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COMMODITY FREEZER PACK

A guide to freezing injunctions

By HFW in collaboration with 7KBW



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INTRODUCTION

It was in 1975 in *Mareva Compania Naviera SA v International Bulkcarriers SA* where HFW acted for the successful applicant in securing an injunction restraining the respondents from removing or disposing of any moneys out of the jurisdiction¹.

The "Mareva injunction" or freezing order as it is now commonly known in England, has since developed and become an important tool available to those who wish to prevent a party from disposing of or dealing with its assets, usually until a judgment can be obtained or enforced.

This Pack looks at English freezing orders in more detail, initially looking at the basic principles in securing such an order as an applicant and responding to an order as a respondent. We then go on to look at the potential implications of breaching the terms of the order, which usually result in severe consequences.

After looking at some of the basic principles involved, we examine how a freezing order can be utilised in relation to fraudulent activity, after which we consider using freezing orders to freeze third party assets, by reference to the latest authorities².

We then touch upon alternative asset preservation and disclosure orders as well as considering how freezing orders can be utilised against "persons unknown", especially in the context of a cyber-attack.

Finally, we provide a spotlight on some key jurisdictions, looking at the routes available to "freeze" assets in those jurisdictions, in order to give you some useful insights.

¹ HFW were at the vanguard of the development of both the domestic English freezing order (*The Mareva* [1980] 1 All ER 213) and the worldwide freezing order (*Babanaft International Co SA v Bassatne* [1990] Ch 13).

² Please also refer to our *Enforcement Pack*, 2nd edition (September 2018) which looks in more detail at how injunctions can be used to aid enforcement of judgments and awards.

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01

REQUIREMENTS



PROCEDURE AND KEY COMPONENTS

It is an important starting point to note that freezing orders have been described as a "*nuclear weapon*" of the law³ and so they should not be seen as the "go to" tool in all cases where there are sums due. In addition, there are a number of hurdles that need to be satisfied, which may make securing a freezing order difficult.

Nonetheless, they remain a vital tool available via the English courts.

What needs to be satisfied to secure a freezing order?

There are a number of criteria which need to be satisfied in order to secure an English freezing order, as below:

- **Just and convenient:** Section 37(1) of the Senior Courts Act 1981 provides that the English High Court may grant an injunction where "*it appears to the court to be just and convenient to do so*", with an application being refused if the potential injustice to the respondent would surpass the potential benefit to the applicant; it is a balance.
- **Cause of action:** The applicant must have an accrued, current – not future – cause of action (e.g. a debt owing) against the respondent, albeit it is not necessary for proceedings to have been issued at the time of the application.
- **English courts to have jurisdiction:** The English courts should have jurisdiction in relation to the substantive claim (i.e. pursuant to the dispute resolution clause in the contract) or have some statutory power to grant the order. We consider the court's statutory power in relation to arbitral proceedings below. For worldwide freezing orders, where the court may not have jurisdiction in relation to the substantive claim, the court retains a statutory power to grant the worldwide freezing order pursuant to section 25 of the Civil Jurisdiction and Judgments Act 1982.
- **"Good arguable case":** Linked to the requirements of being just and convenient and the applicant having a good cause of action, the applicant must also have a "good arguable case" on the merits of the substantive claim. It does not mean that the applicant needs to establish that "*it is bound to succeed*"⁴ with its substantive claim against the respondent, however it must be more than merely arguable: it has to be a *good* arguable case.
- **Existence of assets:** Perhaps the most obvious requirement, the applicant must show that there are assets to freeze. The applicant does not however need to identify what the respondent owns with exact precision; to the contrary, the freezing order will require the respondent to disclose its assets, and we consider the same later on in this Pack. The potential assets can include cash, bank accounts, shares, land and even insurance premiums or claims. The freezing order will usually also cover assets acquired whilst the order is in place. Note however, a freezing order does not give the claimant any proprietary or security interest over the assets.

