URGENT INJUNCTION APPLICATIONS: BEST PRACTICE AND PITFALLS TO AVOID

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INTRODUCTION

1. Pre-emptive relief may often be determinative of the course of litigation; the effect of an early tactical advantage is frequently difficult to reverse. What follows is intended to help applicants and respondents:

    (1) focus on the circumstances in which injunctive relief (particularly in the context of without notice applications) is genuinely appropriate;
    (2) highlight important aspects of the practice and procedure governing applications for interim injunctions;
    (3) understand the content of the duties on a without notice applicant and the consequences of breach;
    (4) consider in more detail the duty of full and frank disclosure;
    (5) examine the role of undertakings, or cross-undertakings, in damages;
    (6) understand some of the issues which arise on implementation and enforcement of the order;
    (7) understand the range of costs orders which may be made.

2. Just as early success may strengthen a claimant's hand, the bloody nose of an unsuccessful application can have lasting consequences.

3. A convenient starting point (and salutary lesson) for those advising a prospective applicant for urgent injunctive relief is the decision of Henderson J in *Franses v Somar Al Assad and Ors* [2007] EWHC 2442(Ch) where the court held a without notice freezing injunction obtained by a liquidator against a judgment creditor was:

    (1) improperly made without notice;
    (2) suffered from "severe" procedural flaws; and
    (3) obtained against a backdrop of a breach of the duty of full and frank disclosure in 2 respects.

4. The cumulative effect of the deficiencies justified an award of costs against the liquidator applicant on the indemnity basis. The public criticism of the legal team involved was not probably particularly welcome either.

JURISDICTION

5. The jurisdiction of the High Court to grant injunctions (and, more particularly, freezing injunctions) was the subject of review by the House of Lords in *Fourie v Le Roux* [2007] UKHL 1; [2007] 1 WLR 320.

6. The main speech was delivered by Lord Scott of Foscote, from which it is possible to extract the following propositions:

    (1) the word "jurisdiction" is potentially ambiguous. In the strict sense, jurisdiction is a reference to the court's power to grant the relevant relief. Sometimes, however, jurisdiction is used to describe the settled practice governing the exercise of the power; the High Court's power to grant injunctions is derived from the pre-Supreme Court of Judicature Act 1873 powers of the Chancery courts, a power now confirmed in s 37 of the Supreme Court Act 1981[1];

[1] Which provides (so far as is relevant):

> *(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just to do so.*

(2) whether the jurisdiction has been properly exercised by a judge does not involve a review of discretion but an examination of the restrictions and limitations placed on the power by a combination of judicial precedent and rules of court;

(3) provided the court has in personam jurisdiction over the person against whom an injunction, whether interlocutory or final, is sought, the court has jurisdiction, in the strict sense, to grant it;

(4) as to the granting of interim relief in relation to proceedings that have been or about to be commenced in a foreign state, jurisdiction (in the strict sense) exists by virtue of the Civil Jurisdiction and Judgments Act 1982, as extended by the Civil Jurisdiction and Judgments Act 1982 (Interim relief) Order 1997 (SI 1997/302);

(5) in suitable circumstances a freezing order[2] may be, and often is, granted and served on the respondent before substantive proceedings have been instituted. Such an order is valid and of immediate effect but if proceedings for substantive relief are not instituted, the freezing order may lapse in accordance with its own terms or, on an application by the respondent, may be discharged;

(6) no "activation" of the court's jurisdiction to grant an injunction by issue of substantive proceedings is, therefore, needed;

(7) whenever an interlocutory injunction is applied for, the judge, if otherwise minded to make the order, should pay careful attention to the substantive relief that is, or will be, sought;

(8) in deciding whether, in the words of s 37 of the SCA 1981, it is "just and convenient" to grant an injunction, the court must have regard to the interests of the defendant as well as the claimant;

(9) it is very difficult to visualise a case where the grant of a freezing order, made without notice, could be said to be properly made in the absence of any formulation of the case for substantive relief that the applicant for the order intended to institute;

(10) at the least a draft claim form might be expected;

(11) the respondent to a without notice freezing injunction made without substantive proceedings having been started is entitled to the protection of directions about the institution of such proceedings.

7. As to the power of a Master or District Judge sitting in the High Court to grant an interim injunction, see *Practice Direction 25A – Interim Injunctions*, paras 1.1 to 1.4[3] & *Civil Procedure* (the *White Book*), 2016, vol 1, at para 25.0.7.

8. So far as county courts are concerned, s 38 of the County Courts Act 1984 confers a general power, subject to regulations, for a county court to make any order which could be made by the High Court of the proceedings were in the High Court.

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(2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just.

(3) The power of the High Court under subsection (1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, 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.

(4) …

(5) …

[2] And, by extrapolation, any other interim order.

[3] Reproduced in *Civil Procedure* (the *White Book*), 2016, vol 1, at p 760.

9. The county courts' jurisdiction to grant freezing injunctions is now unrestricted but applications for search orders must be made to the High Court: see the County Court Remedies Regulations 2014.

OVERVIEW OF AVAILABLE RELIEF

10. CPR 25.1(1) contains some common (and some less common) forms or interim relief; it is not exhaustive as sub-paragraph (3) makes plain:

    The fact that a particular kind of interim remedy is not listed in paragraph (1) does not affect any power that the court may have to grant that remedy.

11. CPR 25.1(1) does, however, expressly refer to the following types of injunctive or quasi-injunctive relief:

    (1) interim injunctions (CPR 25.1(1)(a));

    (2) an order for the detention, custody or preservation of relevant property (CPR 25.1(1)(c)(i));

    (3) an order under section 4 of the Torts (Interference with Goods) Act 1977 to deliver up goods (CPR 25.1(1)(e));

    (4) freezing injunctions (CPR 25.1(1)(f)); and

    (5) search orders(CPR 25.1(1)(h)).

PRINCIPLES FOR RELIEF – INTERIM INJUNCTIONS GENERALLY

12. The leading authority on the grant of interim injunctions generally continues to be *American Cyanamid Co v Ethicon Ltd* [1975] AC 396. In some instances, however, the initial threshold test will vary according to the nature of the relief sought.

Initial threshold – a serious issue to be tried

13. Generally the applicant must first satisfy the court that his claim discloses a serious issue to be tried: [1975] AC 396, at 407 G per Lord Diplock. It is no part of the court's function at the hearing of an application for interim injunctive relief to try to resole conflicts of evidence or to decide difficult questions of law: *ibid* at 407H. Unless the material available to the court at the hearing of the application fails to disclose a real prospect of the claimant's succeeding in his claim for a permanent injunction, the court should go on to consider whether the balance of convenience lies in granting or refusing the interim relief sought: *ibid* at 408 A-B.

14. Where the court is considering whether to grant relief which might affect the exercise of the right to freedom of expression under the Convention for the Protection of Human Rights and Fundamental Freedoms (e.g. applications in the context of defamation proceedings), a higher threshold is required. Section 12(3) of the Human Rights Act 1998 provides that no such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed. "Likely" in this context does not mean more likely than not but is higher than "real prospect" or "serious issue to be tried": see *Cream Holdings v Banerjee* [2005] 1 AC 253; *Boehringer Ingelheim Ltd v Vetplus Ltd* [2007] EWCA Civ 583; [2007] Bus LR 1456; [2007] FSR 29.

