# Laying down the law on freezing orders

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**CATEGORY:**
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In UL v BK [2013] EWHC 1735 (Fam), Mostyn J reiterated the mantra that the law to be applied in one court room must be the same as that applied in the next, whether in the High Court or a county court, the Family Division or the Chancery.

This case concerned a freezing injunction which a wife had successfully obtained against her husband, without notice and, Mostyn J found, without much evidence. He refused her application to continue the freezing order.

A freezing injunction (also known as a 'Mareva order') prevents a respondent from disposing of or moving his assets. It is a draconian measure: one of the court's two 'nuclear weapons' (the other being search orders, also known as 'Anton Pillar orders', which allow the applicant to enter the respondent's premises for search and seizure).

Imposed against someone who has little or no knowledge of the application, and (usually) no opportunity to be heard (so lawyers should take note of the potential human rights implications under Article 6 of the European Human Rights Convention), a freezing order can be financially paralysing.

It is for good reason, therefore, that the hurdle for obtaining a freezing injunction is high. The applicant must have a good arguable case, prove there is a 'real risk of dissipation' and show that it would be just and convenient in all the circumstances of the case to grant the freezing order.

In recent years, it has been increasingly easy to surmount that hurdle; or that hurdle has been lowering. In an earlier case, Mostyn J expressed his shock at the 'volume of spurious ex parte applications' (FZ v SZ and others [2011] 1 FLR 64) and in this recent case the Judge again deplores the 'continued widespread abuse of the principles governing ex parte applications'.

Mostyn J reminds us of those principles. There must be a real risk of dissipation. Holding assets in an offshore structure is not enough. The applicant must have an appropriately strong case, supported by evidence of objective facts. Further, and importantly for practitioners, it is imperative that all the safeguards and principles the law requires are 'scrupulously applied'.

### Notice

The applicant has a duty to give the respondent notice of the application (however short) unless it is 'essential' that the respondent must not be aware of the application. Rarely will it be acceptable to give no notice at all. There is no excuse for failing to contact a respondent, in this age of instant communication. Doing so can save costs, and judges hearing urgent applications are used to communicating with the respondent by telephone or by e-mail. But just as an e-mail to the respondent can take seconds, so too an e-mail to the bank with an instruction to transfer funds offshore, out of the freezing order's reach, can be sent in an instant. It is the lawyer's role to weigh up that risk against the applicant's duty to give (even very short) notice to the respondent of the injunction application.

### Illegally obtained documents

Recounting the Court of Appeal case of *Tchenguiz v Imerman* 2010 (in which Withers acted), Mostyn J warned divorcing spouses against 'self-help'. Applicants should not access and copy confidential documents belonging to their spouse. If they do, the lawyer acting for (typically) the applicant wife should hand them to the husband's solicitors (if he has one) without reading them. The husband's solicitor should review them (mindful of his/her duty to the court) and disclose the relevant, admissible documents. If the husband has no solicitor, the wife's solicitor should retain the documents (unread) and the court will need to decide what should happen – with the likely outcome that an independent lawyer will be appointed to review the documents, undertaking the same exercise as the husband's lawyer would have done.

There may be circumstances in which the wife tells her solicitor 'too much' (for example, privileged information), in which case he/she may have to cease to act.

### Candour

The sources of information and belief must be clearly set out for the court. The applicant's affidavit in support of his/her application for a freezing injunction is key. Often it forms the main evidence the court has before it, so a lot hinges on it.

If the wife has seen documents indicating her husband is dealing with assets unjustifiably and there is a clear risk of dissipation, then her recollection of those documents may form the basis of her written evidence (even if those documents were illegally obtained). But she must be candid in explaining how she came about such knowledge. An absence of candour can be fatal to an applicant's success, as in this case, in which the wife was criticised for failing to state in her evidence that she had obtained documents by accessing her husband's safe. That was, the judge

found, a serious breach of her duty of candour, which contributed to her forfeiting her right to have a freezing injunction re-granted.

### Damages

Applicants are required to give undertakings to the court to compensate the loss others experience as a result of the freezing order. This may include loss suffered by the respondent and also loss or damages incurred by a third party (eg the respondent's company). Mostyn J annexed to his judgment standard examples of freezing and search orders, including wording for the appropriate undertakings.

These are high octane applications which have to be made quickly – but that does not mean they should be made lightly. Wasted costs orders can be made against applicants who fail to comply with the necessary safeguards and principles. This judgment serves as a warning to lawyers to have ‘all their ducks in a row' before turning up at court to appear in the urgent applications list.

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