TRANSNATIONAL FREEZING ORDERS

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1. It is a waste of time and costs to sue someone for money if respondents are free, and exercise their freedom, to get rid of their assets in order to frustrate any judgment that is obtained. The risk that this will happen is greater in an age where money can instantly be transferred electronically to a safe haven abroad which the courts cannot reach.

2. Yet in the common law world less than forty years ago respondents were free to do what they liked with their own assets prior to judgment. After judgment, a judgment creditor's only remedy was to take out execution.[1]

3. A dramatic change occurred on 22 May 1975 when the English Court of Appeal set off arguably the greatest piece of judicial activism in modern times. It was the ex parte interim freezing order - or freezing injunction as the English courts call it - restraining the removal of assets from the jurisdiction: *Nippon Yusen Kaisha v Karageorgis*.[2] The reason was that otherwise the assets were in danger of being removed from the jurisdiction so as to frustrate a money judgment which Japanese shipowners had

1 *Lister & Co v Stubbs* (1890) 45 Ch 1 at 14 ; *Mills v Northern Railway of Buenos Ayres Co* (1870) LR 5 Ch App 621 at 628; *Robinson v Pickering* (1881) 16 Ch 660 at 661

2 [1975] 1 WLR 1093, [1975] 3 All ER 282, [1975] 2 Lloyd's Rep 137

against Greek charterers for the hire of a ship. The charterers had disappeared but had funds in London banks. The Court of Appeal indicated that the order be notified to the banks.

4. A month later the Court of Appeal followed that decision when a similar emergency arose in *Mareva Compania Naviera SA v International Bulkcarriers SA ('The Mareva')*[3]. Again, shipowners were owed money for charter hire and the charterer had money in a London bank. An ex parte interim freezing injunction was made stopping the funds from being taken out of the jurisdiction. Again, notice of the injunction was given to the bank.

5. This was an international project from the start. The early English cases drew on the civil law, where attachment of assets prior to the determination of legal proceedings was well established in jurisdictions such as Germany, Italy and France. The need for this innovation was confirmed by the rapid proliferation of such cases throughout the common law world.

6. So powerful is this form of relief that it has been perceptively described as one of 'the laws' two nuclear weapons': *Bank Mellat v Nikpour*[4]. The other is the search order (Anton Piller order) which was also created by the English Court of Appeal in 1975.

7. For many years this new form of relief was called a Mareva injunction. Today it is generally called a freezing order in Australia and a freezing injunction in England. These terms now appear in the respective rules of court. As discussed below, the difference between an 'order' and an

3 [1975] 2 Lloyd's Rep 509, [1980] 1 All ER 213

4 [1985] FSR 87 per Donaldson LJ

'injunction' in this context is not merely semantic but has had profound practical consequences in the different development of the relief in Australia and in England.

CONTEMPT OF COURT SANCTION

8. Disobedience to a freezing order is punishable as a contempt of court. A third party with notice of the order, such as the respondent's bank, is also guilty of contempt if it helps or permits its breach. Third parties are warned of this on the front page of the example freezing order (Australia) or freezing injunction (England).

COURT RULES AND PRACTICE NOTES

9. In Australia the freezing order has developed with little or no statutory recognition other than harmonised rules of court and a harmonised practice note, which since 2006 have been adopted by all Australian superior courts. The harmonised rules and practice notes are helpful because they restate the case law in a form which offers clear guidance and certainty to litigants. They were drafted by the Harmonisation Committee of the Council of Chief Justices of Australia and New Zealand. The Harmonisation Committee attempts, not always successfully, to ensure that important aspects of procedure are uniform or harmonised throughout the Australian jurisdictions. This has been successful in the case of freezing and search orders. The Federal Court version is set out in the Appendix to this paper.

10. In England the freezing injunction came to be recognised in s 37 of the *Supreme Court Act* 1981, which provides:

> **37. POWERS OF HIGH COURT WITH RESPECT TO INJUNCTIONS AND RECEIVERS**
>
> (1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.
> (2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just.
> (3) The power of the High Court under subsection (1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction.

11. In England s 25 of the *Civil Jurisdiction and Judgments Act* 1982, as extended in 1997, empowers the High Court to grant all forms of freestanding interim relief, including freezing injunctions and search orders, in relation to substantive proceedings anywhere in the world unless, in the opinion of the court, the fact that the court has no jurisdiction apart from this section in relation to the subject matter of the proceedings in question makes it inexpedient for the court to grant it. In its original 1982 form, s 25 conferred a statutory jurisdiction to grant freestanding interim relief of any nature, including Mareva relief, but only in aid of proceedings brought or to be brought in a Contracting State to the Brussels Convention 1969. Section 25 was extended to Lugano Convention countries by the *Civil Jurisdiction and Judgments Act* 1991. Finally, in 1997 (after *Mercedes Benz AG v Leiduck*[5]) it was extended to proceedings anywhere in the world by the Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997. Previously, there was a gap in English law because the House of Lords in

5 [1996] AC 284

The Siskina[6] held that an English court has no jurisdiction to grant a Mareva injunction against foreign respondent otherwise than in support of a cause of action which the English court has jurisdiction to enforce. Section 25 reverses that decision.