15. For the threshold test on applications for freezing injunctions, see below.

Balance of convenience

16. The court should in this context first consider whether, if the claimant were to succeed at trial in establishing his right to a permanent injunction, he would be adequately compensated by

an award of damages for the loss sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of trial: *American Cyanamid* at 408 C.

17. If damages in the measure recoverable at common law would be an adequate remedy *and the defendant would be in a financial position to pay them*, no interim injunction should normally be granted, however strong the claimant's claim appeared to be at that stage (emphasis added): *ibid* at 408 C-D.

18. If, on the other hand, damages would not provide an adequate remedy for the claimant in the event of his succeeding at trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the claimant's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the tome of the trial: *ibid* at 408 D.

19. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the claimant would be in a financial position to pay them, there would be no reason upon this ground to refuse an interim injunction: *ibid* at 408 E.

20. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both, that the question of balance of convenience arises: *ibid* at 408 F.

21. The matters relevant to a determination of where the balance lies will vary from case to case: *ibid*.

22. Where other factors are evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo: *ibid* at 408 G.

FREEZING INJUNCTIONS

23. An applicant for a freezing injunction must satisfy the court of:

    (1) the existence of a legal or equitable right in support of which the injunction is sought (see *BCS Corporate Acceptances Ltd v Terry and anr* [2016] EWHC 533 (QB) where a freezing injunction obtained against a defendant's wife was discharged in the absence of relevant proceedings against her);

    (2) its jurisdiction in relation to that legal or equitable right;

    (3) a good arguable case for the relief claimed (this is marginally higher than a serious issue to be tried[4]);

    (4) the existence of assets (within or without the jurisdiction) within the legal or beneficial ownership of the respondent;

    (5) a risk of dissipation of assets (other than in the ordinary course of business);

    (6) the applicant's willingness to provide a cross-undertaking in damages (save in exceptional circumstances).

24. An applicant's cross-undertaking in damages is dealt with below.

25. It is frequently the adequacy of evidence of a risk of dissipation that causes the court most anxiety. In *Mobil Cerro Negro Ltd v Petroleos De Venezuela SA* [2008] EWHC 532; [2008] 1 Lloyds Rep 684 Walker J said this (at paragraph 35) about the expression "dissipation of assets":

[4] See *Derby & Co Ltd v Weldon* [1990] Ch 48, at 57-58 per Nicholls LJ; *Metropolitan Housing Trust Ltd v Taylor and ors* [2015] EWHC 2897 (Ch) at [17] – [26].

The focus is on the conduct of the defendant as regards the defendant's assets and the question is whether a particular course of conduct in relation to assets by the defendant, actual or feared, is conduct which should or may lead the court to conclude that the grant of a freezing order is just and convenient.

26. Freezing orders are emphatically not granted as security for claims and by procuring such an order a claimant is not in any better position that any other actual or claimed creditor. It follows that the mere fact that a defendant's creditworthiness is in doubt does not justify the making of a freezing order: *ibid* at para 36.

27. The risk of dissipation must involve a risk of impairing the claimant's ability to enforce a judgment or award. In the application of this principle it is not *necessary* for the claimant to prove that enforcement in England and Wales, rather than elsewhere will be impaired. Nor is it *necessary* for the claimant to prove that the purpose of the defendant's actual or feared conduct is to frustrate the enforcement of any judgment which is obtained, provided that, objectively, that would be its effect: *ibid* at para 40.

28. The risk of impairment does not, however, in every case mean a freezing injunction should be granted; the conduct relied upon must be unjustifiable by normal and proper commercial considerations: *ibid* at para 41.

29. In *Congentra AG v Sixteen Thirteen Marine SA* [2008] EWHC 1615; [2008] 2 Lloyds Rep 602 Flaux J explained that the risk of dissipation had two relevant senses, viz:

    (1) 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 he ordinary course of business: *The Niedersachsen* [1983] 2 Lloyds Rep 600 per Mustill J as interpreted by Christopher Clarke J in *TTMI v ASM Shipping* [2006] 1 Lloyds Rep 401, at 406 [24]-[27];

    (2) that 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: *Stronghold Insurance v Overseas Union* [1996] LRLR 13 at 18-19 per Potter J and *Motorola Credit Corporation v Uzan (No 2)* [2004] 1 WLR 113 at 153 .

30. It is, therefore, not necessary to show that a judgment would be completely defeated. The extent of difficulty in enforcement will, however, be a factor in the exercise of the court's overall discretion: *Metropolitan Housing Trust Ltd v Taylor and ors* [2015] EWHC 2897 (Ch) at [28].

31. In *Thane Investments Ltd v Tomlinson & ors* [2003] EWCA Civ 1272 Peter Gibson LJ emphasised (at paragraph 21) the need for any application for a freezing injunction to be supported by "*solid evidence...of the likelihood of dissipation*".

32. Pointing to some dishonesty on the part of the intended respondent to the injunction is insufficient: *Thane* at para 28; *UCB Home Loans Corporation v Grace and anr* [2011] EWHC 851 (Ch) (what is required is dishonesty sufficiently proximate to the applicant's claim). The court will scrutinise with care whether what is alleged to have been the dishonesty of the person against whom the order is sought in itself really justifies the inference that that person has assets which he is likely to dissipate unless restricted (*Thane* at para 28).

33. The court will be particularly interested in evidence of such things as a poor credit history, a record of defaulting on other debts or any threat to remove or otherwise deal with the relevant assets: *ibid* at para 26. The defendant's proven links with another country to which he may decamp will also be highly relevant, as will any lack of openness on the part of the defendant in response to enquiries about his intentions in relation to assets being realised.

34. In *VTB Capital plc v Nutritek International Corp* [2012] EWCA Civ 808; [2012] 2 Lloyds Rep 313; [2012] 2 BCLC 437 the Court of Appeal agreed (at [177]) with what Peter Gibson LJ had said in *Thane* about the need for the court to be careful in its treatment of evidence of dishonesty but went on to observe that where the dishonesty alleged is at the heart of the claim against the relevant defendant, the court may well find itself able to draw the inference that the making out, to the necessary standard, of that case against the defendant also establishes sufficiently the risk of dissipation of assets.

35. Plainly, the more easily realised or moved the assets identified in the evidence may be, the easier it is to justify a risk of dissipation. Where there is evidence as to the form which the assets take which in itself indicates there has been no attempt to dissipate in the past and, by the nature of those assets, any such dissipation in the future is unlikely, then the court may take a different view. Moreover, the mere fact of asset realisation by a defendant is insufficient (at least where the application is not for a "proprietary" freezing order in which the claimant asserts that an asset held by the defendant is really his); there must, as noted above, be some basis for believing that the disposal of assets is unjustifiable: see, for example, *Renewable Power & Light plc v Renewable Power & Light Services Inc & ors* [2008] EWHC 1058 (Ch).

36. Ultimately the test is not one of probability of dissipation, but of real risk: *Caring Together Ltd v Bauso and ors* [2006] EWHC 2345 (Ch) at para 64.

37. *Thane* is not a judgment to the effect that allegations of dishonesty are insufficient to found the necessary inference of a real risk of dissipation, but a reminder that in order to draw the inference it is necessary to have regard to the particular allegations of dishonesty and to consider them with some care: *Jarvis Field Press Ltd v Chelton* [2003] EWHC 2674 (Ch) at para 10.

38. There is or may be an appreciable risk in the case of somebody who appears to be guilty not merely of dishonesty, but dishonesty in financial dealings in relation to the use or misuse of assets, that he will take steps to put such assets outside the reach of the people claiming an entitlement thereto: *Jarvis Field* at para 17.

