PRIVATE CLIENTS, SMES,
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# Freezing orders

## 10 important pre-application considerations explained

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# INTRODUCTION

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

A freezing order is a remedy that the court may order in support of a claim brought by an applicant. For the court to grant a freezing order, it will need to be satisfied that:-

(i) the applicant has a substantive good arguable claim against the respondent; (ii) that there is a solid risk that unless a freezing order is granted the respondent may not have assets available to pay any judgment that the applicant may obtain and (iii) it is just and convenient to grant the order.

The effect of a freezing order is not to give the applicant any security over the assets that are frozen. It merely prevents the respondent from dealing with those assets (eg disposing of them or charging them) pending trial.

Before applying for a freezing order, any applicant must be aware of the nature of the order they are seeking from the court and the obligation it is under when making such an application.

Whilst some of these considerations relate to legal aspects, any applicant must always bear in mind the practical considerations of applying for a freezing order before deciding to commence that course of action. Often, when faced with a possible fraud or other serious wrongdoing, applicants are very keen to head off to court and seek a freezing order against a respondent but in so doing they must be aware that this is only the first part of what can be a very lengthy, time consuming and expensive process.

Proper consideration of this prior to making such an application, together with consideration of other potential remedies, is essential before embarking on what could be a very lengthy set of legal proceedings.

Freezing orders are a powerful weapon in the right hands. Careful thought and due consideration should be taken prior to taking any steps to obtain such an order. Whilst difficult to do in what are often very serious circumstances an applicant might find itself in, it is always worth taking some time to step back and consider all the options before reaching a decision.

The practical considerations which all applicants should take into account include the following:-

## 1 The time, expense and commitment involved

Freezing orders are one of the most serious types of order which a court can grant. As a result the court does not grant them lightly and as set out above, a freezing order is only the first step in what can be a lengthy litigation process.

Freezing orders are time consuming. Often, they require significant investment of management time and involvement of senior individuals before an application can be issued. Applicants will be deeply involved with their legal advisors in the preparation of the evidence required to obtain a freezing order. This can often involve working over some days and nights (and sometimes weeks) in order to produce the affidavit evidence required in support of the freezing order.

If the applicant is a company, senior personnel will be required to access company documentation and help prepare the evidence to substantiate allegations made, commonly involving analysis of money flows and other financial information to help evidence the wrong doing by the respondent. This may

require the assistance of the finance team of a company, the bookkeeper or the company accountant. This will obviously have an impact on the day to day running of the business at a time when it has already suffered from the respondent's wrongdoing.

In circumstances where the court grants a without notice freezing order, the applicant will normally be required to go back to court 7 to 14 days later for what is known as the return date. Often that hearing is fairly brief. If the respondent wishes to challenge the continuation of the freezing order, the court will usually set a timetable for the service of evidence and relist the hearing. In the meantime the injunction will continue.

The standard terms of a freezing order are that it will not prevent the respondent from making payments in the ordinary course of business or spending money on legal advice and representation. Additionally, if the respondent is an individual, it will state that the order will not restrict the respondent from spending a specified amount per week or month on ordinary living expenses. The principle is that the respondent ought not to be restricted from making his or her usual payments in accordance with their standard of living. Usually at the without notice hearing the applicant will estimate what the respondent's expenditure may be and will seek a restriction that the respondent does not spend more.

Typically in the days between the granting of the freezing order and the return date, the respondent may take issue with the practical effect of the order on payments in the ordinary course of business and (where the respondent is an individual) on the amount of permitted living expenses. Practically the return date hearing will often be concerned with resolving such matters, if disputed.

## 2 Dealing with the substantive claim

The grant of a freezing order is only the start, not the end of the claim. A freezing order is simply a remedy to prevent a respondent putting his / her assets out of the reach of the applicant. Whilst the applicant may have the protection of a freezing order in place, it is still under an obligation to pursue its substantive claim against the respondent – commonly a monetary claim in respect of the losses it has suffered. A freezing order cannot be obtained in isolation without the existence of a substantive claim against the respondent (although it may not yet have been issued).

This can be a lengthy process and ultimately end up in trial at court. Set out below are the main steps which will have to be undertaken in the substantive claim.

