

Freezing Orders and Assets: A 2017 update

Introduction

A freezing order is an interim injunction. Its primary objectives are to prevent a party from disposing of, or dealing with, their assets. The relevant procedural rules are CPR 25 and PD 25A.

Freezing Orders are often applied for by claimants to preserve the defendant's assets from dissipation and to prevent the defendant making himself "judgment proof". They are an extreme measure and have been referred to as a "nuclear" weapon of the law (Candy v. Holyoake [2017] EWCA Civ 92). They are one of the most powerful tools available to the civil courts as any breach of the order could lead to committal proceedings for contempt of court.

Freezing Orders are typically applied for *ex parte* (without notice to the respondent) and, if granted, will usually be made for a specified amount of time following which a return date will be fixed for a full hearing.

There are two types of freezing order:

1. A domestic freezing order (limited to England and Wales); and
2. A worldwide freezing order ("WFO").

The Test

The ultimate question is whether it is 'just and convenient' to grant the injunction. This phrase gives the court a wide discretion and can boil down to whether the benefit to the applicant outweighs the injustice to the defendant.

The case law is well established. In order to be successful, the applicant must show:

1. That the courts of England and Wales have jurisdiction;
2. A cause of action (a legal or equitable right);
3. A good arguable case on the underlying merits¹;
4. The existence of assets within the legal or beneficial ownership of the respondent;
5. A real risk, judged objectively, of the respondent's assets being dissipated; and
6. An ability to provide an undertaking in damages.

¹ NB: Freezing orders can also be sought in support of Arbitral Proceedings in accordance with s44 Arbitration Act 1996.

Domestic Freezing Orders

The source of domestic jurisdiction is s37 of the Senior Courts Act 1981. This type of order is the most appropriate if the defendant clearly has sufficient assets in the jurisdiction to satisfy a judgment. However, freezing orders are not a guarantee that the claimant will recover the full sum.

Worldwide Freezing Orders (“WFOs”)

The source of worldwide jurisdiction is s25 of the Civil Jurisdiction and Judgments Act 1982. As one would expect, WFOs are typically applied for when a defendant has assets outside England and Wales. They apply to foreign assets as opposed to just the assets within England and Wales.

WFOs may also be granted in support of foreign proceedings provided there is sufficient connection with the jurisdiction of England and Wales or some special circumstance to justify the court’s involvement. However, a freezing order may not be used to enforce the penal law of a foreign state or in proceedings against a foreign state.

Freezing Orders and the Insolvency Act 1986

A freezing order does not afford the claimant any priority over other creditors if the defendant becomes insolvent nor does it provide any security over the assets frozen. Rather, it prevents a person or entity from being able to deal with or dispose of the assets in question.

There are other options to support applications for freezing orders, such as appointing a receiver or proprietary injunctions. A more unconventional approach would be to appoint a provisional liquidator under s135 Insolvency Act 1986; which has remained untouched by recent insolvency amendments. However, if an application to appoint a provisional liquidator is successful, the likelihood is that it would have a fatal effect on the company.

Freezing Assets and Criminality

The overlap between purported criminality and freezing orders is often significant.

Alleged or actual dishonest conduct is often used to bolster arguments that there is a risk of dissipation. The risk of dissipation test was recently clarified in relation to notification injunctions and freezing orders in the case of Candy v. Holyoake [2017] EWCA Civ 92. The test is whether there is a “real risk, judged objectively and based on solid evidence, that a future judgment would not be met because of unjustifiable dissipation of assets”. The judgment in Candy highlighted that the mere possibility of defendants using links to complex and offshore corporate structures was insufficient to show risk of dissipation. It also demonstrated that the court should not accept that a notification injunction was necessarily less onerous than a conventional freezing injunction.

Whilst alleged or confirmed criminality may assist with elements of obtaining (and perhaps maintaining) a freezing order, a recent judgment gave guidance on the interaction between suspected criminality under the Proceeds of Crime Act (“POCA”) 2002 and injunctions generally. In The National Crime Agency v. N & RBS [2017] EWCA Civ 253 the Court of Appeal allowed an appeal against several interim orders made by Burton J compelling RBS to execute payment instructions.

N was an authorised payment institution and held a number of bank accounts with RBS. RBS complied with s340 POCA 2002 and froze N’s accounts whilst seeking consent from the NCA to return funds to N.

N commenced proceedings for a mandatory injunction requiring the bank to execute past payment instructions. Burton J ordered RBS to make the specified payments and also made a declaration that RBS would not be committing any criminal offence under POCA or otherwise and it was not obliged to make any disclosure as required by criminal law or any other law. The orders themselves were not overturned on appeal (because the monies had already been irrevocably paid over) but the principle was detailed clearly; when a company is acting under POCA 2002 in relation to suspicious transactions and reports this to the NCA, the third party affected cannot override the freezing of accounts by simply seeking injunctive relief and one cannot justify the grant of an interim declaration save for in exceptional circumstances.

This case will no doubt provide a significant amount of difficulty for financial institutions in the interim period between reporting and the granting of consent where a financial institution has frozen their clients' accounts or cannot conduct normal business, but is unable to inform their client of the reasons why.

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