

## **IT'S FREEZING HERE!**

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#### **INTRODUCTION**

1. This paper deals with the following issues:
  - (a) Freezing orders in support of domestic proceedings.
  - (b) Free standing injunctions in support of proceedings in another jurisdiction.
  - (c) Injunctions against defendants against whom no cause of action is pleaded (“*Chabra*” defendants).

#### **A. FREEZING INJUNCTIONS IN SUPPORT OF DOMESTIC PROCEEDINGS**

2. Provided that certain conditions are satisfied, in common with the courts of many other jurisdictions, where a claim is made in Gibraltar, the Gibraltar court has the power<sup>1</sup> to make an interim order to freeze the assets of a defendant to those Gibraltar proceedings until judgment or further order of the court.
3. There are essentially two bases on which such an order (a freezing order) might be made:
  - (a) If the claimant establishes at least a good arguable proprietary claim to a particular piece of property, or assets in the hands of the defendant, the Court can freeze those particular assets (on the basis that it might turn out that they belong to the claimant not the defendant, and therefore the defendant should not be allowed to deal with them until the question of ownership has been determined); or
  - (b) If the claimant establishes that:

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<sup>1</sup> See section 12 of the Supreme Court Act 1960 and the English Senior Courts Act 1981 s.37; Supreme Court Rules 2000 rule 6; English CPR 25.1(1)(f).

- i. it has at least a good arguable case in a personal money claim against the defendant; and
- ii. there is a real risk that the defendant will remove or dissipate his assets so that any judgment on the claim would go unsatisfied, or be more difficult to satisfy, if the order is not granted<sup>2</sup>: see *Nimenea Maritime Corp v Trave Schiffartgesellschaft GmbH* [1983] 1 WLR 1412 at 1422H.

the Court can make a general freezing order, which prohibits a defendant from disposing of his assets before judgment thereby rendering any judgment obtained against him Pyrrhic. Orders in this second category are also known as *Mareva* injunctions.<sup>3</sup>

4. If the evidence is that notice of the application for a freezing order would be likely to cause the defendant to dispose of his assets, or remove them from the jurisdiction, a claimant can ask the Court to make a freezing order against a defendant without giving any prior notice of the application to the defendant. That way, there is no risk of the defendant dissipating or removing his assets before the court can hear the application and make the order.
5. Subject to limited exceptions<sup>4</sup> the English standard form freezing order<sup>5</sup> prohibits the defendant from dealing with his assets. A penal notice (warning the defendant that disobedience of the order can result in imprisonment) is usually printed on the front of a freezing order, and the sealed order is served on the defendant, often personally<sup>6</sup>, and on anyone, including in particular banks, holding the defendant's assets. If, after notice of the order, the defendant deals with his assets in breach of the order he will be liable for

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<sup>2</sup> As will be clear from (a), a claimant does not need to show a risk of dissipation if it is making a proprietary claim to the assets it seeks to freeze

<sup>3</sup> After the English case of *Mareva Compania Naviera SA v International Bulk Carriers SA* [1980] 3 All ER 213 in which the court's power to grant such relief was recognised.

<sup>4</sup> Allowing for the payment of ordinary living expenses (in the case of an individual) and a reasonable amount on legal fees. These exceptions are generally not included if the basis of the injunction is a proprietary claim.

<sup>5</sup> An example of which is annexed to this paper.

<sup>6</sup> A requirement in England for contempt proceedings for breach of the order.

contempt of court for which he may be subject to a fine, sequestration of his assets or imprisonment.

6. In order to police the freezing order, the defendant is also generally required by the terms of the freezing order to disclose all of his assets, usually in the form of an affidavit. Non-disclosure is a contempt of such an order (also therefore punishable by a fine, sequestration or prison) and untruths in such an affidavit is perjury.
7. Importantly, the freezing order will generally only require the defendant to disclose his own assets. This will not therefore include the assets of a company<sup>7</sup>, even if he owns and controls the company<sup>8</sup>: see *Lakatamia Shipping Company Limited v Nobu Su* [2014] EWCA Civ 636, but will include assets over which a defendant has power, directly or indirectly, to dispose of or deal with as if it were his own, including the proceeds of a loan agreement: see the English Supreme Court's recent (21<sup>st</sup> October 2015) decision in *JSC BTA Bank v Mukhtar Ablyazov & 16 ors (2015)* [2015] UKSC 64. .
8. However, the English Court of Appeal has recently (27<sup>th</sup> February 2015) upheld an order requiring a defendant to make disclosures in relation to trusts of which he was a beneficiary on the basis that the jurisdiction to make a freezing injunction carries with it the power to make whatever ancillary orders are necessary to make it effective. The claimant bank did not (yet) seek to bring the trust assets within the scope of the freezing injunction made against the defendant, but sought the disclosure in order to test its assertion that the defendant was the effective owner of the assets: see *Jsc Mezhdunarodniy Promyshlenniyy Bank & Anor v Sergei Viktorovich Pugachev (2015)* [2015] EWCA Civ 139

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<sup>7</sup> Unless such assets are held by the company as nominee for, or on trust for, the defendant.

