

**BTMK**  
SOLICITORS

A BTMK GUIDE TO

# Freezing Injunctions



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# Freezing Injunctions

## What are they?

Freezing injunctions (or Mareva injunctions as they are also known) are a type of Court Order which is considered to be the most nuclear of pre-action steps in English law. The Order is pursued from a Court when one party (the Claimant) has a claim against another (the Defendant) but where the Claimant is concerned that the Defendant may dissipate monies or assets to avoid enforcement of the eventual Judgment.

## How can the Order be obtained?

Freezing injunctions are not easily obtained from the Court. This is because there are both evidential and legal grounds which must be satisfied before a freezing injunction can be granted. The grounds are also incredibly restrictive and therefore good evidence needs to be submitted to the Court to demonstrate that the Claimant's claim has good prospects of success as well as there being a significant risk that the Defendant's assets will be dissipated.

To prepare for obtaining the injunction, a successful application will need to consist of a detailed affidavit (or affirmation) together with a formal application based on the judicial model order, with any departures clearly marked and explained, being made to the Court and a hearing date obtained. The injunction itself can either be made with or without notice to the Defendant. They are normally made without notice.

## Why would a Freezing Order be sought?

1. To preserve assets: It is usual for a Claimant to seek a freezing injunction before proceedings have been issued in order to prevent a Defendant from disposing of their assets which may result in a Judgment being unsatisfied. On the other hand, freezing orders can also be sought at any point in proceedings and also following a Judgment being made.

Freezing orders can also be granted in proprietary claims, for example where the Applicant is wishing to make a claim against a particular asset that the Defendant owns.

It is important to note that freezing orders do not provide security over, or priority for, payment from a Defendant's assets. Additionally, freezing orders are also unable to provide security against a possible future judgment or a judgment already obtained. Instead, freezing orders are a mechanism to prevent a Defendant from dissipating or disposing of their assets with the intention or effect of frustrating enforcement of a prospective judgment. The Claimant therefore does not have priority over the Defendant's other creditors or in circumstances where the Defendant may become insolvent.

2. Where a freezing order is sought in support of foreign proceedings under s.25 CJA, the court will consider whether granting it would be 'inexpedient', especially where respondents have no assets or meaningful connection to England & Wales.
3. To assist Arbitration Proceedings: the Court in England and Wales can grant freezing orders in the support of arbitration proceedings anywhere in the world. That power also extends to orders to aid enforcement of arbitration awards.

## Can you get a worldwide freezing injunction?

Usually a freezing order will be limited to England & Wales when being granted by the High Court. There are however circumstances whereby a freezing injunction can be obtained on a worldwide basis (commonly known as a Worldwide Freezing Order) if the Defendant has assets located outside England & Wales and there is a significant risk that those assets will be dissipated if the order is not made on a worldwide basis. To obtain a worldwide freezing order, additional evidence needs to be put forward to the Court in relation to the Defendant's assets abroad.

## Freezing Injunctions - continued

### **When should a Freezing Order be obtained?**

When applying for a freezing order, the application needs to be made promptly as any delay will potentially have an adverse effect on the applicant and the Court may not grant the Order. This is especially true in circumstances whereby the applicant is unable to justify any delay which has taken place since the wrongdoing was discovered.

It is usual for the application to be made within two to five days of discovering the alleged wrongdoing by the Defendant. In that time, a detailed witness statement or affidavit needs to be prepared.

When will a Freezing Order not be granted?

1. In proceedings against the Crown;
2. In proceedings against a Foreign State, unless they have provided written consent;
3. To help enforce a penal law of a Foreign State;
4. By a Defendant until after he has filed an Acknowledgement of Service or a Defence.

### **The effect of a Freezing Order**

A freezing order interferes with a Defendant's ability to deal with its own assets and therefore before making such an order, the Court will carefully examine the evidential and legal grounds of any freezing injunction application made by a Claimant.

A freezing order cannot be used simply to make life difficult for the Defendant such that they have to cease trading or they are unable to pay reasonable living expenses.

For a company that is served with a freezing order, they are entitled to continue trading and to make payments in the ordinary course of business. In addition, the Defendant is also permitted payment of reasonable legal expenses in order to obtain legal advice in addition to a weekly sum of money for living expenses.

### **Types of assets that can be included within a Freezing Order**

The freezing order may also only be attached to assets which a judgment could be potentially enforced against. A wide number of assets can be caught by a freezing order. Technically, all types of assets can be frozen, including but not limited to:-

- Bank accounts;
- Shares;
- Motor Vehicles;
- Land; and
- Intangible assets (such as goodwill and intellectual property).

