

Freezing injunctions and search orders

I. Introduction

Two of the most far-reaching and potent instruments in the toolkit of an English court are freezing injunctions and search orders. Both are orders *in personam*, directed to the conduct of a defendant (or judgment debtor) but they may have collateral effects on third parties which lends them something of an *erga omnes* character.

A freezing injunction, previously known as a *Mareva* injunction, restrains a defendant from

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removing assets from the jurisdiction or from dealing with assets, pending the determination of the court proceedings or execution of the judgment (or an arbitral award) (*Mareva Compania SA v International Bulk Carriers SA* [1980] 1 All ER 213). It may be applied to assets within the territorial jurisdiction of the court, but in an appropriate case (and subject to appropriate provisos to respect other countries' sovereignty) it may be applied to assets located anywhere, in which case it is often called a 'worldwide' freezing injunction.

A search order, previously known as an *Anton Piller* order, requires the defendant to permit certain persons to enter his or her premises, to search for documents or other articles of movable property, and to take them away and retain them for the purpose of preserving them, either as evidence or as the subject matter of the legal dispute (*Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55).

II. Freezing injunctions

The fundamental principle underlying the far-reaching effect of a freezing injunction is that 'within the limits of its powers, no court should permit a defendant to take action designed to ensure that subsequent orders of the court are rendered less effective than would otherwise be the case'. That is, while it is recognized that 'one of the hazards facing a plaintiff in litigation is that, come the day of judgment, it may not be possible for him to obtain satisfaction of that judgment fully or at all', the purpose of a freezing injunction is to prevent the defendant 'artificially . . . creat[ing] such a situation' (*Derby & Co Ltd v Weldon (Nos 3 and 4)* [1990] Ch 65, 76).

But while their effect can be far-reaching, their purpose, namely the prevention of a defendant dissipating his or her assets with the intention or effect of frustrating enforcement of a prospective (or actual) judgment, must be borne in mind. It has been emphasized that they are not a proprietary remedy, nor are they granted to give a claimant advance security for his claim (and hence do not have priority over the normal rules on an insolvency), and they are not an end in themselves. Rather, they are a supplementary remedy, granted to protect the efficacy of court proceedings, domestic or foreign (*Fourie v Le Roux* [2007] 1 WLR 320, 322 [3]).

This being so, a freezing injunction is often, but not always, sought before the

commencement of substantive proceedings. It is also usually sought without notice to the defendant (*ex parte*). The reason for this is plain: the very existence of the proceedings may be a catalyst to dispose of, or otherwise deal with, assets in such a way to defeat the purpose of the proceeding. But the apparent unfairness of a court acting on the unilateral application of one party, contrary to the principle of *audi alteram partem*, is mitigated by highly detailed (and very strict) rules and safeguards. Among the most important are, first, the duty of the claimant to exercise utmost good faith in making the application, requiring him or her to bring to the court's attention all facts and other matters which might affect the court's decision whether or not to grant the injunction; and, second, the right of the defendant to apply to the court at short notice to have the injunction lifted or varied.

A freezing injunction is not legally operative on the property itself, nor does it give the claimant an interest in the property (→ Property and proprietary rights). Rather, it acts by restraining the defendant, who must be subject to the personal jurisdiction of the court, from dealing with the assets that are the subject of the order (*Anglo Eastern Trust Ltd v Kermanshahchi* [2002] EWHC 1702 (Ch); *Flightline Ltd v Edwards* [2003] 1 WLR 1200).

As already noted, the assets that may be the subject of a freezing injunction may either be within the court's territorial jurisdiction, or outside the jurisdiction. What is important is whether the defendant is personally subject to the jurisdiction of the English court. That said, it is useful to consider the relevant principles separately as the English courts have generally been more reluctant to grant such far-reaching injunctions where the assets in question are outside the jurisdiction of their courts.

Turning first to a freezing injunction in respect of assets within the jurisdiction, there are four matters that must be satisfied by the claimant to secure the favourable exercise of the court's discretion to grant a freezing injunction.

First, the claimant must have a good arguable case on a substantive claim over which the court has jurisdiction. The requirement that there be a good arguable case was explained as being one 'which is more than barely capable of serious argument and yet not necessarily one which the judge believes to have a better than 50 per cent chance of success' (*Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft mbH*

und Co KG [1983] 2 Lloyd's Rep 600, 603, 605; affirmed on appeal [1983] 1 WLR 1412). This is to be contrasted with a 'serious question to be tried', which is sufficient for most other types of interlocutory injunction (see generally, *American Cyanamid Co v Ethicon Ltd* [1975] AC 396).

