Client: Stewarts Law LLP Yellow News
Source: Solicitors Journal (Main)
Date: 18 June 2013
Page: 14
Reach: 5000
Size: 1142cm2
Value: 3186.18

Keeping a cool head

Defendants seeking to get freezing orders discharged stand a much better chance if they think strategically and do not rush into potentially costly and ineffective counter-attacks, says Jane Colston

When responding, as defendant, to a freezing injunction, Michael Caine's line in *The Italian Job* often springs to mind: "You're only supposed to blow the bloody doors off!". Too much production and too little thinking can mean poor judgment calls are made which can negatively affect the whole action.

Defendants are usually faced with large, coordinated and aggressive claimant legal teams which make the lives of defendants deliberately challenging and time pressured. Claimants and the courts often blend simultaneous orders to make freezing orders vice-like effective.

Typically, defendants see the combination of freezing injunctions with disclosure/asset tracing orders and gagging orders, but they are also seeing the increasing use of more exceptional orders such as passport delivery up and Tipstaff orders, and electronic tagging.

The courts have allowed claimants to press ahead on several fronts simultaneously including seeking a cross-examination order, committal applications and debarring orders. A legal tsunami can therefore hit defendants in a never-ending wave.

The reality is that once a claimant has established a good arguable case (see box) it is difficult for the average defendant to challenge it.

First response

A defendant's first response on being served is key. Such decisions are likely made under time pressure. The knee jerk response may be to fight. It may be to flee. The important starting point is that freezing orders are subject to strict compliance until they are varied or discharged. The courts have recently imposed substantial custodial sentences on those found in breach of freezing orders.

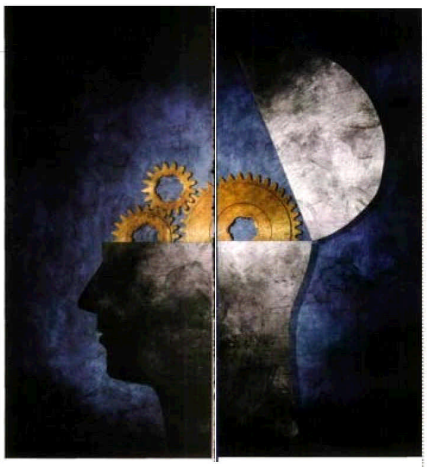
On the return date, failure to be full and frank is a primary counter-attack by defendants as it may be a solid ground on which to get the injunction discharged. Well-funded claimants can be tempted to do extreme things to win. The case of *St Merryn Meat Ltd v Hawkins* (29 June 2001) is a vivid example of the pitfalls defendants can exploit. Here the defendant's alleged fraud was obtained through bugging of a home telephone. The claimant sought to cover this up. The court discharged the freezing order because of the "need to demonstrate to the claimants (and other applicants for without notice interim orders) the gravity of their duty of disclosure and the consequences of ignoring them".

However, without strong arguments such as illegal telephone tapping, it is difficult in practice to discharge a freezing order, especially as any application to vary or set aside needs to be prompt and the court will not conduct a mini-trial. The court stands back and considers overall what is just and convenient. An example of the difficulty is the case earlier this year of *Alternative Investment Solutions (General Ltd) v Valle De Uco Resort and Spa* [2013] EWHC 333 where a worldwide freezing injunction was imposed following a default on a loan agreement. The defendants applied to discharge the order for material non-disclosure and providing false evidence. The claimant had alleged that it entered into the loan agreement induced by misrepresentations during a site visit. The defendants were able to show that this was wrong because the site visit was later. Secondly, the defendants were able to show that a relevant charge was not due on signature of the loan but later on.

Despite the defendants being able to show the above, the application was refused because the claimant was able to show a good arguable case of fraudulent misrepresentation and that there was a real risk of dissipation. Mr Justice Vos said that the non-disclosure by the claimant of the timing of the security was significant, but failure did not in his view vitiate the order. The court felt that the false evidence given by the claimant was more serious. However, it stated that it could not be blind to the fact that a refusal to continue or renew an order might work a real injustice. Perhaps importantly, the claimant apologised for its errors.

