



Freezing Orders/Mareva Orders

13 Wentworth Selborne Chambers

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Basic principles and history

1. A freezing order is defined in the *Uniform Civil Procedure Rules 2005* (NSW) (*UCPR*) as an 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.¹
2. It 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.² The purpose of a freezing order is to prevent a defendant or a third party from disposing of her assets, including claims and expectancies, so as to frustrate or inhibit the process of the court by depriving the plaintiff of the fruits of any judgment obtained in the action.³ It is not the purpose of freezing orders to create security for the plaintiff, nor to require a defendant to provide security as a condition of being allowed to defend the action. Nor should a freezing order introduce a new vulnerability to imprisonment for debt or alleged

¹ UCPR rr 25.10 and 25.11(1).

² UCPR r 25.11(2).

³ *Jackson v Sterling Industries Limited* (1987) 162 CLR 612 at 625; UCPR r 25.11 and Practice Note SC Gen 14 at [5].

indebtedness by requiring a defendant to find money under the duress of the threat of contempt.⁴

3. A freezing order operates in personam. It does not deprive the party subject to its restraint either of title to, or possession of, the assets to which the order extends, and it does not improve the position of the claimants in an insolvency of the judgment debtor.⁵ The sole concern of the court is to provide reasonable measures to ensure that the processes of the court are not frustrated by removal from the jurisdiction, dissipation or misapplication of assets which will be available to meet any eventual judgment.⁶
4. Nevertheless, a freezing order is a drastic remedy (which should not be granted lightly)⁷ because it is bound to have a significant impact on the property of the person against whom it is made, operating in a practical sense as a very tight “negative pledge”.⁸
5. The first freezing order was granted in 1975 by the English Court of Appeal in *Nippon Yusen Kaisha v Karageorgis*⁹ and the jurisdiction to grant freezing orders was shortly afterwards confirmed in the case which provided the original name for freezing orders, *Mareva Compania Naviera SA v International Bulkcarriers SA (The Mareva)*.¹⁰ In those cases freezing orders were made against foreign-based defendants to restrain them from removing assets from the English court’s jurisdiction.¹¹ However, freezing orders were soon extended to operate against local residents and in restraint of not only the removal of assets from the jurisdiction, but also of the dissipation of such assets within the jurisdiction of the court.¹²

⁴ *Jackson v Sterling Industries Limited* (1987) 162 CLR 612 at 625.

⁵ *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 403.

⁶ *Goumas v McIntosh* [2002] NSWSC 713.

⁷ *Frigo v Culhaci* [1998] NSWCA 17 at [6].

⁸ *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 403.

⁹ [1975] 1 WLR 1093; 3 All ER 282.

¹⁰ [1975] 2 Lloyd’s Rep 509.

¹¹ *Nippon Yusen Kaisha v Karageorgis* [1975] 1 WLR 1093; *Mareva Compania Naviera SA v International Bulkcarriers SA (The Mareva)* [1975] 2 Lloyd’s Rep 509.

¹² *Barclay-Johnson v Yuill* [1980] 1 WLR 1259; *Rahman (Prince Abdul) v Abu-Taha* [1980] 1 WLR 1268, referred to in the judgment of Gaudron J in *Jackson v Sterling Industries Limited* (1987) 162 CLR 612 at 637.

6. Jurisdiction to make freezing orders in Australia was confirmed by the decision of the High Court of Australia in *Jackson v Sterling Industries Limited*.¹³ In that case Deane J¹⁴ accepted that in Australia as a general proposition a court can grant a freezing order if circumstances are such that there is a danger of the defendant absconding or a danger of the defendant's assets being removed from the jurisdiction or disposed of within the jurisdiction, or otherwise dealt with so that there is a danger that a successful plaintiff will not be able to have her judgment satisfied.¹⁵
7. In *Jackson v Sterling Industries Limited* and subsequently¹⁶, the High Court has held that the Federal Court's power to make a freezing order is derived from s 23 of the *Federal Court of Australia Act 1976 (Cth)*.¹⁷ The power to make freezing orders is as an incident of the substantive jurisdiction to entertain the action.¹⁸ Deane J described it as part of the armoury of a court of law and equity to prevent the abuse or frustration of its process in relation to matters coming within its jurisdiction.¹⁹ It is a doctrine developed by courts of equity to protect the integrity of the court's processes once set in motion.²⁰
8. Consistent with the High Court's reasoning, the Supreme Court of New South Wales' jurisdiction to make freezing orders comes from its inherent jurisdiction or s 23 of the *Supreme Court Act 1970*,²¹ which provides, that the court "shall have all jurisdiction which may be necessary for the administration of justice in New South Wales".

