

Freezing Injunctions

Introduction

A freezing injunction is a court order that can be obtained to restrain a party from disposing of or dealing with its assets.

When will an application for a freezing injunction be made?

Usually an application for a freezing injunction is made before proceedings are issued (including arbitration proceedings) and when the applicant fears that the respondent will dispose of or dissipate its assets before judgment can be obtained and enforced. However, a freezing injunction can be sought at any time; before proceedings are issued, during the course of proceedings and after judgment has been obtained (to prevent the disposal of assets before the judgment is satisfied).

A freezing injunction takes effect personally against the respondent, and can therefore be granted in respect of any known assets held by the respondent up to the value of the claim. Equally, where the applicant has a proprietary or tracing claim, a freezing injunction can be granted in respect of particular assets which are the subject matter of a claim; this is particularly useful in cases where fraud is suspected.

Freezing injunctions can, in special circumstances, be granted by the court in support of overseas proceedings.

A freezing injunction may be made against a third party who holds assets on behalf of the respondent, for example a bank, as well as against the respondent.

When will the court grant a freezing injunction?

The court has discretion to grant a freezing injunction and will do so only when it considers that it is just and convenient. The following conditions must be satisfied:

- The English court must have jurisdiction.
- The applicant must have a cause of action, i.e. an underlying legal or equitable right which may give rise to a judgment that can be enforced against the respondent's assets. In this respect a counterclaim is sufficient.
- The applicant must demonstrate to the court that he has a good arguable case although he does not need to show that the case will definitely succeed.

- There must be sufficient assets in existence to meet the claim.
- There must be a real risk of the disposal or dissipation of the assets.
- The applicant must provide an undertaking to the court to pay any damages to the respondent if it is later shown that the injunction should not have been granted (the applicant will therefore have to demonstrate to the court that it could meet any liability for damages by giving a cross-undertaking – see further below).

When making its decision the court will also apply the 'balance of convenience' test, which means that the court will take all relevant factors into account and will weigh up the likely detriment caused to the respondent against the benefit the injunction would provide to the applicant. This assessment may be made in monetary terms. For example, if the respondent could be adequately compensated in damages if it transpired that the injunction was wrongly granted, then the court should be more willing to allow the injunction. Conversely, if damages would not be adequate compensation for the respondent, or if the applicant would gain only limited benefit from the injunction, then the court may reject the application.

The applicant's behaviour will also be considered and he must act reasonably, diligently and without unnecessary delay. Any delay in applying for a freezing injunction will make it more difficult to convince the court that the injunction is necessary on the grounds of risk of dissipation. Practically, delay also increases the risk that the assets in question will already have been dissipated by the time any injunction is granted.

Cross-Undertaking in damages

The applicant must undertake to the court to pay any damages that the respondent sustains by reason of the freezing order if it later turns out that the order should not have been granted. This undertaking extends to damage suffered by any other party notified of the order. The court may require the applicant to give security or to identify assets in support of any undertaking. The duty of full and frank disclosure (see below) extends to facts which materially affect the value of the security given.

Assets affected by the freezing injunction

A freezing injunction can only freeze those assets over which a judgment can be attached. As well as money held in bank accounts, a freezing injunction can apply to land, vehicles, shares, bonds and other financial instruments.

Assets can include those held beneficially for the respondent, for example, assets held on trust.

A freezing injunction can apply to assets held within England & Wales (i.e. a domestic freezing injunction) and to assets outside England & Wales (i.e. a worldwide freezing injunction).

The freezing injunction may be:

- Limited to the value of the claim (These orders are 'maximum sum orders' and are the most usual type).
- Limited to a specific asset which has a value that is equal to or greater than the value of the claim.
- Unlimited, encompassing all of the respondent's assets. This is only made in exceptional circumstances.

The freezing injunction normally requires the respondent to disclose the value, location and details of all his assets exceeding a minimum value.

A freezing order does not prevent a defendant from spending money on ordinary living expenses, legal fees, carrying out ordinary business transactions, or paying debts as they fall due. If it is shown that the respondent has access to other funds in excess of the value of the freezing order sought, the court may grant an order without these exceptions.

Procedure

A freezing injunction will often be made 'without notice' to the other party i.e. without the other party being present at or aware of the hearing because to give notice might lead to assets being dissipated. The applicant should consider in each case whether the risks/urgency merit a 'without notice' application.