³ *Bank Mellat v Nikpour* (1985) FSR 87

⁴ *The Niedersachsen* [1983] 1 WLR 1412

- **Risk of dissipation:** The applicant must provide solid evidence to show that there is a real risk of unjustified dissipation, in order to freeze the identified assets, and that, if the order is not granted, the judgment (or award) may go unsatisfied or enforcement may become more difficult. Some factors in proving the risk of dissipation may include (i) the ease at which assets can be dissipated, (ii) the respondent's credit record, (iii) engagement with the proceedings/claims, (iv) previous defaults and/or (v) a failure to file accounts. However, the fact that the respondent may have structured its business using complex or offshore structures will not necessarily be sufficient to prove a risk of dissipation. Nor is a freezing order intended to stop a respondent using its assets in the normal course of business.
- **Undertaking:** The applicant will also be required to provide an undertaking to pay damages, on the basis that it may transpire that the freezing order should not have been granted and that the respondent has suffered damages as a result of the order. The value of the undertaking and whether or not sums need to be paid into the court as security will be decided on a case-by-case basis. This is an important consideration for applicants as the potentially "nuclear" effect of such orders can cause significant damage to the respondent's business.

General procedure

Applications for freezing orders can be made before, during or after commencing proceedings in relation to the substantive claim, however there will be strategic considerations involved in relation to when it would be most effective to do so and whether an applicant will have satisfied the above requirements by the time of the application.

The procedure for an application is stated in the Civil Procedure Rules (CPR) 23 and 25 and usually made *without notice* to the respondent. It is without notice, or *ex parte*, to avoid the respondent disposing of the assets before the freezing order comes into existence.

Note that when making applications without notice there is a duty on the applicant of "full and frank disclosure" whereby the applicant must disclose all material matters to the court – whether for or against granting the application – in order to assist the court in deciding whether to grant the order or not. If it turns out there was a failure by the applicant to do so, the court retains discretion to set aside or vary the order at the return hearing and/or to impose costs penalties on the applicant.

An applicant is required to prepare and file the following, as well as paying the relevant court fee:

- a. claim form,
- b. application notice,
- c. evidence providing that the above requirements have been satisfied, to be provided in the form of an affidavit, and
- d. draft freezing order stating the relief sought.

Thereafter there will be a without notice hearing involving just the applicant after which an *interim* freezing order will be finalised and sealed by the court. The interim freezing order and all the documents referenced in the application (including the hearing bundle and a full note of the hearing), must then be served on the respondent as well as any third parties who may hold assets belonging to the respondent.

Service is an important aspect of the process and usually the applicant will apply for alternative service (e.g. by email and courier) in order to speed up the often slow process of service to parties located in foreign jurisdictions.

Thereafter a return hearing will be fixed at which the respondent is invited to participate, and where the decision is taken to continue, vary or discharge the interim freezing order. If the court is not convinced by the respondent's arguments to discharge the interim freezing order, the court will order a *continued* freezing order.

How are third parties affected?

Although the freezing order will be made against the respondent, third parties served with the order are also bound, to the extent that they must not take any steps that may breach the terms of the order or indeed assist the respondent in potentially breaching the order.

Key components of a freezing order

Although each freezing order will be unique and at the court's discretion, there are a number of key consistent components. We consider some of the components of a worldwide freezing order below⁵:

- a. **Penal Notice:** An important part of a freezing order, and part of the reason why they are referred to as a "nuclear option" is because of the penal notice which states that the respondent or any third party could be imprisoned, fined or have their assets seized if they breach or assist in the breach of the order:

"If you [Respondent] disobey this order you may be held to be in contempt of court and may be imprisoned, fined or have your assets seized.

Any other person who knows of this order and does anything which helps or permits the Respondent to breach the terms of this order may also be held to be in contempt of court and may be imprisoned, fined or have their assets seized."

- b. **The "Freeze":** This is the bite of the order and is self-explanatory – the figure to be inserted will depend on the specific circumstances of the case:

*"Until the return date or further order of the court, the Respondent must not –
(1) remove from England and Wales any of his assets which are in England and Wales up to the value of US\$[XX]; or
(2) in any way dispose of, deal with or diminish the value of any of his assets whether they are in or outside England and Wales up to the same value."*

⁵ Worldwide freezing orders are broader in scope than a domestic order as they apply worldwide, however both orders contain similar components.

