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Interim Injunctions – the use of freezing injunctions and other orders in hot pursuit of the fraudster

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Interim Injunctions – the use of freezing injunctions and other orders in hot pursuit of the fraudster

Neil Hext QC and Daniel Saoul QC[1]

4 New Square

Introduction

1. This handout supports the podcast on how one approaches an application to freeze assets in the hands of a wrongdoer, as well as recent developments in the law relating to freezing orders against third parties under the so-called "Chabra" jurisdiction. It also includes brief observations in relation to Norwich Pharmacal and Bankers Trust applications.

2. This handout aims to be a useful aide-memoire of the key issues covered.

The nature of a freezing injunction

3. A standard freezing injunction (s. 37 of the Senior Courts Act 1981 and CPR 25.1(1)(f)) is non-proprietary and restrains a proposed defendant from disposing of, dealing with or diminishing his assets up to a certain value in the jurisdiction, or removing those assets from the jurisdiction. The order can also restrain him from disposing of or dealing with his assets up to a certain value outside the jurisdiction.

4. Where an applicant has no proprietary claim to assets, obtaining a freezing injunction does not give him security for his claim or priority over other creditors of the defendant. It simply prevents a defendant from dissipating his own assets which would otherwise be available to meet a judgment.

The key requirements

5. The key requirements of obtaining a freezing injunction are as follows:

    a. The applicant must have a good arguable case against the defendant;

    b. There must be reason to believe that the defendant has assets (or an interest in assets) which can be frozen;

    c. There must be a real risk of the assets being dissipated outside the ordinary course of business;

[1] Thanks are due to Helen Evans who was a co-author of a previous draft of this handout. The authors assume no responsibility to any party in respect of this paper or the seminar at which it is presented.

d. The court must be persuaded that it is just and convenient to order a freezing injunction.

6. In addition, an applicant must be willing to provide a cross-undertaking in damages, which he may be required to fortify, for instance by paying money into Court or his solicitors' account or by way of bank guarantee – see further below.

Good arguable case

7. A freezing injunction is not a claim in its own right – it must be sought in support of substantive proceedings (*The Siskina* [1979] AC 210 at 256).

8. The first step, therefore, is for the applicant to identify his cause of action against the defendant. The applicant does not need to prove that he has "the better of the argument" or that he would succeed in obtaining summary judgment against a defendant or the strike out of any defence. The test is that the claim should be more than barely capable of serious argument, but not necessarily having better than 50% prospects of success (*The Niedersachsen* [1983] 2 Lloyd's Rep 600)).

9. The explanation of the applicant's case must contain information about what it is likely to be worth. Freezing injunctions only restrain defendants from dealing with assets up to a certain value; and this value is set by reference to the likely value of the case (including interest and costs: *Thevarajah v Riordan* [2015] EWHC 1949 (Ch)).

The existence of assets

10. A freezing order should not be granted unless the applicant can establish a sufficiently strong case that the defendant owns the assets in respect of which the order is sought (or has some interest in them): CPR 25.1.25.5.

11. The standard form freezing injunction used in the Commercial Court contains an explanation that the defendant's frozen assets include "*all assets whether or not they are in his own name, whether they are solely or jointly owned*". It also states that they include "*any asset which [the defendant] has the power, directly or indirectly, to dispose of or deal with as if it were his own*" and that the defendant 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*". The standard form also includes, in square brackets, the wording "*and whether the respondent is interested in them legally beneficially or otherwise*", but the issue of whether to include these words has to be considered on a case by case basis: *JSC BTA Bank v Kythreotis & Ors* [2010] EWCA Civ 1436.

12. There will be circumstances where this language may not be sufficient and where it may be desirable to seek orders against third parties – see further below.

13. Note that the standard form of non-proprietary freezing order contains a requirement that a defendant provide information about his or her assets. This type of order is governed by CPR 25.1.1(g) (which empowers a court to order a party to provide "information about relevant property or assets which are or may be the subject of an application for a freezing injunction"). Defendants can refuse to provide information where they are protected by the privilege against self-incrimination.

Real risk of dissipation

14. It is important to remember that the purpose of a non-proprietary freezing injunction is to prevent the dissipation of assets which would normally be available to meet a judgment. As noted above, this type of freezing injunction does not provide security for a claim. Nor does it prevent an appropriate use by the defendant of his assets: see *UCB Home Loans Corporation Ltd v Grace* [2011] EWHC 851 (citing with approval *Laemthong International Lines Co Ltd v ARTIS* [2004] EWHC 2226 (Comm)). The test is therefore whether there is a real risk of dissipation outside of the ordinary course of business.

