

Developers Selling Units to the Point a Building Defects Court Order is Meaningless: Freezing Orders

Introduction

A Mareva injunction, more commonly known as a “freezing order” under the correct circumstances can deter frustration, abuse of the Court system, and protect an applicant’s claim, such as a claim for breach of statutory warranty against a builder and/or developer under the Home Building Act 1989.

Freezing orders are quite serious as they significantly restrict a person's or entities proprietary rights, and Courts do not give them lightly.

A successful application, on the other hand, requires:

- (a) the applicant, and lawyers responding swiftly to gather evidence and, if proceedings have not yet commenced, effectively present the applicant's position without substantive pleadings;
- (b) evidence of a risk of asset disposition; and
- (c) an undertaking as to damages or a payment into Court of an appropriate sum.

What is a Freezing Order?

A freezing order is an interlocutory order restraining a person or corporation from removing any assets located in or outside Australia or from disposing of, dealing with or diminishing the value of, those assets. The purpose of the freezing order is to prevent frustration or abuse of the process of the Court. Arguably, the freezing order does not restrict the sale of property but means that the proceeds of sale must be preserved.

In order to obtain a freezing order the applicant must prove that it has a good arguable case and that there is a danger that its judgment or prospective judgment will go wholly or partially unsatisfied because the respondent’s assets will be removed from the jurisdiction or dissipated, or that the respondent would abscond.

Subject to orders of the relevant Court, a freezing order will cease if the respondent pays a specified sum into the Court or an agreed bank account, or provides security in that amount by another agreed method.

Risks vs. Rewards of a Freezing Order

A freezing order is important in minimising the risk that a judgment will be wholly or partly unsatisfied, most crucial for creditors looking to protect assets. From an evidentiary perspective, the



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risk of dissipation of assets is generally easier to prove if there is evidence of fraud. Interestingly, evidence of dishonesty alone may be sufficient to draw the conclusion that assets are being reduced or disposed.

However, as a condition of granting a freezing order the Court usually requires that the applicant is to provide the “*usual undertaking as to damages*”. The “*usual undertaking as to damages*” is an enforceable undertaking that the applicant gives to the Court, agreeing to submit to the Court’s orders to pay compensation to any party effected by the order should it be found by the Court that the freezing order should not have been made at first instance and that the respondent or other parties suffered damage as a result of the freezing order.

The usual undertaking as to damages exposes the applicant to a later damages claim should the applicant’s claim be unsuccessful. If such an undertaking is not given, then the Court will usually refuse to grant a freezing order. Therefore, if you seek a freezing order on a contested basis it will be necessary to be prepared to provide an undertaking as to damages to the Court.

Essentially, this means that in the event that the prevention of the respondent dealing with the assets (up to the amount claimed) causes them losses and the applicant does not obtain judgment for an amount equal to, or greater than, the amount preserved, the applicant may be liable for the losses suffered by the respondent for the amount of money preserved that is greater than the amount received in judgment i.e. say the applicant seeks \$500,000 and the applicant obtains only \$300,000, the applicant may be liable for the respondent’s losses from being unable to deal with the remaining \$200,000 that was preserved.

The respondent would have to prove to the Court the extent of the damage suffered as a result of the freezing order in order for the Court to determine the amount of damage that the respondent should receive.

Thus, the risk of applying for a freezing order is that the applicant may have to pay a significant amount of money to the respondent if the applicant does not win the case and may have to compensate any affected third parties.

When a Developer is a Special Purpose Vehicle

To obtain a freezing order is not ordinarily an easy task. However, in the recent Court of Appeal decisions, the Court clarified the tests applicable for a party to obtain a freezing order against a developer, where the developer was a special purpose vehicle in building defects proceedings.

A developer is a special purpose vehicle if the sole purpose of the corporation is to develop a specific residential and/or commercial development.

