"The Big Freeze": The Rise and Rise of the *Mareva* Injunction

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Introduction

1. On 20 May 1975, a "without notice" application was made by Geoffrey Brice QC to Mr Justice Donaldson, sitting in the Commercial Court, for an injunction to restrain the respondent from removing funds in London banks from the jurisdiction, so that there might be assets here against which the claimant could enforce a judgment if its claim against the respondent succeeded.

2. The application was rejected, but renewed on appeal two days later where it was granted by the Court of Appeal on the basis of a short judgment in *Nippon Yusen Kaisha v Karageorgis*.[1] The following month, Bernard Rix applied for a similar order to prevent the proceeds of hire paid under a time charter for the vessel "The Mareva AS" into a London bank account from being removed from the jurisdiction. Mr Justice Donaldson thought the decision in *Lister v Stubbs*[2] precluded an order of this kind and observed that the Court of Appeal in the *Nippon* case had not been referred to it. He granted the order for a limited period, to allow the claimant to renew the application before the Court of Appeal. There, the application succeeded in *Mareva Company Naviera SA v International Bulk Carriers SA*, where the Court of Appeal gave more detailed reasons for its conclusion.[3]

3. It may be for that reason that it was Mr Rix's rather than Mr Brice's case which became synonymous with orders of this type, although the battle for naming rights ceased to be quite so important when they became known as freezing orders. But whatever they are called, the form of interim relief which emerged from the Court of Appeal in May and June 1975 has revolutionised the conduct of civil litigation in this jurisdiction. Lord Denning MR, who presided in both appeals, described the order as "the greatest piece of judicial law reform in my time."[4]

4. The number of occasions on which injunctions of this kind have been sought and granted expanded enormously in the years which followed that initial burst of judicial creativity. In 1979, Mustill J observed that "applications are being made at the rate of

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[1] *Nippon Yusen Kaisha v Karageorgis and Another* [1975] 1 WLR 1093.
[2] *Lister v Stubbs (*1895) 45 Ch D 1.
[3] *Mareva Company Naviera SA v International Bulk Carriers SA* [1975] 2 Lloyd's Rep 509.
[4] Lord Denning, *The Due Process of Law* (1980), 134.

about 20 per month" and "almost all are granted."[5] In 1986, Mr Justice Bingham lamented:[6]

> "It was not so very long ago since ex parte applications for injunctive relief were infrequently made and even more exceptionally granted … The advent of the *Mareva* injunction has, as is notorious, led to such applications becoming commonplace, hundreds being made every year and relatively few refused".

5. The first specialist English law[7] text books on the subject followed in 1985, one occupying a mere 135 pages and selling for a mere £23.50,[8] the other (offering slightly less value per page) of 133 pages at £29.50.[9] Steven Gee and Geraldine Andrews published *Mareva Injunctions: Law and Practice* in 1987, which soon established itself as the leading text, and became *Gee on Commercial Injunctions* in its fifth edition in 2004. The size, scope and, it must be said, cost of that treatise has followed the exponential growth of its subject.

6. In May 2025, we will celebrate the 50th anniversary of the freezing injunction with a conference in the Business and Property Courts which is being organised by Mr Justice Butcher and Mr Justice Trower. I am aware of at least one other conference which is being organised to mark the occasion.

7. By way of a rather inadequate trailer for those more substantive occasions, in this talk I wanted briefly to look at how some of the elements of this jurisdiction have developed over the past 50 years, and what they suggest we should be thinking about at the golden jubilee.

The need for a cause of action for substantive relief over which the court has jurisdiction

8. It was for a long time the law that a cause of action for monetary relief was an essential pre-requisite of freezing order relief, and that it had to be a cause of action over which the courts of England and Wales had jurisdiction. That was the result of the decision of the House of Lords in *The Siskina* in 1979.[10] This had a number of consequences:

    a. The court would not grant freezing order relief in support of a cause of action being asserted in proceedings in another jurisdiction,[11] save on the basis of the express statutory power to do so introduced by s.25 of the Civil Jurisdiction and Judgments Act 1982 and s.44 of the Arbitration Act 1996.

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[5] *Third Chandris Shipping Corporation v Unimarine SA* [1979] 2 All ER 972, 976.
[6] *Siporex Trade SA v Comdel Commodities Ltd* [1986] 2 Lloyd's Rep 428, 436.
[7] In Australia see M Hetherington, *Mareva Injunctions* (1983).
[8] Marc Hoyle, *The Mareva Injunction and Related Orders* (1985).
[9] DG Powles, *The Mareva Injunction and Associated Orders* (1985).
[10] *Owners of the Cargo Lately Laden on Board the Siskina v Distos Compania Naviera SA* [1979] AC 210.
[11] *Mercedes-Benz AG v Leiduck* [1986] AC 284.

b. The court could not grant freezing order relief in advance in support of a cause of action for damages which had yet to accrue. That was a particular issue in ship sale cases, in which the buyer's claim for defects in the purchased vessel would only accrue on completion, the same point at which the purchase price might already have been moved on from the account into which it had been paid.[12]

c. That led, briefly, to a practice of obtaining inchoate freezing orders in advance of completion, which would take effect immediately completion occurred, the buyer saying, virtually simultaneously, "here is the price" and "here is my freezing order to prevent you moving from it the jurisdiction." That practice was brought to an end in *The P*.[13]

9. But slowly and surely, the irresistible momentum of the freezing injunction has gradually removed most of those difficulties. In *Fourie v Le Roux*[14] the House of Lords accepted that there was jurisdiction to grant freezing order relief to an applicant who, at the time of seeking the order, did not intend immediately to commence substantive proceedings and who had not undertaken to do so, provided the court had in personam jurisdiction over the respondent.

