FREEZING ORDERS - THE RECIPIENT'S PERSPECTIVE
"ROLL OVER OR FIGHT?"

Introduction

1. This talk will focus on the position of a respondent or third party (and in particular a bank) given notice of a freezing order. We will consider the following.

   - What to do, and what not to do
   - Applications to vary or discharge
   - Protections for banks and third parties
   - Liabilities for contempt and negligence
   - Costs and expenses
   - Enforcement of undertakings.

   We will refer to the party who obtains the freezing injunction as the "applicant" and the party against whom the freezing injunction is made as the "respondent".

What to do, and what not to do

2. The starting point is always to consider the order carefully to identify:

   - the respondent whose assets are frozen
   - what assets are covered by the order
   - the nature of any ancillary orders included (such as orders for disclosure of assets), and
   - the extent of any permission or exception allowing the respondent or any third party to deal with the assets.

Strict compliance

3. The importance of strict compliance with the order cannot be under-estimated since non-compliance may be regarded as a contempt of court. See for example the recent decision of Mr Justice McCombe in *R (on the application of Revenue & Customs Prosecution Office) v Lloyds TSB Bank plc* [2007] EWHC 2393 (Admin) in which the bank was given notice of a freezing injunction affecting the assets of Mr R. Mr R had been convicted of offences concerning money laundering the proceeds of drugs, but his conviction had been quashed and a re-trial ordered. Pending the re-trial the prosecuting authority had agreed with Mr R's advisers that £2m in Mr R's possession which had been held in a court funds' account, would be paid into a current account of Mr R's with the bank but would then be covered by the terms of a freezing order. The freezing order allowed for Mr R to pay certain living expenses and costs, and provided for Mr R to disclose to the prosecutor the names and numbers of all accounts under Mr R's control and the sums in those accounts.

4. Having received the funds, the bank was concerned that holding the money in a current account would not make it easy for the bank to police any use being made by Mr R of the account. The bank therefore transferred the funds into two higher interest-bearing accounts (a term deposit and tracker account). It gave notice to Mr R, but did not seek the prior permission of the court or the prosecuting authority. Mr R subsequently pleaded guilty to certain of the offences for which he faced re-trial. The prosecuting authority then sought to deal with the confiscation of the funds, only to be told that they had been moved from the account into which they had originally been paid. To compound the problem, the bank when originally asked to disclose the new account numbers appears to have refused to do so without Mr R's consent. Ultimately Mr R's authority was obtained, the account details were provided and a new confiscation order made. But the prosecuting authority then applied to commit Mr R and the bank for contempt in removing the funds from the original account.

5. Once the bank had served its evidence explaining why it had moved the funds, the prosecuting authority agreed not to press the court to impose any penalty. But they applied for the bank to

pay their costs and for that purpose the Judge had to consider whether the bank had breached the freezing order, such that there had been a contempt of court. He rejected the bank's argument that transferring money between accounts was not a dealing with the funds. He held that by moving the funds the bank had breached the terms of the freezing order. It had "removed the identifying characteristic of this debt owed by the bank to Mr R, by being a debt with a clearly identified location and identification within books of the bank to one that was not so readily ascertained". As the dealing had been deliberate, the Bank was in contempt of court.

6. By the time when the application had been made the prosecuting authority had known that it had not been prejudiced (in fact it had benefited from the additional interest on the funds in question). Therefore the judge held that it was not appropriate to make any order for costs, but since the bank had effectively offered a "drop hands" settlement prior to the hearing, the prosecuting authority was ordered to pay the bank's costs of counsel's attendance.

7. The case was therefore something of a storm in a tea-cup. But the Judge's strict approach to the issue of breach of the order is to be noted. The fact that the respondent or third party is acting in what he or she perceives to be a reasonable and honest fashion may not provide an answer to an allegation that action has been taken in breach of the terms of the order.

8. In the past there has been some doubt whether a third party disposes of an asset in contravention of a freezing injunction if he merely transfers the asset to the respondent. In *Z Ltd v A-Z and AA-LL* [1982] QB 558 Lord Denning MR indicated (at 574) that a third party must not hand the asset over to the respondent, but in *The Law Society v Shanks* [1988] 1 FLR 504 Lord Donladson MR stated that handing the asset over to its owner did not amount to a dissipation or a disposal. In *Bank Mellat v Kazmi* [1989] 1 QB 541 Nourse LJ indicated (at 547) that although mere notice of a freezing injunction did not prevent transfer to the owner, the third party would be in contempt if on notice of a "probability that the asset will be disposed of or dealt with in breach of the order". These cases do not appear to have been cited to the Judge in the Lloyds TSB case.

9. Nevertheless, the lesson here is to ensure that any action which affects the assets to which the order does or may apply, should be discussed and agreed with the applicant in whose favour the freezing order was made, or sanctioned by the court (if agreement cannot be reached), before it is carried out.

Applications to discharge by the respondent

10. Where the order has been made at a hearing at which the respondent was not present or represented, the respondent will need to consider whether there are grounds on which to apply to have the order discharged. Although not invariable practice in every case, the court rules provide (in CPR Part 25 PD para 5.1(3)) for an order made without notice to contain a return date. At that hearing a respondent who wishes to do so, may seek to have the injunction discharged. Alternatively, he may apply to the court at a later date to have the injunction discharged. Delay in making such an application may be material, but generally only if the applicant has been put at a disadvantage by the delay: *Lloyds Bowmaker Ltd v Britannia Arrow Plc* [1988] 1 WLR 1337 at 1346 (Glidewell LJ).

11. The respondent needs to consider whether the applicant has fallen into the kind of pitfalls covered by Hugh Sims and Richard Ascroft in their presentation. We set out here a checklist of the principal grounds for challenge, and examine some of these from the point of view of the respondent below.

    - Should the applicant have given prior notice to the respondent?
    - Does the applicant's evidence disclose a good arguable case against the respondent?
    - Does the applicant's evidence establish that the respondent has assets within the jurisdiction (and, in the case of an order with extra-territorial effect, outside the jurisdiction)?
    - Does the applicant's evidence establish a risk of dissipation of the respondent's assets?
    - Has there been a failure by the applicant to make full and frank disclosure?

