Best practice

Preserving assets by restraining and freezing orders

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Restraining and freezing orders can be expensive and inflammatory. That said, no matter how valuable a client's potential claim might be in theory, there is no value to it unless there are secure preserved assets against which it can ultimately be enforced. Therefore practitioners must always consider the specific circumstances and potential risks and take whatever steps are necessary to protect their client's position – which might, in extreme cases, include an application for a restraining/freezing order.

This is a huge topic, but here are some pointers to help navigate the waters.

Decide first if you'll apply under MCA 1973 or the SCA 1981/the inherent jurisidiction

There are two possible routes when an injunction is sought to preserve assets:

(a) an anti-disposition injunction preventing the respondent from dealing with a specific asset which is about to be disposed of, under s 37(2)(a) of the Matrimonial Causes Act 1973 ('MCA 1973');

(b) the more general freezing order under s 37 of the Senior Courts Act 1981 ('SCA 1981') and the court's inherent jurisdiction.

The MCA 1973 can only be used in matrimonial cases (and not in TOLATA or Sch 1 cases), and can only be used to freeze assets in which the respondent has an interest. So, for example, property owned by a company cannot be frozen unless the company is joined and injuncted. If the company is not joined, then it will not be possible to apply under the MCA 1973, but the SCA 1981/the inherent jurisdiction will be available. The SCA 1981/the inherent jurisdiction can be used in TOLATA and Sch 1 cases.

What is the test, or tests?

Although historically it was considered easier to obtain a freezing order under s 37, SCA 1981/the court's inherent jurisdiction than under the MCA 1973, more recently it has been established by the courts that the test to be applied is the same, regardless of which route you choose.

Section 37 MCA 1973 requires the applicant to show that the respondent is about to make a disposition with an intention of defeating the applicant's claim for financial relief. It is therefore crucial to be able to provide evidence of a real risk of a specific disposition. Section 37(5)(b) of the MCA 1973 creates a rebuttable presumption that the respondent intends to defeat a claim for financial relief if the threatened transfer would have the consequence of doing so. Therefore, all the applicant has to show is that a transaction is about to happen which would have the effect, if not restrained, of defeating her claim.

Under the SCA 1981, relief can be granted where the court is satisfied that:

(i) the claimant has a good arguable case against the defendant;

(ii) there is a real risk that judgment will go unsatisfied by reason of the disposal by the defendant of his assets, unless he is restrained from disposing of them; and

(iii) it would be just and convenient in all the circumstances of the case to grant the relief sought.

Although they are worded differently, essentially, both tests require proof of a real risk of dissipation.

As Mostyn J notes in *ND v KP (Freezing Order: Ex Parte Application)* [2011] EWHC 457 (Fam), [2011] 2 FLR 662:

> '. . . whilst the words used are different the language all points in the same direction, namely that there must be a good case put before the court, supported by objective facts, that there is a likelihood of the movement, or the dissipation, or the spiriting away, or the salting away, or the squirreling away, or the making of a disposition, or the transfer, of assets, with the intention of defeating a claim. It all comes to the same thing.'

Ex parte or short (even very short) notice?

The requirement of exceptional urgency for ex parte applications is expressly stipulated in para 5.1 of FPR 2010 PD 18A. This was emphasised by Mostyn J in *L v K (freezing orders: principles and safeguards)* [2013] EWHC 1735 (Fam):

> 'Where the application for a freezing order is made ex parte the applicant has to show that the matter is one of *exceptional urgency*. Short informal notice must be given to the respondent unless it is *essential* that he is not made aware of the application. No notice at all would only be justified where there is powerful evidence that the giving of any notice would likely lead the respondent to take steps to defeat the purpose of the injunction, or where there is literally no time to give any notice before the order is required to prevent the threatened wrongful act. Cases where no notice at all can be justified are very rare indeed. The order of the court should record on its face the reason why it was satisfied that no or short notice was given.' [51]

The same point has been made by Tugendhat J in the Queens Bench Division (*O'Farrell v O'Farrell* [2012] EWHC 123 (QB), [2013] 1 FLR 77):

> '[66] Like Mostyn J, I too have been shocked at the volume of spurious ex-parte applications that are made in the Queens Bench Division. . . . In these days of mobile phones and emails it is almost always possible to give at least informal notice of an application.'

However, whilst it is the case that the rise of technology allows short notice to be given quickly and easily, that same technology also allows respondents to move their assets quickly and easily.

This principle has since been reiterated by the then President of the Family Division, Sir James Munby, in para 7 of his Practice Guidance dated 18 January 2017.

The duty of candour

Where no notice, or short notice, is given, the applicant is fixed with a high duty of candour. An applicant is under a duty to the court to make the fullest disclosure of all material facts, including any defence he has reason to anticipate may be advanced. If the court finds that there have been breaches of the duty of full and fair disclosure, the general rule is that it should discharge the order.

The evidence

The application must be supported by evidence, which must set out all of the facts on which the applicant relies, including all material facts of which the court should be made aware. The sources of information and belief must be clearly set out. Concerns or suspicions without evidential basis will not be sufficient. There must, at least, be evidence of an unjustified dealing with assets by the respondent. Holding assets in off-shore structures (for example) will not of itself amount to such unjustified conduct.

Where an application is made without notice, the evidence must also set out why notice was not given.

Who to apply to

Mostyn J addressed this in the case of *Tobias v Tobias* [2017] EWFC 46, [2018] 1 FLR 616, in which he stated that in his view it was impossible to conceive of any circumstances where an application for a freezing order should be heard in the High Court, rather than the Family Court in a money case. The Family Court has full jurisdiction whether the application is pursuant to the Matrimonial Causes Act or the Senior Courts Act.

Best practice

An application for a freezing order should ordinarily be heard by a judge of district judge level or a judge of circuit judge level within the Family Court. If the application for a freezing injunction seeks to freeze in excess of £15m, then it would be appropriate to approach a High Court Judge. If the application is to freeze assets in excess of £7.5m and it is accompanied by factors of complexity (as set out in the Statement on the Efficient Conduct of Financial Remedy Hearings dated 1 February 2016, at para 3(3)–3(10)), then it would be appropriate to approach a High Court judge. However, if the assets sought to be frozen do not exceed £7.5m, then it would only be appropriate to approach a High Court judge if the application involved a novel and important point of law.

The order

Standard order 3.1 should be used.

The order must contain an undertaking by the applicant to pay any damages sustained by the respondent which the court considers the applicant should pay.

The order must also contain a number of safeguards: the respondent should be permitted to undertake ordinary business dealings, and provision must be made to allow the respondent to meet his day to day living expenses and legal representation.

The order must be served on the respondent, together with the application, statement in support and a full note of the hearing. The order must also be served on affected third parties. If third parties are to be served, it is important to consider the order in which they are to be served if they might 'tip off' the respondent.

As stated at the outset, restraining and freezing orders can be expensive and inflammatory. As Mostyn J described in *L v K*, 'a nuclear winter often ensues'. However, in some cases they are vital for our clients.