### DRAFTING DETAILED PARTICULARS OF CLAIM

Particulars of claim is the term given to a document which formally sets out the detail of the claim an applicant has against a respondent.

These documents commonly need to be prepared by a barrister / counsel as it is they who specialise in drafting these detailed legal documents. In a complex case involving various allegations of wrongdoing and high levels of loss, the particulars of claim can run in to many pages and will take numerous revisions to get right. However, it is vital that it is correct as it will form the pleaded basis of the applicant's claim throughout the entire case and the document which the respondent will have to answer by way of defence.

If the freezing order has been obtained in circumstances of great urgency, the court will not require the detailed particulars of claim to have already been prepared. If, (as is often the case in fraud claims) the freezing order is obtained after a lengthy period of investigation and preparation, the particulars of claim, setting out the applicant's substantive case, will need to be prepared and put before the court on the application for the freezing order.

## DEFENCE AND COUNTERCLAIM

If the respondent intends to fight the claim, it will prepare and serve a defence to all of the allegations set out in the particulars of claim. Again, this can be a detailed and lengthy document and the respondent may even seek to counterclaim against the applicant for any monies it may believe are due and owing to it. If that happens, the applicant then has to prepare a defence to the counterclaim to avoid judgment being entered for that amount.

## COSTS AND CASE MANAGEMENT CONFERENCE

The parties will then have the matter listed for what is known as a Cost Case Management Conference (CCMC) at which stage the court will review the claim to date and put in place steps to take the matter forward to trial (commonly known as "directions"). Directions are akin to a timetable put in place by the court that the parties have to adhere to, setting out a chronological sequence of steps / actions for all parties to carry out up to and including trial.

In advance of that hearing, the applicant will need to provide detailed information with regard to the likely costs of the litigation together with detailed information relating to the nature and extent of any disclosure of documents within the proceedings.

The Cost and Case Management Conference will take place at court (normally listed for 1-2 hours) and a judge will review the court file before putting in place directions to take the matter to trial.

## DISCLOSURE OF DOCUMENTS

An applicant will then need to produce what is called a Disclosure List. This is a list setting out all relevant documents it has (or had) in its possession which are relevant to the current legal proceedings. This exercise in complex fraud proceedings can be very onerous indeed.

It is not uncommon now for large volumes of documents to be stored electronically (especially in large scale frauds) and parties often need to agree the parameters of any electronic search for documents (what is called "e-disclosure"). If necessary, the parties will need to appoint an independent IT expert to undertake searches of relevant databases by way of agreed key word search criteria.

It should be borne in mind that this process is in addition to the more traditional review and cataloguing of all hard copy documents which in large scale cases can also be a very lengthy and time consuming exercise.

However, disclosure is of paramount importance in claims of this nature. Failure to properly undertake the disclosure process can result in a respondent making applications against an applicant for specific disclosure of relevant documents and in very exceptional circumstances can even lead to a party making an application against the other party to have its claim struck out for failure to properly complete the disclosure exercise.

There are also costs consequences for failing to properly cooperate with any order of court. Even if your primary case is stronger and likely to succeed, a failure to comply with any order of court can lead to interim cost orders against you before trial.

Once disclosure lists have been completed, they are exchanged with the respondent who will in turn send their own list. Each party can then request copies of some or all of the documents on the opponents list or alternatively go to inspect the originals (such requests must be made within a specified time limit). In large cases the inspection and copy process can take considerable time. Even when complete, the applicant and its legal advisors will then need to sift through all the documents to understand their important or otherwise in the claim thus extending the time taken up by the disclosure process.

## WITNESS STATEMENTS

The next stage of the directions process is commonly the preparation of witness statements (or affidavits in certain types of proceedings), detailing for each individual who has direct knowledge of the issues relevant to the claim, their evidence in relation to the substantive case. In complex fraud cases these statements can be very lengthy indeed but are crucial to get right. The statements set out the factual basis of an applicant's claim and commonly witness statements are required from various different individuals and even third parties to the litigation. They will also exhibit all the key documentation to support an applicant's claim.

It is critical that these statements are properly produced as, ultimately, the applicant will only be able to rely upon the details contained in these statements at trial. These documents can often take a number of months to prepare and complete.