39. The importance of cogent, relevant evidence on this aspect of any application cannot be overstated Unsupported statements and expressions of fear carry very little, if any, weight. There need to be evidence of objective facts from which the court can infer a risk of dissipation: *Metropolitan Housing Trust Ltd v Taylor* (supra) at [30]) citing *O'Regan v Iambic Productions Ltd* (1989) 139 NLJ 1378 at 1379.

40. The scope of assets caught by freezing injunctions expressed in standard form extends beyond what many might intuitively think. The goodwill of a respondent's business (notwithstanding its tangible nature) is, for example, caught: (see *Templeton Insurance Ltd v Thomas and anr* [2013] EWCA Civ 35; *Sloane House Ltd v Fleury and ors* (unrep, 04.07.14, Turner J).

41. More recently, in *JSC BTA Bank v Ablyazov* [2015] UKSC 64; [2015] 1 WLR 4754 the Supreme Court held that the extended definition of assets in paragraph 6 of the current standard form Commercial Court freezing order includes proceeds of loan agreements to which a defendant was party. Those acting for and against applicants seeking freezing injunctions should consider carefully what (if any) contractual rights (or other choses in action) may constitute assets for the purposes of the order. Although paragraph 9 of the standard form order used in the Commercial Court obliges a defendant to provide information about his assets to the claimant, there is not an exact match between the wording in paragraph 9 and the definition of assets in paragraph 5. An applicant for such injunctive relief may, therefore, be well advised to seek express disclosure of assets over which the defendant has control but which are not owned legally or beneficially by him (see further in this context, *Global Maritime Investments Cyprus Ltd v Gorgonia Di Navigazione SRL* [2014] EWHC 706 (Comm)). It is also important to note that not all contractual rights or other choses in action or their proceeds will fall within the prohibition contained in the standard form freezing order; a defendant is not

thereby restrained from dealing with or disposing of any of his assets in the ordinary and proper course of business.

PROPRIETARY CLAIM

42. The standard form freezing injunction which permits expenditure by a respondent in the ordinary course of business will not necessarily apply where the underlying claim is proprietary in nature: see *Halifax v Chandler* [2001] EWCA Civ 1750 at [16]-[20] per Clarke LJ; *BDW Trading Ltd v Fitzpatrick and ors* [2015] EWHC 3490 (Ch) at [58]-[65].

43. Where the claimant is asserting a proprietary claim against the defendant his position may be adequately protected by an order (proprietary injunction) preserving the relevant assets pending trial or further order (see CPR 25.1(1)(c) and *Madoff Securities International Ltd and anr v Raven and ors* [2011] EWHC 3102 (Comm); [2012] 2 All ER (Comm) 634 at [126] et seq). Unlike in the case of a freezing injunction, it is not necessary to show any risk of dissipation and even if there has been delay in applying (something which might lead to the refusal of a freezing order) a proprietary injunction may still be granted (see *Cheareny v Neuman* [2009] EWHC 1743 (Ch) at [101]-[102]).

44. A proprietary claim will often arise where the defendant has acted in breach of fiduciary duty whether by misapplication of his principal's monies or other assets or through receipt of bribes or secret commissions (as to which see *FHR Ventures v Cedar Capital* [2015] AC 250).

APPLICATION CONTENT AND PROCEDURE

45. There is frequently a tension between the client's understandable wish to act decisively and promptly to restrain some actual or threatened invasion of his rights and the need to collate the necessary evidence and prepare the proceedings upon which injunctive relief is parasitic.

46. Proper adherence to the practice and procedure governing the grant of interim injunctions is vital. Failure to comply with the rules and practices of the court:

    (1) will or may render any injunction granted in consequence of the flawed application improper and susceptible to immediate discharge;

    (2) potentially expose the applicant to adverse costs orders; and

    (3) be a breach of the advocate's duty to the court[5].

47. The rules governing the making of injunction applications are contained in CPR 23 General Rules About Applications for Court Orders) and CPR 25 (Interim Remedies): familiarisation with the applicable rules and the accompanying practice directions is a must. Aspects of these are discussed in more detail below.

48. So far as evidence in support of an application is concerned, CPR 23.7(3)(a) provides:

    When a copy of an application notice is served it must be accompanied by-
    (a) a copy of any witness statement in support

49. Reference should also be made to paras 9.1 to 9.7 of *PD23A – Applications*.

50. CPR 25.3(2) provides that an application for an interim remedy must be supported by evidence unless the court orders otherwise. The form which that evidence must take is amplified in paragraphs 3.1 and 3.2 of *PD 25A – Interim Injunctions*. Importantly, applications for search orders and freezing injunctions *must* be supported by affidavit evidence, a requirement emphasised by Peter Gibson LJ in *Thane* (at para 21).

[5] See, for example, *Memory Corpn plc v Sidhu (No 2)* [2000] 1 WLR 1443, at 1460 per Mummery LJ.

TIMING

51. In many instances the outcome of applications for interim relief is determinative of the outcome of the litigation as a whole and this particularly true in the context of interim injunctions. The early tactical advantage of a successful application (which necessarily requires the court to have found the existence of a serious issue to be tried) cannot be overstated; the respondent and his or her legal team are immediately on the back foot.

52. Apart from an early possible judicial indication of the strength of the claim[6], there is an additional incentive for an applicant for injunctive relief to act expeditiously; such relief is discretionary in nature and delay may be fatal if unexplained[7]. This will especially be the case where the respondent has changed his position on the basis of the applicant's apparent lack of concern (or apparent approval of the conduct subsequently challenged) or the respondent has otherwise been lulled into a false sense of security.

53. Ultimately each case turns on its own facts and little is to be gained by seeking to divine from the authorities a maximum time within which any application must be made. In *Raks Holdings AS v Ttpcom Ltd* [2004] EWHC 2137 (Ch), however, Lloyd J, in refusing an interim injunction to restrain exploitation of allegedly confidential information disclosed to the defendant in the course of a commercial collaboration which had come to an end, considered a delay of 4 months[8] to be fatal; the lack or urgency showed that the claimant did not really fear irrevocable damage in the meantime such as would justify an injunction. See also *AAH Pharmaceuticals Ltd & ors v Pfizer Ltd & anr* [2007] EWHC 565 (Ch) where delay was a "powerful factor" in the refusal of the claimants' application for an interim injunction restraining Pfizer Ltd from terminating its supply agreements with the claimants in accordance with proposals published some months before. The fact that the claimants were pursuing their complaints with the OFT did not provide a good ground for not bringing the matter before the court at a much earlier stage.

54. The making of an early application for interim relief is, however, not without its disadvantages for the claimant:

    (1) it necessarily gives rise to some front-loading of costs as the evidence gathering and drafting phases of the claim are condensed to a short period of time;

    (2) in an effort to establish a "serious issue to be tried" and otherwise to bolster the chances of success there is naturally a tendency to disclose all of the evidence obtained by the claimant; the defendant accordingly has advance warning of what can usually be assumed to be the high-water mark of the claimant's claim.

THE ORDER

55. Para 2.4 of *PD25A – Interim Injunctions* provides:

    Whenever possible a draft of the order sought should be filed with the application notice and a disk containing the draft should also be available to the court in a format compatible with the word processing software used by the court. This will enable the court officer to arrange for any amendments to be incorporated and for the speedy preparation and sealing of the order.