- c. **Provision of Information:** This requires the respondent to revert within a very short period of service, with information on and the location of its assets exceeding a certain value. This is often the aspect that is ignored by a respondent which can result in the repercussions stated in the penal notice and explored further in this Pack:

"... the Respondent must within 24 hours of service of this order and to the best of its ability inform the Applicant's solicitors of all its asset worldwide exceeding US\$[XX] in value whether in its own name or not and whether solely or jointly owned, giving the value, location and details of all such assets.."

"Within 48 hours after being served with this order, the Respondent must swear and serve on the Applicant's solicitors an affidavit setting out the above information."

- d. **Exceptions:** There will usually be exceptions allowing the respondent to spend sums on legal representation and for disposal of assets in the normal course of business:

"This order does not prohibit the Respondent from spending a reasonable sum on legal advice and representation. But before spending any money the Respondent must tell the Applicant's legal representatives where the money is to come from..."

"This order does not prohibit the Respondent from dealing with or disposing of any of his assets in the ordinary and proper course of business."

There is an "ordinary and proper course of business" exception (sometimes called the *Angel Bell*⁶ exception, named after the case which produced the rule), because freezing orders are there to prevent assets being disposed for the purpose of avoiding enforcement, and not to give priority to the applicant. If the respondent cannot pay any of its debtors before paying the applicant, the applicant would be effectively jumping the queue and becoming a secured creditor.

Freezing freezers

It should also be briefly noted that there have been cases where overlapping freezing orders have been granted to different claimants, however there is yet to be detailed analysis on the applicable principles. Generally, a "double freeze" may be justified where one claim is much larger than the other.

⁶ *Iraqi Ministry of Defence v Arcepey Shipping Co SA (The Angel Bell)* [1981] QB 65. Note also the recent case of *Michael Wilson & Partners Ltd v John Forster Emmott* [2019] EWCA Civ 219 where the Court of Appeal confirmed that it will sometimes and perhaps usually be inappropriate to include the *Angel Bell* exception in a post-judgment freezing order, but that each case should turn on its own facts.

Freezing orders and arbitration

Can a freezing order be secure in relation to arbitral proceedings?

The simple answer is yes – section 44(1) of the Arbitration Act 1996 (the "AA") provides that the court has the same power to make orders for matters listed in section 44(2) of the AA as it does in relation to regular court proceedings, while section 2(3) of the AA extends the court's jurisdiction to arbitrations outside England and Wales (unless that circumstance is considered to make it inappropriate for the court to act).

Section 44(2)(e) empowers the court to grant interim injunctions in support of arbitrations and section 44(3) allows the court in urgent cases to make orders preserving assets. Further, section 44(2)(c)(i) provides:

"Those matters are... making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings... for the inspection, photographing, preservation, custody or detention of the property."

Therefore, unless the parties have agreed otherwise, freezing orders may be obtained in aid of both English and foreign arbitrations and both before and after an award is made (although different criteria apply in each situation).

Freezing orders can also be helpful tools in assisting with enforcement of secured arbitral awards, and we look at a recent HFW case in relation to the same further in this Pack.

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RESPONSE AND BREACHES

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RESPONDING TO A FREEZING ORDER

Immediate steps: as the respondent

Following service of the interim freezing order, a respondent should carefully review the terms to understand the obligations stated within the order and especially the provision of information obligations. As mentioned earlier, the timelines in complying with the provision of information obligations are usually extremely tight and so a prompt review is often required. If more time is required to revert, the respondent should consider whether to make urgent applications to the court varying the order to allow for more time.

It is important to note that doing nothing is not an option and can lead to committal proceedings being brought by the applicant against the respondent for breach of the order.

The respondent should also consider which assets the order extends to and whether any of the exceptions may apply in allowing the respondent to deal with such assets. If the respondent is unsure or requires clarification from the court, for example it believes that it may have to deal with or dispose of certain assets ahead of the return hearing and so fears breaching the order, the respondent should make an urgent application to the court seeking clarification.

Another key aspect of the respondent's immediate response would be to analyse whether the application was properly made by the applicant, and if not, to consider applying to discharge or vary the freezing order, for example, for failure by the applicant to make full and frank disclosure of all material aspects when making its application. Such applications can be made at the return hearing, as opposed to the above applications which will need to be made more urgently⁷.

