

PRIVATE CLIENTS, SMES,
DIRECTORS & SHAREHOLDERS

Varying the terms of a freezing order

The grounds and procedure



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 order is referred to as the respondent.

Even if there are no grounds to have a freezing order discharged, there may be legitimate reasons to vary the terms of the freezing order. A variation can either be agreed by consent between the parties to the litigation or, alternatively in the event that the applicant's solicitors refuse to agree the variation by consent, a respondent can do so by making an application to court.

1 Grounds to vary the terms of a freezing order

Common grounds for seeking the variation of the terms of a freezing order include the following:

THE ORDER IS OPPRESSIVE AND THE RESPONDENT IS UNABLE TO PAY LIVING, LEGAL OR BUSINESS EXPENSES.

A respondent is always entitled to have sufficient money to pay reasonable living costs and legal or business expenses. It is common for a respondent to seek an increase in the allowance given in the order for either living expenses or legal costs.

Commonly, a sum of £500 a week is provided for in the terms of a freezing order in respect of living expenses. However, the respondent will need to assess whether this amount is appropriate for his/her reasonable living expenses and whether or not an increase should be sought. In order to seek a variation of the living allowances figure, it will be necessary to show what the respondent's normal expenditure is, by reference to bank statements and / or facility / loan documents etc. Of course, there may be a number of reasons why a respondent would not want an applicant having access to such information. However, it is not uncommon for the respondent to have to provide full details of his/her financial position in accordance with the provision of information sections contained within the usual freezing order itself.

Furthermore, if the freezing order does not support a proprietary claim to the frozen assets (i.e. specifically targeting the assets – see our booklet titled "Freezing orders – a practical guide" then the court will normally allow a respondent to use his assets for ordinary living expenses together with reasonable, legal and business expenses.

However, if the applicant claims a proprietary right to the frozen assets (i.e. the applicant claims the rights to a specific asset such as a house purchased with allegedly stolen money), the court is unlikely to vary the terms of the freezing order unless the respondent can show three things:

- 1. There are no other assets available at all;**
- 2. He has a good defence to the claim / or a reasonable prospect of success; or**
- 3. He is entitled to the funds in question.**

It is always sensible to consider all issues relating to an application to vary the term of a freezing order at an early stage. The courts generally do not like it if a respondent returns to court more than once to seek to vary the terms of a freezing order.

2 The maximum sum claimed by the applicant is excessive

In all freezing orders, a respondent's assets are frozen up to a certain specified limit. This limit normally equates to the quantum of the losses which the applicant says it has suffered as a result of the respondent's actions. However, it is open to a respondent to apply to reduce the maximum sum if it can be shown that the applicant has not given a realistic value of the claim, for example by not taking into account any counterclaims that might be available to a respondent.

3 Variation of any ancillary orders

When granting a freezing order, the court will ordinarily consider making any additional orders that the applicant may seek – these are commonly known as ancillary orders. Such orders often relate to, for example, disclosure of documents and / or provision of information about assets, details of which must be provided to the applicant sworn as true and correct in the form of an affidavit. It is often the case that the deadlines in the court order are impossible to meet, due to the volume of documentation to be disclosed, the fact that it may relate to information held in different jurisdictions or, for example, that the documentation is in the possession, custody or control of third parties and may take some time to recover.

In such circumstances, a respondent needs to explain why a particular deadline cannot be met and provide an alternate deadline within a reasonable time. Ideally, if it is open to a respondent to do so, he should provide partial disclosure of documentation whilst making every effort to comply with full disclosure by any agreed extended deadline.

A respondent may also wish to vary the terms of the order on the basis that disclosure of documents or information will not be given on the grounds of privilege against self-incrimination. For more details regarding the privilege against self-incrimination, please see our booklet in this series dealing with this particular aspect.

