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Securing assets during a claim in EU countries

Gibraltar

1 What are the different types of measures?

An injunction is a court order requiring a party to either take certain steps or refrain from taking certain steps. An interim injunction is such an order made before the trial of the claim. A claimant may seek to protect his or her position in the course of legal proceedings, or even before proceedings are begun, by seeking an interim injunction to prevent the defendant from acting in a way which will harm the claimant.

There are also two specific types of injunction which a claimant may seek where there is a risk that the defendant will take steps to destroy evidence or to frustrate any judgment obtained by the claimant. The first is a search order, which requires the defendant to permit a search of his or her premises for documents or property; the second is a freezing injunction, which prohibits the defendant from dealing with assets or moving them out of the jurisdiction.

Where the claimant is seeking payment of a sum of money (e.g. a debt or damages), the court may order the defendant to make an interim payment on account of any sum which the defendant may ultimately be required to pay, in order to avoid hardship to the claimant as a result of any delay in obtaining judgment.

A defendant may face the risk that, even if the claim is dismissed and the claimant is ordered to pay costs, it will be impossible to enforce the costs order. To protect the defendant, the court may in certain circumstances order the claimant to provide security for costs, usually by paying a sum of money into court.

The Supreme Court has the power to grant interim relief in support of proceedings in another jurisdiction if it is expedient to do so. It may also grant a “worldwide freezing injunction” which applies to assets in other jurisdictions.

2 What are the conditions under which such measures may be issued?

2.1 The procedure

Injunctions (including Search Orders and Freezing Injunctions)

Injunctions are orders of the court. In the absence of a search order or freezing injunction, the defendant is generally under no obligation to permit a search of his or her premises or to refrain from dissipating his or her assets. An application for a search order or freezing injunction is made in the Supreme Court. An applicant must make full and frank disclosure of all material facts of which the court should be made aware (particularly where the application is made without notice). A draft order should also be provided, specifying precisely the steps which are required.

For interim injunctions the applicant is normally required to give a “cross-undertaking in damages” - a promise to compensate the respondent for any losses caused by the injunction if it subsequently turns out that it should not have been granted (e.g. because the applicant loses at trial).

Applications may be made without giving notice to the respondent if there are good reasons not to give notice. They may also be made before the claimant has issued the claim form commencing the main proceedings. There is no formal requirement that the applicant should be represented by a lawyer at the hearing of the application, but an applicant will normally need legal advice and representation in order to make such an application.

Once the court grants the order, it must be drawn up and served on the respondent. Court officers do not play any part in serving or enforcing interim injunctions. However, search orders must be carried out in accordance with special procedures. They must normally be served by a “supervising solicitor” who is familiar with search orders and independent of the applicant’s solicitors. The supervising solicitor must explain the search order to the respondent and advise the respondent of his or her right to seek legal advice. The supervising solicitor will carry out or supervise the search, and report on the search to the applicant’s solicitors.

Interim Payments and Security for Costs

Interim payments and security for costs may be provided by agreement between the parties, but in the absence of agreement it is necessary to apply to the court. The application is made by filing an application notice supported by written evidence. The application must be served on the respondent, who may file evidence in reply. If the court makes the order, it will determine the form and amount of the security or payment which must be made.

Costs of obtaining orders

There is no fixed scale of costs for obtaining any of the orders described above. There are, however, specific court fees for issuing an application for an order which depend on whether the application is made with notice to the respondent or without notice. Full details of these fees can be obtained from the Supreme Court Registry, 277 Main Street, Gibraltar, telephone number (+350) 200 75608.

The applicant is liable to pay the fees of his or her solicitors (and in the case of a search order, those of the supervising solicitor), although the respondent may ultimately be ordered to pay those costs.

2.2 The main conditions

All of the remedies described in this section are discretionary and the court will not grant them if it considers that they would be inappropriate or disproportionate in the circumstances. The courts tend to exercise greater caution in relation to search orders and freezing injunctions because they are particularly severe measures.

Interim Injunctions

In deciding whether to grant an interim injunction, the court will first consider whether the action raises a “serious question to be tried” (rather than being “frivolous or vexatious”). If it does not, the injunction will be refused.