<sup>8</sup> If the claimant wishes to obtain information in relation to assets held by companies controlled by the defendant, the claimant must also seek an order against the company itself

9. Freezing orders may be limited in their effect to assets within Gibraltar (domestic freezing orders) or they may extend to assets of the defendant wherever they are in the world (worldwide freezing orders)<sup>9</sup> where<sup>10</sup>:
  - (a) The claimant has a good arguable case<sup>11</sup>;
  - (b) The claimant satisfies the court:
    - i. That there are no assets or insufficient assets within the jurisdiction to satisfy the claim; and
    - ii. That the defendant has assets outside of the jurisdiction; and
  - (c) There is a real risk of dissipation of those foreign assets so as to render any judgment which the claimant may obtain nugatory.
10. Whilst a freezing order can be a very effective tool to prevent the removal or dissipation of assets when the defendant and the assets are within the jurisdiction of the Gibraltar court, where there are assets outside the jurisdiction of the Gibraltar court, a worldwide freezing injunction from the Gibraltar court may be of only limited, or no, assistance, particularly where the defendant is also out of the jurisdiction, has no intention of returning and does not have any assets in Gibraltar.
11. In such a case, the Gibraltar court's coercive powers (under its contempt jurisdiction) are more theoretical than real, and so attempts to prevent the defendant from dealing with or disposing of the foreign assets are often pursued in the relevant foreign jurisdiction(s).
12. It is therefore necessary to consider the circumstances in which the courts of one jurisdiction will grant freezing orders in support of proceedings elsewhere.

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<sup>9</sup> See *Babanaft International Co SA v Bassatne* [1990] Ch 13 where the court's jurisdiction to grant a worldwide freezing order was first recognised.

<sup>10</sup> These factors have been refined in the case law and are summarised in Volume 2 of the 2014 edition of the English Civil Procedure published by Sweet & Maxwell (the "White Book") at paragraph 15-83.

<sup>11</sup> This is a pre-requisite of any freezing order

## B. FREE-STANDING FREEZING ORDERS

13. The starting point is the fundamental rule that the right to an interim injunction does not and cannot exist in isolation; it is always incidental to and dependent on the enforcement of a substantive right which usually, but not invariably, takes the shape of a cause of action (*The Siskina* [1979] AC 210). On the basis of that fundamental rule, historically it was not possible to get an injunction unless there were substantive proceedings in the same jurisdiction in which the injunction was sought, to which the injunction was incidental. That led to substantive proceedings having to be commenced, if they could be, in all relevant jurisdictions so that injunctions in all relevant jurisdictions could be sought and obtained where appropriate, and then the substantive proceedings in all but the lead jurisdiction were stayed. Sometimes however it was not possible to start substantive proceedings in relevant jurisdictions so as to be able to apply for an interim injunction in that jurisdiction, which conundrum led to difficulty and injustice. As Lord Nicholls (in a powerful and influential dissenting speech) said in *Mercedes Benz v Leiduck* [1996] 1 AC 284

*“the defendant’s argument comes to this: his assets are in Hong Kong, so the Monaco court cannot reach them; he is in Monaco, so the Hong Kong Court cannot reach him. That cannot be right ... A person operating internationally cannot so easily defeat judicial process. There is not a black hole into which the defendant can escape out of sight and become unreachable ....”*

14. Where an injunction in aid of substantive proceedings in one jurisdiction is sought in another jurisdiction, the first point to consider is whether the offshore court has jurisdiction to grant an injunction in aid of the substantive proceedings (the “**jurisdiction issue**”). Injunctions of this nature have become known as “free-standing injunctions”
15. Sometimes, there is a further difficulty: if the defendant against whom the free standing injunction is sought is not within the jurisdiction of the court being asked to grant it, a further question must be asked and answered, which is whether the Court has jurisdiction to grant permission to serve the proceedings for a freestanding injunction out of the jurisdiction (the “**territoriality issue**”).
16. Sometimes, an injunction is sought against a party against whom no cause of action is asserted in the substantive proceedings. In these cases, a third issue arises, and that is

whether the Court has jurisdiction to grant an injunction against a party against whom no cause of action is asserted.

17. The first two of these three issues will be considered on a jurisdiction by jurisdiction basis below. The third issue will then be considered.

(a) **ENGLAND**

18. In England, if the English Court is asked to grant an injunction in aid of foreign proceedings, both the jurisdiction and the territoriality issues are covered by statute and the English Civil Procedure Rules (CPR):

(a) Section 25 of the English Civil Jurisdiction and Judgments Act 1982 (CJJA 1982), as amended, empowers the Court to grant a free standing injunction in support of foreign proceedings; and

(b) CPR PD6B para 3.1(3) gives the Court power to permit service out of the jurisdiction where a claim is made for an interim remedy under s.25(1) of the CJJA 1982.

19. The s.25 CJJA jurisdiction was originally limited to supporting proceedings that had been or were to be commenced in Brussels Convention contracting state (later a Brussels Convention, Lugano Convention or Brussels Regulation state),<sup>12</sup> but has since been extended by Order in Council<sup>13</sup> to include proceedings that are anywhere else in the world. However, s.25(2) CJJA 1982 allows a court to refuse to grant relief if the fact that the court has no jurisdiction apart from the section makes it inexpedient for the court to grant it.