¹³ (1987) 162 CLR 612.

¹⁴ With whom Mason, Wilson and Dawson JJ agreed.

¹⁵ *Jackson v Sterling Industries Limited* (1987) 162 CLR 612 at 623 per Deane J citing with approval Lord Denning MR in *Rahman (Prince Abdul) v Abu-Taha* [1980] 1 WLR 1268 at 1273 which was approved in *Ballabil Holdings Pty Ltd v Hospital Products Ltd* (1985) 1 NSWLR 155 at 160 per Street CJ.

¹⁶ *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 393.

¹⁷ Section 23 provides: "The Court has power, in relation to matters in which it has jurisdiction, to make orders of such kinds, including interlocutory orders, and to issue, or direct the issue of, writs of such kinds, as the Court thinks appropriate."

¹⁸ *Jackson v Sterling Industries Limited* (1987) 162 CLR 612 at 622.

¹⁹ *Jackson v Sterling Industries Limited* (1987) 162 CLR 612 at 623.

²⁰ *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 399.

²¹ *Pathways Employment Services Pty Ltd v West* (2004) 212 ALR 140 per Campbell J citing *Riley McKay Pty Ltd v McKay* [1982] 1 NSWLR 264 and *Ballabil Holdings Pty Ltd v Hospital Products Ltd* (1985) 1 NSWLR 155.

9. A freezing or ancillary order 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).²²

Uniform procedure

10. In 2006 the Harmonisation of Discovery Rules Committee²³ agreed on uniform rules and a uniform practice note in respect of freezing orders, which in New South Wales are now contained in UCPR Pt 25 Div 2 and Practice Note SC Gen 14.²⁴ The rules apply to the Supreme Court and the District Court,²⁵ and among other things they confirm the District Court's jurisdiction to make a freezing order although they do not expand that jurisdiction.²⁶ There is no power to make freezing orders in the Local Court,²⁷ however, the Supreme Court could make a freezing order in respect of a Local Court judgment or a cause of action being pursued in the Local Court.²⁸
11. The Supreme Court's Practice Note SC Gen 14,²⁹ is said to supplement the rules relating to freezing orders. It addresses (among other things) the Supreme Court's usual practice relating to the making of a freezing order and the usual terms of such an order. Although the District Court has not issued a similar practice note, Practice Note SC Gen 14 should be followed in any application in that court as far as it is applicable.³⁰

²² UCPR r 25.11(2); *Ballabil Holdings Pty Ltd v Hospital Products Ltd* (1985) 1 NSWLR 155; Practice Note SC Gen 14 at [8]. This was contrary to restrictions that had been expressed in *Owners of Cargo on board the Siskina v Distos Compania Naviera SA (The Siskina)* [1979] AC 210.

²³ Which consisted of representatives of each of the jurisdictions of the States and the Federal Court.

²⁴ The uniform rules have been adopted with necessary variations by the Federal Court: *Federal Court Rules* O25A; the Australian Capital Territory Supreme Court: *Court Procedure Rules 2006*, subdiv [2.9.4.2], the Supreme and County courts of Victoria: *Supreme Court (General Civil Procedure) Rules 2005*, O37A and *County Court Rules of Procedure in Civil Proceedings 1999*, Ch 1 O37A; and the *Supreme Court of Tasmania Supreme Court Rules 2000*, Pt 36 Div 1A. In Western Australia the practice note, but not the rules, has been adopted. Queensland and South Australia have not adopted the uniform rules.

²⁵ UCPR r 25.1.

²⁶ *Civil Procedure Act 2005* (NSW), s 5(1). For the extent of the District Court's jurisdiction to grant a freezing order, see *Pelechowski v Registrar, Court of Appeal* (1999) 198 CLR 435.

²⁷ Part 25.1 confines the operation of Pt 25 of the UCPR to the District and Supreme courts.

²⁸ UCPR r 25.14(b)(ii); see [7.40] below.