12. In England the freezing injunction and assets disclosure order is recognised in r 25 of the Civil Procedure Rules 1998, which relevantly provides:

> **Interim Remedies**
>
> **Orders for interim remedies**
> 25.1 — (1) The court may grant the following interim remedies —
> …
> (f) an order (referred to as a 'freezing injunction (GL)') —
> (i) restraining a party from removing from the jurisdiction assets located there; or
> (ii) restraining a party from dealing with any assets whether located within the jurisdiction or not;
> (g) an order directing a party to provide information about the location of relevant property or assets or to provide information about relevant property or assets which are or may be the subject of an application for a freezing injunction;
> …
> (4) The court may grant an interim remedy whether or not there has been a claim for a final remedy of that kind.
>
> 25.4 —(1) This rule applies where a party wishes to apply for an interim remedy but —
> (a) the remedy is sought in relation to proceedings which are taking place, or will take place, outside the jurisdiction; or

13. Rule 6.20(4) of the Civil Procedure Rules 1998 (UK) permits a claim to be served out of the jurisdiction with the permission of the court if 'a claim is made for an interim remedy under s 25(1) of the 1982 Act'.

6 *Siskina v Distos Compania Naviera SA (The Siskina)* [1979] AC 210

14. Section 44 of the *Arbitration Act* 1996 (UK) provides:

> 44(1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.
>
> (2) Those matters are -
>
> …
>
> (e) the granting of an interim injunction …

15. In contrast to the Australian harmonised rules and practice note, the English rules and Practice Direction 25A – Interim Injunctions refer only briefly to freezing injunctions. The main value of the English practice direction lies in its example form.

Ex Parte Application

16. It is routine for freezing orders to be obtained ex parte in the first instance and for the proceedings to be made returnable before the court within a day or two thereafter. The rationale is that prior notice may prompt the feared dissipation or dealing with assets.

Proof: The Essential Elements

17. As recognised in the harmonised rules of court, a claimant for a freezing order must prove two things. First, that it has a good arguable case. Secondly, that there is a danger that a judgment or prospective judgment will be wholly or partly unsatisfied because the respondent or another person might abscond or their assets might be removed from the jurisdiction or disposed of, dealt with or diminished in value.

The Assets Restrained

18. The value of the assets restrained normally should not exceed the maximum amount of the applicant's likely judgment (including interest) and costs. Freezing orders usually do not extend to dealings with assets for living, legal and business expenses and existing contractual obligations.

19. In England one of the standard forms of ex parte freezing injunction (in the Commercial Court Guide) was amended in 2009 to include assets held on trust: *JSC BTA Bank v Kythreotis*[7]. It is possible that Australia will follow. This is only a holding position to provide the opportunity of investigating a claim that the assets are held on trust before they are released from the injunction and accompanying disclosure obligation.

Undertaking in Damages

20. An applicant for an interim freezing order is normally required to give the court an undertaking in damages (in England it is called a cross-undertaking). The object is to ensure that the respondent and third parties will receive compensation for any loss they suffer by reason of the grant of the interim freezing order if it eventuates that it ought not to have been granted. The form of the undertaking is set out in the example form of freezing order in the Australian practice note and the English practice direction.

7 [2010] EWCA Civ 1436, [2011] 1WLR 888

21. A claimant, particularly a foreign claimant, may have insufficient assets within the jurisdiction to provide substance for the usual undertaking in damages. If this is the case the claimant may be required to support the undertaking with security: see the Australian practice note at [17] and undertaking 8 in the example form.

22. The principles that apply as to whether to order an inquiry into damages and as to evidence of damages where a freezing order has been wrongly ordered were stated in *Yukong Line of Korea Ltd v Rendsberg Investment Corp of Liberia ('The Rialto')*[8]. Under the usual undertaking in damages, general damages can be awarded; but damages for emotional distress are not recoverable unless the particular facts make it appropriate as an exception.[9]

Disclosure of Material Facts

23. The courts insist on complete disclosure of all material facts whenever freezing orders are sought ex parte. Failure to make full disclosure may result in the order being dissolved and the claimant's undertaking in damages being called upon. The duty of disclosure is stated in the Australian harmonised practice note at [19]. The leading English case is *Brink's Mat Ltd v Elcombe*[10]. The following principles stated by Ralph

8 [2001] 2 Lloyd's Rep 113 at [32] – [36]

9 *Al-Rawas v Pegasus Energy Ltd* [2009] 1 All ER 346

10 [1988] 1 WLR 1350; 3 All ER 188

Gibson LJ were approved by the Court of Appeal in *Behbehani v Salem*[11] (omitting citations):

(1) The duty of the applicant is to make a full and fair disclosure of all the material facts.

(2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers.

(3) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.

(4) The extent of the inquiries which are held to be proper, and therefore necessary, must depend on all the circumstances of the case including

(a) the nature of the case which the applicant is making; and the order for which application is made and the probable effect of the order on the defendant; and

(b) the degree of legitimate urgency and the time available for the making of inquiries.

(5) If material non-disclosure is established the court will be astute to ensure that a plaintiff who obtains an ex parte injunction without full disclosure is deprived of any advantage he may have derived by that breach of duty.

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends upon the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

(7) Finally, it is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded. The Court has a discretion, notwithstanding proof of

11 [1989] 1 WLR 723 at 726, [1989] 2 All ER 143

> material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms. When the whole of the facts, including that of the original non-disclosure are before the Court, it may well grant a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed.

Third Parties

24. Rule 6(5) of the Australian harmonised rules reflects the Australian case law concerning a freezing order against a third party, i.e. a person other than a judgment debtor or prospective judgment debtor:

> 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.

25. This rule reflects the decision in the leading Australian case on freezing orders against third parties, *Cardile v LED Builders Pty Ltd*[12]. In that case, copyright infringement proceedings in respect of building plans were brought by LED Builders Pty Ltd ('LED') against Eagle Homes Pty Ltd ('the old company'), which carried on a housing construction business.