10. And our ideas of freezing possibility were considerably broadened by *Broad Idea International Ltd v Convoy Collateral Ltd*[15] in which the Privy Council held *The Siskina* to have been wrongly decided in suggesting that a freezing order depended on the claimant having a cause of action against the respondent triable in this jurisdiction. In that case, freezing order relief had been sought in the BVI, which had no equivalent of s.25 of the CJJA 1982, in support of substantive proceedings to be commenced in Hong Kong. Relief was sought against two respondents, one located in the BVI, the other served out of the jurisdiction, for the sole purpose of obtaining freezing order relief from the BVI courts in support of the intended Hong Kong proceedings.

11. The Privy Council upheld the submission that the gateway relied on to serve proceedings out of the jurisdiction – a claim for an injunction ordering the defendant to do or refrain from doing some act within the jurisdiction – did not apply where the only relief sought was a freezing injunction. But the Board rejected the argument that the absence of a cause of action being asserted in the BVI was fatal to the granting of the freezing order against the respondent served within the jurisdiction, provided the court had personal jurisdiction over the respondent. In particular, the Board found that the essential purpose of a freezing injunction is to assist the enforcement through the courts process of a n anticipated money judgment[16] with the claimants underlying cause of action being relevant only in so far as it bears on the prospect that such a judgment will be obtained. The Board stated:[17]

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[12] *Veracruz Transportation Inc v VC Shipping Inc* [1992] 1 Lloyd's Rep 53.
[13] *The P* [1992] 1 Lloyd's Rep 470.
[14] *Fourie v Le Roux* [2007] 1 WLR 320.
[15] *Broad Idea International Ltd v Convoy Collateral Ltd* [2023] AC 389.
[16] Save for post-judgment freezing injunctions.
[17] *Broad Idea International Ltd v Convoy Collateral Ltd* [2023] AC 389 [89].

> "The interest protected by a freezing injunction is the (usually prospective) right to enforce through the courts process a judgment or order for the payment of a sum of money. A freezing injunction protects this right to the extent that it is possible to do so without giving the claimant security for its claim or interfering with the respondents right to use its assets for ordinary business purposes. The purpose of the injunction is to prevent the right of enforcement from being rendered ineffective by the dissipation of assets against which the judgment could otherwise be enforced."

12. We should pause at this point and consider how significant this rationalisation of the freezing order jurisdiction is. The statement that "the essential purpose of a freezing injunction is to facilitate the enforcement of a judgment tor order for the payment of a sum of money by preventing assets against which a judgment could potentially be enforced from being dealt with in such a way that insufficient assets are available to meet the judgment"[18] and "to prevent the right of enforcement from being rendered ineffective by the dissipation of assets against which the judgment could otherwise be enforced"[19] could root the jurisdiction to grant freezing orders in the power of the court to prevent the abuse of its own process.[20]

13. However, *Broad Idea* makes it clear that the power can be exercised, absent any statutory underpinning, when the judgment which might be rendered nugatory is that of a foreign court, and even where there is no reciprocal enforcement treaty between the relevant jurisdictions. The Board concluded[21] that "there is no difference in principle between a case where a freezing injunction is sought in anticipation of (i) a future judgment of a BVI court in substantive proceedings brought in the BVI, (ii) a future judgment of a foreign court enforceable by the BVI court on registration in the BVI, and (iii) a future judgment of a BVI court obtained in an action brought to enforce a foreign judgment". It follows that a freezing order can be granted by the English court even though enforcement proceedings may never be commenced here (either because the claim does not succeed, or the judgment is settled without enforcement or the claimant chooses not to do enforce here but somewhere else).[22] It is not possible to rationalise orders granted on this basis as being designed to prevent the abuse of the process of the English court. Instead, freezing orders in support of foreign proceedings appear to reflect some transnational policy in support of the enforcement of judgments and awards in favour of all jurisdictions, not simply those with whom the executive has seen fit to enter into reciprocal enforcement arrangements.

