

**COVID-19 and Freezing/Proprietary Injunctions**

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Andrew Maguire explores whether it is possible, given the present circumstances, for an applicant to apply for Freezing and Proprietary Injunctions remotely.

**Introduction**

During these uncertain times during the lockdown, the question arises as to whether an applicant may still apply for an urgent interim without notice freezing or proprietary injunction as well as ancillary orders, such as a search order or a *Norwich Pharmacal*/Banker’s Trust order, (which will be collectively referred to as an “injunction” or “injunctive relief”) at the High Court?

The simple answer is yes. An applicant can still obtain an urgent injunction and the courts are still open for business; remotely or by telephone.

The obtaining of emergency injunctive relief has always been permitted via an out of hours’ telephone call or even a visit to the appropriate duty High Court judge (see PD 25A at ¶4.5). Consequently, the new, temporary, regime is certainly not alien to the judges who administer this jurisdiction pursuant to s.37 of the Senior Courts Act 1981.

**Are my rights to bring a claim curtailed by COVID-19?**

Not generally; save for the limited exceptions where this has been expressly legislated for (e.g., the temporary restrictions on the right to evict tenants), in most instances, the law remains unchanged by COVID-19.

**The requirements for remote bundling during Covid-19**

Any court hearing is now likely to proceed remotely. The Civil Justice in England and Wales Protocol regarding Remote Hearings, issued on 26.3.2020 states that:

1. the parties should, if necessary, prepare an electronic bundle of documents and an electronic bundle of authorities for each remote hearing.
2. Each electronic bundle should be indexed and paginated and should be provided to the judge’s clerk, court official or to the judge (if no official is available), and to all other representatives and parties well in advance of the hearing.
3. Electronic bundles should contain only documents and authorities that are essential to the remote hearing. Large electronic files can be slow to transmit and unwieldy to use.
4. Electronic bundles can be prepared in .pdf or another format. They must be filed on CEfile (if available) or sent to the court by link to an online data room (preferred), email or delivered to the court on a USB stick.

Thus, some care is required in preparing an e-bundle (as was highlighted by Mr Justice Birss in *[Invista Textiles (UK) Ltd v Botes](https://www.bailii.org/ew/cases/EWHC/Ch/2019/58.html" \l "para59" \t "_blank)*[2019] EWHC 58 (Ch)); as different considerations are required to traditional hard copy bundling.

As a practical tip, investing time in hyperlinking bundles, including the indices of core or authorities bundles or within the text of electronic witness statements to documents, is time very well spent.

By s 55 and Schedule 25 of the Coronavirus Act 2020, the Courts Act 2003 has been modified for as long as the Coronavirus Act 2020 remains in force. In summary:

1. s.85A of the Courts Act 2003 allows live-streaming (video or audio) of proceedings, at the direction of the court. However, under CPR 39.2(g) and PD 51Y para 2, the Court may direct that proceedings are to take place in private where it is necessary to secure the proper administration of justice. In *National Bank of Kazakhstan v Bank of New York Mellon* [2020] EWHC 916 (Comm), Teare J directed that there be a live stream on YouTube, and that its details be provided on the Cause List. The links were also provided on the websites of the respective solicitors’ firms.
2. s.85B and s.85C of the Courts Act 2003 provides for various offences in respect of recording or transmitting such live-streamed proceedings or other proceedings taking place through a live video or audio link. This includes taking pictures of people participating in those court proceedings; such as selfies.

PD51Y, which will remain in force for as long as the Coronavirus Act 2020 remains in force, also contains provisions on remote hearings during the pandemic.

**Which form of software will be used?**

The main software is Skype for Business, although Zoom and Microsoft Teams have also been used. The trial of *National Bank of Kazakhstan v Bank of New York Mellon* [2020] EWHC 916 (Comm), which was the first live-streamed Commercial Court trial, took place on Zoom. However, paragraph 13 of the Protocol Regarding Remote Hearings provides a choice, so as to be flexible, as to particular software.