15. In order to satisfy the test that there is a "real risk of dissipation", it is not necessary to show that a defendant is likely to put his assets beyond reach: *AH Baldwin & Sons v Al Thani* [2012] EWHC 3156. Equally there is no need to prove an intention to defeat judgment. Sometimes an applicant has evidence of a specific risk. However, in many cases there is no evidence about a particular transaction being planned in order to defeat a potential judgment. The applicant can rely on factors such as:

    a. The defendant dealing with assets in a manner other than in the usual or ordinary course of business or his life, so as to render enforcement more difficult;

    b. The defendant persistently breaching promises to repay with implausible excuses;

    c. The liquid nature of a defendant's assets;

    d. The defendant's ties with other jurisdictions (and the difficulty of enforcement in those jurisdictions).

16. The fact that the claimant has a claim which is unanswerable does not of itself amount to a "real risk of dissipation" of assets against which a judgment may be enforced (although it is a strong factor in favour of granting a freezing injunction): White Book, Vol 2, para 15.23.

17. A question often arises as to whether the dishonesty of a defendant can in itself establish a risk of dissipation. This was often treated claimants as being determinative until 2003 when the Court of Appeal handed down the decision in *Thane Investments Ltd v. Tomlinson (No. 1)* [2003] EWCA Civ 1272. In that case Peter Gibson LJ said:

> "*[Counsel for the respondents] submitted that it has now become the practice for parties to bring ex parte applications seeking a freezing order by pointing to some dishonesty, and that, he says, is sufficient to enable this court to make a freezing order. I have to say that, if that has become the practice, then the practice should be reconsidered. It is appropriate in each case for the court to scrutinise with care whether what is alleged to have been the dishonesty of the person against whom the order is sought in itself really justifies the inference that that person has assets which he is likely to dissipate unless restricted*."

18. Since that decision, claimants have become more circumspect about relying solely on dishonesty. However, it has become increasingly clear that dishonesty *can* evidence a risk of dissipation. For example, where the defendant is alleged to have carried out a fraud involving the movement of large sums of money from one bank account to another, it is not hard to infer that, unless restrained, he may seek to move it again once he appreciates that the claimant is on his trail.

More recent cases have made clear that one needs to ensure that the dishonesty in question is of the sort from which an inference of risk of dissipation can be drawn; but where that is established, dishonesty can be enough. See *VTB Capital plc v. Nutritek International Corp* [2012] EWCA Civ 808 (para 177)[2], *Madoff Securities International Ltd v. Raven* [2011] EWHC 3102 (Comm), and *Jarvis Field Press Ltd v. Chelton* [2003] EWHC 2674; see also *Candy v. Holyoake* [2017] EWCA Civ 92, para 61.

19. Delay on the part of a claimant can create difficulties in persuading the court that there is a real risk of dissipation. However, if the court is satisfied on the evidence that there is a risk of dissipation and that there may well still be assets at large, the court should grant the freezing order, despite the delay, even if only limited assets are ultimately frozen by it: *Madoff Securities International Ltd v Raven* [2012] 2 All E.R. (Comm) 634 (at para 156) and also *JSC Mezhdunarodniy Promyshlenniy Bank v. Pugachev* [2015] EWCA Civ 906, para 34.

Is it just and convenient to order a freezing injunction?

20. When considering making a freezing injunction, the court has to be satisfied that it is "just and convenient" to do so: s. 37 of the Senior Courts Act 1981. If an applicant has established that it has a good arguable case and that there is a real risk of assets being dissipated, it is rare for an application to fail at this stage. Nevertheless, it will be important, in complying with the obligation of full and frank disclosure (see below) to have regard to the prejudice which a freezing injunction might cause a Respondent and/or their business.

The obligation of full and frank disclosure

21. The requirement for full and frank disclosure is extremely important. See *Siporex Trade SA v Comdel Commodities Ltd* [1986] 2 Lloyd's Rep 428 at 437, cited with approval more recently in *PCV v the Y Regional Government of X* [2014] EWHC 68 (Comm).