²⁹ This Practice Note, which commenced on 14 June 2006, applies to the Court of Appeal and to the Common Law and Equity Divisions of the Supreme Court.

³⁰ The *District Court Act 1973*, s 46(2)(c) stipulates that in relation to the power of the District Court to grant any injunction which the Supreme Court might have granted: "The practice and procedure of the Court shall, so far as practicable and subject to this Act and the rules, be the same as the practice and procedure of the Supreme Court applicable in the like circumstances."

12. Nothing in the uniform rules diminishes the inherent, implied or statutory jurisdiction of the court to make a freezing order or ancillary order if the court considers it in the interest of justice to do so.³¹

When to apply for a freezing order

13. Applications for freezing orders can be made at any stage of the proceedings, including before proceedings are commenced,³² and after judgment. The application is normally made by notice of motion, either in existing proceedings or, more usually, at the time of commencement of the proceedings. The notice of motion must be accompanied by an affidavit setting out in admissible form the matters in support of the application.

Ex parte application

14. Applications for freezing orders are often urgent and made in circumstances where there is a concern that the respondent will seek to dissipate assets if given notice of the application. Accordingly, applications seeking freezing orders are often filed in court before the duty judge and at that stage the plaintiff will either seek the freezing order on an ex parte basis or seek short service of the notice of motion to have it heard urgently.
15. Exceptional circumstances are needed before a court will make an order against a person without giving them a chance to be heard, however, applications for freezing orders are a classic illustration of where it is often necessary to make orders ex parte in order to avoid those orders being defeated by prior notice.³³
16. Where the application is made ex parte, it should be made by a motion filed at the same time as the originating process seeking final relief. In cases of extreme urgency the application may be made before the originating process is filed and in those circumstances, the affidavit in support of the application must set out the basis of the claim against the respondent in sufficient detail for the court to understand it.
17. An application for an ex parte freezing order should be made to the duty judge in the division in which the proceedings have been commenced or are to be

³¹ UCPR rr 25.14(6) and 25.15.

³² UCPR rr 6.1 and 25.2(c).

³³ *Re Elm* [2006] NSWSC 1137 per Brereton J.

commenced.³⁴ The application should seek that the orders are made and entered forthwith. 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 has the opportunity to be heard. For this to be done, the time for service of the motion should be abridged. When the matter next comes before the court the applicant then bears the onus of satisfying the court that the order should be continued or renewed.³⁵

18. 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, including 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.³⁶ In many cases it is appropriate to give the other side notice of the application even though no summons has been filed and served. In those circumstances if the other side declines to turn up to court (as they are entitled to) the application is still classed as ex parte and the applicant is subject to the duty to make full and frank disclosure.
19. Practice Note SC Gen 14 contains an example of an ex parte order, which has been reproduced in full at Appendix A to this paper.
20. Courts with power to grant freezing orders also have power to grant orders ancillary to freezing orders such as an order requiring the disclosure by a defendant of his assets.³⁷ That power is recognised in UCPR r 25.12,³⁸ which provides that the court may make such an order as the court considers appropriate.³⁹

³⁴ UCPR r 25.2.

³⁵ Practice Note SC Gen 14 at [9].

³⁶ *Frigo v Culhaci* (unreported, New South Wales Court of Appeal, Mason P, Sheller JA and Sheppard AJA, 17 July 1998); *Westpac Banking Corporation v McArthur* [2007] NSWSC 1347; Practice Note SC Gen 14 at [19].

³⁷ *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 622 per Deane J, with whom Mason, Wilson, Brennan and Dawson JJ agreed on this point; *Vasil v National Australia Bank Ltd* (1999) 46 NSWLR 207. For a further discussion on possible ancillary orders see Biscoe P, *Mareva and Anton Piller Orders: Freezing and Search Orders* (LexisNexis Butterworths Australia, 2005).

³⁸ Order 25A, r 3 is the equivalent Federal Court rule.

³⁹ UCPR r 25.12(1).

