FREEZING ORDERS

Practical guidance on obtaining, resisting, policing and enforcing them

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ESSEX COURT CHAMBERS
BARRISTERS

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Overview

- Mainly practical tips: things not (necessarily) in cases or texts
- Predominantly based on Commercial Court practice
- Follow progress of a standard action:
  - ***Applying*** *for and obtaining Freezing Orders*
    - *Including the* ***types and terms*** *of Freezing Orders*
  - *The Defendant's* ***response***
  - *The Claimant's role in* ***policing*** *Freezing Orders*
  - ***Enforcement*** *of Freezing Orders*

Obtaining the Order I: Type of Order

Proprietary or Personal?

Obtaining the Order I: Type of Order

Proprietary and Personal

Obtaining the Order I: Type of Order

Advantages of Proprietary Freezing Orders *1/2*

- Only need to satisfy *American Cyanamid* test
  - Merits: "*serious issue to be tried*" (strike-out) *vs.* "*good arguable case*"
  - No need to prove risk of dissipation
    - *Polly Peck International plc v Nadir* (No. 2) [1992] 4 All ER 769 at 784g
    - *Cherney v Neuman* [2009] EWHC 1743 at [102]
- Width and flexibility of powers *e.g.* to order disclosure of:
  - Whereabouts / use of the assets themselves
  - Their traceable proceeds: consideration / reason for transfers
  - Fruits of the assets (interest; dividends)

Obtaining the Order I: Type of Order

Advantages of Proprietary Freezing Orders *2/2*

- Protection from depletion of assets by spending on:
  - Living expenses (otherwise a weekly allowance, often substantial)
  - Legal fees (otherwise what is "*reasonable*"…)
  - *Ostrich Farming Corp. v Ketchell* (CA, unrep., 10 December 1997); *Independent Trustee Services v GP Noble Trustees* [2009] EWHC 161 (Ch)
    - *"No man has a right to use somebody else's money, for the purpose of defending himself against legal proceedings."*
    - A defendant subject to a proprietary injunction has the burden of showing that he has no other non-proprietary assets before there is any question of inviting the Court to exercise its discretion to allow the spending of any proprietary moneys

Obtaining the Order I: Type of Order

Advantages of Proprietary Freezing Orders

***Post-Script**: "Temporary Use" of Proprietary Assets*

- Where illiquid non-proprietary assets (e.g. real property)
- *E.g.* Undertaking to 'top-up' proprietary pot later
- Problem: cannot recreate proprietary nature of interest in substitute assets
- Generally, existence of non-proprietary assets is fatal
  - *FM Capital Partners v Marino* [2016] EWCA Civ 1301
  - Cross-undertaking to cover loss from *e.g.* fire-sale of non-proprietary assets

Obtaining the Order I: Types of Claim

What types of **Proprietary** claim?

- Breach of trust or fiduciary duty
- Rescission
- Void contract
- Bribery / secret commissions
  - *FHR European Ventures v Mankarious* [2015] AC 250
- Controversial constructive trust claims (*e.g.* money obtained by deceit?)

Obtaining the Order I: Types of Claim

What (unusual) types of Personal claim?

- Tort of knowingly inducing or procuring the wrongful violation of a judgment debt?
  - *Marex Financial v Sevilleja* [2017] 4 WLR 105 - Knowles J. (arguable)
  - Also a possible contempt of court: *Marex* at [57].
- Lawful means conspiracy to injure: *ditto*
- Unlawful means conspiracy
  - NB unlawful means can include:
    - Contempt: *BTA Bank v Ablyazov (Khrapunov)* [2017] 2 W.L.R. 1563
    - Breach of contract (?)

Obtaining the Order II: Procedure and Evidence

Ex parte vs. On Notice

- Is secrecy essential if there is a genuine risk of dissipation?
  - Not always: *e.g. Fiona Trust v Privalov* [2007] EWHC 1217 (Comm) (David Steel J.)
  - On-going proceedings, in which the freezing order was said to be ancillary to the asset disclosure; apparently strong evidence of risk of dissipation in any event
  - "*The fact that the application is made* inter partes *is scarcely prejudicial to the respondent*" [Not entirely true: duty of full and frank disclosure]
- *Ex parte* application during on-going proceedings
  - *E.g.* upon discovery, unknown to Defendant, of new evidence of wrongdoing
- But do not flinch from going *ex parte* if secrecy is justified

Obtaining the Order II: Procedure and Evidence

Delay

- Better: "*Lapse of time*"
- Goes primarily to the *reality* of risk of dissipation
- In practice, rarely a bar to an injunction otherwise justified
- *Gramsci Shipping v Recoletos* [2011] EWHC 2242 (QB) (Cooke J.) at [29]:

> "…**it is no answer for a defendant to come to the court to say that his horse may have bolted** before the gate is shut and then to put that forward as a reason for not shutting the gate. **That would be to pray in aid his own efforts to make himself judgment proof — if that, indeed, is what has occurred** — and to avoid the effect of any court order which the court might make. If he can show that there is no risk of dissipation on other grounds, that is one thing. If he can show that the claimants do not consider that there is such a risk by virtue of the delay in seeking the order, that again is a relevant factor. However, if the court is satisfied about those matters in favour of the claimant, **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**."