12 [1999] HCA 18, 198 CLR 380.

Judgment was given for LED. The shares in the old company were held by Mr and Mrs Cardile. Months before proceedings were commenced, the old company declared and paid a dividend of $400,000 to the shareholders. After proceedings were commenced and before judgment:

(a) the old company declared a further dividend of $800,000 to the shareholders of which $658,977 was actually paid or applied to their benefit (the precise amount is relevant because it came to be reflected in the orders which the High Court of Australia ultimately approved);

(b) the shareholders formed and controlled a new company, Ultra Modern Developments Pty Ltd ('the new company'), which began a housing construction business using new plans; and

(c) the old company's business name, 'Eagle Homes', was transferred to the new company.

26. LED elected for an account of profits and moved for, first, the joinder of the shareholders and the new company as parties to the action and, secondly, Mareva type orders against the shareholders and the new company pending the taking of the accounts. The primary judge in the Federal Court of Australia dismissed both motions. The Full Federal Court allowed the appeal, holding that Mareva relief should have been granted against the shareholders and the new company. They set aside the order

dismissing the notice of motion and remitted the matter for determination in accordance with their reasons. The primary judge then promptly made freezing orders restraining the shareholders and the new company from disposing of or dealing with any of their assets other than for specified purposes. On higher appeal by the shareholders and the new company, the High Court unanimously held that there was power to grant Mareva orders against the shareholders and the new company but that the orders should not have extended to all their assets. The guiding principle for determining whether to make a freezing order against a third party was laid down in the joint judgment at [54], [57], and is now reflected in r 6(5) of the Australian rules set out above at [24].

27. In considering the form of relief, it was held that as the rights and obligations of the shareholders with respect to their property could only be determined in disgorgement proceedings against them under s 37A of the *Conveyancing Act* 1919 (NSW), consideration should have been given to the order being made subject to an undertaking that those proceedings would be commenced: at [70]. Section 37A provides that every alienation of property with intent to defraud creditors shall be voidable at the instance of anyone thereby prejudiced.[13] The High Court restricted the freezing order:

    (a) against the shareholders to the amount of $658,977 in order to correspond with the total value of the dividends they had received; and

13 Section 37A was recently illuminated in *Marcolongo v Chen* [2011] HCA 3; 85 ALJR 380

(b) against the new company to dealing with the business name 'Eagle Homes'.

The Types of Transnational Freezing Orders

28. There are two main types of transnational freezing orders and disclosure of assets orders:

    (a) orders which apply to foreign assets in aid of local judicial proceedings (sometimes called worldwide orders); and

    (b) orders which apply to local assets in aid of foreign judicial proceedings.

29. The latter pose more difficulties than the former.

Foreign Assets

30. Freezing orders extending to foreign assets ie assets located abroad, are routinely made where respondents are within the court's personal jurisdiction, particularly in cases of international fraud, subject to limitations and safeguards which have become standardised in the example forms of freezing order in the Australian practice note and the English practice direction.

31. Freezing orders over assets located abroad raise three questions. First, does the court have personal jurisdiction over the respondent? Secondly, if so, is there jurisdiction to make a freezing order? Thirdly, if so, are there

difficulties of conflict of laws, comity or enforceability which affect the discretion whether to make the order or the form of the order?

32. On the first question, the court has personal jurisdiction over anyone served in Australia or who consents to the court's jurisdiction or who is served out of Australia under the authority of the rules of court. On the second question, the court has jurisdiction to make freezing orders and ancillary orders against those over whom it has personal jurisdiction even if they reside overseas and even in relation to overseas assets. On the third question, the manner in which the court should exercise its discretionary power has been worked out through the cases.

33. Considerations of comity require the courts to refrain from making orders which infringe the exclusive jurisdiction of the courts of other countries. However, a freezing order does not normally offend this principle in any way because it operates solely in personam: *Derby & Co Ltd v Weldon (Nos 3 and 4)*[14]. For centuries equity has exercised jurisdiction over persons amenable to its personal jurisdiction to order them to do, or to refrain from doing, an act abroad: *Lord Portalington v Soulby.*[15]

34. Problems of enforceability may arise if a disobedient respondent or third party is physically located abroad because often they are effectively not subject to the sanction of contempt of court and the co-operation of a foreign court would be required in order to enforce the order. Such a situation is most likely to arise in the case of foreigners who are technically within the local court's jurisdiction because they were served while

14 [1990] Ch 65 at 82

15 (1834) 40 ER 40 at 41–42; [1824-34] All ER 610

temporarily in the country or were served outside the jurisdiction under long arm service rules of court. In such a case, there is a tension between competing principles. On the one hand, the courts assume that a person subject to their jurisdiction will obey their orders. On the other hand, they are careful to avoid conflicts of laws and are careful about making orders against foreigners in respect of their conduct outside the court's territorial jurisdiction.

35. Problems of enforceability may be reduced, however, where a respondent outside the jurisdiction is unable to remove assets from the jurisdiction or dispose of them within the jurisdiction without the assistance of a third party within the jurisdiction. This is because the collaborator within the jurisdiction and with notice of the freezing order risks punishment for contempt.

