A PRACTICAL GUIDE TO:
Freezing Orders from the 2TG Commercial Fraud Team

INTRODUCTION

A freezing order is an interlocutory injunction which restrains a respondent from disposing of, or dealing with, its 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 r25.1(1)(f).

To obtain a freezing order, the applicant must establish:

1. A serious issue to be tried (formerly referred to as 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;
4. That the granting of the order is just and convenient.

Two new model orders were introduced in April 2025, one suitable for a straightforward freezing injunction and one designed for cases where a proprietary claim is asserted. The new model orders are available online from HMCTS via justice.gov.uk. Use of the model orders is mandatory (CPR r.25.14(1)) and any deviation from the model order must be drawn to the Court's attention (CPR r.25.14(2)).

Charles Dougherty KC
cdougherty@2tg.co.uk

William Clerk
wclerk@2tg.co.uk

Alistair Mackenzie
amackenzie@2tg.co.uk

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), [2012] IL Pr 15 at [127] 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 9 of the model 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 - £2000 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. See consideration of what constitutes "ordinary" living expenses in *Vneshprombank LLC v Bedzhamov and others* [2019] EWCA Civ 1992, [2020] 1 All ER (Comm) 911. Paragraph 9(1) of the model freezing order includes additional wording which 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, though as the guidance indicates this should only be included "where really necessary".

- Dealing with or disposing of assets in the ordinary and proper course of business (the "Angel Bell" proviso). See *Organic Grape Spirit Ltd v Nueva IQT, SL* [2020] EWCA Civ 999, [2020] 2 CLC 176 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). As the editors of the White Book note (Vol 2, para 15-71), "[w]here 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 (e.g. *Abbey Forwarding Limited v Hone* [2010] EWHC 1532 (Ch)". See *Compagnie Noga v ANZ Banking Group* [2006] EWHC 602 (Comm) per Christoper Clarke J at [9] for an exposition of a number of principles relating to the variation of a freezing order – the "essential test" is whether it is in the interest of justice to make the variation sought (per Trower J in *JSC Commercial Privatbank v Kolomoisky* [2024] EWHC 3394 (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 (*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. The standard form exception at paragraph 9(1) of the model order operates to ensure that the respondent can meet the expenses of the underlying proceedings and not as a means of conducting litigation generally (per Foxton J in *CRO v REC* [2023] EWHC 189 (Comm); [2023] 2 All ER 789 doubting the analysis of Neuberger J in *Cantor Index Ltd v Lister* [2002] CP Rep 25). Nevertheless, 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 but the model order should be varied where appropriate to permit such expenditure (*Halifax v. Chandler* [2001] EWCA Civ 1750). The model order permits either a stated sum to be permitted or "a reasonable sum". The standard wording under the model order does not require the respondent to identify the amount to be spent or where it is to come from *(CRO v* REC [2023] EWHC 189 (Comm) and the notes to the model order state these requirements should "only be included where really necessary". 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, it is for the respondent to 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, *Kea Investments Ltd v Watson* [2020] EWHC 472 (Ch) and *Skatteforvaltningen v Solo Capital Partners LLP* [2020] EWHC 2161 (Comm).

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, [2019] 4 WLR 53 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) Serious Issue to be tried (good arguable case)

It is necessary for an applicant to show a serious issue to be tried (formerly referred to as 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 (*Dos Santos v Unitel SA* [2025] 2 WLR 255).

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, 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 Veracruz I* [1992] 1 Lloyds Rep 353).

Broad Idea has since been approved as representing English law by the Court of Appeal (Re *G (Court of Protection: Injunction)* [2022] EWCA Civ 1312; *Bacci v Green* [2022] EWCA Civ 1393) and the Supreme Court (*Wolverhampton City Council v London Gypsies and Travellers* [2024] AC 983).

