HARNEYS

How to get an injunction in the BVI

This guide sets out answers to frequently asked questions on obtaining injunctive relief in the British Virgin Islands.

What is an injunction?

An injunction is a court order prohibiting a person from doing something (a prohibitory injunction) or requiring a person to do something (a mandatory injunction). Specific injunctions include search orders, Norwich Pharmacal (third party disclosure) orders and freezing orders (or Mareva injunctions).

Injunctions can be final (permanent), interlocutory (until the final hearing or trial) or interim (until further order, which may be before the final hearing).

Injunction applications are frequently sought in the BVI, with the BVI courts readily granting them in appropriate circumstances.

Do I have a right to an injunction?

An injunction is granted at the court's discretion: it is not available as a remedy as of right. An injunction will usually be granted where it appears to be just and convenient to the court. The BVI court derives its power to grant injunctions from section 24 of the Eastern Caribbean Supreme Court (Virgin Islands) Act (***SCA***).

Whether the court will exercise its discretion to grant an injunction will depend on several factors, including delay, whether the injunction can be appropriately monitored, and whether the applicant has "clean hands", ie no misconduct or illegality is linked to the relief sought. There must also be an actual or threatened breach of the applicant's rights.

When considering the grant of an interim injunction, the court must exercise its discretion under guidelines set down in the seminal case of *American Cyanamid Co v Ethicon Limited*.

What are the American Cyanamid guidelines?

The court's primary objective is to follow the course which presents the lowest risk of irreparable prejudice if, after a trial, the decision to grant an interim injunction is subsequently found to be incorrect. In *American Cyanamid*, the House of Lords set out a three-stage test for granting an interim injunction.

- **Serious question to be tried**: The court must be satisfied that there is a serious question to be tried; ie the underlying claim itself must not be frivolous or vexatious.
- **Adequacy of damages**: The court must consider the adequacy of damages. This involves two steps:
    - If the claimant were to succeed at trial, from the claimant's point of view, would damages be an adequate remedy? If so, and the defendant would be financially able to pay them, no interim injunction would typically be granted.
    - If the defendant were to succeed at trial, would they be adequately compensated by the claimant's undertaking in damages for the loss caused by applying the interim injunction? If they would be adequately compensated, then an interim injunction should be granted.
- **Balance of convenience**: If there is doubt about the adequacy of damages to the claimant or the defendant, the court must consider the "balance of convenience". This involves the court assessing all factors and taking the course of action which presents the lowest risk of injustice; ie whether it would do more significant damage to the applicant if the injunction were wrongly refused than it would do to the respondent if the injunction were improperly granted. In performing this exercise, the court will consider any factors relevant to the facts of the case, which will necessarily be case-specific. If the factors are evenly balanced, then the court should act to preserve the status quo.

The courts typically exercise the discretion to grant an interim mandatory injunction more sparingly than an interim prohibitory injunction since, given that it is an order which requires a party to do something, there is generally a higher risk of injustice and irredeemable harm to the respondent if the decision is subsequently found to be incorrect.

When can I apply for an interim injunction?

Part 17 of the Eastern Caribbean Supreme Court Civil Procedure Rules (Revised Edition) 2023 (***EC CPR***) sets out the procedure for interim remedies, including injunctions.

An application for an interim injunction can be made at any time, including before proceedings are started and after judgment has been given (EC CPR 17.2(1)). The court may only grant an interim remedy before a claim has been issued if the matter is urgent or it is otherwise in the interests of justice to do so (EC CPR 17.2(3)). If the application is heard before proceedings are issued, the applicant will be required to give an undertaking to issue a claim form as soon as possible after that (EC CPR 17.2(5)).

Do I have to notify the respondent about the injunction I am seeking?

The general rule is that applications for interim injunctions are made "on notice" to the respondent. In these cases, the applicant provides the respondent with a copy of the application documents before the hearing. A copy of the application notice must be served on the respondent as soon as practicable after it is filed at court and, in any event, at least three clear days before the hearing at which the court will deal with the application (EC CPR 17.4(3)). Where there is insufficient time to give three clear days' notice, the court will still expect the applicant to provide the respondent with some, albeit reduced, informal notification.

In practice, however, many applications are made without notice to the respondent. Applications may be made without notice (also called *ex parte*). The court will grant without notice injunctions where there appears to be good reason for not giving notice, such as where giving notice would enable the respondent to take steps to defeat the purpose of the interim order or there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act (EC CPR 17.3(3) and EC Practice Direction 17 No 4 of 2023 Procedure for Applying to the Court for an Interim Order). If an interim injunction is granted, the court will set a return date within 28 days for the parties to return before the court to allow the respondent to defend its position.

Without notice applications impose additional onerous obligations on the applicant. Foremost of these is the duty to make full and frank disclosure; in other words, to disclose to the court all relevant facts and points of law concerning the application, whether they support the applicant's case or are adverse to it. The duty extends to information that the applicant would have known if they had made reasonable and proper enquiries before applying.

Do I have to give an undertaking in damages?

It is standard practice to require a successful applicant for an interim injunction to give an undertaking in damages to the respondent against whom the injunction has been granted. The cross-undertaking will usually be included within the draft order provided by the applicant. The purpose of the undertaking is to require the claimant to pay for any loss the respondent sustains because of the injunction if the court concludes later that the injunction should not have been granted or should not have been granted for that length of time.

What is a freezing order?

