



# Précis Paper

## Freezing Orders

A discussion about the principles, procedures and pitfalls in obtaining freezing orders and the circumstances in which they should be sought.

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# Précis Paper

## Freezing Orders

1. In this edition of BenchTV, John Turnbull SC (Barrister, 9 Windeyer Chambers, Sydney) and Geoffrey McDonald (Barrister, 9 Windeyer Chambers, Sydney) discuss the principles, procedures and pitfalls in obtaining freezing orders and the circumstances in which they should be sought.

### What is a freezing order?

2. Generally, freezing orders are sought, usually ex parte in the first instance, in circumstances where a plaintiff is concerned that a defendant is disposing of or imminently proposes to dispose of assets so that the plaintiff, if successful in their action would be denied the fruits of their victory.
3. A freezing order is an order by the court to restraining the assets of the defendant. The Mareva injunction from the case, *Mareva Compania Naviera SA v International Bulk Carriers SA (The Mareva)* [1980] 1 All ER 213 is the most common form of freezing order.
4. An application for court needs to be made to obtain the order. It can be ex parte, that is without notice. This is because the threshold is that if there is a danger that the assets will be dissipated, then giving notice to the defendant gives them more time to dissipate the assets.

### Difference between a freezing order and injunction

5. There is not a great deal of difference between a freezing order and an injunction.
6. Freezing orders cover all the assets and the standard order usually identifies specific assets within all the assets. There is also some carve out and exceptions for spending money on ordinary living expenses, legal fees etc. An injunction on the other hand, tends to be specific to assets, transactions or conduct..

### Principles for entitlement to freezing order

7. For a freezing order to be made, there must be a good, arguable case.
8. Then, there must be a danger that the debtor is going to dissipate assets and conduct themselves in a manner that is going to frustrate the orders of the court or the prospective orders of the court. In terms of frustration of an order, it may be an order that has already been made by the court (e.g. Judgment for a debt due) or it may be an order that you anticipate or that is likely to be made

### A good arguable case

9. *In the case of Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co. KG* [1984] 1 All ER 398 the judge noted that for a good arguable case, it is not necessary that there be better than a 50% chance of being successful, however it must be more than barely capable of serious argument.

### Danger

10. The rules provide that the court can make a freezing order having regard to all the circumstances that there is a danger that the judgement or prospective judgement won't be satisfied because the judgement debtor or another person absconds or the assets of that person are removed from Australia or from a place inside or outside of Australia or disposed of, dealt with or diminished in value.
11. Authorities note that there must be facts from which a prudent, sensible commercial man or woman can properly infer a danger of default. A prima facie case of fraudulent misrepresentation or fraudulent misappropriation of assets or serious wrongdoing readily supports the inference that the defendant is a person who would not preserve their assets.

### Purpose of freezing orders

12. The decisions of both *Cardile v LED Builders* [1999] HCA 18 and *Seyedabadi v Samimi* [2013] NSWCA 279 note that the object of the freezing order is to protect the integrity of the court's processes by preserving the efficacy of the judgment or prospective judgement. It is not to provide the plaintiff with security or priority over other creditors.
13. The plaintiff must demonstrate that by reason of disposal of the defendant's assets, the plaintiff will not be able to have his judgement satisfied in full or in part or the risk is that the defendant lacks probity.

### Disclosure

14. There is an obligation of full disclosure on both sides and the lack of disclosure is grounds for the freezing order to be set aside. Firstly, the plaintiff needs to be fully upfront with the court in obtaining the order and the defendant in defending the order, needs to give the court full disclosure of the things the court would normally expect them to tell them in defending such a claim.

### Exceptions to assets

15. The exceptions to the orders do not prohibit paying ordinary living expenses, legal fees, dealing with assets including disposing of assets in their usual course of business and discharging obligations incurred under a contract entered into before the freezing order was made.

### Ancillary Orders

16. The standard form of the orders freeze all of the assets whether in the defendant's name solely or jointly and include assets that a person has the power to dispose of them as if they were their own assets such as a beneficiary of a trust.
17. The most common ancillary order is a disclosure order, which is an obligation on the debtor to disclose their assets giving location, value and details including any mortgages, charges and encumbrances.
18. There are also Anton Pillar Orders which is an access order where a person is authorized to come onto someone's property to obtain possession of records or information.
19. There may also be ancillary orders regarding restrictions on travel to leave the country or orders appointing a receiver.

### Procedures

20. Under the practice notes, there is some guidance regarding the way in which an application should be made
21. If there are no proceedings on foot, then the usual procedure is to proceed by way of a summons in the Supreme Court which may then transform into pleadings if it becomes necessary
22. There needs to be a supporting affidavit which covers the merits of the case and the danger of dissipation
23. A plaintiff may make an undertaking as to damages. This means that the applicant for the freezing order undertakes that they will submit to an order for damages if their case is lost.

