

Distilling Disputes Series

Presented by Fried Frank's Disputes team, the Distilling Disputes series uses data and graphics to draw out the strategic issues which clients face when litigating disputes in the English Courts and in international commercial and investment arbitration. The seventh edition provides an overview and insights into the pre-emptive remedies available in the English Courts. These are of particular relevance in the context of the pursuit of fraud claims, and this article highlights the toolbox of remedies available to potential claimants, including Freezing Orders, Disclosure Orders and Search and Imaging Orders, and other ancillary powers available to the English Courts.

This edition is co-authored with Steven Gee, KC. Steven is an English King's Counsel and arbitrator with forty years' experience of appearing in some of the most complex and important commercial litigation and arbitration disputes. Steven is the leading authority on injunctions under English law. His book, *Commercial Injunctions*, now in its seventh edition, provides definitive guidance on the full range of pre-emptive remedies available in the English Courts, and has been cited in courts across the world.

Fried Frank's multi-disciplinary team of barristers and solicitors has extensive experience of advising and acting for claimants and respondents in civil fraud claims, and in making and resisting applications for pre-emptive relief in the English Courts, including for Freezing Orders, and orders to obtain disclosure of assets, information and documentation, and to preserve evidence.

Edition 7: Freezing Orders, Search and Imaging Orders and Disclosure Orders

Insights into pre-emptive remedies available in the English Courts

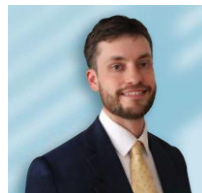
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Freezing Orders

A worldwide freezing order (“WFO”) is one of the English Courts’ “nuclear” weapons – subject to certain specified exceptions, it prohibits a respondent from in any way disposing of, dealing with or diminishing the value of any of its, her or his assets whether they are in or outside England and Wales up to a specified value. Depending on the wording of the order, this may extend to assets whether or not held in the defendant’s own name and whether or not beneficially owned by the defendant.

The applicant must establish:

- a) a good arguable case on the merits;
- b) a real risk, judged objectively, that a future or existing judgment would not be met because of an unjustified dissipation of assets supported by solid evidence; and
- c) that it would be just and convenient in all the circumstances to grant the freezing order.

Some recent examples of WFOs made by the English Courts



WFO obtained by Ukrainian bank restraining Ukrainian businessmen from dealing with their assets up to the value of £2.6bn in connection with claims of fraudulent misappropriation.



WFO obtained by Russian banks restraining Russian businessmen from dealing with their assets up to the value of \$570m in connection with alleged fraud.



WFO made against Turkish businessman in support of claims regarding alleged misappropriation of c£50m whilst assisting moving assets out of Turkey.



WFO granted against members of Indian family in connection with \$1bn fraud claims following default on loans by Indian banks in connection with a diamond trading business.



WFO obtained by Indian banks restraining Indian businessman from dealing with his assets up to the value of £1.1bn in aid of enforcement of judgment debts.

English court injunctions in aid of arbitration and foreign proceedings

Injunctions and other interim relief can be granted in respect of arbitration proceedings whether or not the seat is in England, and in relation to substantive proceedings elsewhere in the world.

Injunctions against third parties

Injunctions can be granted against non-parties to preserve assets which are not in a defendant’s name – such as against a company or trust – including those against whom no cause of action is maintained.

Freezing Orders

Ancillary Orders – What other orders can be obtained with a Freezing Order?

The English Courts have a broad jurisdiction under s.37(1) of the Senior Courts Act 1981 to grant orders ancillary to a Freezing Order to make sure it is effective.

Disclosure / Source of funds – an order requiring the defendant to provide information about his assets wherever situated or to provide disclosure of documents; or, an order to disclose information about the source of funds used for legal costs or to identify the recipient beneficiary of funds transferred by the defendant.

Cross-examination – an order requiring the defendant to attend court for immediate cross-examination about his assets – normally where there are justifiable concerns as to the accuracy of disclosure made by the defendant. There is also power for a non-party to be cross-examined.

Passport Order – an order requiring the defendant not to leave the jurisdiction and to deliver up his passport.

The powers available under s.37(1), Senior Courts Act 1981

Provision of contact details – an order requiring the defendant’s solicitors to provide details as to how to contact the defendant or his location.

Mandate or authority – an order requiring the defendant to provide an authority or permission to a third party – for example directing a bank, social media or email provider to disclose information to the claimant.

Preservation/ delivery of assets – an order to take steps for the proper and appropriate preservation of an asset for the purposes of any future enforcement, such as to realise a receivable due to the defendant; or, an order for the delivery-up of assets of the defendant for safe-keeping

Discharge of a Freezing Order

A freezing injunction will typically be made without notice to the defendant. The defendant may then apply to the court of first instance to have a Freezing Order discharged, and which will take the form of a complete rehearing of the matter, including whether the requirements for the grant of a Freezing Order have been met.

23%

% success rate on applications to discharge a freezing injunction based on publicly reported judgments in 2021-2022

0%

Whilst a number of applications were made to discharge the order based on alleged material non-disclosure by the claimant when obtaining the injunction, these arguments failed in decisions reported in 2021-2022.

Cross-undertaking in damages and fortification

The English Civil Procedure Rules require the applicant for an injunction to give an undertaking to meet any order for damages if the respondent suffers loss which the Court considers should be compensated for as a result of the order. Where the applicant is not able to show sufficient assets within the jurisdiction to give substance to the undertaking in damages, he may be required to fortify his undertakings by providing security.

