

Freezing Orders



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- There are two primary routes through which assets can be frozen:
 - Matrimonial Causes Act 1973 s.37
 - The inherent jurisdiction/Superior Court Act



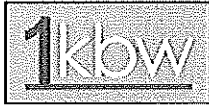
Matrimonial Causes Act s.37

- (1)any reference in this section to defeating a person's claim for financial relief is a reference to preventing financial relief from being granted to that person, or to that person for the benefit of a child of the family, or reducing the amount of any financial relief which might be so granted, or frustrating or impeding the enforcement of any order which might be or has been made at his instance under any of those provisions.
- (2) Where proceedings for financial relief are brought by one person against another, the court may, on the application of the first-mentioned person
- a) if it is satisfied that the other party to the proceedings is, with the intention of defeating the claim for financial relief, about to make any disposition or to transfer out of the jurisdiction or otherwise deal with any property, make such order as it thinks fit for restraining the other party from so doing or otherwise for protecting the claim;.....
- (5) Where an application is made under this section with respect to a disposition which took place less than three years before the date of the application or with respect to a disposition or other dealing with property which is about to take place and the court is satisfied --
- (a) in a case falling within subsection (2)(a) or (b) above, that the disposition or other dealing would (apart from this section) have the consequence...
of defeating the applicant's claim for financial relief, it shall be presumed, unless the contrary is shown, that the person who disposed of or is about to dispose of or deal with the property did so or, as the case may be, is about to do so, with the intention of defeating the applicant's claim for financial relief.
- (6) In this section "disposition" does not include any provision contained in a will or codicil but, with that exception, includes any conveyance, assurance or gift of property of any description, whether made by an instrument or otherwise.



Matrimonial Causes Act s.37

- Proceedings must already exist.
- It is only available within ancillary relief proceedings, NOT Children Act 1989 Schedule 1
- Have to prove that other party is *about to make* a disposition. It is a pure question of fact.
 - In **Smith v Smith (1973) 117 SJ 525** and **K v K (avoidance of reviewable disposition) (1983) 4 FLR 31** no evidence to establish an imminent disposition.
- The manner in which a property has been dealt with in the past is relevant
 - **Quartermaine v Quartermaine (1974) 4 Fam Law 156.**
 - **Walker v Walker [1983] Fam 86**
 - evidence short of establishing H was about to make a disposition.
 - BUT since H had in the past displayed a lack of concern in dealing with W's claim, circumstances justified the suspicion and fear that an asset *might* be dissipated if no immediate steps were take to preserve it;



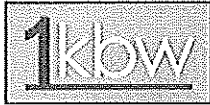
Matrimonial Causes Act s.37

- Meaning of Defeating:
 - S.37(1)
 - Includes
 - Reducing the amount which might be granted
 - Frustrating enforcement
 - Arguably decreasing liquidity
 - In short: Anything that makes the court's job harder.



Matrimonial Causes Act s.37

- "Defeating" does not have to be the main motive.
 - **Kemmis v Kemmis (Welland Intervening) [1988] 2 FLR 223**
 - *"it does not have to be the sole or even his dominant intention as long as it plays a substantial part in the intentions as a whole".*
 - **Sherry v Sherry [1991] 1 FLR 307**
 - the normal inference that a man intends the consequences of his action applies



Matrimonial Causes Act s.37

- Use of s.37 is not restricted to property in UK - Hamlin v Hamlin [1986] 1 FLR 61
- Parties must have / had a beneficial interest in the property being frozen. This doesn't include the assets of a company, which is a separate legal entity - Crittenden v Crittenden [1990] 2 FLR 361
- "otherwise dealing with" should be given a wide meaning
 - Z Ltd v A-Z and AA-LL [1982] QB 558
 - Quartermain v Quartermain (1974) 118 Sol Jo 597.
- Court has power to make such orders as it thinks fit for protecting the claim. This can include ordering monies to be paid into court in relation to Mareva orders), or into a joint account or solicitors account.
 - Re Mordant, Mordant v Halls [1996] 1 FLR 334



Superior Court Act s.37(3)

"The power of the High Court...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 the jurisdiction"



Superior Court Act s.37(3)

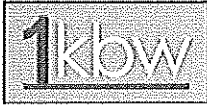
- There are 4 requirements :
 - A cause of action justiciable in England and Wales
 - A good arguable case
 - The defendant having assets within the jurisdiction
 - A **real risk** that the defendant may dispose of or dissipate those assets before judgement can be enforced



Superior Court Act s.37(3)

- **re M (Freezing Injunction) [2006] 1 FLR 1031** cited (with approval):
 - **Thane Investments Ltd & Ors v Tomlinson & Ors [2003] EWCA Civ 1272** per Gibson LJ:

*“The court, however, has repeatedly stressed that a **cautious approach** is appropriate before what has been called one of the court’s nuclear weapons (see **Bank Mellat v Nikpour [1985] FSR 85** at page 92 per Donaldson J) is deployed, particularly if an order is sought and obtained without notice to the person made subject to the order.”*