20. The principles by which inexpediency should be determined were considered and restated by the Court of Appeal in *Motorola Credit Corp v Uzan (No. 6)* [2003] EWCA

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<sup>12</sup> There is an additional requirement in such cases that there must be a real connecting link between the subject matter of the measures sought and the territorial jurisdiction of the contracting state: *C-391/95 Van Uden* [1999] Q.B. 1225; [1999] 2 W.L.R. 1181.

<sup>13</sup> Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997/302 Art 2.

Civ 752, [2004] 1 W.L.R. 113, at para 115. There are five particular considerations which the court should bear in mind.

- (a) First, whether the making of the order will interfere with the management of the case in the primary court e.g. where the order is inconsistent with an order in the primary court or overlaps with it.
- (b) Second, whether it is the policy in the primary jurisdiction not itself to make worldwide freezing/disclosure orders.
- (c) 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 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.
- (d) Fourth, whether at the time the order is sought there is likely to be a potential conflict as to jurisdiction rendering it inappropriate and inexpedient to make a worldwide order.
- (e) 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.

21. The position in other jurisdictions varies. Many offshore jurisdictions do not have a statutory framework, and have turned to the dissenting speech of Lord Nicholls in *Mercedes Benz AG v Leiduck* [1996] AC 284 for support.

(b) **GUERNSEY**

21. Like England, the jurisdiction to grant a free standing injunction is conferred by statute and the territoriality issue is covered by the Guernsey Court's rules:

(a) s.1(7) Law Reform (Miscellaneous Provisions (Guernsey) Law 1987 provides:

*“An injunction may **in exceptional circumstances** be granted notwithstanding that proceedings have not been and are not to be instituted before the Court”* (emphasis added).

(b) Part II, Rule 8 of the Guernsey Royal Court Civil Rules 2007 gives a general power to permit service out of the jurisdiction provided that the claim is properly justiciable and the matter is *“a proper one for service out of the jurisdiction”*. The relevant rule provides as follows:

“8.

*(1) The Court may give leave to effect service of a document out of the jurisdiction.*

*(2) The Court shall not make an order under paragraph (1) unless satisfied (by affidavit or otherwise) that the matter to which the document relates-*

*(a) is properly justiciable before the Court, and*

*(b) is a proper one for service out of the jurisdiction.”*

22. In **Garnet Limited v BNP Paribas SA, Government of Indonesia Intervening** [2009 - 2010] GLR 1, the Guernsey Court of Appeal said: *“Guernsey as an offshore financial centre, will wish to be able to grant freezing injunctions in aid of proceedings elsewhere, but section 1(7) requires that the Court exercise appropriate caution before doing so”*

23. When is a claim “a proper one for service out of the jurisdiction”? The Guernsey Court examined this issue in the context of an unfair prejudice petition in **Cobra Business Ventures Limited et al and Green Field Capital Limited at al** (27/2012) in which case the Deputy Bailiff, granting leave to permit service on defendants out of the jurisdiction of the Guernsey Court, confirmed that the correct approach was that set out in **Carlyle Capital Corporation Limited and others v Conway and others** (unreported, 22 July 2011) at paragraph 16 of which the Deputy Bailiff in *Carlyle* had said

*“In rule 8, “properly” and “proper” are not explained and leave scope for interpretation. In my view, they require the Court to have regard to the legal principles governing service out of the jurisdiction in England. Hence, it is appropriate to have regard to the recent decision of the Privy Council on*

*appeal from the Isle of Man, referred to by the Plaintiffs as AK Investment CJSC v Kyrgyz Mobil Tel Limited and by the non-resident Defendants as Altimo Holdings and Investment Limited v Kyrgyz Mobil Tel Limited [2011] UKPC 7.”*

24. Thus, the applicant has to demonstrate that there is a serious issue to be tried; there is a good arguable case that the claim falls into one or more classes of case in which permission to serve out of the jurisdiction may be given in England; that in all of the circumstances the jurisdiction is clearly or distinctly the appropriate forum for the trial of the dispute and that in all the circumstances the Court ought to exercise its discretion to permit service of the proceedings outside of the jurisdiction.

(c) **JERSEY**

25. Unlike England and Guernsey, the jurisdiction issue is not covered by statute. The Jersey Court has therefore had to grapple with the difficulty, and has done so by approving and developing Lord Nicholls’ dissenting speech in *Mercedes Benz*: in *Solvalub Ltd v Match Investments Ltd* [1996] JLR 361<sup>14</sup> the Jersey Court of Appeal held that the Jersey Court has jurisdiction to grant a free standing freezing injunction in aid of foreign proceedings for the (dissenting) reasons Lord Nicholls gave in *Mercedes Benz*.