If there is a serious question to be tried, the court will then consider the “balance of convenience”. This involves asking whether it would be worse to require the claimant to go without the injunction until trial, or to make the defendant suffer the injunction. In deciding this question, the court will consider the following matters in the following order:

Would an award of damages be an adequate remedy for the claimant if the claimant were to win at trial? If damages would be adequate, the injunction will be refused. If they would not (e.g. because the harm to the claimant would be irreparable or non-pecuniary), the remaining questions must be considered.

Would the claimant's cross-undertaking in damages give the defendant adequate protection if the defendant were to win at trial? If damages would adequately protect the defendant, that normally counts in favour of the injunction.
Where the other factors appear evenly balanced, the court will maintain the status quo. This factor normally counts in favour of the injunction.
Other social or economic factors may be considered, such as the impact of granting or refusing the injunction on employment or on the availability of medicines.
As a last resort, the court may consider the relative merits of the parties' cases, but only if it is possible to form a clear view that one party's case is much stronger than the other's.

Search Orders

A search order may be made for the purpose of securing the preservation of evidence or property relevant to legal proceedings. The conditions for obtaining a search order are stricter than for other types of injunctions, and the court will not make an order unless the applicant shows that all of the following conditions are satisfied:
There is an extremely strong prima facie case against the defendant.
The activities of the defendant which give rise to the proceedings cause serious actual or potential harm to the claimant.
There is clear evidence that the defendant has incriminating documents or material.
There is a "real possibility" or a "probability" that the relevant documents or material will disappear if the order is not made.

Freezing Injunctions

The court has the power to grant a freezing injunction where it is "just and convenient" to do so. A freezing injunction will not be ordered unless the claimant can show that all of the following conditions are satisfied:
The claimant has a substantive cause of action over which the courts of Gibraltar have jurisdiction.
The claimant has a "good arguable case" against the defendant.
There are grounds for believing that the defendant has assets within the jurisdiction.
There is a "real risk" that the defendant will deal with the assets in a way which means any judgment cannot be enforced (e.g. by disposing of the assets or removing them from the jurisdiction).
The court will exercise particular caution before granting freezing injunctions in support of foreign proceedings, especially if the freezing injunction would overlap or conflict with any freezing order made by the foreign court in which the main proceedings are taking place, or if the foreign court has refused to freeze assets.
The court will not grant a worldwide freezing injunction if the respondent has sufficient assets within the jurisdiction, and must consider whether a worldwide injunction could be enforced in the countries where the respondent has assets.

Interim Payments

The court may order the defendant to make an interim payment only if the defendant has admitted liability to pay money to the claimant, if judgment has already been given in favour of the claimant for a sum of money which is to be assessed later, or if the court is satisfied that at trial the claimant will recover a "substantial amount of money" (or in a claim for possession of land, a payment in respect of the defendant's occupation of the land). In personal injury cases, a payment may only be ordered if the defendant's liability will be met by an insurer or the defendant is a public body.

Security for Costs

The most common cases in which the court may order the claimant to provide security are where:
The claimant is resident outside the European Union and the European Free Trade Area (Iceland, Liechtenstein, Norway and Switzerland) and it would be difficult to enforce a costs order in the claimant's country of residence.
The claimant is a company or other incorporated body and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so. (In deciding whether to order security, the court will take into account whether the claimant's lack of money or funds has been caused by the defendant's conduct.)
The claimant has changed address with a view to evading the consequences of the litigation; or has failed to give a correct address in the claim form.
The claimant has taken steps in relation to his or her assets that would make it difficult to enforce an order for costs against him or her.
The court will only make the order if satisfied that it is just to do so in all the circumstances. It will consider whether the application for security is being used to stifle a genuine claim, and whether the claim has a reasonably good prospect of success.
The court also has the power to order that security must be provided by:
a non-party who is funding the claim in return for a share of the fruits of the proceedings, or who has assigned the right to bring the claim to the claimant in order to avoid the risk of facing a costs order;
any party to proceedings who has, without good reason, failed to comply with court rules.

3 Object and nature of such measures?

3.1 What types of assets can be subject to such measures?

Interim Injunctions

An injunction may require a party to take or refrain from taking steps in relation to any type of asset.

