

PRACTICE DIRECTION NUMBER 1 OF 2007

DISTRICT COURT OF QUEENSLAND

FREEZING ORDERS (ALSO KNOWN AS 'MAREVA ORDERS' OR 'ASSET PRESERVATION ORDERS')

Practitioners are reminded that the District Court does not have jurisdiction to make such orders until a proceeding has been commenced for relief within s 68 of the District Court of Queensland Act: see *Startune Pty Ltd v Ultra-Tune Systems (Aust) Pty Ltd* [1991] 1 Qd R 192.

1. This Practice Direction concerns Chapter 8 Part 2 Division 2 of the *Uniform Civil Procedure Rules* ("UCPR") relating to freezing orders (also known as 'Mareva orders' after *Mareva Compania Naviera SA v International Bulkcarriers SA (The Mareva)* [1975] 2 Lloyd's Rep 509, or 'asset preservation orders').
2. A pro-forma freezing order is set out below as an appendix.
3. The respondent to an application for a freezing order may be the person alleged to be liable on a substantive cause of action of the applicant or a third party, such as a person who has possession, custody or control, or even ownership, of assets which he or she may be obliged ultimately to disgorge to help satisfy a judgment against another person. Rule 260D(4) of the *UCPR* addresses the minimum requirements which must ordinarily be satisfied on an application for a freezing order against such a third party before the discretion is enlivened. The third party will not necessarily be a party to the substantive proceeding (see *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380), but may be a respondent to the application for the freezing or ancillary order.
4. The duration of a freezing order made without notice should be limited to a period terminating on the return date of the application which should be as soon as practicable after the order is made, when the respondent will have the opportunity to be heard. The applicant will then bear the onus of satisfying the Court that the order should be continued or renewed.
5. A freezing order should reserve liberty for the respondent to apply on short notice. An application by the respondent to discharge or vary a freezing order will normally be treated by the Court as urgent.
6. The value of the assets covered by a freezing order should not exceed the likely maximum amount of the applicant's claim, including interest and costs.
7. The order should exclude dealings by the respondent with its assets for legitimate purposes, in particular:

- (a) payment of ordinary living expenses;
 - (b) payment of reasonable legal expenses;
 - (c) dealings and dispositions in the ordinary and proper course of the respondent's business, including paying business expenses bona fide and properly incurred; and
 - (d) dealings and dispositions in the discharge of obligations bona fide and properly incurred under a contract entered into before the order was made.
8. The Court may make ancillary orders. The most common example of an ancillary order is an order for disclosure of assets.
9. The *UCPR* confirm that certain restrictions expressed in *The Siskina* [1979] AC 210 do not apply in this jurisdiction. First, the Court may make a freezing order before a cause of action has accrued (a '*prospective*' cause of action). Second, the Court may make a free-standing freezing order in aid of foreign proceedings in prescribed circumstances. Third, where there are assets in Australia, service out of Australia is permitted.
10. The affidavits relied on in support of an application for a freezing or ancillary order should, if possible, address the following:
- (a) information about the judgment which has been obtained, or, if no judgment has been obtained, the following information about the cause of action:
 - (i) the basis of the claim for substantive relief;
 - (ii) the amount of the claim; and
 - (iii) if the application is made without notice to the respondent, the applicant's knowledge of any possible defence;
 - (b) the nature and value of the respondent's assets, so far as they are known to the applicant, within and outside Australia;
 - (c) the matters referred to in rule 260D of the *UCPR*; and
 - (d) the identity of any person, other than the respondent, who, the applicant believes, may be affected by the order, and how that person may be affected by it.

Chief Judge PM Wolfe
22 June 2007

APPENDIX

DISTRICT COURT OF QUEENSLAND Pro-forma Freezing Order

On the undertakings in Schedule A to this order,

THE COURT ORDERS AS FOLLOWS:

Introduction

1. (a) The application for this order is made returnable immediately.
(b) The time for service of [*describe documents required to be served*] is abridged and service is to be effected by [*insert time and date*].¹
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 a judge listed in Applications.²
3. 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 the person served or notified.
4. In this order:
 - (a) 'applicant', if there is more than one, includes all the applicants;
 - (b) 'respondent', if there is more than one, includes all the respondents;
 - (c) 'third party' means a person other than the respondent and the applicant;
 - (d) 'unencumbered value' means value free of mortgages, charges, liens or other encumbrances.
5. (a) A respondent ordered to do something must do it by himself or herself or through directors, officers, partners, employees or agents;
(b) A respondent ordered not to do something must not do it personally or through directors, officers, partners, employees, agents or in any other way.

Freezing of assets

[For order limited to assets in Australia]

6. (a) The respondent must not remove from Australia or in any way dispose of, deal with or diminish the value of any of its assets in Australia ('Australian assets') up to the unencumbered value of AUD\$ ('the relevant amount') until [*trial or further order, or until 4pm on (the return date)*].

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

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

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- (b) If the unencumbered value of the respondent's Australian assets exceeds the relevant amount, the respondent 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 the respondent's Australian assets still exceeds the relevant amount.