14. The Board also disapproved of *The Veracruz* and associated authorities holding that a freezing order cannot be granted until the cause of action has accrued, stating[23] that

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[18] Ibid, [85].
[19] Ibid, [88].
[20] For an early rationalisation along these lines see Robert Goff J in *The Angel Bell* [1980] 1 All ER 480, 486-87.
[21] *Broad Idea International Ltd v Convoy Collateral Ltd* [2023] AC 389, [95].
[22] As the Privy Council noted in *Mercedes Banz AG v Leiduck* [1996] AC 284, 298-99, "the *Mareva* injunction does not enforce anything, but merely prepares the ground for a possible execution by different means in the future".
[23] *Broad Idea International Ltd v Convoy Collateral Ltd* [2023] AC 389, [97].

"any requirement that a right to be paid money must allegedly have accrued before a freezing injunction can be granted is contrary to principle"[24] and that:

> "What matters is whether there is a sufficient likelihood (evidenced by the requirements of an intention to institute proceedings and a good arguable case) that a judgment will be obtained and that it will be rendered ineffective unless the court acts now to grant an injunction."[25]

15. That seems to leave the need for a gateway for service out of the jurisdiction as the last remnant of the obstacles which the need for a cause of action for substantive relief over which the court has jurisdiction once placed in the way of obtaining freezing order relief. That difficulty arise because it has been held that paragraph 3.1(2) of Practice Direction 6B – "a claim is made for an injunction ordering the defendant to do or refrain from doing an act within the jurisdiction" – does not to apply to freezing injunctions. That was the conclusion of the House of Lords in *The Siskina*,[26] the Privy Council in *Mercedes Benz AG v Leiduck*[27] and the Privy Council did not feel it appropriate to revisit that interpretation in *Broad Idea*.[28]

16. But it is possible that the obstacle was never there, its solution hiding in plain sight all along. While para. 3.1(2) may not be available, what about para. 3.1(20) which provides a service out gateway for claims brought under any enactment which allows proceedings to be brought?

    a. In *Orexim Trading v Mahavir Port*[29], the Court of Appeal suggested that the first question which arises in this context is whether there is a relevant territorial limit on the operation of the statute. If there is not, then presumptively it should be possible to serve the proceedings out of the jurisdiction. On that basis, it was held that a claim under s.423 of the Insolvency Act 1986 could, in principle, be served out of the jurisdiction through this gateway.

    b. In *Gorbachev v Guriev*,[30] the Court of Appeal held that a claim for third party disclosure under s.34 of the Senior Courts Act 1981 could be served out of the jurisdiction through the same gateway, on the basis that a claim for relief under the Senior Courts Act 1981 was brought "under any enactment."

    c. In *Broad Idea*, it was noted that the statutory power to grant injunctions is conferred by s.37(1) of the Senior Courts Ac1 1981.[31]

    d. It would seem to follow that, unbeknown to Lord Diplock in *The Siskina* and the Privy Council in *Mercedes Benz* and *Broad Idea*, there was a basis for

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[24] Ibid.
[25] Ibid, [99].
[26] *Owners of the Cargo Lately Laden on Board the Siskina v Distos Compania Naviera SA* [1979] AC 210.
[27] *Mercedes-Benz AG v Leiduck* [1986] AC 284.
[28] *Broad Idea International Ltd v Convoy Collateral Ltd* [2023] AC 389, [108],[121], [215], [221].
[29] *Orexim Trading Ltd v Mahavir Port and Terminal Private Ltd* [2018] EWCA Civ 1660.
[30] *Gorbachev v Guriev* [2023] EWCA Civ 327.
[31] *Broad Idea International Ltd v Convoy Collateral Ltd* [2023] AC 389, [12]. [20], [40] and [118].

seeing a freestanding application for freezing order relief out of the jurisdiction all along – just under a different gateway.

How strong must the case on the merits be?

17. A potential mechanism for controlling the grant of freezing order relief would be to require the claimant to establish a particularly strong prospect of obtaining judgment before a freezing order would be granted.

18. At a relatively early stage in the life of the freezing order jurisdiction, in 1978, the test was determined to be that of a "good arguable case". In *Rasu Maritima SA v Minyak Dan Gas Numi Negara*,[32] the Court of Appeal rejected the suggestion that before getting a freezing order, the claimant had to establish its claim to a summary judgment standard. However, Lord Denning MR offered an alternative test:[33]

> "I would hold that an order restraining removal of assets can be made whenever the plaintiff can show that he has a 'good arguable case.' That is a test applied for service on a defendant out of the jurisdiction … and it is a good test in this procedure which is appropriate when defendants are out of the jurisdiction. It is also in conformity with the test as to the granting of injunctions whenever it is just and convenient as laid down by the House of Lords in *American Cyanamid Co v Ethicon Ltd* …"

19. That passage is rather confusing – suggesting that the "good arguable case" test was appropriate because the defendant was out of the jurisdiction (when this will not always be the case), and that it was "in conformity with" the *American Cyanamid* test (which requires, of course, only a "serious issue to be tried"). What is undeniable, however, is that the "good arguable case" test was borrowed from the jurisdictional context. The test was used extensively in *Mareva* cases over the following years.[34] However, the case invariably cited as establishing (or at least explaining) the test is *The Niedersachsen*,[35] in which Mustill J sought to make sense of Lord Denning's comments:

    a. He rejected the analogy with the *American Cyanamid* test, because a *Mareva* application was of a "quite different character" to an application for an interim injunction.