Forms of security include:

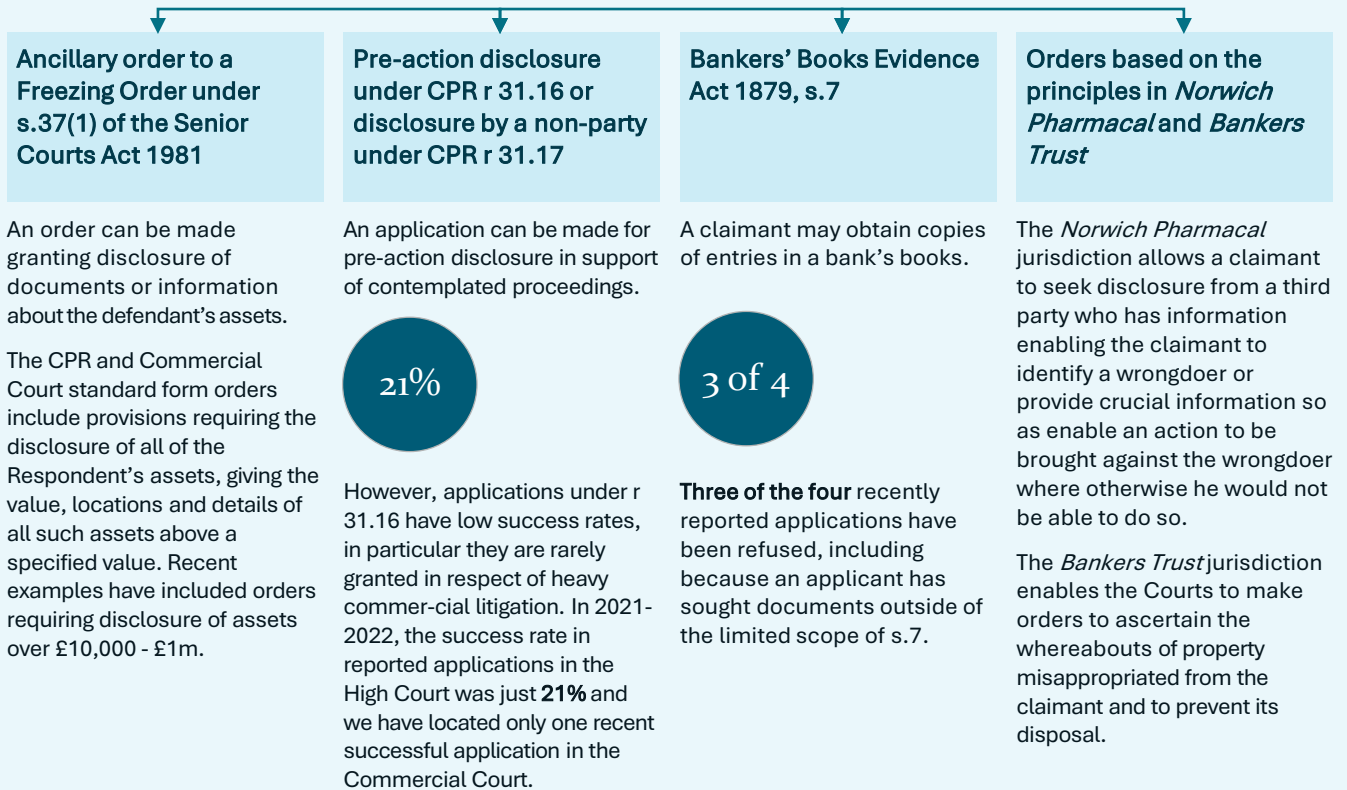
- a payment into Court;
- a bond issued by an insurance company;
- a first demand guarantee or standby credit issued by a bank;
- a payment to the applicant’s solicitors;
- the guarantee or undertaking of a parent company with substantial assets within the jurisdiction.

| Recent examples | Fortification provided |
|--|--|
| <i>4VV Limited</i> – a group claim alleging fraud in connection with property investment scheme - £50m WFO | Insurance policy with limit of £500,000 |
| <i>Mints</i> – alleged fraud against Russian banks - \$572m WFO | \$2m paid into solicitors’ client account |
| <i>Isbilen</i> – claims for misappropriation of funds - £40m WFO | \$1.39m paid into solicitors’ client account – subsequently replaced by £2.1m of assets held with bank |

Disclosure, Search and Imaging Orders

Disclosure Orders

The English Courts have a range of powers to order disclosure pre-judgment, including against non-parties. There are also additional powers in respect of proprietary claims and in support of the execution or enforcement of a judgment.



Search and Imaging Orders

Search Order – the Court orders a defendant to give permission to a limited number of persons, including the claimant's solicitors and a supervising solicitor from the Court to enter relevant premises, such as a home or office, to search for evidence, property or other material and to remove it so it can be preserved in order to prevent the defendant from altering, destroying or hiding such evidence or property if given notice.

Imaging Order – an order for forensic computer experts to take complete copies of the contents of storage media incorporated in or associated with computers, smart phones and cloud storage to enable all digital evidence to be preserved for subsequent analysis.

The orders may include requirements for the defendant to provide email addresses and passwords, or to identify the whereabouts of any safe and provide the key or combination.