12. A hearing to discharge an injunction is a re-hearing (not an appeal): *Laemthong International Lines Co Ltd v ARTIS* [2005] 1 Lloyd's Rep 100 at 107. The respondent will need to consider what evidence he can and should adduce if he wishes to challenge the applicant's evidence. If there has been any relevant change of circumstances which means the injunction is no longer appropriate, details will need to be set out in the respondent's statement in response. We draw particular attention to the following points.

Should the applicant have given prior notice to the respondent?

13. The Chancery Guide states (at para 5.18) that applications for freezing injunctions and search orders are "invariably made without notice in the first instance". As Walker J stated in *Mobil Cerro Negro Ltd v Petroleos De Venezuela SA* [2008] 1 Lloyd's Rep 684 at para 2: "the applicant must justify the use of this exceptional procedure, and applicants generally do so by saying that there is a substantial risk that advance notice would defeat the purpose of the order".

14. There may be cases in which it may not have been appropriate for the applicant to proceed without notice if the case was not one of exceptional urgency: *Franses v Al Assad* [2007] EWHC 2442 (Ch). But of itself, the failure to give notice in a case where notice could and should have been given, may not be enough to persuade the court to discharge an injunction which is otherwise properly made.

Does the applicant's evidence disclose a good arguable case against the respondent?

15. The respondent should consider whether the applicant has at least formulated the case for substantive relief - "without the issue of substantive proceedings or an undertaking to do so, the propriety of the grant of an interlocutory injunction would be difficult to defend": *Fourie v Le Roux* [2007] 1 WLR 320 at 333 (Lord Scott).

16. But the threshold is a fairly low one - the court needs only be persuaded that it is sufficiently arguable that a cause of action exists, not that a cause of action probably does exist: *Mobil v Petroleos* above at para 34. Merely technical objections are unlikely, of themselves, to be sufficient to persuade the court that no cause of action exists. See for example *Dean & Dean v Natela Grinina* [2008] EWHC 927 (QBD) in which the applicants obtained a freezing injunction in support of a claim for legal fees, for which the respondent claimed she could not be liable until she had been presented with an appropriate bill. The bills on which the applicants relied had been marked "pro forma" which the judge accepted would usually indicate that no payment was required. It also appeared that the bills had not been signed by a partner, and contrary to the requirements of the Solicitors Act 1974 did not state that certain disbursements were unpaid. But Jack J (at para 16) gave these technical objections short shrift: "My conclusion is that the points raised on behalf of Ms Grinina as to cause of action are technical rather than of substance, and that if a sufficient case was otherwise made out for a freezing order the court should not be deterred by them".

17. Nevertheless, there may be cases in which there is a defence to the claim, including a defence of set-off, which is so clear as to persuade the court to discharge the injunction.

Does the applicant's evidence establish that the respondent has assets within the jurisdiction (and, in the case of an order with extra-territorial effect, outside the jurisdiction)?

18. The respondent will usually be required to provide details of his assets. If assets exist and are substantial, that of itself may be a ground on which to apply to have the injunction discharged, although it may be necessary to offer to provide some security (see below). But hard evidence of assets is required and failure to provide details may weigh in the balance against discharging an injunction (see for example, *Third Chandris Corp v Unimarine SA* [1979] 1 QB 645 at 672 per Lawton LJ - "the charterers have presented an image of themselves made up of words, not of facts").

19. There can also be cases in which a question arises as to whether assets specified in the injunction belong to the respondent or to a third party. In *SCF Finance v Masri* [1985] 1 WLR 876, Lloyd LJ stated (at 885):

> "(i) Where a plaintiff invites the court to include within the scope of a *Mareva* injunction assets which appear on their face to belong to a third party, e.g. a bank account in the name of a third party, the court should not accede to the invitation without good reason for supposing that the assets are in truth the assets of the defendant. (ii) Where the defendant asserts that the assets belong to a third party, the court is not obliged to accept that assertion without inquiry, but may do so depending on the circumstances. The same applies where it is the third party who makes the assertion, on an application to intervene. (iii) In deciding whether to accept the assertion of a defendant or a third party, without further inquiry, the court will be guided by what is just and convenient, not only between the plaintiff and the defendant, but also between the plaintiff, the defendant and the third party. (iv) Where the court decides not to accept the assertion without further inquiry, it may order an issue to be tried between the plaintiff and the third party in advance of the main action, or it may order that the issue await the outcome of the main action, again depending in each case on what is just and convenient."

The above approach was approved by the Court of Appeal in *Allied Arab Bank Ltd v Hajjar* [1989] Fam Law 68.

Does the applicant's evidence establish a risk of dissipation of the respondent's assets?

20. The issue is whether there is "solid evidence" of the alleged risk of dissipation: *The Niedersachsen* [1983] 2 Lloyd's Rep 600 at 606-7 per Mustill J. There can be a real risk of dissipation where even an apparently financially solid company transfers its assets outside the jurisdiction if enforcement overseas would cause extra costs and delays: *Stronghold Insurance Co Ltd v Overseas Union Insurance Ltd* [1996] LRLR 13 at 18-19 per Potter J (which Walker J was prepared to accept as correct in *Mobil v Petroleos* above at para 39). But the mere fact that the actual or feared conduct would risk the claimant's ability to enforce a judgment or award does not in every case mean that a freezing order should be granted. The conduct must be "unjustifiable": *Ketchum International v Group Public Relations Holdings* [1997] 1 WLR 4 at 10 (Stuart-Smith LJ), applied in *Mobil v Petroleos* above at para 41.

21. Each case necessarily turns on its own facts. But both *Mobil v Petroleos* and *Dean v Grinina* (above), provide recent examples of situations in which freezing orders were discharged for lack of evidence of a risk of dissipation.

