

PROTECTIVE PRE-TRIAL ORDERS

General

Where circumstances require, an interim order (i.e. pre-trial order) can be made by the court or informally by the court offices without notice to the other side if there are good reasons. It may be necessary to freeze certain assets or to make search before the other party has the opportunity to take steps to frustrate the order. If ownership of a piece of moveable property is in question and a party apprehends that the other party to the dispute may remove it from the country, it may be possible to obtain a court order to stop its removal. Similarly, if there is a dispute over a sum of money, it may be possible to freeze the assets concerned so that they are available when the court decides the dispute after a full "trial" or hearing.

There are two special types of "pre-hearing" Orders which Courts will make in appropriate cases in order to assist and preserve a claim until the full hearing of the case.

Freezing Injunction

The first type of order is a so called "freezing" injunction. This may be granted where it can be shown that there is a real risk that the defendant might dispose of his assets in order to avoid enforcement of a judgement subsequently obtained. A freezing injunction is an order against a defendant to prevent him from disposing of his property until the claim has been determined. It is usually limited to assets within the jurisdiction of Court (i.e. in the country) and limited to a certain amount. There must be very clear proof to show that unless the injunction is granted the defendant will dispose of the property to prevent the claimant enforcing the judgement. This type of freezing injunction is only available in exceptional circumstances.

Freezing injunctions are usually obtained urgently and secretly without notice to the other party. A claimant must give an undertaking in damages for loss sustained by the defendant in the event that he ultimately loses the claim. A freezing injunction will affect third parties who have possession of the defendant's property. This will typically include a bank. If the bank breaches the order, it would be in contempt of Court.

The claimant must show that he has a claim and that there is a real risk of disposal of assets by the defendant. The claimant must disclose the full details of all relevant facts both for and against his case. If he fails to do so, this will result in the order being set aside for non-disclosure. There must be a very real risk that the property will disappear unless it is restrained.

It is not enough that a defendant may potentially go into liquidation or become bankrupt. It is necessary to show that the defendant is a debt dodger. It may be relevant if the defendant is not based in the jurisdiction and that it might be difficult to later enforce the judgement. Appropriate evidence about the defendant's reputation may be very helpful.

There is flexibility as to the exact type of order the Court may make. The court order will usually be made for a short time without notice but the defendant will have the opportunity to apply to have it discharged within a very short period, usually about a week.

The order will usually require the defendant to inform the claimant's solicitor about all his assets within the jurisdiction, giving their value and location. This must be made in a sworn affidavit. It is possible to have the defendant brought to Court to answer questions in relation to his assets, if appropriate. The order can be noted in the Land Registry as a restriction to prevent the defendant disposing of land. The order will usually specify what assets the defendant is still free to deal with.

The defendant can apply to court to set aside the freezing injunction on the basis that it should not have been made in the first place. Alternatively, the defendant can seek to vary the order so as to make it less restrictive. It can also be set aside on the basis that the claimant has not fully disclosed all material circumstances. If the Court considers

that the claimant has misled it, it can penalise it in costs, set aside the injunction and allow the defendant to claim damages for the harm caused.

The English Courts will usually only make orders in relation to assets where they are in England and Wales. In exceptional circumstances, they will make worldwide freezing orders where there are insufficient assets in the jurisdiction to meet the claim and the risk of them being concealed is extremely high. This will rarely be the case.

It is possible for the Courts in England to grant a freezing injunction to a claimant who is taking proceedings in another EU State such as Ireland.

Pre-trial Injunction

An injunction is a Court order directing somebody to do something or more often, not to do something. Breach of the terms of an injunction is punishable as a contempt of Court. A contempt of Court is a refusal to obey a Court order and can be punished by immediate fines and/or prison. A Court order is directly enforceable against the person that it is addressed to.

Injunctions can arise in the course of legal proceedings or they can be part of a final order after a hearing. Sometimes the pre-trial injunction will effectively decide the position because the parties do not take the litigation any further.

As in Ireland, an injunction can be obtained in England and Wales, before a dispute comes to full hearing. It can be obtained without notice to the other party provided that this is necessary. Where an injunction is obtained without notice, there will usually be a short period in which the other party concerned must be notified and will have an opportunity to contest it.

An injunction will only be given before a matter goes to trial, where damages would ultimately be inadequate. It is given to preserve the so called "status quo". It will usually only be given where a party has or is threatening to evade the other party's legal or equitable rights. Because an injunction is discretionary it is a principle that the party seeking it must act in good faith and must have "clean hands".

