

PRIVATE CLIENTS, SMES,
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Freezing orders – a practical guide

12 common questions answered



1 What is a freezing order?

A freezing order is an interim order which affects the ability of a person or company to deal with certain assets. This can be the entirety of the assets or up to a limit specified by the court.

The purpose of a freezing order is to stop a person (or company) from disposing of or dealing with their assets other than in the ordinary course of business. The idea behind a freezing order is typically to preserve a defendant's assets and prevent a defendant to a monetary claim from frustrating the claim by putting his/her assets beyond the reach of the applicant. It has the effect of freezing some or all of an individual's assets, essentially preserving them until judgment is obtained in the underlying proceedings and is capable of enforcement.

Freezing orders are not lightly granted by the courts. The reason is due to the extraordinary nature of the remedy which a freezing order offers an applicant. They interfere with the prima facie right of a person to deal with his assets as they wish and as such, the court will look very carefully at any application for such an order.

2 Which courts can grant freezing order?

The court's jurisdiction to grant a freezing order is derived from the Senior Courts Act 1981 (SCA 1981). The relevant rules are contained in the Civil Procedure Rules 1998 (as amended), Part 25 and Practice Direction 25A.

A freezing order can either be granted by a judge in the high court or a circuit judge in the county court. The latter is a relatively new development and has been in place since April 2014.

There are exceptions to this rule, whereby a freezing order may be granted by a master or district judge in the high court or a district judge in the county court, but only if the freezing order is:

- 1. In a format already agreed by the parties.**
- 2. In connection with or ancillary to a charging order.**
- 3. In connection with or ancillary to an order appointing a receiver by way of equitable execution; or**
- 4. In proceedings pursuant to CPR 66.7 relating to an order restraining persons from receiving sums due from the Crown.**

However, the most common route is to seek a freezing order before a judge in the high court and there is always a high court judge available at short notice to hear emergency applications of this nature. Often, when considering a freezing order, the legal advisor to the applicant will contact the court shortly before attending court to make the application and in so doing will provide a brief time estimate of how long he believes the application will take. Ideally it will also lodge papers in advance to enable the judge to pre read in to at least some of the papers.

3 Why might someone seek a freezing order?

The following are reasons why a freezing order may be sought:-

TO ASSIST IN THE PRESERVATION OF ASSETS.

Commonly, a claimant will seek a freezing order before proceedings have been issued in order to prevent a defendant from disposing of his assets in order to defeat any eventual judgment. However, freezing orders can be sought at any time in proceedings and even after judgment has been obtained in the substantive proceedings.

Freezing orders can also be granted in proprietary claims, i.e. where the applicant is making a claim against a particular identifiable asset connected to the alleged fraud. The court will apply different principles on the granting of a freezing order over property and these are covered in our other booklets in this series.

It is important however to understand that freezing orders do not provide security over or priority for payment from a defendant's assets. Neither does it provide security against a possible future judgment or a judgment already obtained. They are simply there to prevent a defendant from dissipating his/her assets with the intention or effect of frustrating enforcement of a prospective judgment. They do not therefore give a claimant priority over the defendant's other creditors generally or in the event of a defendant's insolvency (as in such circumstances the claimant will have equal rights to other unsecured creditors). Accordingly, a freezing order is not the appropriate tool where it appears that the defendant is already indebted to other creditors with potentially larger claims.

However, a bona fide buyer of an asset subject to a freezing order for value, without notice of the freezing order, will gain good title to it. However this can be a contentious matter in itself and the buyer will have to provide evidence it was not connected with the defendant and had no knowledge of the existence of the freezing order.

TO ASSIST FOREIGN PROCEEDINGS

Courts in England & Wales may grant freezing orders in order to aid foreign proceedings, pursuant to Section 25 of the Civil Jurisdiction and Judgments Act 1982 (CJJA 1982). For more information relating to this, please see our other booklets in this series.

TO ASSIST ARBITRATION PROCEEDINGS

The court's power in this country to grant freezing orders in the support of arbitration proceedings anywhere in the world derives from Section 44 of the Arbitration Act 1996. This power extends to granting freezing orders to aid enforcement of arbitration awards (as opposed to any pre-award). In order to find out more about freezing orders and arbitration awards, please see our other booklets in this series.

4 When are freezing orders not possible?

There are some circumstances where freezing orders are not available. These are as follows:-

1. **In proceedings against the Crown.**
2. **In proceedings against a foreign state, unless it has provided written consent.**
3. **By a defendant until after he has filed an acknowledgement of service or a defence.**
4. **To help enforce a penal law of a foreign state.**

5 What assets may be frozen?

A freezing order may only attach to assets against which a judgment could potentially be enforced.

Over the years, a wide range of assets have been caught by the terms of freezing orders and the terms of the order will always be strictly interpreted. In principle, all types of assets can be frozen including, for example, bank accounts, shares, motor vehicles and land. Excluded assets include those which are perishable (food being an example). However, intangible assets such as goodwill are covered.

It is necessary to show that the respondent has either a legal or beneficial interest in the asset in question. Assets can be jointly owned or held by a third party for the benefit of a respondent. If shares are frozen, the court order should also ensure that the company is restricted from dealing with the shares (possibly reducing the value of those shares).

It is not always possible at the time of applying for a freezing order to know whether a respondent owns a particular asset or not. Where there is doubt the terms of the order should include them and, if necessary, they should be amended at a later date.

6 Can freezing orders attach to assets in foreign jurisdictions?

The English courts have the ability to grant freezing orders to cover assets of a respondent held abroad. Whilst a cautious approach is taken by the courts in such circumstances, the court will exercise its jurisdiction pursuant to Section 25 of the CJA 1982 where appropriate. To learn more about worldwide freezing orders, please refer to our other booklets in this series.