Excluded assets are perishable items (such as food).

It is also necessary for the Claimant to demonstrate that the Defendant has either a legal or beneficial interest in the asset. Such assets can also be jointly owned or held by a third party for the benefit of the Defendant.

## Freezing Injunctions - continued

### The Value of the Assets included within a Freezing Order

There are three main types of freezing order that can be made by the Court:-

1. **A General Order:** This type of order extends to all of the Defendant's assets. As this order is unlimited in nature, the same is usually only justifiable in very exceptional circumstances;
2. **A maximum sum order:** This type of order is the most common and is made in circumstances where the Court places a monetary limit on the freezing order and the Defendant is at liberty to deal with assets above this sum on the proviso that there remains unencumbered assets remaining in the jurisdiction up to the amount of the maximum sum order;
3. **An order attaching to specific assets:** This types of order is normally sought in relation to large and high value assets including but not limited to, property or vessels which are worth as much as or exceeding the value of the claim.

### Can a freezing order be made against a third party?

Freezing orders can be made against a third party against whom the Claimant has no claims against but that third party may hold assets on behalf of the Defendant.

The Court will take a number of factors in to account when considering the same, including but not limited to, whether the third party Respondent has a connection with the jurisdiction and the relevant assets there as well.

In addition, freezing orders are also often served on third parties to prevent them from dealing with any transactions that may contravene the freezing order. An example of this is that solicitors are often notified where a property asset (that could be transferred to another entity by them) is subject to a freezing order.

### How long does a Freezing Order last?

A freezing order is initially granted on an interim basis. This is on the basis that freezing orders are usually granted without any notice to the Defendant.

Once the interim period expires, another Court hearing takes place. At that hearing, the court can do a number of things including varying the terms of the freezing order or discharging the freezing order.

In the event that the freezing order is continued until trial or further order, the freezing order remains in place until there is a trial of the Claimant's / Applicant's underlying claim itself or the parties otherwise agree by consent at a later stage for the freezing order to be withdrawn. The latter normally happens when the parties have reached a settlement.

### Other Orders made by the Court in addition to a Freezing Order

When being asked to make a freezing order, the Court can also often be requested to grant additional orders known as ancillary orders or incidental relief. These orders can assist a Claimant / Applicant who may be the subject of a fraud in order to obtain vital information from a Defendant. The most common ancillary order relates to disclosure orders

Others types of ancillary orders are:-

1. **A Passport Order:** The Court may require a Defendant to deliver up their passport and not leave the jurisdiction. These orders are however exceptional and will only be granted in the most serious of fraud cases as it fundamentally interferes with a Defendants s liberty and human rights.

## Freezing Injunctions - continued

2. **An Appointment of a Receiver over a Defendant or their company:** A Receiver who is appointed by the Court has a right to all income due to the Defendant or their company. The Court will only appoint a Receiver in circumstances where a freezing order on its own will not provide sufficient protection against the risk of the Defendant disposing of their assets. This type of order is very unusual and are not granted lightly by the Court (particularly when the Defendant is a company).
3. **An Order to cross-examine a Respondent about his assets:** This is an order only granted in exceptional circumstances and is usually requested if the Defendant has provided a defective affidavit. The Claimant / Applicant will usually apply for this type of order at the return hearing.
4. **Immediate Delivery up to the Applicant's Solicitors of Certain Assets or Payment of a sum of money into Court:** This type of order is usually made when the Claimant / Applicant has a proprietary claim to the Defendant's Respondent's assets and where there is an identifiable asset belonging to the Claimant / Applicant which has passed to the Defendant as a result of fraud.
5. **An Order requiring the Respondent to sign a document authorising his bank to disclose information to the Applicant:** This type of order is common to enable a Claimant / Applicant to liaise directly with the Defendant's bank in circumstances where usually the Bank would refuse to communicate without proper written authorisation.

### Which Courts grant Freezing Orders

In the High Court, freezing orders may only be made by a High Court Judge (not Masters, District Judges or ICC Judges). In the County Court, they may only be granted by a Circuit Judge authorised for this purpose.

A freezing injunction may also be granted by a Master or District Judge in the High Court or a District Judge in the County Court but only if the freezing order meets certain requirements.