36. In the summer of 1988 in a trio of cases the English Court of Appeal, reversing its earlier practice (see *Ashtiani v Kashi*[16]), followed the lead of Australian cases by extending the Mareva jurisdiction to restrain the disposal of the respondents' worldwide assets: *Babanaft International Co SA v Bassatne*[17]; *Republic of Haiti v Duvalier*[18]; and *Derby & Co Ltd v Weldon (No 1)*[19]. These cases settled in England that there is jurisdiction to make a freezing order and an ancillary disclosure order in respect of assets outside the territorial jurisdiction, both before judgment and after judgment.

16 [1987] QB 888

17 [1990] Ch 13

18 [1990] 1 QB 202

19 [1990] Ch 48

37. In each case a worldwide Mareva injunction was granted subject to conditions for the protection of third parties. In the first case, *Babanaft*, the injunction was granted after and in aid of enforcement of a judgment of an English court in a fraud action against the respondents: a post-judgment case. In the second case, *Republic of Haiti*, the injunction was granted in aid of proceedings pending against the respondents in France: a special kind of case. An order was also made requiring the respondents to disclose information concerning their assets worldwide. In the third case, *Derby*, a worldwide Mareva injunction was granted in aid of proceedings pending against the respondents in England: a typical pre-judgment case. A worldwide assets disclosure order was also made.

Undertakings: Harassment

38. In order to prevent harassment of a respondent in multiple actions around the world, the Australian example form of freezing order contains the following undertakings by the claimant to the court:

> (6) The Applicant will not without the permission of the court use any information obtained as a result of this order for the purpose of any civil or criminal proceedings, either in England and Wales or in any other jurisdiction, other than this claim.
>
> (7) The Applicant will not without the permission of the court seek to enforce this order in any country outside England and Wales [or seek an order of a similar nature including orders conferring a charge or other security against the Respondent or the Respondent's assets].

39. The English example form has virtually identical undertakings. As regards the second of those undertakings, the English Court of Appeal has laid down the 'Dadourian Guidelines' to guide the court when an application for

leave is made: *Dadourian Ground International Inc v Simms.*[20] The Court of Appeal also provided a commentary in relation to each guideline.

40. The rationale of such undertakings was explained in *Tate Access Floors Inc v Boswell*[21] per Browne-Wilkinson VC:

> In any case where a world-wide order is made, it is capable of operating oppressively if the plaintiffs are free to start other proceedings in other jurisdictions (thereby exposing the defendants to a multiplicity of proceedings) and to use information obtained under compulsion in this jurisdiction for the purposes of pursuing criminal or civil remedies in other jurisdictions. It is for that reason that the Court of Appeal has laid down that, as a term of any world-wide Mareva relief, the order should contain undertakings not, without the leave of the court, to start such proceedings or use such information.

Orders in aid of foreign judicial proceedings

41. In England, the main barrier to an effective transnational freezing order in aid of foreign proceedings has been the House of Lords' judgment in *The Siskina.*[22] Lord Denning, who presided over the Court of Appeal, described it as his most disappointing reversal.[23] *The Siskina* involved a claim for damages for breach of duty and contract by Saudi-Arabian cargo owners against a one-ship Panamanian company for wrongful detention of the claimant's cargo in Cyprus. The ship had sunk in Greek waters. The respondent's only asset was insurance monies payable by London underwriters. Thus, the only connection of the litigation with England was the location of that asset.

20 [2006] 1 WLR 2499; 3 All ER 48 at [25]

21 [1991] Ch 512 at 525F

22 [1979] AC 210

23 Denning, *Due Process of Law*, (1980) Butterworths, London,141

42. The claimant obtained an ex parte Mareva injunction restraining the respondent from disposing of the insurance monies and obtained leave to serve the writ on the respondent under a rule of court which permitted service out of the jurisdiction 'if in the action begun by the writ … an injunction is sought ordering the defendant to do or refrain from doing anything within the jurisdiction'. The rules of court did not permit service out of England for the substantive claims because they had no connection with England.

43. The House of Lords held that English courts had no substantive jurisdiction just because the respondent had an asset in England; and that where there was no jurisdiction to commence substantive proceedings in England there could be no Mareva injunction. Lord Diplock said: 'A Mareva injunction is interlocutory not final: it is ancillary to a substantive claim for debt or damages.'[24] His Lordship read down the rule of court under which leave to serve out of the jurisdiction had been granted. He held that it presupposed the existence of a substantive right, which is subject to the jurisdiction of the English court. Thus, the claimant failed because the rules of court did not permit service on the respondent.

44. Subsequently, in *Channel Tunnel Group Ltd v Balfour Beatty Corporation Ltd*[25], Lord Mustill stated the *Siskina* principle in the following terms:

> For present purposes it is sufficient to say that the doctrine of the *Siskina*, put at its highest, is that the right to an interlocutory injunction cannot exist in isolation, but is always incidental to and dependant on the enforcement of a substantive right, which usually although not invariably takes the shape of a cause of action. If the underlying right itself is not subject to the jurisdiction of the English

24 at 253

25 [1993] AC 334 at 364

court, then that court should never exercise its power under section 37(1) by way of interim relief.

45. *Channel Tunnel* modified the *Siskina* decision in one respect. Freezing orders in aid of foreign proceedings can be granted if the dispute could have been adjudicated in England, even if it would not be adjudicated in England by reason (in the *Channel Tunnel* case) of an arbitration agreement choosing a foreign venue. The *Siskina* decision was also modified in *British Airways Board v Laker Airways Ltd*[26]; and *South Carolina Insurance Co v Assurantie Maatschappj 'De Zeven Provincien' NV*[27].

46. The problem with the *Siskina* decision was that the Lords viewed a freezing order solely through the prism of the law of injunctions. They considered that a Mareva 'injunction' was a form of interlocutory injunction.

