

FREEZING (*MAREVA*) ORDERS

- A ROUGH GUIDE -

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A. Power to Grant Mareva freezing order

- Not an injunction but an order
- Basis is inherent jurisdiction of the Court or s 23 SCA (not s66)

23 Jurisdiction generally

The Court shall have all jurisdiction which may be necessary for the administration of justice in New South Wales.

See *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 (Gaudron, McHugh, Gummow and Callinan JJ)

66 Injunction

(1) The Court may, at any stage of proceedings, by interlocutory or other injunction, restrain any threatened or apprehended breach of contract or other injury.

So what?

- No need to have existing proceedings in NSW.
- Not need to be in aid of existing legal or equitable right.
- No 'good arguable case' test.
- No 'balance of convenience' test.

B. Requirements

1. Prove the case to the required minimum standard

(a) Various articulations of the test

'Prima facie cause of action'

Patterson v BTR Engineering (Aust) Ltd (1989) 18 NSWLR 319 at 321F (Gleeson CJ)

'Good arguable cause'

Rogers AJA in *Patterson*:

'One which is more than barely capable of serious argument, and yet not necessarily one which the Judge believes would have a better than 50 per cent change of success'

'Serious issue to be tried'

Patrick Stevedores Operations No 2 Pty Ltd v MUA (1998) 195 CLR 1 at 46 [76] Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ

'Reasonably arguable case on legal as well as factual matters'

Cardile v LED Builders Pty Ltd (1999) 198 CLR 380 at 408 [68] Gaudron, McHugh, Gummow and Callinan JJ

'Prima facie evidence & reasonably arguable case on law'

Davis v Turning Properties [\[2005\] NSWSC 742](#), Campbell J

(b) Strength of case is relevant to threshold and discretion

Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG [1984] 1 All ER 398, Mustill J at 402-3

2. Prove a danger that judgment will not be satisfied because of:

- (a) Defendant absconding.**
- (b) Assets being removed out of the jurisdiction.**
- (c) Assets disposed of within the jurisdiction.**
- (d) More difficulty to enforce judgment**
- (e) Otherwise dealt with in some fashion [diminished in value].**

See *Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319, Gleeson CJ at 321-322.

"The remedy is discretionary, but it has been held that, in addition to any other considerations that may be relevant in the circumstances of a particular case, as a general rule a plaintiff will need to establish...secondly, a danger that, by reason of the defendant's absconding, or of assets being removed out of the jurisdiction or disposed of within the jurisdiction or otherwise dealt with in some fashion, the plaintiff, if he succeeds, will not be able to have his judgment satisfied."

Congentra AG v Sixteen Thirteen Marine SA [2008] EWHC 1615 (Comm) at [49]: A “**risk of dissipation**” can be shown by proving:

(1) there is a real risk that a judgment or award will go unsatisfied, in the sense of a real risk that, unless restrained by injunction, the respondent will dissipate or dispose of his assets other than in the ordinary course of business;

(2) that unless the respondent is restrained, assets are likely to be dealt with in such a way as to make enforcement of any judgment or award more difficult, unless those dealings can be justified for normal and proper business purposes.

C. Evidence of Danger

(a) Level of evidence required

The requirement as to evidence to establish the threat to dispose of the assets was further discussed in the Court of Appeal in *Frigo v Culhaci* [1998] NSWCA 17. The Court (Mason P, Sheller JA and Sheppard AJA) said:

“A plaintiff must establish, by evidence and not assertion, that there is a real danger that, by reason of the defendant absconding or removing assets out of the jurisdiction or disposing of assets within the jurisdiction, the plaintiff will not be able to have the judgment satisfied if successful in the proceedings. There has been much debate as to the precise degree of risk which must be shown: see generally *Patterson*. What is clear is that mere assertions that the defendant is likely to put assets beyond the plaintiffs reach will not be enough: *Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG* [1984] 1 All ER 398; *Patterson*.

In *Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG* [1984] 1 All ER 398, Mustill J at 406 said:

“It is not enough for the plaintiff to assert a risk that the assets will be dissipated. He must demonstrate this by solid evidence. This evidence may take a number of different forms. It may consist of direct evidence that the defendant has previously acted in a way which shows that his probity is not to be relied on. Or the plaintiff may show what type of company the defendant is (where it is incorporated, what are its corporate structure and assets, and so on) so as to raise an inference that the company is not to be relied on. Or, again, the plaintiff may be able to found his case on the fact that inquiries about the characteristics of the defendant have led to a blank wall. Precisely what form the evidence may take will depend on the particular circumstances of the case. But the evidence must always be there. Mere proof that the company is incorporated abroad, accompanied by the allegation that there are no reachable assets in the United Kingdom apart from those which it is sought to enjoin, will not be enough.”

Electric Mobility Company Pty Ltd v Whiz Enterprises Pty Ltd [2006] NSWSC 580 Hamilton J at [7]:

“must be proved on the balance of probabilities in the way and to the extent that is usual in interlocutory applications for restraint generally. There is no need for the case to be made out in some special way. The reference by Mustill J [*Ninemia*] to “solid evidence” is meant in my view only to emphasise that there must be actual evidence from which the appropriate inference may be drawn by the Court. On the other hand, the appellate courts have reminded primary judges that they must always be vigilant to ensure that parties’ assets are not frozen and their business lives impeded lightly and that Mareva relief is not to be used to give plaintiffs security for the satisfaction of their judgments

(b) Factors

- The nature of the respondent’s assets – the more liquid the greater the risk of dissipation. Equally, if the respondent’s assets may be very difficult to dissipate, this may be a factor against granting the order
- The financial standing of the respondent and his/its credit history
- Lack of ties to the jurisdiction
- If moving assets abroad, the ease with which enforcement can take place abroad (this may require foreign law evidence).
- Any statement made by the respondent as to how he will deal with his assets
- Conduct in relation to this dispute or a previous dispute – e.g. evading service, paper defences, failing to answer reasonable questions

(c) Gathering Evidence

Searches

- Property search (no fixed assets in the jurisdiction)
- Shareholder or director search
- Credit search

Known Facts?