Search Orders

A search order requires the defendant to permit entry to his or her premises, but does not allow the applicant to force entry. The order must specify the premises which may be searched and list the items which the people conducting the search may inspect, copy and remove. The order may only cover evidence which may be relevant in the proceedings, or property which may be the subject-matter of the proceedings or as to which a question may arise in the proceedings.
The standard form order requires the respondent to hand over all the items listed in the order. Where relevant evidence may be held on computers, access must be given to all computers on the premises so that they can be searched, and copies must be provided of all relevant items found.

Freezing Injunctions

The court may make a freezing injunction in relation to the respondent's property which prohibits the respondent from reducing his or her assets within the jurisdiction below a specified value, or an order freezing specific assets. The respondent will still be allowed to spend stipulated sums on living expenses and legal advice and representation, and the order may permit the respondent to deal with assets in the ordinary course of business.
The standard form of freezing injunction is a "maximum sum" order which states that it applies to all the respondent's assets up to a stated value. It covers any asset which the respondent has the power to deal with as his or her own, including assets held or controlled by a third party in accordance with the respondent's instructions.

A general or “maximum sum” order will cover any assets, including movable and immovable property, vehicles, money and securities. The order will also extend to any assets which are acquired after it is made. It may specify particular properties, business assets and bank accounts which are frozen. A joint bank account will not be frozen unless specifically covered in the order.

3.2 What are the effects of such measures?

The defendant is warned that a failure to comply with an interim injunction is a contempt of court for which the defendant can be imprisoned, fined or have assets sequestrated.

It is not necessarily a contempt of court for a third party to allow the respondent to dispose of assets in breach of a freezing injunction. However, if a third party who has been notified of the freezing injunction knowingly assists the respondent in disposing of assets which are frozen, that party commits a contempt. The applicant should therefore provide copies of the freezing injunction to third parties such as the respondent’s bankers, accountants and solicitors. (The standard form of order assumes this will be done and warns third parties of the possible penalties. It also includes undertakings by the applicant to meet the reasonable costs incurred by third parties in complying with the order, and to indemnify them against liabilities incurred in doing so.)

Even if they have been notified of the order, banks and other third parties may still exercise rights of security and set-off which were created before the freezing injunction was made.

A freezing injunction does not give the claimant any property rights in relation to the frozen assets. The right to bring proceedings for contempt is generally the claimant’s only remedy. A contract made in breach of an injunction is illegal and may therefore be unenforceable by a party who knows that it will breach the order. In addition, the court may sometimes be able to grant a separate injunction preventing the defendant from performing a contract with a third party. However, ownership may still be transferred under an illegal contract, and once such a contract has been performed it is not normally possible to recover the assets transferred.

3.3 What is the validity of such measures?

When an order for an interim injunction is made in the presence of the parties, it may state that it is effective until trial, judgment or a further order of the court, or until a specified date. (If an injunction is effective “until further order” it will not lapse when the court gives judgment, but only when it makes an order which expressly or impliedly discharges the injunction.)

An interim injunction made without notice to the respondent will normally last for a limited period, seldom longer than 7 days, and another court order will be needed to continue it. When granting an injunction without notice, the court normally fixes a “return date” for a further hearing at which the respondent may attend and contest the continuation of the order. The standard form freezing injunction states that it applies until the return date or further order.

4 Is there a possibility of appeal against the measure?

The defendant or any third party who is directly affected by an interim injunction may apply to the court at any time to have the order varied or discharged (although an application in relation to a search order which has already been executed should normally wait until the trial). It is not necessary to wait until the return date to contest an order made without notice. The defendant must give prior notice of the application to the claimant’s solicitors. The application should usually be made to the court that granted the order, and will often be heard by the same judge.

The grounds on which the respondent may make such an application include: failure to satisfy one of the conditions of the order, a material change in circumstances which removes the justification for the order, the oppressive effect of the order, unreasonable interference with the rights of innocent third parties, and delay by the claimant in pursuing the claim. Where the injunction was obtained without notice to the respondent, the grounds for discharging or varying the order also include failure by the applicant to disclose material facts to the court in obtaining the order, and insufficient evidence to justify giving interim relief without notice.

If the court sets aside the order, the respondent is then entitled to rely on the applicant’s cross-undertaking in damages and claim compensation. The court will order an “inquiry as to damages” to ascertain the respondent’s losses, although this may be deferred until the trial or later.

The court also has the power to discharge or vary orders for interim payments and security for costs, and to order that all or part of the money paid under the order should be repaid.

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