47. The critical difference between the English case law and the Australian case law is that in England freezing orders are regarded as a species of injunction, whereas in Australia they are not: *Davis v Turning Properties Pty Ltd.*[28]

48. In Australia, the courts have invoked their inherent or implied jurisdiction including, in the case of the Supreme Court of New South Wales, the manifestation of its inherent jurisdiction in s 23 of the *Supreme Court*

26 [1985] AC 58 at 89

27 [1987] AC 24 at 40

28 [2005] NSWSC 742 at [22] – [34]. See also Peter Biscoe, *Freezing and Search Orders*, (2nd ed) 2008, LexisNexis Butterworths, Australia, at [1.17] – [1.18], [1.28], [2.28], [2.58] – [2.62].

Act 1970, which provides that: 'The Court shall have all jurisdiction which may be necessary for the administration of justice in New South Wales'.

49. The High Court of Australia has confirmed that a freezing order (formerly called a Mareva order or asset preservation order) is not an injunction.[29]

50. The different Australian approach has liberated the Australian freezing order from the restraints of case-bound law governing injunctions. It has led to a more flexible approach to the availability of such relief without the statutory intervention that was required in England.

51. The *Siskina* constraints have been cast off in Australia in the cases and in the harmonised rules of court. The harmonised practice note accompanying the rules encapsulates their effect as follows (eg par 15 of the Federal Court Practice Note):

> 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 freestanding 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.

52. It is worth looking at these three *Siskina* constraints a little more closely.

53. The first *Siskina* constraint was that the claimant must establish that it has a pre-existing cause of action i.e. that the cause of action has accrued. A troublesome consequence is that prospective actions may be left without remedy. For example in the case of a debt which does not fall due for payment until next week the creditor cannot seek relief despite the

29 *Patrick Stevedore Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1; *Pelechowski v Registrar*, Court of Appeal, NSW (1999) 198 CLR 435 at [45], [52]; *Cardile v LED Builders Pty Ltd* [1999] HCA 18; 198 CLR 380 at [41] – [42]; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 99

debtor's intention is to export all its assets and thereby frustrate any judgment that its creditor might obtain. A number of Australian cases proceeded on the basis that an accrued cause of action is not an invariable requirement. This is now reflected in the Australian harmonised rules of court, which permit a freezing order to be made if (inter alia) the claimant has a good arguable case on an 'accrued or prospective cause of action': eg O 25A r 5(1)(b) of the Federal Court Rules.

54. The second *Siskina* constraint was that a freezing order can only be granted in protection of a cause of action which the court has jurisdiction to enforce by final judgment. Consequently, the court could not grant a free-standing freezing order where a foreign court, and not the local court, had jurisdiction over the cause of action. In *Mercedes Benz AG v Leiduck*[30] Lord Nicholls considered this was no longer good law. The majority of the Privy Council in *Mercedes Benz* expressed no view. Subsequently in England s 25 of the *Civil Jurisdiction Judgments Act* 1982 reversed this aspect of the *Siskina* decision.

55. In Australia this *Siskina* constraint was rejected in *Davis v Turning Properties Pty Ltd*[31]. Campbell J held that the Supreme Court of NSW has inherent jurisdiction to make a free-standing freezing order in aid of the enforcement of a foreign judgment in Australia, whether that judgment had yet been obtained or not. In *Davis* the Supreme Court of the Bahamas had made a worldwide freezing order against one of the defendants, Mr Turner. Campbell J made a free-standing freezing order is respect of

30 [1996] AC 284 at 305-310

31 [2005] NSWSC 742, (2005) 222 ALR 676

the assets in New South Wales of Mr Turner and a related New South Wales third party company. On the evidence, there was a powerful case that Mr Turner had defrauded the claimant. No substantive relief was sought in the Bahamas or in New South Wales, but his Honour was satisfied that substantive proceedings would be commenced. His Honour ordered that the foreign claimant's undertaking as to damages be secured. His Honour observed at [35]:

> The administration of justice in New South Wales is not confined to the orderly disposition of litigation which is begun here, tried here and ends here. In circumstances where international commerce and international monetary transactions are a daily reality, and where money can be transferred overseas with sometimes as little as a click on a computer mouse, the administration of justice in this state includes the enforcement in this state of rights established elsewhere.

56. That decision is now reflected in provisions of the Australian harmonised rules of court (eg O 25A r 5(1), (2) and (3) of the Federal Court Rules):

> **5 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;
>
> (b) there is a sufficient prospect that the judgment will be registered in or enforced by the Court.

57. Those rules refer to a sufficient prospect that the Australian court will register or enforce the foreign judgment. For present purposes it is sufficient to say that registration of a foreign judgment is not always available.

58. The third *Siskina* constraint was that the existing long-arm service rules of court did not permit service of an application for a free standing freezing order in aid of foreign proceedings even through the respondent had assets within the jurisdiction. In *The Siskina* the Lords indicated that a more liberal long-arm service rule was a matter for the Rules Committee. The Australian solution has been to make a new long-arm service rule which permits service of an application for free standing freezing order relief in aid of foreign proceedings where the respondent has assets within the Australian jurisdiction. For example, Order 25A r 7 of the Federal Court Rules provides:

> **7 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.

59. It is notable that although the Australian rules might appear prescriptive, they include a rule that they do not diminish the inherent or implied jurisdiction of the court to make freezing orders.