26. On the territoriality issue, the Jersey Court of Appeal advocated a change to the Service of Process (Jersey) Rules 1994 so as to give the Court specific jurisdiction to permit service of proceedings for a free standing injunction in aid of foreign substantive proceedings out of the jurisdiction, but such an amendment does not appear to have been made. The Royal Court had to grapple with the territoriality issue in *Krohn GmbH v Varna Shipyard* [1997] JLR 194, where the defendant was a Bulgarian shipyard company. The Royal Court held that it had power, under Rule 7(b) of the Service of Process (Jersey) Rules 1994<sup>15</sup>, to order service of its process on a defendant outside Jersey where an injunction is sought (and where the only relief sought is a freezing

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<sup>14</sup> A decision criticised by Prof Matthews in “No Black Holes, Please, We’re Jersey”, 1 Jersey Law Review 132 (1997).

<sup>15</sup> Which provides that service out of the jurisdiction may be allowed by the Court where “(b) an injunction is sought ordering the defendant to do or refrain from doing anything **within the jurisdiction** (whether or not damages are also claimed in respect of the doing of or failure to do that thing)” (emphasis added)

injunction) and the injunction orders the defendant to do or refrain from doing anything within the jurisdiction.

27. Challenges to *Krohn* were rejected by the Royal Court in *Yachia v Levi* 26th March 1998 (unreported) and *State of Qatar v Al-Thani* [1999] JLR 118. In *Yachia* the Deputy Bailiff stated that “*It may well be in the light of these judgments that if a judge in this jurisdiction has exercised his discretion to grant a Mareva injunction then the Service out Order should in general follow.*”

(d) **ISLE OF MAN**

28. The Isle of Man follows the scheme in England and thus:

(a) The jurisdiction issue is covered by statute: Section 56B(1) of the High Court Act 1991 provides : “*The High Court shall have power to grant interim relief where proceedings have been or are about to be commenced in a country or territory outside the Island.*” ; and

(b) The territoriality issue is covered by the rules of court: Rule 2.41(1)(d) Rules of the High Court of the Isle of Man provide that the Court can give permission to serve proceedings out of the jurisdiction if a claim is made for an interim remedy under s.56B High Court Act 1991.

(e) **BRITISH VIRGIN ISLANDS**

29. Like Jersey, the position in the BVI is judge-made and based on Lord Nicholls’ dissenting speech in *Mercedes Benz*: as to the jurisdiction issue, Bannister J held in *Black Swan Investment ISA v Harvest View* 23rd March 2010 BVIHCV 2009/399, that there was jurisdiction to grant a free standing injunction in aid of foreign proceedings. He said “*Given the lacuna in the authorities to which I have referred, I propose to fill it in this jurisdiction by respectfully adopting this reasoning of Lord Nicholls in Mercedes Benz. I hold accordingly that I have jurisdiction not only in the strict but also in the broad sense to continue the injunction originally granted ..*”

30. In *Yukos CIS Investments Ltd v Yukos Hydrocarbons Investments Ltd* 26th September 2011, the Court of Appeal confirmed that jurisdiction. See also *Gudavadze v Carlina Overseas Corp* (High Court, unreported, June 2012).

31. The defendants in each of the *Black Swan, Yukos and Gudavadze* cases were BVI companies, or had agreed to submit to the jurisdiction of the BVI Court, so the territoriality issue did not arise. The BVI rules of court are modelled on the old English Order 11 and do not provide an obvious gateway for service out of injunction-only proceedings, unless the Jersey *Krohn* approach to ECSC CPR rule 7.3(2)(b)<sup>16</sup> is adopted.

(e) CAYMAN

32. Until recently the position on the jurisdiction issue in the Cayman Islands was, again, judge made: in *VTB v Universal Telecom Investment Strategies Fund SPC* (CICA, 5 June 2013), the Court of Appeal held that the Cayman Court has jurisdiction to grant a free standing injunction but it was necessary that the defendant was subject to the jurisdiction of the court.

33. Furthermore, the Grand Court Rules positively prohibited service out of the jurisdiction of the Cayman Court of proceedings which only claimed an interlocutory injunction: Order 11, rule 1(1)(b), stated that: “*service out of the jurisdiction can be permitted by the Grand Court 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 (whether or not damages are also claimed in respect of a failure to do or the doing of that thing) provided that a claim for an interlocutory injunction shall not of itself be a sufficient ground for service of a writ of the jurisdiction”* (emphasis added). The judge in *VTB* suggested that consideration be given to a rule change in this regard, but held that until the rules were changed, permission to serve out of the jurisdiction of proceedings claiming only a free standing injunction could not be given.

34. The position in Cayman has recently changed on both counts

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<sup>16</sup> Which also provides that service out of the jurisdiction may be allowed if the claim is for an injunction ordering the defendant to do or refrain from doing some act within the jurisdiction;

