An Introduction to Freezing Orders

By James Brown | June 28, 2022

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Freezing orders (or freezing injunctions) are one of the most powerful forms of relief obtainable from the English courts.

A party subject to a freezing order is directed by the court not to deal with or dispose of its assets save in the very limited circumstances provided in the order.

It therefore provides a means for a claimant to ensure that a defendant's assets will remain preserved so that the claimant may eventually enforce against them in the event it is successful in the proceedings.

The reach of such orders can be very wide indeed as will be detailed in this briefing note.

Moreover, as well as being obtainable in connection with English court and arbitral proceedings, such orders may be obtained by parties:

1. in respect of assets that are located outside of England and Wales; and/or
2. in support of proceedings that are taking place in a foreign jurisdiction (i.e. taking place other than in England or Wales), whether court or arbitral proceedings.

As such, given the potentially wide range of circumstances in which the English court may be prepared to grant a freezing order, this brief introduction should be of wide interest.

The nature of a freezing order

As stated, a freezing order directs a party not to deal with or dispose of its assets save in certain limited circumstances (in the case of an individual, usually so as to meet ordinary living expenses and legal costs, and in respect of a company, to pay necessary sums to keep on trading).

Whilst it does not provide the party that has obtained the order with any security interest in the assets of the party that is the subject of the order, it will specify that any breach of the order may result in penal consequences. Additionally, they will direct third parties with notice of the order, not to dispose of or deal with the assets or assist the defendant to do so. In short, a breach of the order will be a contempt of court that could result in a fine or prison sentence.

As such, freezing orders can be very effective indeed.

When can a freezing order be obtained

Such an order can be obtained in the course of proceedings, i.e. before any judgment is obtained, or post-judgment.

In appropriate circumstances, it is even possible to obtain a freezing injunction before proceedings are issued.

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It may be granted in the context of court proceeding in the English courts. However, as stated, the English courts may also be prepared to grant freezing orders in aid of proceedings - whether court or arbitral – that are taking place abroad.

The jurisdiction to order freezing orders in aid of court proceedings overseas arises from section 25 of the Civil Jurisdiction and Judgment Act 1982 (CJJA 1982). The courts, however, will only exercise their discretion to grant such interim relief where it would be expedient to do so and will typically be cautious in granting such relief for fear of encroaching upon the jurisdiction of the local courts. The English court will consider the risk of conflicting or overlapping orders in other jurisdictions and whether the court would be making an order it could not enforce.

As for arbitration, the court's power to grant freezing orders both before or during an arbitration, or indeed in support of arbitral proceedings anywhere in the world derives from section 44 of the Arbitration Act 1996. The court may also issue a freezing order to aid the enforcement of an arbitral award, whether domestic or foreign.

What type of assets can be frozen?

The types of assets that may be frozen is very broad.

Such an order may extend to chattels, properties, shares and other forms of securities, bank accounts, crypto-currency, vessels/yachts and so on.

A freezing order's reach may be in respect of domestic assets only – i.e. those located only within England and Wales – or worldwide. Typically, however, the court will not grant a worldwide freezing order if there are sufficient assets within the jurisdiction to meet a likely eventual judgment.

The jurisdiction to freeze assets located outside of the jurisdiction is derived from Section 37 of the Senior Courts Act 1981.

What must be shown to obtain a freezing order

A freezing order is a seriously onerous order for the recipient. As such, the courts will not lightly grant a freezing order.

The applicant will need to act promptly to obtain such an order – indeed delay may lead to the court declining to grant such an order. Further, the applicant will need to persuade the court that it is has a cause of action, (although a recent Privy Council decision - non-binding but in practice likely to be highly persuasive on a court now faced with such an application - has indicated that this is no longer necessary), a good arguable case, and that it is just and convenient to make the order.

To establish jurisdiction, if the court does not have personal jurisdiction in respect of the defendant it will usually be necessary to show that there are assets in the jurisdiction.

The applicant will usually need to show that without a freezing order being granted there is a real risk that assets will be dissipated by the defendant such that there will not be assets available at the enforcement stage.

The duty of full and frank disclosure

Often the applicant will seek a freezing order without notice being provided to the defendant – because to inform the defendant in advance of its intention would risk the defendant doing the very

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thing that the order is intended to prevent (i.e. dissipating its assets so as to defeat an eventual judgment).

In these circumstances, a duty of “full and frank disclosure” will be imposed upon the applicant.

In short, this requires the applicant when applying for the freezing order to bring to the attention of the court issues which may tend away from the granting of such an order. In other words, the applicant will need to highlight for the court the issues which the respondent would likely themselves make if they were faced with the application in court.

A finding that the applicant failed to meet its duty of full and frank disclosure is a very common basis for a freezing order to subsequently be set aside by the court at the request of the respondent.

Ancillary orders

The courts have broad powers to support claimants who have obtained such a freezing order to ensure its full impact.

Accordingly, the court will typically grant a supporting disclosure order against the defendant. This will require the defendant to provide the claimant with details of their assets – usually in the form of a sworn affidavit.

Applicant’s undertakings

Any party considering applying for a freezing order should have in mind that it will be required to give an undertaking to the court as to damages. In so doing, the applicant undertakes that if the court later determines that the freezing injunction should not have been awarded, it will pay to the respondent damages in respect of any loss suffered by the respondent. The court may require that the applicant fortifies its undertaking by providing security.

It is hoped that the above provides a useful introduction in respect of this very powerful remedy obtained from the English court.

The author of this piece, and other Haynes Boone London lawyers, have successfully obtained such orders for clients, and would be pleased to address any queries in respect of the above.

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