22. If a defendant can show that there has been a failure on the part of the claimant in this respect, it can lead to the discharge of the injunction, even if the order would otherwise have been appropriate. Non-disclosure, therefore, has become something of a happy hunting ground for respondents keen to displace the original order. Even if an attempt of this sort is unsuccessful, it can generate expensive and time-consuming satellite litigation, shifting the focus from the defendant's alleged wrong-doing to the claimant's conduct of the application and dissipating the momentum that would otherwise have been generated in the bringing of the claim.

23. It is therefore essential that full consideration is given, by both the applicant and his legal team to the known facts that give rise to the claim and the possible defences that might be available to the defendant. What are the possible weak points in the claim? Are there issues where there is uncertainty? Has there been any delay in the making of the application that needs to be explained? Are there issues on quantum? Have there been communications between the parties that might undermine the claimant's case on risk of dissipation? It helps to try to put oneself in the position of the defendant and ask, what would one say if instructed to resist the application at the return date?

[2] Appeal to the Supreme Court dismissed on other points: [2013] 2 WLR 398.

The Cross-Undertaking in Damages

24. An applicant for a freezing injunction must give a cross-undertaking in damages, to make good any losses suffered by the respondent should the injunction ultimately prove wrongly granted. This is significant and should not be overlooked. At the very outset of the planning of an application, enquiries should be made of the client to check that they are willing to make such a commitment.

25. The ability of the applicant to meet any order for damages against it is something that should be addressed in the application. If the applicant itself is not likely to be good for the money, consideration should be given to offering undertakings from associates, e.g. parent companies.

26. In addition, it is possible for the Court to require, or for the Respondent to seek, fortification of the cross-undertaking, especially if the applicant is outside the jurisdiction. Where fortification is required, it can take the form of money paid into Court or the applicant's solicitors' account (to be held subject to undertakings), a bank guarantee or similar.

Freezing Injunctions Against Third Parties

27. An order against the primary wrongdoer will often not be enough. For example:

    a. They might have no (or few) assets in their name;

    b. They may have concealed and/or transferred their assets to shell companies, relatives etc;

    c. Although the applicant's case may be that the third parties are mere nominees, those third parties may well deny this and assert that the assets are their own – which would, *prima facie*, take them outside the standard freezing injunction wording insofar as it applies to the main respondent;

    d. Any assets in the wrongdoer's own name may be held in jurisdictions where enforcement may be difficult;

    e. Given the international nature of many businesses, there may be debts located in England to which the wrongdoer is or will in the future be entitled. These are potential targets for an applicant, but are primarily controlled by the debtor located in England;

    f. It is often cleaner, more transparent and more secure to bring these third parties before the Court by naming them as respondents to the application;

Substantive Jurisdiction

28. The power to grant a freezing order against a third party in support of a claim against a main wrongdoer first properly emerged in *TSB v. Chabra* [1992] 1 WLR 231 where an order was made against a company which the main wrongdoer (Mr Chabra) was a director and part owner of. The

basis of this was that:

> "*there is a good arguable case that there are assets, apparently vested in the [Third Party], which may be beneficially the property of [the Defendant] and therefore available to satisfy the plaintiff's claims against him if established at trial. I am also of the view that it is arguable that the [Third Party] was, in fact, at relevant times the alter ego of [the Defendant] and that its assets, or at least some of its assets, may be available to meet the plaintiff's claims against him if established*" (per Mummery J in Chabra)

29. The *Chabra* jurisdiction was subsequently affirmed by the Court of Appeal in *Mercantile Group v. Aiyela* [1994] QB 366 and has, in particular in the last five or six years, been the subject of significant jurisprudence and development.

Criteria / Scope

30. The breadth of the Chabra jurisdiction is now far greater than it was. Although the Courts are clear that it is an exceptional jurisdiction and to be exercised with caution, the key test is whether there is a "good reason to suppose" that an asset in the third party's name will, through one legal means or another, be amenable to enforcement of the judgment against the wrongdoer[3]. As Gloster J (as she was then) put it in *The Mahakam* [2011] EWHC 3143:

> "*In circumstances where a defendant/judgment debtor (i.e. the cause of action defendant (CAD)) against whom it is appropriate to make a freezing order…has a debt, or other receivable owing to it by a third party non-cause of action defendant (NCAD), or a claim, or potential claim, against a third party NCAD, the English Court has jurisdiction (or 'legal power'…) to grant a freezing order against the third party NCAD"*