### Third parties

24. If notice is given to third parties and they assist the debtor in breaching the freezing order, they can be liable for the breach also.
25. There is no specific list of third parties that require notification of the orders, however the common commercial entities that are notified are banks or people who are dealing with the specific assets that are mentioned in the freezing order.

### Varying a freezing order

26. There are many circumstances in which a court will vary the orders with the view to satisfying the purpose of the order

After a freezing order has been obtained

27. A judgement and freezing order are only an interim solution. All the normal debt collection processes that take place from there follow afterwards, such as seizing assets, issuing bankruptcy notices, appointment of a receiver.

The Rules in each State and Federal (guide only)

- Freezing Orders Practice Note (GPN-FRZG) (Also known as "Mareva Orders" or "Asset Preservation Orders")  
<https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-frzg>
- VICTORIA; SC GEN 17 FREEZING ORDERS  
<https://www.supremecourt.vic.gov.au/law-and-practice/practice-notes/sc-gen-17-freezing-orders>
- NSW Practice Note No. SC Gen 14 Supreme Court – Freezing Orders (also known as 'Mareva orders' or 'asset preservation orders')  
[http://www.lawlink.nsw.gov.au/practice\\_notes/nswsc\\_pc.nsf/a15f50afb1aa22a9ca2570ed000a2b08/688837f333335949ca2577490080a612?OpenDocument](http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/a15f50afb1aa22a9ca2570ed000a2b08/688837f333335949ca2577490080a612?OpenDocument) and Uniform Civil Procedure Rules 2005 (NSW), Rule 25.14
- SUPREME COURT OF QUEENSLAND PRACTICE DIRECTION NUMBER 1 OF 2007 FREEZING ORDERS (ALSO KNOWN AS 'MAREVA ORDERS' OR 'ASSET PRESERVATION ORDERS') [https://www.courts.qld.gov.au/\\_data/assets/pdf\\_file/0020/86411/sc-pd-1of2007.pdf](https://www.courts.qld.gov.au/_data/assets/pdf_file/0020/86411/sc-pd-1of2007.pdf)
- Western Australia 9.6 Order 52A - Freezing Orders; 9.6.1 Freezing Orders (Mareva Orders)  
[https://www.supremecourt.wa.gov.au/\\_files/Consolidated\\_Practice\\_Directions.pdf](https://www.supremecourt.wa.gov.au/_files/Consolidated_Practice_Directions.pdf)
- South Australia Supreme Court Civil Supplementary Rules 2014 Part 12—Injunctions Division 1—Freezing orders 211—Introduction  
<http://www.courts.sa.gov.au/Lists/Court%20Rules/Attachments/206/Supreme%20Court%20Civil%20Supplementary%20Rules%202014.pdf>

VIC SC GEN 17 FREEZING ORDERS

Par 4.18 The affidavits relied on in support of an application for a freezing order or an ancillary order should, if possible, address the following: (a) information about the judgment that has been obtained, or, if no judgment has been obtained, the following information about the cause of action: (i) the basis of the claim for substantive relief; (ii) the amount of the claim; and (iii) if the application is made without notice to the respondent, the applicant's knowledge of any possible defence; (b) the nature and value of the respondent's assets, so far as they are known to the applicant, within and outside Australia; (c) the matters referred to in Rule 37A.05; 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.

Paragraphs in other states Practice notes; NSW [20], QLD [10], WA [20], SA [214]



## BIOGRAPHY

### John Turnbull SC

Barrister, 9 Windeyer Chambers, Sydney

John was called to the bar in 1983. John primarily appears in first instance and appellate cases in the Federal Court, Supreme Court and the District Court and CARS. He appears for both plaintiffs and defendants. During his early years, John practiced in a wide range of jurisdictions including crime, commercial cases, compensation cases, insurance cases and equity suits. As his practice developed, he specialised more in the areas of common law, commercial law and equity. In over 30 years of practice, he has conducted many hundreds of first instance cases and numerous appellate matters. Doyle's Guide 2019 lists John as Leading Counsel in the Leading Insurance Law Barristers NSW category.

### Geoffrey McDonald

Barrister, 9 Windeyer Chambers, Sydney

Geoffrey McDonald has been admitted as both a barrister and accountant since 1996. For 25 years he was an insolvency partner and ultimately the National Chairman of a national accountancy firm. Given that he specialises in the areas of commercial insolvency and bankruptcy law, the combination of 'barrister and accountant' gives him an advantage in his daily practice and when undertaking these often-complex cases, Geoffrey often presents complimentary seminars on commercial and insolvency law updates.

## REFERENCES

### Cases

*Mareva Compania Naviera SA v International Bulk Carriers SA (The Mareva)* [1980] 1 All ER 213

*Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co. KG* [1984] 1 All ER 398

*Cardile v LED Builders* [1999] HCA 18

*Syedabadi v Samimi* [2013] NSWCA 279