56. The early provision of a draft order for consideration by the court prior to the hearing to was emphasised in *Memory Corporation plc v Sidhu (No 2)* (supra) at p 1460 C per Mummery LJ. See also para 5.19 of the Chancery Guide[9].

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[6] Though many judges are astute to avoid saying anything other than that the case alleged by the claimant is one with a real prospect of success. Anything more than this can be dangerous because the judge is usually without a full understanding of the factual position.
[7] See also para 2.7 of *PD23A – Applications* which provides that every application should be made as soon as it becomes apparent that it is necessary or desirable to make it.
[8] Since discovery of a vital piece of evidence.
[9] Reproduced in the *White Book*, 2016, vol 2, at p 147.

57. Para 5 of *PD25A – Interim Injunctions* identifies those matters which must, unless the court orders otherwise, be contained in any order for an injunction. They are:

- Applicant's cross undertaking in damages
- Applicant's undertaking, where the application is made without notice, to serve on respondent as soon as practicable the application notice, evidence in support and any order
- a return date (where application made without notice)
- Applicant's undertaking (where application made before filing of application notice) to file and pay appropriate fee on same or next working day
- Applicant's undertaking (where application made before issue of claim form) to issue and pay appropriate fee on same or next working day; or
- directions for commencement of claim
- clear statement of what respondent must do or not do

58. Annexed to *PD25A – Interim Injunctions* are "examples" of a Freezing Injunction and a Search Order. These may be modified as appropriate in any particular case (see paras 6.2 and 7.11 of the PD) but should otherwise be regarded as standard form. A failure to adopt the latest version may be the subject of criticism (or worse) and any modification or departures from the standard form must be drawn to the court's attention: see *Memory Corporation plc v Sidhu (No 2)* (supra) (freezing injunction); *The Gadget Shop Limited v The Bug.com Ltd* [2001] FSR 26 (search order).

WITHOUT NOTICE APPLICATIONS

59. CPR 23.4 provides:

> *(1) The general rule is that a copy of the application notice must be served on each respondent.*
> *(2) An application may be made without serving a copy of the application notice if this is permitted by-*
> *(a) a rule[10];*
> *(b) a practice direction; or*
> *(c) a court order.*

60. CPR 23.7 contains rules as to:

> (1) the time within which the application should be served;
> (2) the filing of written evidence with the application.

61. Paragraphs 3 & 4 of the *PD23A – Applications* are also relevant:

> *3. An application may be made without serving an application notice only:*
> *(1) where there is exceptional urgency,*
> *(2) where the overriding objective is best furthered by doing so,*
> *(3) by consent of all parties,*
> *(4) with the permission of the court,*
> *(5) where paragraph 2.10 above[11] applies, or*
> *(6) where a court order, rule or PD permits.*
>
> *4.1 Unless the court otherwise directs or paragraph 3 of this practice direction applies the application notice must be served as soon as practicable after it has been issued and, if there is to be a hearing, at least 3 clear days before the hearing date (rule 23.7(1)(b)).*

[10] E.g. CPR 25.3(1).
[11] Para 2.10 provides that where a date for a hearing has been fixed and a party wishes to make an application at that hearing but he does not have sufficient time to serve an application notice he should inform the other party and the court (in writing if possible) as soon as he can of the nature of the application and the reason for it. He should then make the application orally at the hearing.

4.1A Where there is to be a telephone hearing the application notice must be served as soon as practicable and in any event at least 5 days before the date of the hearing.

4.2 Where an application notice should be served but there is not sufficient time to do so, informal notification of the application should be given unless the circumstances of the application require secrecy.

62. CPR 25.3 is in these terms:

(1) The court may grant an interim remedy on an application made without notice if it appears to the court that there are good reasons for not giving notice.

(2) An application for an interim remedy must be supported by evidence, unless the court orders otherwise.

(3) If the applicant makes an application without giving notice, the evidence in support must state the reasons why notice has not been given.

63. Paragraph 4 of *PD25A – Interim Injunctions* (which deals with urgent applications and without notice applications) is also relevant. Paragraph 4.3(3) provides:

[E]xcept in cases where secrecy is essential, the applicant should take steps to notify the respondent informally of the application.

64. Reference should also be made to para 16.2 of the Chancery Guide[12], paras 7.12.1 et seq of the Queen's Bench Guide[13], para F2 of The Admiralty and Commercial Courts Guide[14] as applicable.

65. So, an applicant for an interim injunction who proceeds without having served an application notice on the respondent and without having given the respondent even informal notice of the hearing, must set out why in his evidence and (under the PDs accompanying CPR Parts 23 & 25) justify his position by reference to circumstances of secrecy and not just urgency.

66. The importance of the general principle that applications (including applications for injunctions) should only be made without notice, and in particular outside court hours, in cases of "exceptional urgency" was emphasised in *Franses* v *Somar Al Assad and Ors* (supra), at para 67. It is apparent from Henderson J.'s judgment that:

(1) urgency brought about by inaction on the part of the applicant is unlikely to attract much judicial sympathy;

(2) the reasons for proceeding without notice should not be confined to bare assertions; what is required is "a proper analysis of the issue and a reasoned explanation supported by references to the evidence."[15]

67. A litigant making a without notice application is under a "compelling duty" to make full and frank disclosure (as to which see further below) and "especially on a without notice application for relief which freezes the defendant's assets, invades his privacy and threatens his reputation: *Memory Corpn plc v Sidhu (No 2)* (supra) at p 1453 A per Robert Walker LJ; p 1459 H to 1460 A per Mummery LJ.

68. It is the particular duty of the advocate to see that the correct legal procedures and forms are used; that a written skeleton argument and a properly drafted order are prepared by him personally and lodged with the court before the oral hearing; and that at the hearing the court's attention is drawn by him to unusual features of the evidence adduced, to the applicable law and to the formalities and procedure to be used: *ibid* at p 1460 B per Mummery LJ.

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[12] Reproduced in the *White Book*, 2016, vol 2, at p 147.
[13] *Ibid* at p 339.
[14] *Ibid* at pp 406-7.
[15] *Franses v Somar Al Assad* (supra) at para 72.

69. It is incumbent on an applicant for without notice relief to provide full notes of the hearing to those affected by any order as soon as reasonably practicable (see further below).

THE DUTY OF FULL AND FRANK DISCLOSURE; A CLOSER LOOK

Introduction

70. The duty of full and frank disclosure applies to all applications made without notice. The principle goes back to *Castelli v. Cook* (1849) 7 Hare 89, 94 and to the well known case of *Rex v. Kensington Income Tax Commissioners, Ex parte de Polignac (Princess)* [1917] 1 K.B. 486, 509, in which Warrington L.J. said:

    "It is perfectly well settled that a person who makes an ex parte application to the court - that is to say, in the absence of the person who will be affected by that which the court is asked to do - is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him. That is perfectly plain and requires no authority to justify it."

71. Here we consider the following questions which arise in relation to the duty when making urgent injunction applications:

    (1) When does the duty apply?
    (2) What is the nature and extent of the obligation?
    (3) How long does the duty last?
    (4) How is the respondent to know the obligation has been discharged?
    (5) What are the consequences of a failure to discharge this duty?
    (6) When to spot the tactical discharge application and how to address it?

(1) When does the duty apply?