Second, the court must have jurisdiction over a substantive claim capable of supporting the freezing injunction. To this end, *Lord Bingham* explained, in *Fourie v Le Roux* [2007] 1 WLR 320, 322–3 [2]–[3], that such injunctions are not an end in themselves; '[t]hey are a supplementary remedy, granted to protect the efficacy of court proceedings, domestic or foreign. . . . [The claimant] must at least point to proceedings already brought, or proceedings about to be brought, so as to show where and on what basis he expects to recover judgment against the defendant'.

There has been significant debate in the case-law as to whether something short of an immediately enforceable cause of action is sufficient. This remains an open question as a matter of English law. Indeed, in *HM Revenue & Customs Commissioners v Ali* [2012] S.T.C. 42, [33], *Warren J* considered this was so, leaving open the possibility that a present debt payable in the future (and thus, not an immediately enforceable cause of action) could be sufficient to ground a freezing injunction. It may be difficult to reconcile this statement with the dicta of *Lord Bingham*, and future cases will determine how far beyond the accepted boundaries of an immediately enforceable cause of action a freezing injunction will be permitted to roam.

Third, s 37(3) of the Senior Courts Act 1981 provides that the power to grant a freezing injunction involves 'restraining a party to any proceedings from removing from the jurisdiction . . . or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction'. Accordingly, provided the court has personal jurisdiction over the defendant, that express power extends to granting the injunction only in respect of assets in the jurisdiction. But, over time, the courts have developed jurisprudence permitting a worldwide freezing injunction. The worldwide freezing injunction will be considered separately below.

Fourth, the claimant must be able to establish that, if an \rightarrow injunction is not granted,

there is 'a real risk that a judgment or award in favour of the claimants would go unsatisfied' (*Ninemia Maritime Corporation v Trave Schiffahrtgesellschaft mbH und Co KG* [1983] 1 WLR 1412, 1422). This requirement has been further explained by identifying two circumstances where there is a sufficient risk of dissipation to warrant the grant of a freezing injunction, namely that: (i) there is a real risk that a judgment or award will go unsatisfied, in the sense of a real risk that, unless restrained by injunction, the defendant will dissipate or dispose of his assets other than in the ordinary course of business; or (ii) unless the defendant is restrained by injunction, assets are likely to be dealt with in such a way as to make enforcement of any award or judgment more difficult, unless those dealings can be justified for normal and proper business purposes (*The Nicholas M* [2008] 2 Lloyd's Rep 602, 614 [49]).

It is apparent that there are various restrictions on how far a court will go in freezing the assets of a defendant. For example, absent exceptional circumstances, the court should not impose on a defendant a freezing injunction that extends beyond the necessary assets to satisfy the *prima facie* justifiable quantum of the claim (*Z Ltd v A-Z and AA-LL* [1982] QB 558, 583, 589). That is, the defendant should be left free to deal with the balance of his or her assets. Another means of restricting the freezing injunction is to permit the defendant to make payments in good faith and in the ordinary course of business (*Iraqi Ministry of Defence v Arcepey Shipping Co SA* [1981] QB 65). Likewise, in respect of natural persons, the freezing injunction should not prohibit them paying for ordinary living expenses, nor for the payment of ordinary debts as and when they become due (*Babanaft International Co SA v Bassatne* [1990] Ch 13). And, absent alternative funds, the order should permit the payment of expenses in respect of legal proceedings (*A v C (No 2)* [1981] QB 961).

In order to obtain the \rightarrow injunction, it is necessary for the claimant also to provide an undertaking to the court that it will pay the defendant any \rightarrow damages which flow from the grant of the injunction if it later transpires that the injunction should never have been granted. Such an undertaking (usually called a cross-undertaking) then provides the court with a power to order the claimant to pay damages to compensate for the loss caused by an injunction – either by third parties who are notified of the

injunction and incur expense as a result (such as banks which have to search to see if they hold the relevant assets) or by the defendant itself if the injunction should not have been granted. Indeed, a body of case-law has also developed whereby a defendant may seek fortification of the undertaking as to damages. That is, a defendant may obtain an order that the claimant pay an amount of money into the court's account as a form of security for the cross-undertaking if he or she satisfies the court (i) of an intelligent estimate of the likely amount of loss which might result to a defendant by reason of the injunction; (ii) that the applicant for fortification has shown a sufficient risk of loss to require fortification; and (iii) that the contemplated loss would be caused by the grant of the injunction. The court need be satisfied that the defendant has a good arguable case that it will suffer loss in consequence of the making of the freezing injunction (*Energy Venture Partners Limited v Malabu Oil Limited* [2015] 1 All ER (Comm), [13], [52]–[53]).