An injunction will not be granted if damages would be an adequate remedy. An injunction will therefore be granted whether a serious harm which is likely to continue and which will be irreparable or cannot be quantified in financial terms or the defendant does not have the means to pay the damages.

An essential part of an injunction is that the person seeking it gives an undertaking to pay damages in compensation if he does not ultimately succeed in his claim. An injunction is granted without a full consideration of the merits. Therefore it can only be granted pending a full trial if the person claiming it gives an undertaking to compensate for any loss occasioned, if it proves on the ultimate hearing of the dispute that he is not entitled to the right or remedy concerned.

In deciding whether to grant an injunction a Court will decide where the so called "balance of convenience" lies. This involves assessing the relative costs and benefits of granting or refusing the injunction. For example, one person may seek an injunction which, if granted, would mean the other person would be out of business but if refused would enable both parties to stay in business. Because the consequences for person claimed against is so serious, it is likely the injunction will be refused.

Injunctions may issue without notice where circumstances so require. It would be necessary to show that the notification of the application would prejudice the matter concerned. For example if a person was about to set up in business and another claimed that he was going to use confidential papers, it would be necessary that the first person is restrained from destroying the confidential information before he knows court proceedings are being taken.

If a person does not comply with the terms of an injunction there are two methods of enforcement. The first involves an application for committal to prison. As an alternative, the Court may impose a fine and take security for further compliance. A Court officer can be appointed to ensure future compliance.

The procedure for committal to prison for breach of injunction involves a further application to court describing the alleged breaches and supporting it by witness statements. These must be served personally at least three days before the committal hearing.

Enter and Search powers

There is no general power for a party to a civil action to search a premises. There are rights to obtain disclosure of documents but this is much more restricted. In such cases the inspection would be by mutual arrangement of documents which the other side had disclosed. However, in some circumstances, a court may make an order allowing the claimant to enter and search the defendant's premises for property belonging to the claimant or for evidence

A search order will allow representatives of the claimant to enter and search a property. This could be relevant for example where a former employee has taken customer lists. In the absence of such a pre-emptive order, the relevant evidence could be destroyed. Likewise, if a competitor is infringing copyright the order may be necessary in order to obtain evidence while it was still available.

A search order is only granted in very exceptional circumstances. The claimant would have to prove he will suffer serious harm and injustice if the order is not made. The claimant must make enquiries and give full disclosure of all the circumstances. The claimant must give an undertaking for damages for loss incurred by the defendant in the event that his claim does not succeed or if he acts excessively in the execution of the order and damages any third party. Any mistake or excessive action in enforcing the order is a serious contempt of Court and can be penalised.

Generally, the court order provides that the claimant's solicitor, under the guidance of a supervising solicitor, (who must be an experienced person in such matters) undertakes the search. The supervising solicitor is obliged to prepare a report afterwards which must be sent to the claimant's solicitor, the court and the defendant.

The order will specify the items which are subject to the search. If they belong to the defendant, the claimant's solicitor must undertake to return them within two working days during which time copies may be taken. Under some circumstances, it may be possible to retain the documents.

If ownership is disputed, the claimant's solicitor will usually retain them until the defendant's solicitor undertakes to keep them in safe custody and produce them upon request.

The claimant has the right to ask for the defendant's co-operation but he can not compel it. He cannot use force if the defendant does not comply with the order. His only come-back is to have the defendant committed for contempt of Court.

The supervising solicitor (there are a panel of such solicitors) has to explain the Order to the defendant in ordinary language. He should explain the Order and specify that the defendant can be punished with imprisonment if he does not obey. He should specify that the defendant is entitled to take legal advice. The defendant may exercise the rights to have his own solicitor present. Alternatively, he may apply to court to set the order aside.

If there is a risk of breach of the peace, the Police can be asked to attend. This should rarely be necessary. If a large number of people are being sued it may be necessary to co-ordinate raids at different premises with precision to ensure the various people do not tip each other off.

This Guide is intended as an overview and broad outline of the matters covered in it. Its purpose is to inform and raise awareness. We are happy to offer specific legal advice on particular circumstances.

This Guide should not be relied on as a substitute for comprehensive legal advice with reference to the particular circumstances.

While we have taken due care in the preparation of this publication, we do not accept legal liability as a result of any reliance placed on anything in this Guide. The reader should rely only on specific legal or taxation advice.