A Practical Guide to FREEZING ORDERS

A Practical Guide from the 2TG Commercial Fraud Team

MARCH 2023

Introduction

A freezing order is an interlocutory injunction which restrains a respondent from disposing of, or dealing with, his own assets. The purpose of a freezing order is to prevent a defendant from moving, hiding or otherwise unjustifiably dissipating those assets. It is an interim remedy granted to ensure that the court process is effective.

The power to grant a freezing order derives from the equitable powers of the High Court. It is confirmed by s37(1) and s37(3) of the Senior Courts Act 1981 (the "**1981 Act**") and is set out at CPR r.25.1(1)(f). The standard (or example) form of freezing order is annexed to 25A.PD.[1]

To obtain a freezing order, the applicant must establish:

(1) A good arguable case;

(2) The existence of assets belonging to or under the control of the respondent against which judgment could be enforced;

(3) A real risk that the respondent will dissipate those assets and the judgment will be left unsatisfied if the order is not given; and

(4) That the order is just and convenient.

The general scope and limitations of freezing orders

A freezing order does not give an applicant security for his claim, and in particular does not give any proprietary rights against the assets covered by the order. Accordingly, a freezing order will not give priority over other creditors, and does not guarantee that a respondent will recover the value of any judgment eventually awarded. Freezing orders take effect against the respondent personally, rather than attaching to the assets themselves.

A freezing order should therefore be distinguished from a proprietary injunction. A proprietary injunction can also be obtained at an interlocutory stage and is appropriate where the applicant seeks to assert that the assets held by the respondent are in fact the applicant's beneficial property. The Court's approach to such injunctions is different, particularly in relation to the respondent's right to use such monies to pay third parties, legal costs or living expenses (see *Madoff Securities International Ltd v Raven* [2011] EWHC 3102 (Comm) for a summary of the principles relevant to the grant of a proprietary injunction).

A freezing order is granted to facilitate enforcement of a judgment or order for payment of a sum of money by preventing assets against which such a judgment could potentially be enforced from being dealt with in such a way that insufficient assets are available to meet the judgment.

Accordingly, the freezing order will be limited in amount to the approximate value of the applicant's judgment to be potentially enforced, together with an allowance for interest and costs (see further below).

Because the purpose of a freezing order is only to prevent a respondent from evading the Court process by making *unjustifiable* disposals of his assets, it does not prevent a respondent from spending money in ways which he can show are legitimate. In particular, paragraph 11 of the standard freezing order will not prevent a respondent from:

- Spending money on his ordinary living expenses. What constitutes "ordinary" living expenses is usually construed subjectively, by looking at the past standard of living of the particular respondent and allowing a sum that will enable the respondent to maintain their previous standard of living. A figure of £1000 - £1500 per week is the usual range, but the applicant should tailor the figures to what he knows about the respondent's estimated income and lifestyle/ expenditure. Paragraph 11(1) of the standard form freezing order includes additional wording which

1 See Appendix 11 of the Commercial Court Guide (11th ed, 2022) for the standard form used in the Commercial Court.

indicates that it may in appropriate cases be ordered that before spending any such money the respondent must tell the applicant's legal representatives where the money is to come from. See recent consideration of what constitutes "ordinary" living expenses in *Vneshprombank LLC v Bedzhamov and others* [2019] EWCA Civ 1992, [2020] 1 All ER (Comm) 911.

- Dealing with or disposing of assets in the ordinary and proper course of business. This provision is usually only necessary if the respondent is a company or is known to be a sole trader/ self -employed. See *Organic Grape Spirit Ltd v Nueva IQT, SL* [2020] EWCA Civ 999 per Newey LJ at [14] to [24] for a summary of the relevant principles as to what constitutes "the ordinary and proper course of business", and note in particular the separate and cumulative requirements i.e. any disposal must be both in the "ordinary" and also in the "proper" course of business (per Lewinson LJ in *Michael Wilson & Partners Ltd v Emmott* [2015] EWCA Civ 1028). Where it is disputed, or is a matter of doubt, whether a proposed dealing with or disposal of assets is in the ordinary and proper course of business, a variation of the freezing order may be required (see e.g. *Compagnie Noga v ANZ Banking Group* [2006] EHWC 602 (Comm) and *Abbey Forwarding Ltd v Hone* [2010] EWHC 1532 (Ch)). Where the respondent chooses to conduct his affairs through corporate vehicles as opposed to personally his management of those investments may not be considered as being in the ordinary course of business (see *JCS Commercial Bank v Igor Valeryevich Kolomoisky* [2018] EWCA Civ 3040). Where a variation of the order is requested it is then the respondent who bears the burden of persuading the Court, who will consider the same principles it did when granting the freezing order (*Tidewater Marine International Inc v Phoenixtide Offshore Nigeria Ltd* [2015] EWHC 2748 (Comm)). Even where a transaction is outside the ordinary and proper course of business (such as commencing a new business), the Court may on application still sanction it (*JSC BTA Bank v Ablyazov (No 3)* [2010] EWCA Civ 1141, [2011] Bus LR D119) unless the transaction would be improper in that its apparent purpose is to ensure funds are not available to satisfy any judgment, or the business the transaction facilitates has no reasonable prospect of success (*Organic Grape Spirit Ltd* per Newey LJ at [21]).
- Spending money on legal expenses. This includes not only the instant claim but also any other claims brought or defended by the respondent. A freezing order should not prevent bona fide costs being incurred in proceedings which were commenced before the freezing order was granted and that have a reasonable prospect of success (*Halifax v Chandler* [2001] EWCA Civ 1750). However, in *Linsen International ltd v Humpuss Sea Transport Pte Ltd* [2010] EWHC 303 (Comm) it was pointed out that the wording of the standard form freezing order at paragraph 11(1), which allows limited expenditure on legal advice and representation, would potentially permit a series of payments each below the stated maximum. A provision was therefore added that if the money spent by the respondents on legal advice exceeded a particular sum, or thereafter any multiple of that sum, the respondents were required to tell the claimants where the money had come from and the amount expended. Practitioners should note that where the freezing order includes a proprietary injunction, a respondent's lawyers may potentially be liable as constructive trustees for any sums received under the legal expenses exception to the order (*AA v BB* [2021] EWHC 1833 (Ch)).
- Paying other debts as they fall due. If another creditor calls in his debt, ordinarily the Court will allow that debt to be paid (as the freezing order does not provide priority over other creditors). A variation of the order will normally be granted where a bona fide creditor requests payment (see *Halifax v Chandler* (above)).

Sometimes it will be possible to show that the respondent has access to more funds than the value of the freezing order sought. If there is good evidence that the respondent will have other funds, not frozen by the order, from which he can meet his living, business and legal expenses, the Court may grant an order without these exceptions or remove the exceptions via a variation of the order (see *Wang v Darby* [2022] EWHC 835 (Comm) for a recent example).