7 What value of assets will be caught by the freezing order?

There are three main types of freezing order:-

1. **A maximum sum order. The court places a monetary limit on the freezing order. This is the most common type of order.**
2. **A general order that extends to all of the respondent's assets. An unlimited order of this nature is only justifiable in exceptional circumstances. These include where the extent of the respondents assets is unknown, the fraud claim is a complex one and the total value of it cannot yet be determined.**

- 3. An order that attaches to specific assets. These orders are normally sought in relation to large, high value assets, such as ships or property that is worth as much as, or more than the claim.**

8 What about a respondent's business, legal expenses and living expenses?

It is a rule that freezing orders must not be used in an oppressive manner.

For example, they cannot be used to make life so difficult for someone that they have to stop trading. A company served with a freezing order has the right to continue trading and make payments in the ordinary course of business – e.g. to employees and suppliers.

Equally, a respondent is entitled to payment of reasonable legal expenses in order to obtain advice with regard to the meaning of the order.

In addition, a respondent is allowed a weekly sum of money for living expenses. This is normally set at £500 a week, although respondents often seek to vary the terms of the freezing order to increase this amount.

9 Can orders be made against non-parties?

Freezing orders can be made against third parties against whom the claimant has no claims, but who appear to hold assets on behalf of a respondent. The court's authority stems from the case of *TSB Private Bank International SA against Chabra* [1992] 2 All ER 245. These orders are referred to as the "Chabra Jurisdiction". The courts will take a variety of factors in to account when considering such orders, including whether the third party respondent has a connection with the jurisdiction and the relevant assets there as well.

In addition, freezing orders will often be served on third parties to prevent them from dealing with any transactions that may contravene the order. For example, solicitors are often notified where a property asset (that could be transferred to another entity by them) is subject to a freezing order. The freezing order will have a penal notice attached to it warning any recipient that if they act in assisting the contravention of the order then they could be criminally liable.

10 How long does a freezing order last?

Most freezing orders are only granted for a period of time until the return date (usually the second hearing) when all parties including the respondent can attend court. This is because most freezing orders are obtained without notice to a respondent. The return date is ordinarily seven days after the granting of the freezing order. At that hearing, the freezing order may be subject to challenge and discharge, and hence fall away. Alternatively it can be varied by agreement or by court order. Or it can simply remain in place whilst the parties litigate the substantive claim or come to an earlier settlement.

11 What other orders can the court make at the same time to help an applicant?

As part of granting freezing orders, the court will often be asked to grant additional orders for the benefit of an applicant (commonly known as ancillary orders or incidental relief). These orders

can often assist an applicant who may be the subject of a fraud in obtaining crucial and important information from a respondent.

The most common of these relate to disclosure orders. Commonly, a respondent will be given a short period of time to disclose different categories of documentation, and must often do so by swearing an affidavit stating the searches that have been made and the documents which have been located, together with giving reasons why certain documents could not, for example, be disclosed.

Ancillary orders which can be applied for include:-

- 1. An order to cross-examine a respondent about his assets – This is an onerous obligation and is granted only in exceptional circumstances. It is only granted where a court believes it is just and convenient to do so. However, although it can be a legitimate tool to the asset disclosure process, it is seen as the exception rather than the rule. Any cross-examination must be proportionate and just and relates solely to the issue of assisting asset disclosure and is not to be used for any other purpose. Ordinarily, these types of ancillary orders are requested after a respondent has provided an affidavit of means and it is shown to be defective. The time for applying for one would ordinarily be at the return date of a freezing order at which all parties are present. However, in exceptional circumstances, the courts may grant them at the first hearing when the application is heard without notice to the respondent.**
- 2. A passport order – The court may require a respondent to deliver up his passport and not leave the jurisdiction. However, these orders are exceptional and only granted in the most serious of fraud cases. The reason why is that they fundamentally interfere with a respondents liberty and human rights.**
- 3. An appointment of a receiver over a respondent or his company – A receiver appointed by the court has a right to all income due to the respondent or his company. The court will only appoint a receiver in circumstances where a freezing order on its own will not provide adequate protection against the risk of the respondent putting his assets beyond the reach of the applicant. They are highly unusual and are not granted lightly (especially in respect of companies) as the appointment of a receiver over a company is likely to cause damage to that particular company's business and perhaps third party interests such as un-associated shareholders, employees and suppliers. If a receiver is appointed, an applicant may be asked to increase the undertaking in damages due to the likely detrimental effect the appointment of a receiver may have.**
- 4. Immediate delivery up to the applicant's solicitors of certain assets or payment of a sum of money into court – This is most commonly ordered when a claimant has a proprietary claim to the respondents assets and where there is an easily identifiable asset belonging to the applicant which has passed to the defendant as a result of the fraud.**
- 5. An order requiring the respondent to sign a document authorising his bank to disclose information to the applicant – These precedent letters are common in injunctive proceedings. They enable a claimant to then liaise directly with the respondent's bank in circumstances where normally the bank will not communicate without proper written authorisation.**

- 6. An order requiring the disclosure of the identity of a third party funder – These orders are granted to help identify a defendant's third party legal expenses funder.**

12 Can a respondent still borrowing money whilst subject to a freezing order?

Case law demonstrates that a freezing order does not prevent a respondent from incurring new liabilities and thereby increasing his overall indebtedness, provided the action in question does not diminish the value of the frozen assets, for example where the respondent seeks to place security over an asset subject to the freezing order.

However, it remains a risk to an applicant that further unsecured creditors could be incurred by the respondent and in the event that the respondent is subsequently declared insolvent the increase in the value of unsecured creditors will diminish the returns for all creditors (including the applicant).

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