- *Madoff Securities v Raven* [2012] I L Pr 275 (Flaux J.) at [156]:

> "If the court is satisfied on other evidence that there is a risk of dissipation, the court should grant the order, despite the delay, even if only limited assets are ultimately frozen by it."

Obtaining the Order II: Procedure and Evidence

Risk of Dissipation

Authority *vs.* reality?

- "*Solid evidence of an objective risk of unjustifiable dissipation*"
  - *Ketchum International v Group Public Relations Holdings* [1997] 1 WLR 4 at 10 (Stuart-Smith LJ)
- Not every case of dishonesty of itself establishes a proper inference of a risk of dissipation to the necessary relatively high standard: it is necessary to examine the nature of the underlying fraud and how it was perpetrated to determine whether such an inference can properly be drawn
  - *Thane Investments Ltd v Tomlinson (No.1)* [2003] EWCA Civ 1272
- Reality? If there is a strong case of dishonesty on the merits, the Court will usually readily infer a risk of dissipation
  - *E.g. Andrews v Stanway* (Commercial Court, 29 June 2017, Sara Cockerill QC)

Obtaining the Order II: Procedure and Evidence

Full and Frank Disclosure

- Focus on realistically *material* points, not on trivia or minutiae
- If left in real doubt about materiality, disclose (in some way)
- Do not miss the 'easy' points:
  - Time bar issues
  - Contractual limitations / exemptions
  - Likely foreign law defences or weaknesses
  - Proceedings in relation to the same or related subject matter abroad (criminal or civil)
  - Taking of inconsistent positions in other fora or documents etc.
  - Obvious issues with deponent's credibility (payments, Queen's evidence *etc.*)

Obtaining the Order III: Terms of the Order

Asset Disclosure

Personal Freezing Orders

- Standard form

  > *"Unless sub-paragraph (2) [self-incrimination] applies, the Respondent must* ***within [72] hours of service of this order*** *and to the best of his ability inform the Applicant's solicitors of all his assets worldwide (****exceeding £10,000 each in value****) whether in his own name or not and whether solely or jointly owned* **[*]***, giving the value, location and details of all such assets…"*

- Timings are a trade-off: quick is not always best (no time for reasonable enquiries)
- Consider *Kythreotis* wording [*]: *"…and whether the Respondent is interested in them legally, beneficially or otherwise"*? *BTA Bank v Solodchenko* [2011] 1 WLR 888
- Bespoke approach?
  - Care: varied judicial attitudes to change
  - Entirely novel approach? Asset questionnaire (initially): ask for and get (only) specifics

Obtaining the Order III: Terms of the Order

Asset Disclosure

Proprietary Freezing Orders

- Very broad powers derived from:
  - CPR 25.1(1)(g)
  - Equitable jurisdiction to protect trust fund (*Bankers Trust v Shapira* [1980] 1 WLR 1274)
  - *Norwich Pharmacal* jurisdiction
- No standard form. Accepted wording example (based on Gee):

> *"…the Respondent must within 72 hours of service of this order upon him and to the best of his ability and after making all reasonable enquiries inform the Applicant's solicitors in writing of the location, nature and value of all assets which represent in whole or in part, or are derived from the proceeds or fruits (including any interest earned thereon) of, the Proprietary Assets [as defined], regardless of whether or not such proceeds or assets are in the Respondent's own name and whether they are solely or jointly owned…"*

Obtaining the Order III: Terms of the Order

Enforcement / Service

1/2

- Think ahead on enforcement
  - CPR 81.5 prevents enforcement unless the order has been served
  - CPR 81.6 requires personal service
- CPR 81.8(2)(a) allows Court to dispense with service prior to enforcement if *"just to do so"*
  - Seek pre-emptive dispensation: often granted where strong evidence of dishonesty / likelihood or real possibility of evasion (esp. if abroad)
- CPR 81.8(2)(b) allows Court to order alternative service of Order
  - Commonly granted (*e.g.* email, English solicitors not on record)
  - Despite usual authorities under CPR 6.15 stressing hurdle of *"good reason"* (speed generally not sufficient)
  - Set the precedent early on: previous orders then become the default order

Obtaining the Order III: Terms of the Order

Enforcement / Service

2/2

- Standard form undertaking not to take steps abroad:

  "The Applicant will not without the permission of the court seek to enforce this order in any country outside England and Wales or seek an order of a similar nature including orders conferring a charge or other security against the Respondent or the Respondent's assets."