21. The most common example of an ancillary order is an order for disclosure of assets.⁴⁰ Normally, the court orders the respondent to swear an affidavit of assets (see appendix A at [8]). In an exceptional case, the applicant may be granted leave to cross-examine on that affidavit.⁴¹
22. Ancillary orders are subject to an individual respondent's right to claim privilege against self incrimination.⁴² If the individual respondent wishes to claim privilege against self incrimination, he or she must file a notice of motion pursuant to the *Civil Procedure Act 2005* (NSW), s 87, applying to revoke the order made. That section provides for a procedure whereby, in certain circumstances, the respondent may give the evidence concerning his or her assets and receive a certificate which prevents the evidence being used against the person in proceedings in New South Wales.⁴³ The court has created standard orders to deal with a claim for privilege against self incrimination (see appendix A at [9]).
23. If the respondent files a notice of motion claiming privilege against self incrimination, he or she need only comply with the order to extent that it is possible without disclosure of the material which may tend to prove that the respondent has engaged in incriminating conduct, until the motion is determined.
24. There are other less common ancillary orders,⁴⁴ such as:
 - a. An order for the delivery up (to a named solicitor) of designated assets which were not specifically in issue in the proceedings.⁴⁵
 - b. An order directing the respondent to require his or her bank to disclose information to the applicant.

⁴⁰ UCPR r 25.12(2)(a), Practice Note SC Gen 14 at [14]; *Pathways Employment Services Pty Ltd v West* (2004) 212 ALR 140 per Campbell J citing *House of Spring Gardens Ltd v Waite* [1985] FSR 173; *Kodak (Australasia) Pty Ltd v Cochran* (unreported, Supreme Court of New South Wales, Brownie J, 4 April 1996) and *Planet International Ltd v Garcia (No 2)* [1991] 1 Qd R 426.

⁴¹ *Den Norske Bank ASA v Antonatos* [1999] QB 271; *Deputy Commissioner of Taxation v Hickey* (1996) 33 ATR 453.

⁴² *Pathways Employment Services Pty Ltd v West* (2004) 212 ALR 140.

⁴³ See *Evidence Act 1995* (NSW), ss 128 and 133.

⁴⁴ Discussed in more detail in Biscoe P, *Mareva and Anton Piller Orders: Freezing and Search Orders* (LexisNexis Butterworths Australia, 2005), chapter 3.

⁴⁵ *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612; see also *Ballabil Holdings Pty Ltd v Hospital Products Ltd* (1985) 1 NSWLR 155.

- c. An order that the respondent restores or pays money to a designated account or into court.
- d. An order restraining the respondent from departure from the jurisdiction and in extreme cases delivery up of their passport.
- e. An order for the appointment of a receiver.

Freezing orders against judgment debtors and prospective judgment debtors

- 25. “Freezing orders” and “ancillary orders” are available against judgment debtors, prospective judgment debtors and third parties (as to which see paragraph 33 below).⁴⁶
- 26. The court will make a freezing order where judgment has been given in favour of the applicant by the court.⁴⁷ It is also possible to get freezing orders in support of judgments in favour of the applicant granted by other courts outside New South Wales both within and outside Australia,⁴⁸ if there is a sufficient prospect that the judgment will be registered in or enforced by the court.⁴⁹
- 27. The requirements that must be proved to obtain a freezing order against a prospective judgment debtor are contained within UCPR r 25.14(b).⁵⁰ The court will only grant a freezing order against a prospective judgement debtor: where an applicant has a good arguable case on an accrued or prospective cause of action that is justiciable in the court; or in another court and there is a sufficient prospect that the judgment will be registered in or enforced by the court. The court enquires whether the applicant for the order has a good arguable case on legal as well as factual matters.⁵¹

⁴⁶ UCPR r 25.14.

⁴⁷ UCPR r 25.14(1)(a)(i).

⁴⁸ UCPR r 25.14(1)(a)(i).

⁴⁹ UCPR r 25.14(2).

⁵⁰ Which is largely the same as the previous test outlined in *Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319 per Gleeson CJ at [321] cited by Brereton J in *Harrison Partners Construction Pty Ltd v Jevana Pty Ltd* [2005] NSWSC 1225.

⁵¹ *Davis v Turning Properties Pty Ltd* [2005] 222 ALR 676 at 687.

28. The expression “good arguable case” was discussed by Mustill J (as his Lordship was) in *Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft and Co KG (The Niedersachsen)*,⁵² where his Lordship concluded:

“I consider that the right course is to adopt the test of a good arguable case, in the sense of a case which is more than barely capable of serious argument, and yet not necessarily one the judge considers would have better than a 50% chance of success.”