The position is more difficult where the claimant asserts a proprietary claim to the frozen funds because it is the applicant's case that the money is not in fact the respondent's money at all but is held on trust for the applicant. Where the freezing order restrains the respondent from dealing with assets to which the applicant asserts title, the respondent must establish that there are no other funds or assets available to him from which he can pay his legal expenses. Once that hurdle is cleared, the Court may make an order allowing the respondent to use part of the funds for his legal expenses. This is a discretionary power and in such cases the Court will be careful to weigh any prejudice to the applicant in allowing the defendant to use funds which

may turn out to be the applicant's property against any potential prejudice to the defendant in not being allowed to do so: *Halifax v Chandler* and *Sundt Wrigley Co Ltd v Wigley* (unreported, 23 June 1993). See also *Marino v FM Capital Partners Ltd* [2016] EWCA Civ 1301 and *Kea Investments Ltd v Watson* [2020] EWHC 472 (Ch).

Different considerations may also apply in the case of post-judgment freezing orders. A useful overview of the guiding principles for post-judgment freezing orders was set out by the Court of Appeal in *Emmott v Michael Wilson & Partners* [2019] EWCA Civ 219 at [53] to [57] and more recently in *National Bank Trust v Yurov & Ors* [2021] EWHC 164 (Comm). Where there is an immediately enforceable post-judgment asset freezing order, it may be inappropriate to include an ordinary course of business exception: *Mobile Telesystems Finance SA v Nomihold Securities Inc* [2011] EWCA Civ 1040.

Establishing that the relevant tests are satisfied

(1) Good arguable case

It is necessary to show that the applicant has a good arguable case for being granted a judgment or order for the payment of a sum of money that is or will be enforceable through the process of the Court.

This need not be against the respondent (though it usually is), provided the substantive relief in the form of a judgment will be enforceable against the respondent by the Court from whom the injunction is sought (*Broad Idea v Convoy Collateral* [2021] UKPC 24 at [92]).

This is most often established by reference to a cause of action against a respondent. However, by a bare majority, the Privy Council in *Broad Idea* held (obiter) that it is no longer a pre-requisite to the grant of a freezing order that the applicant has a cause of action against the respondent (*Broad Idea* (above) at [90], departing from *The Siskina* [1979] AC 210 and *The Veracuz I* [1992] 1 Lloyds Rep 353).

Broad Idea has since been approved in *Re G (Court of Protection: Injunction)* [2022] EWCA Civ 1312, in which the Court of Appeal held that *Broad Idea* "now represents the law of England and Wales as to the circumstances in which the Court may grant an injunction" [61]. This paragraph of *Re G* was quoted and thereby endorsed by the Court of Appeal in *Bacci v Green* [2022] EWCA Civ 1393 (per Baker LJ at [16] and Arnold LJ at [52]).

As to what is meant by "good arguable case", an applicant must show a case that is more than barely capable of serious argument but not necessarily one which has a greater than 50% chance of success at trial (see e.g. *The Niedersachsen* [1983] 1 WLR 1412; *Lakatamia Shipping Co Ltd v Morimoto* [2019] EWCA Civ 2203). The applicant does not have to have "much the better" of the argument (*Kazakhstan Kagazy Plc v Arip* [2014] EWCA Civ 381) and the central concept remains that the claim must have "a plausible evidential basis" (*Lakatamia Shipping Co Ltd v Morimoto* [2019] EWCA Civ 2203 and *Blockchain Optimization SA v LFE Market Ltd* [2020] EWHC 2027 (Comm)).

(2) Existence of assets

The applicant must show that the respondent holds assets against which a relevant judgment could be enforced.

For a domestic freezing order, the test to be met by the applicant is whether there are "grounds for belief" of the existence of assets amenable to enforcement in this jurisdiction (*Ras al Khaimah Investment Authority & Ors v Bestfort Developments LLP & Ors* [2018] 1 WLR 1099). If a worldwide freezing order is sought, the applicant must show (a) that there are no assets or insufficient assets within the jurisdiction to satisfy his claim and (b) that there are grounds for belief that there are assets outside the jurisdiction.

In some instances, the applicant will be able to identify with particularity the respondent's assets to be frozen by the freezing order (e.g. nature, location etc). To the extent that such assets are known or suspected to exist, these should be identified even if their value is unknown.

Paragraph 6 of the standard form freezing order annexed to PD23 prevents a respondent from removing or disposing of or dealing with assets, "whether or not they are in his own name and whether or not they are jointly owned", as well as any assets "which he has the power, directly or indirectly, to dispose of or deal with as if they were his own". This will be the case if a third party holds or controls the asset in accordance with the respondent's direct or indirect instructions. If it is known or suspected that assets belonging to the respondent are in the hands of third parties, attempts should be made to define their location and other details as far as possible. See also below in relation to third party freezing orders. Paragraph 7 of the standard form freezing order annexed to the Commercial Court Guide includes an additional, broader wording (to be included on a case-by-case basis and only where circumstances strictly require it) extending the scope of the freezing order to assets "whether the Respondent is interested in them legally, beneficially **or otherwise**" (emphasis added).

The words "dealing with" in the standard form freezing order are to be given a wide meaning and include disposing of, selling or charging the asset.

Whether the right to draw down a loan facility is an asset will depend on the wording of the order and the type of loan. In *JSC BTA Bank v Ablyazov* [2015] UKSC 64 the Supreme Court found that where the order stated (as now appears in the standard form) that assets included those the respondent "had the power directly or indirectly to dispose of, or deal as if they were his own" this covered not only those that the respondent owned legally or beneficially but those over which the respondent had control. In that case the proceeds of the loan facility were to be used at the defendant's sole discretion and it was found that he did have control over them, despite the fact that the lender's permission had to be sought in order to assign or transfer rights and the lender could also cancel the loan facility. In *FM Capital Partners Ltd v Marino* [2018] EWHC 2889 (Comm) the Court highlighted that while *Ablyazov* had not explicitly overturned the earlier Court of Appeal judgment of *Lakatamia Shipping v Su* [2014] Civ 636 there was a clear inconsistency of approach between the two judgments on the definition of what constitutes an asset. The Judge held that to the extent the two are in conflict, the Supreme Court had impliedly overruled the Court of Appeal in *Lakatamia* and its narrower approach to assets.

This may also apply to trusts or companies controlled solely by the respondent. However, it may be difficult for an applicant to show sufficient control over offshore assets companies or trusts prior to disclosure. In these circumstances it may be necessary to apply for a disclosure order to acquire further details of any companies the respondent has an interest in (see below and *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2016] 1 WLR 160).

In each case it is necessary to consider whether the standard wording is sufficient, and if not whether any extension can be justified.

Where there is a dispute as to the ownership of assets, the following principles apply (*SCF Finance Co Ltd v Masri* [1985] 1 WLR 876, CA): (1) if the assets appear to belong to a third party they should not be included in the scope of the freezing order without evidence that they are the respondent's (2) the mere assertion by a respondent that a third party owns the assets need not be accepted without inquiry (the same principle applies to a third party who intervenes to vary a freezing order to exclude assets) (3) the Court must do its best to do what is just and convenient between all concerned (4) in a proper case the Court may direct an issue to be tried either before or after the main action as to the ownership of the assets.