- Searches lead to blank wall?
- Origins / Business domicile – mere fact of foreigner not enough
- Length of time in business – is the Defendant to be relied upon?
- Ties to the jurisdiction
- Previous defaults
- Statements or arrangements indicating intention to transfer assets out of jurisdiction

- Evidence that a respondent has made sophisticated use of manipulating assets through international accounts, companies and/or properties. See e.g. *JSC BTA Bank v Ablyazov* [2009] EWHC 2840 (Comm).
- The respondent has been moving assets out of the jurisdiction, even if not to defeat judgment. See *Stronghold Ins v Overseas Union* [1996] LRLR 13
- Disposals of assets (actual or threatened)
- Conversion of assets into fungible form
- Nature of assets
- Circumstances of dispute – e.g. prima facie case of serious wrongdoing or fraudulent misappropriation
- Location of assets in other jurisdictions (e.g. ones in which judgment is or is not likely to be enforced)

See:

- *Third Chandris Shipping Corporation v Unimarine SA* [1979] QB 654, Lawton J at 671-2
- List of factors in P Biscoe, *Mareva and Anton Piller Orders* (2005) at [6.10].

D. Discretionary considerations

- Applicant has acted diligently and expeditiously
- Status of proceedings taken against D and Third Parties
- Willingness to give undertakings (see Practice Note)
- Interests of innocent third parties and breadth of orders (see Practice Note)

E. Form of Orders

Considerations include:

- Nature of assets covered by order
- Value of assets covered
- Exclusions of allowances for living, legal and business expenses
 - Dealings in the “ordinary course of business”: Usually necessary if the defendant is a company or is known to be a sole trader/self-employed. Any doubt or dispute about where a dealing is in the ordinary and proper course of business may require a clarification

or variation to the freezing. See *Abbey Forwarding Ltd v Hone* [2010] EWHC 1532 (Ch).

- Legal Expenses: Includes the instant and any other claims brought or defended by the respondent. Consider including a cap on total payments. See *Linsen International Ltd v Humpuss Sea Transport Pte Ltd* [2010] EWHC 303 (Comm)
 - Proprietary Claims: If the Plaintiff claims a proprietary interest in the frozen assets (e.g. fraud, equitable fraud etc), it may seek to exclude even the above. The defendant will then have to establish there are no other assets from which to meet legal expenses. See *Halifax v Chandler* [2001] EWCA Civ 1750 and *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2009] EWHC 161 (Ch).
- Persons and assets out of the jurisdiction (see below re Worldwide Freezing Orders)
 - Liberty to apply, whether or not *ex parte*
 - Duration of order

F. Order in aid of Foreign Proceedings

- In aid of actual or prospective foreign judgment.
- Even if foreign judgment not likely to be enforceable.

See *Davis v Turning Properties* [\[2005\] NSWSC 742](#), Campbell J

White v Verkouille (1989) 2 Qld R 191, McPherson J at 194:

“In equity, for reasons said to be associated with Chancery’s special responsibility for protecting the rights of foreign merchants, the position is different. Equity lends its aid to the enforcement of a foreign judgment without requiring as a prerequisite that it be made a judgment of this Court...[T]he foundation of the assistance afforded by courts of equity in cases such as this is the jurisdiction to act in personam against the defendant.”

G. Order in aid of Foreign Arbitration Proceedings

- See Article 17J of the [UNCITRAL Model Law on Commercial Arbitration](#) (As adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006), in Schedule 2 to the *International Arbitration Act 1974* (Cth).

- The Model Law (and so, Article 17J) is in Schedule 2 of the *International Arbitration Act 1974* (Cth). It is given force of law by [s. 16](#) of that Act.
- Art 17J provides that the Court “shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of [Australia], as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration”
- The foreign arbitration must be an arbitration to which the Model Law applies. See Articles 1 and 2 of the Model Law.
- See *ENRC Marketing AG v OJSC “Magnitogorsk Metallurgical Kombinat”* [\[2011\] FCA 1371](#)

H. Defendant Overseas, Assets in Australia – Service Out

UCPR 25.16 Service outside Australia of application for freezing order or ancillary order

An application for a freezing order or an ancillary order may be served on a person who is outside Australia (whether or not the person is domiciled or resident in Australia) if any of the assets to which the order relates are within the jurisdiction of the court.

Uniform Practice Note

15. The rules of court confirm that certain restrictions expressed in *The Siskina* [1979] AC 210 do not apply in this jurisdiction. First, the Court may make a freezing order before a cause of action has accrued (a ‘prospective’ cause of action). Secondly, the Court may make a free-standing freezing order in aid of foreign proceedings in prescribed circumstances. Thirdly, where there are assets in Australia, service out of Australia is permitted under a new ‘long arm’ service rule.

Note: Used to be a problem at law. See *The Siskina* [1979] AC 210, *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334

I. Defendant in Jurisdiction, Assets in a Foreign Country

The Worldwide Freezing Order and the Practice Note Precedent

Only if necessary

1. Only to be used where unencumbered assets in Australia are insufficient to meet judgment. [See Practice Note Order 6]
2. Effective against parties, their agents, officers, employees and persons in the jurisdiction who can effect or impede the court's order. [See Practice Note Order 5, 16]

Third Parties (e.g. Banks)

3. Not effective against other third parties (such as banks) unless subject to the jurisdiction or the judgment is enforced elsewhere. [See Practice Note Order 16(b)(iii)]
4. Cannot order third parties to do something that would conflict with bona fide legal obligations including orders of a foreign court (e.g. bank with local and foreign branches, assets in foreign account). [See Practice Note Order 17]

“[F]reezing orders have been tailored to make it clear, first, that they do not affect anyone outside the jurisdiction unless enforced by a court of the relevant country and, secondly, that they do not prevent third parties such as foreign banks, which have an English presence and are therefore subject to the jurisdiction, from complying with what they reasonably believe to be their obligations under the law of the situs or proper law of the debt or any order of a local court: see *Baltic Shipping Co v Translink Shipping Ltd* [1995] 1 Lloyd's Rep 673.” Lord Hoffman in [Eram Shipping Company Ltd & Ors v Hong Kong and Shanghai Banking Corporation Ltd](#) [2003] UKHL 30 (12 June 2003) para [58].