- *"Dadourian Guidelines"*
  - *Dadourian Group v Simms* [2006] 1 WLR 2499
- Get *Dadourian* material into *ex parte* application if possible
- Another area where authority suggests higher hurdle than exists in practice

Responding to the Order I: Asset Disclosure

- No easy answers… do only (but everything) the Order requires
- If reasonable enquiries are required: focus, advise and record
- Privilege against self-incrimination?
  - In a case of fraud / dishonesty, generally irrelevant
  - Abrogated by statute:
    - Section 31(1) of the Theft Act 1968
    - Section 13 of the Fraud Act 2006
      - Any offence involving deception or surreptitious dealing: *Kensington International v Congo* [2008] 1 WLR 1144
      - Including under s. 328 of POCA 2002: *BTA Bank v Ablyazov* [2010] 1 WLR 976
  - Only applies to English criminal offences
    - Section 14 of the Civil Evidence Act 1968

Responding to the Order II: Discharge Application

- Serious tactical questions
  - Whether to challenge at all
  - What grounds to challenge upon
    - Good arguable case on the merits
    - Risk of dissipation
    - Material non-disclosure
- Even if your client is 'innocent', is a challenge sensible?
  - Not a trial on the merits: both sides can have a good arguable case
  - What information or evidence will you have to obtain and present at this very early stage?
  - Evidence will be on affidavit
  - **Can and should you risk it?**

Responding to the Order II: Discharge Application

- Challenge on the merits?
  - Particularly unlikely to be successful in absence of material non-disclosure
  - Requires Respondent to commit to defence on affidavit
  - Timing consideration: pre-pleading?
  - Hostage to fortune except in clearest case: damaging *dicta* replayed *ad nauseam*

- Risk of dissipation?
  - If evidence of dishonesty, highly risky
  - Can backfire and open up most damaging areas
  - Leave it be unless an error was obviously made *ex parte*

Responding to the Order II: Discharge Application

Material Non-Disclosure

1/3

- Once again, the authorities do not match the modern practice
  - General rule is that a freezing order obtained *ex parte* without full and frank disclosure should be discharged, both in order to deprive the wrongdoer of an advantage in the litigation which was improperly obtained, and to serve as a deterrent for the future and to preserve the integrity of the court's process in granting ex parte applications
    - See *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350 at 1358
  - *"The rule requiring full disclosure seems to me to be one of the most fundamental importance, particularly in the context of the draconian remedy of the Mareva injunction. It is in effect, together with the Anton Piller order, one of the law's two 'nuclear' weapons. If access to such a weapon is obtained without the fullest and frankest disclosure, I have no doubt at all that it should be revoked."*
    - *Bank Mellat v Nikpour* [1985] FSR 87 (at 92)

Responding to the Order II: Discharge Application

Material Non-Disclosure
2/3

- In fact, now much more merits-driven; using costs as sanction for non-disclosures
- Overriding consideration is the interests of justice, considering:
  - Importance of the fact not disclosed, including consideration of whether the injunction would have been granted anyway (without overtly elevating that into the 'acid test')
  - Need to encourage proper compliance with the duty and to deter non-compliance
  - Culpability: innocent if fact not known or relevance not perceived (except blind-eye)
  - Injustice to a claimant if an order is discharged leaving a defendant free to dissipate

See *National Bank Trust v Yurov et al.* [2016] EWHC 1913 (Comm) (Males J.)

RESPONDING TO THE ORDER II: DISCHARGE APPLICATION

MATERIAL NON-DISCLOSURE
3/3

- When applying to discharge for non-disclosure:
  - If possible, specify the particular non-disclosures in the Application Notice
  - Deal clearly and separately in the evidence with each allegation
    - *"…the defendants served 130 pages of written evidence with a liberal scattering throughout of allegations of failures of disclosure by the bank. As a result identification of the matters relied on by the defendants was far from straightforward and the bank's advisers were left to aim at what proved to be a moving and in some respects ephemeral target. This is not an acceptable way to proceed"* (*per* Males J. in *National Bank Trust* at [14])
  - Avoid a scattergun approach (looks desperate and is annoying): pick your best few points
- Inappropriate if proof of non-disclosure depends on proof of facts themselves in issue in the action (unless really plain and can be summarily established)