31. Examples of this will therefore include:

    a. Where the third party is alleged to be a mere nominee for the wrongdoer;

    b. Where the third party has received assets from the wrongdoer at an undervalue (typically for no consideration) and one of the wrongdoer's main purposes for doing so was to put assets beyond the reach of his creditors, so as to engage Section 423 of the Insolvency Act 1986 (and see *Lemos v Lemos* [2016] EWCA Civ 1181, and also *Bataillon v Shone* [2016] EWHC 1174 QB for how such a case can pan out at trial);

    c. Where the third party owes a present or future contractual debt to the respondent, which the applicant could, in due course, have recourse to via a third party debt order;

32. In addition, exercise of the *Chabra* jurisdiction requires the claimant to show that there is a real risk that the third party in question will deal with the assets in such a way as to prevent the claimant from obtaining recourse to them to enforce any judgment given against the defendant: *JSC Mezhdunarodniy Promyshlenniy Bank v. Pugachev* [2015] EWCA Civ 906, para 29.

[3] *PJSC Vseukrainskyi Aktsionernyi Bank v. Maksimov* [2013] EWHC 422, cited with approval by the Court of Appeal

33. In many cases it will be possible to infer risk of dissipation by the third party where risk of dissipation on the part of the defendant can be established[4], especially if the premise for the application is that the assets are (at least arguably) beneficially owned by the defendant; and where the assets are in practice controlled by the defendant, the risk to which he gives rise will affect them too.

34. Note that it is not necessary to establish that the risk of dissipation on the part of the third party stems from some impropriety or dishonesty on the part of the third party. Whilst a case of collusion will often be asserted, Chabra orders are in theory at least also available against innocent third parties (see *Maksimov*, and also *Cartier v Richemont* [2016] EWCA Civ 658 – not a freezing injunction case, but confirms the breadth of the Court's equitable power to grant injunctions including against innocent third parties).

35. Note that it is not necessary to identify specific assets held by the third party that are susceptible to a Chabra order; rather the threshold is that there is a good reason to suppose that such assets exist. Nevertheless, it is important, when crafting the order sought, to tailor this very carefully to the circumstances. One should not simply seek a mirror-image of the freezing injunction sought against the main wrongdoer (which will typically be broad, in the standard form or similar). Rather, careful thought should be given to which assets, in the name of the third party, might be available for enforcement of a judgment against the main wrongdoer. Only those assets should be caught, and care needs to be taken not to catch assets of the third party which have nothing to do with the main respondent and which could not be enforced against in due course (and see Potter LJ's comments to this effect in *Yukong Line v. Rendsburg* [2001] 2 Lloyd's Rep 113).

<u>Territorial Jurisdiction</u>

36. It is important not to overlook that just as against the primary wrongdoer, territorial jurisdiction must be established against the third party.

37. A full discussion of jurisdictional issues is outside the scope of this note, however some particular points arise in relation to Chabra applications that are worth bearing in mind:

    a. If the third party is located in England or can be served in England no difficulty should arise and jurisdiction should be established as of right;

    b. If the third party needs to be served outside the jurisdiction, then permission must be sought in the usual way (and consideration should also be given to permission for alternative service, to expedite matters – see *Abela v Baadarani* [2013] 1 WLR 2043);

    c. This requires identifying a "gateway" under CPR 6. This is not always straightforward, and can be a serious problem if there is no cause of action asserted against the third party, because the prevailing view in the authorities is that an assertion that a third party is merely a nominee for the main wrongdoer, is not in itself a cause of action, such that the "necessary and proper party" gateway is not available. Therefore, careful thought will need to be given to whether an arguable cause of action can in fact be asserted against

[4] See for example the inferences drawn by the court in *Pugachev* itself

the third party – for instance pursuant to Section 423 of the Insolvency Act 1986, or a third party debt / garnishee claim, or by way of a tracing claim.

d. These areas can be highly technical and they should not be underestimated. Sufficient time will need to be devoted to considering both the legalities, and mechanics, of service, in the course of preparing the application.

Chabra & orders in support of overseas proceedings and in support of arbitrations

38. As is well known, freezing orders can be obtained in support of litigation proceeding overseas, pursuant to Section 25 of the Civil Jurisdiction and Judgments Act 1982 (as amended). The prevailing view is that the Chabra jurisdiction extends to such circumstances (and difficulties with service out do not arise because applications under Section 25 have their own service out gateway under CPR 6BPD para 3.1(5)).