No multiplicity of proceedings

5. Includes undertaking not to use the material produced (in answer to Mareva) in any foreign proceedings (i.e. *Harman v Home Office* implied undertaking). [See Practice Note, Undertaking (6)]
6. Includes undertaking not to sue in a foreign jurisdiction for same relief (i.e. no multiplicity of proceedings). [See Undertaking (7)]
7. May be possible to get permission for exception where appropriate – see the UK Court of Appeal guideline judgment in [Dadourian Group Int Inc v Simms & Ors](#) [2006] EWCA Civ 399 (11 April 2006).
Factors include:

- Real prospect that assets in that other jurisdiction
- Evidence as to who they are held by.
- Evidence of risk of dissipation of those assets.
- Balancing of interests of parties and possible other parties in foreign proceedings.
- Evidence as to applicable law and practice in foreign court (including range of orders that could be made) and the nature of the proposed proceedings to be commenced.
- Not normally available to go get superior relief in the foreign court (e.g. get *in rem* order whereas here it operates *in personam* only).

Note: Probably OK to exclude WFO ambit in respect of another country if you will seek better relief there!

J. Third Party Assets and Orders against Third Parties

UCPR 25.13 Respondent need not be party to proceeding

The court may make a freezing order or an ancillary order against a respondent even if the respondent is not a party to a proceeding in which substantive relief is sought against the respondent.

Where there is a dispute as to the ownership of assets, the following principles may apply (*SCF Finance Co Ltd v Masri* [1985] 1 WLR 876, CA):

- (1) if the assets appear to belong to a third party they should not be included in the scope of the freezing order without evidence that they are the respondent's;
- (2) the mere assertion by a respondent that a third party owns the assets need not be accepted without inquiry (the same principle applies to a third party who intervenes to vary a freezing order to exclude assets);
- (3) the court must do its best to do what is just and convenient between all concerned; and
- (4) in a proper case the court may direct an issue to be tried either before or after the main action as to the ownership of the assets

Circumstances

- (a) Intermingling of assets
- (b) Recent transfers that may be voidable
- (c) Possible tracing of plaintiff funds
- (d) Control by third party over defendant's assets

Coxton Pty Ltd v Milne (Court of Appeal of NSW, 20 December 1985, unreported) at 13:

“Without attempting to define or to limit the extent of the exception, the necessary circumstances [for the grant of a Mareva order] will exist when the affairs of a defendant sued by a creditor for an alleged debt and of the third party against whom the injunction is sought are intermingled, the alleged debtor and the disposition of its assets are effectively controlled, de jure or de facto, by the third party, the debtor's assets will be insufficient to meet the debt, the creditor, although having no vested or accrued cause of action against the third party, may become entitled to have recourse to the third party or his assets to meet his debt, and there is a danger that the third party will send his assets abroad or otherwise dispose of them.”

Cardile v LED Builders Pty Limited [\(1999\) 198 CLR 380](#)

- If the third party holds or is using or has exercised or is exercising a power of disposition over, or is otherwise in possession of assets, including claims and expectancies, of the judgment debtor or potential judgment debtor.
- If by some process, ultimately enforceable by the courts, is or may be available to the judgment creditor as a consequence of a judgment against that actual or potential judgment debtor, pursuant to which, whether by appointment of a receiver, trustee in bankruptcy, liquidator or otherwise, the third party may be obliged to disgorge property or otherwise contribute to the funds or property of the judgment debtor to help satisfy the judgment against the judgment debtor. [Example – s 37A Conveyancing Act fraudulent transfer; s 488G Corporations Act – uncommercial transaction]
- Preventative, e.g. restrain carrying into effect family arrangement under Part 8B *Family Law Act 1975* (Cth)
- May have to give undertaking to meet necessary expenses (e.g. of bank) in complying with order. See Practice Note, *Z Ltd v A-Z and AA-LL* [1981] 1 QB 558 at 574 (Lord Denning MR).

K. Ancillary Orders

UCPR 25.12 Ancillary order

(1) The court may make an order (an “ancillary order”) ancillary to a freezing order or prospective freezing order as the court considers appropriate.

(2) Without limiting the generality of subrule (1), an ancillary order may be made for either or both of the following purposes:

- (a) eliciting information relating to assets relevant to the freezing order or prospective freezing order,
- (b) determining whether the freezing order should be made.

IMPORTANT NOTE:

- In NSW, ancillary orders may be subject to special rules of evidence where the privilege against self-incrimination may be invoked for criminal and civil penalty offences.
- See [s.87 Civil Procedure Act 2005 \(NSW\)](#) and [ss.128-128A Evidence Act 1995 \(NSW\)](#).
- Section 128 EA contains the general privilege against self-incrimination and the use of the certificate procedure.¹
- Section 128A EA:
 - Applies where any order is made “requiring a person to disclose information as part of, or in connection with, a freezing, search or other order under Part 25 of the *Uniform Civil Procedure Rules 2005*”. Section 128A (insofar as it applies and operates) thus extends the privilege embodied in s. 128 into interlocutory matters.
 - Any affidavit in respect of which a claim is invoked is to be placed in a sealed envelope.
 - A separate affidavit in support of the claim must be served on the other parties.
 - If there are reasonable grounds for the objection, the court must order the sealed envelope returned.
 - Only the court can order the unsealing of an envelope.

¹ There is doubt however that s. 128 applies to interlocutory matters. See *Griffin v Sogelease Australia Ltd* [2003] NSWCA 158.