### Typical costs involved to obtain a Freezing Injunction

There are a number of costs involved in respect of obtaining or defending a freezing order. Such costs will vary subject to the action required but the key costs involved to apply for a freezing order are:-

1. **Solicitors / Counsel's fees:** Freezing Orders are not straightforward and a significant amount of work is required in a very short space of time (especially where there is suspected dishonesty or fraud). The costs involved will be subject to the documents to be reviewed and considered, whether the Order is sought on a worldwide basis and the size of the claim. Counsel's fees will also be payable in respect of Counsel preparing a skeleton argument, attending Court and presenting the evidence and legal argument required to obtain the freezing order. BTMK will be able to provide a costs estimate tailored to your application. The minimum costs involved are rarely less than £10-15,000 + VAT.
2. **Court fees:** Application fees are £313 (on notice) or £123 (by consent/without notice). Issue fees for money claims are 5% up to £200,000 and £10,000 for claims over £200,000. Refer to EX50/EX50A for updates. It must also be borne in mind that the Freezing Order is not a standalone order and when applying for a freezing order it shall also be necessary for the Claimant to issue their legal claim against the Defendant. There will also be a Court fee payable to issue that claim and the value of the fee shall be subject to the value of the damages claim being pursued. In sizeable claims the Court fee can be as much as £10,000.

## Freezing Injunctions - continued

### Typical costs involved to defend a Freezing Injunction

If a Defendant is served with a Freezing Order, they have the following options to consider in dealing with the same:-

1. The Defendant can agree the continuation of the Order until the Claimant's claim is determined at trial or until a further Order is made by the Court; this can be the most cost effective.
2. The Defendant can attempt to vary the terms of the Order but such will require legal assistance being sought to persuade the Court why the Order should be varied;
3. In the event that there are grounds to fully discharge the Order, the Defendant can seek to provide detailed evidence in this regard in addition to Counsel presenting that evidence at a fully contested hearing.

The costs will vary subject to the level of assistance sought although it is worth bearing in mind that the Order will contain provisions allowing the Defendant to incur reasonable legal costs to deal with the Claimant's claim.

Another key aspect of the application is the full and frank disclosure of documents if the applicant fails to fully disclose any relevant detail or document then this can lead to the Court discharging the freezing order at a later date and the applicant will also be exposed to an adverse costs order.

## Some commonly used terminology

### Freezing Orders - without notice hearings explained

Freezing orders can be obtained either on an "on notice" or "without notice" basis. Most Freezing Injunctions are obtained on a without notice basis – i.e. without any notice to the Defendant at the time of the application. Our experts at BTMK have a wealth of experience in applying for and obtaining "without notice" freezing orders in these high pressure scenarios.

Properly serving a Freezing Order after it has been granted is vitally important. Failure to do so can invalidate the Freezing Injunction or the notice period provision in it. We understand these crucial requirements and work closely with professional process servers and enquiry agents to ensure that this important aspect is properly adhered to and the proper evidence obtained.

### Freezing Injunctions - the return date

When Freezing Injunctions are granted without any notice to a Respondent, the court provides a date to all parties to return to court – known as the Return Date. Our experts can help with all necessary preparation leading up to and including the Return Date, to reduce your stress in these high pressure scenarios.

### Practical steps to consider after a Freezing Order is granted

Obtaining the Freezing Order is the first step in a potentially long process. It is important that an Applicant fully understands that there are other steps to be taken. Here at BTMK, our experts can guide you through this process with full transparency and clarity.

# Freezing Injunctions - continued

## Dealing with the substantive claim

The grant of a Freezing Order is only the start, not the end of the claim. It is vitally important to understand that a Freezing Order cannot simply stand on its own. It is often the start of a long process and a claim in the High Court in the ordinary way must be commenced and seen through. This must be considered at the outset and we can help you with this, to understand the steps, the costs and the risks.

## Freezing Injunctions - cross-undertaking in damages

An essential part of getting a Freezing Order is the giving of a cross undertaking in damages by the Applicant. It is important the Applicant understands what this means and the financial implications of providing this. We can explain this to you in a clear, commonsense way, so you fully understand the implications.

## Duty of full and frank disclosure

Fundamental to the Freezing Injunction process is the duty of full and frank disclosure. Failure to comply with this can mean the Freezing Order being discharged with significant cost penalties. We can ensure you understand this in advance and to ensure you are fully compliant.

## Alternatives remedies to Freezing Orders

Anyone thinking of obtaining a Freezing Injunction needs to consider the time, effort, risks and financial implications of what can be a long process. It is always worth considering what other remedies may be available, which are less time consuming, costly, stressful and potentially risky. We can assess this for you and give you the tools to make the best decision for you.

## Applications to discharge a Freezing Order

It is always open to a Respondent to apply to have a Freezing Injunction discharged. BTMK have the experience to help an Applicant resist such an application, in addition, we regularly help Respondents with these applications and can maximize your prospects of success.