A freezing order (also known as a Mareva injunction) is a special interlocutory injunction that restrains a defendant from disposing of, dealing with, or diminishing their assets up to a specific value. Its primary purpose is to prevent the dissipation or concealment of assets that would otherwise be available to satisfy a judgment or award.

A freezing injunction may also be granted against a "non-cause of action defendant" – that is to say, a person against whom the application has no right to claim substantive relief. The basis for granting the injunction is that the person injuncted holds or controls assets against which a judgment against the primary defendant could potentially be enforced. The jurisdiction to make such orders is known as the Chabra jurisdiction after the eponymous case.

A freezing order often contains ancillary orders requiring disclosure of the respondent's assets. The purpose of the ancillary asset disclosure order is to ensure the effectiveness of the freezing order or to aid in the enforcement of any judgment when obtained. Such orders will usually require the respondent to disclose all of their worldwide assets above a specific value within a short time of service of the order and to provide an affidavit verifying the asset disclosure.

What is the BVI court's jurisdiction to grant freezing orders?

The jurisdiction to grant domestic freezing orders derives from section 24 of the SCA and EC CPR 17.1(1)(j). In early 2021, section 24A was enacted, amending the SCA, to give the BVI courts statutory jurisdiction to grant freestanding freezing orders and other interim relief in support of foreign proceedings. The wording of section 24A of the SCA and section 25 of the English Civil Jurisdiction and Judgments Act 1982 is substantially similar, with both provisions giving their respective courts a discretion to refuse an application if that court has "no jurisdiction apart from this section" and the relief sought is "inexpedient".

In *Claimant X v A TVI Company* BVIHC (COM) 37/2021, the BVI court adopted the following two-stage approach used in England and Wales when deciding whether to exercise its discretion to grant a freezing order in aid of foreign proceedings:

- Whether the facts would justify the relief sought if the substantive proceedings had been brought in the BVI.
- If yes, would it be unwise to grant the relief sought? In determining whether it is "inexpedient", the court will consider whether there are connecting factors to the jurisdiction and other factors, including whether the making of the order will interfere with the management of the case in the primary court, whether there is a risk of conflicting inconsistent or overlapping orders in other jurisdictions, and whether the court will be making an order which it cannot enforce.

New section 24A was swiftly followed by the majority judgment of Lord Leggatt in the Privy Council appeal of *Broad International Ltd v Convoy Collateral Ltd* [2021] UKPC 24 (BVI), which confirmed the continued existence of the common law equitable power to grant a freezing injunction against a defendant when no substantive claim is made against the defendant in proceedings before the domestic court. Such freestanding injunctions are based on an "enforcement principle" for the purpose of assisting enforcement of a prospective (or existing) foreign judgment rather than to support an existing cause of action.

What is the test for a freezing order?

The *Convoy Collateral* judgment contained a detailed rationalisation of the court's powers to grant freezing orders generally. Lord Leggatt stated that an applicant for a freezing order must establish that:

- The applicant has a good arguable case. This has been held to mean a case that is more than barely capable of serious argument but not necessarily one with a greater than 50 per cent chance of success at trial and a plausible evidential basis.
- The respondent holds assets (or is liable to take steps to reduce the value of assets outside the ordinary course of business) against which such judgment could be enforced.
- There is a real risk without an injunction, the respondent will deal with the assets (or reduce their value) outside the ordinary course of business, which would impair the availability or value of assets so the judgment would be left unsatisfied. In practice, the risk of dissipation can often be shown in a claim for fraud by the nature of the claim.

How do I apply for a freezing order in the BVI?

Applications for freezing injunctions will almost always be made without notice to the respondent because giving notice of the application might precipitate the dissipation feared. The applicant will, therefore, be under the duty to make full and frank disclosure to the court of all material facts and will usually be required to provide an undertaking to the court to pay any damages which the court considers the applicant should pay should it turn out that the order should not have been made (EC CPR 17.4(2)).

The documents which must be filed with the court are the application notice, an affidavit setting out the factual background and gives complete and frank disclosure, a draft order including a penal notice which sets out the consequences of non-compliance, a certificate of urgency (if the matter is urgent), a skeleton argument (and authorities bundle if authorities are cited), and a listing request form for the court to list the without notice hearing in front of a judge. If no existing claim has been filed, a claim form must also be issued or an undertaking given to issue one as soon as possible. The applicant must also pay the court filing fees.

The EC CPR now provides for service of court process out of the jurisdiction without permission from the court if an application is made for interim relief where proceedings have been or are about to be commenced in a foreign jurisdiction (EC CPR 7.3(11)). The claimant must file a certificate confirming that they have complied with the EC CPR service provisions.

EC CPR 17.4(4) limits the period of an interim order made without notice to not more than 28 days. In practice, the court will list a further short hearing within 28 days of granting the order. If the respondent applies to set it aside after receiving notice of the freezing order, a substantive return date to reconsider whether the order was made correctly will be listed at the short hearing. Otherwise, if there is no opposition, the freezing order will likely continue until trial or further court order.

What happens if the respondent does not comply with the freezing order?

Failure to comply with the terms of a freezing order, including any ancillary asset disclosure orders, is contempt of court, which may be punishable by imprisonment in the case of individuals or by sequestration of assets in the case of a company. The court has inherent jurisdiction to make a committal order with extraterritorial effect against a contemnor who resides outside the BVI.

Conclusion

We hope this guide helps you understand how to get an injunction in the BVI.

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