39. All of the usual requirements will apply, and in addition the applicant will need to establish that the fact that the main claim is taking place abroad does not make it "inexpedient" for the English Court to interfere. Typically one will need to establish that relevant assets are located in, or controlled by a party located in, England, in order for it to be attractive for the English Court to step in. General principles of comity will also need to be considered.

40. The English Court also has jurisdiction to grant interim injunctions in support of arbitrations pursuant to Section 44 of the Arbitration Act 1996. A number of points arise:

    a. First, this is a section that can be contracted out of – an applicant will want to check that this is not the case before proceeding;

    b. Second, the English Court can only interfere if the arbitral tribunal does not have the power to do so. In Chabra cases this may be relatively straightforward to establish, given that the third party is (by definition) not a party to the arbitration. However an applicant will need to be comfortable that the tribunal (if constituted) is not able to make an alternative order against one of the parties to the arbitration that could have the same effect as that sought against the third party;

    c. Third, where the arbitration is seated overseas the applicant will have to establish (by analogy with Section 25 applications) that this fact does not make it "inappropriate" for the English Court to intervene. Again, to satisfy this one is ideally looking to point to assets located in, or controlled by third parties located in, England. Broader comity issues will also be borne in mind.

41. In addition where Section 44 orders are concerned, there is a controversy as to whether this extends to orders against third parties at all. This has, so far, only been considered at first instance:

    a. In *Cruz City 1 Mauritius Holdings v Unitech* [2014] EWHC 3704, Males J concluded (possibly on a *obiter* basis, although it is not entirely clear) that Section 44 did not extend to orders against third parties (notwithstanding the express wording in Section 44(1) to the effect that the English Court has "for the purposes of and in relation to arbitral proceedings the same power of making orders…as it has for the purposes of and in relation to legal proceedings");

b. This has since been followed by Sara Cockerill QC, sitting as a Deputy High Court Judge, in *DTEK Trading v Morozov* [2017] EWHC 94 (Comm) in which, at the ex parte stage, she rejected arguments challenging the reasoning in Cruz City;

c. One of the authors has however subsequently been involved in an application of this kind (the details of which remain confidential at this stage) in which a Commercial Court Judge has been persuaded to disagree with Cruz City and DTEK, and to conclude that the correct analysis is that Section 44 does extend to injunctions against third parties, with the Court of Appeal (at the permission stage) observing that it was highly doubtful that the reasoning in Cruz City was correct.

42. This is important because (as with Section 25 CJJA) an application under Section 44 can be served out of the jurisdiction under its own gateway (CPR 62.5(1)(b)). If Section 44 does not extend to third parties, then there is no gateway available for service out of an application for an injunction against a third party out of the jurisdiction, in support of an arbitration.

43. In any case, there is an alternative route where the third party is in England: regardless of the position under Section 44, in these circumstances Section 37 of the Senior Courts Act remains available (the Supreme Court having confirmed that Section 44 of the Arbitration Act does not abrogate the breadth of Section 37 of the Senior Courts Act - *UST-Kamenogorsk Hydropower v AES* [2013] UKSC 35).

Norwich Pharmacal and Bankers Trust Orders

<u>What are these orders?</u>

44. There are cases where, without obtaining information from known parties such as banks, a claimant is not even in a position to bring an application for a freezing injunction or any other proceedings against a wrongdoer. In this sort of case, the Norwich Pharmacal jurisdiction (named after *Norwich Pharmacal v Customs & Excise Commissioners* [1974] AC 133 and now governed by CPR 31.18) can assist. The original Norwich Pharmacal order merely required a third party to disclose the identity of a wrongdoer. However, the jurisdiction has been extended by cases such as *Bankers Trust Ltd v Shapira* [1980] 1 WLR 1274 to enable the court to require a third party to provide information about the activities of the wrongdoer. In *Bankers Trust,* the third party was a bank and the wrongdoer its customer. The court observed as follows:

> *"It is a strong thing to order a bank to disclose the state of its customer's account and the documents and correspondence relating to it. It should only be done when there is a good ground for thinking the money in the bank is the plaintiff's money — as, for instance, when the customer has got the money by fraud — or other wrongdoing — and paid it into his account at the bank. The plaintiff who has been defrauded has a right in equity to follow the money. He is entitled, in Lord Atkin's words, to lift the latch of the banker's door……. The customer, who has prima facie been guilty of fraud, cannot bolt the door against him. Owing to his fraud, he is disentitled from relying on the confidential relationship between him and the bank….. If the plaintiff's equity is to be of any avail, he must be given access to the bank's books and documents — for that is the only way of tracing the money or of knowing what has happened to it".*

45. In *AOOT Kalmneft v Denton Wilde Sapte* [2002] 1 Lloyds LR 417 it was held that courts should take a realistic view of the way in which frauds were committed and should grant an order if there was a real prospect that the information sought might assist in locating and preserving assets by helping to build up a complete picture of what had been done.

When can you obtain this type of order?

46. Norwich Pharmacal/Bankers Trust style orders are not generally available against a respondent who is likely to be a defendant to proceedings. They are available against third parties caught up in the wrongdoing of a potential defendant in a capacity of more than a mere witness. It used to be argued that the third party needed to have facilitated the wrongdoing: *Ricci v Chow* [1987] 1 WLR 1658. However, in *Various Claimants v News Group Newspapers* [2014] 2 WLR 1756 Mann J held that the test for the exercise of the Norwich Pharmacal jurisdiction was not limited to whether the party against whom disclosure was sought had participated in, or facilitated, the wrongful act. The real question was whether he was a mere witness or more than a mere witness. The court pointed out that the involvement may be less than "facilitation or participation".

47. The three key pre-requisites of obtaining Norwich Pharmacal/Bankers Trust style relief are set out in *Mitsui & Co Ltd v Nexen Petroleum UK Ltd* [2005] 3 All ER 511 at para 21, as follows:

> *"i) a wrong must have been carried out, or arguably carried out, by an ultimate wrongdoer[5][12];*
>
> *ii) there must be the need for an order to enable action to be brought against the ultimate wrongdoer; and*
>
> *iii) the person against whom the order is sought must: (a) be mixed up in so as to have facilitated the wrongdoing; and (b) be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued."*

48. Although they can prove very powerful tools in helping pursue moneys misappropriated in a fraud, the following key points should be noted about Norwich Pharmacal/Bankers Trust style orders:

    a. They are a remedy of last resort. A claimant should not rely on this type of order where it could satisfactorily rely on pre-action disclosure under CPR 31.16;

    b. An application for an order can be refused in circumstances where a claimant knows the identity of a defendant and has adequate information to bring an action: *Nikitin v Richards Butler LLP* [2007] EWHC 173. Orders are not designed to bolster information about a case which can be adequately (even if sparsely) pleaded;

    c. It is less common than with freezing injunctions to seek Norwich Pharmacal relief on a without notice basis. In exceptional circumstances a without notice order may be

[5] It is not necessary to prove that a wrong has occurred, but it is necessary to show a reasonable basis for claiming that it has: see CPR 31.18.5

granted in reliance on the Bankers Trust case. If there is a concern about a fraudster being tipped off, it is common for the order against the third party holding information or documents to prevent disclosure of the application or the order;

d. Applicants for Norwich Pharmacal/Bankers Trust orders usually have to pay the respondent's costs (given that the respondent is merely someone who has become mixed up in another person's wrongdoing). Such costs are commonly sought by way of damages in any eventual proceedings against the wrongdoer about whom information is sought in the application;

e. The applicant for an order has to give a cross undertaking for damage.

Freezing Injunctions Against Wrongdoers and Third Parties

Neil Hext QC & Daniel Saoul

1

Introduction

- Non-proprietary injunction
- Freezes D's assets up to a certain value
- Prevents dealing with those assets or removal from jurisdiction (subject to exceptions)
- Can be made "worldwide"
- Does not give security
- Can be against third parties

2

Key Requirements

- Good arguable case against D
- Reason to believe that D has assets to be frozen
- Real risk of dissipation outside ordinary course of business
- Just and convenient

3

Example

- Client discovers employee has been making unauthorised withdrawals from bank account over period of years
- Withdrawals have been "justified" by reference to bogus invoices
- Payments have been made by bank transfer to a number of different bank accounts at banks in the UK