In *Elektromotive Group Ltd v Christopher Pan* [2012] EWHC 2742 Mr Justice Eder considered 14 allegations of material non-disclosure on an application to discharge a freezing order. He was persuaded by

Client: Stewarts Law LLP Yellow News
Source: Solicitors Journal (Main)
Date: 18 June 2013
Page: 14
Reach: 5000
Size: 1142cm2
Value: 3186.18



Onerous duty

The applicant for a freezing order has an onerous duty, by being full and frank, to establish:

- that it has a "good arguable case" i.e. "more than barely capable of serious argument but not necessarily one which the judge considers would have a better than 50 per cent chance of success";
- the existence of assets belonging to the defendant within the jurisdiction;
- solid evidence of a real risk of dissipation of assets; and
- that the order is just and convenient.

none of them and stated that even if this was wrong and there had been a material non-disclosure which would justify the discharge of the injunction, he would have granted a fresh injunction in any event.

Odds against

Defendants should not be "gung ho" in applying to discharge a freezing order

"Defendants should not be "gung ho" in applying to discharge a freezing order without knowing the risks of trying and failing"

without knowing the risks of trying and failing. The odds seem to be against defendants. In seeking to discharge the freezing injunction and failing the defendant will incur a large legal bill and his affidavit evidence, which is likely to be detailed but produced in a rush, may attract unhelpful and negative comments from the judge. Defendants should be perhaps laser focussed. In some circumstances, it may be better for a defendant to keep his powder dry to fight the bigger battle.

A cost efficient way of avoiding costly interlocutory battles, or at least to gain time to think and properly prepare, is to offer undertakings. If undertakings are given a defendant needs to expressly reserve the right to challenge it later on if he does not want to lose that right (without having to show a change in circumstances (see *Emailgen Systems Corporation v Exclaimer Ltd and Anor* [2013] EWHC 167 (Comm)).

Seeking a variation in the legal and living spend allowed may be a better way to go if the defendant can tolerate the freezing order. It usually allows reasonable living and legal expenses and ordinary course of business spend for 'frozen' companies. The odds seem to be in favour of such applications. When making such an application to vary a freezing order, the defendant should bear in mind that any such application carries the risk of the order being varied in favour of the applicant instead i.e. in seeking a variation the amount can go down as well as up.

In the case of *Veisi Trading Co v Parsai* [2013] EWHC 420 (Ch) the first defendant applied to vary the freezing order against him so that to increase his permitted limit for living and legal expenses. The judge emphasised that it had been submitted by the claimants that monies had been depleted by massive spending on an extension to the house and other payments in respect of motor cars and other frivolities. The judge said that this had been spending by an impecunious couple who have no visible means of support on their own evidence and were never going to be able to repay the money they allegedly owed. The judge was unimpressed with the defendants' spending and said that "without being parsimonious about this, it seems to me that they should learn to live within their means and this money is hotly disputed therefore not to be taken as being their means." Accordingly the order was varied down to allow the couple to use £1,400 per month pending trial which would enable them at least to pay their mortgage and to live frugally.

Haste slowly

When considering the response to a freezing order, a defendant should "make haste slowly" and take into account the robust approach of the claimants and the court. While the respondent has the right to vary and/or discharge an injunction such applications are difficult, likely to be hard fought and expensive to run. Alleging material non-disclosure on slender grounds may be latched on, knee jerk, as the only hope of discharging the grip of a freezing order. Practically, is there any hope of doing so on the substantial merits of the case and/or the balance of convenience?

A cool-headed look is required before engaging on an expensive application to discharge the injunction. Even if there has been a material non-disclosure, the court had a discretion which may justify the continuation of the order e.g. where the material non-disclosure was innocent and if an injunction could properly be granted even had the omitted facts been disclosed. It may be the better course (while strictly complying with the order) is to be extremely focused and to seek a variation of the order and/or an expedited trial.

Jane Colston is a partner at Stewarts Law (www.stewartslaw.com). She is grateful to Agnieszka Szewczyk, paralegal, for her assistance in the preparation of this article