- Disclosure of the affidavit is subject to a certificate being granted against the use of the information contained in it, or “any information, document or thing obtained as a direct result or indirect consequence” of that information, against the person (save for perjury etc.).
- The privilege does not apply to documents contained in any annexure or exhibit that was in existence prior to the order being made.
- *Note:* The “sealed envelope” approach was that taken by Austin J in *Bax Global (Australia) Pty Ltd v Evans* (1999) 47 NSWLR 538, [\[1999\] NSWSC 815](#); but disapproved of – in the pre-128A context – by the NSW Court of Appeal in *Ross v Internet Wines Pty Ltd & Ors* [\[2004\] NSWCA 195](#) (see Giles JA, with whom Spigelman CJ and McColl JA agreed, esp. at [104]).
- Section 87 CPA:
 - Is complementary to s. 128 (not s. 128A) for interlocutory matters.
 - Does not apply where s. 128A applies: see s.87(2A) CPA.
- (The Practice Note form of Penal Notice at para 9.1(b) *used to refer* to s.87 CPA. On 21 September 2009, the Supreme Court announced that the Practice Note would be amended. The Court said that “Until this occurs, practitioners are asked to amend paragraph 9.1(b) of the form of freezing order by substituting the reference to section 87 of the *Civil Procedure Act 2005* with a reference to the regime as set out in section 128A of the *Evidence Act 1995*.” See discussion of ss.128-128A EA and s.87 CPA, and the historical precedents, in *Specialty Fashion Group Limited v Muirhead Nominees Pty Ltd & Ors* [\[2009\] NSWSC 754](#).)

(a) Asset disclosure order

- Prevents surreptitious disobedience.
- Identifies third parties who can be given notice.
CBS United Kingdom Ltd v Lambert [1983] Ch 37 at 42 (CA)
- Informs whether to continue undertaking as to damages – risk assessment.
Bax Global (Australia) Pty Ltd v Evans (1999) 47 NSWLR 538 at 544-5, [\[1999\] NSWSC 815](#) at [23], Austin J
- Could be sought post-judgment in anticipation of Mareva.
Witham v Holloway [\(1995\) 183 CLR 525](#)
- Can be sought for world-wide assets.

Ballabil Holdings Pty Ltd v Hospital Products Pty Ltd (1985) 1 NSWLR 155

- Can be sought against third parties mixed up in arrangements of defendant.

- (b) **Order for examination**
- (c) **Delivery up order**
- (d) **Bank Direction Order**
- (e) **Pay money into Court**
- (f) **Restraining departure from the jurisdiction**
- (g) **Mareva Receiver**
- (h) **Prevent transfer between jurisdictions**
- (i) ***Norwich* order against third party mixed up to disclose assets**
- (j) **Anton Piller order**

See P Biscoe, Ch 3

L. Available Courts in NSW

UCPR 25.1 Application

(1) This Part applies to proceedings in the Supreme Court or the District Court.

(2) Divisions 2 and 3, but not this Division, also apply to proceedings in the Dust Diseases Tribunal.

M. Timing

UCPR 25.9 Orders may be made at any stage of proceedings

Orders may be made under this Part at any stage of proceedings.

Stronger if sought post-judgment: *Babanaft International Co SA v Bassatne* [1990] Ch 13 (CA)

N. Ex Parte applications and the Duty of Full and Frank Disclosure before and after the application

- (a) Practice Note example
- (b) Note particular requirements on applicant
 - Service of all court documents and documents tendered
 - Service of written submissions
 - Service of transcript or a note of oral submissions / statements made
- (c) Do not forget duty to make **full and frank disclosure**

“An applicant for a freezing order made without notice is under a duty to make full and frank disclosure of all material facts to the Court. This includes disclosure of possible defences known to the applicant and of any information which may cast doubt on the applicant’s ability to meet the usual undertaking as to damages from assets within Australia.” (Practice Note)

- See discussion in *Complete Retreats Liquidating Trust v Geoffrey Logue* [\[2010\] EWHC 1864 \(Ch\)](#) at [60] (Roth J); *Elektromotive Group Ltd v Pan* [\[2012\] EWHC 2742 \(QB\) \(18 October 2012\)](#) at [33]
- It is no excuse for an applicant to say that he was not aware of the importance of the matters he omitted to state. *Walter Rau v Cross Pacific Trading Ltd* [\[2005\] FCA 955](#).

O. Undertakings

(a) As to Damages

UCPR 25.8 Meaning of “usual undertaking as to damages”

The “usual undertaking as to damages”, if given to the court in connection with any interlocutory order or undertaking, is an undertaking to the court to submit to such order (if any) as the court may consider to be just for the payment of compensation (to be assessed by the court or as it may direct) to any person (whether or not a party) affected by the operation of the interlocutory order or undertaking or of any interlocutory continuation (with or without variation) of the interlocutory order or undertaking.

(b) Other Undertakings

See Practice Note for detail of undertakings.

P. No *in rem* effect

- *Babanaft International Co SA v Bassatne* [1990] Ch 13 (Court of Appeal. Kerr LJ at 32 (see also Nicholls LJ at 46):

“there can be no question of such orders operating directly upon the foreign assets by way of attachment, or upon third parties, such as banks, holding the assets. The effectiveness of such orders for these purposes can only derive from their recognition and enforcement by the local courts, as should be made clear in the terms of the orders to avoid any misunderstanding suggesting an unwarranted assumption of extraterritorial jurisdiction”.

- *Eram Shipping Company Ltd & Ors v Hong Kong and Shanghai Banking Corporation Ltd* [\[2003\] UKHL 30 \(12 June 2003\)](#), Lord Bingham of Cornhill at [23].

Q. Breaches of order – Third Parties and Tort Liability

- There is no compensation for applicant in contempt proceedings.
- It is difficult to prove ‘knowing’ contempt.
- *Australian Securities And Investments Commission v R Wynhoven & Associates Pty Ltd (ACN 087 373 108)* (2004) 51 ACSR 384 Selway J (FCA) at [11]: Doubted whether such an order could be made.
- *Customs and Excise v Barclays Bank plc* [\[2006\] UKHL 28 \(21 June 2006\)](#): House of Lords rejected extending tort liability to a Bank that failed to prevent withdrawal of funds from an account due to operator error.

