing or disposal of assets in the ordinary course of trading and the payment of trade debts. 'Trade debts' were defined in Iraqi Ministry of Defence v Arcepy Shipping Co SA¹⁸ as payments which are made in 'good faith in the ordinary course of business'.
- Costs of litigation: an order will normally allow the defendant to pay the reasonable costs of the present litigation if no other funds are available.
- Bank accounts: to safeguard the bank the order should expressly state that it does not prevent the bank from exercising any right of set-off it may have in respect of facilities given to the defendant or from honouring transactions entered into *before* the order was made. Cheque cards should be recalled once order has been served.

¹⁸ [1981] QB 65.

Ancillary orders

33. The court has the power under **CPR, r.25.1(1)(g)** to order the disclosure of documents and answers to requests for further information designed to help the claimant ascertain the whereabouts of the defendant's assets (clause 9 of the standard order). Disclosure of documents relating to bank accounts can also be sought from the defendant's bank.

34. What are the limits to disclosure?

- Disclosure should not be part of a 'fishing exercise'. The application must be backed by some evidence and not mere suspicion: Faith Panton Property Plan v Hodgetts.
- There is no freestanding power to order 'pre-application' disclosure of information which might assist in obtaining a freezing order if the claimant does not have sufficient material to justify the order in the first place: Parker v Structured Credit Fund Ltd¹⁹.

35. Where the claimant has 'justifiable concerns' about the information provided in the defendant's affidavit, an application can be made for cross-examination on the contents. This would be an exceptional measure and should be conducted before a master or district judge (**PD 2B, para. 7**).

Effect of the order

36. The injunction will bind the defendant as well as third parties with knowledge of it. A third party with knowledge who assists the defendant in the disposal or dissipation of frozen assets will be in contempt of court.

¹⁹ [2003] EWHC 391.

37. A bank may also be sued in negligence if it releases assets after receiving notice of an order: Customs and Excise Commissioners v Barclays Bank plc²⁰. Generally order should therefore be served on the bank first and then the defendant.

Discharge or variation

38. A without notice order will remain in force until judgment or further order or, as in most cases, until a return date fixed by the judge at the initial hearing. Any application to discharge or vary the order should be dealt with at this hearing, although clause 13 of the standard order allows the defendant or anyone else notified of the order to apply back to the court at any time with short notice to the claimant.

39. An application to vary or discharge the order should be made in accordance with **CPR Pt 23**. Where it is clear that the order should be varied or discharged the parties may agree this in a Consent Order.

40. A non-party affected by the terms of the order can apply for variation without formally intervening, providing that they can show a clear interest: Cretanor Maritime Co Lt v IMM Ltd²¹.

41. *Reasons for variation*: include where the order is more onerous than it need be, or where it imposes unnecessary obligations or hardship on a third party, or fails to include one of the key provisos.

42. *Discharge*: can be sought by a defendant on a number of grounds:

²⁰ [2005] 1 WLR 2082.

²¹ [1978] 1 WLR 966.

- *Discharge where the case was not an appropriate for an order:* this may occur where the defendant can cast doubt on one of the four key requirements for the grant of relief i.e. by showing that the claimant does not have a good arguable case on merits or by raising an arguable defence or set-off, or by demonstrating that there is no real risk of the dissipation of assets.

- *Discharge where a security is provided:* this can be where a sum sufficient to meet the potential claim is paid into court, into an account in the names of the parties' solicitors or by bond or guarantee. In Technocrats International Inc v Fredic Ltd²² it was recently held that the standard security provision in a freezing injunction gives only 'security' against the risk of dissipation of assets. It does not provide security against the defendant's other creditors.

- *Discharge due to material non-disclosure:* the claimant's duty of full and frank disclosure is extremely strict. It includes any defence or facts going against the grant of the order and relates to both in the claimant's actual knowledge and facts which would have been known on the making of reasonable enquiries. Practical points to note include:
 - material facts should appear be in the claimant's affidavit; mention in exhibits is insufficient: National Bank of Sharjah v Dellborg²³.
 - it is not enough to refer the judge to an earlier statement or affidavit made by a defendant, the judge should be persuaded to read it! Art Corp. v Schuppan²⁴.

²² [2005] 1 BCLC 467.

²³ (1992) The Times, 24 December 1992.

²⁴ (1994) The Times, 20 January 1994.

- disclosure includes any shortcomings in the claimant's own financial standing which may effect its undertaking in damages.
 - a breach of the advocates duty to the court may result in sanctions being applied against the lay client: Memory Corp. v Sidhu (No.2)²⁵.
- *What are the options if the court finds there has been a material non-disclosure?* The court has the discretion to continue or grant a new order on terms (such as the payment of costs or damages) if the disclosure was innocent and the injunction could properly have been granted even if the facts had been disclosed: Lloyds Bowmaker Ltd v Britannia Arrow Holdings²⁶:
 - In deciding the consequences of any breach, the court should take into account all the relevant circumstances, including the gravity of the breach, the excuse or explanation offered, the severity and duration of any prejudice caused, prejudice caused, whether it is remediable or has been remedied.
 - The court must also apply the overriding objective and the need for proportionality: Memory Corp. v Sidhu (No.2). It has been held that the rule against material non-disclosure should not itself become an instrument of injustice: Behbehani v Salem²⁷.
 - *Discharge on the basis of delay:* a failure by a claimant to press on with his action as quickly as possible will provide grounds for discharging the order unless a full and sufficient explanation can be given for the delay: Walsh v Deloitte²⁸.

²⁵ [2000] 1 WLR 1443, CA.

²⁶ [1988] 1 WLR 1337.

²⁷ [1989] 1 WLR 723, CA.

²⁸ LTL 18/12/2001.

Defendant's tactics

43. The defendant faced with a freezing injunction has a number of options:

- To seek variation or discharge of the order.
- Provide security.
- Raise procedural defects with the court.
- Resist excessive requirements for disclosure in appropriate cases.
- Apply to court for the claimant to fortify its undertaking in damages by a payment in or security.

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