35. New legislation, which came into force on 20 October 2014, gives the Grand Court the power to grant free standing injunctions in respect of proceedings which have, or are to be, commenced in an overseas court, which are capable of giving rise to a judgment which may be enforced in the Cayman Islands under any Law or at common law (see the Grand Court (Amendment) Law 2014 which inserts a new Section 11A into the Grand Court Law of the Cayman Islands). By section 11A(4) the Grand Court is given the power to make such an order even if the cause of action which is being litigated in the foreign proceedings is not a cause of action which could be litigated in the Cayman Islands and the same section expressly provides that the order does not need to be ancillary or incidental to any proceedings in the Cayman Islands. The Court is entitled to refuse an application for interim relief if in its opinion it would be unjust or inconvenient to make an order (s.11A(5)), but section 11A(6) requires the Court to have regard to the fact that the power is ancillary to proceedings that have been or are to be commenced in a place outside the Islands and that the purpose of the power is to facilitate the process of the foreign court that has primary jurisdiction over the dispute.
36. On 12 December 2014 the Grand Court (Amendment) Rules 2014 came into effect. These amendment rules deleted the proviso in Order 11 rule 1(1)(b) and added new Order 11 rule 1(1)(n) which allows for the service out of the jurisdiction of any action, with leave of the Court, where "*the claim is brought for any relief or remedy pursuant to section 11A of the Grand Court Law (2008 Revision) (as amended by the Grand Court (Amendment) Law, 2014)*".
37. Accordingly, the Grand Court now has a statutory jurisdiction to grant a free standing injunction in relation to proceedings which (i) have been or are to be commenced in a court outside of the Cayman Islands; and (ii) are capable of giving rise to a judgment which may be enforced in the Cayman Islands under any Cayman Islands statute or at common law, and jurisdiction to give leave to serve proceedings for such an injunction out of the jurisdiction.

(f) **BERMUDA**

38. In *E.R.G Resources LLC v Nabors Global Holdings II Ltd* [2012] SC (Bda) 23 Com. (5th April 2012), Kawaley CJ confirmed interim injunctive relief in support of foreign proceedings can be granted where the Bermuda court has jurisdiction over the defendant. The defendant in the case was a Bermudian company, so the territorial issue did not arise.

(g) **BAHAMAS**

39. In *Meespierson (Bahamas) Ltd v Grupo Torras SA* (1998/1999) 2 OFLR 16; (1999) BHSJ No 31 the Court of Appeal held that there was no jurisdiction to grant a freestanding injunction on the basis that *The Siskina* was to be preferred over Lord Nicholls' dissenting speech in *Mercedes Benz v Leiduck*. The application for a freezing injunction in aid of proceedings in another country was therefore dismissed.

**C. INJUNCTIONS AGAINST CHABRA DEFENDANTS**

40. In *TSB Private Bank International SA v Chabra* [1992] 1 WLR 231, Mummery J (as he then was) held that it was possible to obtain a (domestic) freezing injunction against someone in respect of whom the claimant had no independent cause of action.
41. In *Chabra* the defendant was the beneficial owner of the majority of the shares in a company. The freezing injunction against the defendant personally prevented him from dealing with his shares in the company, but there was no order preventing the company from dissipating its assets such that the defendant's shares in the company became worthless.
42. An injunction was granted against the company on the basis that there was credible evidence (not contradicted by evidence from the defendant, Mr Chabra) that assets which appeared to belong to the company might in fact belong to him (and even that it was his alter ego) and that such assets might therefore be available to satisfy a judgment against him.
43. In Australia, in *Cardile v LED Builders Pty Ltd* (1999) 162 ALR 294, the Australian High Court reviewed and restated the law on asset preservation orders in Australia with

particular reference to the power to grant injunctions against third parties. The High Court determined that it was not necessary for the defendant to have a beneficial interest in the assets held by the third party, stating that the *Chabra* jurisdiction may be exercised if either:

- a. The third party holds, is using, or has exercised or is exercising a power of disposition over, or is otherwise in possession of, assets, including “claims and expectancies”, of the judgment debtor or potential judgment debtor. Whilst the term “expectancies” is not defined in the judgment, given the context it would appear to be assets due/owing to the third party or reasonably anticipated to be obtainable by it; or
- b. Some process, ultimately enforceable by the courts, is or may be available to the judgment creditor as a consequence of a judgment against that actual or potential judgment debtor, under which, whether by appointment of a liquidator, trustee in bankruptcy, receiver or otherwise, the third party may have to disgorge property or otherwise contribute to the funds or property of the judgment debtor to help satisfy the judgment against the judgment debtor.

44. *Cardile* has since been accepted in England in a series of first-instance decisions, beginning with the decision in *C Inc Plc v L* [2001] 2 Lloyd's Rep 459 and continuing to *Dadourian Group International Inc v Azuri* [2005] EWHC 1768.

45. In these decisions the courts have generally applied a broad interpretation of the second limb set out above. The decision in *HM Revenue & Customs v Egleton* [2007] 1 All ER 606 also applied a broad interpretation to the second limb (as per Briggs J, paragraphs 41 to 42), as did Flaux J in *Linsen International Ltd v Humpuss Sea Transport Pte Ltd* [2011] EWHC 2339 (Comm), [2012] Bus. L.R. 1649<sup>17</sup> and Gloster J (as she then was) in *Parbulk II A/S v PT Humpuss Intermoda Transportasi TBK (The Mahakam)* [2011] EWHC 3143 (Comm), [2011] 2 C.L.C. 988.<sup>18</sup>

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<sup>17</sup> The Court of Appeal dismissed an appeal against the judgment: [2011] EWCA Civ 1042, although due to it being an urgent application, its judgment pre-dated Flaux J's written reasons.

