Barristers' Chambers

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Issue 49
S37 Injunctions without notice – 'Damned if you do and damned if you don't'

A Solicitor unlike Counsel has no hiding place when it comes to the correct and considered response to be given to a client's urgent instruction that the other spouse is about to move a valuable asset in a divorce case. The information given in the instruction is usually not entirely accurate, however the concern of the client is real. The Solicitor's knowledge of the divorce case is often by recent instruction with little time at this point to take a full historical statement or to make an assessment as to what assets are held, their values and how much the client's realistic claim is worth. The client has no idea if the other party has seen a solicitor themselves. So what do you do – issue an injunction application? If you do – do you serve the application before obtaining any order?

This is a common enough dilemma in any busy family Solicitor's office – and so, it is essential that the practitioner has a full command of the procedure and the pitfalls – get the procedure wrong and there is likely now to be a claim for a wasted costs order against the Solicitor. The two sources of information needed are **FPR 2010 Part 20** and the High Court decisions and guidance of Mostyn J in ***UK v BK (freezing orders: safeguards: standard examples)*** *[2013] EWHC 1735 (Fam)*. *See also* ***ND v KP (freezing order: ex-parte application)*** *[2011] EWHC 457 (Fam)*. What is set out below is no substitute for personal reference to the source information itself and what follows is intended only to deal with **those cases where a s 37 MCA 1973 injunction is contemplated and where the same is considered to be so urgent that it is to be made without notice**. It is likely that the required knowledge from these specific sources is best tabulated for ease of reference and accordingly:-

Reference	Rule Content	General Principles	Mostyn J's Guidance
Without Notice Injunction			
FPR 2010, 9.6	Part 18 procedure applies to an application for an order 'preventing a disposition'.		

FPR 2010, Rule 9.6(2)	an application may be made without notice to the Respondent.		
FPR 2010 Rule 9.3	'Order preventing a disposition' is defined as an order under MCA 1973, s 37(2)(b) or (c), in proceedings under MFPA 1984, an order under s 23(2)(b) or 23(3) of that Act, in proceedings under CPA 2004, Sch 5, a order under para 74(3) or (4) and if proceedings under CPA 2004, Sch 7, an order under para 15(3) or (4).		i) The court has a general power to preserve specific tangible assets in specie where they are the subject matter of the claim. Such an order does not necessarily require application of all the freezing order principles and safeguards, butit is open to the court to impose them. ii) Where there is a freezing order in a sum of money which is capable of embracing all of the other party's assets up to a specified figure, then essential that all other principles and safeguards are scrupulously applied.
FPR 2010, 18.4	the Applicant must file an application notice. (The appropriate form for applications under Part 18 is form FP2).		
FPR 2010, Rule 18.7	the application notice must include what order the Applicant is seeking and the reason the		Standard injunction orders are appended to the judgment of ***UK v BK*** *and authorised by* the President for general use. Mostyn J also stated that any departure from the standard form should be communicated to the judge in any

	Applicant is seeking the order. A draft of the order sought must also be attached to the application notice		given case.
FPR 2010, Rule 18.8(2)	the Applicant must, when filing the application notice, file a copy of any written evidence in support	The supporting evidence must provide full details in support of the application, and in particular identify specifically the assets where relief is being sought and setting out evidence in support of the application and, in particular, dealing with the allegation that there is about to be a disposition to a third party with the intention of defeating the claim of the applicant. Evidence must be exhibited to the affidavit/ statement which itself must comply with **FPR 2010 PD 22A** and in particular (see paragraph **4.3**), 'indicate the source for any matters of information and belief'.	Whether the application is made under MCA 1973 s37 or SCA 1981 s37, the applicant must show, by reference to clear evidence, an unjustified dealing with assets (which would include threats) by the respondent giving rise to the conclusion that there is a solid risk of dissipation of assets to the applicant's prejudice. Such an unjustified dealing will normally give rise to the inference that it is done with the intention to defeat the applicant's claim. Accordingly, the applicant must put forward an appropriately strong case supported by evidence of objective facts rather than mere expressions of suspicion or anxiety. The evidence in support of the application must depose to clear facts. In accordance with **FPR 2010 PD22A para 4.3**, the sources of information and belief must be clearly set out.
FPR 2010, Part 18.9	the court may deal with an application without a hearing if court		

	considers appropriate, or if the parties agree as to the terms of the order sought		
FPR 2010, r 18.12	the court can make an order even if either party fails to attend the hearing.		
FPR 2010, PD18A, para 6.1 (not applicable if no notice application sought)	*the application notice must be served as soon as practicable after issued and, where to be a hearing, at least 7days before the hearing date*		
para 6.2	*where application notice should be served, but not sufficient time to do so, informal notification of the application to be given unless circumstances of application require no notice of the application to be given..*		
FPR PD 18A para 5.1 – <u>No Notice Application</u>	a) Where there is <u>exceptional urgency</u>. (b) Where the overriding objective is	(1) No order should be made without notice to the other party unless there is very good reason for departing from the	(1) Freezing orders made without notice violate natural justice and are intrinsically unfair. Accordingly, <u>essential</u> that the requirements of **FPR PD18A, para 5.1** to be met. An applicant <u>has to show</u> that the matter was