22. In *Mobil v Petroleos*, the respondent was the state-owned national oil company of Venezuela. The applicant had the benefit of an oil exploitation agreement with one of the respondent's subsidiaries, and a guarantee from the respondent. When the Venezuelan government imposed a policy of requiring oil exploration to be carried out by companies which were at least 60% Venezuelan owned, the applicant claimed compensation, called on the guarantee and obtained a freezing order covering assets up to $12 billion. Walker J rejected the respondent's assertion that the applicant did not have a sufficiently arguable case, but accepted that the applicant had failed to show a good arguable case of unjustifiable conduct on the part of the respondent in relation to its assets. Relevant factors in arriving at that conclusion included the following, which give a "flavour" of the approach of the court in the context of a large commercial claim.

    - An arbitration award (under the ICC) under the guarantee could be enforced in Venezuela. No evidence had been advanced that enforcement in Venezuela would be any more difficult than in Europe (para 46).
    - The alleged failure of the respondent to honour its obligations was relevant only to the issue whether the applicant had a sufficiently arguable claim, not to the issue of risk of dissipation (para 49).

- Public declarations made by the respondent that it did not expect to pay were merely declarations of its negotiating stance. On the evidence settlements had in fact been reached with most other oil companies (para 53).
- Suggestions that the respondent had been seeking to delay the arbitration were "insubstantial". There was nothing improper in making jurisdictional challenges (para 59).
- Although the respondent had adopted a policy of disposing of its assets in the USA and Europe, that reflected the policy of the Venezuelan government and gave no substantial basis for fearing unjustifiable conduct on the respondent's part in relation to its assets (para 61).
- There was "nothing unusual" in the ease with which funds or shares could be transferred by the respondent (para 62).
- The fact that the respondent had been taking "technical points" as to service might have been significant if there had been allegations of fraud (and there might be "other cases" where it would be significant). But here there was no such allegation: "technical points are there to be taken by a respondent who genuinely objects to the order" (para 64).
- The fact that the respondent's assets were concealed behind structures which the applicant could not penetrate, was not significant. In the absence of a court order, the respondent was entitled to decide whether to permit the applicant to "penetrate" its structures (para 65).
- Although the claim was "huge", the size of the claim, when compared with the respondent's "nature and financial standing", gave no assistance to the applicant (para 68).
- The absence of evidence of assets outside Venezuela was unsurprising (para 70).
- Any deterioration in the respondent's credit ratings was not in itself a basis for a freezing order. Even if the respondent had needed to increase its liquid reserves, there was no reason to doubt that banks remained prepared to assist it (para 72).
- In the absence of any allegation of fraud, and since the respondent had assets of at least $4.7 billion in the USA, the lawful removal of $11m from the respondent's New York bank account was not significant (para 74).

23. In *Dean v Grinina* the freezing order obtained by the applicant was in the sum of just over £500,000. The respondent was a citizen of Georgia but lived with two of her children in a substantial property in London. The family was alleged to be of "considerable wealth". The respondent had retained the applicant to represent her defence to criminal charges of causing death by dangerous driving and doing acts to pervert the course of justice. It was alleged that she had knocked down and killed a pedestrian, then had her car broken up and disposed of. Her defence was that she was not driving the vehicle at the time. Another Georgian had admitted being the driver but had subsequently committed suicide.

24. It was the respondent's case that she had engaged the applicants at very high rates (up to £750 per hour) because of the urgency of her position, but that the rates should have been reduced thereafter. The firm also incurred substantial fees in relation to civil matters "some of them to very little effect". The respondent's bail had been varied to allow her to attend a memorial service in Moscow, on terms that she put up £200,000 and her brother stand surety. But the respondent fell ill in Moscow and had remained there. Medical evidence was produced to confirm her condition.

25. A cheque for £50,000 from the respondent had been dishonoured shortly before the freezing order was granted. The applicant then commenced proceedings for assessment of their bills. The assessment proceedings were still continuing. The sum outstanding at the time of the hearing was said to be £341,000. The respondent's only substantial assets were said to be sums totalling £65,000 in two bank accounts.

26. The applicant's case was that the respondent had decided to remain in Moscow because she feared imprisonment if she returned to face trial: "in short the foundation stone for the case as to risk of dissipation is Ms Grinina's continuing absence in Moscow". But Jack J held that there were strong reasons for accepting her evidence that she intended to return to face trial: otherwise she could be convicted in her absence and would be a fugitive from justice. The applicants themselves believed she had a good defence and she had put up the £200,000 to meet her bail conditions. She had not removed the £65,000 in her bank accounts even when

warned of the possibility of a freezing injunction, and had instructed a new firm in the UK to respond to the assessment proceedings.

27. Finally, by way of example, we refer to another recent case: *Renewable Power & Light Plc v Renewable Power & Light Services Inc* [2008] EWHC 1058 (Ch) decided by Lewison J. There the respondent had been the applicant's director, chief executive and president, but had been dismissed amidst allegations of breach of contract, negligence and breach of fiduciary duty. The applicant had obtained the freezing injunction to restrain in particular any dealing with the proceeds of sale of shares, and had alleged that the respondent was in breach of a "lock-in" arrangement which had been intended to prevent the respondent from disposing of his interest in the applicant's share capital. It transpired that those allegations could not be sustained, but the applicant sought to rely on other evidence to support the grant of the freezing injunction.