**Which documents are required to be filed electronically, to obtain an injunction?**

The following documents should be completed, which will be usually prepared by specialist counsel, so as to ensure the best prospects of obtaining the injunctive relief:

* Application Notice along with evidence in support of the application.
* A draft Order – which will set out the terms for the freezing Order.
* Ancillary Orders, which may be needed – this may include an order for cross-examination, delivery of passport, or order for a company receiver.

If a freezing order is then granted at a without prejudice hearing it will usually be made for a specific amount of time and a return date will be fixed for a full hearing.

Following the granting or the order it should then promptly be served by the applicant on the respondent and any third parties known, or believed to hold assets of the respondent.

At the full hearing the court will determine whether the injunction should be continued, varied or discarded.

**Does the applicant need to physically sign statements of truth on statements of case and other required documents, such as affidavits?**

Solicitors can sign statements of truth on claim forms and other pleadings, provided that they have express authorisation from their client and confirmation that the client has read the contents of the document and understands the consequences of instructing a solicitor to sign a statement of truth where they lack an honest belief in what is stated.  A solicitor should never sign a statement of truth on behalf of a client unless they have had this authorisation and confirmation in writing; an email will suffice.

Solicitors cannot sign statements of truth on witness statements on behalf of clients or third parties.  CPR 5.3 provides that “*where any of these Rules or any practice direction requires a document to be signed, that requirement shall be satisfied if the signature is printed by computer or other mechanical means*”.

It is very easy for a client to sign a statement on a tablet or smartphone either with stylus technology or by inserting an e-signature into a Word document or pdf, although arguably the act of the witness simply typing out their name in regular fashion will suffice provided that this is done by the witness themselves.

To underline the importance of statements of truth, amendments to paragraph 2.1 and 2.2 of [PD22](https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part22/pd_part22) that came into force on 6.4.2020 have altered the required wording. Statements of truth are now required to read:

*“I believe that the facts stated in [these/this] [e.g. Particulars of Claim/Witness Statement] are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.”*

The position regarding affidavits is more complicated during the lockdown, as they must be sworn in front of a commissioner for oaths, such as a solicitor.  Whilst their use is limited in civil proceedings, they are still required in specified instances for example, in committal proceedings, or with freezing orders. However, although CPR PD 25A, 3.1 states that an affidavit is required, if there is insufficient time to properly swear an affidavit, an undertaking may have to be given.

**What must be proven to freeze someone’s assets during Covid-19?**

Case law states that the following six conditions must be met in order to grant a freezing order (the requirements for a proprietary order do not include (v) – the risk of dissipation or secretion):

1. The applicant must have a cause of action, that is, an underlying legal or equitable right.
2. The English court must have jurisdiction.
3. The applicant must have a good arguable case.
4. The existence of assets (which now includes cryptocurrencies, such as Bitcoin: see *AA v Persons Unknown* [2019] EWHC 3556 (Comm), [2020] 4 WLR 35 at [56]-[61]).
5. There is a risk of dissipation or secretion.
6. The applicant must provide an undertaking in damages.

**What must an applicant provide for a successful freezing order injunction application?**

Full disclosure of all relevant information must be provided by the applicant including an undertaking in damages to compensate the respondent if it is then decided that the freezing order should not have been awarded.

It is important that in the disclosure the applicant provides all facts and information so that court is able to properly exercise its discretion. These facts include anything that could adversely affect the applicant’s own case; how long the dispute has been ongoing; and facts that the applicant or their advisors did not know but could have discovered if they made reasonable enquiries. In this regard, oral submissions are usually required, especially where time is limited to enable the judge to read all of the documents: see *Vestey Foods UK Ltd v Cox and others* [2018] EWHC 3466 (Ch).