(3) Real risk of dissipation

In summary, an applicant will demonstrate a sufficient "risk of dissipation" if it can show that (1) there is a real risk that a judgment or award will go unsatisfied, in the sense of a real risk that, unless restrained by the injunction, the respondent will dissipate or dispose of his assets other than in the ordinary course of business, or (2) that unless the respondent is restrained, assets are likely to be dealt with in such a way as to make enforcement of any judgment or award more difficult, unless those dealings can be justified for normal and proper business purposes (for a recent overview of the applicable principles see Haddon-Cave LJ in *Lakatamia Shipping Company v Morimoto* [2020] 2 All ER (Comm) 59 taken from the decision of Popplewell J in *Fundo Soberao de Angola v Dos Santos* [2018] EWHC 2199 (Comm); see also Flaux J at [49] of *Congentra AG v Sixteen Thirteen Marine SA ("The Nicholas M")* [2008] EWHC 1615 (Comm); [2008] 2 Lloyd's Rep 602).

The test is whether there is a "real" risk, i.e. "something which is more than fanciful" (*Les Ambassadeurs Club Ltd v Songvo Yu* [2021] EWCA Civ 1310). There is no requirement to show that there is a very high probability of dissipation. Whether there is a real risk is judged objectively. There must be "solid evidence" to support the assertion (*The Niedersachsen* [1983] 2 Lloyds Rep 606). Mere expressions of opinion or assertions of the likelihood of dissipation will not satisfy the Court (see *Rosen v Rosen* [2003] EWHC 309 (QB) Fulford J).

Sometimes an applicant will have specific evidence that a respondent is about to dissipate his assets. However, in practice direct evidence of a risk of dissipation is fairly rare. Usually the risk of dissipation is intrinsically linked to the nature of the claim: fraud. Evidence of dishonesty is normally enough to establish the risk. However, it is not enough to provide evidence of dishonesty in isolation. The Court is obliged to scrutinise whether the dishonesty alleged really justifies the inference that assets are likely to be dissipated (see *Thane Investments Ltd v Tomlinson* [2003] EWCA Civ 1272).

Nevertheless, where allegations of dishonesty are at heart of the applicant's case and/or the cause of action itself is

based on fraud, the Court may find itself able to draw the inference that evidence, which is sufficient to establish a good arguable case against the respondent, is also sufficient to establish a risk of dissipation (see *VTB Capital Plc v Nutritek International Corp* [2012] EWCA Civ 808). That being said, in *Holyoake v Candy* [2017] EWCA 92 the Court of Appeal found that the evidence relating to the substance of the allegations establishing a good arguable case was not sufficiently strong to support the necessary real risk of dissipation.

Other factors the Court will take into account may include:

- Evidence that a respondent has manipulated assets through international accounts, companies and/ or properties (see e.g. *JSC BTA Bank v Ablyazov* [2009] EWHC 2840 (Comm)).
- The respondent moving his assets out of the jurisdiction, even if not to defeat judgment – *Stronghold Ins v Overseas Union* [1996] LRLR 13.
- The nature of the respondent's assets – the more liquid, the greater the risk of dissipation. Equally, if the respondent's assets may be very difficult to dissipate, this may be a factor against granting the order. This consideration is particularly pertinent when a party is seeking a freezing order over cryptoassets. For example, in *Osbourne v Persons Unknown* [2022] EWHC 1021 (Comm) at [20], the Court was satisfied that it was appropriate on the balance of convenience to grant the order sought due to the "very real risk that these [crypto]assets will be transferred through multiple different accounts at great speed, and in a way which will make it practically either very difficult, or possibly even impossible, for the claimant to trace and retrieve her assets."
- The financial standing of the respondent and his/its credit history.
- Lack of ties to the jurisdiction. If the respondent is a company registered aboard, or an English company controlled by an offshore company, about which little is known, it may make it easier to draw an inference of a risk of dissipation (*Third Chandris Shipping v Unimarine* [1979] 1 QB 645 at [669]).
- If moving assets abroad, the ease with which enforcement can take place abroad (this may require foreign law evidence).
- Any statement made by the respondent as to how he will deal with his assets.
- His conduct in relation to the present dispute or a previous dispute – eg evading service, paper defences, failing to answer reasonable questions etc. (*See Global Maritime Investments Cyprus Ltd v Gorgonia Di Navagazione SRL* [2014] EWHC 706 (Comm) and *Griffin Underwriting Ltd v Varouxakis* [2021] EWHC 226 (Comm)).

(4) Just and convenient

The Court will consider all the circumstances in deciding whether it is just and convenient to make the order (*Charles Russell v Rehman* [2010] EWHC 202 (Ch) Roth J).

This is a requirement under s.37 of the 1981 Act. In practice, if an applicant can show a good arguable case and a real risk of dissipation, it will normally follow that the order sought is just and convenient.

Bacci v Green situates the "just and convenient" test in its proper context (see [46] to [51]):

- The Court has jurisdiction to grant an injunction whenever the Court has in personam jurisdiction over the respondent (see Fourie v Le Roux [2007] 1 WLR 320).
- The power of the Court to grant an injunction is (subject to express statutory restrictions) unlimited (Broad Idea itself citing Spry, Equitable Remedies, 9th ed., (2014)).
- Nevertheless, the exercise of the jurisdiction must have a principled basis, but the practice of the Court can and should change to meet modern challenges (Fourie v Le Roux, Cartier v BT [2018] 1 WLR 3259 and Broad Idea).
- Where the Court is exercising its jurisdiction under s.37(1) of the 1981 Act to grant an injunction, the test is justice and convenience.

In *Re G*, the Court of Appeal (approving *Broad Idea*) held that the "just and convenient" test is comprised of two requirements: first, "the person protected by the injunction has an interest that merits protection" [69] and second, that "that there is a legal or equitable principle which justifies exercising the power to order the defendant to do or not do something" [71].

Other factors to consider before applying for a freezing order

(1) The need to give full and frank disclosure

Applications for freezing injunctions will almost always be made without notice to the respondent. This is because giving notice of the application might precipitate the dissipation feared. See for example *Oak Tree Financial*

Services Ltd v Higham [2004] EWHC 2098 (Ch) where Laddie J held that giving notice of the applicant's intention to apply for a freezing order was wholly inappropriate for precisely this reason. However, short notice may sometimes be appropriate, where for example the risk of dissipation in the interim is negligible: see e.g. *Frances v Al Assad* [2007] EWHC 2442 (Ch).

In this context, it is worth noting that the Courts have recently been keen to re-emphasise the requirement to give notice under PD23A generally and that cases where no notice is required are likely to be very rare indeed, i.e. where there is genuinely insufficient time to do so or it would defeat the purpose of the order: see *Practice Guidance (Family Courts: Without Notice Orders)* [2017] 1 W.L.R. 478 issued by the President of the Family Division.

Where the application is made without notice, the applicant will be under a duty to make full and frank disclosure to the Court. This is a very important part of the application, and should be dealt with fully and clearly.