28. Lewison J rejected the new allegations. He made the following points.

- In so far as the respondent's conduct was now criticised, the allegations were consistent with incompetence and did not justify an inference that the respondent intended to make himself judgment proof (para 18).
- An allegation of dishonesty had to be clearly made. The court would not infer dishonesty (para 20).
- Although the respondent admitted that he should not have claimed certain expenses from the applicant, "in the context of the substantive claim which, according to RPL, is worth US$48 million, the "fiddling" of £2,500-worth of expenses is trivial" (para 24).
- An allegation that the respondent had failed to notify the applicant of two share disposals, as required by the lock-in agreement, did not support an adverse inference that the respondent was intending to make himself judgment proof. The share sales had been openly conducted through the applicant's brokers (as required by the lock-in agreement) and the respondent had made attempts to notify the applicant, by e-mail and fax (para 31).
- The respondent had demonstrated that he had a legitimate reason for selling the shares, particularly since they were his most readily realisable source of cash (para 37).
- An English judgment could be enforced in Alberta, where the respondent lived, and it was irrelevant that the respondent had "acted highly litigiously previously" - "Not only is this the pot calling the kettle black in view of the extraordinary vigour with which RPL have pursued Mr Lewis, but he is only highly litigious in the same way that a dog is dangerous in the French saying 'ce chien est méchant. Il se défend" (para 43).
- Use of funds by the respondent to fund his defence was unobjectionable (para 44).
- Use of the proceeds of sale of the shares to make an investment in another company or business enterprise could not be labelled a 'diversion of funds". That was the respondent's normal method of carrying on business (para 45).
- Payments made by the respondent to his wife were repayments of loans. There was nothing to indicate the loans were made otherwise than in good faith. Freezing orders are not designed to give one creditor priority over another (para 46).
- Although the respondent had made a gift of £5,000 to his wife, "to suggest that the making of a gift of that modesty is evidence of an attempt to conceal or dissipate assets when the proceeds of sale of the shares have approached £1 million, and the remaining shares might be worth double that amount, is really scraping the bottom of the barrel" (para 48).

Has there been a failure by the applicant to make full and frank disclosure?

29. Immaterial non-disclosure is not a means of escaping from a freezing injunction which would otherwise have been justified. Nevertheless, the courts have stressed the heavy burden of full and frank disclosure of material facts known to the applicant and also any additional facts which he would have known if he had made such enquiries. Failure to do so carries with it the risk of being denied relief whether or not the applicant had a good arguable case or even a strong prima facie case, although the court retrains a discretion. See the recent summary of the applicable principles in *R (Lawer) v Restormel Borough Council* [2007] EWHC 2299 (Admin) at para 60-69.

30. The applicant for a freezing injunction which has been obtained without notice to (or with only informal notice to) the respondent is under a duty to make a note of the hearing. By reference to that note, and in line with the guidance given in the *Restormel* case, the respondent should check the following.

    - Did the applicant specifically identify all relevant documents for the judge?
    - Did the applicant take the judge to the particular passages in the documents which are material?
    - Did the applicant take appropriate steps to ensure the judge correctly appreciated the significance of what he was asked to read?

31. By way of recent example, we refer to *Al-Rawas v Pegasus Energy Ltd* [2007] EWCA Civ 268 in which search and seizure orders and a freezing order obtained by the applicant were discharged on a variety of grounds, including non-disclosure. The applicant had suggested that the respondents had deliberately set up loans totalling US$10.405m, designed to create or give the appearance of a series of debts owed to one of the respondents (His Highness Sheikh Khalifa bin Hamed Al-Thani), so as to use the requirement to pay the 'loans' as a pretext for a rights issue, which was intended to reduce the applicant's shareholding to a negligible level. However, by the time the case came before the judge (Ramsay J), the applicant accepted that he had been aware that loans totalling US$6.795m had been made to the Sheikh, and it therefore became impossible to rely on any suspicion about the loans to establish the applicant's case.

32. The Court of Appeal agreed with the judge that the failure to disclose this information "was both serious and persistent". Since the suggestion that the loans may not have been genuine had played a significant part in persuading the court to grant the original orders, it was sufficiently serious for the court to discharge the orders on this ground alone.

Applications to vary

33. Exceptionally applications to vary are made by the applicant - but the courts have stressed that this is to be regarded as a fall-back position and the primary consideration is to get the wording of the order right from the outset: *Z Ltd v A-Z* above at 587-8 per Kerr LJ. More often applications to vary fall into one or more of the following main categories.

    - Applications to enable the respondent to discharge liabilities or expenses
    - Applications by third parties - often for clarification.

34. The standard form of freezing injunction provides for variations by agreement in writing. In a simple case, agreed variations can be given effect by a consent order which can be submitted to the court for sealing without the need for any appearance on behalf of the parties: *Z Ltd v A-Z* above at 587-8 per Kerr LJ. If agreement cannot be reached, an application must be made to the court.

Application to vary by the respondent

35. Most frequently the application will be made to enable the respondent to pay debts or expenses. Where the injunction does not support a proprietary claim, there can be no objection in principle to the respondent using his assets for ordinary business dealings, ordinary living expenses and reasonable legal costs: see for example *SCF v Masri* above at 880G. The current standard form freezing injunction covers these matters under the heading "Exceptions to this Order", but there may be financial limits allowed for in the order which are insufficient, and which the respondent will wish to have increased.

36. Generally if the respondent relies on certain facts to make an application to pay legal or business expenses, it is incumbent on him to apply for appropriate relief based on those same facts once and once only. It is an abuse to make two separate applications based on the same facts: *Halifax v Chandler* [2001] EWCA Civ 1750 at para 26 (Clarke LJ).

Variation to pay the respondent's living, legal and business expenses

37. When asked to permit ordinary business expenditure, the court will not usually consider whether the business expenses are reasonable or balance the strength of the respondent's case that he needs to pay them against the strength of the applicant's case, or even take into account the fact that any monies spent will not be available to the applicant if it obtains judgment: *Halifax v Chandler* [2001] EWCA Civ 1750 at para 18 (Clarke LJ).

38. A corporate respondent may be entitled to pay trade creditors even if it is in the process of running down its business and there will be little or nothing left to meet the applicant's claim, if no judgment has been given on that claim: see for example *K/S A/S Admiral Shipping v Portlink Ferries Ltd* [1986] 2 Lloyd's Rep 236 at 243 (Sir John Donaldson MR). This is because it would be wrong to enable the applicant to use the freezing injunction as a means of obtaining priority for an undetermined claim against the claims of other creditors who would in the ordinary course have been paid before the applicant.