Superior Court Act s.37(3)

*"It is clear on the authorities that what the court must be satisfied about before making such an order is that the applicant for the order has a good, arguable case, that there is a **real risk that judgment would go unsatisfied** by reason of the disposal by the defendant of his assets, unless he is restrained by the court from disposing of them, and that it would be just and convenient in all the circumstances to grant the freezing order. It is important that there should be solid evidence adduced to the court of the likelihood of dissipation. Neuberger J rightly acknowledged in paragraph 14 of his judgment:*

"... the duty of a person seeking an order, and in particular an order which can have as substantial an effect as a freezing order, in the absence of the Defendant against whom it is sought, is strict and important. An order against a person in his absence, particularly when it is a freezing order, which is a very serious infringement of his rights and liberties, can only be justified on appropriately clear and strong facts and risks. It should only be granted in circumstances which provide maximum protection for the person against whom the order is to be made. The courts have frequently emphasised the importance of compliance with the various requirements of the Rules relating to the obtaining of without notice orders."



Superior Court Act s.37(3)

- BUT – we are special (!)

Shipman v Shipman [1991] 1 FLR 250 Per Anthony Lincoln J
[at 253]:

The court was not required to have regard to the many restrictions and safeguards surrounding the use of worldwide Mareva injunctions and to assimilate the use of and procedure for injunctions in the Family Division to those in commercial law. The matrimonial field called for a different approach. If the injunction were discharged the husband could change his intentions, however genuine and well-disposed to his wife his present state of mind might be. Both he and the assets were out of the jurisdiction



Superior Court Act s.37(3)

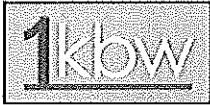
- **Khreino v Khreino No 2 (court's power to grant injunctions) [2000] 1 FCR 80:**

Family Division judges day in day out exercise the inherent jurisdiction to grant injunctions to ensure that one spouse does not selfishly or irresponsibly salt away, squirrel away or spirit away family assets which may be in his name but which must be carefully preserved pending the ultimate judicial determination as to what proportion of that asset must be either transferred to or made available for the benefit of the applicant spouse. The power is so widely recognised and so widely used that it is perhaps not entirely surprising that there is little direct authority other than those cases to which I have referred. It is often the way that the more widely used is a power and the more widely it is recognised the less easy it is to find specific authority that establishes its existence. It is simply taken as read by all specialists working in the field, whether they be judges or whether they be practitioners.



Superior Court Act s.37(3)

- **Poon v Poon [1994] 2 FLR 857**
 - "every effort is made to preserve the status quo and to discourage or prevent either spouse from pre-emptive strike" (Thorpe J)
- **KSO v MJO & JMO (PSO Intervening)(Freezing order) [2010] 1 FLR 930**
 - Placed emphasis not on a "real risk" but a "fear" and inferences from past behaviour
 - Only evidence was a refusal to provide an undertaking and certain information



Both Jurisdictions

- How Much to Freeze

- **Ghoth v Ghoth [1992] 2 FLR 300**

- "that there was no reason why the court in matrimonial proceedings should grant a Mareva injunction covering all the assets of the other party, since the purpose of a Mareva injunction was to safeguard the plaintiff or petitioner from a situation in which the assets of the opposing party were run down with the intention of making that party judgment-proof, and in matrimonial proceedings no petitioner was ever likely to get the whole of the respondent's fortune;"*



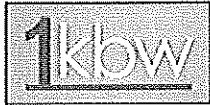
Both Jurisdictions

- Ordinary Course of Business

- Every order drafted should permit the respondent (where applicable) to undertake ordinary business dealings.

- **Perry v Princess International Sales & Services Ltd [2005] EWHC 2042 (Comm):**

- Dissipation, to my mind, implies some use of his assets by the person sought to be enjoined, in a manner which is, in the circumstances, improper or unjustifiable. The court will not restrain a person from dealing with his assets in the usual or ordinary course of business, provided of course that that business is a lawful one. I do not think that the position is different because that business involves a degree, even a substantial degree of risk or speculation.*



Both Jurisdictions

• **Halifax Plc v Rupert Sydney Chandler [2001]**
EWHC Civ 1750

- *In cases of what may be called ordinary business expenses the court does not usually consider whether the business venture is reasonable, or indeed whether particular business expenses are reasonable.*
- *the purpose of a freezing injunction is not to interfere with the defendant's ordinary business or his ordinary way of life.*
- *there can be no objection in principle to the defendant's dealing in the ordinary way with his business and with his other creditors, even if the effect of such dealings is to render the injunction of no practical value*



Both Jurisdictions

• **TTMI Ltd of England v ASM Shipping Ltd of India [2005]**
EWHC 2666 Comm

- *underlying purpose of the jurisdiction is not to provide a claimant with security for its claim but to restrain a defendant from evading justice by disposing of assets otherwise than in the ordinary course of business so as to make itself judgment proof*
- *A defendant may be likely to make perfectly normal dispositions, such as the payment of ordinary trading debts, the effect of which may be that, when any award is made, it is, in whole or in part unsatisfied when, absent those payments, it might have been satisfied or satisfied to a greater extent. Something more than a real risk that the judgment will go unsatisfied is required.*



Both Jurisdictions?