72. At first blush the answer to this question is obvious; it applies when the application is made without notice. That is correct as far as it goes. There can be no argument that the duty of full and frank disclosure always applies when an application is made without notice. It is an essential part of the quid pro quo for the court entertaining a departure from the fundamental principle of fairness that an order should not be made without giving the person who is the subject of the order a chance to be heard.

73. What about short notice applications however; does the principle apply then?

74. The Court may abridge the 3 day time for service (CPR 23.7(4)). Further, if there is insufficient time to serve in accordance with the rules, but an application needs to be heard urgently, informal notification of the application should be given unless the circumstances of the application require secrecy; see paragraph 4.2 of the PD set out in paragraph 61 above.

75. So there may be a category of cases where the court will bless short notice, in which case, on conventional principles the duty of full and frank disclosure will not apply. There can be some advantages to an applicant in taking this approach if they do not wish to have to give full and frank disclosure, but nevertheless there is a good reason for urgency.

76. In addition, circumstances may arise where the applicant cannot serve within the rules, but provides informal notification. It is frequently the case in those circumstances that the respondent may appear before the Court and personal service be effective. On one view the application is no longer without notice in those circumstances. Any fair minded observer can see however that whilst the respondent can be heard, and indeed may even be ably represented, there is not a level playing field.

77. If a respondent is at all concerned in these circumstances that they cannot properly present a full case, they should invite the Court to treat the application on the basis that the duty of full and frank disclosure should apply. They can cite their old friend, the overriding objective, which specifically refers to ensuring the parties are on an "equal footing" as being a relevant consideration. They might invite the Court in those circumstances to direct that the Court should not give permission to serve short, but instead should treat the application as being effectively without notice, albeit with the benefit of limited submissions from the respondent.

78. The applicant may have to accept, in those circumstances, that the duty should apply. But in their turn, even if not at the first hearing, if faced with a discharge application on the grounds of a breach of this duty, the applicant may profitably rely on the fact that the application was on short notice. They may seek to contend that the duty should be treated as tempered by that fact to a certain extent, or at least that the consequences of non-compliance should be less severe (see further below), especially if they can make out the case that any failure on their part could have been remedied by the respondent.

(2) What is the nature and extent of the obligation?

79. There is a wealth of case on the nature and extent of the duty of full and frank disclosure. For present purposes it is useful to summarise the nature of the duty as follows (drawn from the decision of Bingham J in *Siporex Trade SA v Comdel Commodities* [1986] 2 LR 428 @ 437, subsequently cited with approval in the more recent case of the Court of Appeal in *Marc Rich & Co Holding GmbH v Krasner* [1999] CLY 487):

    (1) The applicant is required to show the utmost duty of good faith and must present his case fully and fairly; as such "fair presentation" cannot be separated from the duty;
    (2) The affidavit or witness statement in support of the application must summarise the case and the evidence on which it is based;
    (3) The applicant must identity the key points for and against the application and not rely on general statements and the mere exhibiting of unhelpful documents;
    (4) He or she must investigate the nature of the claim alleged and facts relied on before applying and must identify any likely defences;
    (5) He must disclose all facts, or matters, which reasonably could be taken to be material by the judge deciding whether to grant the application; the question of materiality is not to be determined by the applicant.

80. The Courts have observed that it is especially important that the duty is strictly observed on a without notice application for relief which freezes the defendant's assets, invades his privacy and threatens his reputation; see *Memory Corporation v Sidhu* [2000] 1 WLR 1443. For a useful summary of applicable principles in the context of freezing injunctions, see *Metropolitan Housing Trust Ltd v Taylor* (supra) at [36].

81. It is questionable whether there is any difference in the nature of the obligation as between different without notice injunctions. However the greater the risk of substantial prejudice the greater the consequences are likely to be for a breach of the duty; see the cases collected by Steven Gee QC in Commercial Injunctions, 5th Edition @ para 9.001, footnote 6.

(3) How long does the duty last?

82. Many litigants make the mistake of thinking that as long as they have discharged their duty before obtaining their order they no longer need be concerned with the duty. In fact, the duty remains in place until the order has been implemented. It is a continuing duty in that sense.

83. The following matters have been considered to be relevant matters which have occurred after the application has been granted, but before full execution has occurred, which should have been drawn to the attention of the court before any further action had been taken:

(1) in relation to a freezing order, obtaining cautions to register against foreign properties owned by the defendants; see *Commercial Bank of the Near East plc v A* [1989] 2 LR 319;

(2) in relation to a search order, receiving a letter which offered voluntary access for the purpose of searching for certain items; see *O'Regan v Iambic Productions* (1989) 139 NLJ 1378;

(3) on an application to serve out of the jurisdiction, the existence of prior foreign proceedings; see *Network Telecom (Europe) Ltd v Telephone Systems International Inc* [2003] EWHC 2890 (QB) (Burton J).

84. In the last case the nature of the continuing obligation is subjected to analysis and all the relevant cases are helpfully reviewed, notwithstanding the fact that the case id not concern an injunction application.

(4) How is the respondent to know the obligation has been discharged?

85. The duty to keep a full and proper note of the without notice hearing, and to provide a copy to the respondent, is sometimes viewed as being part of the duty of full and frank disclosure. It is better understood however as being a duty which enables the respondent to ascertain whether or not the duty of full and frank disclosure has been complied with. It is intended to remedy, as best it can, the absence of the respondent at the first hearing, and provide the respondent with the chance to attend any subsequent on notice hearing, or the return date, with the best possible knowledge of the earlier hearing.

86. The following cases have put the flesh on the bones of this additional duty as follows:

(1) Full notes of the hearing should be supplied with all due expedition to any party affected by the relief sought, whether or not the respondent asks for it; *Interoute Telecommunications (UK) Ltd v Fashion Gossip Ltd*, The Times, November 10, 1999 (Lightman J);

(2) The applicant cannot rely on a transcript being available or that it will suffice even if it is available; *Cinpres Gas Injection Ltd v Melea Ltd* [2005] EWHC 3180 (Pat).

87. Non-compliance with these additional, or ancillary duties, is likely to have the same or similar consequences to non-compliance with the duty of full and frank disclosure to the court. The applicant must be careful therefore not to allow the efficacy of the order to be attacked on the grounds of tardy transmission of the note of the hearing, or for that failure to be part of a long list in a tactical discharge application.

(5) What are the consequences of a failure to discharge this duty?

88. It is often said that the starting point for a failure to discharge the duty of full and frank disclosure is that the order so obtained should be discharged. This used to be known as the "golden rule". These days, the rule is recognized as not being a "golden one". In reality, most judges have always recognized they have a discretion in what they do.

89. A number of cases have reviewed the relevant principles (see *Brink's-MAT Ltd v Elcombe* [1988] 1 WLR 1350; *Memory Corporation v Sidhu* [2000] 1 WLR 1443; *Arena Corp Ltd (In Provisional Liquidation) v Schroeder* (2003) EWHC 1089 (Ch); *Dadourian Group International Inc* [2007] EWHC 1673 (Ch) (Warren J)), which can be distilled here as follows:

(1) If the non-disclosure would have resulted in the order not being made initially then the proper remedy will be for the order to be discharged;

(2) If an order could properly have been made even if the material fact or matter had been disclosed, the court may nevertheless continue the order, or make an order on new terms, particularly where the failure was innocent and not grave;

(3) A material non-disclosure which was intentional, or grave even if not intentional, will tend to tip the balance in favour of discharge;
(4) Other factors may still be relevant however, including the speed with which the failure is cured, whether the consequence of the breach was remediable and has been remedied.