39. For this purpose trade creditors include persons who are not owed debts as such but also those owed liquidated damages or who have claims for moneys had and received: see *Customs & Excise Commissioners v Sawyer* [2001] EWCA Civ 1976 at para 61. So, for example, a respondent who had been in a partnership business succeeded in having a freezing injunction varied to enable him to pay (from assets to which the applicant had no proprietary claim) claims made against him by clients and his accountants' fees: *Investment & Pensions Advisory Services v Gray* [1990] BCLC 38.

40. The respondent may even be permitted to pay debts which could not be enforced against him. "A reputable businessman who has received a loan from another person is likely to regard it as dishonourable if not dishonest, not to repay that loan even if enforcement of that loan is technically illegal": *The Angel Bell* [1981] 1 QB 65 at 73 (Robert Goff J), and the *Sawyer* case (above) at para 51.

41. But a variation to enable a subsidiary company to transfer money to its parent has been refused in a case where the transfer was not to discharge a routine trading debt but was in reality a return of trading capital to the sole beneficial shareholder in the respondent company: *Atlas Maritime Co SA v Avalon Maritime Ltd (No 1)* [1991] 3 All ER 769. Similarly, the court has granted a freezing injunction to prevent a proposed sale of a business to a new company which was not at arm's length: *Customs & Excise Commissioners v Anchor Foods Ltd* [1999] 1 WLR 1139.

42. In the past it had been suggested that to obtain a variation to meet some existing liability, the respondent must always show that no other assets are available to meet that liability: *A v C (No 2)* [1981] QB 961 at 963. Certainly if there is some other source from which a liability would usually be met, a variation is likely to be refused. So for example, in *Atlas Maritime Co SA v Avalon Martime Ltd (No 3)* [1991] 4 All ER 783, a variation sought by the respondent to pay legal expenses was refused where the parent company of the respondent had historically managed the respondent's business and provided money to meet its liabilities. But when the applicant has no proprietary claim to the respondent's assets, it seems that it is only necessary to satisfy the court by full disclosure of the respondent's needs and that there is no ulterior motive involving the dissipation of undisclosed assets: *Campbell Mussels v Thompson* (1985) 81 LS Gaz 2140. The respondent's evidence in support of the application for the variation will therefore need to be sufficient to demonstrate that the debt or expense which the respondent wishes to pay is legitimate in the sense that it was incurred or will be incurred in the ordinary course of the respondent's business. If, however, the applicant claims a proprietary right to assets held by the respondent, the court will not vary the injunction to allow expenditure from that fund unless the respondent satisfies the court that no other assets are available, and that he has an arguable case, with a real prospect of success, that he is entitled to the fund: *Director of the Assets Recovery Agency v Creaven* [2006] 1 WLR 622 at para 25.

Banks and third parties

43. Any third party notified of a freezing injunction must comply with it. Aiding and abetting any breach of the order by the respondent is a contempt of court, as is any act which deliberately interferes with the course of justice by frustrating the purpose for which the order was made: see for example *Commissioners of Customs & Excise v Barclays Bank plc* [2007] 1 AC 181 para 29 and the wording in the standard form of freezing order under the heading "Effect of this order". But the applicant should equally take care in considering the identity of the third parties to be served with notice of the injunction, because the applicant exposes himself to liability on the undertaking to compensate third parties for damage suffered as a result of the injunction.

44. Third parties may also apply to have a freezing injunction varied or discharged. The application is made within the proceedings in which the injunction was made, and it is not necessary for the third party to be made a party to the proceedings: *Creatnor Maritime Co Ltd v Irish Marine Management Ltd* [1978] 1 WLR 966 at 978 (Buckley LJ).

45. A variation of a freezing order may be sought by a third party to allow for payment by the respondent of debts owed to the third party. As in the case of an application by the respondent, the evidence in support of the application must demonstrate that the payment is "no more than a payment which would normally have been made out of such assets had there been no injunction": *A v B (X intervening)* [1983] 2 Lloyd's Rep 532 at 534 (Parker J).

46. A freezing injunction which causes an unwarranted interference with the rights of a third party will be discharged. So, for example, in *Galaxia Maritime SA v Mineralimportexport* [1982] 1 WLR 539, a freezing injunction which covered a cargo of coal owned by the respondent but loaded on the third party's vessel, was discharged in circumstances where the vessel had been chartered to another party and if prevented from sailing forthwith that would have interfered with the third party's freedom to use its trading assets and the crew's arrangements for Christmas. The prejudice was not met by the applicant's offer of a guarantee, for otherwise the applicant could effectively compulsorily purchase the third party's rights.

47. The business of banks and other third parties (such as bailees) who have or control the respondent's assets as an incident of their own business cannot be said to be prejudiced in quite the same way. In their case the interference in their business is adequately covered by the applicant's cross-undertaking in damages and (in the case of banks) the applicant's obligation to meet the bank's reasonable costs of compliance.

Effect on bank accounts

48. Once a bank receives notice of a freezing injunction against a customer, the customer's authority to give instructions to the bank is revoked. The bank should therefore freeze the customer's accounts up to the specified maximum sum (if any) - in the sense of allowing no further debits on the instructions of the customer. This includes payment of cheques drawn before and after the order was made. See *Z Ltd v A-Z* above at 574 (Lord Denning MR). Generally the bank will allow credits, unless the order specifically prohibits it: the reason for this is that returning a credit properly due to the respondent can affect the value of his assets and might therefore be regarded as a breach of the Order. In cases of particular urgency notice of the freezing injunction may be given to the bank orally in the first instance – for example by a telephone call. That may give rise to issues as to whether the call is genuine. But with modern means of fairly instantaneous communication, a lender can expect to be provided with a sealed copy of the order very soon after being notified orally. The standard form of freezing injunction expressly provides that anyone notified of the order will be given a copy of it by the applicant's legal representatives. In cases of genuine doubt, during any period of delay in receipt of the document, the bank is best advised not to allow the affected accounts to be operated and could contact the court said to have issued the order for confirmation that an order has been made.