<sup>18</sup> The relevant sections of both cases can usefully be read in full: *Linsen*, paras 146-152; *Parbulk*, paras 38-64.

46. In *Parkbulk* Gloster J summarised the relevant test as follows (para 62):

*“In my judgment, the principle recognised in the Cardile case, and applicable as a matter of English law, is a simple one. In circumstances where a defendant/judgment debtor (i.e. a cause of action defendant (‘CAD’), against whom it is appropriate to make a freezing order at the suit of a claimant, has a debt, or other receivable owing to it by a third party NCAD [non cause of action defendant], or a claim, or potential claim, against a third party NCAD, the English court has jurisdiction (or ‘legal power’ as Aikens J put it) to grant a freezing order against the third party NCAD, in appropriate circumstances, to restrain the NCAD from dissipating its assets up to the amount of its debt to, or the claim by, the CAD or judgment debtor. Such an order is doing no more than protecting the right, or contingent right, of the claimant (whether by a third party debt order, charging order, appointment of a receiver or liquidator etc.) to obtain satisfaction of its judgment debt against the defendant by means of attachment, or other collection, of the proceeds of the latter’s receivable from, or claim against, the third party. Whether the court grants such an order against the third party will be a matter for the exercise of its discretion, depending on the particular circumstances of the case. Normally, if there is no reason to doubt the propriety of the third party, it may well be sufficient, for example, to injunct the defendant from collecting the receivable, otherwise than by instructing the third party to pay it into a designated account. In other circumstances, it may be appropriate, at an interlocutory stage, to appoint a receiver over the receivable/claim against the third party in order to enable the receiver to collect it and pay it into court, or an escrow account, or otherwise preserve the receivable/claim from dissipation by the defendant/judgment debtor. But if, for example, the circumstances show collusion, or impropriety, or some participation, on the part of the third party, in attempts by the defendant/judgment debtor to render itself judgment proof, then it may be appropriate for a freezing order to be granted against the third party itself. (This rehearsal of circumstances which may give rise to the exercise of the court’s discretion is not meant to be in any way exhaustive.) Such an order does not involve any ‘piercing of the corporate veil’, nor, I venture to suggest, any major new development in English law.”*

47. It remains to be seen what effect, if any, the tighter approach taken in *Prest v Petrodel Resources Ltd and Others* [2013] UKSC 34, [2013] 2 AC 415, to the sanctity of corporate identity has on the Chabra jurisdiction.

48. As to territoriality, there is a potential debate as to whether it is possible to get permission in England to serve out where the potential *Chabra* defendant is not within the jurisdiction. This was done on the facts in a number of cases (e.g. *Linsen*) but it is unclear on what basis it will be possible to fit an offshore *Chabra* defendant within one of the English jurisdictional gateways for the purposes of service out of the jurisdiction

following *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7; [2012] 1 W.L.R. 1804.

49. The standard injunction claim falls within 6BPD para 3.1(2), whereas the s.25 CJA 1982 injunction falls within 6BPD para 3.1(5). The requirements of para 3.1(2) will not be met in respect of an offshore *Chabra* defendant unless it could be argued that the worldwide freezing order sought against him orders him to refrain from doing an act within the jurisdiction (as well as outside of it) which means that the requirements of para 3.1(2) are met<sup>19</sup>; para 3.1(5) will only be relevant if the application against the *Chabra* defendant in England is in support of proceedings elsewhere.
50. Claimants have in the past used the “necessary and proper party” gateway under 6BPD para 3.1(3). For instance, in *JSC BTA Bank v Ablyazov* [2013] EWHC 1869 (Comm), Field J<sup>20</sup> accepted *obiter* (paras 30, 33) that a *Chabra* submission on the basis of para 3.1(3) could be maintained on the basis of *C Inc plc v L* [2001] CLC 1054. However, *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7; [2012] 1 W.L.R. 1804, was not cited to him, and *C Inc plc* predates *Kyrgyz Mobil*.
51. In *Kyrgyz Mobil* Lord Collins considered in detail the necessary and proper party gateway in detail. He confirmed (at paras 82, 86) that there had to be a serious issue to be tried in the claim against a potential new defendant under the gateway. *Kyrgyz Mobil* is not, of course, technically binding, so this is currently ripe for further judicial consideration.

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**([www.xxiv.co.uk](http://www.xxiv.co.uk))**

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<sup>19</sup> Given that the substance of the relief sought against an offshore defendant is in reality to restrain acts offshore, this may be a difficult argument to run.

<sup>20</sup> The case has now been considered by the Court of Appeal [2014] EWCA Civ 602 but although the point was discussed (see paragraphs 91 to 97) it was not necessary for it to be determined.