60. The former Chief Justice of New South Wales, Spigelman CJ, considered that curial reciprocity enlivens the court's inherent jurisdiction to grant a free-standing freezing order in aid of foreign proceedings:

> Where the other court will in fact act in support of the Australian court then the Australian Court should itself reciprocate, in my opinion, even if it can point to no express statutory power. To put the matter more precisely this manifestation of the inherent jurisdiction should be recognised as a common law principle by reason of the significance of reciprocity in the international law of nations. It is a manifestation of the way the common law can develop to accord with principles of international law. [32]

61. Most of the cases on freezing orders in aid of foreign proceedings are English. The English Court of Appeal considered the exercise of the court's power under s 25 to grant worldwide Mareva relief in support of foreign proceedings in *Republic of Haiti v Duvalier*[33]; *Credit Suisse Fides Trust SA v Cuoghi*[34]; *Refco Inc v Eastern Trading Co*[35] and *Motorola Credit Corporation v Uzan.*[36]

62. The ratio decidendi of each of *Republic of Haiti* and of *Credit Suisse Fides Trust SA* expressed in Dicey, Morris & Collins on *The Conflict of Laws* are that:

> … the court granted world wide Mareva relief in support of proceedings in, respectively, France and Switzerland. In the former case the relief was effective because the defendants had solicitors in England who held assets for them abroad and in the latter case the defendant was domiciled in England. In each case therefore the fact that the court had no jurisdiction apart from s 25 (in the former case because the substance of the case had no relevant connection with England, and in the latter case because there were already proceedings in Switzerland) did not make it 'inexpedient for the court to grant' the relief within the meaning of s 25(2). [37]

63. *Credit Suisse* and *Refco* may be contrasted. In *Credit Suisse* the English court granted relief, which the foreign court seized of the substantive

32 J J Spigelman, "Freezing Orders in International Commercial Litigation", *Singapore Academy of Law Journal* (2010) Vol 22 490

33 [1990] 1 QB 202

34 [1998] QB 818

35 [1999] 1 Lloyd's Rep 159

36 [2004] 1 WLR 113

37 Dicey, Morris & Collins, *The Conflict of Laws*, 14th ed, Sweet & Maxwell, London, 2006, vol 1 [8-031].

proceeding had no jurisdiction to grant against a non-resident such as the respondent, but would have granted if the respondent had been resident within its jurisdiction. In *Refco*, the English court refused relief which the foreign court seized of the substantive proceedings would have refused even if the respondents were resident within its jurisdiction and had assets there.

64. *Motorola* was a case of alleged international fraud which had no substantive connection with England. The issue was whether a worldwide freezing order should be made under s 25 of the *Civil Jurisdiction and Judgments Act* 1982 (set out above) in support of an action in a foreign jurisdiction. The substantive proceedings brought by the claimant against the four respondents, who were members of a Turkish family, were pending in New York. The Court of Appeal upheld worldwide freezing and cross-examination orders against two of the respondents who had assets in England, one of whom was also resident in England. But the court set them aside against the other two respondents who did not have assets in England on the basis that it was 'inexpedient' to grant such relief when no sanction was available against them in the event of their disobedience.[38] The court held that there are five considerations which should be borne in mind when considering whether it is 'inexpedient' to make such an order:

> First, whether the making of the order will interfere with the management of the case in the primary court eg, whether the order is inconsistent with an order in the primary court or overlaps with it. That consideration does not arise in the present case. Second, whether it is the policy in the primary jurisdiction not itself to make world wide freezing/disclosure orders. Third, whether there is a danger that the orders made will give rise to disharmony or confusion and/or risk of conflicting inconsistent or overlapping orders in other jurisdictions, in

38 at [125]–[126]

> particular the courts of the state where the person enjoined resides or where the assets affected are located. If so, then respect for the territorial jurisdiction of that state should discourage the English court from using its unusually wide powers against a foreign defendant. Fourth, whether at the time the order is sought there is likely to be potential conflict as to jurisdiction rendering it inappropriate and inexpedient to make a world wide order. Fifth, whether in a case where jurisdiction is resisted and disobedience to be expected, the court will be making an order which it cannot enforce.[39]

65. The House of Lords in *Fourie v Le Roux*[40] held that provided the court has in personam jurisdiction over a respondent it has power to make a freezing order but that it is difficult to envisage a case where a without notice freezing order could be made in the absence of any formulation of the case for substantive relief that the applicant intended to institute.

66. In *Banco Nacional de Comercio Exterior SNC v Empresa de Telecommunicaciones de Cuba SA*[41], the claimant, a Mexican bank, obtained judgment in Italy against the defendant, a Cuban telecommunications company. When a large sum remained outstanding after enforcement proceedings in Italy, the claimant sought to enforce the judgment in England and some other European countries. It registered the Italian judgment as a judgment in England pursuant to an EC Council Regulation and obtained a domestic freezing order covering monies due to the respondent from others. The judge held that the claimant was not required to give the usual undertaking to comply with any order to compensate third parties who might suffer loss as a result of the order. The claimant subsequently applied for and was granted a world wide

39 at [115]

40 [2007] 1 WLR 320, [2007] 1 All ER 1087

41 [2008] 1 WLR 1936, [2007] EWCA Civ 662

freezing order in the standard terms, including the undertaking in respect of third party losses. Allowing the appeal, the Court of Appeal held:

(a) save in exceptional circumstances such as where the third party was not innocent, an applicant for a freezing order had to give the standard undertaking to abide by orders of the court in respect of third party losses caused by the order, whether the applicant sought the order pre or post judgment;

(b) the EC Council Regulation did not give the English court jurisdiction to grant a worldwide freezing order. The subject matter of the worldwide freezing order was not connected with the court's territorial jurisdiction since the respondent was not resident in England and its English assets were protected by the domestic freezing order. The Italian court did not grant worldwide freezing orders as a matter of policy. Given the multiplicity of enforcement proceedings in other member states there was a danger that continuation of the worldwide order would give rise to confusion and a possibility of overlapping orders in other member states. Therefore it was not expedient for the court to grant a worldwide order. Accordingly the court should have declined to exercise its jurisdiction to make a freezing order under s 25(1) of the *Civil Jurisdiction and Judgments Act* 1982.