Immediate steps: as a third party

Similarly to the respondent, on service of an interim freezing order, a third party should carefully assess the order. It must comply with the order and not permit or assist the respondent in breaching the order. Note that the second half of the penal notice applies specifically to third parties who could be found liable if they do not comply with the order.

Third parties are not usually required to provide information, unless the court has ordered third parties to do so.

Third parties may also apply to court to vary/discharge the order or to ask for clarification and it is usual practice for the applicant to bear the costs for the same.

⁷ Note the provisions of information obligations are not discharged by making an application to discharge an order and so must be complied with – *Motorola Credit Corporation v Uzan* [2002] EWCA Civ 989

BREACHING AN ORDER

Penalties and committal proceedings

CPR 81 – Court's power in relation to committals

The court considers the breach of a freezing order as very serious, and so repercussions are often heavy⁸.

CPR 81.4 provides the court with a right to order committal where the respondent does not comply with an order to act within a timeframe. Where the respondent is a company, the director or other officers can be liable:

"(1) If a person –

- a. required by a judgment or order to do an act does not do it within the time fixed by the judgment or order; or*
- b. disobeys a judgment or order not to do an act, then... the judgment or order may be enforced by an order for committal..*
- c. If the person referred to in paragraph (1) is a company or other corporation, the committal order may be made against any director or other officer of that company or corporation."*

The penalty could be a fine and/or seizure of assets of the individuals or companies. In addition, if the respondent is an individual, or if the respondent is a company and the individuals to be committed are directors/other officers, they could face up to two years' imprisonment.

Committals in action

Non-compliance

In one particular example, HFW were asked to assist with the enforcement of an LMAA arbitration award⁹. The respondent participated in the arbitration, but failed to pay the fairly modest sum due to our claimant clients, despite numerous demands to do so. Through investigation it was discovered that the respondent, based in the Marshall Islands, had a Chinese parent company which opened up subsidiary companies in various "closed" jurisdictions and ceased using them (and potentially dissipated assets) once a liability had accrued.

As a result of this evidence of evasion of an award, the English High Court granted an interim worldwide freezing order (WFO). Upon a failure to comply with certain obligations under the WFO, including a requirement for provision of information, the claimant pursued the respondent and the respondent's director for contempt of court.

⁸ Regarded as "an attack on the administration of justice which usually merits an immediate sentence of imprisonment of a not insubstantial amount" - *Asia Islamic Trade Finance Fund Ltd v Drum Risk Management Ltd and others* [2015] EWHC 3748 (Comm), Popplewell J

⁹ *Bunge SA v Huaya Maritime Corp* [2017] EWHC 90 (Comm)

The effect

The claimant secured the contempt of court order against both the respondent and the director – against the director on the basis that he was the "directing mind" of the respondent and so must have known about the obligations that come under the WFO. As a result, the director was sentenced to 18 months imprisonment. The implication of this was that, if the director ever travelled to the UK, he would have been arrested and imprisoned.

In the present case, after service of the committal order, the claimant received payment in full of the award, interest and costs from the respondent – possibly as respondent and the director became aware of the true and severe ramifications of the committal order.

Therefore, once secured, non-compliance of a WFO could have serious ramifications for the respondent and their directors and so could be a useful, albeit last-resort, tool in securing payment.

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FREEZERS AND OTHER CONSIDERATIONS

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FREEZERS AND FRAUD

There are a number of further considerations when applying for a freezing injunction against a respondent who is alleged to have committed fraud.

Risk of dissipation. When it comes to the question of risk of dissipation, the court will have considerable sympathy for the argument that, because the respondent has (arguably) engaged in dishonest behaviour, they may be the type of person who will take steps to hide or dissipate their assets so that they are beyond execution.

However, this argument will not always carry weight. There are different types of dishonest behaviour. A person who steals another's property is dishonest, and the court will readily conclude that person is likely to take steps to dissipate their assets. A person who previously lied as a witness in court is also dishonest, but that is a rather different type of dishonest conduct, and the court will be less willing to conclude that there is a risk that they will dissipate their assets¹⁰.