    b. He regarded the analogy with service out of the jurisdiction as "rather distant", but nonetheless relied on the authority Lord Denning had referred to in that context – *Vitkovice v Horner*[36] – to tease out of that case the fact that "the plaintiff has to do substantially more than show that the case is merely 'arguable': a word which to my mind at least connotes that, although the claim will not be laughed out of Court, the plaintiff will not be justified in feeling any

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[32] *Rasu Maritima SA v Minyak Dan Gas Numi Negara* [1978] QB 644.
[33] Ibid, 661.
[34] E.g. *Cretanor Maritime Company Limited v Irish Marine Management Ltd* [1978] 1 Lloyd's Rep 425; *Third Chandris Shipping Corporation v Unimarine SA* [1979] 2 Lloyd's Rep 184.
[35] *Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft GmbH (The Niedersachsen)* [1983] 2 Lloyd's Rep 600, 605.
[36] *Vitkovice v Korner* [1951] AC 869.

optimism" but "need not go so far as to persuade the Judge that he is likely to win."

c. He concluded:

> "In these circumstances, I consider that the right course is to adopt the test of a good arguable case, in the sense of a case which is more than barely capable of serious argument, and yet not necessarily one which the Judge believes to have a better than 50 per cent. chance of success."

20. So matters rested, in comparatively tranquil waters, even at the stage when the courts became entangled in a series of cases seeking to elucidate the meaning of those same three words – "good arguable case" – for the purposes of establishing that the courts of England and Wales over a defendant who was out of the jurisdiction.[37] However, the two "good arguable case" concepts collided in *Lakatamia Shipping Co Ltd v Morimoto* in the judgment of Haddon-Cave LJ, who, in what appears to have been something of an aside, equated the tests in these two different contexts.[38]

21. That led to a series of first instance authorities expressing different views on the question of whether "good arguable case" had the same meaning in the freezing order and jurisdictional contexts. In favour of the view that it did were the decisions of Edwin Johnson J in *Harrington & Charles Trading Co Ltd v Mehta*[39] and Dias J in *Chowgule & Co Pte Ltd v Shire*.[40] The opposite view was expressed by Butcher J in *Magomedov v TGP Group Holdings (SBS) LP*[41] and Bright J in *Unitel SA v Unitel International Holdings BV*.[42]

22. The case before Bright J has now been considered by the Court of Appeal. In *Dos Santos v Unitel SA*,[43] the Chancellor rejected the suggestion that the issue of whether a "good arguable case" had been made out in the freezing order context should be approached using the three-limbed test which applies to jurisdiction cases. However, the Court of Appeal went further than making it clear that the higher jurisdictional test does not apply, going onto hold that the test of "good arguable case" is in fact the same as the "serious issue to be tried" test used in the summary judgment and *American Cyanamid* contexts. Popplewell LJ gave the leading judgment on this second aspect, stating:[44]

> "The time has come, in my view, to recognise that the gateway merits test for a freezing order is and should be the same as that for interim injunctions generally, namely whether there is a serious issue to be tried. That is so both as a matter of principle and because it is no different in substance from the test applicable to freezing orders of 'good arguable case'".

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[37] See *Brownlie v Four Seasons Holdings* [2017] UKSC 80, *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34 and *Kaefer v AMS* [2019] EWCA Civ 10.38.
[38] *Lakatamia Shipping Co Ltd v Morimoto* [2019] EWCA Civ 2203, [38].
[39] *Harrington & Charles Trading Co Ltd v Mehta* [2022] EWHC 2960 (Ch).
[40] *Chowgule & Co Pte Ltd v Shire* [2023] EWHC 2815 (Comm).
[41] *Magomedov v TGP Group Holdings (SBS) LP* [2023] EWHC 3134 (Comm).
[42] *Unitel SA v Unitel International Holdings BV* [2023] EWHC 3231 (Comm).
[43] *Dos Antos v Unitel SA* [2024] EWCA Civ 1109.
[44] Ibid, [122].

23. Popplewell LJ was not persuaded by the contention that the invasive (and, some might say, draconian) nature of a freezing order justified an enhanced merits test, stating he could not see:[45]

> "any logic in seeking to control the grant of freezing orders through a heightened merits test as a gateway. Rather, the invasive nature of the relief should be taken into account in considering the other aspects of the test which are required to be fulfilled; in the safeguards built in to the wording of the orders in the form of exceptions; and in the application of the cross-undertaking in damages."

24. We do, of course, sometimes apply different merits thresholds for the purpose of determining whether or not to grant particular types of interim relief. Most obviously, when deciding whether or not to grant anti-suit relief when proceedings are brought in other jurisdiction in breach of a jurisdiction or arbitration agreement (or, probably, vexatiously and oppressively), the test applied is whether the applicant has shown to "a high degree of probability" that the claim has been brought in breach of the relevant choice of forum agreement. This has been justified by the effect on the foreign court of the order.[46] In *Ecobank Transactional Inc v Tanoh* Christopher Clake LJ applied the same test to anti-enforcement injunctions, stating:[47]

> "In both cases the injunction will preclude the enjoined party from carrying on either with the trial or with attempts to secure the fruits of a judgment obtained at the trial. In both cases the English court is interfering, albeit indirectly, with the working or output of a foreign court. In both cases it could be said that if the arbitral tribunal concludes that the arbitration agreement does not apply the respondent will be able to continue with the trial or the enforcement."