The application for the freezing injunction must be supported by evidence in the form of an affidavit, sworn by the applicant. It must be accurate and give full and frank disclosure (see below). The affidavit must explain the reasons for the urgency of the application and the risk of dissipation, it must give details of the respondent's assets to be frozen, and it must also give evidence of the applicant's ability to meet any cross-undertaking in damages.

Initially a freezing injunction sought 'without notice' will be granted on an interim basis and it will last until the date set for a further hearing at which the respondent will be present (the 'return date'). At that hearing there will be arguments from both parties as to why the freezing injunction should be continued, varied or set aside.

Duty of full & frank disclosure: applications without notice

As the respondent is not present at the first hearing, the applicant has responsibility to disclose all material relevant matters to the court, including those which may be unfavourable to the applicant. This extends to matters raised by the respondent in correspondence and any relevant defences. The duty of full and frank disclosure extends to all known material facts including those which would have been apparent upon proper inquiry. Any incorrect information or omission which is subsequently discovered must be corrected immediately. The duty of disclosure is on-going.

Failure to comply with this disclosure obligation may result in the court setting aside the injunction and ordering the applicant to indemnify the respondent for any costs incurred by him and to pay compensation for any loss suffered by the respondent because of the injunction. The court may make this ruling even if the omission would not have changed the court's decision on whether to grant the freezing injunction. Knowingly misleading the court could lead to a criminal charge of perjury.

Serving a freezing injunction

The freezing injunction must be served promptly after the hearing and served personally on the respondent to make sure that it can be enforced by committal proceedings. It must also commence with a 'penal notice' which states the penalty for breaching an injunction (see below).

The respondent should also be served with the application, supporting evidence and a note of any 'without notice' hearing.

In some cases where the injunction includes assets held by third parties, the order may be served on a third party prior to being served on the respondent. For example, a bank will be served ahead of the respondent so that funds can be frozen by the bank before any attempt by the respondent to transfer funds from his bank account.

The mandatory aspects of the freezing order, including the liability for committal, and the asset disclosure obligation, only take effect when the order is served personally. By contrast, the prohibitory aspects of the order – including the obligation not to dissipate assets, take effect following service by any means.

Breaching a freezing injunction

Committal proceedings for contempt of court, which is punishable by a fine, imprisonment or the seizure of assets, are the sanctions against a respondent who breaches the terms of a freezing injunction. The applicant has no right to damages against the respondent arising from the breach of a freezing injunction.

Limitations of freezing injunctions

- It is an expensive and time-consuming process.
- The applicant has a duty of full and frank disclosure which can be burdensome. Whilst discharging this duty normally uncovers facts which are essential to the litigation, the effect is to front-load costs.
- The applicant will be required to give a number of undertakings to the court including:
 - (a) an undertaking to pay damages to the respondent if it is later shown that the injunction should not have been granted (such damages could be significant if the respondent has, for example, been restrained from using assets in the course of his business);
 - (b) an undertaking to pay costs reasonably incurred by a third party in complying with the injunction, for example, the costs sustained by a bank in freezing an account.
- The applicant risks being in contempt of court should he breach the undertaking given to the court.
- A freezing injunction does not provide the applicant with any security over assets and nor does it give the applicant any prior rights over assets ahead of any other creditors. There is no guarantee that a claimant will recover the full sum.
- Once the injunction has been granted, the applicant must pursue his underlying claim diligently (which brings with it all the normal costs and risks of pursuing High Court litigation to trial, if no earlier settlement is reached).

- Unless and until the freezing injunction is registered or recognised in a foreign court, it is not enforceable overseas, and therefore not legally binding on third parties outside the jurisdiction. Whilst an overseas bank may as a matter of policy elect to observe a foreign injunction obtained in the UK, this is not guaranteed. Prompt registration in the local courts is therefore important.

There is a risk that the injunction will have little benefit if, once it is granted, the applicant discovers that the assets which it covers have already been dissipated.

Tactical advantages of freezing injunctions

- Preserving assets for enforcement purposes.
- Assist in asset tracing claims (e.g. by requiring the respondent to disclose the details of his assets).
- Inconveniencing the respondent and affecting his creditworthiness. This might bring financial pressure to bear on the respondent to make him settle, pay up or offer up security (as a freezing injunction does not provide any security). A freezing injunction can therefore be a tactically powerful weapon.

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Should you have any questions please contact Julie Herriott (julie.herriott@pinsentmasons.com), or your usual Pinsent Masons adviser who will be able to assist you further.

This note does not constitute legal advice. Specific legal advice should be taken before acting on any of the topics covered.

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