A judicial warning

Mary Gaskins and Sarah Woodsford summarise guidance and practice points on freezing orders in UL v BK (Freezing Orders: Safeguards: Standard Examples)

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'There has to be proof of an intention to dissipate, which means a deliberate or reckless dealing in relation to assets, rather than some random event unconnected to the motives of the respondent.'

In June 2013, Mostyn J gave judgment in *UL v BK (Freezing Orders: Safeguards: Standard Examples)* [2013] regarding the application by a wife to continue a freezing order that had been made without notice to the husband in February 2013.

It gives very clear guidance as to the:

- circumstances in which issuing such applications without notice is justified;
- safeguards that all applications, without and without notice, should include;
- format of the applications and supporting draft order; and
- consequences of getting it wrong.

This is a cautionary tale and a 'must read' for all family lawyers dealing with freezing orders. The principles in *Tchenguiz v Imerman* [2010] are also revisited, specifically whether documents accessed unlawfully can constitute evidence in an application for freezing injunctions. In the absence of any examples in the Family Procedure Rules 2010 (FPR 2010), Mostyn J appended standard examples of freezing and search orders, approved by the president of the Family Division.

The freezing order

The wife's application in *UL v BK* was for the continuation of a freezing order, made without notice to the husband two months earlier. The freezing order prevented the husband from dealing with a property in Marbella, which the wife said was worth £10m, and froze assets 'presently registered in his sole name' up to a combined value of £20m. He was also required to provide detailed financial disclosure and nominate the £20m of assets to be frozen.

Key omissions in the without notice order

Mostyn J highlighted that the required safeguards were largely missing from the order, in that it did not:

- State clearly whether it was a worldwide freezing injunction or limited to England and Wales.
- State why no notice had been given to the husband, even if just short informal notice.
- Contain an exception for sums to be spent by the husband to meet his own living and legal costs and for disposal of assets in the ordinary course of business.
- Contain the following undertakings by the wife:
  - to pay damages to the husband or any third party caused loss by the order which the court may be of the opinion ought to be paid;
  - to pay the reasonable costs of anyone other than the husband which have been incurred as a result of compliance with the order;
  - not, without the permission of the court, to use any information obtained as a result of the order for the purposes of any civil or criminal proceedings, other than the present claim, either in

England and Wales, or in any other jurisdiction; and

- not to seek to enforce the order in any country outside England and Wales, without the permission of the court.

- Contain a statement of the husband's right to apply, within seven days, to set the without notice order aside, under FPR 2012 r18.10 and r18.11.e.

Criticisms of the wife's application

As well as taking issue with the failure to meet all of the required safeguards in the order, Mostyn J had difficulty with its specific wording, particularly in light of the wife's evidence in her supporting statement.

The order froze assets 'presently registered in his [the husband's] sole name' up to a combined value of £20m. However, in her own statement, the wife stated that she was not aware of any other assets than the Marbella property held in the husband's name, specifically saying 'I fear it may be the only asset in his sole name'. Mostyn J expressed disbelief that the 'order froze a sum plucked out of the air' and assets that were not identified and even expressed by the applicant to possibly not exist.

In reviewing the wife's sworn statement, Mostyn J disregarded all but one of her justifications for requiring the order on the basis that none provided 'solid evidence of an unjustified dealing by the husband with his assets' that would give rise to a serious risk of dissipation to her prejudice.

The exception was the allegation that the husband had repeatedly told her that he would disappear, she would 'get nothing' if she divorced him and 'there is no one in the world who can tell me what to give you'. Mostyn J held that evidence of these threats did potentially provide the necessary evidence, however, the evidence fell short because the wife did not state specifically:

- when or where they took place;
- in what context or circumstances the statements were made;
- if they were made in the presence of another person; and
- if the husband was calm and calculating, or angry and florid.

He held that if evidence such as this was to be relied up on, then it must be 'fully particularised, placed in context, and painted in full colour'.

The reminder here is that mere statements of suspicion, anxiety and concern do not justify a freezing order. This is a real problem for family lawyers who are often confronted by clients with nothing more than suspicions and concerns, that may of course be well placed, but the judgment is clear that, without objective evidence of these suspicions or concerns, an application should not proceed.

Mostyn J called the without notice procedure 'intrinsically unfair' and shared his, and other judges', concern at the number of without notice applications that are made

Court's power to make a freezing order

In considering the wife's application, Mostyn J reviewed the origins of the court's power to order freezing injunctions and considered whether there is a distinction between the test for applications under s37 Supreme Court Act 1981 and those made under s37 Matrimonial Causes Act 1973. He referred to his own decision in *ND v KP* [2011], in which he found there was no distinction.

He then reiterated the principles already established in case law that must be satisfied before such an order is made:

- There has to be proof of an intention to dissipate, which means a deliberate or reckless dealing in relation to assets, rather than some random event unconnected to the motives of the respondent.
- The applicant must rely on objective facts and 'expressions of anxiety or suspicion' will not be sufficient.
- At the very least, there must be evidence of an unjustified dealing in relation to assets by the respondent; merely holding assets in an off-shore trust will not, by itself, amount to unjustified conduct.

Mostyn J also reminds us that FPR 2010 PD22A para 4.3(b) requires a sworn statement to 'indicate the source for any matters of information and belief'.