Annexure A

NSW Supreme Court Practice Note SC Gen 14 (16 June 2010)

Supreme Court – Freezing Orders (also known as ‘Mareva orders’ or ‘asset preservation orders’)

Application

This Practice Note applies to the Court of Appeal and to the Common Law and the Equity Divisions of the Supreme Court.

Commencement

This Practice Note was issued on 16 June 2010 and commences on 1 July 2010.

Freezing Orders.

1. This Practice Note supplements Division 2 of Part 25 of the Uniform Civil Procedure Rules 2005 (UCPR) relating to freezing orders (also known as ‘Mareva orders’ after *Mareva Compania Naviera SA v International Bulkcarriers SA (The Mareva)* [1975] 2 Lloyd’s Rep 509, or ‘asset preservation orders’).

2. This Practice Note addresses (among other things) the Court’s usual practice relating to the making of a freezing order and the usual terms of such an order. While a standard practice has benefits, this Practice Note and the example form of order annexed to it do not, and cannot, limit the judicial discretion to make such order as is appropriate in the circumstances of the particular case.

3. Words and expressions in this Practice Note that are defined in UCPR rule 25.10 have the meanings given to them in that rule.

4. An example form of ex parte freezing order is annexed to this Practice Note. The example form may be adapted to meet the circumstances of the particular case. It may be adapted for an inter partes freezing order as indicated in the footnotes to the example form (the footnotes and references to footnotes should not form part of the order as made). The example form contains provisions aimed at achieving the permissible objectives of the order consistently with the proper protection of the respondent and third parties.

5. The purpose of a freezing order is to prevent frustration or abuse of the process of the Court, not to provide security in respect of a judgment or order.

6. A freezing order should be viewed as an extraordinary interim remedy because it can restrict the right to deal with assets even before judgment, and is commonly granted ex parte.

7. The respondent is often the person said to be liable on a substantive cause of action of the applicant. However, the respondent may also be a third party, in the sense of a person who has possession, custody or control, or even ownership, of assets which he or she may be obliged ultimately to disgorge to help satisfy a judgment against another person. Subrule 5(5) addresses the minimum requirements that must ordinarily be satisfied on an application for a freezing order against such a third party before the discretion is enlivened. The third party will not necessarily be a party to the substantive proceeding, (see *Cardile v LED*

Builders Pty Ltd (1999) 198 CLR 380) but will be a respondent to the application for the freezing or ancillary order. Where a freezing order against a third party seeks only to freeze the assets of another person in the third party's possession, custody or control (but not ownership), the example form will require adaptation. In particular, the references to 'your assets' and 'in your name' should be changed to refer to the other person's assets or name (e.g. 'John Smith's assets', 'in John Smith's name').

8. A freezing or ancillary order may be limited to assets in Australia or in a defined part of Australia, or may extend to assets anywhere in the world, and may cover all assets without limitation, assets of a particular class, or specific assets (such as the amounts standing to the credit of identified bank accounts).

9. The duration of an ex parte freezing order should be limited to a period terminating on the return day of the motion, which should be as early as practicable (usually not more than a day or two) after the order is made, when the respondent will have the opportunity to be heard. The applicant will then bear the onus of satisfying the Court that the order should be continued or renewed.

10. A freezing order should reserve liberty for the respondent to apply on short notice. An application by the respondent to discharge or vary a freezing order will normally be treated by the Court as urgent.

11. The value of the assets covered by a freezing order should not exceed the likely maximum amount of the applicant's claim, including interest and costs. Sometimes it may not be possible to satisfy this principle (for example, an employer may discover that an employee has been making fraudulent misappropriations, but does not know how much has been misappropriated at the time of the discovery and at the time of the approach to the Court).

12. The order should, where appropriate, exclude dealings by the respondent with its assets for legitimate purposes, in particular:

- (a) payment of ordinary living expenses;
- (b) payment of reasonable legal expenses;
- (c) dealings and dispositions in the ordinary and proper course of the respondent's business, including paying business expenses bona fide and properly incurred; and
- (d) dealings and dispositions in the discharge of obligations bona fide and properly incurred under a contract entered into before the order was made.

13. Where a freezing order extends to assets outside Australia, the order should provide for the protection of persons outside Australia and third parties. Such provisions are included in the example form of freezing order.

14. The Court may make ancillary orders. The most common example of an ancillary order is an order for disclosure of assets. The annexed example form provides for such an order in paragraph 8 and for the privilege against self-incrimination in paragraph 9. Section 128A of the *Evidence Act 1995* (Cth) and *Evidence Act 1995* (NSW) govern objection to compliance on the self-incrimination ground in relation to a freezing order. In particular subsections, (3)ff of s 128A govern the procedure to be followed after objection is taken in accordance with paragraph 9 of the example form of freezing order annexed to this Practice Note.

15. The rules of court confirm that certain restrictions expressed in *The Siskina* [1979] AC 210 do not apply in this jurisdiction. First, the Court may make a freezing order before a cause of action has accrued (a 'prospective' cause of action). Secondly, the Court may make a free-standing freezing order in aid of foreign proceedings in prescribed circumstances. Thirdly, where there are assets in Australia, service out of Australia is permitted under a new 'long arm' service rule.

16. As a condition of the making of a freezing order, the Court will normally require appropriate undertakings by the applicant to the Court, including the usual undertaking as to damages.

17. If it is demonstrated that the applicant has or may have insufficient assets within the jurisdiction of the Court to provide substance for the usual undertaking as to damages, the applicant may be required to support the undertaking by providing security. There is provision for such security in the example form of freezing order.