In *Dos Santos v Unitel* (above) the Court of Appeal confirmed that there is no distinction between the "serious issue to be tried" merits test and the "good arguable case" merits test, though the nomenclature of "serious issue to be tried" should be used. The merits test for a freezing order is thus no different in substance from the merits test for other interim injunctions (*American Cyanamid*).

(2) Existence of assets

The applicant must show that the respondent holds assets (or is liable to take steps other than in the ordinary course of business which will reduce the value of 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 (*Derby & Co Ltd v Weldon (No1)* [1990] Ch 48 and *Gable Insurance AG v Dewsall* [2025] EWCA Civ 884) 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 7 of the model order prevents a respondent from removing or disposing of or dealing with or diminishing the value of assets, "whether or not they are in the name of the Respondent [and] whether they are solely or jointly owned [and whether the Respondent is interested in them legally, beneficially, or otherwise]", including any asset "which the Respondent has the power, directly or indirectly, to dispose of or deal with as if it were the Respondent's 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.

The additional words in square brackets within Paragraph 7 of the model order "[and whether the Respondent is interested in them legally, beneficially, **or otherwise**]" (emphasis added) extend the scope of the freezing order and are to be included on a case-by-case basis and only where circumstances require it.

The words "dealing with" in the model 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 model order) 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 an overview of the applicable principles see Haddon-Cave LJ in *Lakatamia Shipping Company v Morimoto* [2019] EWCA Civ 2203, [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 the summary of Cockerill J in *Petroceltic Resources Ltd & Ors v David Fraser Archer* [2018] EWHC 671 (Comm) and of 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).

It is for the applicant to provide the Court with evidence of the risk of dissipation, and it is important not to reverse the burden of proof (*Holyoake v Candy* [2017] EWCA Civ 92, [2018] Ch 296 per Gloster LJ at [50]-[51]).

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 serious issue/ 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* (above) the Court of Appeal found that the evidence relating to the substance of the allegations establishing a good arguable case (or serious issue using current nomenclature) was not sufficiently strong to support the necessary real risk of dissipation. The wrongdoing alleged by the applicant must be relevant to the risk of dissipation (per Haddon-Cave LJ in *Lakatamia v Morimoto* (above) at [51] restated by the Court of Appeal in *Mex Group Worldwide Ltd v Ford* [2024] EWCA Civ 959, [2025] 1 WLR 975).

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 abroad, 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.
- The respondent's conduct in relation to the present dispute or a previous dispute – eg evading service, paper defences, failing to answer reasonable questions, failure to comply with disclosure orders etc. (*See Global Maritime Investments Cyprus Ltd v Gorgonia Di Navagazione SRL* [2014] EWHC 706 (Comm); *Griffin Underwriting Ltd v Varouxakis* [2021] EWHC 226 (Comm); *Commercial Bank of Dubai PSC v Al Sari* [2024] EWHC 3304 (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 serious issue 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*).
- 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). Even the giving of full notice may not be fatal – see *Dos Santos v Unitel* (above) where the application was made on some 14 months' notice to Ms dos Santos. At first instance ([2023] EWHC 3231 (Comm) Bright J stated at [85]: *"I would never regard [giving notice] as, by itself, a signal that there is something wrong with the application, although it is no doubt salutary for the applicant to explain matters".*

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 consideration of the scope of the duty to investigate a defendant's possible defence see *Tugushev v Orlov* [2019] EWHC 2031 (Comm) at [7] per Carr J (as she then was)). 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.

Whilst in all but exceptional cases the resolution of disputed allegations will be a matter for trial and not interlocutory applications (particularly where they overlap with allegations in the substantive claim) (*Derby & Co Ltd v Weldon (No1)* [1990] Ch 48 and *Mold Investments Ltd v Holloway* [2025] EWCA Civ 986), the fact that allegations are disputed must itself be disclosed where it is material (*Astor Asset Management 3 Ltd v Salinas Pilego* [2025] EWCA Civ 1060 at [21-22]).

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 *Derma Med Ltd v Ally* [2024] EWCA Civ 175 and *Mex Group Worldwide v Ford* [2024] EWCA Civ 959.