90. Overall, the Court must have in mind the question of the overriding objective and proportionality (cf the approach taken by HHJ Havelock-Allan QC in *Re Industrial Services Group Ltd* [2003] BPIR 392, where an innocent material non-disclosure lead to a percentage deduction in costs being applied).

91. It is important to remember that if a material non-disclosure is remedied by a respondent at the return date, and the judge concludes it is appropriate to continue the order, such respondent is unlikely to be able to rely on that factor in support of a subsequent discharge application; see *Dadourian Group International Inc* above.

(6) When to spot the tactical discharge application and how to address it?

92. The courts are very much alive to the tactical application by the respondent for the order to be discharged on grounds of material non-disclosure; see the observations of Timothy Walker J in *Worldcom International v Home Communications Ltd,* September 16, 1998, unrep.

93. They are usually not difficult to spot. A good measure is where the respondent's evidence and submissions on non-disclosure are greater than their evidence and submissions on the substantive part of the application. That said, even though the application may be tactical, that does not always provide the applicant with an easy way of dealing with them. The best approach is, if it is considered there is a risk of the court considering there has been any material non-disclosure, of ensuring that best efforts are made to cure any error which may have occurred, and explain how it may have arisen. But in some cases serious points may be raised which are not readily susceptible of summary disposal. In those cases it is a legitimate request that the application for discharge, or the relevant part, should be stood over to trial; see *A v B (A Company*) [2002] EWCA Civ 337; [2002] 2 All ER 545 CA. That approach may be particularly attractive to the Court if it can be demonstrated that the cross undertaking as to damages offered is a solid one.

UNDERTAKINGS IN DAMAGES

Introduction

94. It is commonly thought that the origin of the practice of the court to require an applicant for an injunction to give an undertaking (or cross-undertaking) in damages to protect the defendant is that it is part of the price for ex parte (without notice) relief. Whether or not that is correct, the practice has evolved that an undertaking in damages is expected whether or not the interim application is made without notice. The rationale is that it is an important protection in circumstances where the facts, and entitlement to relief, have yet to be determined. Whilst the question of whether an undertaking in damages should be given is discretionary, with a few exceptions, an undertaking should be given in all interim applications (such an undertaking is required, unless the court orders otherwise; para 5.1 of the PD to CPR Part 25). The fact that the applicant may not be good for any damages awarded is a separate matter, albeit an important consideration as to whether the order should be granted.

95. It is useful to consider the undertaking in damages by reference to the following headings:

(1) The typical form of the undertaking
(2) The nature of the undertaking
(3) The impecunious applicant
(4) Exceptions
(5) Third parties
(6) Fortification applications

(7) Inquiries into damages

(1) The typical form of the undertaking

96. The typical form of undertaking in favour of the defendant/respondent is in the following terms (taken from the example order for freezing orders):

> *(1) If the court later finds that this order has caused loss to the Respondent, and decides that the Respondent should be compensated for that loss, the Applicant will comply with any order the court may make.*

(2) The nature of the undertaking

97. It is important to understand the nature of the undertaking. It is to the Court, and therefore a breach of the undertaking is a contempt of court. However, it is for the benefit of the respondent in the event that the claim fails or the order is later set aside and the respondent has suffered loss as a result of the order; see *Hoffmann-La Roche & Co AF v Secretary of State for Trade and Industry* [1975] AC 295 @ 361. It does not, however, have any existence independent of the proceedings in which it is given. In particular, it is not considered to give rise to an independent cause of action. If an order is discharged, the remedy for the respondent is to obtain a direction from the court that an inquiry into damages is taken and an order made accordingly. Until such time as an order is made that damages should be payable the respondent is reliant on obtaining relief through the proceedings in which the undertaking was given.

(3) The impecunious applicant

98. Given that an undertaking is required, unless the court orders otherwise, lawyers and clients alike frequently wrongly assume that an injunction cannot be obtained if the applicant does not have funds to support the undertaking, or cross undertaking. However it is well established that in the right case the fact that the applicant is impecunious will not be a bar to an order being granted; see *Allen v Jumbo Holdings Ltd* [1980] 1 WLR 1252 (the legally aided applicant provided an undertaking of questionable value in that case). In those cases the court will typically expect that the merits of the underlying claim are very good. In addition, however, the applicant may be able to make a persuasive case for contending that they are only impecunious due to the actions of the respondent of which complaint is made, and that is also a relevant factor for the court to consider (cf. security for costs applications).

99. In addition, in the context of claw back claims brought by liquidators or other office holders of insolvent companies, the court will often accept a cross-undertaking in damages which is limited to the assets in the hands of the office holder (namely the net realizable and un-pledged assets of the company in liquidation); see *DPR Futures Ltd* [1989] 1 WLR 778, followed in *RBG (Resources) Plc v Rastogi* (31 May 2002) (Laddie J) . The logic appears to be that because the office holder is acting in a representative capacity they cannot be expected to offer a personal undertaking (cf. the public body cases referred to as exceptions below).

100. It should be noted, however that in many cases a claim brought by a liquidator will be supported by a commercial funder. That will be a material factor to disclose on any without notice hearing, and the court may in those circumstances consider that a limited undertaking in damages would not be appropriate; see the decision in *Franses* referred to above.

101. Ultimately, acceptance of a limited cross-undertaking by insolvency office holders is a matter for the court's discretion: see *JSC Mezhdunarodiny Promyshlenniy Bank and anr v Pugachev* [2015] EWCA Civ 139; [2016] 1 WLR 160 at [66] to [86] per Lewison LJ.

(4) Exceptions

102. There are certain entities who are not required to offer an undertaking. The best known is the crown. This rule, or practice, also extends to local authorities and any public officer when bringing proceedings to enforce the law.

103. For example, the secretary of state is not required to give a cross undertaking for the appointment of a provisional liquidation, which application is made on a without notice basis; see *Re City Vintners Ltd*, 10 December 2001, unrep.

(5) Third parties

104. The current position is that the court is required to consider in all cases whether or not an undertaking should be made in relation to parties other than the respondent (see para 5.1A of PD25A). The standard forms, or examples, include such an undertaking in freezing order cases, but not for search orders. It is presumably anticipated that in those cases where the undertaking is in the example order, the onus will be on the applicant to explain why the order is not appropriate, where as in other cases, the court is required to consider the point, but it is anticipated there will be no presumption applied.

105. In freezing orders, the example order contains the following undertaking:

> *(7) The Applicant will pay the reasonable costs of anyone other than the Respondent which have been incurred as a result of this order including the costs of finding out whether that person holds any of the Respondent's assets and if the court later finds that this order has caused such person loss, and decides that such person should be compensated for that loss, the Applicant will comply with any order the court may make.*

106. This wording was considered by Michael Briggs QC (then a deputy) in *Harley Street Capital Limited v Tchigirinsky* [2005] EWHC 2471 (Ch), when he rejected the submission that the undertaking was limited to persons who hold any assets of the respondent, and reaffirmed the orthodox view that any sufferer of loss may be compensated.

(6) Fortification applications

107. The question of fortification for the undertaking in damages may arise at an initial without notice hearing. More often, however, it arises on a return date of a without notice application, or subsequent inter partes hearing.

108. In *Harley Street Capital Limited v Tchigirinsky*, above, three principles were identified as being applicable:

(1) the court is required to make an intelligent estimate of the likely amount of the loss which could be suffered;
(2) the person who seeks fortification must show a sufficient level of risk of loss;
(3) the loss will not qualify for compensation unless it has been caused by the grant of the injunction.