If the court is satisfied that it is appropriate to make the freezing injunction, it will usually require the defendant to disclose to the claimant the form and whereabouts of his or her assets. This is known as a disclosure order. It serves two purposes: first, to seek to prevent the defendant from disobeying the freezing order; and, second, to enable notice to be given to third parties who may have custody of the assets, most particularly, banks. So as to ensure the efficacy of such disclosure order, the courts have permitted cross-examination on affidavit and ordered disclosure of documents in relation to the matters the subject of the order (*House of Spring Garden Ltd v Waite* [1985] FSR 173).

The purpose of notifying banks or other third parties who may have an interest in the relevant assets or who may otherwise be affected by its terms is both practical and legal. First, it may prevent an unscrupulous defendant removing or otherwise dealing with the assets in breach of the injunction, and second, it will create some of the conditions for holding the third party liable for contempt of court if they knowingly assist in ('aid and abet') the breach of the injunction, or knowingly act in a way which is contrary to its purpose. On the other hand, a claimant who gives notice to a third party, such as a bank, runs the risk that that party may incur expenses in complying with the injunction which the claimant will then be called upon to pay pursuant to the cross-undertaking in damages.

Freezing injunctions are available in aid of proceedings in other jurisdictions, in aid of a foreign judgment and in aid of an arbitration award. In all cases, however, the defendant must personally be subject to the jurisdiction of the English courts (*The Siskina* [1979] AC 210).

Turning now to worldwide freezing injunctions, although attended by the need for special grounds, their availability as a mechanism to secure justice is undisputed. This is so despite earlier jurisprudence suggesting that the existence of assets within the jurisdiction was a prerequisite to their availability (*Mareva Compania SA v International Bulk Carriers SA* [1980] 1 All ER 213). The terms of s 37(3) of the Senior Courts Act 1981, to which reference was made above, have been interpreted to mean that there should be no discrimination against parties not domiciled, resident or present within the jurisdiction, not so as to mean that a freezing injunction is limited to assets within the jurisdiction (*Babanaft International Co SA v Basstne* [1990] Ch 13).

The principles discussed above in relation to the grant of freezing injunctions in respect of assets within the jurisdiction apply equally with respect to assets outside the jurisdiction, save that the court will require, in addition to there being a good arguable case and a real risk of dissipation, that there is a sufficiently strong link with England and Wales (*Mobil Cerro Negro Ltd v Petroleos de Venezuela SA* [2008] 1 Lloyd's Rep 684). It follows from the limited circumstances in which the court is willing to grant such extraterritorial relief that, if assets available within the jurisdiction are sufficient to satisfy the *prima facie* justifiable *quantum* of the claim, there will be no cause to grant an injunction in respect of assets outside the jurisdiction (*Derby & Co Ltd v Weldon (Nos 3 & 4)* [1990] Ch 65, 79).

The effect on third parties in overseas countries is particularly pertinent to the grant of a worldwide freezing injunction. That is to say, → comity requires that adequate regard be paid to the jurisdiction of foreign courts over assets located within the confines of their own territorial jurisdiction. As a result of this concern, a so-called *Babanaft* proviso is included in such orders, which provides that the order is expressed not to affect third parties outside the reach of the English court's jurisdiction (*Babanaft International Co SA v Basstne* [1990] Ch 13). There is now a general requirement (subject to some exceptions) that the order

should expressly provide that it does 'not affect or concern anyone outside the jurisdiction of this court' (see para 19(1) of the example of a search order annexed to Practice Direction 25A (Interim Injunctions)).

Such is the risk of a worldwide freezing order affecting defendants and third parties that more recently the courts have generally required that the claimant give an undertaking that the order will not be enforced without the permission of the English court. The rationale for this limitation is a concern that the injunction should not be used as a means of oppression by bringing applications in a number of countries throughout the world (*In re Bank of Credit and Commerce International SA* [1994] 1 WLR 708).

III. Search orders

Originally developed as a remedy in intellectual property cases by the English courts in the 1970s, culminating in the judgment of the Court of Appeal in *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55, the jurisdiction of the High Court of England and Wales to make search orders is now found in s 7 of the UK Civil Procedure Act 1997. (For the background to the enactment of s 7, see the report of the committee of judges appointed by the Judges' Council: *Anton Piller Orders: A Consultation Paper* (Lord Chancellor's Department, 1992).)

That provision enables the court to make an order for the purpose of securing, in the case of any existing or proposed proceedings, the preservation of evidence which is or may be relevant or the preservation of property which is or may be the subject matter of the proceedings or as to which any question may arise in the proceedings: s 7(1). It may only be sought by a person who is, or appears to the court likely to be, a party to the proceedings: s 7(2).