The scope of the duty of full and frank disclosure requires the applicant to show the utmost good faith and disclose his case fully and fairly. This places a high duty on the applicant and includes all significant factual, legal and procedural aspects of the case: *Memory Corporation v Sidhu* [2000] 1 WLR 1443. The applicant must identify the crucial points for and against the application and not rely on general statements and the mere exhibiting of numerous documents. He must investigate all causes of action and identify any defences (for recent consideration of the scope of the duty to investigate a defendant's possible defence see *Tugushev v Orlov* [2019] EWHC 2031 (Comm) at [31]). He must disclose all facts which reasonably could be taken into account by the Court in deciding whether to grant the application and it is no excuse for an applicant to say that he was not aware of the importance of the matters he omitted to state (see e.g. *Siporex Trade SA v Comdel Commodities Ltd* [1986] 1 Lloyd's Rep 428).

The applicant must point out what the respondent is likely to argue in his defence, and any facts or factors which he might be likely to rely upon. The applicant can then go on to counter the potential defence.

If there has not been a full and frank disclosure there is a presumption that the Court will set aside the order – *Brinks MAT v Elcombe* [1988] 1 WLR 1350. The Court will, however, bear in mind the need to act proportionately – *Memory Corporation v Sidhu* [2000] 1 WLR 1443. Guidance on the effect of a material non-disclosure and the relevance of whether the non-disclosure was deliberate was recently considered by the Court of Appeal in *PJSC Commercial Bank v Kolomoisky* [2020] Ch 783 (see in particular [249]).

It is therefore crucial to take full instructions and ask the client if there is anything that he thinks might be damaging to his case. The Court must be presented with all material facts. However, the Court has a discretion to continue or re-new a freezing order, even if there has been an inadvertent material non-disclosure, and in practice it is likely to be difficult to overturn an injunction once obtained if there is a good arguable case and a real risk of dissipation. However, even where the Court refuses to set aside an order, it may still penalise the at-fault party in costs. For example, in *PJSC National Bank and another v Mints and others* [2021] EWHC 692 (Comm), Teare J considered whether to set aside an order for permission to serve out of the jurisdiction where the Claimants had failed to properly comply with their duty of full and frank disclosure. Teare J held that whilst it was not in the interests of justice to set aside the order, the Claimants' "failure to comply with their duty can properly be marked by an appropriate order as to costs" [97]. The Claimants recovered none of their costs and were ordered to pay one quarter of three Defendants' costs.

In relation to the duty of full and frank disclosure, consider in particular factors such as:

- Delay in bringing the application.
- Whether the respondent has previously been investigated and cleared of any wrongdoing, or any other information about the respondent's character or background that would militate against any alleged dishonesty.
- Whether the applicant has behaved reprehensively. In particular, consider whether in investigating its case the applicant has obtained any evidence illegally. This must be disclosed to the Court. Consider also whether the applicant has acted in the past in a way that is inconsistent with his current case.
- Whether innocent third parties are likely to be adversely affected by the order.
- Whether the order is likely to have a particularly oppressive effect on the respondent, or its business.

The general rule is that the fact and content of without prejudice communications do not fall within the scope of the applicant's duty of full and frank disclosure. However,

the duty may require the disclosure of a without prejudice document or some indication of its existence if it is clear that without it the Court might be misled (*Linsen International ltd v Humpuss Sea Transport Pte Ltd* [2010] EWHC 303 (Comm)). Care should therefore be taken to avoid making sweeping statements or allowing certain impressions to be created as this may result in a duty to disclose without prejudice material which could otherwise have been avoided: for example, stating or implying that a respondent has been evasive by not replying to a letter of claim or other correspondence when in fact a without prejudice response has been received.

(2) Cross undertaking in damages

The applicant must provide a cross undertaking in damages: if the freezing order was not justified and the respondent suffers damage the Court may order the applicant to compensate the respondent for his losses. If the freezing order wrongly pushes a respondent company into administrative receivership the applicant will be liable to compensate the respondent up to the value of the company immediately before the freezing order was granted: *Johnson Control Systems Ltd v Techni-Track Europa Ltd (in administrative receivership)* [2003] EWCA Civ 1126.

Giving the cross undertaking will require the applicant to give evidence of financial standing. If the applicant is a company, it is good practice to provide the Court with evidence of the company's net current assets and a copy of its most recent accounts.

The standard form of order provides for security to be provided to fortify the undertaking. If the applicant is a large or well-known company, the Court may regard the fortification as unnecessary. However, it is very likely to be required if the applicant has limited assets, or if it is a foreign entity.

No cross undertaking is required in favour of a respondent from a public body acting in exercise of law enforcement functions: *FSA v Sinaloa Gold plc* [2013] UKSC 11.

In order to enforce a cross-undertaking the claimant should show a *prima facie* case that, but for the order or injunction, the relevant loss would not have been suffered. If the defendant is unable to produce other material to displace that prima facie case then the Court can draw the inference that the damage would not have been sustained but for the order (for an overview of the case law on this issue see *SCF Tankers Ltd (formerly known as Fiona Trust & Holding Corporation) v Privalov* [2017] EWCA Civ 1877 at [42] – [46]).

The usual contractual rules, including as to remoteness, apply by analogy on the assessment of damages under the cross undertaking and the respondent may also recover general damages for distress, damage to reputation and business disruption: *Hone v Abbey Forwarding* [2014] EWCA Civ 711.

(3) Failure at the without notice stage

If the applicant fails at the without notice hearing he must disclose his attempt to the respondent, unless he gets permission from the Court not to do so (for example to allow time for an appeal): see CPR 23.9.

(4) The return date

Winning the without notice hearing should not be treated as a victory: especially given that there is no opposition. The hardest part of a freezing order application is succeeding on the return date.

(5) Is it worth it?

Despite the factors set out above, a freezing order is often the only way of seeking to ensure that assets will remain available to meet a judgment, especially in fraud cases. A freezing order can also have the incidental advantage of placing the respondent on the back foot at the outset and sometimes leads to a swift capitulation or payment into Court. The standard order will also require the respondent to reveal what assets he has, which may be a very helpful factor in assessing the commercial merits of pursuing the litigation and the level at which the applicant may be prepared to settle.

(6) Service

Consider in advance how you are going to serve the respondent. If his whereabouts are not clear, you may need to consider retaining investigators, or obtaining an order for alternative service. An application for an order for alternative service must be backed by evidence. Service upon legal representatives is not good service unless permitted by an order for alternative service pursuant to CPR 6.15 or 6.27 (*MBR Acres Ltd & Ors v Maher & Ors* [2022] EWHC 1123 (QB)).

If you want to be able to commit the respondent for contempt for breach of a mandatory provision (such as provision of information), personal service is necessary unless the Court dispenses with personal service: CPR 81.4(2)(c) (for an example of the Court dispensing with the requirement for personal service, see *Business Mortgage Finance 4 Plc v Hussain* [2022] EWHC 449 (Ch). Do not forget

permission for service out of the jurisdiction, if required.

Third parties (such as banks) are affected by the order from the time that they have notice of the order – formal service as such is not necessary, although the standard undertakings provide that a third party should be provided with a copy of the order. It is worth ensuring that you have the relevant contact and email details in place so that you can notify banks as soon as the order is granted.