Other common terms which respondents seek to vary include:

1. **Varying the terms of a passport order;**
2. **Requiring the respondents to deliver up his passport and to not leave jurisdiction;**
3. **The appointment of a receiver which could cause damage to his existing business.**

THE PROCEDURE TO VARY THE TERMS OF A FREEZING ORDER

If a respondent wants to apply to vary a freezing order, this is done by way of the following:

1. **Drafting an application notice.**
2. **Drafting a detailed affidavit setting out specifically the grounds upon which the respondent seeks to rely upon in terms of the proposed variation of the freezing order including the reasons for the proposed amended terms.**

- 3. The application notice will need to be issued at court and a date will be provided to all parties by the court at which the application will be heard. It is important when considering the extent of the variation to consider the time estimate appropriate, as this will ensure that the respondent obtains sufficient time at court to have the variation application heard. Bearing in mind it is likely that the applicant, when served with an application to vary the terms of a freezing order, may itself serve evidence in response and as such, sufficient time must be set aside by the court to hear both of the parties' representations.**
- 4. As part of the application, a respondent will require the services of a barrister/counsel to represent it at the hearing and prior to the hearing. Counsel will prepare what is called a skeleton argument which will need to be filed at court, commonly the day before the hearing. The applicant's solicitors will need to select an appropriate barrister with the appropriate expertise, sufficient experience and who is able to work within the applicant's financial constraints. The solicitors will have to draft a comprehensive brief/instructions bringing the barrister up-to-speed on all background matters and providing copies of all statements made in the proceedings and any other documents which may be relevant to the barrister's role. The barrister is generally referred to as "counsel".**
- 5. A skeleton argument is a document prepared by counsel setting out both the factual and legal aspects of the application and it is provided for the benefit of the judge hearing the application to quickly get him/her up to speed with the documentation which has been served. It is vitally important that the skeleton argument is prepared properly, as a well prepared skeleton argument will be critical to the extent to which a judge is brought fully up to speed prior to the application being heard.**

TIMINGS OF THE APPLICATION TO VARY A FREEZING ORDER

The application is ordinarily made either:

1. Prior to the return date

- i.** The return date is the date which the court will set, following the granting of a Without notice freezing order, at which both parties will re-attend court. This is commonly 7-14 days after the granting of the without notice freezing order. If the respondent has sufficient time to prepare a detailed affidavit seeking to vary the terms of the freezing order between service on it of the original freezing order and the return date, then the return date is the sensible time to have any variation application heard.
- ii.** If however, further time is needed after service of the freezing order, it is possible, by consent, for an extension of the return date to be agreed between parties to enable the respondent to prepare the affidavit evidence required as part of the variation application. This will also enable the parties to list the matter for sufficient time to have that application to vary heard at the return date.

2. After the return date

- i. Alternatively, even after the return date, the respondent can at any time make an application to vary the terms of a freezing order if any of the above grounds arise, for example if the respondent is unable to pay living, legal or business expenses pursuant to the terms of the original freezing order. If this matter cannot be dealt with by consent with the applicant, then the respondent is left with no choice but to make a formal application to court to have the underlying freezing order amended.

Other examples leading to an application to vary may include,

1. **Where a respondent is subject to a freezing order but is unclear as to whether a payment from a business account would for any reason be in breach of the terms of a freezing order. On occasion, clarity is sought from the courts on this particular point to avoid a respondent being in breach of the freezing order accidentally and in potential contempt of court.**
2. **Where the respondents' assets, for example his family home, are subject to the freezing order, but in order to afford or pay his legal representatives the respondent either needs to sell his property and/or give a charge in favour of his legal advisors over the property. A variation to the freezing order would therefore be required so that the respondent does not fall foul of the requirements not to deal with or diminish his assets at court under the terms of the freezing order.**
3. **Where the respondent has been loaned money by a family member to pay legal expenses and the respondent then needs to repay those loans (if substantiated) to the family member pursuant to the terms of the loan agreement from the assets which have been "frozen" by the freezing order. Again, unless this matter can be dealt with by consent, a formal application will need to be made to the court for a variation of the underlying freezing order.**

OTHER CONSIDERATIONS

If a respondent wishes to set-aside a freezing order which has been obtained without notice, the right route is that he must apply to the judge and not, for example, attempt to appeal to the court of appeal without having first been to the court in the first instance.

The application must be made promptly if at all possible.

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