25. To date, at least, search orders have been held to require "an extremely strong prima facie case", a test which appears to have been endorsed by the House of Lords in *Rank Film Distributors Ltd v Video Information Centre*.[48] Lord Wilberforce[49] stated that "because they operate drastically and because they are made, necessarily, ex parte - i.e. before the persons affected have been heard, they are closely controlled by the court … They are only granted upon clear and compelling evidence, and a number of safeguards in the interest of preserving essential rights are introduced." Lord Fraser referred to "the need for "strong prima facie evidence".[50]

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[45] Ibid, [130].
[46] *Emmott v Michael Wilson & Partners Ltd* [2018] EWCA Civ 51, [39].
[47] *Ecobank Transactional Inc v Tanoh* [2015] EWCA Civ 1309, [91].
[48] *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380.
[49] Ibid, 439.
[50] Ibid, 444.

26. In addition, in cases of mandatory injunctions,[51] or where an interim injunction is likely to be determinative, a higher merits threshold may be required.[52] In this context, as Popplewell LJ noted, the merits fall to be re-visited as part of the "just and convenient" analysis, rather than as part of the threshold test, Popplewell LJ's judgment appears to suggest that the merits (beyond a serious issue to be tried) should play a similar role in freezing injunctions.[53] That might suggest that an application for a particularly intrusive freezing order, or perhaps particularly intrusive parts of a proposed freezing order, might be refused because, although the threshold merits test had been passed, the claim was not strong enough to bear the full weight of the application. If so, identifying when consideration of a higher merits threshold is brought into play will offer inventive parties considerable scope for argument.

27. What is unique about search and freezing orders is that the legal right relied upon to obtain the injunction is not a right pre-existing the commencement of legal or arbitral proceedings and arising under general principles of private law, but a right arising from the commitment to commence legal or arbitral proceedings in pursuit of an award of monetary relief, which subsists only for so long as those proceedings are in contemplation or underway, or have succeeded. That might have offered a principled basis for a higher merits test, but that is not the direction the law has ultimately taken.

The assets to which a freezing order can extend

28. The *Mareva* originally came into being to prevent assets within England and Wales from being moved out of the reach of the enforcement mechanisms of the English court once judgment was obtained here, and relief was only awarded where there was clear evidence of assets here.[54] That came to be expanded to cases where there was evidence that assets would or might be present within the jurisdiction within a short period.[55] By the start of the 1990s, the court was granting freezing relief in respect of assets abroad.[56] As so often, what was once "rare"[57] has become commonplace, the "worldwide freezing injunction" becoming the default application in the Commercial Court, at least.

29. However, that expansion in the territorial reach of freezing injunctions is, perhaps, less dramatic than the readiness to extend the reach of orders beyond assets in the legal or beneficial ownership of the respondent. The *Mareva* precedent in the first edition of Gee and Andrews extended to "any of [its/their] assets"[58] and the authors explained "a *Mareva* injunction seeks to preserve the defendant's proprietary interest in assets within the jurisdiction".

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[51] *Shepherd Homes Ltd v Sandham* [1971] Ch 340, 351; *Films Rover Ltd v Canno Film Sales Ltd* [1987] 1 WLR 670, 680; *Locabail International Finance Ltd v Agroexport* [1986] 1WLR 657, 664.
[52] *Lansing Linde Ltd v Kerr* [1991] 1 WLR 251, *National Commercial Bank Jamaica Ltd v Olint Corpn Ltd* [2009] UKPC 16; *Planon Ltd v Gilligan* [2022] EWCA Civ 642.
[53] *Dos Antos v Unitel SA* [2024] EWCA Civ 1109, [131].
[54] *MBPXL Corporation v International Banking Corpn Ltd* 28 August 1975.
[55] Gee and Andrews, *Mareva Injunctions: Law and Practice* (1987), 48-49,
[56] *Republic of Haiti v Duvalier* [1990] 1 QB 202; *Derby & Co Ltd v Weldon (No 1)* [1990] Ch 48; *Derby v Weldon (Nos 3 and 4)*]1990] Ch 65, 77-80; *Babanaft International Co v Bassatne* [1990] Ch 13.
[57] *Babanaft International Co v Bassatne* [1990] Ch 13, 28.
[58] Gee and Andrews, *Mareva Injunctions: Law and Practice* (1987), 110.