4

First Steps

- Instructions on cross-undertakings
- Detailed affidavit – in draft
  - Who will swear it?
  - exhibit
- Resources
- Which court?
- Work out when you are going to go – balance urgency against being ready
- *Ex parte* usually appropriate – but make sure you have considered it

5

Documents

- You will need:
  - Affidavit (plus exhibit)
  - Draft order (use of standard forms)
  - Skeleton argument
  - Application notice (plus fee)
  - Application notice for return date (7/14 days)
  - Draft claim form (and draft PoC, if poss)
- But can be done with less in cases of great urgency

6

Good Arguable Case

- Work out the cause(s) of action
- Plethora of different routes in fraud – deceit, breach of trust/fiduciary duty, dishonest assistance, restitution, etc. etc.
- Fraud may also give rise to proprietary claims
- But nb does not have to be a fraud case
- Need "good arguable case" but prospects do not necessarily have to be more than 50%

7

Risk of Dissipation

- A key requirement – must be a real risk that D will dissipate assets outside of the ordinary course of business
- Indicators:
  - Abnormal dealings with assets
  - Persistent breach of promises/implausible excuses
  - Liquid nature of D's assets (weak)
  - D's ties with other jurisdictions

8

Risk of Dissipation - Dishonesty

- Is evidence of dishonesty enough? *Thane Investments v. Tomlinson* (2003)
- Look at nature of dishonesty
- Eg. dishonesty involving movement of large sums of money from one bank account to another may lead to proper inference
- *VTB Capital v. Nutritek* (2012); *Madoff v. Raven* (2011); *Jarvis Field Press v. Chelton* (2003); *Candy v. Holyoake* (2017)

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Full and Frank Disclosure

- Freezing injunction – easy to get; harder to hold?
- Breach of duty of full and frank disclosure can lead to discharge of injunction
- Don't give your opponent ammunition
- Needs to be upfront in skeleton/affidavit – not buried in exhibit

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Full and Frank Disclosure

- Possible defences/areas of uncertainty (including legal points)
- Is there evidence which undermines your case?
- Has there been delay? (but nb *Pugachev*)
- Points undermining dissipation risk?
- Issues on quantum?
- Communications with D?
- Any issues re cross-undertakings – will C be good for the money?

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Exceptions to Order

- Reasonable legal expenses
- Ordinary living expenses for individual (say £1,000 per week?)
- Disposals in the ordinary course of business
- Where dealing with an ongoing business, are there mechanisms that can be put in place to allow legitimate payments with minimum disruption?

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Cross-Undertakings

- To compensate D for loss caused by injunction if court should so order (nb may need to be fortified by bank guarantee)
- To issue claim form and swear affidavit (if in draft)
- To serve claim form, affidavit, all evidence and application for return date on D
- To compensate third parties
- Not to use info for other purposes; not to enforce outside jurisdiction
- Don't forget note of hearing

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Norwich Pharmacal

- Quite common to seek simultaneous order for info e.g. from bank
- *Ex parte* on bank to avoid tipping off
- Powerful means to follow the money
- Consider *Norwich Pharmacal* order coupled with gagging order *prior* to getting freezing injunction
- Note: will need to pay bank's costs

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Pushing the Boundaries: the Chabra Jurisdiction

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28 September 2017

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The Chabra Jurisdiction

Why and When?

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Extending the boundaries of the freezing injunction

Since the decision in The Mareva, the boundaries of the freezing injunction have continued to be stretched:

- Orders seeking to freeze assets worldwide are now standard – where reciprocal action overseas will be taken, this should be planned in advance to the extent possible and the Dadourian guidelines [2006] 1 WLR 2499 must be respected, including obtaining foreign law evidence in appropriate cases
- Freestanding orders in support of overseas litigation anywhere in the world are now frequently granted pursuant to Section 25 of the Civil Jurisdiction and Judgments Act 1982 (note the "inexpedient" test and the Penal Rule)
- Likewise Section 44 of the Arbitration Act 1996 is available and permits the English Court, in appropriate circumstances, to make orders in support of domestic and international arbitrations
- Note also freezing injunctions in support of contribution claims are also now available: Kazakhstan Kagazy v Arip [2016] EWCA 1036

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Chabra: Why?

