



## THINKING OF APPLYING FOR A FREEZING INJUNCTION OR HAVE JUST RECEIVED ONE?

RECENT DEVELOPMENTS IN ENGLISH FREEZING INJUNCTIONS ARE WORTH HAVING IN MIND.

**Freezing injunctions are an important litigation tool used to ensure potential assets are not disposed of and remain available to satisfy a future judgment.**

Recent English court judgments have provided interesting developments in three areas:

1. Widening the scope of those able to bring an application for a freezing injunction;
2. Setting out the importance of oral submissions when applying for a freezing injunction; and
3. Confirming when a director's legal expenses will fall within the "ordinary and proper course of business".

This article will review each of these in turn and give a practical conclusion on what parties now need to have in mind when seeking or defending a freezing injunction.

# “These recent developments help provide further guidance for parties seeking freezing injunctions.”

## 1. Who can apply for a freezing injunction?

**In what appears to be the first judgment of its kind, the English High Court has allowed a dissolved company to apply for a freezing order.**

The High Court has considered the approach to be taken when faced with a dissolved company applying for the continuation of a freezing injunction against its accountant, whose alleged fraudulent activity led to the company being struck off the Companies Register. The court came up with a pragmatic solution in order to give a just result. In this case, there was a pending application by the director and shareholder to restore the company under section 1029 of the Companies Act 2006 and by the dissolved company to continue the freezing injunction previously ordered.

The court relied on section 37 of the Senior Courts Act 1981 to order the injunction within the application to restore the company. Mr Justice Zacaroli approved the freezing injunction, adding the director and shareholder as applicants to avoid any retrospective issues of the freezing injunction being in place when the company had ceased

to exist (*Yuzu Hair and Beauty Ltd (Dissolved) v Selvathiraviam* [2019] EWHC 772 (Ch))<sup>1</sup>.

The judgment shows the pragmatic approach the court will take in order to assist parties where time is of the essence and demonstrates that, even though a company is dissolved this will not necessarily be a bar to applying for a freezing injunction.

## 2. The importance of oral submissions

**The court has highlighted the importance of oral submissions at without notice hearings.**

Allegations against the defendant for a breach of fiduciary duty and unlawful means conspiracy were raised at a without notice application for a freezing injunction. The judge had read the written submissions and the written evidence on the risk of dissipation, but no oral submissions were made on this point to give a fair presentation of the facts. The lack of specific oral submissions was found to be “not good enough” and the court later found that they should have formed a fundamental part of the defendant’s fair representation.

The court warned that, although a defendant may be able to dissipate his assets (a family home and a pension fund in this case), this did not

show that there was a real risk of dissipation.

The invasive nature of an injunction requires the clear identification to the court of any contrary arguments on the risk of dissipation as part of the applicant’s duty of full and frank disclosure. In this case, the judge indicated that he had “not taken on board the details” at the without notice hearing but clarified that, by addressing the issue, the applicant would have been seen to have been fair and even-handed in its delivery of the facts. The High Court found however that there had not in fact been a fair presentation (*Vestey Foods UK Ltd v Cox and others* [2018] EWHC 3466 (Ch))<sup>2</sup>.

This judgment should act as a warning to any party seeking to rely upon their written submissions alone; it is essential to make oral submissions to draw the court’s attention to all salient details, especially where reading time is limited.

## 3. What falls within the expenditure exclusion?

**The court have held that a director’s legal expenses fall within the “ordinary and proper course of business” undertaking required for a freezing injunction.**

<sup>1</sup> <https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Ch/2019/772.html>

<sup>2</sup> *Vestey Foods UK Ltd v Cox and others* [2018] EWHC 3466 (Ch)



When a defendant's funds are frozen, they can still pay expenses that fall within the "ordinary and proper course of business", thereby allowing the business to continue despite the freezing injunction. The Court of Appeal has recently found that, where a director is a vital asset to a company, paying his legal expenses in resisting extradition can be within the "ordinary and proper course of business" for that company. In this case, the court found that the director's daily activities played a vital part in the running of the company and therefore the legal expenses incurred in resisting his extradition were for the company's benefit (*Koza Ltd and another v Akcil and others* [2019] EWCA Civ 891)<sup>3</sup>.

The expenditure exclusion is very fact specific, but the Court of Appeal stated that the expenditure does not have to be commercial to fall within the ordinary and proper course of business. It also noted that there is no specific rule in relation to alternative sources of funding being available.

This judgment is particularly interesting for directors and corporations, as it acknowledges the crucial role they have in the day-to-day running of a business and confirms that their direct expenses may be considered to be part of the company's expenses.

### Summary

These recent developments help provide further guidance for parties seeking freezing injunctions. Without notice applications are often brought with limited information and time, but as *Vestey Foods* shows, oral submissions are always required, even if it is just so that the judge can have a recap of the written evidence. We welcome the court's pragmatic approach in *Yuzu Hair*, following which parties can be reassured by the court's flexibility in enabling a dissolved company to apply for a freezing injunction.

For further information on Freezing Injunctions, please see our Client Guide at this link: <http://www.hfw.com/downloads/001226-HFW-Client-Guide-Freezing-Injunctions.pdf><sup>4</sup>

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<sup>3</sup> <https://www.baillii.org/cgi-bin/format.cgi?doc=ew/cases/EWCA/Civ/2019/891.html>

<sup>4</sup> <http://www.hfw.com/downloads/001226-HFW-Client-Guide-Freezing-Injunctions.pdf>

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