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Background to freezing orders in Jersey: What you need to know

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Background

The inherent jurisdiction of the Royal Court of Jersey (the Court) underpins its ability to grant an injunction. This gives the court the flexibility to grant an injunction where it appears just and convenient to do so and on bespoke terms. Whilst not binding in Jersey, the court has and continues to find English judgments on the subject persuasive. In relation to freezing orders, the court's approach has generally mirrored that of the English courts.

The court also has a statutory jurisdiction under the Jersey insolvency legislation to grant injunctions to assist the courts of a prescribed list of countries (currently the United Kingdom, the Isle of Man, Guernsey, Finland and Australia).

While this article is limited to a summary of freezing orders in a civil context, it is worth noting that the court also has the ability to make a number of other orders which can give a creditor an advantage with seeking to recover what is due. By way of example, the granting of search and seizure (Anton Piller) orders and third party documentation production (Norwich Pharmacal) orders are well trodden paths in Jersey.

Freezing orders

Previously known as a 'Mareva injunction, a freezing order is probably the most common type of injunction applied for in Jersey. The effect of a freezing order is to prevent an affected party from dealing with the assets that are the subject of the order to the prejudice of the applicant. An application for a freezing order is often accompanied by a request for the disclosure of documentation relating to the asset base of the defendant (from the defendant directly and/or from third parties) to ensure that the freezing order can be policed.

A freezing order can be applied for pre and post judgment, as part of substantive legal proceedings in Jersey and also in support of substantive legal proceedings in a foreign jurisdiction. It can also be applied for in connection with Jersey or foreign arbitration proceedings.

The Application

Typically, a freezing order will be sought on an *ex parte* basis (without notice to the other party or parties). The principal reason for this is that if a defendant is notified of the application beforehand, it might take steps to try and put assets beyond the creditor's reach.

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As the other parties are not represented at an *ex parte* hearing, the party seeking the freezing order must give full and frank disclosure of all matters in the party's knowledge which the judge needs to know about (which includes all material points against the granting of the freezing order). Non-disclosure is a common reason for a freezing order being lifted. The court has gone as far to say that it may lift a freezing order on the grounds of innocent non-disclosure even where that disclosure, had it been made, would not have stopped the freezing order being granted. Although freezing orders are often made in haste, the court has held that a rushed application is not an excuse for deficient disclosure.

To apply for a freezing order, the applicant will have to:

- demonstrate that it has a good, arguable case; confirm that it has made full and frank disclosure (as set out above);

- provide particulars of its claim against the defendant;

- state its grounds for believing that the defendant has assets in Jersey (which can include assets held on trust); and

-explain why there is a risk of those assets being dissipated.

In addition to the above, the applicant will need to give an undertaking in damages, so that if the freezing order is lifted and/or the defendant succeeds in defending the substantive action, the applicant is bound to compensate the defendant for any loss suffered under the terms of the freezing order.

Security for that undertaking (a payment) might be required. The applicant will also likely need to meet the legal costs of any party cited who is affected by the freezing order.

Even if the above criteria are satisfied, the court still retains a discretion that it may only grant the freezing order if it considers that it is just and convenient to do so.

Next steps

If the freezing order is granted on an *ex parte* basis, it will be necessary to serve the same on the other parties. If applicable, an order for leave to serve the freezing order out of the jurisdiction on parties outside of Jersey will need to be obtained beforehand. The matter will then return before the court so that the matter can be heard on an *inter partes* basis.

Having been served with a freezing order, it is open to the defendant (and/or any parties cited, albeit that they are generally neutral to the application) to apply to the court to lift or vary the freezing order.

Reasonable living and business expenses

Ordinarily, an allowance will be made for the defendant to use funds to pay reasonable living or ordinary bona fide business expenses and legal fees from the frozen assets unless sufficient assets are available elsewhere. An applicant can seek to extinguish a defendant's allowance in certain circumstances where a well founded

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proprietary claim against specific assets is made (for example, that misappropriated funds identified in a bank account belong solely to the applicant).

Breaching a freezing order

If the defendant and/or a party cited breaches the freezing order, they will be in contempt of court and liable to pay a fine and/or be imprisoned (although special rules apply to a bank's security and right of set-off against funds held in a bank account).

Summary

Jersey is a reputable and highly regulated financial centre. It has a sophisticated, responsive and modern legal framework. The court has repeatedly demonstrated a willingness to ensure that a creditor's efforts are not rendered nugatory by a defendant putting assets beyond their reach. However, an applicant must tread carefully when seeking a freezing order. It's a powerful tool, but it carries with it potentially significant exposure should things not go to plan.

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