67. *Mobil Cerro Negro Ltd v Petroleos De Venezuela SA*[42] concerned the conditions to be satisfied for grant of a freezing order in aid of foreign arbitration or litigation affecting assets not located in England. The respondent, Petroleos De Venezuela SA ('PDV'), was the national oil company of Venezuela. It applied successfully to discharge a worldwide freezing order which had been obtained by Mobil in the sum of $US 12 billion. The freezing order had been granted pursuant to s 44 of the *Arbitration Act* 1996 in support of an intended ICC arbitration in New York in which Mobil sought to enforce a contractual claim under a guarantee given by one of PDV's subsidiary companies. It was held that:

(a) although Mobil had a sufficiently arguable case that it had an accrued cause of action against PDV, it did not have a good arguable case that there was a real risk of dissipation of assets or that the case was one of urgency.

(b) the court would only be prepared to exercise its discretion to grant an application, in aid of foreign litigation or arbitration, for a freezing order affecting assets if the respondent or the dispute had a sufficiently strong link to England or, in cases not covered by the Brussels Convention, where there was some other factor of sufficient strength to justify proceedings in the absence of such a link. The presence of assets in England might in appropriate circumstances demonstrate a relevant link.

42 [2008] 1 Lloyds Rep 684, [2008] EWHC 532

(c) if PDV had no substantial assets in England, considerations of comity would point strongly against the grant of a freezing order. No allegation of fraud was made against PDV and there was no other factor of sufficient strength to justify proceeding in the absence of a relevant link with England.

(d) Mobil lacked a good arguable case that PDV had, or was the effective controller of, any substantial assets within the jurisdiction. Accordingly, the question whether the presence of such assets would make it appropriate to grant a worldwide freezing order did not arise.

68. In *ETI Euro Telecom International NV v Republic of Bolivia*[43], the plaintiff ('ETI'), a Dutch company, had a 50 per cent interest in E, a Bolivian telecommunications company. The Bolivian government nationalised E without compensation. ETI submitted an arbitration claim to the International Centre for Settlement of Investment Disputes ('ICSID') pursuant to a treaty between the Netherlands and Bolivia. ETI obtained an attachment order in aid of the arbitration in respect of E's bank deposits in New York and obtained, without notice, a freezing order in England pursuant to s 25 of the *Civil Jurisdiction and Judgments Act* over E's deposits held in London. It was held that the freezing order had not been made in relation to 'proceedings' in the New York court in the relevant sense required by s 25; that s 25 did not extend to the making of an order

43 [2009] 1 WLR 665, [2008] 2 Lloyd's Rep 421, [2008] EWCA Civ 880

in support of ICSID arbitrations; and that in any event it was 'inexpedient' within the meaning of s 25(2) to grant relief. Also Bolivia was entitled to immunity under the *State Immunity Act* 1978 and there was no independent basis for an order against ETI.

ANCILLARY ORDERS

69. The court has power to make all such ancillary orders as appear to the court to be just and convenient to ensure that the freezing order jurisdiction is effective to achieve its purpose: *AJ Bekhor & Co Ltd v Bilton.*[44]

70. Ancillary orders are given prominence in the harmonised rules of court where they are defined as follows (eg FCR O 25A r 5(3)):

> **3 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.

71. The following is a list of ancillary orders that have been made, but they are not necessarily all that can be made:

- disclosure of assets;
- cross-examination of a respondent about assets disclosure;
- specified assets to be delivered;
- respondent to direct its bank to disclose information to the claimant;

44 [1981] QB 923 at 940

- respondent to pay money into court or a designated account;
- restraining the respondent from leaving the jurisdiction for a period. For example, until compliance with an assets disclosure order and cross-examination thereon;
- appointment of a receiver to the respondent's assets.[45]
- transfer of assets from one foreign jurisdiction to another;
- a search (Anton Piller) order[46];
- a Norwich order (a free standing discovery order).[47].

Disclosure of Assets order

72. An ancillary disclosure of assets order is routinely made because disclosure of assets is generally critical to the efficacy of a freezing order. In the first place, disclosure of the assets upon which the freezing order operates makes it more difficult for a respondent surreptitiously to disobey the freezing order. Secondly, disclosure identifies third parties such as banks who have custody of the assets. This enables notice of the order to be given to them so as to bind them to the order. Third parties will be guilty of contempt of court if they knowingly assist a respondent to breach the order. Thirdly, disclosure may enable the freezing order to be framed by reference to specific assets rather than as a maximum sum order, thereby minimising oppression to the respondent, and unnecessary exposure of the applicant to risk under its undertaking as to damages.

45 Justice Peter Biscoe, *Freezing and Search Orders*, (2nd ed) 2008, LexisNexis Butterworths, Australia, Ch3

46 *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55

47 *Norwich Pharmacal Co v Commissioners of Customs Excise* [1974] AC 133 (HL)

Fourthly, disclosure assists an applicant to make a rational decision whether to continue its undertaking as to damages.