If the above is satisfied, the order must then adhere to the safeguards, set out above, and the rules regarding notice.

Warning about applications without notice

Mostyn J called the without notice procedure 'intrinsically unfair' and shared his, and other judges', concern at the number of without notice applications that are made. We are reminded of the requirement of 'exceptional urgency' (para 5.1 FPR 2010 PD18A) and that 'except in cases where it is essential that the respondent must not be aware of the application, the applicant should take steps to notify the respondent informally of the application' (para 4.3(c) FPR 2010 PD20A). In light of Mostyn J's judgment, 'should', in this context, is now to be read as 'must'.

The judgment emphasises that any notice is better than no notice, even if the respondent does not have time to prepare fully. Although this point is made, it is clear that proper notice should be given, unless there are exceptional reasons. Mostyn J confirmed that without notice applications are necessary only in very rare circumstances and warns that a case that begins with a without notice application is usually only heading in one direction from that point onwards, ie: 'Often, the respondent is so enraged by the step taken again him and looks to take counter-offensive measures'.

Illegally obtained documents

Mostyn J also sets out his interpretation of the principles established in *Imerman* [this tends to be the way family lawyers refer to the case] and held that 'whatever the historic practice', it is unlawful for one party to a marriage (or anyone else) to breach the other's privacy by copying or accessing documents, whether they exist in hard or soft copy. If private documents are accessed, that party is at risk of criminal penalties and being sued for breach

Key points for practitioners

- Without notice applications should only be made in cases where there is 'exceptional urgency' – notice must be given, even if informal.
- In all freezing order applications, the safeguards must be complied with and the draft order(s) must accord with those approved and appended to the *UL v BK* judgment.
- Consistency in what is sought and the evidence in support is key.
- The procedure following *Imerman* regarding illegitimately obtained information should be followed.
- If a party relies on illegitimately obtained documents, they must say so in their statement and risk the consequences under criminal and civil law.
- Sanctions for failure to comply with the requirements are serious for both clients and their lawyers, eg a wasted costs order may be made.

of confidence and misuse of private material.

Helpfully, Mostyn J reiterates how family practitioners should deal with these documents:

- If a solicitor receives the documents from their client, the solicitor must not read them, but immediately obtain them from their client and return them (including any copies) to the other party's solicitor. It is the other party's solicitor that has the duty to the court and to disclose those which are both admissible and relevant to the other party's claim. If the solicitor becomes dis-instructed, that solicitor must retain the documents, pending a further order of the court.
- If the other party does not have a solicitor, then the solicitor acting for the person who accessed the document must retain the document, unread and in sealed files, and must approach the court for directions.

In respect of whether that knowledge can be relied on, the judgment confirmed that:

- The person who accessed the documents is permitted to rely on their knowledge to challenge the accuracy of their spouse's disclosure in the proceedings. That knowledge is admissible evidence, although it may restrict a solicitor's ability to act if the expression of that knowledge involves privileged matters.
- As in *UL v BK*, where one of the failings of the wife's case was not mentioning in her sworn statement that she had found information by accessing the husband's safe illegitimately, knowledge of the information can be relied upon to show that there is unjustifiable dealing of assets and therefore there is a clear risk of dissipation. However, the applicant's sworn statement has to reveal how that information was obtained and that it derived from illegitimately obtained documents, even if it leads to civil or criminal proceedings. Mostyn J stated that this would be the price that would potentially have to be paid for making an application based on illegitimately obtained information.

It should also be noted that the husband successfully sued the wife for breach of confidence and misuse of private information in the Queen's Bench Division, although Slade J declined to transfer the husband's civil claims against the wife to the Family Division to be heard together with her claim for a financial remedy. Despite the High Court's general jurisdiction, it was held that it should be first heard by a specialist judge, provided that it did not delay the 'main dispute between the spouses'. A three-day hearing is listed for January 2014.

Mostyn J's conclusions

Having set out the fundamental principles relating to freezing orders, Mostyn J considered the wife's application and concluded that it was fatally flawed and the freezing order must be discharged on the basis that:

- the wife had seriously breached her duty of candour in not mentioning that she had accessed the husband's safe without permission;
- there was lack of evidence to back up the wife's allegations of an unjustified dealing by the husband;
- the order froze personal assets in a vast sum and the wife did not know whether the husband had such assets or not;
- there was no explanation to the court as to why there was an exceptional urgency (and therefore that the application justified no notice);
- there was no explanation why the key safeguards were not applied; and
- there was a failure to offer undertakings in damages.

Mostyn J stated that had the wife's application not been flawed, it was 'distinctly possible' that a freezing/preservation order over, at least, the Marbella property would have been justified.

At the hearing, on the basis of the husband's sworn statement which gave information about his means (his assets were held in off-shore structures, including a Liechtenstein foundation) the wife requested a re-grant of the injunction. Mostyn J held that all the arrangements that the husband had made were undertaken historically as part of his desire to keep his business secret, which he had no doubt that the wife was well aware of. He held that an application under Part 18, FPR 2010 was required and, in light of the wife's conduct, she had forfeited the right to the re-grant of an injunction. ■

ND v KP
[2011] EWHC 457 (Fam)
Tchenguiz & ors v Imerman
[2010] EWCA Civ 908
UL v BK (Freezing Orders: Safeguards: Standard Examples)
[2013] EWHC 1735 (Fam)