Existence of assets and delay. Thieves, once they have misappropriated assets, tend to launder the proceeds of their wrongdoing immediately to some faraway jurisdiction, rather than wait around until they are discovered and sued (though in one case, a fraudster decided to buy a luxury house in central London, after stealing millions from a bank based in London)¹¹. When a freezing injunction is applied for, the respondent may say that the order should not be granted because there has been too much delay, and there are no longer any assets in existence which will be caught by the injunction.

Such an argument will, almost inevitably, be given short shrift by the court: the respondent is essentially relying on its own wrongdoing to avoid a freezing injunction being granted. The approach of the court in these circumstances is that, even if some assets have already been dissipated, the court will still order a freezing injunction as long as there is a chance of other assets being caught. As one judge put it rather vividly: "*there is no reason why the court should not shut the gate, however late the application, in the hope, if not the expectation, that some horses may still be in the field or, at the worst, a miniature pony*"¹².

Unidentified fraudsters. Many modern crimes involve fraudulent email and deceptive communications where the criminal poses as a legitimate counterparty seeking payment. Usually the identity of the fraudster will not be known when the deception is first discovered and a freezing injunction is needed. This is not a bar to obtaining an injunction where a UK bank account can be identified, because the order can be granted against "persons unknown" (as discussed below) and then the bank records may assist in identifying the criminal¹³. This shows that the Achilles heel of many fraudsters is their dependence on a bank, which can be enjoined.

Connecting factor with England. It has been recognised that in cases of serious international fraud the English court may not be so strict in applying the requirement of a strong connecting factor with England and may more readily intervene for example to assist with injunctions in aid of enforcement of a foreign arbitration award (*Arcelormittal USA LLC v Essar Steel Ltd*¹⁴).

¹⁰ *Thane Investments Ltd v Tomlinson* [2003] EWCA Civ 1272

¹¹ *Otkritie v Urumov* [2012] EWHC 890 (Comm)

¹² *Antonio Gramsci v Reoleto* [2011] EWHC 2242 (QB)

¹³ *World Proteins Kft v Persons Unknown* [2019] 4 WLUK 35

¹⁴ [2019] EWHC 724 (Comm)

FREEZERS AND THIRD PARTY ASSETS

A fundamental assumption of a freezing order is that it seeks to preserve assets which could eventually be available to enforce a judgment against the respondent. How far does the definition of assets extend?

The standard form freezing order contains the following wording: "*the Respondent's assets include any asset which he has the power, directly or indirectly, to dispose of or deal with as if it were his own.*" This is designed to prevent a respondent from circumventing a freezing order by having someone else hold the legal title of assets which, in reality, belong to the respondent. For example, if the respondent's assets are placed in an offshore trust, and the trustee hold the assets for his benefit, the above wording would catch those assets and freeze them.

Does this principle apply where assets are held not by an offshore trust, but by a company? What if the respondent is the company's sole shareholder, or director, or both?

There is a tension here for the law. On the one hand, the most fundamental rule in company law is that a company has separate legal personality, and so a company's assets are owned by the company – not by its directors or shareholders, even a 100% shareholder. On the other hand, just like a trust, a company can be abused to circumvent a freezing order.

The English courts have recently been grappling with this issue in a series of cases, one of the latest being *FM Capital Partners Ltd v Marino*¹⁵. In that case, a freezing injunction was granted against the third defendant (Mr Ohmura). As normal, the order applied to assets which Mr Ohmura "has the power, directly or indirectly, to dispose of or deal with as if it were his own."

However, the order went on to state that Mr Ohmura had such power "if a third party (which shall include a body corporate) holds or controls the asset in accordance with his direct or indirect instructions." This wording could, on its face, apply to assets held by companies which were directly or indirectly owned by Mr Ohmura, and companies of which he was a director.

However, the English High Court decided that Mr Ohmura did not have power to dispose of these companies' assets as if they "were his own". To the extent Mr Ohmura disposed of the companies' assets, he was doing so not in his personal capacity but in his capacity as an agent of the company. Therefore, the freezing injunction did not apply to the company's assets.

This does not mean, however, that a respondent can simply place all of its assets into holding companies and dissipate as they wish.

Firstly, if a respondent instructs its company to dispose a valuable asset without receiving anything in return, that will affect the value of the company's shares. Since the respondent owns the shares, the respondent will be diminishing the value of its assets, which would be contrary to the freezing order.

