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A light chill? An alternative to freezing orders

By Jason Woodland

Faced with a dispute, obtaining judgment against a defendant is satisfying, but it is only half the battle. A claimant needs to know that any judgment can be enforced and the money recovered. Any sensible claimant will undertake due diligence on a potential defendant to make sure that there are enough assets to pay any judgment before embarking on litigation, but what if a claimant believes that the defendant will dissipate assets as soon as they are notified of a claim in an attempt to make themselves judgment proof?

In those circumstances, the Court has the power to intervene and grant a freezing order, the "nuclear weapon" of civil litigation. It prevents a party to litigation from disposing or dealing with their assets pending a trial of the claim and requires that party to make full disclosure of their assets so that the order can be policed effectively. It is usually obtained without notice to the defendant, and is therefore one of the most intrusive orders the civil courts can make. In the right circumstances, a freezing order can have a significant impact on the outcome of a case.

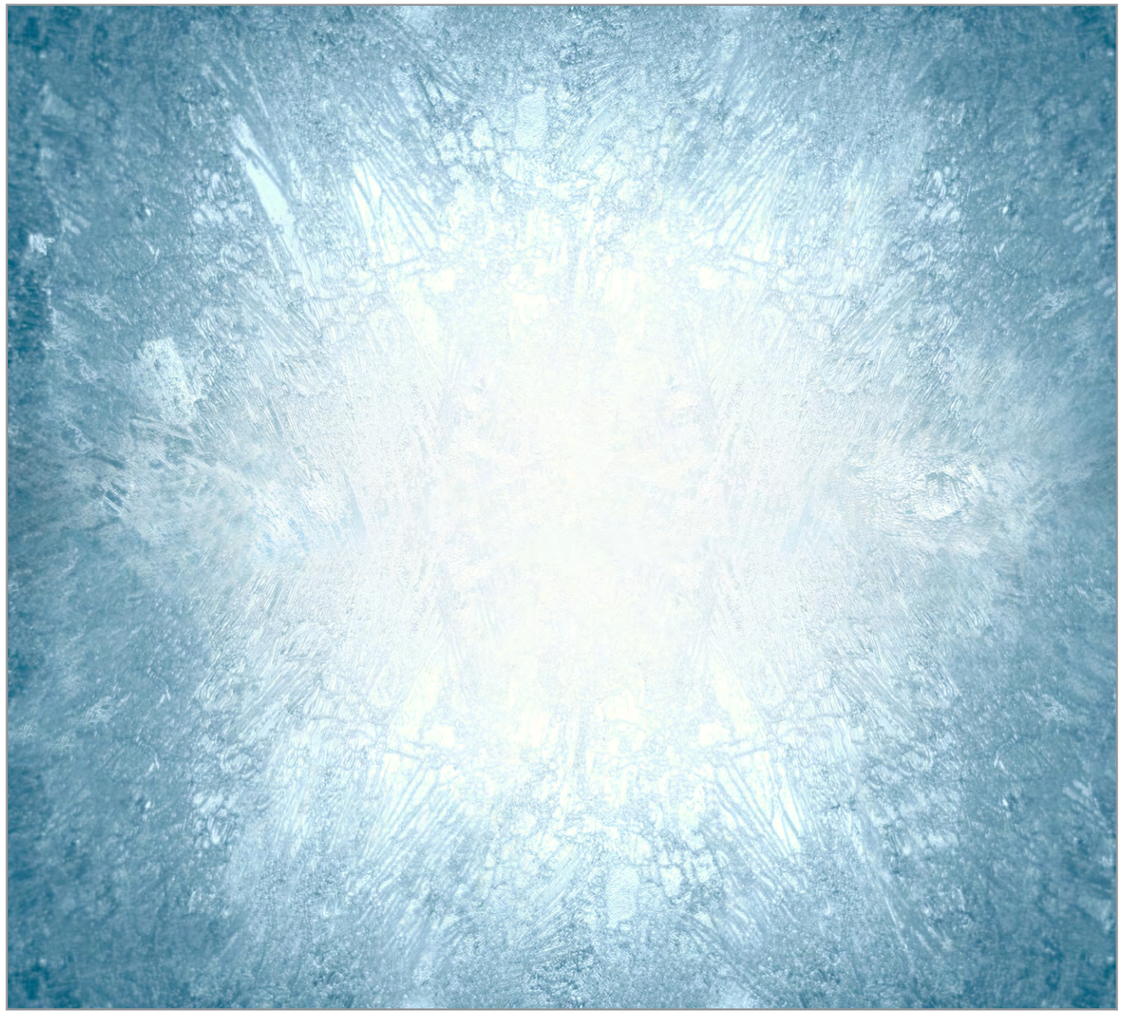
Broadly speaking, in order to obtain a freezing order, a claimant must show:

- that he/she has a good arguable case; and
- there is a risk of dissipation of assets.