49. In the past the courts have said that particular bank accounts should be specified with as much precision as possible: *Z Ltd v A-Z* above at 575D (Lord Denning MR). Whilst this is appears no

longer to be required, it is still believed to be good practice for the applicant to ensure that the order refers to specific account details if known so far as possible. Nevertheless the bank served will need to have efficient and reliable systems to identify the accounts to which the respondent is a party. In some cases (especially if the order refers to multiple respondents or addresses) a bank served may first check with the applicant's solicitors that the applicant intends a full search to be made of accounts at all branches.

50. The standard form of freezing order is expressed to apply to the assets of the respondent "whether or not they are in his own name and whether they are solely or jointly owned. For the purpose of this order the Respondent's assets include any asset which he has the power, directly or indirectly, to dispose of or deal with as if it were his own. The Respondent is to be regarded as having such power if a third party holds or controls the asset in accordance with his direct or indirect instructions." Thus joint accounts to which the respondent is a party, and accounts known to be held on his behalf by any nominee or other third party, are all affected. If there is doubt as to the extent of the respondent's interest, the procedures explained in *SCF Finance v Masri* above, may come into play.

51. The standard form of freezing injunction also expressly provides that it applies to any money standing to the credit of any bank account including the amount of any cheque drawn on such account which has not been cleared. But if prior to the date when notice of the injunction was given to the bank, a cheque backed by a cheque guarantee card has been issued, or a payment has been made by credit card, the bank should be entitled to debit the respondent's account: *Z Ltd v AZ* above 576-7. If in doubt as to whether the order permits it to do so, the bank will need to seek the consent of the applicant or a variation of the order. The difficulty which arises in "stopping" such payments is likely to make it prudent for the bank to withdraw the card facility from its customer, if it can do so under the terms and conditions applicable to the use of the card.

52. When the order is expressed in sterling but the bank holds an account in another currency, the bank should convert the credit balance into sterling at the then buying rate to the extent necessary to meet the sum stated in the order, and then put a stop on the account to this extent: *Z Ltd v A-Z* above at 593B. It should be sufficient to calculate the sterling equivalent and freeze that amount, rather than actually converting the funds into sterling.

53. A bank which receives a third party debt order attaching an account balance after having received notice of a freezing injunction will need to apply to the court which granted the freezing injunction for permission to pay the judgment creditor when the third party debt order is made absolute, unless the applicant for the freezing order gives his consent to the payment being made. The bank will also advise the court serving the TPDO and the claimant that there are other legal proceedings affecting the account, in accordance with CPR 72.8(2).

Effect on other banking transactions

54. The restriction which a freezing injunction imposes on dealing with assets includes charging them (this was originally established in *CBS United Kingdom Ltd v Lambert* [1983] Ch 37 (CA) at 42). A bank which has received notice of the injunction cannot, therefore, take security over any assets of the respondent without obtaining a variation of the order. Nor can it realise any security granted before notice of the injunction was received, but on an application to vary the injunction to permit realisation of a security, permission will usually be given in the absence of evidence of collusion with the applicant: *Gangway Ltd v Caledonian Park Investments (Jersey) Ltd* [2001] 2 Lloyd's Rep 715.

55. The view expressed in *Paget's Law of Banking* (13th ed) para 26.16 is that the benefit of an irrevocable letter of credit is prima facie an asset to which a freezing order will apply. Whether or not that is correct, the proceeds of the credit clearly would be such an asset and a bank receiving payment on behalf of its customer ought therefore the treat the proceeds in the same way as credit balances held for the customer. So there will in normal circumstances be no

objection to a freezing order imposing a specific restraint on the proceeds of a letter of credit as and when received by the respondent: *Z Ltd v A-Z* above at 574 & 591.

56. The existence of a freezing injunction made against the customer on whose behalf a letter of credit has been issued will not, save in exceptional circumstances, prevent that bank from making payment under the credit. To restrain performance would be both an interference in the ordinary course of the respondent's business, and contrary to the general reluctance of the court to interfere with payment under letters of credit and performance guarantees. *Lewis & Peat v Almatu Properties Ltd* [1993] 2 Bank LR 45 (CA).

57. It has been said that a freezing injunction should not apply to shares, title deeds and articles held in safe custody, unless these are specifically mentioned in the order, because the bank cannot be expected to know their value and, in the case of safe custody, may not know the contents of any safe deposit box: *Z Ltd v A-Z* above at 590-1. However the bank will often take a more cautious approach and advise the unit holding any safe custody item not to allow the respondent to access it without further reference to the bank's legal department.

Protections for banks and third parties

58. The standard form of freezing injunction contains a number of provisions designed to protect banks from difficulties which might otherwise arise in the interpretation of the order or in giving effect to it. The following are of particular importance.

59. The standard form provides that no bank need enquire as to the application or proposed application of any money withdrawn by the respondent if the withdrawal appears to be permitted by the order. This means that in so far as the order allows the respondent to make withdrawals up to a specified amount a specified period (whether weekly or otherwise) to meet living expenses, business expenses, or legal costs, the bank does not need to ensure that the funds withdrawn are in fact being used for those permitted purposes. But for this proviso it might be suggested that a bank was put on inquiry that the respondent was using the funds for improper purposes by its knowledge as to the identity of the payees of cheques or other payment instructions given by the respondent. In practice, however, banks will not usually rely on this carve out. A bank can make judgments regarding what is in the ordinary course of business for a bank but not necessarily what is in the ordinary course of business for another type of business and will generally ask for express permission for the accounts to run to set limits or unmonitored.

60. The standard form also includes a provision (known as the "Baltic proviso" – from the decision in *Baltic Shipping Co Ltd v Translink Shipping Ltd* [1995] 1 Lloyd's Rep 673) for incorporation into orders having world-wide or extra-territorial effect, that in respect of assets located outside England and Wales, the order does not 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. This protects banks with branches or subsidiaries abroad in jurisdictions where the freezing injunction is not recognised, from being held in contempt by the court which issued the freezing order. See *Bank of China v NBM LLC* [2002] 1 WLR 844 (CA) in which the court decided that the applicant's undertaking in damages was not a sufficient protection in cases where the effect of the order might be to place a bank in breach of contract to its customer under the local law applicable in the jurisdiction in which its foreign branch is situated.