29. If an applicant is a judgment creditor, or a prospective judgment creditor that has satisfied the court that he has a good arguable case, the next step is to determine whether there is a risk that the judgment or prospective judgment will remain wholly or partly unsatisfied, because one of the matters prescribed by the rules apply. UCPR r 25.14 (4) provides:

“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.”

30. An applicant for a freezing order does not have to show a positive intention on the part the respondent to frustrate any judgment of the court.⁵³ It is sufficient that there is a danger that assets will be dealt with in a way which will in fact

⁵² [1984] 1 All ER 398 at 404; applied in *Errigal Ltd v Equatorial Mining Limited* [2006] NSWSC 953 per White J; *Westpac Banking Corporation v McArthur* [2007] NSWSC 1347 per Barrett J.

⁵³ *Harrison Partners Construction Pty Ltd v Jevana Pty Ltd* [2005] NSWSC 1225 Brereton J.

prevent the applicant from recovering on any judgment,⁵⁴ such as a proposed investment of the defendant's sole remaining asset in a bona fide but speculative business venture.⁵⁵

31. The applicant for a freezing order must demonstrate by evidence rather than 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 proceeding.⁵⁶ There is no reason in principle why the evidence which is relevant to establishing that the applicant has a prima facie case might not also have a bearing on whether there is a risk of dissipation of assets. This will especially be so where the prima facie case that is made out against a defendant is one of serious dishonesty involving diversion of money from its proper channels.⁵⁷
32. In determining an application for a freezing order, there is no need for the case to be made out in some special way, rather it must be proved on the balance of probabilities in the way and to the extent that is usual in interlocutory applications for restraint generally.⁵⁸

Freezing orders against third parties

33. In *Cardile v LED Builders Pty Ltd*,⁵⁹ the High Court held that a court *may* make a freezing order against a third party, against whom no relief was being sought in the substantive proceedings. This power is confirmed by UCPR r 25.13. The principles outlined by the majority⁶⁰ in *Cardile* as to when a freezing order may be made against a third party have now been adopted in UCPR r 25.14(5), which provides that a court may make a freezing order or an ancillary order or both against 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:*

⁵⁴ *Patterson v BTR Engineering (Aust) Limited* (1989) 18 NSWLR 319 at 321; *Beach Petroleum NL v Johnson* (1992) 9 ACSR 404 at 406; *Cardile v LED Builders Pty Limited* (1999) 198 CLR 380 at 389.

⁵⁵ *Harrison Partners Construction Pty Ltd v Jevena Pty Ltd* [2005] NSWSC 1225 per Brereton J relying on dicta in *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380.

⁵⁶ *Frigo v Culhaci* [1998] NSWSC 393.

⁵⁷ *Patterson v BTR Engineering* (1989) 18 NSWLR 319 at 326.

⁵⁸ *Frigo v Culhaci* [1998] NSWSC 393.

⁵⁹ (1999) 198 CLR 380.

⁶⁰ Gaudron, McHugh, Gummow and Callinan JJ at 405-406.

(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.”*

34. UCPR r 25.14(5) is said to address the minimum requirements that must ordinarily be satisfied on an application for a freezing order against a third party before the discretion is enlivened.⁶¹ It is in addition to the court’s jurisdiction to make orders against third parties pursuant to the court’s inherent jurisdiction.⁶²
35. When seeking relief against a person, against whom no relief is being sought in the substantive proceedings, that person should be a respondent to the motion seeking the freezing order.⁶³

Discretionary considerations

36. Once a court has decided that it has jurisdiction to grant a freezing order, it must then consider whether as a matter of discretion the case is an appropriate one in which to grant the order.⁶⁴ The court’s discretion is confirmed in the terms of UCPR r 25.14, which provides that the court “*may*” make a freezing order if the requirements of that rule are satisfied.

⁶¹ Practice Note SC Gen 14 at [17].

⁶² *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 401.

⁶³ UCPR r 18.3(b).

⁶⁴ *Davis v Turning Properties Pty Ltd* (2005) 202 ALR 676 at 687.