Such an order is far-reaching and requires the defendant to consent to what would otherwise be a trespass to land, and what would otherwise constitute the tort of conversion; it permits the person named in the order to enter premises (including a vehicle: s 7(8)) in England and Wales, and, while on the premises, to carry out a search for or inspection of anything described in the order, make or obtain copies of anything so described and to retain for safe keeping anything described in the order (s 7(3)–(5), see further, paragraph 7 of Practice Direction 25A (Interim Injunctions) and the

annex thereto, which provides an example of a search order).

Search orders are necessarily sought by a claimant without notice to the defendant. As with freezing injunctions, the rationale is clear: if the defendant were aware of the application for a search order, he or she would, on the claimant's case, take steps to conceal, remove or destroy the subject property. The safeguards attending an *ex parte* application for a search order are comparable to those which apply in the case of a freezing injunction, including the duty of full and frank disclosure to the court. Where a search order is obtained on inadequate disclosure of material evidence known to the claimant, the defendant will generally be entitled to have it set aside and to be compensated (cf *Columbia Pictures Industries v Robinson* [1987] Ch 38, 86–8). Similarly, a cross-undertaking in → damages is required and damages would be payable to the defendant pursuant to the undertaking for any damages suffered by him or her if it turns out that the search order should not have been granted. Additionally, the order provides for the defendant's interests to be protected by requiring the search to be conducted under the supervision of a named 'supervising solicitor', who is independent of the parties and who is experienced in the conduct of such searches. Solicitors (that is, qualified lawyers other than barristers) are officers of the court and in this role the supervising solicitor is directed by the order to explain it to the defendant and to direct the manner in which the search is carried out, including making preliminary decisions on whether particular material is protected from production on the grounds that it is privileged or might incriminate the defendant.

Given the nature of the order, and the fact that the defendant is not present at the application, the courts have been careful to scrutinize the circumstances where such an order is appropriate. Initially, it was suggested that such orders are 'at the extremity of [the] court's powers' and they 'will rarely be made, and only when there is no alternative way of ensuring that justice is done to the applicant' (*Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55, 61). But, over time, their use has become more common; 'in practice [search] orders are granted far too routinely for them to be regarded as exceptional' (Rupert Jackson and others (eds), *Civil Procedure (White Book)*, vol 2 (2016 edn, Sweet & Maxwell 2016) [15–91]).

The grounds for the making of the order are now well-established (*Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55, 62; *Lock International plc v Beswick* [1989] 1 WLR 1268, 1279–80; *Indicii Salus Ltd v Chandrasekaran* [2006] EWHC 521, [85]).

First, the claimant must have an extremely strong *prima facie* case; a suspicion of the commission of a wrong or a serious question to be tried as to whether a wrong has been committed is not enough.

Second, the damage, whether potential or actual, must be very serious for the claimant.

Third, there must be clear evidence that the defendant has in his or her possession the incriminating documents or things.

Fourth, there must be a real possibility that the defendant will destroy such material before an application on notice is made; a “real possibility” is to be contrasted with the extravagant fears which seem to afflict all plaintiffs who have complaints of breach of confidence, breach of copyright or passing off (*Booker McConnell v Plascow plc* [1985] RPC 425, 441).

Fifth, the harm likely to be caused by the execution of the search order on the defendant in his or her business affairs must not be out of proportion to the legitimate object of the order.

If the court is satisfied on these matters, it may, but need not, make the search order sought. It remains for the court to consider, in the exercise of its discretion, the injustice to the defendant, who is absent. In so doing, the court asks whether the claimant will suffer a greater injustice than that which the court by making the order, will be inflicting on the defendant (*Columbia Picture Industries v Robinson* [1987] Ch 38).

Given the nature of the relief the subject of a search order, they are commonly sought in cases against former employees who have joined competitors or started competing businesses of their own, cases involving infringement of intellectual property rights and matrimonial proceedings where one spouse is thought to have made inadequate disclosure.

As such, they are a very powerful tool for a claimant to ensure the preservation of evidence or property that, assuming the claimant is right, is likely to be very significant to the pursuit of its claims against the defendant.

IV. Conclusion

The freezing injunction and the search order are very powerful tools for assisting claimants to

secure justice in appropriate cases. Their availability is unquestioned, but the English courts have been very careful to develop principles to limit their use only to cases where their far-reaching effect is properly justified. To this end, the English courts have developed safeguards to ensure that the breadth of such orders does not go beyond what is necessary to achieve their intended purpose in the particular case, and to ensure that they do not place an unjustified burden on the defendant or third parties.

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Literature

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