# Freezing Injunction Granted in Support of Unsatisfied Security for Costs Order

**16 May 2023**

## INTRODUCTION

In *Santina Ltd v Rare Art (London) Ltd (trading as Koopman Rare Art)* [2023] EWHC 807 (Ch), the High Court considered an appeal against an order for security for costs (the "SFC Order"), and a challenge to an *ex parte* freezing injunction (the "Freezing Order").

The Court dismissed Santina Limited ("Santina")'s appeal against the SFC Order on the basis that the judge below had properly exercised his discretion to order security for costs, and upheld the Freezing Order on the ground that the Court had jurisdiction to make it.

This case is of particular interest because the Court considered that Santina's failure to comply with the SFC Order was capable of triggering the freezing injunction jurisdiction. This required the Court to view the unsatisfied SFC Order as the equivalent of a cause of action that may (or may not) in due course convert into a money judgment.

## THE FACTS

On 16 July 2021, Santina brought proceedings against Rare Art alleging that Rare Art's sale of a pair of silver gilt soup tureens (the "Tureens") for £181,500 was induced by false representations.

On 25 May 2022, Rare Art applied for security for costs against Santina. On 13 October 2022, Deputy Master Glover ordered that:

- Santina give security for Rare Art's costs in the amount of £130,000;
- unless Santina comply with this order, the proceedings be automatically stayed, save that Rare Art have liberty to apply to strike out or dismiss the proceedings; and

- Santina pay the costs of the application in the amount of £14,000.

Santina did not pay the amount ordered by way of security for costs nor the costs in respect of the application. Accordingly, the trial was vacated.

Santina sought permission to appeal the order of Deputy Master Glover, and Rare Art sought to have the claim struck out (as envisaged by the SFC Order). Rare Art's strike-out application was stayed pending determination of Santina's application for permission to appeal.

On 14 March 2023, Rare Art applied for an *ex parte* freezing order. In light of the unsatisfied SFC Order and likely costs Rare Art would recover if awarded its costs of the entire case, Edwin Johnson J granted a worldwide freezing injunction whereby Santina could not dispose of, deal with or diminish the value of any of its assets (including the Tureens) in or outside England and Wales up to the value of £200,000.

## THE JUDGMENT

### Appeal from SFC Order

Marcus J considered that the SFC Order made by Deputy Master Glover was a discretionary one, which could only be interfered with if it was plainly wrong (i.e. the mere fact that he might disagree with the Deputy Master was not enough to permit the setting aside of the SFC Order).[1] Marcus J held that the Deputy Master had appropriately considered the matters raised by Santina in its grounds of appeal, and so Santina's appeal against the SFC Order failed.

### Continuation of Freezing Order

Santina had challenged the Freezing Order on the basis that (among other things) there was no jurisdiction to make the Freezing Order.[2] Indeed, Marcus J observed at the outset that a freezing order will only be granted if the applicant is also a claimant with a cause of action vested in it.[3] On the face of it, the judge noted that this ought to have been

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1 Citing *Dhillon v. Asiedu* [2012] EWCA Civ 1020 at [33(d)].

2 Note that, Santina did not contend that the Court lacked "jurisdiction" to make the Freezing Order, given the unlimited discretion to grant injunctive relief where it appears to be just and equitable to do so (section 37 of the Senior Courts Act 1981). Rather, the point Santina made was that the Freezing Order was so far outside the discretion to grant freezing order relief, as normally understood, as to amount to a discretion that should not be exercised.

3 Citing *Siskina v Distos Compania Naiera SA (The Siskina)* [1979] AC 210; and *Veracruz Transportation Inc. v VC Shipping Co Inc and Den Norske Bank A/S (The Veracruz)* [1992] 1 Lloyd's Rep 353.

fatal to Rare Art's application for freezing order relief, as it was not a claimant in the proceedings.

Notwithstanding, Marcus J referred to the decision of the Court of Appeal in *Jet West Ltd v Haddican*[4] as authority for the proposition that "*a costs order in favour of a defendant (as well as a claimant) is sufficient to found jurisdiction to make a freezing order.*" However, Marcus J found that whilst Rare Art had a costs order (assessed and payable) in its favour, he did not think it could properly found jurisdiction for the Freezing Order, as it was only in the amount of £14,000.

However, Marcus J considered that "*the failure to comply with the* [SFC Order], *resulting in an automatic stay of these proceedings and a right in Rare Art to apply to strike out the proceedings*" and "*obtain[…] an order in their favour of their costs of the entire proceedings*" was capable of triggering the freezing order jurisdiction. Notably, Marcus J accepted that an unsatisfied security for costs order is the equivalent of a cause of action that may—or may not—convert into a money judgment.

## COMMENTARY

This judgment provides important clarification on the scope of the Court's jurisdiction to make freezing orders in respect of costs. In particular, this decision confirms that an unsatisfied security for costs order is capable of triggering the freezing order jurisdiction.

Accordingly, the subject of an adverse costs order—even a contingent one (as here)—will not be allowed to thwart an order of the Court by putting beyond reach assets that might be used to satisfy that costs order.

This decision will be of significance for practitioners advising defendants that have succeeded in obtaining a security for costs order in circumstances where: (a) the claimant has failed to comply with the order; and (b) it appears the claimant is attempting (or may attempt) to dissipate or transfer its assets (whether in England & Wales or overseas).

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[4] [1992] 1 WLR 487. In this case, the Court of Appeal considered whether freezing order relief could be granted to a party who had the benefit of a costs order (such order to be taxed if not agreed). The Court of Appeal held that precisely the same rationale as applied to causes of action also applied in support of any judgment or order of the C?ourt for the payment of money. Lord Donaldson MR put the point thus: "*[w]here you have someone who is already subject to a money judgment, including an order for costs…the courts will not allow people to set their orders at nought simply by removing assets from the jurisdiction*" [at 489].

Please do not hesitate to contact us with any questions.

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