If applying without notice to the defendant, a claimant must also make "full and frank disclosure" to the Court of all material facts and arguments, even if harmful to the claimant's case. This is a significant burden and a failure to make full and frank disclosure is one of the main grounds relied on by defendants when seeking to set aside a freezing order.

In addition, an applicant must provide a cross-undertaking to the Court to pay damages for any loss suffered by the defendant if it is later shown that the injunction should not have been granted. As a result, applying for a freezing order can be a high risk strategy: get it right and the claimant will have secured significant advantages in the litigation; get it wrong and the claimant could be faced with a large bill.

Until recently, when faced with a defendant who may dissipate assets in advance of a trial the claimant has been left with a stark choice: apply for a freezing order with the accompanying risk, or don't apply and take their chances when it comes to enforcing a judgment.



Notification injunctions: a useful alternative?

The High Court has recently confirmed in *Holyoake & Anor v Candy & Ors [2016] EWHC 970 (Ch)* that it has the power to grant a "notification injunction" as an alternative to a freezing order. This notification injunction requires the defendant to give written notice of their intention to dispose of or deal with assets. If the claimant objects to the disposal, it can apply to the Court for a freezing order preventing the transaction. It is therefore, at least on its face, less intrusive than a freezing order.

That case concerned the loan of £12 million made to Mark Holyoake and his company to fund a multi-million pound property development. The lender was CPC Group Ltd (CPC), a company that was ultimately controlled by Christian Candy, and, allegedly, by his brother, Nicholas Candy, two well-known property developers.

> *Mr Holyoake claimed that in the course of their business relationship he and his family were subject to a vitriolic campaign of threats, abuse, intimidation and coercion by the defendants. As a result, Mr Holyoake claimed that he was coerced into entering into a long series of further agreements with CPC that were ultimately disadvantageous to him.*

Mr Holyoake claimed that in the course of their business relationship he and his family were subject to a vitriolic campaign of threats, abuse, intimidation and coercion by the defendants. As a result, Mr Holyoake claimed that he was coerced into entering into a long series of further agreements with CPC that were ultimately disadvantageous to him. Mr Holyoake stated that he was eventually forced to sell the property at a loss, and ultimately repaid more than £37 million to CPC in relation to the initial £12 million loan. The defendants denied those allegations.

Mr Holyoake was concerned about the prospect of the defendants dissipating their assets to make themselves judgment proof. In particular, he relied on the corporate structure of the defendants' business, arguing that it was "*particularly opaque*" and therefore easy for the defendants to transfer assets beyond the reach of the claimants. The claimants therefore applied for a notification injunction. They did not apply for a freezing order on the basis that they were "*seeking no more relief than they consider reasonably necessary to protect their position*".

Mr Justice Nugee determined that:

- The Court did have the power to make a notification injunction under section 37 of the Senior Courts Act 1981
- The claimant was still required to show that it had a good arguable case (and not a lower threshold)
- The claimant was still required to demonstrate that there was a risk of dissipation of assets, though the Judge confirmed that the degree of risk necessary for a notification injunction was less than for a freezing order

The future

Whilst the Judge accepted that the degree of risk of dissipation need not be as high as when applying for a freezing order, there was little guidance as to how much of a risk the claimant needed to establish, nor how significant the difference was between the two tests.

If the concept of notification injunctions proves attractive to claimants, this test will inevitably have to be developed.

On the face of the judgment, the lower test for risk of dissipation was the only difference between an application for a freezing order and a notification injunction. However, there are some other potential advantages:

- An application for a notification injunction will usually be made on notice to the defendant, and so the duty of full and frank disclosure will not apply.
- The risk of being required to pay an loss incurred by the defendant pursuant to the cross-undertaking in damages is probably going to be lower: the prospects of transactions not proceeding simply because of the notification requirement is, in most cases, going to be rare (though the Judge was prepared to require the claimants in *Holyoake* to fortify their cross-undertaking in damages by, for example, paying a sum of money into Court).
- The costs of compliance with the notification injunction are likely to be lower than a freezing order

If the lower threshold for risk of dissipation is developed to a point when claimants can be certain of the test they have to meet, then notification injunctions may become the starting point for claimants seeking to protect their position when faced with a defendant who may dissipate assets. This may leave traditional freezing orders for cases where the risk of dissipation is very high or there are real concerns about whether the defendant will comply with the notification regime.

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Jason Woodland is a partner at Peters & Peters, a leading commercial litigation and business crime firm, and sits on the committee of the London Solicitors Litigation Association. He specialises in heavy-weight commercial litigation, often involving allegations of fraud and where emergency injunctive relief (such as freezing and search orders) is obtained. Jason acts for both claimants in seeking to trace and recover misappropriated assets, as well as for defendants who are subject to fraud claims. Much of Jason's work involves litigation in foreign jurisdictions and parallel civil and criminal proceedings.