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 renew a freezing order, even if there has been an inadvertent material non-disclosure, and in practice it may be difficult to overturn an injunction once obtained if there is a serious issue 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 or a third party suffers damage the Court may order the applicant to compensate the respondent for its 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.

Fortification of the cross-undertaking is an option under the model freezing order. If the applicant is a large or well-known company, the Court may regard the fortification as unnecessary. However, it is likely to be required if the applicant has limited assets, or if it is a foreign entity. Whilst fortification is an issue which will usually be taken by a respondent at the return date, an applicant at the without notice stage should still address whether fortification is necessary to protect against loss caused in the period before the return date (*Astor Asset Management 3 Ltd v Salinas Pilego* [2025] EWCA Civ 1060 at [21-22]).

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 (usually, the respondent to the injunction) should show a *prima facie* case that, but for the order or injunction, the relevant loss would not have been suffered. If the defendant (the applicant for the injunction) 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 claimant 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.

The model order encourages applicants to consider whether certain orders, such as those requiring a respondent to give notice of assets being dealt with in the ordinary and proper course of business, are better sought on the return date rather than at the without notice stage.

(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 model 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 r.6.15 or r.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 general provisions of CPR Part 23 as modified by the provisions of CPR r.25.6-8..

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 confirm in the form of a sworn statement all the evidence on which was relied. 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 serious issue to be tried (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 may be thought to go without saying that notice of an application for a freezing order is likely to precipitate dissipation, but nevertheless an applicant must explain in evidence why notice was not given (CPR r.25.3(3)).

- The cross undertaking in 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 may, in an appropriate case, be claimed and calculated on a compound basis.

The Order

Start with the most up to date model freezing order. It is available in soft format on the Ministry of Justice website.

You may well want to modify the model order, but you should use it as the starting point. Any change to the model order 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.

Note the (new) mandatory requirement on the front-sheet of the model order: *"This model order includes footnotes, which are provided for guidance, and do not form part of the model order itself. Two copies of the draft order proposed by the applicant must be submitted at or before the hearing in Word, one with the footnotes included for the assistance of the court and one without the footnotes for sealing and service."*

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").

Whether, following *Broad Idea*, the *Chabra* jurisdiction is to be regarded as a separate jurisdiction or as a particular set of circumstances in which the Court will exercise its power to grant relief in the form of a freezing order is a question of theory rather than substance. In decisions since *Broad Idea*, the Courts have continued to apply the same principles as previously in considering whether a freezing order should be granted against what is referred to as either a third party or a "non-cause of action defendant" (see eg *Commrs for HMRC v Ducas Ltd* [2024] EWHC 3132 (Ch), *Commercial Bank of Dubai v Al Sari* [2024] EWHC 3304 (Comm)).

Where an order is sought against such a party, the applicant is required to provide an evidential basis that there is good reason to suppose that assets held in the name of the non-cause of action defendant would be amenable to some process enforceable by the courts by which they would become available to satisfy a judgment against a defendant against whom the applicant asserts a cause of action (see eg *Lakatamia Shipping v Su* [2014] EWCA Civ 636, 2015 1 WLR 291, *Commrs for HMRC v Ducas*). That process may be eg on the basis that the non-cause of action defendant is a mere nominee or bare trustee, or by operation of s.423 of the Insolvency Act 1986 (*Lemos v Lemos* [2017] 1 P&CR 12).

If an injunction is to be sought on a *Chabra* basis, the precise order sought should be drawn with care and with regard to the fact that the respondent is not the substantive defendant. In particular, the particular sum or property to be frozen should be justified by reference to the property of the cause of action defendant which the respondent is said to hold.

Other Advanced Orders

It will often be appropriate to make significant changes to the model 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 amendments to the model order sought need to be made ex parte or whether they can wait until the return date.