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

- (c) If the unencumbered value of the respondent's Australian assets is less than the relevant amount, and the respondent has assets outside Australia ('ex-Australian assets'):
 - (i) The respondent must not dispose of, deal with or diminish the value of any of its Australian assets and ex-Australian assets up to the unencumbered value of its Australian and ex-Australian assets of the relevant amount; and
 - (ii) The respondent may dispose of, deal with or diminish the value of any of its ex-Australian assets, so long as the unencumbered value of its Australian assets and ex-Australian assets still exceeds the relevant amount.

[For either form of order]

- 7. For the purposes of this order, the respondent's assets include:
 - (a) all its assets, whether or not they are in its name and whether they are solely or co-owned;
 - (b) any asset which it has the power, directly or indirectly, to dispose of or deal with as if it were its own (you are to be regarded as having such power if a third party holds or controls the asset in accordance with the respondent's 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) [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].

Provision of information

- 8. Subject to paragraph 9, the respondent must:
 - (a) on or before the return date for the further hearing (or within such further time as the Court may allow) to the best of its ability inform the applicant in writing of all the respondent's assets in [Australia] [world wide], giving their value, location and details (including any mortgages, charges or other encumbrances to which they are subject) and the extent of the respondent's 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 applies if the respondent is not a corporation and wishes to object that compliance with paragraph 8 may tend to incriminate the respondent or make the respondent liable to a civil penalty;
 - (b) This paragraph also applies if the respondent is a corporation and all of the persons who are able to comply with paragraph 8 on its behalf and with whom it has 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) The respondent must, on or before the return date for the further hearing (or within such further time as the Court may allow), notify the applicant in writing that the respondent or all the persons referred to in (b) wish to take such objection and identify the extent of the objection;
 - (d) If such notice is given, compliance with paragraph 8 is necessary only to the extent that it is possible to do so without disclosure of the material in respect of which the objection is taken; and
 - (e) If such notice is given, the Court may give directions as to the filing and service of affidavits setting out such matters as the respondent 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 the respondent from:
- (a) paying [up to \$..... a week/day on] [the respondent's ordinary] living expenses;
 - (b) paying [\$.....on] [the respondent's reasonable] legal expenses;
 - (c) dealing with or disposing of any of the respondent's assets in the ordinary and proper course of the respondent's 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 the respondent's assets in discharging obligations bona fide and properly incurred under a contract entered into before this order was made, provided that before doing so the respondent gives the applicant, if possible, at least two working days written notice of the particulars of the obligation.
11. The respondent and the applicant may agree in writing that the exceptions in the preceding paragraph are to be varied. In that case the applicant or the respondent 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 the

respondent, and the Court may order that the exceptions are varied accordingly.

12. (a) This order will cease to have effect if the respondent:
 - (i) pays the sum of \$..... into Court; or
 - (ii) pays that sum into a joint bank account in the name of the respondent's solicitor and the solicitor for the applicant as agreed in writing between them; or
 - (iii) provides 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 the respondent's other creditors in the event of the respondent's insolvency.
- (c) If this order ceases to have effect pursuant to (a), the respondent 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.

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 the respondent 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 the respondent if the withdrawal appears to be permitted by this order.

[For world wide order]

16. Persons outside Australia

- (a) Except as provided in subparagraph (b) below, the terms of this order do not affect or concern anyone outside Australia.
- (b) The terms of this order will affect the following persons outside Australia:
 - (i) the respondent and its directors, officers, employees and agents (except banks and financial institutions);
 - (ii) any person (including a bank or financial institution) who:
 - (A) is subject to the jurisdiction of this Court; and
 - (B) has been given written notice of this order, or has actual knowledge of the substance of the order and of its requirements; and
 - (C) is able to prevent or impede acts or omissions outside Australia which constitute or assist in a disobedience of the terms of this order; and
 - (iii) any other person (including a bank or financial institution), only to the extent that this order is declared enforceable by or is enforced by a court in a country or state that has

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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 the respondent, provided that in the case of any future order of a court of that country or state made on the respondent's 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 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 –
 - (a) file [*describe documents required to be filed*]; and
 - (b) serve on the respondent copies of this order and [*describe documents required to be served*].
- (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 effect³ the applicant will promptly take all reasonable steps to inform in writing anyone who has been notified of this order, or who he has reasonable grounds for supposing may act upon this order, that it has ceased to have effect.
- (6) The applicant will not, without leave of the Court, use any information obtained as a result of this order for the purpose of any civil or criminal proceedings, either in or outside Australia, other than this proceeding.
- (7) The applicant will not, without leave of the Court, seek to enforce this order in any country outside Australia or seek in any country outside Australia an order of a similar nature or an order conferring a charge or other security against the respondent or the respondent's assets.
- (8) The applicant will:
 - (a) on or before [date] cause an irrevocable undertaking to pay in the sum of \$ to be issued by a bank with a place of business within Australia, in respect of any order the court may make pursuant to undertaking (1) above; and
 - (b) immediately upon issue of the irrevocable undertaking, cause a copy of it to be served on the respondent.

³ For example, if the respondent pays money into Court or provides security, as provided for in paragraph 12 of this Order.