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What the court requires to grant a freezing injunction

Legal and evidential considerations explained

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INTRODUCTION

In this booklet, the person or company seeking the freezing injunction is referred to as the applicant and the person or company subject to the injunction is referred to as the respondent.

It is a rule of thumb that courts will not grant freezing injunctions lightly. This is because they go against a fundamental principle that an individual should be able to deal freely with his or her own assets. Therefore, there are strict and onerous obligations on a party seeking to obtain an order of this nature from the court, particularly on a without notice basis.

Commonly, most freezing injunctions are sought without any prior notice to a respondent ("without notice applications") on the basis that the applicant does not wish to notify and / or give the respondent any advance warning of the proposed action in case the respondent then takes steps to put any assets beyond the reach of the applicant. However, in the absence of the respondent being given the opportunity to make representations at the initial hearing, the evidential burden on the applicant is very high. The court has to be very satisfied that the freezing injunction is appropriate to grant and will look at the application very carefully.

The granting of a freezing injunction is entirely at the court's discretion. The court will always consider whether it is just and convenient to grant a freezing order. Applications will be refused if the injustice and /or detriment that would be caused to a respondent outweighs the benefit that is gained by the applicant. Equally, the court will take into consideration the applicant's conduct and how quickly they have acted in seeking an order. Any delay in making the application will severely damage the chances of a successful application.

In order to obtain a freezing injunction, an applicant must show the following:-

1 It has a good or properly arguable case

However, this is a relatively low threshold for the applicant to get over. Recent judicial commentary states:

"the right course is to adopt the test of a good arguable case, in the sense of a case which is more than barely capable of serious argument, and yet not necessarily one which a judge believes to have a better than 50% chance of success".

It is not a requirement at the initial hearing that the court has to form a provisional view that the claimant will probably succeed at trial in its underlying substantive claim. However, the court will take into account the apparent strengths and weaknesses of the case when deciding whether the claimant's case is sufficiently strong to reach the appropriate threshold. This will include assessing the apparent plausibility of statements in affidavits in support of the application. However, the test is not particularly an onerous one for the claimant to pass.

If the applicant is able to convince the court of the merits at this first hearing (which was heard without notice to the respondent) then an Interim injunction may be granted and a further hearing listed which must then be notified to the respondent.

The question of a good arguable case can sometimes become more important at the return date of an injunction when a full hearing takes place and at which the respondent is also present. At that hearing the court will determine whether the injunction should continue until trial of the claim itself or

until any further order in the substantive proceedings. By that stage, it is likely that the respondent will have presented evidence in response to the applicant's original affidavits and the court will consider this carefully. However, it is established case law that the return date must not become a trial in itself, even in circumstances where the respondent is seeking to have the injunction discharged. Other commentary with regard to this particular requirement states that a claimant's case must not be

2 There must be a risk, or a real risk, of the respondent dissipating or hiding his assets

This is normally the most important factor the court will look at when deciding whether to grant a freezing injunction. If the applicant can satisfy the test, it is then for the court to determine whether it is just and convenient to grant the injunction (as it is a discretionary remedy). There is a sufficient risk of dissipation if it can be shown that:-

- **There is a real risk that a judgment or award will go unsatisfied, in the sense of a real risk that, unless restrained by injunction, the defendant will dissipate or dispose of his assets other than in the ordinary course of business.**
- **Unless the respondent is restrained by injunction, assets are likely to be dealt with in such a way as to make enforcement of any award or judgment more difficult, unless those dealings can be justified for normal and proper business purposes.**

The legal authorities suggest that the following factors are relevant when determining if an applicant should be granted a freezing injunction:

1. **The nature of the respondent's assets. The more liquid and disposable the assets, the easier they are for the respondent to dissipate and hence the greater the need for a freezing injunction to be granted.**
2. **The nature and financial standing of the respondent's business including its length of establishment. The less established and more precarious the business, the more likely the court is to grant the order.**
3. **What the respondent has said about dealing with its/their assets in the past. This is often indicative of the respondent's likely intentions in respect of possible dissipation of assets.**
4. **Whether the respondent is living or has a company incorporated in a jurisdiction known to be a tax haven with lax or difficult to follow company law.**
5. **Whether English Judgments are actually enforceable in the place where the respondent has substantial assets. The more enforceable the place of jurisdiction, the less likely the order will be granted – for example the EU compared to somewhere such as the Cayman Islands.**
6. **Whether the underlying claim involves dishonesty, even if fraud itself is not pleaded.**
7. **Whether the response to the applicant has previously been evasive, or implausible reasons or explanations have been provided to information, or questions asked.**
8. **Whether there is any evidence of other dishonesty beyond the current claim.**

9. **Whether the respondent has a past history of not paying debts or association with an insolvent company or other legal entities.**
10. **Whether there is any evidence of actual or threatened removal of assets from the jurisdiction.**
11. **Whether there is a past history of failing to comply with court orders.**
12. **Whether there is a past history of failing to disclose assets**

3 The applicant must provide an undertaking in damages

Any applicant applying for a freezing injunction must undertake to the court to pay any damages that a respondent or any other party may suffer as a result of the freezing order if it later transpires that it should not have been granted. This undertaking can in certain circumstances be limited to a specific sum by the applicant, subject to the court agreeing.

Depending on the financial standing of the applicant, the court may direct that monies be paid into court and held in an account until determination of the matter at trial. Alternatively, the court may simply rely upon an undertaking from an applicant to pay damages if, for example, the applicant is of significant financial standing, such as a bank or other financial institution.

If an applicant ultimately loses the underlying substantive claim or a defendant successfully argues that the freezing injunction should be discharged, the applicant could face a very significant claim in damages against it, either in terms of the legal costs of the main proceedings, the legal costs of the injunction application and the undertaking in damages arising from the injunction, both to the respondent and third parties (subject to any limitation as described above).

In any subsequent enquiry as to damages, the defendant must prove that the losses he alleges would not have occurred but for the injunction, but not that the injunction was a sole cause of the loss.

It is open to a respondent to ask the court at the return date for the cross undertaking in damages to be increased and fortified (which refers to mechanisms to secure payment in the event the undertaking is called on). When considering the question, the court will adopt the course which will involve the least risk of injustice. It is balancing act between having an undertaking which is of realistic value but ensuring that the fortification of it does not stifle the underlying litigation.

A cross undertaking in damages is not required where the applicant is the Crown or a law enforcement body.

4 The requirement of full and frank disclosure

An applicant has a duty of full and frank disclosure of all material facts. What this means is that an applicant is required to provide full details of all information / documentation that is and /or may be relevant to the underlying claims, the timing of and /or the reasons for the application, including any such information / documentation which may be detrimental to the applicant's position.

For more details regarding this, see our other booklet dealing with this particular aspect.

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