Secondly, we said above that a company's assets are owned by the company, and not by its shareholders or directors. That is a general rule, but there will be cases where the company's assets will be found to be held on trust for the benefit of its shareholder. This is more likely to apply where the company is merely a holding company for the respondent.

¹⁵ [2018] EWHC 2889 (Comm)

Thirdly, whilst the general rule is that a freezing injunction can only be obtained against a respondent who will become a defendant to a substantive legal claim, that is not an invariable rule. In some cases, a freezing injunction can be obtained against a respondent on the basis that (if the claim is successful) the judgment will be enforceable against the respondent's assets – typically the respondent will be a nominee or trustee. This exceptional jurisdiction is known as the "Chabra" jurisdiction, named after the case which created the rule.

Therefore, for respondents looking to circumvent freezing orders, *FM Capital Partners Ltd v Marino* is no cause for celebration.

ASSET PRESERVATION AND DISCLOSURE ORDERS

Disclosure orders ancillary to freezing orders

We mentioned above the common requirement for respondents who have been served with freezing orders to provide information regarding their assets. It is important to remember the purpose of this disclosure, which is to allow the applicant to police the freezing order, may incidentally lead to useful evidence in pursuing the claims against the respondent. Once the applicant knows where the respondent's assets are, they can take further steps to preserve those assets. For example, if the respondent reveals the existence of previously-unknown bank accounts, the applicant can notify the bank and ensure the money in those bank accounts are not dissipated.

If the respondent is uncooperative in providing information about their assets, the respondent will potentially be in contempt of court, and the applicant could ask the court to punish the respondent by imprisonment or fine. However, in practice, the applicant may find it more useful to ask the court to require the respondent to attend court for cross-examination about their assets, with the aim of eliciting further information about the assets. Some freezing orders require the respondent to deliver up their passport, to ensure that they remain within the jurisdiction.

The asset disclosure order found in a freezing order should not be confused with other types of orders which require disclosure of information regarding a person's assets, which we briefly touch upon below.

Notification orders

A less-intrusive alternative to applying for a freezing injunction is to apply for a "notification order". These orders do not prevent the respondent from dealing with or disposing of their assets. However, if the respondent wishes to deal with or dispose of any asset above a certain value, they are required to notify the applicant of that disposal. At that stage, the applicant can take further action (including applying for a full freezing injunction).

In practice, these orders are rarely sought. One reason is that the requirement to show a good arguable case or risk of dissipation is not relaxed in any way simply because the applicant is seeking a notification order and not a freezing order. The second reason is that, in our experience, once an applicant has demonstrated a good arguable case and a risk of dissipation, the courts rarely exercise their discretion to refuse a freezing injunction on the basis that it is too intrusive. Therefore, there is rarely the need to resort to the "backup" option of a notification order.

Freestanding disclosure orders

If the aim is to obtain information about a potential claim with the aim of bringing legal proceedings (and not to preserve assets), the applicant should apply for a freestanding disclosure order: either an order under CPR 31.16 / section 33 of the Senior Courts Act 1981, or a "Norwich Pharmacal" order. A detailed discussion of these orders is outside the scope of this Pack but, in summary, these orders can be obtained against either the potential respondent or third parties who have been mixed up in wrongdoing, and they will order the respondent to disclose the necessary information to enable the ultimate wrongdoer to be sued. Sometimes these orders are made in conjunction with a freezing order against the principal respondent: an example is where a spouse could made the subject of disclosure

orders if they were suspected of becoming mixed up in a respondent's attempts to defeat execution of a judgment (as in *Mercantile Group v Aiyela*¹⁶).

Proprietary injunctions

In some cases, the applicant may have a property right in a specific asset held by the respondent – this most often happens in fraud cases where the respondent has misappropriated assets; the applicant can point to the stolen asset or its proceeds and assert that the asset – in truth – belongs to the applicant. In those cases, the applicant should consider applying for a proprietary injunction. The requirements are slightly different: because of the applicant's proprietary interest in the asset, a risk of dissipation need not be shown.

Proprietary injunctions bite on a more limited range of assets (the misappropriated assets or their proceeds, rather than all of the respondent's assets). However, proprietary injunctions bite much harder: the standard exceptions, which allows a respondent to spend money on living costs or legal costs, or to dispose of assets in the ordinary course of business, do not generally apply to assets subject to a proprietary injunction.