30. The complex structures in which wealth is now held have led to substantial revisions in this aspect of the freezing injunction. In 2002, the standard form freezing injunction attached to CPR PD 25 and that in the Admiralty and Commercial Court, extended the reach of the injunction to "any asset which he has power, directly or indirectly, to dispose of or deal with as if it were his own", and provided that a respondent would be regarded as having such a power "if a third party holds or controls the assets in accordance with his direct or indirect instructions". In *JSC BTA Bank v Solodchenko*[59] Pattern LJ held that these words made it clear that the respondents assets "can include assets held by a foreign trust or a Liechtenstein Anstalt when the defendant retains beneficial ownership or effective control of the asset". He stated that the words had been introduced to catch assets held by the defendant in what were described as sham trusts "in which assets owned or controlled by the defendant were held by third parties in a trust or other similar entity ostensibly for the benefit of a third party."

31. In April 2009, the standard form freezing order wording in the Commercial Court allowed in appropriate cases for the inclusion of language stating that the injunction applies to assets "whether the Respondent is interested in them legally, beneficially or otherwise."

32. The concept of an interest in assets "otherwise" than legally or beneficially is one which, in many legal contexts, would receive close and critical forensic scrutiny. In *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev*[60] the Court of Appeal held that the words "or otherwise" in the order before the court extended the reach of the order to assets held under the terms of a discretionary trust, where the respondent was one of the potential class of beneficiaries, even if enforcement could not be levied against those assets. In *JSC BTA Bank v Ablyazov (No 10)*[61] the Supreme Court held that (certainly) the Commercial Court wording (and perhaps the 2002 wording) extended the reach of a freezing order to a loan facility which the respondent was entitled to draw-down from and apply as he wished.

33. It has been suggested that the guiding principle when determining what assets can be caught by a freeing injunction is that, to be capable of being frozen, assets must be of a kind which a judgment against the respondent could be enforced against.[62] As Rix LJ explained in *Lakatamia Shipping Co v Su*:[63]

> "The point of freezing orders is to restrain dealings by the defendant with assets which, if judgment is obtained, will be available to satisfy the judgment. It is obvious, therefore, that the assets targeted by such an order are assets that belong beneficially to the defendant, since only such assets will be so available. Thus assets held by the defendant as a trustee for others will not, in the absence of words expressly extending the order to them, be caught by the order."

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[59] *JSC BTA Bank v Solodchenko* [2010] EWCA Civ 1436, [26] and [28].
[60] *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2015] EWCA Civ 139, [51].
[61] *JSC BTA Bank v Ablyazov (No 10)* [2015] UKSC 64, [39].
[62] *Federal Bank of the Middle East Ltd v Hadkinson* [2000] 1 WLR 1695, 1709.
[63] *Lakatamia Shipping Co v Su* [2014] EWCA Civ 636, [46].

That would extend to assets which the defendant had disposed of under a transaction which could be set aside (re-vesting the assets in the defendant and rendering them susceptible to enforcement against the defendant). But what of assets over which the defendant has practical control, but to which the defendant has no legal or equitable right?

34. There is scope for conflict between the desire to extend orders to assets which, in practice, a respondent is able to enjoy, and the enforcement principle. I sought to identify some of the issues in *Civiello v Brodahl*,[64] although in compliance with my own duty of full and frank disclosure, I should point out that Steven Gee KC has written an article saying the decision was reached in error because the judge did not understand the authorities, in piece entitle "Taking an Axe to the Standard Freezing Injunction."[65]

35. I do not propose to unsheathe my axe in response – at least, not today – but just to flag up some of the issues the debate throws up:

    a. There is the issue of whether, where the respondent is the legal or beneficial owner of a company, a freezing order can be made over the assets of the company, or simply over the respondent's shareholding in the company.

    b. If the former, is this limited to cases in which a real risk is shown that the respondent may reduce the value of his shareholding by transactions disposing of assets at the company level?

    c. Do decisions which doubt whether the standard freezing order extends without more to assets of a company wholly owned and controlled by respondent survive the decision of the Supreme Court in *Ablyazov*?

    d. Where an injunction extends in the first instance to assets which, so far as appearances are concerned, belong to a non-party but where it is said that further investigation will show they are the respondent's assets, should the court direct an early determination of that issue to prevent any unjustified restriction on third party assets continuing longer than necessary?

    e. If the application of a freezing order to assets which appear to be beneficially owned by a non-party is justified on the basis that they may nonetheless be susceptible to execution against the respondent, should the court look more carefully at the stage the injunction is sought at the viability of the process by which it is said that the assets can be made amenable to the execution of a judgment against the respondent and how realistic is it that the suggested method of execution will be available?

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[64] *Civiello v Brodahl* [2024] EWHC 707 (Comm).
[65] Steven Gee KC, "Taking an Axe to the Standard Freezing Injunction: *Civello v Brodahl"*[2024] EWHC 707 (Comm) (2024) CJQ 184.

f. Where a respondent *could* in practice access assets to meet a judgment debt, but cannot be compelled to do so by a court order, would it be appropriate for the court to seek (indirectly) to force the respondent to access the assets to pay the judgment debt by preventing any other use of the assets? That would involve a three walled prison, in which the only use which could be made of the asset would be discharge of the judgment debt.

g. If the answer to that question is no, then the court would need to be astute not to make orders whose real teeth lie not in the preservation of the efficacy of legitimate means of enforcement, but because the inconvenience of a freezing order may provide an indirect means of forcing a respondent (or others) to do something which could not have been directly compelled.