18. The order to be served should be endorsed with a notice which meets the requirements of UCPR rule 40.7.

19. An applicant for an ex parte freezing order is under a duty to make full and frank disclosure of all material facts to the Court. This includes disclosure of possible defences known to the applicant and of any information which may cast doubt on the applicant's ability to meet the usual undertaking as to damages from assets within Australia.

20. The affidavits relied on in support of an application for a freezing or ancillary order should, if possible, address the following:

(a) information about the judgment that has been obtained, or, if no judgment has been obtained, the following information about the cause of action:

(i) the basis of the claim for substantive relief;

(ii) the amount of the claim; and

(iii) if the application is made without notice to the respondent, the applicant's knowledge of any possible defence;

(b) the nature and value of the respondent's assets, so far as they are known to the applicant, within and outside Australia;

(c) the matters referred to in UCPR rule 25.14; and

(d) the identity of any person, other than the respondent, who, the applicant believes, may be affected by the order, and how that person may be affected by it.

J J Spigelman AC
Chief Justice of New South Wales
16 June 2010

Example form of *ex parte* Freezing Order

[Title of Proceeding]

PENAL NOTICE

TO: [*name of person against whom the order is made*]

IF YOU:

(A) REFUSE OR NEGLECT TO DO ANY ACT WITHIN THE TIME SPECIFIED IN THIS ORDER FOR THE DOING OF THE ACT; OR

(B) DISOBEY THE ORDER BY DOING AN ACT WHICH THE ORDER REQUIRES YOU TO ABSTAIN FROM DOING, YOU WILL BE LIABLE TO IMPRISONMENT, SEQUESTRATION OF PROPERTY OR OTHER PUNISHMENT.

ANY OTHER PERSON WHO KNOWS OF THIS ORDER AND DOES ANYTHING WHICH HELPS OR PERMITS YOU TO BREACH THE TERMS OF THIS ORDER MAY BE SIMILARLY PUNISHED.

TO: [*name of person against whom the order is made*]

This is a '*freezing order*' made against you on [*insert date*] by Justice [*insert name of Judge*] at a hearing without notice to you after the Court was given the undertakings set out in Schedule A to this order and after the Court read the affidavits listed in Schedule B to this order [1].

THE COURT ORDERS:

INTRODUCTION

- (a) The application for this order is made returnable immediately.
- (b) The time for service of the application, supporting affidavits and originating process is abridged and service is to be effected by [*insert time and date*]. [2]

Subject to the next paragraph, this order has effect up to and including [*insert date*] ('**the return day**'). On the return day at [*insert time*] am/pm there will be a further hearing in respect of this order before the Court. [3]

Anyone served with or notified of this order, including you, may apply to the Court at any time to vary or discharge this order or so much of it as affects the person served or notified.

'applicant', if there is more than one applicant, includes all the applicants;

'you', where there is more than one of you, includes all of you and includes you if you are a corporation;

'third party' means a person other than you and the applicant;

'unencumbered value' means value free of mortgages, charges, liens or other encumbrances.

5. (a) If you are ordered to do something, you must do it by yourself or through directors, officers, partners, employees, agents or others acting on your behalf or on your instructions.

(b) If you are ordered not to do something, you must not do it yourself or through directors, officers, partners, employees, agents or others acting on your behalf or on your instructions or with your encouragement or in any other way.

FREEZING OF ASSETS

[For order limited to assets in Australia]

6. (a) You must not remove from Australia or in any way dispose of, deal with or diminish the value of any of your assets in Australia ('Australian assets') up to the unencumbered value of AUD\$ ('**the Relevant Amount**').

(b) If the unencumbered value of your Australian assets exceeds the Relevant Amount, you may remove any of those assets from Australia or dispose of or deal with them or diminish their value, so long as the total unencumbered value of your Australian assets still exceeds the Relevant Amount.

[If the Court makes a worldwide order, the following additional paragraph (c) also applies.]

(c) If the unencumbered value of your Australian assets is less than the Relevant Amount, and you have assets outside Australia ('ex-Australian assets'):

(i) You must not dispose of, deal with or diminish the value of any of your Australian assets and ex-Australian assets up to the unencumbered value of your Australian and ex-Australian assets of the Relevant Amount; and

(ii) You may dispose of, deal with or diminish the value of any of your ex-Australian assets, so long as the unencumbered value of your Australian assets and ex-Australian assets still exceeds the Relevant Amount.

[For either form of order]

7. For the purposes of this order,

(1) your assets include:

- (a) all your assets, whether or not they are in your name and whether they are solely or co-owned;
 - (b) any asset which you have the power, directly or indirectly, to dispose of or deal with as if it were your own (you are to be regarded as having such power if a third party holds or controls the asset in accordance with your direct or indirect instructions); and
 - (c) the following assets in particular: the property known as [title/address] or, if it has been sold, the net proceeds of the sale; the assets of your business [known as [name]] [carried on at [address]] or, if any or all of the assets have been sold, the net proceeds of the sale; and any money in account [numbered account number] [in the name of] at [name of bank and name and address of branch].
- (2) the value of your assets is the value of the interest you have individually in your assets.

PROVISION OF INFORMATION [4]

8. Subject to paragraph 9, you must:

- (a) at or before the further hearing on the return day (or within such further time as the Court may allow) to the best of your ability inform the applicant in writing of all your assets in [Australia] [world wide], giving their value, location and details (including any mortgages, charges or other encumbrances to which they are subject) and the extent of your interest in the assets;
- (b) within [] working days after being served with this order, swear and serve on the applicant an affidavit setting out the above information.

9.(a) This paragraph (9) applies if you are not a corporation and you wish to object to complying with paragraph 8 on the grounds that some or all of the information required to be disclosed may tend to prove that you:

- (i) have committed an offence against or arising under an Australian law or a law of a foreign country; or
- (ii) are liable to a civil penalty.

