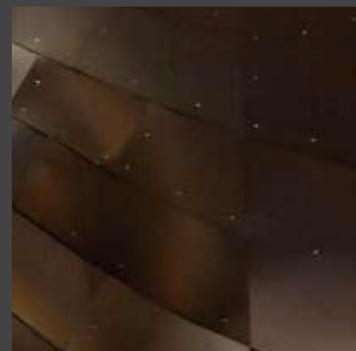


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A Briefing Guide to

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# Freezing Orders

RAHMAN RAVELLI

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Freezing of assets is an area of law where it is essential that the right course of action is chosen and acted upon decisively.

Strong, pro-active legal representation and an intelligent, effective strategy implemented at the earliest possible stage will maximise the chances of you being able to gain the desired outcome in relation to a freezing order.

Rahman Ravelli provides the robust representation that is necessary to challenge assumptions and allegations made by another party and ensure that our clients' difficulties are minimised or resolved as quickly as possible.

## What Is A Freezing Order?

Freezing orders are put in place so that defendants (also known as respondents) cannot diminish the value of the assets or dissipate them – move them or make them impossible to locate - before any judgement is made regarding the ownership of those assets.

Section 37 of the Senior Courts Act 1981 confirms the jurisdiction of the High court to grant a freezing injunction on an interim basis, providing it is “just and convenient” to grant relief. A court can grant an injunction in any case where it would be “right and just” to do so.

Assets that can be frozen include bank accounts, private and public shares, tangible property (such as vehicles and land) and intangible property (such as goodwill in a business or intellectual property rights).

A freezing injunction is effective from the moment it is notified to the respondent. Failure to comply with the freezing order will result in contempt of court proceedings. It is essential, therefore, that legal advice is sought by those bringing or defending a freezing order at all stages of the process.

In order to make a successful application for a freezing order you will have to show that there was an underlying cause of action – for example, a fraud committed - and that there is a real risk of dissipation of the assets. Any application must show there is a good and arguable claim against the defendant. Putting a successful application together requires the assistance of those with the most skill in this particular area of law.

As it is not unusual for high net worth individuals to move their wealth between countries, courts can impose worldwide freezing orders.

All aspects of a freezing order require those involved to make their case in the clearest, most convincing and logical manner possible. A failure to do this will give the defendant ample opportunity to argue that the freezing order should be varied or even discharged by the court. This is why it is essential to seek the best legal expertise whether you are bringing or defending such an order.

## Applying For A Freezing Order

An application for a freezing order has to be prepared carefully and must adhere to the duty of full and frank disclosure. Otherwise it will give the respondent grounds challenging the order once it has been made.

The applicant has to be able to show that:

- They have a good arguable case
- There is a real risk of dissipation
- The assets concerned are within the jurisdiction of the court
- It is just and right to grant the order

The applicant also needs to consider any possible issues that the defence may raise against the application and be able to show that enforcing a judgment without a freezing order would be difficult.

This can involve emphasising the possible risk of dissipation if a freezing order is not

granted. Such emphasis can involve highlighting any or all of the factors below:

- The defendant's conduct. Has the defendant acted in a discreditable way or is he being evasive?
- The type of assets and how they are held. Moveable or liquid assets can be more easily dissipated, taken out of reach and held in complex company structures.
- The length of time the defendant has been in business, the type of business and its financial position. A new company or one with questionable accounting practices or an unclear financial position can represent a risk.
- The defendant's cross-border connections. If the defendant has associates abroad or has moved assets to another jurisdiction this can be seen as a risk.

## Without Notice Applications

When an application is made for a freezing order it is done on an ex-parte basis. This is also known as a without notice application. This means that the application is made to the court without the defendant being notified.

In most circumstances, an order is not made against a party without them being given the opportunity to make representations. But an ex-parte application can be heard if notifying the defendant of the application is likely to cause injustice to the applicant and if the court is satisfied that the risk of loss outweighs the risk of injustice if the order is not made. The applicant has to show that giving notice of the

application would defeat or prejudice the purpose of the application.

Such an application requires the applicant to act with secrecy, speed and attention to detail. It has to be supported by evidence that justifies the application being made without the defendant being notified.

The application, therefore, must contain:

- The reasons why it is being made without notice
- A request for the hearing to be in private
- The circumstances and background facts to the application
- Arguments for why a freezing injunction must be granted
- A cross undertaking in damages - an undertaking by the applicant to pay any damages which the respondent may sustain which the court considers the applicant should pay.
- Full and frank disclosure of the facts

## After the Application

After the application has been heard and granted by the court, the applicant is required to give an undertaking to issue and serve the claim form to the respondent as soon as reasonably practicable.