36. The answer to these questions should be found not simply in amendments to and interpretations of the standard form freezer wording, but in a principled exposition of the nature and limits of the freezing order jurisdiction which the terms of the standard freezing order template should reflect.

The costs of a contested return date

37. Where a challenge is made to the continuation of a "without notice" freezing order on the return date (or a further hearing provided for at the return date), and the challenge fails, should the respondent be required to pay the costs of that hearing?

38. In contested hearings for conventional *American Cyanamid* injunctions, the general practise had been to reserve the costs of the inter-partes interim injunction hearing until trial. This is apparent from a line of authorities from *Richardson v Desquenne et Giral UK Ltd*[66] onwards. There had been a long-standing dispute about whether the same approach should apply in freezing orders. The Court of Appeal in *Dos Santos v Unitel SA*[67] held that it should not. While parallels between freezing and *American Cyanamid* injunctions justified the application of a common merits test, they did not justify the same general rule as to costs. The Chancellor summarised the position as follows:[68]

> "One situation in which the Court will usually make an order that the costs be reserved is in the case of an *American Cyanamid* interim injunction … [T]hat is because, on the balance of convenience, the Court is prepared to grant an interim injunction which allows a party to rely upon a right or obligation, the existence of which has yet to be established, effectively holding the ring pending the trial. If at trial the right or obligation is established then the injunction can be made final and permanent or other relief granted. However if the claimants case fails at trial, then it can generally be said that the interim injunction should not have been granted, since the right or obligation did not

[66] *Richardson v Desquenne et Giral UK Ltd* [2001] FSR 1.
[67] *Dos Antos v Unitel SA* [2024] EWCA Civ 1109.
[68] Ibid, [117]-[119].

exist or was not established. Hence it is generally more appropriate for the costs of the application for the interim injunction to be reserved to the trial judge.

However, the position is different in the case of a freezing injunction. If the claimant establishes the three criteria referred to … above then the Court will grant the injunction. When granted it is not 'interim' or dependent on the balance of convenience … nor will the Court make the injunction final at trial.

Another important distinction between a freezing injunction and an *American Cyanamid* injunction is that whereas, in the case of the latter, if the relevant right or obligation is not established at trial it can generally be said that the interim injunction should not have been granted, in the case of the former even if the claim fails at trial, it does not follow that the freezing order was not correctly granted."

39. That does pose the question, however, of whether an order which cannot be re-visited, and where the undertaking in damages may not be enforceable even if the claim fails at trial, should have the same merits threshold as one which does not share those features.

Other features of the freezing order jurisdiction

40. To avoid this lecture exceeding its one hour time estimate, I am going to run relatively quickly through some other features of the freezing order jurisdiction.

41. First, *the risk of dissipation*:

    a. One of the few developments in the freezing order jurisdiction which might be said to have raised the bar for obtaining relief of this kind is in relation to what must be established by way of "risk of dissipation".

    b. Some early cases had suggested a need to show "nefarious intent".[69] However, in *The Niedersachsen*,[70] Kerr LJ posited a more objective test, namely whether the court concludes "on the whole of the evidence before it, that the refusal of *Mareva* injunction would involve a real risk that a judgment or award in favour of the plaintiffs would remain unsatisfied".

    c. More recent cases have emphasised that the risk against which the court order offers protection is not lawful and ordinary expenditure, but only "unjustifiable" dispositions.[71]

    d. If there are any difficulties here, they lie not so much with the test as with its application. The "real risk" test reflects the fact that the court is engaged in an essentially predictive exercise, rather than making findings as to past fact. For that reason, the same test is applied when a claimant suggests that it should be

[69] *Home Insurance Co v Administratia Asigurailor de State* [1983] 2 Lloyd's Rep 674.
[70] *The Niedersachsen* [1983] 1 WLR 1412.
[71] *Candy v Holyoake* [2017] EWCA Civ 602, [49],

given permission to serve out notwithstanding the existence of a prima facie more appropriate forum because of the risk it would not receive justice there.[72] Litigators will have their own views as to the comparative difficulty of establishing a real risk in each context.