Getting ready for the application

(1) Preparing for the application and assembling the team

Applications for freezing injunctions are often made at short notice, with limited time to prepare. Accordingly it is important to plan properly to ensure that you can deal with the evidence and documents as efficiently as possible:

- Get as much of the relevant documentation from the client as possible at an early stage.
- Ensure that you have someone from the client from whom you can take instructions quickly and easily.
- Aim to centralise things, preferably near to the Court.
- Identify a specialist advocate. If counsel, instruct straightaway.
- Have a timetable. Decide when you are going over to Court. This depends upon the urgency of the case. However, it is possible, and sometimes necessary, to start at 9 am and have an order by 5 pm. On other occasions, where there is no immediate urgency and the facts complex, the preparation for the application may take much longer.
- Liaise with the Court. Let them know when to expect you.

(2) Making the application

An application for a freezing order is made by filing an application notice in accordance with the provisions of CPR Part 23 as modified by the provisions of Practice Direction 25A (Interim Injunctions). See in particular paragraphs 2 to 4.

As noted above, generally an application for a freezing order is made without notice to the respondent and if necessary before a claim form has been issued. In such circumstances, the applicant must either undertake to issue the claim form immediately or the Court will give directions for the commencement of the claim. Where possible the claim form should be served with the freezing order.

(3) The documents

You will need a draft affidavit, a draft order (x2), a draft claim form (if there is no existing claim), an application notice (with fee) and a draft application notice for the return date. The advocate should also draft a skeleton argument, unless there is genuinely insufficient time to do so.

The affidavit

In urgent cases, the Court will accept an affidavit in draft accompanied by an undertaking to swear. Take advantage of this because, in such cases, the contents may need to be changed right up until the last minute. Even when there are "technical failings" to comply with the relevant Civil Procedure Rules on affidavits the Court will look at the substance of what the witness has to say and take any deficiencies into account in assessing the weight the evidence should be given (*JSC Mezhdunarodniy Promyshlemniy Bank v Pugachev* [2014] EWHC 4336 (Ch)).

The affidavit should always cover the following areas:

- The cause of action against the respondent, or (where there is no cause of action) the basis for saying that the judgment could be enforced against the respondent. The evidence must establish a good arguable case. The person who swears it should preferably either be the applicant or, if the applicant is a company, the applicant's employee who knows most about what happened. Although it is not uncommon for evidence on urgent applications to be provided by the applicant's solicitor for practical reasons, on an application where affidavit evidence is necessary (e.g. on an application for the grant, continuation or discharge of a freezing order) and the facts are contentious and evidence is to be given on matters that are within the personal knowledge of a party to the proceedings, the correct practice is for the affidavit to be sworn by the party personally and not by their solicitor: *Bracken Partners Ltd v Gutteridge*, 17 December 2001 (unreported). The Court may take into account the unexplained reluctance of a party to swear an affidavit (ibid). Hearsay can be included but ensure that the source is stated.
- Details of the respondent's assets insofar as they are known. If you have the information, include details of bank accounts, property, valuable vehicles and any other major assets.
- Evidence of the risk of dissipation of assets. Usually this

is inextricably linked with the cause of action: fraud. If that is the case, the affidavit should say in terms that the dishonesty of the respondent leads the deponent to believe that he will dissipate his assets if not restrained and provide the facts which support this belief. Unsupported statements or expressions of fear have no weight unless the grounds for such belief are set out: see *Third Chandris v Unimarine* [1979] 1 QB 645 at 685.

- Potential defences. The evidence should set out the respondent's likely defences (you can then rebut them).
- Full and frank disclosure. See above for specific factors to consider. Do not attempt to comply with this obligation by only including relevant documents in the exhibit. You must draw material documents to the judge's attention, either by pointing them out during the course of the hearing or in the body of the affidavit, or preferably both. If the document is not specifically referred to it will be treated as not having been disclosed: *Siporex Trade SA v. Comdel Commodities* [1986] 2 Lloyd's Rep 428, 437.
- The affidavit must state why there is a need to apply without notice. It usually goes without saying that notice of an application for a freezing order is likely to precipitate dissipation, but nevertheless the Practice Direction insists that you say it: 25APD paragraph 3.4.
- The cross undertaking as to damages. Check a corporate applicant's accounts and cross-check against latest management accounts if possible. To avoid giving an undertaking to provide security, there must be evidence of the applicant's financial standing to demonstrate that the risk of the cross-undertaking being unsatisfied is very low. It is also possible to argue that the judgment debt (if there is one) is sufficient security or that the claim is so strong it amounts to security. Although the Court retains a discretion not to order a cross-undertaking in damages, it is only likely not to do so in extraordinary circumstances other than in Crown proceedings: *RBG (Resources) Ltd v Rastogi* [2002] BIPR 1028.
- The amount to be frozen. Set out (briefly) the applicant's case on quantum. The freezing order should be set at a level to cover the likely sum that the applicant would recover at trial including interest and costs (*Charles Church v Cronin* [1990] 1 FSR 1). The Court will seek to ensure that the freezing order is framed to result in the minimum necessary interference with the respondent and will carefully scrutinize the sum to be frozen - *Flightwise Travel Services Ltd v Gill* [2003] EWHC 3082 (Ch). Note that if the cause of action involves a breach of trust then interest should be claimed and calculated on a compound basis.

The Order

Start with the most up to date standard (or example) form. It is available in soft format on the Ministry of Justice website.

You may well want to modify the standard form, but you should use it as the starting point. Any change to standard form must be drawn to the Judge's attention and justified. It is good practice, if there is time, to provide the judge with a marked up version of the draft order showing any such changes.

Some specific tips on completing the order are:

- Do not forget to include the name of the respondent in the penal notice.
- Be careful to ensure that the penal notice correctly reflects the type of respondent: a company cannot be imprisoned and the penal notice should not list this as a penalty against a corporate entity.
- Set as short a time as reasonable for the return date. Bear in mind the need to serve and the fact that the respondent will need some time to obtain advice. It is normally in the applicant's interests to maintain the element of urgency. Normally the return date will be in 1 week, or the following Friday in the Commercial Court.
- Name any known assets in the order. If appropriate ask for specific disclosure regarding particular assets and/or liabilities.
- Make sure that you select the correct Court details for the division that you are applying in.
- Make sure that you and your clients are aware of the standard undertakings in the order. Consider whether they need to be amended: if so this should be drawn to the Judge's attention.

The Claim Form

Draft particulars of claim are not normally necessary. However, brief details of claim in the claim form are.

The Application Notice

Try to get this issued prior to the hearing (if not, give an undertaking to issue). It simply needs to say:

"Applicant applies for an Order:

'Please see attached'

Because:

'Please see the [draft] affidavit of […]'"

Draft Application for Return Date

"Applicant applies for an Order:

'That the freezing injunction granted on […] be continued until further order.'

Because:

'Please see [draft] affidavit of […]'"

Pay the fee for the application before the hearing – except in cases of extreme urgency where this is not possible.