Once complete, the witness statements will be sent to the respondent and they will likewise send theirs to the applicant. It is then necessary to review the respondent's statements in detail and begin to gauge the quality of their evidence and whether it will ultimately "stand up at trial".

## EXPERT EVIDENCE

If the claim involves, for example, complex financial matters or allegations of forgery etc, it is likely that the parties will need to agree to the appointment of an independent expert (eg a forensic accountant) to provide an expert's report dealing with certain aspects of the alleged fraud. That person will also be required to give evidence at court. More often than not the court will insist on a single expert being instructed by both parties, but on occasion it might be that each party will seek to rely upon its own expert on a particular issue.

Experts need to be fully briefed and instructed pursuant to the Civil Procedure Rules 1998 and there are strict guidelines as to how this is to be done to ensure the independence of the expert in the proceedings is maintained.

## INTERIM APPLICATIONS

Throughout the entire litigation process, either party to the proceedings may make an interim Application. Essentially this is the ability to apply to court for various types of orders, such as:

1. **A respondent seeking to vary the terms of an order;**
2. **A respondent seeking to discharge an order;**
3. **Applications to strike-out some or part of a party's pleaded case;**
4. **Applications for specific disclosure;**
5. **Requests for further information in circumstances where a party's pleaded case is unclear;**
6. **An application for security for costs;**
7. **An application for committal of a respondent to prison for not complying with the terms of a freezing order.**

Often, these types of applications cannot be foreseen at the outset of the proceedings but their possibility must be factored into proceedings of this nature as it is unusual to run a case without making (or facing) at least some interim applications.

## PREPARATION FOR TRIAL

The parties will then need to make time and / or resource to prepare for trial. In large cases, this is an extensive exercise as it is the applicant's responsibility to prepare all of the relevant paperwork in to paginated bundles ready for the court. Often many duplicate sets need to be produced so that all relevant parties have a single set of files from which to work from.

As part of the preparation for trial, it is very common to have meetings with the barrister acting for the applicant and these need to be factored into any proceedings. Dependant on when the barrister was instructed, a brief will also have to be delivered detailing all of the background to the case, enclosing all of the pleaded documents and any ancillary evidence and providing detailed instructions as to what is sought. This brief can take some time to prepare, as it effectively is an extension of the evidence in support of the claim. The barrister (unless previously involved) will come in cold and have to read such documents to come up to speed and understand the claim.

Equally, there is often considerable correspondence between the parties to the claim, together with correspondence with the court, third parties, such as the experts, forensic accountants and investigators.

## TRIAL

Ultimately, if the matter is not capable of settlement and / or the parties not willing to enter in to amicable settlement, the case will end up at trial. Trials in complex cases involving fraud can be lengthy indeed due to the very detailed nature of the allegations and the number of witnesses often required to attend court (including expert witnesses).

Complex cases are likely to last a minimum of 10 days and representatives of the applicant needs to be aware that attendance at court throughout this period is required.

If the applicant is a person, or has a nominated individual (where a company brings a claim), to provide evidence then that individual will usually be required to attend the trial and be cross-examined by the defendant's barrister on the evidence in support of the claim (and any other evidence filed in the proceedings).

## 3 Cross undertaking in damages

Applicants must pay heed to the requirement to give an undertaking in damages to the court at the outset of proceedings. This is in the event that it is later shown that the order should not have been granted and the respondent has suffered loss as a result.

The court may even make it a condition of the freezing order that the applicant has to actually pay monies into a court bank account which will be held there until trial or earlier order in the main proceedings. This amount could easily be in the region of £50,000 (or much higher dependant on the value and complexity of the claim) and before commencing an application the applicant should consider whether payment of such a sum is possible and the affect it might have.

In addition, if an applicant loses its substantive claim or the freezing order is discharged for any other reason, it needs to be aware that it can be held liable for a substantial claim in damages pursuant to the undertaking it has given (if this exceeds the payment into court) and generally in the substantive proceedings.

All applicants need to be fully advised by their solicitors with regard to a potential liability under the cross undertaking for damages.

## 4 Costs of third parties

Applicants must also be aware that they are responsible for the costs reasonably incurred by third parties, such as banks and other financial institutions, in complying with the terms of the order.