(b) This paragraph (9) also applies if you are a corporation and all of the persons who are able to comply with paragraph 8 on your behalf and with whom you have been able to communicate, wish to object to your complying with paragraph 8 on the grounds that some or all of the information required to be disclosed may tend to prove that they respectively:

- (i) have committed an offence against or arising under an Australian law or a law of a foreign country; or
- (ii) are liable to a civil penalty.

(c) You must:

- (i) disclose so much of the information required to be disclosed to which no objection is taken; and
- (ii) prepare an affidavit containing so much of the information required to be disclosed to which objection is taken, and deliver it to the Court in a sealed envelope; and

(iii) file and serve on each other party a separate affidavit setting out the basis of the objection.

EXCEPTIONS TO THIS ORDER

10. This order does not prohibit you from:

(a) paying [up to \$..... a week/day on] [your ordinary] living expenses;

(b) paying [\$.....on] [your reasonable] legal expenses;

(c) dealing with or disposing of any of your assets in the ordinary and proper course of your business, including paying business expenses bona fide and properly incurred; and

(d) in relation to matters not falling within (a), (b) or (c), dealing with or disposing of any of your assets in discharging obligations bona fide and properly incurred under a contract entered into before this order was made, provided that before doing so you give the applicant, if possible, at least two working days written notice of the particulars of the obligation.

11. You and the applicant may agree in writing that the exceptions in the preceding paragraph are to be varied. In that case the applicant or you must as soon as practicable file with the Court and serve on the other a minute of a proposed consent order recording the variation signed by or on behalf of the applicant and you, and the Court may order that the exceptions are varied accordingly.

12. (a) This order will cease to have effect if you:

(i) pay the sum of \$..... into Court; or

(ii) pay that sum into a joint bank account in the name of your solicitor and the solicitor for the applicant as agreed in writing between them; or

(iii) provide security in that sum by a method agreed in writing with the applicant to be held subject to the order of the Court.

(b) Any such payment and any such security will not provide the applicant with any priority over your other creditors in the event of your insolvency.

(c) If this order ceases to have effect pursuant (a), you must as soon as practicable file with the Court and serve on the applicant notice of that fact.

COSTS

13. The costs of this application are reserved to the judge hearing the application on the return day.

PERSONS OTHER THAN THE APPLICANT AND RESPONDENT

14. Set off by banks

This order does not prevent any bank from exercising any right of set off it has in respect of any facility which it gave you before it was notified of this order.

15. Bank withdrawals by the respondent

No bank need inquire as to the application or proposed application of any money withdrawn by you if the withdrawal appears to be permitted by this order.

[For world wide order]

16. Persons outside Australia

(a) Except as provided in subparagraph (b) below, the terms of this order do not affect or concern anyone outside Australia.

(b) The terms of this order will affect the following persons outside Australia:

(i) you and your directors, officers, employees and agents (except banks and financial institutions);

(ii) any person (including a bank or financial institution) who:

(A) is subject to the jurisdiction of this Court; and

(B) has been given written notice of this order, or has actual knowledge of the substance of the order and of its requirements; and

(C) is able to prevent or impede acts or omissions outside Australia which constitute or assist in a disobedience breach of the terms of this order; and

(iii) any other person (including a bank or financial institution), only to the extent that this order is declared enforceable by or is enforced by a court in a country or state that has jurisdiction over that person or over any of that person's assets.

[For world wide order]

17. Assets located outside Australia

Nothing in this order shall, in respect of assets located outside Australia, prevent any third party from complying or acting in conformity with what it reasonably believes to be its bona fide and properly incurred legal obligations, whether contractual or pursuant to a court order or otherwise, under the law of the country or state in which those assets are situated or under the proper law of any contract between a third party and you, provided that in the case of any future order of a court of that country or state made on your or the third party's application, reasonable written notice of the making of the application is given to the applicant.

SCHEDULE A

UNDERTAKINGS GIVEN TO THE COURT BY THE APPLICANT

(1) The applicant undertakes to submit to such order (if any) as the Court may consider to be just for the payment of compensation (to be assessed by the Court or as it may direct) to any person (whether or not a party) affected by the operation of the order.

(2) As soon as practicable, the applicant will file and serve upon the respondent copies of:

(a) this order;

(b) the summons or notice of motion to be relied on at the hearing on the return day;

(c) the following material in so far as it was relied on by the applicant at the hearing when the order was made:

(i) affidavits (or draft affidavits);

(ii) exhibits capable of being copied;

(iii) any written submission; and

(iv) any other document that was provided to the Court.

(d) a transcript, or, if none is available, a note, of any exclusively oral allegation of fact that was made and of any exclusively oral submission that was put, to the Court;

(e) the originating process, or, if none was filed, any draft originating process produced to the Court.

(3) As soon as practicable, the applicant will cause anyone notified of this order to be given a copy of it.

(4) The applicant will pay the reasonable costs of anyone other than the respondent which have been incurred as a result of this order, including the costs of finding out whether that person holds any of the respondent's assets.

(5) If this order ceases to have effect [5] the applicant will promptly take all reasonable steps to inform in writing anyone who has been notified of this order, or who he has reasonable grounds for supposing may act upon this order, that it has ceased to have effect.

(6) The applicant will not, without leave of the Court, use any information obtained as a result of this order for the purpose of any civil or criminal proceedings, either in or outside Australia, other than this proceeding.

(7) The applicant will not, without leave of the Court, seek to enforce this order in any country outside Australia or seek in any country outside Australia an order of a similar nature or an order conferring a charge or other security against the respondent or the respondent's assets.

[(8) The applicant will:

(a) on or before [date] cause an irrevocable undertaking to pay in the sum of \$ to be issued by a bank with a place of business within Australia, in respect of any order the court may make pursuant to undertaking (1) above; and

(b) immediately upon issue of the irrevocable undertaking, cause a copy of it to be served on the respondent.] [6]

SCHEDULE B [7]

AFFIDAVITS RELIED ON

Name of Deponent	Date affidavit made
(1)	
(2)	
(3)	

NAME AND ADDRESS OF APPLICANT'S LEGAL REPRESENTATIVES

The applicant's legal representatives are:

[Name, address, reference, fax and telephone numbers both in and out of office hours and email]

END NOTES

[1] The words '*without notice to you*' and '*and after the Court has read the affidavits listed in Schedule B to this order*' are appropriate only in the case of an ex parte order.