Third Party Orders

Prior to the Privy Council's decision in *Broad Idea,* it had been established that the Court has jurisdiction to join a third party as a second defendant and to grant a freezing order against it in support of the applicant's claim against the original respondent, even if there is no substantive cause of action against the third party: *TSB Private Bank International SA v Chabra* [1992] 1 WLR 231 (the "***Chabra* jurisdiction**"). This was done where there was good reason to suppose that the third party's assets were in truth the assets of the respondent and/or the assets would ultimately be available to meet any judgment against the respondent (for example where the assets were held by the third party on a bare trust or as a nominee of the respondent). The ultimate test was always whether there is good reason to suppose that the assets would be amenable to execution of a judgment obtained against the respondent. (See eg *Linsen International Ltd v Humpuss Sea Transport Pte Ltd* [2011] EWCA Civ 1042; *Parbulk II AS v PT Humpuss Intermoda Transportasi TBK (The Mahakan)* [2012] 2 All ER (Comm) 513, *PJSC Vseukrainskyi Aktsionernyi Bank v Maksimov* [2013] EWHC 422 (Comm) and *Phoenix Group Foundation v Gail Alison Cochrane* [2017] EWHC 418 (Comm).)

In light of the decision of the majority of the Privy Council in *Broad Idea,* the *Chabra* jurisdiction is perhaps no longer to be considered a separate jurisdiction; rather, it is an example of the Court exercising the same jurisdiction to restrain a respondent from disposing of, or dealing with, his own assets or assets that he holds or controls and against which a judgment can potentially be enforced.

Given the new approach in *Broad Idea*, which has now been approved as part of English law in both *Re G* and *Bacci v Green*, the nature and scope of the *Chabra* jurisdiction is likely to be the subject of further litigation.

Other Advanced Orders

It will often be appropriate to make significant changes to the standard order, especially if you are dealing with a high value or complex case. In each case you will need to consider whether you can justify the additional relief. Even if the order can be justified you should consider whether the order sought needs to be made ex parte or whether it can wait until the return date.

The following options should be considered:

- Asset disclosure. The standard form provides that the respondent must give details of his assets, but it is broadly worded. Consider if there are specific details that you want the respondent to disclose. Consider clarifying that the respondent should give details of all bank accounts, whatever their balance (i.e. even if overdrawn).
- Disclosure orders. The respondent may also have documents relating to his assets, in particular bank statements, which will reveal where his assets are and their value. You may want to seek rolling disclosure of bank statements so that you can monitor the respondent's activities. You may also wish to seek further details of any beneficial interests or other financial resources already disclosed to assess if the respondent has effective control over those assets. It was following a disclosure order (*JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2016] 1 WLR 160) exposing beneficial interests in five New Zealand trusts that Birss J found that those trusts were "shams" ([2017] EWHC 2426 (Ch)). Note, however, that any disclosure order will be limited to that which is necessary for the purposes of policing the freezing order (per Butcher J in *PJSC Commercial Bank Privatbank v Kolomoisky* [2018] EWHC 482 (Ch)).
- An asset preservation order. If there is a proprietary claim, it may be appropriate specifically to preserve property or funds which are the traceable proceeds of the claimant's property. The order should provide that the respondent is not entitled to pay for expenses out of such funds: there is, in general, no reason why a respondent should be permitted to use money belonging to the claimant to pay for his legal costs and other expenses (*Polly Peck v Nadir* [1992] 2 Lloyds Rep 238). However, if the evidence indicates that the asset to be preserved is a bank account which is the respondent's only source of funds, the order should normally allow the respondent

to pay for expenses from the account at least until the inter partes hearing. If a respondent wishes to draw on funds over which the applicant asserts a proprietary claim to pay for legal expenses or to honour pre-existing contractual obligations, four questions fall to be asked: (1) does the applicant have an arguable proprietary claim to the money? (2) if yes, does the respondent have arguable grounds for denying that claim? (3) if yes, has the respondent demonstrated that, without release of the funds in issue, it cannot effectively defend the proceedings? (4) if yes, where does the balance of justice lie? (see *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2009] EWHC 161 (Ch) cited with approval in *Marino v FM Capital Partners Ltd* [2016] EWCA Civ 1301 at [23]).

- An order for further information. The Court will often permit questions designed to reveal the whereabouts of assets. This will be particularly important where the applicant wishes to carry out a tracing exercise - CPR 25.1(1)(g). The Court sometimes allows more wide ranging questions at the ex parte stage pursuant to CPR 18 where the information can be said to be necessary. The questions can be framed as interrogatories to be included as part of the freezing order.
- An order for delivery up of passport. This is an extreme measure. This may be appropriate where there is a real risk that the respondent is about to leave the jurisdiction in order to frustrate subsequent enforcement orders of the Court – eg a failure to answer questions as to the whereabouts of his assets. See *Bayer AG v Winter* [1986] 1 WLR 497 and more recently *Palmer v Tsai* [2017] EWHC 1860 (Ch). Such an order will normally be limited in time, usually up until the respondent has given full asset disclosure.
- An order for attendance for cross-examination as to assets. This needs to be justified by special circumstances. Normally this would only arise after the respondent has provided an affidavit of assets and the applicant is unhappy with the answers.
- *Norwich Pharmacal* and *Bankers Trust* orders. Orders requiring the respondent or third parties to give disclosure of information which will lead to identification of assets or other wrongdoers if they have facilitated the wrongdoing (whether innocently or not). These orders are most commonly made against banks through which misappropriated funds are believed to have passed. In exceptional circumstances, the Court can order disclosure of a third party's bank accounts. See *Bankers Trust v Shapira* [1980] 1 WLR 1274 and note that *Norwich Pharmacal* Orders now must be started by way of a Part 8 claim (see *Towergate Underwriting Group Limited v Albaco Insurance Brokers Limited* [2015] EWHC 2874 (Ch)). Bankers Trust orders can be also used as a pre-freezing injunction remedy to locate, for example, the proceeds of a fraud and/or bribes paid to the respondent so as to ensure that the freezing order is effective.
- Gagging orders. Orders restraining those served from informing third parties of the proceedings or of the fact that an order has been made. They are often used to give the applicant time to locate and freeze assets before other potential respondents are tipped off and move their assets. They are particularly useful in multi-party fraud cases.
- The appointment of a receiver. The Court has jurisdiction to appoint a receiver in support of a freezing injunction under s.37(1) of the 1981 Act. However, the appointment of a receiver is a very intrusive remedy which is expensive and not easily reversible, although these concerns may be ameliorated to a certain degree by a fortified cross-undertaking in damages. The appointment of a receiver will be inappropriate in the usual freezing order case where the respondent's assets are constituted by money in bank accounts or immovable property. A receivership order will only usually be appropriate where a freezing order is insufficient on its own and there is a measurable risk that if it is not granted the respondent will act in breach of the freezing order or otherwise seek to ensure that his assets will not be available to satisfy any judgment which may in due course be given against him: *JSC BTA Bank v A* [2010] EWCA Civ 1141.