Receivership

In rare cases, the court may appoint a receiver to take control of the respondent's assets if persuaded that a freezing order is unlikely to be sufficient protection against the dissipation of assets.

¹⁶ [1994] QB 366

FREEZERS AND CYBER ATTACKS

Early roots – Harry Potter

In 2003, the fifth book of the Harry Potter series was being printed in "conditions of exceptional security", however at least three books were taken from the printers and offered to the press for purchase. The claimants (publisher and writer) applied for and secured a prohibitory injunction in *Bloomsbury Publishing Group Ltd v New Group Newspapers Ltd*¹⁷, preventing those who had taken the books from disclosing them. The question in that case was whether the injunction could be continued against "persons unknown". Sir Andrew Morritt VC held that you can secure injunctive relief against persons unknown as long as you can be "sufficiently certain" as to the identity of those who are included within the description and those who are not.

Extension to freezing orders

Move forward 14 years and *CMOC v Persons Unknown*¹⁸ confirmed that injunctive relief against "persons unknown" extended to freezing injunctions as well.

In this case there was a cyber-attack, whereby the email account of a member of the claimant's senior management was infiltrated, sending out payment instructions to the claimant's payment team. Subsequently, payments were made to various bank accounts worldwide in the region of GBP6.3m.

HHJ Waksman QC granted the freezing order against such persons unknown with a view that it would be a useful tool against the third parties (the recipient banks) in the context of such fraudulent activity:

"...there is a strong reason for extending the principle which is that the freezing injunction can often be a springboard for the grant of ancillary relief in respect of third parties, which arguably could not get off the ground unless there has been a primary freezing injunction. That is very much the case in fraud litigation and is very much the case here where the first object is of course to notify the banks of the freezing injunction so that they can freeze the relevant bank accounts - irrespective of if and when it comes to the attention of the underlying defendants, And then, secondly, on the basis of that, to obtain vital information from the various banks which may assist in positively identifying some or all of the defendants."

In this case, the judge stated that it was easy to distinguish the defendants in terms of who the order would apply to and who it would not:

"...it makes reference to those who have been involved in the activities said to have constituted the fraud, which is set out in the body of the claim form, and by reference to particular transfers from the Bank of China accounts to other bank accounts. These are themselves are then listed in the schedule. The other species of defendant are - and they may or may not be the same persons - those who are the legal or beneficial holders of those accounts. All of that that seems to me to make it sufficiently clear to anyone affected by this claim, whether they fall within the category of defendant or not."

¹⁷ [2003] EWHC 1205 (Ch)

¹⁸ [2017] EWHC 3599 (Comm)

Comment

Therefore, as long as you can distinguish who would and who would not fall under the definition of a "person unknown", in cases where the identity of the perpetrator is unknown, you can secure injunctive relief and indeed a freezing injunction to support the position. As the Bloomsbury and CMOOC cases show, these can be used to assist recovery of assets and money.

