

S37 injunctions

How do you approach them legally and practically

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1. Introduction

- s37 injunctions a core weapon in the arsenal of the Family Court
- Strict procedure
- Doing it correctly can be the difference between preserving an asset and being on the wrong end of a costs order

- Not dealing with the set aside jurisdiction contained with s37 MCA 1973
- Not dealing with freezing orders under the inherent jurisdiction

2. The 'moving parts'

- s37 (2)(a) MCA 1973
 - Where proceedings for financial relief have been brought
 - Court must be satisfied
 - Respondent about to make
 - Intention of defeating claim for financial relief
 - Disposition or transfer out of jurisdiction or other dealing
 - May make such order as see fit to require respondent to refrain from action being taken

- ‘Where proceedings for FR have been brought.
 - This has been clarified as ‘are brought and have not concluded’; *Ahmed v Mustafa* [2015] 1 FLR 139 CA, see also *Goyal v Goyal* [2016] EWCA Civ 792
 - Does include variation applications
- ‘Satisfied’
 - Interim stage so usually not established on balance of probabilities after full hearing
 - Nevertheless, vital proper evidence is produced

- ‘Respondent about to make’
 - No general power to freeze assets pending the conclusion of litigation ND v KP (freezing order: ex parte application) [2011] EWHC 457 (Fam)
 - Sometimes respondent signals intent
 - Third party information relating to intent
 - Inference from available evidence
 - Mere suspicion not enough; J v H [2022] EWFC 133
 - BUT...beware of locking the stable after the horse has bolted

- ‘Intention of defeating claim’
 - Sometimes intent to defeat claim is pretty obviously the main purpose of a disposition
 - Sometimes not the only intention or not clearly the main intention
 - Includes recklessness UL v BK [2013] EWHC 1735:
 - nefarious intent is not needed, proof of unjustified conduct will suffice
 - if someone is doing something unjustified with his assets then it follows that he must (in a non-innocent way) be intending to do so

– Meaning of claim

- Not just quantum and distribution but also enforcement (see s37(1))

– Example to think about

- H holds a property on trust for Auntie Betty
- One week after issue of Form A, H says to W that he intends to transfer the property into Aunt Betty's name. H is clear that he plans to do so in order to make the evidential picture more clear for the Family Court
- Is this a preventable intended disposition?

- Disposition or transfer out of the jurisdiction
 - Incredibly wide class of actions
 - Any disposition at all that changes ownership or structure
 - Even a like-for-like transfer under the same ownership and structure is caught if the money leaves jurisdiction

3. Types of remedy

- Freeze assets

- Limitations

- must not freeze assets required for day to day living or the proper conduct of business
 - Cannot prevent settling of a will or codicil
 - Assets in a foreign jurisdiction
 - If the decision is not recognised and enforceable in the other jurisdiction then the order will not be made; Hamlin v Hamlin [1986] 1 FLR 61
 - Need to establish recognition and enforcement in foreign jurisdiction

- Can have a payment into Court
 - This can be attractive to both parties (leaves the respondent free to manage affairs but provides the applicant with a high degree of security)
- Requirement of notice before disposal
- Court cannot require undertakings but will often encourage them being offered and will accept them in lieu of order
- Can be used to impound a passport in the right circumstances; Young v Young [2012] 2 FLR 470

4. s37 and bankruptcy

- s37 cannot be used to prevent a respondent from filing for bankruptcy; Hellyer v Hellyer [1997] 1 FCR 340
- Freezing an asset does not prevent it reverting to trustees upon bankruptcy
- BUT if an order for a payment into Court is made, then the monies so held may not revert to the trustees

- Monies paid into a specific account and then made the subject of a garnishee/ third party debt order will not automatically revert to trustees
- Plan ahead!
 - If a party is likely to go bankrupt AND there is a valid concern that there may be a disposition with the intention of defeating the claim then try to protect against both in tandem

5. s37 and tenancies

- The set aside powers under s37 cannot be invoked to undo the giving of notice; Newlon HT v Alsulaimen [1998]3 FCR 183
- There is some academic debate about whether the giving of notice can be prevented using s37
- The case against:
 - Serving a notice to quit is not a disposition of property; Bater and Greenwich [1999] 2 FLR 993 and Newlon (above)

- The case for:
 - Newlon (see p319) did not determine the issue of whether or not a restraining order could prevent notice being given
 - s37 is extremely widely drawn
 - Any dealing
 - Used to protect the claim
 - See observations of Thorpe LJ in Bater
 - BUT Lord Berwick LJ declined to offer a view in relation to Thorpe LJ's analysis

- In practice
 - Assume the power does exist and seek to use it where appropriate
 - Try to resolve the issue by way of undertakings rather than litigation
 - Serve undertaking or order on the landlords

6. s37 and the Inherent Jurisdiction

- Mostyn J queried whether there was any material difference between the two; UL v BK
- Following are examples where Inherent Jurisdiction could be considered:
 - Orders against 3rd parties (not UK banks as they will follow s37 order)
 - If you cannot show an intention to defeat but can show an intention to deal and consequent detriment

7. Procedure

- Increasingly strict adherence to procedure by Courts at all levels
- Duty of full and frank approach
 - If not full and frank then application likely to be discharged ND v KP [2011] 2 FLR 662 FD
 - With indemnity costs Harrison v Harrison [2008] EWHC 362
 - Obligation not just on client but lawyers too Art Corporation v Schuppan [1994] TLR 33
 - Immerman docs must be signalled clearly

- Ex parte applications
 - Reality is such applications can only be brought truly ex parte if the signalling of intent through service is likely to affect adversely the functioning of the protection sought
 - Even urgent applications should be preceded with informal notice; FZ v SZ [2010] EWHC 1630
 - A proper note must be kept and relayed on request; Re S (Child Ex parte orders) [2001] 1 WLR 211
 - The note must be made contemporaneously; Memory corporation v Sidhu [2000] 1 WLR 1443

- Standards safeguard a Court must consider
 - Helpful list in UK v BL
- Undertaking as to damages in relation to third parties in particular
 - Very real
 - Client needs to be aware that if application causes loss (and particularly if too widely or unnecessarily brought) then a real possibility have to make good on the undertaking

- Issue in the correct place (Family Court – not magistrates - unless Inherent Jurisdiction is required or there complexity of the case justifies it, which will rarely be the case; Tobias v Tobias [2018] 1 FLR 616)
- Use the correct Form (Form D50G; FPR 2010 r9.6(1))
- Application must be supported by an affidavit; Para 3.1 of PD20A FPR 2010
- If ex parte, the form and affidavit must explain why

8.Costs

- Clean sheet applies
- Neither a starting point that costs follows the event nor that costs will not ordinarily be awarded
- Poorly brought applications routinely attract costs orders

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