The Hearing

The hearing may last for several hours or just a few minutes. The length of the hearing will often depend upon whether the judge has had the opportunity to read the papers in advance. It is good practice to send down some papers in advance for the judge to read, including the draft order, if at all possible. In any case, always start the hearing by ensuring that it is clear what the judge has and has not read. If he/she has not had the chance to go through the evidence make sure that all the key points are dealt with (especially in relation to full and frank disclosure). Make sure there is someone at the hearing to take a full note of what is said.

An applicant is under a duty to provide the respondent with a full note of the without notice hearing whether or not the respondent asks for it: *Thane Investments v Tomlinson* [2003] EWCA Civ 1272.

A warning, beware the judge:

- Be prepared politely to decline suggestions from the judge on the without notice hearing if they appear to be oppressive to the respondent. If the applicant accepts such suggestions, he will not be able to blame the judge later: *Bank of Scotland v A Ltd* [2001] 1 WLR 751.
- Do not be rushed. Make sure that the judge allows you an opportunity to make full disclosure.

Return Date

At the return date the Court will consider whether the freezing order should be renewed on notice. It is technically for the applicant to show that the grounds for granting the original without notice freezing order are made out rather than for the respondent to show that it should be discharged even if there is an application before the Court to discharge the freezing order (*Charles Russell LLP v Rehman* [2010] EWHC 202 (Ch)). In practice, however, this is unlikely to make much difference.

At the return date hearing it is good practice for the applicant to draw the attention of the Court and the respondent to the respects (if any) in which the draft order prepared by the applicant differs from the original order made without notice (*JSB BTA Bank v Ablyasov* [2009] EWHC 3267 (Comm)).

Resisting a freezing order

If your client is the respondent to a freezing order, you will wish to consider whether the applicant has complied with his obligations in obtaining the order and whether the evidence justifies the continuation of the order – see above. In particular, consider whether the applicant has complied with his obligation of full and frank disclosure. A respondent is entitled to be provided with a complete set of papers that the applicant and the judge relied on at the without notice hearing, including the judgment, any bundles of documents and a full note of the hearing: *Flightwise Travel Service Ltd v Gill* [2003] EWHC 3082 (Ch). This should be requested in advance of the return date if not already provided.

Remember, however, that until a freezing order is set aside the respondent must comply with its terms. It is therefore important that you ensure that your client complies with all the terms of the freezing order (including any disclosure orders). If there are likely to be any difficulties in complying with the order (for example in relation to any time limits) you should obtain the applicant's consent to a variation of the order or, if necessary, apply to Court for a variation of the order.

If there are good grounds to set aside the order and/or to challenge the continuation of the order, you will need to consider whether to make an urgent application to set aside the order or to await the return date. Normally, unless there is extreme prejudice in the order remaining pending the return date, and clear evidence that the order should not have been made, such early applications to discharge are adjourned so as to allow the applicant time to consider the evidence served by the respondent.

If the order is to continue, you should consider whether there are any variations in the order that you should seek. Is the sum frozen too high? Is the weekly allowance sufficient and/or would it be better paid monthly so that large bills such as mortgages can be paid? Is a variation necessary so as to allow the respondent to trade effectively?

If a Court is likely to continue the order you may wish to consider consenting to the continuation of the order or alternatively offering undertakings instead of the order being continued. The cross undertaking in damages should, however, remain. Alternatively, you may wish to offer other security.

If the respondent is not in a position to challenge or apply to discharge or vary the freezing order at the return date (for example because there has been insufficient time since service of all relevant documents) and consents to a continuation of the freezing order or offers undertakings instead, but wishes to reserve an unfettered right to apply to vary or discharge the order subsequently, care should be taken to expressly reserve such a right otherwise a later application to set aside or vary the order may be deemed an abuse of process in the absence of a material change of circumstances: *Chanel v Woolworth* [1981] 1 WLR 485.

Where there is an international element

(1) Jurisdiction

The United Kingdom left the European Union on 31 January 2020 and entered the Implementation Period. The Implementation Period ended at 11pm on 31 December 2020.

Neither the Recast Brussels Regulation nor the Lugano Convention applies after the end of the Implementation Period. Accordingly, jurisdiction is now determined by common law and statute.

The Court acts *in personam* against a third party and the intended subject of the freezing order must accordingly be amenable to the Court's jurisdiction (*Stitching Shell Pesionenfonds v Krys* [2015] AC 616). For the Court to have jurisdiction to hear the claim, one of three conditions must apply:

1. The party must be present within the jurisdiction;
2. The party must have voluntarily submitted to the Court's jurisdiction; or
3. The party must be able to be served with proceedings out of the jurisdiction.

It is this final criterion that poses the most difficulties. There is an important distinction between proceedings where permission is *not* required to serve proceedings out of the jurisdiction, and those where it is.

Permission Not Required

CPR 6.32 and 6.33 set out the situations in which permission to serve out *is not* required. The full extent of these provisions is outside of the scope of this Guide. However, of particular note are the provisions that permission is not required where (1) an exclusive choice of court agreement confers jurisdiction on the Court pursuant to Article 3 of the 2005 Hague Convention (CPR 6.33(2B)(a)); or (2) where there is an express jurisdiction clause in the contract (CPR 6.33(2B)(b)).

Permission Required

CPR 6.36 sets out the situations in which permission to serve out *is* required. The Court must be satisfied that there is a good arguable case that the claim falls within one of the gateways set out under PD6B.3.1. Further, the Court must be satisfied that the Claimant has reasonable prospects of success (CPR 6.37) and that England is the proper place to bring the claim (CPR 6.37(3)).

Whilst a summary of each of the above-mentioned gateways is outside of the scope of this Guide, it should be noted that minor amendments were made to PD6B.3.1. on 1 October 2022. For present purposes, the most important amendment was to paragraph 3.1(25): this provision gives the Court greater powers to assist parties in obtaining information from non-parties where assets are outside of the jurisdiction.

(2) Governing Law

At the end of the Implementation Period, the Rome I Regulation (EU 593/2008) (which determines the law governing contractual obligations) and the Rome II Regulation (EU 864/2007) (which determines the law governing non-contractual obligations) were domesticated into UK law by the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (UK Exit) Regulations 2019 (SI 2019/834). Accordingly, Rome I and Rome II continue to apply to determine the question of governing law as a matter of English law.

(3) Section 25 of Civil Jurisdiction and Judgments Act 1982

Section 25 of Civil Jurisdiction and Judgments Act 1982 allows an English Court to grant interim relief in aid of proceedings elsewhere. It is not necessary for foreign proceedings to have been commenced as long as they will be commenced. The applicant will normally be required to give an undertaking to begin proceedings within a certain time – CPR 25.2(3).

The applicant still needs to show a good arguable case (on the basis of the applicable law) and a real risk of dissipation. The Court will then consider, per s.25(2), whether it is "inexpedient" having regard to all the circumstances to grant the relief sought - *Motorola Credit Corporation v Uzan* [2004] 1 WLR 113 (CA).

The foreign claim must be such that the relief sought in England could be identified as interim relief in relation to the final order sought abroad in the proceedings relied on (*Fourie v Le Roux* [2005] EWCA Civ 204; [2007] UKHL 1).