**APPENDIX: STANDARD FORM ENGLISH FREEZING ORDER**

**IN THE HIGH COURT OF JUSTICE**

**Claim No.**

[ ] **DIVISION**

**Before the Honourable Mr Justice**

[Name of Applicant]

**Applicant**

**-and-**

[Name of Respondent]

**Respondent**

**PENAL NOTICE**

**IF YOU [NAME OF RESPONDENT] DISOBEY THIS ORDER YOU MAY BE HELD IN CONTEMPT OF COURT AND MAY BE IMPRISONED, FINED OR HAVE YOUR ASSETS SEIZED.**

**ANY OTHER PERSON WHO KNOWS OF THIS ORDER AND DOES ANYTHING WHICH HELPS OR PERMITS THE RESPONDENT TO BREACH THE TERMS OF THIS ORDER MAY ALSO BE HELD TO BE IN CONTEMPT OF COURT AND MAY BE IMPRISONED, FINED OR HAVE THEIR ASSETS SEIZED.**

**THIS ORDER**

1. This is a Freezing Injunction made against [ ] ('the Respondent') on [ ] by Mr Justice [ ] on the application of [ ] ('the Applicant'). The Judge read the Affidavits listed in Schedule A and accepted the undertakings set out in Schedule B at the end of this Order.
2. This order was made at a hearing without notice to the Respondent. The Respondent has a right to apply to the court to vary or discharge the order – see paragraph 13 below.
3. There will be a further hearing in respect of this order on [ ] ('the return date').
4. If there is more than one Respondent –

- a. unless otherwise stated, references in this order to ‘the Respondent’ mean both or all of them; and
- b. this order is effective against any Respondent on whom it is served or who is given notice of it.

## **FREEZING INJUNCTION**

[For injunction limited to assets in England and Wales]

5. Until the return date or further order of the court, the Respondent must not remove from England and Wales or in any way dispose of, deal with or diminish the value of any of his assets which are in England and Wales up to the value of £ .

[For worldwide injunction]

5. Until the return date or further order of the court, the Respondent must not –
  - (1) remove from England and Wales any of his assets which are in England and Wales up to the value of £ ; or
  - (2) in any way dispose of, deal with or diminish the value of any of his assets whether they are in or outside England and Wales up to the same value.

[For either form of injunction]

6. Paragraph 5 applies to all the Respondent’s assets whether or not they are in his own name and whether they are solely or jointly owned. For the purpose of this order the Respondent’s assets include any asset which he has the power, directly or indirectly, to dispose of or deal with as if it were his own. The Respondent is to be regarded as having such power if a third party holds or controls the asset in accordance with his direct or indirect instructions.
7. This prohibition includes the following assets in particular –
  - (a) the property known as [title/address] or the net sale money after payment of any mortgages if it has been sold;

- (b) the property and assets of the Respondent's business [known as [name]] [carried on at[address]] or the sale money if any of them have been sold; and
- (c) any money standing to the credit of any bank account including the amount of any cheque drawn on such account which has not been cleared.

[For injunction limited to assets in England and Wales]

8. If the total value free of charges or other securities ('unencumbered value') of the Respondent's assets in England and Wales exceeds £ , the Respondent may remove any of those assets from England and Wales or may dispose of or deal with them so long as the total unencumbered value of his assets still in England and Wales remains above £ .

[For worldwide injunction]

- 8.
- (1) If the total value free of charges or other securities ('unencumbered value') of the Respondent's assets in England and Wales exceeds £ , the Respondent may remove any of those assets from England and Wales or may dispose of or deal with them so long as the total unencumbered value of the Respondent's assets still in England and Wales remains above £ .
  - (2) If the total unencumbered value of the Respondent's assets in England and Wales does not exceed £ , the Respondent must not remove any of those assets from England and Wales and must not dispose of or deal with any of them. If the Respondent has other assets outside England and Wales, he may dispose of or deal with those assets outside England and Wales so long as the total unencumbered value of all his assets whether in or outside England and Wales remains above £ .

## **PROVISION OF INFORMATION**

- 9.
- (1) Unless paragraph (2) applies, the Respondent must [immediately] [within hours of service of this order] and to the best of his ability inform the Applicant's solicitors of all his assets [in England and Wales] [worldwide] [exceeding £ in value] whether in his own name or not and whether solely or jointly owned, giving the value, location and details of all such assets.

- (2) If the provision of any of this information is likely to incriminate the Respondent, he may be entitled to refuse to provide it, but is recommended to take legal advice before refusing to provide the information. Wrongful refusal to provide the information is contempt of court and may render the Respondent liable to be imprisoned, fined or have his assets seized.
10. Within [ ] working days after being served with this order, the Respondent must swear and serve on the Applicant's solicitors an affidavit setting out the above information.

### **EXCEPTIONS TO THIS ORDER**

11.

- (1) This order does not prohibit the Respondent from spending £ a week towards his ordinary living expenses and also £ [or a reasonable sum] on legal advice and representation. [But before spending any money the Respondent must tell the Applicant's legal representatives where the money is to come from.]
- (2) This order does not prohibit the Respondent from dealing with or disposing of any of his assets in the ordinary and proper course of business.]
- (3) The Respondent may agree with the Applicant's legal representatives that the above spending limits should be increased or that this order should be varied in any other respect, but any agreement must be in writing.
- (4) The order will cease to have effect if the Respondent –
- (a) provides security by paying the sum of £ into court, to be held to the order of the court; or
  - (b) makes provision for security in that sum by another method agreed with the Applicant's legal representatives.