109. This latter principle is based on the fact that on an inquiry into damages, the court will approach the matter as if it were a claim for damages for breach of a contractual undertaking, and the same requirements as to causation and foreseeability apply.

110. The form of fortification may take the shape of the example wording in freezing orders:

> [(2) *The Applicant will –*
>
> *(a) on or before [date] cause a written guarantee in the sum of £ to be issued from a bank with a place of business within England or Wales, in respect of any order the court may make pursuant to paragraph (1) above; and*

(b) immediately upon issue of the guarantee, cause a copy of it to be served on the Respondent.]

111. Though, in suitable cases the applicant may prefer, and the court may accept, a payment into court, or a payment to solicitors, instead.

112. If the court considers that an undertaking should be fortified the applicant should be given a reasonable opportunity to put security in place and the order should not be immediately discharged pending the fortification. If the security is not provided then this will justify the injunction order being discharged.

(7) Inquiry into damages

113. Before the court should direct an inquiry, it must first conclude that the injunction was wrongly granted. In most cases, though not all, if a claimant fails at trial then it will follow that the injunction was wrongly granted. The question might also arise before trial, where, for example, in the context of a freezing order it is shown that there is no real risk of dissipation. In those circumstance the Court should still be wary of ordering an inquiry before trial, since if the claim is made out at trial that could be material to the decision as to whether an inquiry should be ordered; see *Cheltenham & Gloucester Building Society v Ricketts* [1993] 1 WLR 1545 and per Lord Scott of Foscote in *Fourie* above.

114. After the Court has concluded the injunction was wrongly granted it may still conclude, as an exercise of discretion, that no inquiry should be directed. For example, the claimant may persuade the court that there are special circumstances which justify the conclusion that the undertaking should not be enforced. The claimant must be careful, therefore, when the issue of an inquiry arises, to ensure that its position is properly protected, or reserved, in relation to such matters when an inquiry is ordered, alternatively that those issues are determined before the inquiry is ordered. Otherwise, following the direction of an inquiry, the Court may only entertain argument on quantum.

115. As stated above, the question of quantum is to be determined on the basis of conventional principles applicable as if there had been a breach of contract between claimant and defendant (see also, more recently, the decision in *Eliades v Lewis* [2005] EWHC 2966 (QB). It is important to distinguish between loss caused by the order and loss which might be caused by the proceedings generally. In some cases that may prove, difficult, or impossible to achieve; cf the decision above in *Harley Street Capital Limited v Tchigirinsky*. It should also be noted that where the Court is satisfied that an order has been obtained by fraud, the rules of remoteness should be relaxed and all loss flowing directly from the breach should be recoverable.

116. There is a useful review of the relevant principles to apply when assessing special and general damages in *Al-Rawas v Pegasus Energy Ltd & Ors* [2008] EWHC 617 (QB). In that case special damages was sought and obtained for wasted management time lost when dealing with a search and seizure order. In addition, the court was satisfied that general damages should be awarded for the inconvenience caused by the order, notwithstanding the absence of any direct evidence, because such inconvenience was an obvious inference from the relevant agreed facts. The claim for a general damages award for emotional distress was dismissed in that case, though it is well established that it can apply (and search orders carried out in the home of a defendant may give rise to such a claim; cf. the decision in *Bonz Group (Pty) Ltd v Cooke* (1994) 3 NZLR 216). The court also awarded aggravated damages, since the order had been obtained by intentional concealment of a material matter. In *Astrazenca AB and anr v KRKA DD Novo Mesto and anr* [2015] EWCA Civ 484; (2015) 145 BMLR 188 the Court of Appeal upheld an award of over £27m following an inquiry before Sales J of damages said to have been suffered as a result of an interim injunction which ought never to have been granted.

IMPLEMENTATION AND ENFORCEMENT ISSUES

Introduction

117. To make the most of the order, at the enforcement and implementation stage requires consideration of the relevant issues before the order is obtained. In many cases, consideration may need to be given as to whether the wording in the example, or standard, form of order should apply, or whether a variation should be considered. In addition the procedure for service needs to be given some thought in advance.

The need for personal service

118. Whilst an order takes effect as soon as it has been made, it cannot be enforced by contempt proceedings if the respondent has not had notice of the order with a penal notice indorsed on it (CPR 81.9(1)). In cases where the injunction is solely prohibitive in nature (e.g. the standard form of freezing order) contempt proceedings cannot be brought, unless the court orders otherwise, unless the respondent is in court when the order is made or has been notified of its terms by telephone or otherwise (CPR 81.8(1)).

119. In short, in most cases it is best to ensure that personal service is effected if the respondent is not present in court when the order is made. That way, armed with an affidavit of service, there is unlikely to be any risk of further argument on the issue.

Committal proceedings

120. Committal proceedings for contempt of court may be considered where, for example, a party has dissipated assets following the service of a freezing order, or has failed to disclose documents ancillary to such an order (as in *Sloane House Ltd v Fleury and ors* (supra)). Often the issue of such applications can cause the recalcitrant defendant to take notice of the allegation of default and remedy the position before the hearing occurs. It must be remembered however that such proceedings should not be issued lightly; proceedings for contempt are tightly regulated, as set out in CPR Part 81. For present purposes it is useful briefly to touch on some of the major principles which apply:

121. First, it must be borne in mind that as long as the defendant has capacity to understand, there is no need to establish any mens rea. All that must be demonstrated, beyond reasonable doubt, is that a breach occurred. By contrast, if a non-party who is the subject of an application establishes that he honestly believed at the time he could do the acts complained of that may provide him with a defence.

122. Secondly, a claimant must consider with care whether to initiate a committal application; if the court ultimately concludes that the breach was a technical one it may conclude that the claimant should pay the defendant's costs of the application; see *Adam Phones Ltd v Goldschmift* [1999] 4 All ER 486. Proportionality and the availability of other remedies must be borne in mind.

123. Thirdly, on the question of sentence, the Court has the power to imprison for a period of two years. Very serious and sustained breaches may result in a sentence in the period 18 months to 2 years; see *Lexi Holdings Plc v Luqman* [2007] EWHC 1508 (Ch) (Henderson J).

124. Fourthly, representatives for the defendant or non-party who is accused of contempt should always have in mind the ability to apply to court to purge his contempt, which effectively amounts to a plea for forgiveness. In some cases such an application can effectively avert a sentence of imprisonment, especially when coupled with other evidence of co-operative behaviour. For a recent case involving deliberate disobedience of disclosure obligations in a worldwide freezing injunction see *Ritz Hotel Casino Ltd v Al-Geabury* (unrep, Spencer J, 07.04.16 – immediate imprisonment).

Unless orders

125. Where there has been a breach of an injunction order, the claimant may also wish to consider, instead of a committal application, whether an unless order might provide more satisfactory relief.

126. On one side of the fence, in *Raja v van Hoogstraten* [2004] 4 All ER 793, the court concluded that non compliance with a disclosure order (ancillary to a freezing order) did not prevent a fair trial and did not justify an order striking out the defence. On the other side, in the more recent decision of *Lexi Holdings plc v Luqman* [2007] EWCA Civ 1501, the Court of Appeal concluded that the respondent's evidence that he had no, or negligible, assets was incredible and in those circumstances an unless order requiring a full statement of his asset position in default of which the defendant was debarred from defending should be made.