In *Aqualand North Sydney Lavender Development Pty Ltd v The Owners – Strata Plan No. 102081* [2025] NSWCA 143 (**Aqualand**), the Court of Appeal reinforced the practical operation of freezing orders against developers structured as special purpose vehicles. The owners corporation successfully obtained a freezing order restraining the developer from dealing with assets up to the value of the claimed \$10.6 million, including proceeds from the sale of remaining residential and commercial lots. The Court noted that while freezing orders are “extraordinary” and granted cautiously, a real or sufficiently serious risk of dissipation is enough to justify restraint. The



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developer's prior distribution of sale proceeds, refusal to provide undertakings and ongoing sales activity supported the inference of probable future dissipation. The Court highlighted that actions done in the ordinary course of business do not shield a developer from a freezing order, making such orders an effective tool to protect plaintiffs in high-value building and strata disputes.

In Aqualand, the Court clarified the tests required for the applicant to obtain a freezing order as follows:

- a) Whether the applicant has a good arguable case on an accrued or prospective cause of action;
- b) Whether there is a sufficient prospect that the Court will give judgment in favour of the applicant;
- c) Whether there is a danger that any judgment the applicant obtains will be wholly or partly unsatisfied because the developer will or may dispose of its assets.; and
- d) Whether the respondent demonstrate any prejudice if a freezing order is granted.

More importantly, the Court indicated that it was not helpful to ask whether the distribution of the remaining profits was in the ordinary course of business or was something that was "extraordinary". This statement makes it much easier for an owners corporation to obtain a freezing order against a developer which is a special purpose vehicle.

Powers of the Strata Committee

As stated above, a crucial element in obtaining a freezing order is the provision of an undertaking called the "usual undertaking in relation to damages," which is described above, and can result in the applicant having to pay compensation to any party affected by the order.

The decision to grant this undertaking can be made by the Committee pursuant to section 36(2) of the Strata Schemes Management Act 2015 (NSW) ("**SSMA**"), subject to the restrictions in section 36(3) of the SSMA. See extracted section 36 below:

"Section 36 - Functions of strata committee

(1) A strata committee has the functions conferred on it by or under this or any other Act.

(2) A decision of a strata committee is taken to be the decision of the owners corporation. However, in the event of a disagreement between the owners corporation and the strata committee, the decision of the owners corporation prevails.

(3) The following decisions cannot be made by the strata committee—

(a) a decision that is required by or under any Act to be made by the owners corporation by unanimous resolution or special resolution or in general meeting,

(b) a decision on any matter or type of matter that the owners corporation has determined in general meeting is to be decided only by the owners corporation in general meeting.

(4) An owners corporation may in general meeting continue to exercise all or any of the functions conferred on it by this Act or the by-laws even though a strata committee holds office."

With reference to section 36(3)(b), it must be satisfied that there is no applicable restriction on the decision-making of the committee determined by the scheme at a general meeting.

What does this mean for you?

If a respondent has hidden or dispersed assets in order to avoid payment of your claim and is potentially unable to pay the judgement amount, a Court win is meaningless.

A freezing order can prohibit a respondent from dealing with certain assets up to the amount sought by you and is a useful tool in your arsenal.

When considering a claim against a party, you should assess not just the legal risks of litigation, but also any behaviour that suggests the respondent is or will conceal assets in order to avoid paying a judgement debt.

A freezing order is always an option worth contemplating if you are concerned (and have evidence) that a respondent may dissipate their assets to avoid compliance of any order you obtain.

Even after the commencement of proceedings against a builder and/or a developer, the owners corporation needs to continuously monitor the conduct of the builder and the developer as to whether they are dispersing assets, and, if so, to seek a freezing order immediately, like in Aqualand.

If you are having concerns that a developer is possibly dispersing assets to compromise the owners corporation's building defects claim, please contact us at enquires@bannermans.com.au or on 02 9929 0226.

Key takeaways

- A freezing order is a court injunction that prevents a party from disposing of their assets.
- To obtain a freezing order, the applicant must demonstrate a risk of asset dissipation.
- The court requires an undertaking as to damages from the applicant when granting a freezing order.
- Evidence of fraud can strengthen the case for a freezing order.
- If a freezing order is granted and the applicant's claim is unsuccessful, they may be liable for damages.

****The information contained in this article is general information only and not legal advice. The currency, accuracy and completeness of this article (and its contents) should be checked by obtaining independent legal advice before you take any action or otherwise rely upon its contents in any way.*

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