



FREEZING INJUNCTIONS

This Client Guide outlines the key points to consider when obtaining or receiving the English court “freezing injunction” (previously known as a Mareva injunction¹): a powerful tool for any party seeking to prevent assets being dissipated prior to enforcement of a judgment or arbitration award.

What is a freezing injunction?

A freezing injunction is a powerful tool, which subject to certain permitted activities prevents a party from using, or disposing of their assets - so effectively *freezes* them at the time of the court order ensuring that they remain available to satisfy a future judgment.

Freezing injunctions can also be ordered in arbitration proceedings to secure any award, where the seat of the arbitration is England, and whether or not the assets are within the jurisdiction of overseas.

Most categories of assets are capable of being the subject of a freezing injunction whether held directly by the respondent (the party receiving the injunction/ the defendant), or by a third party (e.g. a bank) and can include bank accounts, shares, property, and land. It is important to note that a freezing injunction will not give the applicant (the party applying for the injunction/ the claimant) priority over other creditors in the event that the respondent becomes insolvent.

A freezing injunction ordered by the English court can apply to assets within the jurisdiction of England and Wales, or internationally (in this case known as a

worldwide freezing order “WFO”), making the English court system particularly attractive to international parties.

Freezing injunctions include a penal notice, which means that any breach of the freezing injunction by the respondent, or any third party (e.g. a bank) on whom it is served may amount to a contempt of court and result in criminal proceedings. The criminal sanctions include a prison term of up to two years. Where the injunction applies to an organisation, the sanctions will apply to the directors and officers of the organisation.

When should you apply for a freezing injunction?

Whilst a freezing injunction can be sought at any time of the proceedings, or before commencement, it is usually obtained before issue of the proceedings. It is a condition of the injunction that the application is made as soon as possible.

Conditions for a freezing injunction

Because of the wide reaching implications of a freezing order, the courts will only exercise their discretion and make the order when persuaded that:

1. the applicant has a good arguable case on the merits of the underlying claim- i.e. that the claim is likely;
2. the respondent owns the assets;
3. there is a real risk of the respondent disposing of or using the assets before judgment can be enforced (known as dissipation);
4. the injunction is just and convenient (i.e. fair, and that it has been applied for without delay)

1. First ordered in the case of *Mareva Compania Naviera SA V International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509, in which HFW acted for the claimant/ applicants

“It is crucial that you carefully check the terms of the injunction, to determine whether it is applicable to you, to determine which assets may be frozen, but also to understand what it prevents you from doing.”

Key considerations when seeking a freezing injunction

Suitability. Is a freezing injunction appropriate for your circumstances? This is a heavy-handed course of action and needs to be properly justified. Therefore, the potential benefits of a freezing injunction need to be assessed against other types of remedies which may be available.

Are there sufficient assets? It is not only essential to ensure that it is worth the time and costs involved, but there need to be sufficient assets over which the injunction can be applied.

Scope. A freezing injunction can be limited to the value of the claim (including costs and interests), or it can be a general order attached to all of the respondent's assets; or set against identified assets. The order may apply to assets within the jurisdiction of England and Wales, or to assets in other jurisdictions, or even worldwide.

Enforcing the injunction. If a WFO, local legal advice on enforcement should be obtained.

Time and cost. Applying for a freezing injunction involves significant investments of time, usually over a very short period of time, and is therefore significant in terms of legal costs.

Undertakings required to be given by the applicant.

- An undertaking to the court to pay any costs incurred by third parties e.g. a bank's costs of complying with the injunction. .
- An undertaking in damages (known as a cross-undertaking) to the court, which will provide the respondent with compensation for any losses arising from the freezing injunction, in the event that the court finds that the applicant was not entitled to the injunction. This creates a potentially significant exposure for the applicant.

What to do if served with a freezing injunction:

- Immediately forward to your in-house or external counsel.
- It is crucial that you carefully check the terms of the injunction, to determine whether it is applicable to you, to determine which assets may be frozen, but also to understand what it prevents you from doing. This is due to the fact that freezing injunctions are rigorously enforced and any failure to comply with the terms of the injunction may be a contempt of court leading to strict penalties, including: a fine, seizure of assets and even a prison sentence of up to two years'.
- If the respondent, comply with the deadline for providing evidence of your assets- your 'disclosure obligations', unless this will result in self-incrimination.
- If the respondent, consider offering alternative security to the assets covered by the injunction, allowing the injunction to be cancelled.
- If the respondent, consider discharging or varying the injunction, where:
 - the applicant has not shown a good arguable case;
 - the applicant's evidence has not shown the existence of sufficient assets within or outside of the jurisdiction;
 - a risk of dissipation has not been evidenced;
 - the applicant has failed to disclose all relevant documents or information;
 - the order is unnecessarily harsh; or
 - there was an excessive delay by the applicant.

Procedure for obtaining the injunction

1

Planning

Freezing injunctions are ordered by a judge at a court hearing, the “interim hearing” often at short notice, and without notice to the respondent (in order that they cannot dissipate their assets before service).

As the respondent is not present at the interim hearing, the applicant needs to disclose all relevant information to the court, including any unfavourable information. This is known as full and frank disclosure and is an ongoing requirement, meaning that any incorrect or missing information, which is later discovered must be disclosed.

2

Application and Hearing

Evidence in support of an application is on oath by way of an affidavit. The affidavit should:

- set out why the application meets the conditions for an injunction including the reasons of urgency;
- be accurate and provide all the appropriate information and documents;
- give undertakings to the court to pay the costs of and associated with the application and damages if it is subsequently established that the injunction should not have been granted.

Where the first hearing for a freezing injunction application is without notice to the defendant, an injunction will be temporarily made until the date of a second hearing, with the respondent present. This date is known as a return date and will usually be about a week after the first hearing.

3

Service

Before a freezing injunction can be enforced, the application, evidence and a note of the hearing (if without notice) must be served on the respondent.

As is often the case where the injunction applies to assets held by a third party, e.g. a bank), the injunction should be served on the third party before being served on the respondent to prevent them from making a transfer of the funds.

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Final Hearing

A hearing is held after service of the documents on the respondent and gives the parties an opportunity to debate the fairness of the injunction.

After hearing the parties, the court will order the injunction to be continued, varied or discharged.

Advantages of freezing injunctions

- Preserve assets which can be used to enforce a judgment
- Potential to obtain a worldwide freezing injunction/order (WFO)
- Forces the respondent to disclose details of their available assets
- May lead to faster settlement of the dispute resulting in time and cost savings.

Limitations of freezing injunctions

- No security is granted over assets
- No priority is given over the assets
- International enforcement requires the injunction to be recognised by the local court.
- The undertakings required by the applicant create a significant risk in costs and damages.

This client guide was produced by the HFW Knowledge Management team, should you require any further information or assistance with any of the issues dealt with here, please do not hesitate to contact them at KM@hfw.com or your usual HFW contact to discuss.



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