- Borrowing
 - **Cantor Index Ltd v Lister November 22 2001 unrep** (Neuberger J);
 - **Anglo-Eastern Trust Ltd v Kermanshahchi [2002] EWHC 1702 Ch** (Neuberger J):
 - *A freezing injunction restrains the defendant from dealing with his assets, but it does not prevent him from borrowing money thereby increasing his overall indebtedness*



Both Jurisdictions

- **Be Creative!**
 - **Bayer AG v Winter [1986] 1 WLR 597 at 501**
 - *“Bearing in mind we are exercising a jurisdiction which is statutory, which is expressed in terms of considerable width, it seem to me that the court should not shrink, if it is of the opinion that an injunction is necessary for the proper protection of a party to the action, from granting relief, notwithstanding that it may, in its terms be of novel character”*



Both Jurisdictions

- Creative such as:
 - To file an affidavit setting out the respondent's means worldwide (**AJ Beckhor & Co Ltd v Bilton [1981] QB 923**)
 - For a respondent to submit to cross examination on his affidavit of means where it is just and convenient (**Yukong Line Ltd of Korea v Rendsburg Investments Corp of Liberia [1996] 2 Lloyds Rep 604**)
 - To deliver up chattels to the applicant's solicitor (**CBS United Kingdom Ltd v Lambert [1983] Ch 37**)
 - To compel the Respondent to sign a letter of authority directing his bank to disclose information to the applicant (**Bank of Crete v Koskotas [1991] 2 Lloyds Rep 587**) and if he refuses the court can nominate another to sign in it in accordance with Supreme Court Act 1981 s.39 (**Astro Exito Navegacion SA v Southland Enterprise Co Ltd [1993] 2 AC 787**)



Both Jurisdictions

- **Undertakings in Damages**
 - In the QBD and Chancery Divisions = mandatory (**Fenner v Wilson [1893] 2 Ch 565**) and are implied
 - Family Division - **Practice Direction (Injunction: Interlocutory: Family Division) [1974] 1 WLR 576** – The OPPOSITE
 - BUT **re W (Ex parte orders) [2000] 2 FLR 927**:
 - *“where, as here, a spouse sort to restrain the sue of property which belonged, on the face of it, to a third party, it would only be in unusual or exceptional circumstances that the court would decide not to exact an undertaking or cross undertaking in damages”*
 - “on the face of it” – court can look at the reality.
 - **Khreino v Khreino (No 2) (ibid)** and **Purba v Purba [2000] 1 FLR 444** the court declined to require an an undertaking in damages as the third party who sought the protection (or complained of its absence) was in fact the alter ego or agent of the respondent spouse.



Both Jurisdictions

- Ex Parte Applications – VITAL READING:
 - **D v P (Forum Conveniens) [1998] 2 FLR 25**
 - **Re S (ex parte order) [2001] 1 FLR 308**
 - **in re W (Ex parte orders) [2000] 2 FLR 927**



Both Jurisdictions

- Ex Parte – Warnings:
 - Obligation to make the **fullest and most candid disclosure** of all relevant circumstances known to them. This duty is **not confined to the material facts: it extends to all matters, whether of fact or law.**
 - Those who fail in that duty, and those who misrepresent matters to the court, expose themselves to the very real risk of being denied interlocutory relief whether or not they have a good arguable case or even a strong prima facie case
 - ***continuing duty* to inform the court of any subsequent material changes in the circumstances** which had they existed at the time of the hearing should have been disclosed (**Commerical Bank of the Near East v A [1989] 2 Lloyds Rep 319**)



Both Jurisdictions

- Applicant should give an undertaking to issue and serve proceedings
- Applicant should cause the evidence relied on to be sworn in the terms produced or confirming what was said to the court if no statements were produced
- The Respondent should be served as soon as practicable with
 - the proceedings,
 - a sealed copy of the order,
 - copies of the affidavits/draft affidavit and exhibits and
 - a notice of the return date *including* (and this often forgotten) details of the application to be made on the return date.
 - Any note from Counsel
 - Any authorities put before the court.
- The ex parte order should set out on its face a list of all evidential material relied on by the court.



Both Jurisdictions

- Respondent is entitled to request, and be given proper information about what happened at the hearing including:
 - Exactly what documents were before the court either lodged before or handed up during the hearing
 - The authorities that were cited to the court.
 - Information about what took place at the hearing.
 - Attendance Note of the hearing
- Per Munby J

"it would be prudent for those acting for the applicant in such a case to keep a proper note of proceedings, lest they otherwise find themselves embarrassed by a proper request for information which they are unable to provide"



1 King's Bench Walk

Thank You

*Copies of these slides will be available for
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