The following options should be considered:

- Asset disclosure. The model order 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)). However, 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)). See *HMRC v Malde* [2020] EWHC 100 (Ch) per Zacaroli J at [26]-[32] for a useful summary of the authorities setting out the jurisdiction to make orders for further disclosure or the provision of information in support of a freezing order.

- 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. This is provided for in paragraphs 6(2) and 7 of the model freezing and proprietary order. 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). Note that the Court has specific power under CPR r.25.1(1)(g) to require a party to provide information about property or assets which do not currently fall within the scope of a freezing order but which "may" in future. 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, the Court of Appeal's summary of the jurisdiction in *Lakatamia Shipping v Su* [2021] EWCA Civ 1187 and a recent summary of the relevant principles in *Garofalo v Crisp & Ors* [2023] EWHC 2625 (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)). See *Cancrie Investments Ltd SARL v Haider* [2024] EWHC 3087 (Comm) for a recent example. *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 Ablyazov* [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)).

If a respondent wishes to apply for fortification of the cross undertaking (if not already given), it should do so at the return date – the Court has no power to order one subsequently (*Commodity Ocean Transport Corp v Basford Unicorn Industries Ltd (The Mito)* [1987] 2 Lloyd's Rep 197). The criteria for ordering fortification are summarised in *Energy Venture Partners Ltd v Malabu Oil and Gas Ltd* [2015] 1 WLR 2309 (CA) and *Claimants Listed in Schedule 1 v Spence* [2022] EWCA Civ 500.

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

Freezing orders, as with many other applications, can take on additional complexity in cross-border cases. In addition to the matters referred to above, applicants must consider the further issues below, and ensure that a fair presentation is made to the Court.

1. Jurisdiction

Following the United Kingdom's departure from the European Union, the Court's jurisdiction is now determined by common law and statute.

The Court acts *in personam* in granting injunctions and the intended subject of the freezing order must accordingly be amenable to the Court's jurisdiction (*Stichting Shell Pensionenfonds 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 path to jurisdiction 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

Where a respondent can be served with proceedings in the jurisdiction (eg by being present or by nominating solicitors through whom service can be effected) then there is no need to serve proceedings out of the jurisdiction or to obtain any permission to serve. However, in most instances where a respondent has no presence in the jurisdiction, permission will be required.

CPR 6.32 and 6.33 set out the situations in which, as exceptions to that general rule, 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 rules applicable in 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 (in this context, a "good arguable case" has a different meaning to that used in the context of the test for the grant of a freezing order, *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80). 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, expanding the circumstances in which claims can be served out of the jurisdiction. 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 Brexit 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 questions of governing law as a matter of English law. Separate rules will apply to determine the law applicable to certain trusts.

If a foreign law is, or may be, applicable under those provisions, then this is a matter which will need to be drawn to the Court's attention for the purposes of demonstrating that the serious issue to be tried criterion is satisfied.

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(4).

The applicant still needs to show a serious issue to be tried (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 (No 2)* [2004] 1 WLR 113 (CA). Particular factors which the Court will have in mind in considering whether granting the order would be inexpedient include whether to do so would interfere with management of the case in the primary court, whether it is the policy of the primary jurisdiction not to make such orders and whether in a case where jurisdiction is resisted and disobedience expected, the Court will be making an order which it cannot enforce.

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).

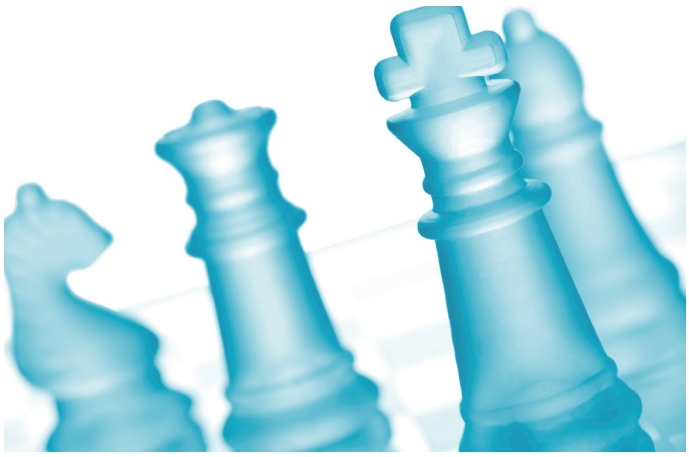
Section 25(7)(b) excludes any interim relief which provides for the production of evidence. This is because the rules provide for other mechanisms to provide evidence from overseas. This does not, however, exclude an order requiring the respondent to provide details of his assets as this is merely incidental 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; and *Mex Group Worldwide v Ford* [2024] EWCA Civ 959.