	best furthered by doing so. (c) By consent of all parties. (d) With permission of the court. (e) Where paragraph 4.9 applies (ie, where a date for a hearing has been fixed and there is insufficient time to file an application notice) or (f) Where a court order, rule or practice direction permits.	rule that notice must be given. A without notice order is an exceptional remedy. (2) without notice relief should only be sought where clear and positive evidence that to go on notice would lead to irretrievable prejudice to Applicant. (3) There has to be a good case supported by objective facts that there is a likelihood of dissipation of assets with the intention of defeating the Applicant's claim. (4) The Applicant has a high duty of candour and must provide the court with objective facts. (5) Time very much of essence and the application is to be made to the court on either the same day as receiving the instructions or the following day. Any delay may prejudice the success of the application. (6) Few courts now	of exceptional urgency. (2) **FPR 2010 PD 20A para 4.3(c)** provides - except where essential that the respondent must not be aware of the application, the applicant should take steps to notify the respondent informally of the application. - Mostyn J emphasised, 'where the application for a freezing order is made ex parte the applicant has to show that the matter is one of exceptional urgency. Short informal notice must be given to the respondent unless it is essential that he is not made aware of the application'. (3) No notice at all only justified where powerful evidence that giving of any notice would probably lead the respondent to take steps to defeat the purpose of the injunction or where there was no time to give any notice before the order was required to prevent the threatened act. (4) Cases where no notice at all could be justified were very rare indeed. (5) The court order should record the reason why court satisfied no notice or short notice was given. (6) Where no notice or short informal notice was given, applicant fixed with a high duty of candour. - so breach of that duty was likely to lead to the order being discharged. (7) In addition to the notice of application, affidavit in support/ statement and draft order, the court will also require a certificate of urgency signed by the solicitor and setting out the reasons why the application is

		have applications judges reserved to deal with urgent applications that day. Such practice virtually non-existent outside London. Necessary to telephone family listing and explain the nature of the application to them to find out whether a district judge available to deal with the application that day. Most courts will then make enquiries of the district judges and will advise of when a slot may be available for the hearing that day. (7) When attending before the district judge to seek the without notice order, it is preferable the client also attends. It may be necessary to take instructions during the course of the hearing itself and the district judge may require the client to give undertakings in respect of damages before being willing to grant the order. (8) If an order is made, it is then	urgent. '***[52]*** *Finally, I draw attention to the great concern of myself and other judges at the continued widespread abuse of the principles governing ex parte applications not only for freezing orders but also more generally. It is worth remembering not only that the ex parte procedure is intrinsically unfair but also, and very importantly, that a case which begins with an ex parte order is usually poisoned from that point onwards. The unilateral step taken at the beginning of case echoes down its history. Often the Respondent is enraged by the step taken against him and looks to take counter-offensive measures. Every single subsequent step is coloured by that fateful first step. Costs tend to mount exponentially. And even after the lawyers close their files and render their final bills the personal relations of the spouses will likely remain forever soured. A nuclear winter often ensues. This is not to say that sometimes, but very rarely, an ex parte application is necessary. Insistence on the imposition of the stringent conditions and detailed safeguards might have the side-effect of mitigating the unhappy consequences to which I have referred. In B v A [2012] EWHC 3127 (Fam) Charles J dealt with an (alleged) child abduction case, where there had been flagrant disregard of the established principles. In para 110 he stated: "It seems to me that if such failures are to be avoided in the future there is a need for judges:*

		necessary to personally serve it and sensible to wait at the court office for sealed and typed up copies of the order. At the same time, arrangements should be made for an enquiry agent to effect personal service of the injunction that day. To assist, the client should bring a recent photo of the respondent to court with them to assist the enquiry agent's identification of the respondent. (9) Where the injunction involves assets or investments controlled by third parties, eg bank accounts , investments etc, then the relevant third party must be served urgently with a sealed copy of the order - usually by fax and also by telephone to comply with any procedures that the third party may have in place for accepting service of orders. (10) Where the respondent has legal representation in place, then their	*(i) to refuse to make without notice orders if the established principles and procedures are not applied (I and some other judges do this), and* *(ii) to treat such failures as negligent and thus as a foundation for the exercise of discretion to make a wasted costs order."* ***[53]** In that case a wasted costs order in the sum of £18,000 was made against the Applicant's solicitors. It must be expected that future abuse of the principles may lead to similar orders being made in the future.'* **Mostyn J**

		solicitors must also be served with the order, the application, affidavit and certificate of urgency by fax. (11) The court will also fix a return date for the application, usually within seven days of the original hearing. The listing for the return date may not be for a fully contested hearing, but for a short directions hearing in the event that the matter may be dealt with by agreement or upon undertakings being given by the respondent. (12) Depending upon the nature of the return date hearing, some courts may also direct at the without notice hearing that the respondent file and serve an affidavit in response prior to the next hearing.	

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