### **COSTS**

12. The costs of this application are reserved to the judge hearing the application on the return date.

## **VARIATION OR DISCHARGE OF THIS ORDER**

13. Anyone served with or notified of this order may apply to the court at any time to vary or discharge this order (or so much of it as affects that person), but they must first inform the Applicant's solicitors. If any evidence is to be relied upon in support of the application, the substance of it must be communicated in writing to the Applicant's solicitors in advance.

## **INTERPRETATION OF THIS ORDER**

14. A Respondent who is an individual who is ordered not to do something must not do it himself or in any other way. He must not do it through others acting on his behalf or on his instructions or with his encouragement.
15. A Respondent which is not an individual which is ordered not to do something must not do it itself or by its directors, officers, partners, employees or agents or in any other way.

## **PARTIES OTHER THAN THE APPLICANT AND RESPONDENT**

16. Effect of this order

It is a contempt of court for any person notified of this order knowingly to assist in or permit a breach of this order. Any person doing so may be imprisoned, fined or have their assets seized.

17. Set off by banks

This injunction does not prevent any bank from exercising any right of set off it may have in respect of any facility which it gave to the respondent before it was notified of this order.

18. Withdrawals by the Respondent

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

[For worldwide injunction]

19. Persons outside England and Wales

- (1) Except as provided in paragraph (2) below, the terms of this order do not affect or concern anyone outside the jurisdiction of this court.
- (2) The terms of this order will affect the following persons in a country or state outside the jurisdiction of this court –
  - (a) the Respondent or his officer or agent appointed by power of attorney;
  - (b) any person who –
    - (i) is subject to the jurisdiction of this court;
    - (ii) has been given written notice of this order at his residence or place of business within the jurisdiction of this court; and
    - (iii) is able to prevent acts or omissions outside the jurisdiction of this court which constitute or assist in a breach of the terms of this order; and
  - (c) any other person, only to the extent that this order is declared enforceable by or is enforced by a court in that country or state.

[For worldwide injunction]

20. Assets located outside England and Wales

Nothing in this order shall, in respect of assets located outside England and Wales, prevent any third party from complying with –

- (1) what it reasonably believes to be its obligations, contractual or otherwise, under the laws and obligations of the country or state in which those assets are situated or under the proper law of any contract between itself and the Respondent; and
- (2) any orders of the courts of that country or state, provided that reasonable notice of any application for such an order is given to the Applicant's solicitors.

**COMMUNICATIONS WITH THE COURT**

All communications to the court about this order should be sent to –

[Insert the address and telephone number of the appropriate Court Office]

If the order is made at the Royal Courts of Justice, communications should be addressed as follows –

Where the order is made in the Chancery Division

Room TM 5.07, Royal Courts of Justice, Strand, London WC2A 2LL quoting the case number.  
The telephone number is 020 7947 6322.

Where the order is made in the Queen's Bench Division

Room WG08, Royal Courts of Justice, Strand, London WC2A 2LL quoting the case number.  
The telephone number is 020 7947 6010.

Where the order is made in the Commercial Court

Room EB09, Royal Courts of Justice, Strand, London WC2A 2LL quoting the case number.  
The telephone number is 0207 947 6826.

The offices are open between 10 a.m. and 4.30 p.m. Monday to Friday.

## **SCHEDULE A**

### **AFFIDAVITS**

The Applicant relied on the following affidavits–

[name] [number of affidavit][date sworn][filed on behalf of]

## **SCHEDULE B**

### **UNDERTAKINGS GIVEN TO THE COURT BY THE APPLICANT**

(1)

If the court later finds that this order has caused loss to the Respondent, and decides that the Respondent should be compensated for that loss, the Applicant will comply with any order the court may make.

[(2)

The Applicant will –

(a) on or before [date] cause a written guarantee in the sum of £ to be issued from a bank with a place of business within England or Wales, in respect of any order the court may make pursuant to paragraph (1) above; and

(b) immediately upon issue of the guarantee, cause a copy of it to be served on the Respondent.]

(3)

As soon as practicable the Applicant will issue and serve a claim form [in the form of the draft produced to the court] [claiming the appropriate relief].

(4)

The Applicant will [swear and file an affidavit] [cause an affidavit to be sworn and filed] [substantially in the terms of the draft affidavit produced to the court] [confirming the substance of what was said to the court by the Applicant's counsel/solicitors].

(5)

The Applicant will serve upon the Respondent [together with this order] [as soon as practicable] –

(i) copies of the affidavits and exhibits containing the evidence relied upon by the Applicant, and any other documents provided to the court on the making of the application;

(ii) the claim form; and

(iii) an application notice for continuation of the order.

[(6)

Anyone notified of this order will be given a copy of it by the Applicant's legal representatives.]

(7)

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 and if the court later finds that this order has caused such person loss, and decides that such person should be compensated for that loss, the Applicant will comply with any order the court may make.

(8)

If this order ceases to have effect (for example, if the Respondent provides security or the Applicant does not provide a bank guarantee as provided for above) the Applicant will immediately take all reasonable steps to inform in writing anyone to whom he has given notice of this order, or who he has reasonable grounds for supposing may act upon this order, that it has ceased to have effect.

[(9)

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.]

[(10)

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].]

**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 e-mail]