The Court will not (save in very exceptional cases) make an order under s.25 where there is no substantial connection with the jurisdiction by virtue of either some assets being located in the jurisdiction or being resident or domiciled here (*Mex Group Worldwide v Ford*).

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. Similarly, the Court of Appeal in *Mex Group* noted that in *Republic of Haiti v Duvalier* [1990] 1 QB 202 there had been a sufficient

connection to grant relief on the basis that on the exceptional circumstances of that case information about location of the assets was available in England and Wales.

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) with lawyers working in other countries. 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 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 model worldwide freezing order includes, at paragraph 20, 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.

2TG Publications

We have a number of other publications in our **Practical Guide series** which may also be of interest:

- **A Practical Guide to Anti Suit Injunctions** by Charles Dougherty KC and Alistair Mackenzie
- **A Practical Guide to Norwich Pharmacal Orders** by Timothy Killen and William Clerk
- **A Practical Guide to the Civil Law of Bribery** by Charles Dougherty KC and David Thomas

Please contact **Deborah Francis** at dfrancis@2tg.co.uk for copies of these.

ABOUT THE AUTHORS

Charles Dougherty KC

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.

"Absolutely fantastic and one of a kind at the Commercial Bar. He is very clever but also very commercial at the same time. His advocacy is absolutely brilliant."; "A real superstar."; "The go-to person for multi-jurisdictional challenges."; "One of the brains of the Bar, [he] quickly gets on top of complex cases and is ten steps ahead of everyone else."

Chambers UK Bar 2025

William Clerk

Will is an experienced commercial, insurance and civil fraud barrister with particular expertise in obtaining or resisting domestic and worldwide freezing orders, search and imaging orders, Norwich Pharmacal and Bankers Trust orders. Much of Will's commercial and insurance work includes issues of commercial fraud, in particular claims concerning breaches of fiduciary duties, economic torts (inducement of breach of contract and conspiracy), and claims in deceit. Will is recommended in the legal directories for his work in the areas of civil fraud, commercial dispute resolution, insurance and sports law.

"He is a smooth and charming advocate with a compelling demeanour in court." "William's work product is outstanding and always cuts through the noise to address the key issues at play."

Chambers UK Bar 2025

Alistair Mackenzie

Alistair is an experienced commercial practitioner, with particular expertise in multi-jurisdictional disputes. He has significant experience across a wide range of civil fraud claims both as sole counsel and part of a larger team, and is recommended as a leading junior in Legal 500 and Chambers UK in a number of different practice areas. Alistair has practised in the Dubai International Financial Centre, and is regularly instructed in arbitrations in London and abroad. Alistair is recommended in the legal directories for his work in the areas of commercial dispute resolution, international claims and jurisdiction, group litigation and product liability.

"Very smart, highly experienced and provides great advocacy"; "Incredibly diligent, hard-working and always gets the work done to a high standard"; "He is meticulous and really hot on the law but also a really good cross examiner"; "His knowledge of foreign jurisdiction law is outstanding"

Chambers UK Bar 2025

CONTACT DETAILS

Address
2TG, 2 Temple Gardens, London, EC4Y 9AY

Telephone
+44 (0)20 7822 1200

Email
clerks@2tg.co.uk

www.2tg.co.uk