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04

FREEZING BY JURISDICTION

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SPOTLIGHT ON FREEZING ASSETS BY JURISDICTION

	Freeze Assets?	Procedure	Time Estimate
Australia	Yes	<p>A freezing order can be obtained by an 'ex parte' or 'on notice' application with a supporting affidavit in the State and Federal Courts in Australia, showing that there is a danger that a judgment or prospective judgment will be unsatisfied.</p> <p>An application for a freezing order made without notice must provide full and frank disclosure of all material facts to the court, including disclosure of possible defences known to the applicant.</p>	Depending on its urgency, the court can issue a freezing order at the first hearing.
Brazil	Yes	<p>The appropriate court order to pursue depends on the supporting document presented with the claim.</p> <p>The applicant must petition to the competent court, presenting a summary description of the right under threat and the risk of damage, as well as evidence that the legal requirements for the granting of relief has been complied with and, finally, what evidence it will submit.</p> <p>As a rule, an action must be filed at a lower civil court in the jurisdiction where the defendant is domiciled or is known to be domiciled, or at the place where the obligation is to be performed.</p>	Usually around 10 days.
Mainland China	Yes	<p>A "Property Preservation Application" must be obtained from the court in the place where the assets are located, or the defendant is domiciled, or from the court that has relevant jurisdiction. A property preservation application can be obtained prior to the commencement of the arbitration or court action, during the arbitration or court proceedings or as an aid to enforcement of an award or judgment.</p>	A pre-action/pre-arbitration property preservation order can usually be obtained within 48 hours. If the application is made once proceedings have been commenced, or in aid of execution of an award or judgment, the order can usually be obtained within 48 hours for urgent matters and within 5 days for non-urgent matters.
Hong Kong	Yes	<p>An application for a Mareva injunction is generally made without notice to the defendant. The Court will review drafts of the Writ, affidavit, exhibits and intended order (which must contain the usual undertakings for relief of this sort) and the plaintiff's skeleton argument.</p> <p>Upon obtaining the injunction, the papers must be served on the defendant without delay, and notice of the order should be given to any third parties (such as banks) who hold assets in the name of the defendant. The case must come back before the Court, usually within seven days. On or before the return date, the defendant will have an opportunity to apply to set aside the injunction. If the defendant does not appear, the injunction will usually be continued until trial or further order.</p>	A hearing can usually be obtained within an hour or two of delivering the papers to the Court.
India	Yes	<p>The general procedure is that an application is filed at the relevant court, together with an affidavit and all other material facts/evidence.</p> <p>The court must be satisfied of the practical certainty of the plaintiff's success and of the existence of grave danger of disposal of assets by the defendant.</p> <p>Once the court is satisfied, a notice must be sent to the defendant.</p> <p>The suit is then tried and the defence of the defendant is tested. A judgment is then passed which results in a decree and is capable of execution.</p>	<p>Depending on its urgency, some courts may grant injunctions within a few days of filing the application.</p> <p>Other courts may take a few months to decide on the application for such an order.</p>
Nigeria	Yes	<p>The application for a freezing order cannot stand alone, it must be filed along with a substantive suit for it to be granted by the court.</p> <p>Another key requirement is that the adverse party has assets within the jurisdiction of the court which they are deemed likely to remove if the application is not successful.</p>	2 to 3 weeks.

	Freeze Assets?	Procedure	Time Estimate
Singapore	Yes	<p>The claimant must make an application to court by way of an originating summons supported by an affidavit.</p> <p>The application may be made before or after proceedings have commenced.</p> <p>Broadly, the applicant must have:</p> <ol style="list-style-type: none"> 1. A valid cause of action over which the court has jurisdiction; 2. A good arguable case on the merits; 3. Assets within the jurisdiction; and 4. There must be a real risk that the respondent will dissipate its assets in order to frustrate enforcement of the judgment / award. <p>The court will also consider whether it is just and convenient to grant the order.</p>	3 to 7 working days, depending on the court's availability for a hearing.
Switzerland	Yes	<p>One must show a court that, more likely than not (i) the debt is due, (ii) there are assets belonging to the debtor which are in the jurisdiction, (iii) one is in the presence of one of a limited number of situations in which attachments can be granted.</p> <p>These include situations where an award or a judgment was handed down.</p> <p>The court can order counter-security against damages for a wrongful arrest.</p> <p>If the arrest is granted, the creditor must start debt-enforcement or substantive proceedings, as the case may be, within 10 days in order to perfect the arrest. The debtor or other third parties can contest the attachment subsequently.</p>	Typically a few hours.
USA ¹⁹	Yes	<p>A temporary injunction or similar provisional remedy may be sought in either a state or federal court of proper jurisdiction.</p> <p>While generally similar in nature, each individual jurisdiction may have slightly different requirements such as the applicable legal test, bonding requirements and the availability of counter-security.</p>	A temporary injunction may be obtained <i>ex parte</i> very shortly after filing. After the <i>ex parte</i> order is obtained, a defendant may seek a hearing to vacate the order.

¹⁹ NB - there are slight differences between state and federal proceedings.

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Whilst every care has been taken to ensure the accuracy of the information contained in this pack at the time of publication, the information is intended as guidance only. It should not be considered as legal advice.

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Please also refer to HFW's recent "[Freezing Injunction](#)" Client Guide, published June 2019.

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