

Injunctions to prevent disposal of assets

Occasionally upon the breakdown of a marriage, or a Registered Civil Partnership, one party may attempt to dispose of assets before the financial issues arising from the breakdown of the relationship have been resolved, to try to reduce what the other party may receive as a settlement.

There are two ways in which the Court may be approached to restrain one party from dealing with assets until the other party's claim for financial provision has been resolved.

1 Section 37 of the Matrimonial Causes Act 1973

This Section is designed expressly to avoid transactions intended to prevent or reduce financial relief. The Court will not make an Order under this Section restraining one party from dealing with assets unless it is satisfied on balance that

- he or she is about to deal with the asset concerned.
- the effect of the proposed dealing would be to defeat or reduce the other party's claim, or enforcement of an existing Order.
- the purpose of the disposal was to defeat or reduce the financial provision for the other party.

The Court will consider each case on its own particular facts. No distinction is drawn between different types of assets, and a Section 37 Injunction can, therefore, be obtained in a variety of different circumstances: e.g. where a party is proposing to transfer monies from a Bank Account to a third party, or where one party is proposing to sell or transfer commercial or residential premises.

For the purposes of such an Injunction, it does not matter whether one or both parties have an interest in the asset concerned. The Court has very wide powers and can make an Order in respect of an asset wherever it is situated, whether in this country or abroad. However, if the asset is situated outside England and Wales, a Court might refuse to make an Order where the Order would be unenforceable. Usually orders dealing with assets abroad are dealt with by the High Court rather than by the usual County Court.

This power is available to the Court also if a party is about to transfer an asset out of the jurisdiction.

If the disposal is made within three years of the application, it is presumed to have been made with the intention of defeating that claim unless the Respondent to the application proves otherwise. If the disposal took place longer than 3 years prior to the divorce petition, the applicant has to prove its purpose and effect.

2 Procedure

Before an Application can be made for an Injunction to restrain the dealing with an asset, an application for financial provision in divorce must be issued, which itself means there must also be divorce proceedings. See the information sheet entitled "Financial Provision on Divorce - The Procedure".

If a general financial application has not been made already, and an the need for an injunction is urgent, the general financial application can be issued at the same time as the application for the Injunction (or an undertaking given by the applicant that the

Head Office

3 Lonsdale Gardens
Tunbridge Wells
Kent TN1 1NX
T 01892 510000
F 01892 549884

Thames Gateway

The Old Rectory
St. Mary's Road
Greenhithe
Kent DA9 9AS
T 01322 623700
F 01322 623701

Injunctions to prevent disposal of assets (continued)

general financial application will be issued within a specified period).

3 "Without Notice" Applications

In some circumstances it is necessary to make an application for an Injunction of this type without giving the other party notice that it is taking place. There are a number of guidelines which the Court will follow in dealing with any application for an Injunction where notice has not been given to the other party. There are no fixed rules, and each case will be considered on its own particular facts.

Some of the guidelines which the Court will follow are:

- 1 On making an application without giving the other party notice, there is a high duty to disclose to the Court all of the relevant circumstances. If an Applicant fails to do this, or misrepresents matters to the Court, the Court is unlikely to grant the Injunction even if the Applicant has a good case.
- 2 If the Court grants an Injunction without the other party being given notice, there will always be a subsequent Hearing for the Respondent to put their case with their own evidence and representations. He/she will be entitled to see all the information and evidence which was put before the Court at the first Hearing.
- 3 If an Applicant obtains an Injunction on a without notice basis, he or she is obliged to provide the Respondent with the information and documentation upon which the without notice Injunction was granted.
- 4 If an Injunction is granted on a without notice basis, the Court will almost certainly require the Applicant to serve the Application, any sworn Statements and Orders and notice of the subsequent hearing upon the Respondent within a set period of time.
- 5 If a without notice Injunction is granted on the basis that the Applicant or his solicitor gave an Undertaking to the Court to do specific things, it is imperative that the Undertaking is complied with.
- 6 The Respondent to an Injunction granted on a without notice basis is entitled to be given information about what happened at the first Hearing and to be told what evidence and documents were lodged with the Court before or during the Hearing, and what legal authorities were given to the Court.
- 7 The Applicant's legal representatives are under an obligation to provide copies of any documents which the Court considered at the Hearing, if requested by the Respondent.
- 8 An Injunction granted on a without notice basis must contain a provision allowing the Respondent to apply to the Court for the Injunction to be discharged.

4 Setting Aside Asset Disposals

As well as granting Injunctions to prevent the disposal of assets, the Court also has the power to set aside a disposal which has been made by one party.

Injunctions to prevent disposal of assets (continued)

An Order will only be granted if the Court is satisfied that the disposal was made with the intention of defeating the other party's claim for financial provision.

If a disposal is made within the three years prior to an application being made to the Court for the disposal to be set aside, and if the Court is satisfied that if the disposal is not set aside then the other party's claim for general financial relief would be defeated, then the Court will assume that the disposal was made with the intention of defeating the other party's claim. The onus would then be on the party who made the disposal to satisfy the Court that the disposal was not made with that intention.

There are restrictions on the circumstances in which the Court can make an Order setting aside a disposal. In particular, if a party disposes of an asset for valuable consideration (e.g. a property is sold at market value) to someone who is acting in good faith and who is unaware of the intention of the person disposing of the asset to defeat the other party's financial claim, then the Court will not make an Order.

5 General Power of the Court

Occasionally the Court is prepared to consider making an injunction to freeze assets, even if the precise requirements of Section 37 cannot be fulfilled, but by invoking the general jurisdiction of the Court.

Whilst Section 37 applications can be dealt with by a District Judge, an application under the inherent general jurisdiction of the Court can only be dealt with by a Circuit

Judge or higher Judge. These orders are known as "Shipman" Orders after the leading case which decided that they were available - **Shipman v Shipman**, reported in 1991.

The test is whether the balance of convenience favours the freezing of assets. The legislative authorities are the Supreme Court Act 1981 Section 37 (1) and the Civil Procedure Act 1997 Rules 7 and 24. Such orders are very similar to those which are available in civil proceedings for a similar purpose.

The Applicant for such an injunction has to be aware that the Court may require an undertaking from him or her to compensate the person whose assets are frozen, if subsequently it transpires the freezing should not have taken place or there has been a knock-on effect which requires compensation.

If an application of this type is made without notice then the Applicant has to give full disclosure of any facts which might indicate to the Court that an Order should not be made. If not, the person is not only at risk of failing to have the Order confirmed at the subsequent hearing between the parties, but will also be at risk of paying the other party's legal costs, and damages to redress their losses.

This information sheet has been prepared to highlight some key issues relating to Injunctions to prevent the disposal of assets. It is intended to be for general guidance only, and is not a substitute for specific advice. It is based upon our understanding of the legal position as at January 2005, and may be affected by subsequent changes in the law.

Injunctions to prevent disposal of assets (continued)

Should you require any specific legal advice on the issues covered, please contact any of the below on 01892 510000 or by email as indicated.

barbara.wright@ts-p.co.uk

sarah.judd@ts-p.co.uk

joanna.pratt@ts-p.co.uk

des.odonnell@ts-p.co.uk

sarah.keily@ts-p.co.uk

© Thomson Snell & Passmore All Rights Reserved