S.25(7)(b) excludes any interim relief which provides for the production of evidence. This is because the rules provide for other mechanisms to provide evidence from overseas. This does not, however, exclude an order requiring the respondent to provide details of his assets as this is merely incidental to the freezing order.

As set out above, permission to serve out, if necessary, should be sought pursuant to CPR 6.36 – any such application must be supported by evidence.

You can also use s.25 post-judgment if it is intended to enforce the foreign judgment here. However, it will be necessary to register the judgment. Once a judgment has

been registered it will be treated as if it were an English judgment.

The Court has power to grant a worldwide freezing order, as well as one restricted to England and Wales, under s.25 but the Court will consider:

- Where the respondent is domiciled. If the respondent is not resident in the jurisdiction there is less likely to be effective enforcement of the order and accordingly less reason to make a worldwide order;
- The reaction of the primary Court to any worldwide order made by the court;
- Why the primary Court did not grant worldwide relief. If the primary Court had power to grant a worldwide injunction but declined to do so this will be a factor against the English Court granting such relief.

See *Banco Nacional De Comercio Exterior SNC v Empresa De Telecommunicaciones De Cuba SA* [2007] EWCA Civ 662; *Mobil v Petroleos de Venezuela* [2008] 1 Lloyd's Rep 684; *United States of America v Abacha and others* [2014] EWCA 1291 .

It would rarely if ever be appropriate or expedient for the English Court to assume jurisdiction under s.25 where the relevant defendant had no connection with the jurisdiction and the relevant assets were not located in England: *Belletti v Morici* [2009] EWHC 2316 (Comm).

However, in *Royal Bank of Scotland Plc v FAL Oil Co Ltd* [2012] EWHC 3268 (Comm) worldwide freezing and disclosure orders were made against a defendant in the UAE, notwithstanding the absence of assets in England and Wales, where it was reasonable to infer the existence of assets in other jurisdictions, where there was evidence of other links to England, and where the identification and location of assets would assist the enforcement of any judgments of the UAE Courts.

(4) Practicalities in cases with a foreign element

In a complex multi-jurisdictional claim it may be necessary/desirable to coordinate the applications for freezing orders (or similar relief). Certain overseas jurisdictions operate very slowly. In practice, English orders tend to be the quickest to obtain. Consider:

- Obtaining permission to delay service of the freezing order (and attendant documents) pending applications overseas;
- If the order needs to be served on a third party to prevent dissipation before the applications have been considered overseas, applying for a gagging order as against the third party.

It is important not simply to accept evidence from a foreign lawyer. The evidence provided by the foreign lawyer should be tested. This is important both to ensure that proper full disclosure is made to the Court and to evaluate the strength of the application/underlying case.

Frequently, the applicant will wish to use any information obtained in this jurisdiction in another jurisdiction. If so, it will be necessary to inform the Court and for the standard undertaking to be varied. Normally this should be done at an inter partes hearing unless this would defeat the object of obtaining the order.

In addition, under the standard undertaking, the permission of the Court is required before taking steps abroad to enforce an English freezing order or obtaining similar relief. The Court of Appeal has given guidance as to the principles to be applied in such cases – *Dadourian v Simms* [2006] EWCA Civ 399.

Beware that proceedings overseas may be mixed criminal/civil. This may impact on:

- The level of control over the overseas proceedings;
- The use of the information obtained by the foreign Court;
- The likelihood of the English Court allowing information obtained pursuant to the freezing order to be used in the overseas proceedings or permitting the applicant to seek similar (freezing) relief overseas. The Court is less likely to grant permission to use information obtained through the English Court for the purposes of foreign criminal proceedings.

As a respondent, be careful not to submit to the jurisdiction unintentionally. Reserve your position. Note the time for disputing jurisdiction under CPR 11 and the special rules for the Commercial Court.

Remember the limitations of a worldwide freezing order

A worldwide freezing order (**WFO**) will not affect anyone outside the jurisdiction other than the respondent (or his officer or agent). However, a person who is given written notice of the order in this jurisdiction and is able to prevent acts or omissions outside the jurisdiction which amounts to a breach of the order will be subject to the jurisdiction of the Court. The standard form worldwide freezing order

includes, at paragraph 19, the *Babanaft* proviso, making this clear.

In practical terms, practitioners should note:

- There is nothing improper in notifying third parties, outside the jurisdiction, of a WFO which has been granted against a defendant; such notifications may be made pursuant to the legitimate aim in making a WFO effective, provided the effect of the order (i.e. the extent to which it binds a third party) is not misrepresented (per Jacobs J in *YS GM Marfin II LLC & Ors v Lakhani & Ors* [2020] EWHC 2629 (Comm)).
- However, a freezing order may be of little assistance if a respondent has no material assets in the jurisdiction and no intention of returning to the jurisdiction.

About the Authors

Charles
Dougherty KC
cdougherty@2tg.co.uk

Charles is a leading commercial silk who specialises in commercial fraud, insurance & reinsurance, professional negligence and private international law. He has vast experience of dealing with high-value fraud claims, in particular claims with a multi-jurisdictional element, and of obtaining (or resisting) freezing and search orders and other interim relief. He is particularly sought out for his experience in dealing with bribery and corruption claims.

He has long been recommended as one of the leading commercial fraud silks in Legal 500 and Chambers UK. He is also recommended as a leading silk for commercial litigation, property damage, product liability, group litigation, professional negligence, travel and insurance & reinsurance.

Charles is an assistant editor of European Civil Practice (Sweet & Maxwell, 2nd ed). He has been called to the Bar of the British Virgin Islands and ad hoc to the Bar of Nevis. He accepts appointments to sit as an arbitrator. He is a director of the Bar Mutual Indemnity Fund Limited.

"Absolutely brilliant."; "A powerful and incredibly bright advocate."; "Probably the most client-friendly KC I have come across."; "A formidable opponent; he is a brilliant advocate and very good on the hard law."; "Technically brilliant, personable and easy to work with."; "Excellent. He is incredibly bright, very quick on his feet and always able to think several steps ahead."; "He is strategic, commercial, and good on his feet."; "Highly intelligent with great experience. He is pragmatic, commercial, and very user-friendly." Chambers UK 2023

William
Clerk
wclerk@2tg.co.uk

Will specialises in commercial law, insurance law, and civil fraud. He is described in the directories as having "a meticulous eye for detail" (Legal 500 2023) which is "second to none" (Chambers UK 2023), and as being "an outstanding junior" (Legal 500 2023). He has particular experience and is regularly instructed in applications for urgent injunctive relief including: freezing orders (domestic and worldwide); search and imaging orders; doorstep delivery up orders; prohibitory and springboard injunctions; and Norwich Pharmacal orders.

Lauren
Hitchman
lhitchman@2tg.co.uk

Lauren acts as both sole and junior counsel in a range of commercial, insurance, and professional negligence disputes. She has particular experience in cases involving allegations of fraud and misuse of confidential information. She is currently instructed as junior counsel in a High Court dispute concerning, amongst other things, breach of confidence by former employees. She has experience of injunctive work and was recently instructed in relation to a springboard injunction.