73. In the international context, asset disclosure orders are particularly important because of the capacity to hold databases in, and to transmit electronic databases rapidly, to safe jurisdictions.

74. So important may disclosure of assets be that a free-standing disclosure of assets order can be made where the assets are, or may, be the subject of an application for a freezing order: eg FCR 025A r 3, English Civil Procedure Rules 1998 r 25.1(1)(g). For example, a free standing disclosure of assets order was made prior to a freezing order in *Maclaine Watson & Co Ltd v International Tin Council (No 2)* [48] and *Witham v Holloway*[49].

75. Where the respondent's assets are all or mostly out of the jurisdiction, a freezing order may be essentially ancillary to a disclosure order, rather than vice versa. That is because the disclosure order should result in disclosure of the foreign jurisdictions in which the assets are located, thereby enabling the claimant to apply in those foreign jurisdictions for more effective freezing orders or alternative relief. That is what happened as a result of the disclosure of assets order in the notorious case of *Republic of Haiti v Duvalier*[50].

76. Ordinarily, a respondent should be required to disclose all assets. If the respondent can choose which assets to disclose, it may disclose those

48 [1989] 1 Ch 286 at 304

49 (1995) 183 CLR 525

50 [1990] 1 QB 202

that are the least available or accessible to the claimant for the purpose of execution: *Motorola Credit Corporation v Yuzan*[51]. However, it is open to a respondent to persuade a court that there is no need to disclose all assets because it can give full and frank disclosure of assets which are sufficient to satisfy the claim: *Shaw v Palmer*[52].

Foreign Banks

77. Notices of freezing orders are routinely given to banks where bank accounts are frozen. There are potential problems where such a bank is outside and not subject to the jurisdiction of the court that made the order. The imposition of liability upon the foreign bank for contempt of court, for failing to act to prevent breach of the order by the respondent, would be extraterritorial. A further problem is if the law of the foreign country to which the bank is subject or where the assets are located requires the foreign bank to deal with them in a different way from the freezing order. A solution has been found in the inclusion of provisos in world wide freezing orders which make it clear that they impose liability on foreign banks only to the extent that the orders are declared enforceable or enforced by a court that has jurisdiction over the foreign bank or its assets. I have discussed these matters elsewhere.[53]

51 [2004] 1 WLR 113 at 153

52 [2004] EWHC 388 (QB) at [18] – [19], [21]

53 Peter Biscoe, *Freezing and Search Orders*, 2nd ed 2008, LexisNexis Butterworths, Australia, [5.43] – [5.50]

APPENDIX

Australian harmonised rules of court and practice note including example form of ex parte freezing order (Federal Court of Australia)

Order 25A Freezing Orders

1 Interpretation

In this Order, unless the contrary intention appears:

ancillary order has the meaning given by rule 3.

another court means a court outside Australia or a court in Australia other than the Court.

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

freezing order has the meaning given by rule 2.

judgment includes an order.

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

2 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.

3 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.

4 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.

5 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; or

(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.

6 Jurisdiction

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

7 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.

8 Costs

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

(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.

FEDERAL COURT OF AUSTRALIA
Practice Note CM 9

FREEZING ORDERS
(Also known as "Mareva Orders" or "Asset Preservation Orders")

This Practice Note commences on 1 January 2010. It replaces *Practice Note No CM 9 – Freezing Orders* issued on 25 September 2009.

1. This Practice Note supplements Order 25A of the Federal Court Rules 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 Order 25A have the meanings given to them in that Order.

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 date 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 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 example form provides for such an order in para 8 and for the privilege against self-incrimination in para 9. Section 128A of the *Evidence Act 1995* (Cth), *Evidence Act 1995* (NSW) and the *Evidence Act 2008* (Vic) govern, within those jurisdictions, objection to compliance on the self-incrimination ground. In particular

subsections (3)ff of s 128A govern the procedure to be followed after objection is taken in accordance with para 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 [e.g. FCR O 37 r 2, NSW UCPR Pt 40 r 7, Victoria SCR O 66 r 10].

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 rule 5 of the Freezing Orders rules of court (Order 25A); 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.

M E J BLACK
Chief Justice
22 December 2009

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[54].

THE COURT ORDERS:

INTRODUCTION

1. (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*][55].

2. Subject to the next paragraph, this order has effect up to and including [*insert date*] ('**the Return Date**'). On the Return Date at [*insert time*] am/pm there will be a further hearing in respect of this order before Justice [*insert name of Judge*][56].

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.

4. In this order:
   (a) 'applicant', if there is more than one applicant, includes all the applicants;
   (b) 'you', where there is more than one of you, includes all of you and includes you if you are a corporation;
   (c) 'third party' means a person other than you and the applicant;
   (d) '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.

54 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.

55 Paragraph 1 is appropriate only in the case of an ex parte order.

56 Paragraph 2 is appropriate only in the case of an ex parte order.

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:

(i) the property known as [*title/address*] or, if it has been sold, the net proceeds of the sale;

(ii) 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

(iii) 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[57]

8. Subject to paragraph 9, you must:
   (a) at or before the further hearing on the Return Date (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.

57 See Practice Note paragraph 14.

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 Date.

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 of the terms of this order; and
        (iii) any other person (including a bank of 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 application for this order for hearing on the return date;
   (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[58] the applicant will promptly take all reasonable steps to inform in writing anyone to 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:

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

(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.][59]

59 See Practice Note paragraph 17.

SCHEDULE B[60]

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]

60 Schedule B is appropriate only in the case of an ex parte order.