42. Second, *asset disclosure*:

a. In *A v C* Robert Goff J had noted that a disclosure order might sometimes be necessary, because it might not be possible for the *Mareva* injunction to operate properly (e.g. in terms of any maximum sum order) without it.[73]

b. However, this was said to be a power to be exercised "sparingly".[74] The first edition of Gee and Andrews in 1987 states that "in practice orders for … disclosure of assets by affidavit are rarely granted on the plaintiff's initial ex parte application".[75] There was no such provision in the standard form attached to the Practice Direction for the Queen's Bench Division in 1983, nor the precedemt in Gee and Andrews.

c. Not only does the standard order now provide for an affidavit of assets "giving the value, location and detail" of all assets,[76] but many applicants seek more, including details of past transactions from bank accounts or the amount and identity of creditors, sometimes by taking the word "detail" in the standard form, capitalising it, and including their own definition. As the 11th edition of *The Commercial Court Guide* notes:[77]

> "The draft order should not be presented as an 'opening offer', leaving it to the Court to amend it down. The Court has noted an increasingly prevalent practice of draft orders being presented to the Court which include wide definitions of some of the terms which appear in the Commercial Court form, thereby considerably adding to its scope, for example of the terms 'asset' or 'details'. These definitions constitute departures from the standard form which should not be sought on a routine basis, and the existence and scope of any suggested definitions in those cases where they are sought must be highlighted and justified".

d. Without notice disclosure obligations constitute one of the most intrusive aspects of a freezing order, because once the information has been handed over, it cannot be recalled. An applicant needs to consider what is the minimum it needs to hold the ring before the return date, not the most it can get away with.

43. Third, the obligation of *full and frank disclosure*. This can be a powerful tool in ensuring the fairness of without notice applications, and there are well-known cases in

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[72] *Altimo Holdings and Investment Ltd v Kyrgyz Movil Tel Ltd* [2011] UKPC 7.
[73] *A v C* [1981] QB 956, 959.
[74] *Bekhor Ltd v Bilton* [1981] QB 923, 950.
[75] Gee and Andrews, *Mareva Injunctions: Law and Practice* (1987) 90.
[76] See for example the precedent in Appendix 11 of *The Commercial Court Guide* (11th).
[77] Ibid, 137.

which freezing orders have been set aside because the duty was not complied with.[78] However, in an information-rich world, the court can often find itself swamped with material which it is not practically in a position to absorb and assess. The lengthy lists of points which appear under the "full and frank disclosure" heading in skeleton arguments and witness statements on without notice applications remind me of advertisements for pharmaceutical products on US television:

> "may cause nausea, dry mouth, itching, diarrhoea, runny nose; common cold, death; blurry vision; severe hair loss; bad breath; loss of a limb; rashes; insomnia and mild flatulence."

Surveys suggest that these lists actually increase drug sales, because the presence of so many minor side effects make the major ones seem less important, and because the long list engenders a sense of trust.[79] Are the same influences at work?

44. Finally, *the undertaking in damages*. It was established at a relatively early stage in the life of the *Mareva* that the fact that the appellant was not in a position to fortify its undertaking in damages did not preclude it from obtaining an order.[80] The interests of justice would clearly not be served if the freezing order was only available to cash-rich applicants, like the Ritz Hotel. However, there is something to be said for requiring an applicant who cannot fortify its undertaking in damages to provide asset disclosure to the respondent. In *LAX SA v JBC SA*,[81] in such case, I expressed concern:

> " at the apparent asymmetry in the fact that LAX had obtained an injunction, and come under a contingent liability under the undertaking in damages, without adducing any evidence as to its assets, while obtaining a coercive order for disclosure of JBCs ass ets, and a freezing order, in support of its own claim. A common complaint about the freezing order jurisdiction is that the applicant is able, on a without notice application, to obtain information as to the identity and location of the respondents asse ts, and thereby obtain an information advantage which cannot effectively be reversed (even if the injunction is later set aside)".

45. While acknowledging that there were material differences between the position of the applicant and the respondent, I concluded that " an applicant in the position of LAX who comes to the court seeking a coercive order but who is unable to provide the degree of assurance a court normally requires that it can make good on its undertaking in damages if it is later held that the injunction should not have been granted, is less well-placed to complain about the invasive nature of a disclosure order of this kind or its interference with rights of privacy or confidence than a respondent."

Conclusion

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[78] E.g. *Fundo Soberano de Angola v dos Santos* [2018] EWHC 2199 (Comm) and *Banca Turco Romana SA v Cortuk* [2018] WWHC 662 (Comm).
[79] Yael Steinhart, Ziv Carmon and Yacob Trope, "Warnings of Adverse Side Effects Can Backfire Over Time" (2013) 24 *Psychological Science* Issue 9.
[80] *Allen v Jambo Holdings Ltd* [1980] 1 WLR 1252.
[81] *LAX SA v JBC SA* [2024] EWHC 2042 (Comm), [8]-[10].

46. In 1982, Donaldson LJ famously described a freezing injunction as one of the laws two "nuclear weapons" [82] However, the 50 years which followed the sudden emergence of the jurisdiction have seen freezing orders “normalised” to an extent which would have surprised the lawyers attendant at their birth. They have proved a powerful weapon in the ongoing battle against cross-border fraud, and have, one suspects, made England and Wales a particularly attractive jurisdiction for a certain type of claim. There have been a number of developments which have made these orders easier to get and enlarged their scope. The 50th anniversary will provide a valuable opportunity to assess the current balance of the application of the freezing order jurisdiction, and whether any further developments are required to ensure an appropriate equilibrium.

[82] *Bank Mellat v Nikpour* [1985] FSR 87, 92.