- Standard Commercial Court wording on a freezing injunction:
  - Prohibits disposal or dealing with assets whether or not in Respondent's name, whether solely or jointly owned, including assets which the Respondent has the power to dispose of directly or indirectly, and whether or not the Respondent is interested in them legally, beneficially or otherwise
  - Prohibits a Respondent from doing something himself or in any other way, including through others acting on his behalf or by directors, officers, partners, employees or agents
- But this will often not be enough – for the Claimant and/or for the Court:
  - Strictly speaking third parties are not respondents to the order and are not before the Court – all else being equal they do not have an opportunity to object
  - Although they will be guilty of contempt if they knowingly aid or abet a breach (e.g a bank permitting a payment out), this is unlikely to be sufficient where the third party considers (or can be presumed to consider) that they are entitled to the frozen asset and/or that their conduct in relation to the asset is independent from the Respondent and in pursuit of their own interests

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Chabra: When?

Therefore:

- Where you want to freeze an asset that you believe the Respondent has access to now or will have access to in the future, but that asset is likely to be in a third party's direct control
- That third party is likely to contest an assertion that they are the Respondent's nominee; and
- There is some legal route for gaining access to the asset once judgment has been obtained against the Respondent (the "good reason to suppose" test)

Then an injunction can and should be sought against the third party (as well as the Respondent) in relation to relevant assets only, and they should be joined to the proceedings for this purpose

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Legal Requirements

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The Legal Test

- TSB Private Bank v Chabra [1992] 1 WLR 231:
  - The origins of the jurisdiction – cases where:

    "*there is a good arguable case that there are assets, apparently vested in the [Third Party], which may be beneficially the property of [the Defendant] and therefore available to satisfy the plaintiff's claims against him if established at trial. I am also of the view that it is arguable that the [Third Party] was, in fact, at relevant times the alter ego of [the Defendant] and that its assets, or at least some of its assets, may be available to meet the plaintiff's claims against him if established*" (per Mummery J in Chabra)

  - But in the modern day the Courts are prepared to go much further:

    "*In circumstances where a defendant/judgment debtor (i.e. the cause of action defendant (CAD)) against whom it is appropriate to make a freezing order…has a debt, or other receivable owing to it by a third party non-cause of action defendant (NCAD), or a claim, or potential claim, against a third party NCAD, the English Court has jurisdiction (or 'legal power'…) to grant a freezing order against the third party NCAD…*" (per Gloster J in The Mahakam [2011] EWHC 3143 (Comm))

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Examples

- Nominee / true owner arguments
- Section 423 of the Insolvency Act 1986
- Third party debt orders
- Note generally Cartier v British Sky Broadcasting Limited [2016] EWCA Civ 658, and also JSC BTA Bank v Solodchenko [2011] 1 WLR 888 and PJSC Bank v Maksimov [2013] EWHC 422 (Comm)

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Jurisdictional issues

- Note that territorial jurisdiction over the third party must still be established (CPR 6)
- Where third party within England / served within England, territorial jurisdiction will typically be established
- Where third party located overseas, authorities conflict – careful consideration to gateways and whether a cause of action should in fact be asserted is required

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Other Practicalities

- Real risk of dissipation must be established as against third party – but this does not necessarily require impropriety or dishonesty on their part
- Order sought should be carefully crafted to capture only those assets which might be susceptible to enforcement
- Cross-undertaking should expressly extend to third party
- Third party, as well as main Respondent, will have an opportunity to apply to discharge
- Generally great care should be taken to ensure that any order does not cause undue prejudice to the third party, particularly if the premise is that the third party is innocent of any wrongdoing

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Chabra and Arbitrations

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Section 44 of the Arbitration Act

"Court powers exercisable in support of arbitral proceedings

(1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.
(2) Those matters are—
(a) the taking of the evidence of witnesses;
(b) the preservation of evidence;
(c) making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings—
(i) for the inspection, photographing, preservation, custody or detention of the property, or
(ii) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property;
and for that purpose authorising any person to enter any premises in the possession or control of a party to the arbitration;
(d) the sale of any goods the subject of the proceedings;
(e) the granting of an interim injunction or the appointment of a receiver."

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Section 44 & Chabra: challenging established wisdom

- Cruz City 1 Mauritius Holdings v Unitech [2014] EWHC 3704
- DTEK Trading v Morozov [2017] EWHC 94 (Comm)
- A v B (2017) (having regard to UST-Kamenogorsk Hydropower v AES [2013] UKSC 35)

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Conclusion

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