## 5 Full and frank disclosure

With freezing orders the obligations on an applicant in terms of disclosure are very onerous indeed. Generally, freezing order applications are made without notice to the respondent. The whole purpose of them is that there is a perceived risk that unless restrained by the order the respondent will dissipate its assets. As with all applications to the court made without notice, there is a duty on the applicant of giving full and frank disclosure. This is due to the fact that without notice applications are one sided, i.e. the respondent is not present at the initial application.

As such, an applicant is obliged to set out all material matters to the court, either factual or legal, which may have a bearing on whether the court grants the freezing order or not. Such disclosure relates not only to matters which are helpful to an applicant's claim, but importantly any facts or legal issues which are or may be detrimental to an applicant's claim.

For example, the applicant is obliged to inform the court as to whether it believes the respondent has any likely defences to the claim or set-offs which it may apply. Equally if the applicant has a previous conviction for dishonesty, this needs to be revealed to the court.

The point is that failure to provide full and frank disclosure to the court may result in a respondent challenging the freezing order at the return date when all the parties are back in court. Ultimately, a lack of full and frank disclosure by the applicant can lead to the freezing order being discharge and if that happens, the applicant faces a risk of a very substantial costs order being made against it.

## 6 Is a freezing order the most appropriate remedy?

It is always worth the applicant considering whether there are other alternative remedies that could be sought from the court which are less time consuming, costly and potentially risky. Such remedies include for example:

### A. AN ORDER PRESERVING PROPERTIES OR SECURING A SPECIFIC FUND.

These orders are commonly granted in situations where there is a dispute as to a party's entitlement to the property or fund in question. The court will take into account in any such application whether (i) there is a serious issue to be tried; and (ii) the balance of convenience favours making an order. In the circumstances the grounds upon which such orders are granted are slightly different to freezing order as there is no requirement to show a real risk of dissipation, although the balance of convenience will often be swayed by demonstrating that there is in fact such a risk.

If an applicant considers that he can rely on the cooperation of the party currently holding funds, he can simply apply for an order as opposed to an freezing order relating to the funds. This type of application is probably the cheapest and most low key alternative to a freezing order and indeed, the order can be granted by a master (a lower grade of high court judge) or even in the county court.

One downside however, is that such a remedy does not give the applicant the same level of protection as a freezing order, which carries a penal notice and puts the respondent at risk of imprisonment for failure to comply with the order (a risk which makes the freezing order more effective).

### B. APPOINTMENT OF A RECEIVER TO HOLD ASSETS OF THE RESPONDENT

An injured party can seek the appointment of a receiver to hold assets of the wrongdoer. This is done so pursuant to Section 37 of the Senior Courts Act, although a receiver will only be appointed in support of a freezing order where the order is insufficient on its own and where there is a measurable risk that the defendant will act in breach of the order.

A receiver can be appointed over both companies and individuals.

### C. PROPRIETARY ORDERS

An injured party can seek what is known as a proprietary order. This is a type of order which attaches to a specific asset or assets rather than a respondent's assets in general. It will only be granted in circumstances in which the applicant is able to make out an arguable claim that it has some beneficial interest in the asset in question. Whilst often described as freezing orders, they are not in fact freezing orders. The test applied by the court is different to that which is required in freezing order scenarios. There is no requirement in a proprietary order to show that there is a real risk of dissipation of assets. Indeed, where a claim is purely proprietary (i.e. there is no monetary claim) the applicant should always give careful consideration to seek a proprietary order as opposed to a general freezing order as the court is actually likely to refuse an application for the latter.

Furthermore, a proprietary order can be granted by the county court as opposed to only in the high court.

## D. THE APPOINTMENT OF A PROVISIONAL LIQUIDATOR

This is probably the most unusual and dramatic remedy available to an applicant. It is made pursuant to Section 135 of the Insolvency Act 1986 in respect of a company. It is an adjunct to winding up proceedings. An order appointing a provisional liquidator may be made in circumstances in which pending the hearing of the winding up petition there is a significant risk that the respondent's assets will be dissipated and or that it will continue some fraudulent trading activity or that its books and records will be destroyed. It is a very serious application indeed, as the appointment of a provisional liquidator over a company is very likely to have a terminal effect on the company's trading life. A creditor in making an application must show that firstly he is likely to obtain a winding-up order on the hearing of a petition and secondly, in all circumstances it is right that a provisional liquidator be appointed.