Territorial effect

127. There is nothing to prevent an injunction being granted against a person over whom the Court has jurisdiction in relation to assets out of the jurisdiction. The most common example of this is the world wide freezing order (another example is where a receiver is appointed over assets abroad). This can lead to difficulties in enforcement, however.

128. First, whilst it may be a contempt of court for the respondent to fail to behave in accordance with the order, that does not mean the foreign jurisdiction will recognise the order made in this country or give effect to it. Whenever it is intended that an order is to have effect outside the jurisdiction it pays to discuss with a lawyer present in that jurisdiction how the courts in that jurisdiction are likely to treat the order and whether any additional steps need to be taken, such as an application for the recognition of the order. For the enforcement of world-wide freezing injunctions outside the jurisdiction, see *Dadourian Group International Inc v Simms* [2006] 1 WLR 2499 and *Arcadia Petroleum Ltd and ors v Bosworth and ors* [2015] EWHC 3700 (Comm).

129. Secondly, special consideration may need to be given to the position of non-parties. Non-parties who are resident abroad are not subject to the court's territorial jurisdiction. There is now a standard proviso (proviso 19) in the example freezing order which deals with this issue in the following terms:

> *Persons outside England and Wales*
>
> *(1) Except as provided in paragraph (2) below, the terms of this order do not affect or concern anyone outside the jurisdiction of this court.*
>
> *(2) The terms of this order will affect the following persons in a country or state outside the jurisdiction of this court –*
>
> *(a) the Respondent or his officer or agent appointed by power of attorney;*
>
> *(b) any person who –*
>
> *(i) is subject to the jurisdiction of this court;*
>
> *(ii) has been given written notice of this order at his residence or place of business within the jurisdiction of this court; and*
>
> *(iii) is able to prevent acts or omissions outside the jurisdiction of this court which constitute or assist in a breach of the terms of this order; and*
>
> *(c) any other person, only to the extent that this order is declared enforceable by or is enforced by a court in that country or state.*

130. Thirdly, there is the even more difficult situation of non-parties who have a presence in the jurisdiction but also in the foreign jurisdiction. This is the situation frequently faced by banks and can give rise to the problem of double jeopardy; they may be required under the law of the foreign state to do something which the order in this country claims to prohibit There is a proviso in the standard wording which is intended to accommodate this problem:

> *20. Assets located outside England and Wales*
>
> *Nothing in this order shall, in respect of assets located outside England and Wales, prevent any third party from complying with –*
>
> *(1) what it reasonably believes to be its obligations, contractual or otherwise, under the laws and obligations of the country or state in which those assets are situated or under the proper law of any contract between itself and the Respondent; and*
>
> *(2) any orders of the courts of that country or state, provided that reasonable notice of any application for such an order is given to the Applicant's solicitors*

131. Again, however, it is sensible to give consideration in advance of the application whether this order is suited, or suitable to the specific facts which present themselves. The example order is not set in stone, and early advice from a foreign lawyer may assist to ensure that the order is effective in practice.

COSTS

Introduction

132. It is useful to consider the range of costs orders which may be made on an injunction application in the following two scenarios:

(1) Where the applicant is granted an interim injunction or procures an undertaking;

(2) Where the applicant fails to obtain an interim injunction or an offer of an undertaking.

The "successful" applicant

133. Where the applicant succeeds in obtaining an interim injunction (at an on-notice hearing) or procuring an undertaking, the applicant will consider, with some justification, that he or she has succeeded and should therefore be awarded his or her costs. That, however, is not the general rule for interim injunction applications; usually (though not invariably) the court will order costs in the case or that costs should be reserved. The reason is that ordinarily the injunction application will not finally decide the merits of the arguments advanced, and accordingly it will usually be premature to consider the applicant as being the successfully party; see the decision of the Court of Appeal in *Desquenne Et Giral UK Ltd v Richardson* [2001] FSR 1.

134. The decision in *Richardson* was applied and followed by Neuberger J (as he then was) in *Picnic At Ascot Inc v Derigs & Ors* [2001] FSR 2, where he helpfully set out a number of guiding principles to apply when considering the appropriate cost order to make in interim injunction applications:

(1) Absent any special factors, if an interim injunction application is obtained applying ordinary balance of convenience principles the court will normally reserve the costs. Whilst this guiding principle should not "tie the court's hands" on questions of costs, it was desirable to have some consistency in the area;

(2) It followed that a respondent who offered an undertaking or agreed to an interim injunction should not be the subject of a more disadvantageous order, since that would be to discourage the respondent from sensible conduct;
(3) If, however, the Court was able to form the view that an injunction was clearly justified, and, for example, the respondent fought the application instead of, reasonably promptly, offering to accede to the application or provide equivalent relief, an immediate costs order against the respondent might be justified;
(4) Overall, it would be appropriate for the Court to ask itself whether (a) it was fair for the applicant to have its costs even if it lost at trial and (b) whether the respondent's opposition was justified.

135. See also *Albon v Naza Motor Trading Sdn Bhd* [2007] EWCA Civ 1124; [2008] 1 Lloyds Rep 1 at para 21 per Waller LJ; *Hospital Metalcraft Ltd v Optimus British Hospital Metalcraft Ltd and ors* [2015] EWHC 3093 (Ch).

The "successful" respondent

136. There is some evidence of a more favourable approach to the respondent who successfully fights off an injunction application. The reasons for that were also the subject of discussion in the *Picnic At Ascot* case and may be summarized as follows:

(1) It is the applicant's choice whether or not to come to court; on the other hand the respondent is compelled to attend;
(2) The Courts wish to encourage applicants not to launch unmeritorious applications.

137. Equally, however, it may be said that a respondent's success cannot be properly measured until trial; it may be found at trial that the injunction application ought, with the benefit of final findings of fact, to have been granted. In those circumstances it might be said that it would be unfair for the respondent to have its costs of the application having regard to the risk of defeat at trial. Furthermore, independently from that question, the applicant may be able to point to some justification for the application, even if it is not successful.

The marginal case

138. In marginal cases the parties might give consideration to whether the court should be persuaded to make a "costs in the case" type order. It is one thing to say that an immediate costs order in favour of an applicant who obtains his order would not be fair to a respondent who was ultimately successful at trial, but it is another to state that the respondent should necessarily have his costs of the application even if he succeeds at trial. Of course, the order that costs be reserved does not take away the opportunity to make such a submission after trial, but consideration should be given to whether there will be difficulty in persuading a trial judge to reconstruct how matters looked at the interim stage. Ordinarily it will pay for the successful applicant to ask for his or her costs of the application, especially in the absence of a strong judicial indication to the contrary, since even then some helpful judicial indications may emerge which can be deployed at trial, even if costs are reserved.

139. Given that many interim applications are determinative of the litigation as a whole, any order which reserves costs or provides for costs in the case ought sensibly to provide for the contingency that the claim may never come to trial in order to avoid distracting and potentially expensive squabbles just about costs. That said, the Court may be persuaded that it will hinder rather than assist the settlement of the case for the Court to keep its "powder dry" on the question of costs at the interim stage.

Conclusion

140. The general rule in interim injunction application cases is to reserve costs where the applicant is successful. That general rule does not apply so strongly where the applicant is

unsuccessful. Like all rules as to costs however, they are not to be construed as inflexible rules which “tie the hands” of the tribunal. There is always a place for persuading the court to take a different view.

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April 2016