POLICING THE ORDER

1/2

- Respondent to a freezing order is immediately on the back foot, so:
  - **Probe** the responses to the asset disclosure intensely and exhaustively in correspondence
  - **Seek disclosure** of documents (esp. bank account statements) evidencing the facts stated
  - Seek confirmation of everything said in correspondence on **affidavit**
  - On Return Date, add bespoke wording to the provision of information section of draft Order
- Even if no right to the information or documents:
  - Most Respondents will give you more than they are required in order to avoid looking cagey or uncooperative
  - Most such queries can be justified, even if a further order would in theory be needed to compel the further information, on the grounds of ensuring the Order is **effective** and **properly policed**
- Where there is a proprietary element to the Order, go even further:
  - Seek explanations of **the reasons and consideration for** transfers of proprietary assets
  - Probe fully for explanations and evidence of **reasonable enquiries** being undertaken

Policing the Order
2/2

- Living expenses and legal costs
  - Require proper justification for increase in weekly living costs allowance
    - *E.g.* high-level breakdown of living expenses over past (*e.g.*) 3 months
    - Be careful not to appear unreasonable (*e.g.* school fees, health care)
  - Beware Respondent withdrawing entire weekly allowance in cash so available without future surveillance
  - For proprietary orders:
    - Obtain and analyse bank account documents to identify other proprietary sources (i.e., moneys derived from the underlying fraud etc., even if passing through others' hands: often changes of currency or swaps of value)
    - Enforce prohibition on using proprietary moneys for living or legal expenses

Enforcing the Order: Committal

Applications for Committal

1/2

- For breaches of Order by: (a) failure to give (any) proper disclosure of assets or (b) dissipation of assets in breach of injunction
- Purpose and effectiveness
- The Court's attitude to committal applications
  - Pyrrhic victories: need to be proportionate
  - *VAB Bank v Maksimov* [2014] EWHC 4370 (Comm) (Hamblen J.)
    - Admitted failure to disclose assets and swear affidavit; and a "*technical*" contempt by assisting companies to breach asset disclosure requirement
    - Other grounds rejected: "*What is particularly striking is that the allegations that Mr Maksimov had failed to disclose assets, usually the centre-piece of a case of this type, were downplayed and eventually almost completely abandoned.*" [18]
    - Claimant ordered to pay 80% of contemnor's costs (of £400k), and to bear its own costs of the committal proceedings (£600k)

Enforcing the Order: Committal

Applications for Committal

2/2

- When?
  - Are facts in issue that will arise at trial?
  - Is enforcement sought to make orders effective before trial?
- Evidence
  - Acts or omissions deliberate; with effect that order breached (not intention to breach)
  - Criminal standard of proof
  - But still civil proceedings, so can use hearsay evidence
    - *Daltel Europe v Makki* [2006] EWCA Civ 94
- Respondent has (and must be told of) right to remain silent (NB timetabling)
  - *Comet Products UK v Hawkex Plastics Limited* [1971] 2 QB 67
- Respondent entitled to criminal legal aid
  - *Kings Lynn v West Norfolk Council v Bunning* [2014] 2 All ER 1095 (QB)

Enforcing the Order: Committal

Sanctions for Committal

- Maximum sentence: 24 months (notionally)
  - 50% (in practice: Criminal Justice Act 2003, s. 258(2))
- Unless 'technical', taken very seriously
  - Expect *c.* 18 months for wilful breaches
    - *Bunge v Huaya Maritime* [2017] EWHC 90 (Comm) (director deliberately failing to disclose company's assets)
    - In *A v B* (Commercial Court; Knowles J.; 30 June 2017), remitted entirely on the basis that there had been a complete misunderstanding on the part of the director who spoke no English and had been misinformed

Enforcing the Order: Committal

Technicalities of Committal

- Contact Tipstaff prior to hearing:
  - Tipstaffrcj@hmcts.gsi.gov.uk (Richard Cheesley)
  - Obtain listing in RCJ, not Rolls Building
- Warrant of committal to prison enforceable only for 2 years
  - Where Respondent is overseas, threat of committal will expire
  - Extension straightforward (for good reason): CPR 81.30(3)

Enforcing the Order: As Respondent

The (Cross-) Undertaking in Damages

- First thing the Applicant should understand
- May need to cover third parties
- Fortification?
  - In theory, see: *Energy Ventures v Malabu* [2015] 1 WLR 2309
  - In practice, at least *ex parte*, generally low
- What is at stake?
  - Open-ended liability for reasonably foreseeable loss caused by the Order
  - *Fiona Trust v Privalov* [2016] EWHC 2451(Comm) : *c.* US$60 million

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