37. The factors that should be considered in exercising the discretion include: the strength of the applicant's case weighed against other factors relevant to the discretion;⁶⁵ any hardship to the respondent and whether orders can be molded in a way which will minimise the hardship to the defendant; whether the applicant proceeded diligently and expeditiously; and whether a money judgment has been recovered in the proceedings.⁶⁶
38. In proceedings against third parties it is relevant to consider whether proceedings are available against the third party and if so why they have not been taken. If proceedings have not been taken the court should consider making any order conditional on proceedings being commenced.⁶⁷
39. Ultimately, however, the exercise of the discretion is not in any way limited and will depend on all of the circumstances of each case.

Affidavit in support of the application

40. If the application is in support of a judgment, the affidavits relied on in support of the application for a freezing or ancillary order should set this out. If no judgment has been obtained, the affidavit in support of the application should contain the following information about the cause of action.⁶⁸
 - a. The basis of the claim for substantive relief so as to demonstrate a good arguable case.
 - b. The amount of the claim.
 - c. If the application is without notice to the respondent—any possible defence or other response to the claim.⁶⁹
41. Every application should be supported by evidence which shows the nature and value of the respondent's assets, so far as they are known to the applicant, within and outside Australia, and so far as it is applicable:

⁶⁵ *Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft and Co KG* [1984] 1 All ER 398 at [403] per Mustill J.

⁶⁶ *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 404.

⁶⁷ *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 404.

⁶⁸ Practice Note SC Gen 14 at [20].

⁶⁹ See [7.30].

- a. That the judgment debtor, prospective judgment debtor or another person has absconded or is likely to abscond.
- b. That the assets of the respondent are or are likely to be removed from Australia.
- c. That the assets of the respondent have been or are likely to be disposed of, or dealt with in a way that will diminish their value.
- d. The identity of anyone, other than the respondent, who the applicant knows or believes may be affected by the order, and how the person may be affected.

Order in support of judgment or prospective judgment in another court

42. Pursuant to UCPR r 25.14(3), freezing orders may be made in support of a prospective judgment in a court outside New South Wales (including courts outside Australia) 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.”*

43. Before the introduction of UCPR r 25.14(3) Campbell J⁷⁰ made a freezing order in support of a freezing order obtained in the Bahamas. This was despite no substantive proceedings having been commenced in the Bahamas and where there was no prospect of the Bahamas’ freezing order being registered in New South Wales. He made the order on the basis that there was a strong prima facie case of fraud against a principal of the defendant and it was likely that substantive proceedings would be commenced in the Bahamas against that principal. He considered that the freezing order was justified because if those proceedings were successful, either an administrator of the principal’s estate or a receiver of his assets would have the practical power to reach the defendant’s

⁷⁰ *Davis v Turning Properties* (2005) 222 ALR 676.

assets in New South Wales by applying for an order that the defendant be wound up in New South Wales.⁷¹

Service outside of Australia

44. The rules now provide for a long arm service rule.⁷² Under the rules an application for a freezing order or an ancillary order may be served on a person who is outside Australia if any of the assets to which the order relates are within the jurisdiction of the court.⁷³

The form of the order

45. Once the court has decided that a freezing order is appropriate, the court must decide what the precise terms of the order are to be. Because of the drastic nature of freezing orders, the orders should be formulated in the most restrained way possible to achieve their purpose. The following principles should be applied in formulating appropriate orders:

- a. A freezing order should reserve liberty for the respondent to apply on short notice.⁷⁴
- b. The value of the unencumbered assets covered by a freezing order should not exceed the likely maximum amount of the applicant's claim, including interest and costs.⁷⁵
- c. Generally, the order should not stop the respondent from dealing with its assets for legitimate purposes,⁷⁶ in particular:
 - i. payment of ordinary living expenses;
 - ii. payment of reasonable legal expenses;

⁷¹ At [42] relying upon *White v Verkouille* (1989) 2 Qld R 191.

⁷² Described that way in Practice Note SC Gen 14.

⁷³ UCPR r 25.16.

⁷⁴ Practice Note SC Gen 14 at [10]; an application by the respondent to discharge or vary a freezing order will normally be treated by the Court as urgent.

⁷⁵ Practice Note SC Gen 14 at [11]. 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).

⁷⁶ *Frijo v Cullaci* (unreported, New South Wales Court of Appeal, Mason P, Sheller JA and Sheppard AJA, 17 July 1998) citing *Clark Equipment Credit of Australia Ltd v Como Factors Pty Ltd* [1988] 14 NSWLR 552 at 569; *Glenwood Management Group Pty Ltd v Mayo* [1991] 2VR 49 at 55-56; *Westpac Banking Corporation v McArthur* [2007] NSWSC 1347.

