

Freezing injunctions in the Cayman Islands

Briefing Summary: The Grand Court of the Cayman Islands ("**Cayman Court**") can grant a freezing injunction: in connection with underlying proceedings brought in the Cayman Islands (whether issued or contemplated); or in relation to proceedings which have been or are to be commenced in a foreign court, which are capable of giving rise to a judgment that may be enforced in the Cayman Islands.

Service Area: Dispute Resolution and Litigation, Commercial Litigation, Corporate Disputes, Fraud and Asset Tracing

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Test for a freezing injunction

To obtain a freezing injunction in the Cayman Islands, the applicant must satisfy certain criteria:

- **Good arguable case:** The applicant must demonstrate a good arguable case against the respondent. This means that the claim must be more than merely speculative. The requirement for a "good arguable case" has been explained as needing to show a serious issue to be tried, a case that would resist a summary judgment application, or one that is more than barely capable of serious argument but not necessarily one with more than a 50% chance of success.
- **Risk of dissipation:** There must be a real risk that the respondent will dissipate their assets, making it difficult to enforce a future judgment. This risk must be more than theoretical; there should be concrete evidence suggesting that the respondent might take steps to move or hide assets to avoid satisfying a future judgment. Factors indicating a risk of dissipation include the respondent's history of asset dissipation or fraudulent behavior, financial instability, or evidence of transferring assets to jurisdictions where enforcement would be difficult.
- **Just and convenient:** The Cayman Court must be convinced that it is just and convenient to grant the injunction. This involves balancing the potential harm to the applicant if the injunction is not granted against the harm to the respondent if it is.

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Particularly due to the inherent risk of dissipation, an application for a freezing injunction is typically made *ex parte*, meaning without notice to the respondent, to prevent the respondent from moving assets before the injunction is granted. When making the application before the Cayman Court, the applicant has a duty of full and frank disclosure (and fair presentation), including any facts that might be unfavourable to their case. The respondent may be able to set aside the freezing order if the applicant breaches this duty of full and frank disclosure.

Form of freezing order

The freezing order operates in *personam* against a respondent, although it is not necessary to specify particular assets in a freezing order, it is usually sensible, proportionate and more effective to do so where possible. The relevant assets can include anything of value including intangibles, choses in action such as bank accounts and debts together with shares and goodwill in businesses.

The standard and usual form of freezing order is a “maximum sum order” where the threshold amount stated in the order usually reflects the amount of the underlying claim.

The standard form of freezing order includes assets which the respondent has power to deal with as if they were the respondent’s own and this may include assets which are formally owned or controlled by a third party but are dealt with in accordance with the respondent’s instructions.

The Grand Court Rules provide standard forms of freezing order which can be amended as necessary and a comparison as against the standard form is usually provided to the Cayman Court as part of the application for the grant of a freezing order.

Fortifying cross-undertakings in damages

When a freezing injunction is granted, the applicant is usually required to provide a cross-undertaking in damages. This undertaking is a promise to compensate the respondent for any loss suffered as a result of the injunction if it is later found to have been wrongly granted.

To ensure that the applicant can fulfill this undertaking, the Cayman Court may require the applicant to fortify their cross-undertaking. This can involve making a payment into court or providing other forms of security. The purpose is to protect the respondent from potential undue financial harm and to ensure that there are sufficient assets available to meet any compensation order made.

Effect of a freezing injunction

Case law repeatedly emphasises that although it is not the purpose of a freezing order to provide any interest in or security over frozen assets, its specific purpose is to prevent a defendant from rendering any judgment unenforceable.

Although the freezing order takes effect in *personam* against the respondent, once its existence and terms are notified to third parties, they may be guilty of contempt of court if they knowingly help or permit the breach of the order or they intentionally frustrate the achievement of the purpose of the order whether or not the respondent is in breach.

For example, where banks are notified of the existence of a freezing order, they should not permit payments to be made from the respondent's frozen accounts unless it is within the terms of, or an exception to, the order.

Applications for the preservation of assets

In addition to freezing injunctions, the Cayman Court can grant other orders to aid asset preservation. These include:

- **Norwich Pharmacal orders:** These orders compel third parties to disclose information that can help identify and locate assets.
- **Anton Piller orders:** These are search orders that allow the applicant to enter the respondent's premises to search for and seize evidence.
- **Bankers Trust orders:** These orders require banks to disclose information about the respondent's accounts.

These orders can prove crucial in cases where the respondent's assets are hidden or difficult to trace. They help ensure that the respondent's assets are accurately disclosed or discovered so they can be preserved and available to satisfy a future judgment.

Applications for security for costs

Security for costs is another important tool in Cayman Islands litigation. It protects defendants from the risk of being unable to recover their legal costs if they successfully defend the claim.

Under Order 23 of the Grand Court Rules, a defendant can apply for an order requiring the plaintiff to provide security for the defendant's costs. This is particularly relevant when the plaintiff is resident outside the jurisdiction or is otherwise unlikely to be able to pay the defendant's costs if ordered to do so.

The Cayman Court has discretion in deciding whether to grant security for costs and will consider factors such as the plaintiff's financial position and the merits of the case. If granted, the plaintiff may be required to make a payment into court or provide other forms of security.

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