61. The standard form also expressly provides that the injunction does not prevent any bank from exercising any right of set off it may have in respect of any facility which it gave to the respondent before it was notified of the order. This preserves the bank's right to combine accounts, which is not inconsistent with the purpose of the injunction, since the combination of accounts is merely a means of ascertaining the net balance due either to or from the customer. But if an order is received which does not expressly allow set-off, it should not be assumed that

set-off is permitted (*Oceanica Castelana Armadora SA of Panama v Mineralimportexport* [1983] 1 WLR 1294 at 1301, Lloyd J) and the bank should seek a variation.

62. Finally, the applicant gives an express undertaking to pay the reasonable costs of anyone other than the respondent which have been incurred as a result of the order. We refer to this in more detail below,

Liabilities for contempt and negligence

63. The established remedy for breach of a freezing injunction is to apply to commit the party in default for contempt of court. But in the case of a third party, such as a bank, a contempt will only have been committed if the third party knowingly sought to frustrate the order - that is to say there has to be shown that there was an intention to interfere with or to impede the administration of justice, and this must be established to the criminal standard of proof: *Customs & Excise v Barclays* above para 29 (Lord Hoffmann). Thus the standard form freezing injunction states that "It is a contempt of court for any person notified of this order knowingly to assist in or permit a breach of this order. Any person doing so may be imprisoned, fined or have their assets seized". Note that the position is different in the case of the respondent: liability on his part is strict and he will be in contempt if he acts in breach of the order after receiving notice of it: *Customs & Excise v Barclays* above at para 56 & 62 (Lord Rodger).

64. The court will punish a party who breaches one of its orders if the breach is sufficiently serious and the required standard of knowledge and intention is sufficiently proved: *Customs & Excise v Barclays* above para 11 (Lord Bingham). For an example of a case in which leave was given for a writ of sequestration to be issued against a bank which had knowingly permitted withdrawals in breach of a freezing injunction (all be it a freezing injunction directed at the bank itself as respondent, rather than as third party), see *Z Bank v D1* [1994] 1 Lloyd's Rep 656, in which the bank argued that the president of the bank (who alone had authority to stop the particular account being operated by the employee authorised by the bank to use the account) mistakenly believed the order did not catch that account because it was not specifically referred to in the order. Colman J held that it was the bank's duty to ensure that the authority of the employee responsible for making withdrawals from the account was withdrawn and the failure to take all possible steps to do so would be a contempt. It had also been the duty of the solicitors advising the bank to have the order translated and relay its contents to the bank's president. The transfers which had been made by the employee with authority over the account had been made intentionally and the failure of the bank to take all necessary steps to withdraw that employee's authority was a contempt of court by the bank. The writ of sequestration would be executed in an amount which would, but for the withdrawals, have been available in the account in question, plus interest.

65. In *Customs & Excise v Barclays* above, C&E sought to go further and to claim in damages against the bank for negligence in failing to comply with a freezing injunctions of which it was given notice. In one case the bank had been notified of the order on 29 January at 12.33pm but as a result of "operator error" a payment of £1.24m was allowed following a payment instruction given at 2.30pm. In the other case, the order was served on the bank at 11.38 am on 30 January but a payment of £1.06m was permitted following a payment instruction given at 2pm. The money was not recovered and the judgments subsequently obtained by C&E against the customers remained unsatisfied at the date of the hearings.

66. It was argued by C&E (and accepted by the Court of Appeal) that the threefold test for establishing liability in negligence was met - the bank could foresee that C&E were liable to suffer loss if the injunction was not given effect, the parties were in a sufficient relationship of proximity for much the same reason, and in all the circumstances it was fair just and reasonable that the bank should be held responsible, particularly because on the facts it was not suggested that the bank had intended to flout the order, so there was no effective redress in contempt.

67. The House of Lords reversed the Court of Appeal and held that no duty of care was owed in the tort of negligence. Since a bank on notification of the order was obliged to comply with it and

was exposed to the risk of punishment for contempt if it did not do so, and since there had been no relevant communication or act between the parties, or any reliance by the commissioners on the bank, the bank could not be understood as having voluntarily assumed responsibility for its actions so as to give rise to a duty of care. In any event, the court exercises its injunctive jurisdiction on the basis that its orders were enforceable only by its power to punish for contempt and the bank's only duty was therefore to the court.

68. In this particular case the bank had, on being notified of the injunctions, sent to C&E a standard letter confirming that the bank would abide by the terms of the order. In fact, neither letter reached C&E before the respective payments were made, so neither could have influenced C&E's conduct. But Lord Bingham expressly stated (at para 3) that in his opinion they were of no significance even if they had been received before the payments were made, since the bank was bound to comply with the order irrespective of any confirmation on its part. The principal purpose of the letters had simply been to notify C&E of its duty to reimburse the bank's costs of complying with the orders.

Costs and expenses

69. The applicant must expect to pay all reasonable expenses and all reasonable costs to which innocent third parties may be put by the service of the freezing injunction: *Project Development Co Ltd SA v KMK Securities Ltd* [1982] 1 WLR 1470 at 1473 (Parker J).

70. In the standard form of freezing injunction, therefore, the applicant gives an express undertaking to pay the reasonable costs of anyone other than the respondent which have been incurred as a result of the order including the costs of finding out whether that person holds any of the respondent's assets and if the court later finds that the order has caused such person loss, and decides that such person should be compensated for that loss, the applicant also undertakes to comply with any order the court may make.

71. It follows that a bank will be entitled to its reasonable costs involved in identifying the affected accounts and imposing the necessary restrictions on the use of those accounts. These costs are not usually substantial, but if in exceptional circumstances they are expected to be substantial and the bank has good reason to doubt the applicant's ability to meet them, it would be open to the bank to apply to the court which made the order for a direction requiring the applicant to pay money into court as security.

Enforcement of undertakings

72. A respondent or third party who suffers loss as a result of the making of the freezing order will wish to consider obtaining compensation from the applicant if it later transpires that the order was wrongly obtained. This will require the party affected to apply to enforce the applicant's undertaking. Enforcement involves the court conducting an inquiry as to the damages which the applicant should pay.