**Can a without notice injunction be served by email or fax as opposed to personal service?**

In order to be able to seek committal for contempt under CPR 81, the freezing order must have the requisite penal notice prominently displayed on the front page: see CPR 81.9(1). The penal notice is a warning to the respondent that disobedience to the order would be a contempt of court punishable by imprisonment, a fine or sequestration of assets: see CPR 81.9(1).

The penal notice should be served personally on the respondent in accordance with CPR 81.5 and 81.6: see CPR 81.9(1). Otherwise, it may not be possible to enforce the order by committal proceedings.

However, in exceptional circumstances, the court may dispense with personal service of an order requiring a person not to do an act (such as a freezing order) if the court is satisfied that the respondent has had notice of the order, by having been either: (a) present when the order was made; or (b) notified of its terms by telephone, e-mail or otherwise: CPR 81.8(1).

In *Bunge S.A. v Huaya Maritime Corp* [2017] EWHC 90 (Comm), at [26]-[27], the court dispensed with the requirement of personal service in light of the respondent’s knowledge of the terms of the asset disclosure order made against the company of which it had actual control.

In the case of any order, the court pursuant to CPR 81.8(2*)* may in exceptional circumstances either:

1. Dispense with personal service, if it thinks it is just to do so; or
2. Make an order for alternative service.

**How is a freezing order enforced during Covid-19?**

Freezing orders are generally enforced by committal proceedings for contempt of court. Committal proceedings may generally only be brought against a person who the order was original served on.

Committal proceeding are classified as civil proceedings in England and Wales, however the penalty may be a fine, seizure of assets or up to two years’ imprisonment. To commit a person for breach of injunction a deliberate or wilful breach of the order must be established beyond reasonable doubt, which is the criminal standard of proof.

**Will an injunction application take priority over general civil court hearings?**

Yes, a large number of court hearings are going ahead – predominantly using video or audio conferencing facilities.  Inevitably, some court hearings are being adjourned.  HM Courts and Tribunal Service (HMCTS) have published lists that divides work into two categories:

1. “Priority 1: Work that must be done” and
2. “Priority 2: Work that could be done”.

The Priority 1 list includes committal applications, applications for injunctions, and freezing order work, and work with a “real time element”.

The Priority 2 list includes applications to set aside default judgments, applications for security for costs, small claim/fast track trials and infant settlement proceedings.  The lists apply only to county courts.

The High Court has published a [contingency plan](https://www.judiciary.uk/wp-content/uploads/2020/03/High-Court.Contingency.final_.26thMarch2020-002.pdf), which divides work between ‘urgent work’ and ‘business as usual’. The pre-existing ‘out of hours’ provisions are being applied for urgent work.  This will mean that there should always be a judge available to hear a genuinely urgent injunction application, remotely.

**Will any physical hearings be held?**

These are not prohibited per se, although the presumption is that hearings will be held remotely.

**Have any injunctions been granted remotely?**

Yes. On 24.4.2020, in the case of *Motorola Solutions Inc and others v Hytera Communications Corporation Ltd and others* [2020] EWHC 980 (Comm), Jacobs J. in the Commercial Court conducted the contested 3-party hearing remotely by video [see ¶5] and found that evidence obtained during a settlement meeting, of a threat to move assets away from jurisdictions where enforcement could easily be accomplished, fell within the unambiguous impropriety exception to the without prejudice rule and was, therefore, admissible in support of an application for the domestic freezing injunction.

**Find out more**

[Andrew Maguire](https://www.outertemple.com/barristers/andrew-maguire/) is a member of our Commercial Team and specialises in chancery-based commercial law. Andrew is frequently instructed on matters involving cross-border enforcement of judgments and freezing, proprietary and anti-suit injunctions. If you would like to discuss any of the issues covered in this article please contact [Andrew Maguire](mailto:andrew.maguire@outertemple.com) directly or via his Practice Director, [David Smith](http://www.outertemple.com/staff/david-smith/) for a confidential discussion.