[2] Paragraph 1 is appropriate only in the case of an ex parte order.

[3] Paragraph 2 is appropriate only in the case of an ex parte order.

[4] See Practice Note paragraph 14.

[5] For example, if the respondent pays money into Court or provides security, as provided for in paragraph 12 of this Order.

[6] See Practice Note paragraph 17.

[7] Schedule B is appropriate only in the case of an ex parte order.

Annexure B – UCPR Part 25

Division 1

25.8 Meaning of “usual undertaking as to damages”

The “usual undertaking as to damages”, if given to the court in connection with any interlocutory order or undertaking, is an undertaking to the court to submit to such order (if any) as the court may consider to be just for the payment of compensation (to be assessed by the court or as it may direct) to any person (whether or not a party) affected by the operation of the interlocutory order or undertaking or of any interlocutory continuation (with or without variation) of the interlocutory order or undertaking.

25.9 Orders may be made at any stage of proceedings

Orders may be made under this Part at any stage of proceedings.

Division 2 – Freezing Orders

25.10 Interpretation

In this Division:

“ancillary order” has the meaning given by rule 25.12.

“another court” includes a court outside New South Wales, whether inside or outside Australia.

“applicant” means a person who applies for a freezing order or an ancillary order.

“freezing order” has the meaning given by rule 25.11.

“respondent” means a person against whom a freezing order or an ancillary order is sought or made.

Note: The definition of “judgment” in the *Federal Court Rules* is not included above. The word is defined in [section 3](#) of the [Civil Procedure Act 2005](#) for the purposes of that Act and these rules.

Note: In any notice of motion for a freezing order, a party should be referred to by the appropriate expression prescribed by rule 18.3.

25.11 Freezing order

(1) The court may make an order (a “**freezing order**”), upon or without notice to a respondent, for the purpose of preventing the frustration or inhibition of the court’s process by seeking to meet a danger that a judgment or prospective judgment of the court will be wholly or partly unsatisfied.

(2) A freezing order may be an order restraining a respondent from removing any assets located in or outside Australia or from disposing of, dealing with, or diminishing the value of, those assets.

25.12 Ancillary order

(1) The court may make an order (an “ancillary order”) ancillary to a freezing order or prospective freezing order as the court considers appropriate.

(2) Without limiting the generality of subrule (1), an ancillary order may be made for either or both of the following purposes:

- (a) eliciting information relating to assets relevant to the freezing order or prospective freezing order,
- (b) determining whether the freezing order should be made.

25.13 Respondent need not be party to proceeding

The court may make a freezing order or an ancillary order against a respondent even if the respondent is not a party to a proceeding in which substantive relief is sought against the respondent.

25.14 Order against judgment debtor or prospective judgment debtor or third party

(1) This rule applies if:

(a) judgment has been given in favour of an applicant by:

- (i) the court, or
- (ii) in the case of a judgment to which subrule (2) applies—another court, or

(b) an applicant has a good arguable case on an accrued or prospective cause of action that is justiciable in:

- (i) the court, or
- (ii) in the case of a cause of action to which subrule (3) applies—another court.

(2) This subrule applies to a judgment if there is a sufficient prospect that the judgment will be registered in or enforced by the court.

(3) This subrule applies to a cause of action if:

(a) there is a sufficient prospect that the other court will give judgment in favour of the applicant, and

(b) there is a sufficient prospect that the judgment will be registered in or enforced by the court.

(4) The court may make a freezing order or an ancillary order or both against a judgment debtor or prospective judgment debtor if the court is satisfied, having regard to all the circumstances, that there is a danger that a judgment or prospective judgment will be wholly or partly unsatisfied because any of the following might occur:

(a) the judgment debtor, prospective judgment debtor or another person absconds,

(b) the assets of the judgment debtor, prospective judgment debtor or another person are:

- (i) removed from Australia or from a place inside or outside Australia, or
- (ii) disposed of, dealt with or diminished in value.

(5) The court may make a freezing order or an ancillary order or both against a person other than a judgment debtor or prospective judgment debtor (a “third party”) if the court is satisfied, having regard to all the circumstances, that:

(a) there is a danger that a judgment or prospective judgment will be wholly or partly unsatisfied because:

- (i) the third party holds or is using, or has exercised or is exercising, a power of disposition over assets (including claims and expectancies) of the judgment debtor or prospective judgment debtor, or
- (ii) the third party is in possession of, or in a position of control or influence concerning, assets (including claims and expectancies) of the judgment debtor or prospective judgment debtor, or

(b) a process in the court is or may ultimately be available to the applicant as a result of a judgment or prospective judgment, under which process the third party may be obliged to disgorge assets or contribute toward satisfying the judgment or prospective judgment.

(6) Nothing in this rule affects the power of the court to make a freezing order or ancillary order if the court considers it is in the interests of justice to do so.

25.15 Jurisdiction

Nothing in this Division diminishes the inherent, implied or statutory jurisdiction of the court to make a freezing order or ancillary order.

25.16 Service outside Australia of application for freezing order or ancillary order

An application for a freezing order or an ancillary order may be served on a person who is outside Australia (whether or not the person is domiciled or resident in Australia) if any of the assets to which the order relates are within the jurisdiction of the court.

25.17 Costs

(1) The court may make any order as to costs as it considers appropriate in relation to an order made under this Division.

(2) Without limiting the generality of subrule (1), an order as to costs includes an order as to the costs of any person affected by a freezing order or ancillary order.

Annexure C – Uniform Law Links

Practice Notes

- United Kingdom – Civil Procedure Rules, Practice Direction 25A,
http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part25/pd_part25a
- FCA Practice Note CM9 – 1 August 2011
<http://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/cm9>