## The procedure for having a Freezing Order discharged

It is possible to have a Freezing Order discharged or varied. There is a specific procedure for doing this which must be followed carefully.

The timing of an application to discharge a Freezing Order is important to understand. Failure to adhere to the timings can make the difference between success and failure. We can guide you through the process.

## Freezing Injunctions - “a good arguable case”

Freezing Orders are by their very nature very draconian. It is important to understand the court’s approach to assessing Freezing Injunctions.

In order to successfully obtain a freezing injunction, an Applicant must show that it has a good arguable case. A ‘good arguable case’ means one more than barely capable of serious argument; the applicant need not show a >50% prospect at this stage (*Court of Appeal: Dos Santos v Unitel*). This evidential threshold is key and we can advise you whether your application satisfies the ‘good arguable case’ requirements. Similarly, if you find yourself facing such an application, we have the expertise to assess the opponent’s application.

## Dissipating or hiding assets

In order to successfully obtain a freezing injunction, an Applicant must show that there is a risk that the Respondent will dissipate (or put beyond reach), his or her assets. This is a vital part of the evidential threshold required to convince a court to grant a Freezing Injunction.

# Freezing Injunctions - continued

## Freezing Orders - enforcement

Once a freezing Order has been obtained, any breaches of the Freezing Injunction can be enforced. Whether you are looking to enforce the Freezing Injunction or on the receiving end of enforcement proceedings, we are here to help. Obtaining the order is a first step only. Notifying banks and financial institutions is key.

## Contempt of court

The most draconian of all sanctions available to an Applicant for breach of a Freezing Order is to issue an application to have a Respondent committed to prison, or fined, for what is called Contempt of Court. We can provide the expert advice you need – if you are thinking of making an application for contempt of court or facing such an application. Experience is vital in either of these scenarios.

## How long does a Freezing Order last?

We are often asked “how long does a freezing order last”? The answer is - it varies upon a number of different factors. If you have questions like this or more, we can guide you.

## Served with a Freezing Order?

If you find yourself on the receiving end of a Freezing Order, you must act quickly. We can help you deal with what can be very complex and high pressure court application. Our phone lines are 24/7 as the Courts can grant these orders at any time and time is of the essence when obtaining or responding to such an order.

## The privilege against self-incrimination explained

It is frequently the case that a person served with a Search Order or Freezing Injunction is compelled under ancillary disclosure orders to produce certain documents or information to the Applicant. There will also be obligations on parties in court proceedings to make standard disclosure and possible applications by opposing parties for specific disclosure against the Respondent. In this context it is important to understand the right to privilege against self-incrimination. We can advise you at all stages.

## Norwich pharmacal orders explained

It is sometimes the case that an Applicant cannot clearly identify the proper Defendant to any potential proceedings due to the lack of information available to it. In such circumstances, it is possible for an Applicant to seek disclosure of information or documents against a non-party to the proceedings (“the Respondent”).

These are known as Norwich Pharmacal Orders. These orders can be obtained before proceedings are issued, during the course of proceedings or even after judgment has been obtained against a Defendant. We don't cover this area in great detail here but can advise further if needed.

## Defendant's living expenses

As part of the freezing order itself, the Defendant or Respondent is usually permitted reasonable living and legal expenses, subject to limits, disclosure and court control.. This can often become quite a contentious issue. We have the ability to assess this criteria and regularly assist both Applicants and Respondents in these issues.

- 1) No substitute for specific legal advice;
- 2) Act quickly – whether you're an Applicant or a Respondent to such an application;
- 3) Go to an expert. This is a specialist area of law and procedure and expertise is vital. BTMK has applied for and resisted many applications of this nature over many years – we will ensure your position is fully protected.

## Freezing Injunctions - continued

### Summary

BTMK has decades of experience in applying for and resisting urgent High Court Injunction proceedings and the ensuing claims arising from these applications. We work with dedicated team structures in place to ensure that we can act quickly and decisively in relation to these matters. As many of these claims arise out of fraud or fraudulent acts with often complex financial angles, we work with class-leading forensic technologists and forensic accountants that we can call upon to provide expert support where it is necessary. Since the global pandemic of 2020-2021, BTMK also has experience in applying for and resisting High Court applications on a virtual basis, including a full electronic bundling service in compliance with the revised Court rules.

BTMK offers 24/7 telephone lines, so that if you're faced with an urgent matter of this nature, you can reach dedicated expertise, day or night, in or out of office-hours to devise a strategy as to how best to approach these urgent matters.

If you need advice or assistance on these matters, please call us and we'll ensure you receive the best advice possible in your circumstances.

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