An order for a freezing injunction will contain a return date for a hearing – a hearing which the defendant can attend to give their version of events. This hearing will determine whether the order should

be continued, with the defendant able to argue that it should be discharged or varied.

The Chancery Guide, which provides detailed legal guidance on how to bring a case to the Chancery Division of the High Court of Justice, states that when a judge grants an injunction without notice it will usually only be for a limited period only. At the return date the onus will be on the applicant to justify the continuation of the order.

## World Wide Freezing Orders

An application for a worldwide freezing order has a reach that extends beyond the country where it is granted. But it involves the same factors being considered by a court, including:

- The location and nature of the assets.
- The level of additional disruption caused by freezing them.
- The effect the order would have on any other litigation or on third parties.

Whether the freezing order is sought for one jurisdiction or for many, great attention to detail has to be applied to the application. Which is why the right legal advice is so important.

## Defending Freezing Orders

When seeking a freezing order, the person applying for it is under a duty to make a full and frank disclosure to the court as the application is usually made with the defendant not being present. When such an injunction is made without notice to another party, those applying for the order must provide a return date at which the other parties can be present.

This is so the case can be reviewed by the court with the benefit of submissions from the defendant.

The return date is usually a couple of weeks after the order is granted. In complex cases, the court is expected to allow sufficient time for the defendant to consider their position, seek legal advice and piece together the arguments they wish to rely on to challenge the order.

In such circumstances, the defendant needs to act quickly if they intend to challenge the order or seek a variation of its terms; such as the amount it allows to be allocated for living expenses. It is also important for the defendant to ensure that his stance is not viewed as either consenting to the continuation of the injunction or giving any undertakings that could prejudice his ability to challenge the continuation of the injunction.

## Grounds for Having a Freezing Order Discharged

The subject of the order can apply to have it discharged on a number of grounds.

These include:

- The allegation that has been made is not arguable: This could be argued due to some of the evidence that relates to the case or on a matter of law.
- The applicant has not established the risk of the assets being dissipated.

- It would not be just to continue the injunction: The defendant may be able to show they have a good argument to show that they would suffer loss as a result of the order.
- The applicant has not disclosed all relevant facts to the court or has misrepresented the situation when applying for the freezing order
- The court has no jurisdiction to issue the freezing order

Alternatively, the defendant could use the return date hearing to argue for the terms of the freezing order to be varied as its original terms are too wide or cannot be justified

## Identifying Ways to Challenge an Order

Whether seeking to vary the terms of the freezing order or have it discharged, a defendant needs to identify as accurately and quickly as possible the loss they are likely to suffer due to the order. In doing this, they must produce evidence that persuades the court that such loss is likely and explain the impact of such a loss.

When an application is made for a freezing order, it is up to the applicant to make a case that persuades the court to grant one. But the way that the applicant builds and argues their case can also provide the defendant with ways to challenge the order.

When applying for a freezing injunction without notice to the defendant, the applicant has to make a full and frank disclosure to the court to ensure fairness, as the defendant is not present to put their case. The applicant

must put before the court all matters that are relevant to the application, including any that may adversely affect the application. If this duty is not met there are grounds to ask the court to set aside the order due to the applicant's failure to comply with the duty.

The applicant is also under a duty to ensure that the correct legal procedures and forms are used in relation to written arguments prepared by the applicant's legal team and the notes taken of the hearing. A failure to disclose any issue or legal principle of law may also be considered a breach of the duty to give full and frank disclosure, which could also provide grounds for the order to be set aside.

A freezing injunction is a serious intrusion into the defendant's personal or business affairs. As a result, a court will be mindful of the need for an injunction not to be used oppressively or as some sort of security for a claim. Any strong arguments that a defendant can put forward to challenge the credibility of an applicant's arguments or evidence will be carefully considered by the court: which offers considerable scope for challenging what the applicant believes is a good, arguable case.

Issues such as the length of time it has taken an applicant to seek a freezing injunction can be used by a defendant. If the applicant has not been quick in seeking the injunction it could be argued that there is no real risk of dissipation. Similarly, a defendant can emphasise the

length of time they have been doing business reputably to challenge the applicant's claim of there being a dissipation risk.

The facts involved and the circumstances surrounding each application will vary hugely. But each one will offer the potential for the subject of the injunction to challenge the restrictions that the freezing order has placed on them.

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