- iii. dealings and dispositions in the ordinary and proper course of the respondent's business, including paying business expenses bona fide and properly incurred; and
 - iv. dealings and dispositions in the discharge of obligations bona fide and properly incurred under a contract entered into before the order was made.⁷⁷ (See appendix A at [10]-[12].)
- d. Where a freezing order extends to assets outside Australia, the order should provide for the protection of persons outside Australia and third parties (see appendix A at [17]).⁷⁸
- e. The order to be served should be endorsed with a penal notice which warns that the person is liable for committal or sequestration⁷⁹ (see Penal Notice in appendix A).

Undertaking as to damages and other undertakings

46. Freezing orders should be supported by an undertaking as to damages.⁸⁰ If the court through oversight does not seek an undertaking as to damages, it is counsel's duty to inform the court that an undertaking as to damages is the normal price of an injunction.⁸¹ The court may require other undertakings from the applicant such as the examples set out in Schedule A to appendix A.
47. The "usual undertaking as to damages" is defined in UCPR r 25.8 as:

"[A]n 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 addressed 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."

⁷⁷ Practice Note SC Gen 14 at [12].

⁷⁸ Practice Note SC Gen 14 at [13].

⁷⁹ It must meet the requirements of UCPR r 40.7; Practice Note SC Gen 14 at [18].

⁸⁰ *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 401; Practice Note SC Gen 14 at [16].

⁸¹ *Frigo v Culhaci* (unreported, New South Wales Court of Appeal, Mason P, Sheller JA and Sheppard AJA, 17 July 1998).

48. 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.⁸² There is provision for such security in the example form of freezing order (see Schedule A at [8] to appendix A).

Costs

49. The court has a broad discretion as to the cost order that it makes in applications for freezing orders, including making orders in respect of any person affected by a freezing order or ancillary order.⁸³ Costs are often reserved with the effect that the right to costs of the freezing order application is determined after the substantive rights are determined.

⁸² Practice Note SC Gen 14 at [17].

⁸³ UCPR r 25.17.

APPENDIX A

Example form of freezing order taken from Supreme Court Practice Note SC Gen 14

GENERAL FORM OF 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.

OTHER MATTERS: 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.⁸⁴

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

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]*.⁸⁵

⁸⁴ The words “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.

⁸⁵ Paragraph 1 is appropriate only in the case of an ex parte order.

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*].⁸⁶
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.

And if you are ordered to do or not to do something you must do it or 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.

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 assets⁸⁷ 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.

⁸⁶ Paragraph 2 is only appropriate in the case of an ex parte order.

⁸⁷ If the freezing order is against a third party and only seeks to freeze the assets of another person in the third party’s possession, custody or control (but not ownership), the order 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 (for example, “*John Smith’s assets*”, “*in John Smith’s name*”).

[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 INFORMATION⁸⁸

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,

⁸⁸ See [7.35].

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 that compliance with paragraph 8 may tend to incriminate you or make you 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 that compliance may tend to incriminate them respectively or make them respectively liable to a civil penalty;
 - (c) You must, at or before the further hearing on the return date (or within such further time as the court may allow), notify the applicant in writing that you or all the persons referred to in (b) wish to take such objection and identify the extent of the objection;
 - (d) If you give such notice, you need comply with paragraph 8 only to the extent, if any, that it is possible to do so without disclosure of the material in respect of which the objection is taken; and
 - (e) If you give such notice, the court may give directions as to the filing and service of affidavits setting out such matters as you or the persons referred to in (b) wish to place before the court in support of the objection.

EXCEPTIONS TO THIS ORDER

10. This order does not prohibit you from:
- (a) paying [up to \$..... a weekday 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 to subsection (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.⁸⁹

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 worldwide 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

⁸⁹ This paragraph is only applicable to an ex parte order.

- (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 effect⁹⁰ 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:
 - (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.]⁹¹

⁹⁰ For example, if the respondent pays money into court or provides security, as provided for in [12] of this Order.

⁹¹ Practice Note SC Gen 14 at [17].

SCHEDULE B⁹²

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]

⁹² Schedule B is appropriate only in the case of an ex parte order.