73. In *Cheltenham & Gloucester Building Society v Ricketts* [1993] 1 WLR 1545, Neill LJ (at 1551-2) derived the following principles from the cases on enforcement of undertakings.

    - An undertaking as to damages is the price which the person asking for the injunction has to pay.
    - The undertaking does not found any cause of action, but enables the person in whose favour it is given to apply for compensation if it is later established that the order should not have been granted.
    - The undertaking is given to the court, not to any other party.
    - If it is determined that the injunction should not have been granted the undertaking is likely to be enforced, but the court retains a discretion.
    - The question whether the undertaking should be enforced is separate from the question whether the injunction should be discharged or continued.

- Often the injunction will continue to trial, so the question of enforcing the undertaking will not be considered until the end of the trial; even then the court may exceptionally postpone the issue to a later date.
- If the injunction is discharged before trial the court can: (a) determine forthwith that the undertaking should be enforced and proceed to make an assessment of damages; or (b) determine that the undertaking should be enforced and direct an inquiry as to damages to consider causation and quantum; or (c) adjourn the application to enforce until a later date; or (d) determine forthwith the undertaking should not be enforced.
- Damages are awarded on a similar basis to damages for breach of contract.

74. There is jurisdiction to enforce an undertaking even after the action has been discontinued (*Newcomen v Coulson* (1877) 7 Ch D 764) and the court is entitled to consider whether the injunction was wrongly granted even if the injunction has been discharged by consent, as was the situation in the recent case of *Eliades v Lennox Lewis* [2005] EWHC 2966 (QBD).

75. In exercising its discretion to refuse enforcement, the court may have regard to any undue delay on the part of the respondent in seeking to enforce the undertaking: *C&G v Ricketts* above at 1557. But despite there being undue delay of 2 years and 9 months in *Eliades v Lewis* above, Nelson J did not consider that of itself a sufficient reason to refuse enforcement of the undertaking (see at para 89).

76. The court will also have regard to conduct on the part of the respondent which makes it inequitable to enforce the undertaking. But there must be a link between the respondent's conduct with the continuation of the injunction or the enforcement of the undertaking: *Universal Thermosensors Ltd v Hibbern* [1992] 1 WLR 840 at 858. Thus in *Eliades v Lewis* above, after reviewing the facts the judge held (at para 124) that the injunction had not been wrongly granted, but added that even if it had been wrongly granted the special circumstances of the case justified the court declining to enforce the undertaking. In particular, Mr Eliades had been found by a New York jury to be guilty of fraud, he had deliberately concealed assets and lied in evidence to the High Court. Apart from the initial fraud, that conduct related directly to the continuing of the injunction or the enforcement of the undertaking in that it was designed to assist in the discharge of the injunction and to put forward a false level of loss to arise out of it.

77. In *F Hoffmann-La Roche & Co AG v Secretary of State* [1975] AC 295 at 361 Lord Diplock stated that the assessment is made upon the same basis as that upon which damages for breach of contract would be assessed if the undertaking had been a contract between the applicant and the respondent. So applying ordinary contractual causation principles, if the loss would have been suffered because of the bringing of proceedings, even if no injunction had been granted, no damages will be awarded; similarly if the loss would have been suffered in any event because an injunction was properly granted in other proceedings: *Tharros Shipping Co Ltd v Bias Shipping* [1994] 1 Lloyd's Rep 577. Again contractual principles of remoteness of damage should apply, so the court will ordinarily only allow damages for losses which were reasonably foreseeable at the time the undertaking was given. The respondent must also have taken reasonable steps to mitigate any loss, such as by applying to vary the injunction in appropriate circumstances: *Re DPR Futures Ltd* [1999] 1 WLR 778 at 786-7.

78. However in the recent case of *Apex Frozen Foods Ltd v Abdul Ali* [2007] EWHC 469 (Ch), Warren J doubted that it would be right to incorporate all the principles which apply in relation to the assessment of contractual damages. In the case before him the respondent applied for its costs against the applicant liquidator occasioned by litigation started by a company in liquidation in which the company had obtained a freezing order which had subsequently been discharged for material non-disclosure. The respondent contended that it was entitled to the costs it incurred in relation to the freezing order on an indemnity basis as damages recoverable from the liquidator personally on his undertaking. Warren J held that the respondent was entitled to its costs as damages. He favoured the view that the contractual approach was too narrow, and that such costs were "loss" within the meaning of that word in the undertaking. But he added (at para 16) that such costs would form part of the damages recoverable under contractual principles by analogy with cases in which a claimant seeks to recover against a defendant costs

incurred in other litigation with some third party. He also held (at para 31) that only costs on the standard basis could be recovered.

79. For a recent example of an assessment of damages, see *Al-Rawas v Pegasus Energy Ltd* [2008] EWHC 617 (QB). As we have already mentioned above, the applicant had obtained search and seizure orders as well as a freezing injunction, without notice to the respondent in support of litigation in Mauritius based on alleged infringements of her rights as a shareholder. The orders were later set aside and an inquiry into damages ordered. An attempt by the applicant to suggest that the respondent had not mitigated its loss failed (see [2007] EWHC 2427 (QB)). On the assessment hearing, Jack J held that the respondents were entitled to recover special damages in respect of the cost they incurred through dealing with the search and freezing orders. Whilst no evidence had been adduced that any business was disrupted by the search order, applying a common sense approach the court was satisfied that the sheer scale and time take dealing with a search order would have resulted in serious disruption to ordinary business, and the time spent in dealing with the search could be taken as the loss caused. In addition a modest award of £1,000 general damages would be awarded to compensate for consequences which could not be claimed as special damages and would include aggravated damages because the search and seizure order had been obtained by the intentional concealment of material from the court. But unless the particular facts made it appropriate as an exception, damages for emotional distress were not recoverable. Similarly exemplary damages would not be awarded since the undertaking was apt only to provide compensatory damages.

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