A provisional liquidator must also be proposed to the court, which is normally an accountant-qualified insolvency practitioner. This appointment serves only to protect the assets until the company is wound-up and does not always provide security for any assets in the short-term.

It is rare for creditors to seek such appointments, as the benefit of the appointment of a provisional liquidator lies with all creditors (and the applicant's claim will be treated equally against any assets recovered net of the fees of the subsequently appointed liquidator).

## E. EUROPEAN ACCOUNT PRESERVATION ORDER

An applicant may also consider the possibility of a European account preservation order ("EAPO"). This is a new type of regime produced by the European Commission to enable a court in one EU member state to make an order freezing the bank account of a defendant in a different EU member state. The EAPO can only be used to freeze bank accounts and cannot be used against any other assets which the applicant may be aware of. Equally, the rights of an overseas bank to set-off sums against account balances (for example where it operates more than one account in the defendant's name, it may set off an overdrawn account against the account subject to the EAPO).

## F. DELIVERY UP ORDERS

These are orders available under the Civil Procedure Rules 1998 (as amended) PD 25A, which allows the court to require that specified items are provided requiring delivery-up of such assets. A delivery-up order may be made where orders are simultaneously being executed at the defendant's premises (for example freezing orders) and may be ancillary to the main order obtained. The court must include all such ancillary orders as part of a Delivery-Up order for the protection of third parties, including the applicant. Such ancillary orders may relate to the manner of execution, the physical safeguard of assets and strict adherence to the terms of the order. Such an order may also require a cross-undertaking by the applicant.

## G. CHARGING ORDERS

These are orders normally sought against property of the defendant once judgment has been obtained. They are very useful for circumstances where lengthy proceedings have led to obtaining judgment but the defendant refuses to pay the judgment liability (often by reason of an inability to pay the debt). A charging order will normally be relatively straightforward to obtain if judgment has been granted in your favour and no steps have been taken to appeal or revoke the judgment (an appeal must be filed within 21 days). In such the applicant should consider a charging order against

any known property assets as soon as possible. The expediency of dealing with this is vital, as one common tactic often employed is to register a charge against a property to eliminate any equity (and thus make the effectiveness of a charging order pointless).

## 7 What benefits will actually accrue from the freezing order?

Consideration needs to be given to the benefits which will actually accrue as a result of obtaining a freezing order. Often, applicants who are the subject of fraud require their legal advisers to “throw the kitchen sink” at the wrongdoers without thinking of the longer term implications, both in terms of costs and the benefit of taking that course of action. Consideration needs to be given to other types of remedies available to litigants before determining whether to progress down the route of a freezing order (see the previous point).

## 8 Will the freezing order actually stop a person dissipating his assets?

Some respondents may simply act in contravention of the order in any event. Whilst this could lead to their imprisonment, the primary purpose of getting such an order is to preserve assets. It is therefore worth considering whether it is likely the freezing order will have the desired effect in respect of the wrongdoers concerned.

It is often the case the applicant is simply unaware of what assets there are of the defendant and whether the reality is that the defendant may simply carry on and deal with those assets regardless of obtaining a freezing order.

## 9 Policing the order

The applicant must be willing to pursue and enforce the order if necessary with court applications relating to disclosure, cross-examination, the possible appointment of a receiver, delivery-up orders, search orders and/or proceedings for contempt of court.

Whilst these are all remedies available to an applicant, they can incur yet further legal costs and again, this is something which the applicant needs to be advised of carefully at the outset. It is not the case that an applicant can simply sit on a freezing order once granted. Ongoing work needs to be carried out in respect of compliance and enforcement of the freezing order for it to have the maximum effect.

## 10 Applications by the respondent to vary or discharge the freezing order

Applicants need to be aware of the fact that respondents may seek to discharge or vary the freezing order once they have had time to take stock and prepare for the return date hearing. These applications, if fully contested, can become very costly and can in some instances can run for many days.

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