Applications made without notice

1. For the principles to be observed on making an application without notice see *Moat Housing Group-South Limited v Harris* [2006] QB 606; *FZ v SZ (ancillary relief: conduct; valuations)* [2011] 1 FLR 64, *Arena Corporation v. Schroeder* [2003] EWHC 1089 (Ch); *ND v KP* [2011] EWHC 457 (Fam), [2011] 2 FLR 662; *UL v BK (Freezing Orders: Safeguards: Standard Examples)* [2013] EWHC 1735 (Fam).
2. Without notice relief should normally only be sought and granted 'where there is a well founded belief that the giving of notice would lead to irretrievable prejudice being caused to the applicant for relief': see *ND v KP* at [10 to 12]. An applicant for without notice relief is fixed with a high duty of candour, breach of which will, generally speaking, lead to the order being set aside and a refusal to exercise the discretion to re-grant: see *ND v KP* at paras [13 and 14]. In *CEF Holdings Ltd & Anor v City Electrical Factors Ltd & Ors* [2012] EWHC 1524 (QB) Silber J put it this way at [235]:

   ‘generally a without notice injunction should be granted only in circumstances where to give notice would enable the defendant to take steps to defeat the purpose of the injunction, such as in the case of many search or freezing injunction, or where there is some exceptional urgency, which means literally there is no time to give notice.’

3. In *KY v DD* [2011] EWHC 1277 (Fam) (a wardship case) Theis J, giving guidance endorsed by the President of the Family Division, re-emphasised the established principles set out in *Re W (ex parte orders)* [2000] 2 FLR 927; *Re S (ex parte orders)* [2001] 1 FLR 308; *B Borough Council v S and anor* [2006] EWHC 2584 (Fam), and other cases. She added three further guidance points of her own:

   “(1) If information is put before the court to substantiate a without notice order, it should be the subject of the closest scrutiny and, if the applicant is not present in person to verify it, be substantiated by production of a contemporaneous note of the instructions. If that is not available, there may need to be a short adjournment to enable steps to be taken to verify the information relied upon.

   (2) If additional information is put before the court orally, there must be a direction for the filing of sworn evidence to confirm the information within a very short period of time. If that direction had not been made in this case, the passport order would have been executed when the grounds for obtaining it were simply not there. That would have involved a gross breach of the defendant's rights, quite apart from the court having been given misleading information.

   (3) Lastly, leaving the scrutiny that the court should give to without notice applications to one side, it is incumbent on those advising whether such an

application is justified to consider rigorously whether an application is justified and to be clear as to the evidential basis for it."

4. The principles of irretrievable prejudice and candour have been strongly endorsed in *O'Farrell v O'Farrell* [2012] EWHC 123 (QB) and *Edgerton v Edgerton and another* [2012] 1 FCR 421, CA. In the former case Tugendhat J stated at [66 and 67]:

"Like Mostyn J, I too have been shocked at the volume of spurious ex-parte applications that are made in the Queens Bench Division. The number of occasions on which CPR Part 25.2 and CPR 15.3(1) and (3) and PD25A para 4(3) are flouted is a matter of real concern. In these days of mobile phones and emails it is almost always possible to give at least informal notice of an application. And it is equally almost always possible for the Judge hearing such an application to communicate with the intended defendant or respondent, either in a three way telephone call, or by a series of calls, or exchanges of e-mail. Judges do this routinely, including when on out of hours duty. **Cases where no notice is required for reasons given in PD 25A para 4.3(3) ['where secrecy is essential'] are very rare indeed. ... The giving of informal notice of an urgent application is not only an elementary requirement of justice.** It may also result in a saving of costs. The parties may agree an order, thereby rendering unnecessary a second hearing on a return date."

5. The FPR 2010 provision corresponding to CPR PD 25A para 4.3(3) is PD 20A para 4.3(c). This in virtually identical terms requires that **'except in cases where it is essential that the respondent must not be aware of the application, the applicant should take steps to notify the respondent informally of the application.'** This sets the bar high and, as Tugendhat J has pointed out, it will be rare indeed where circumstances make it permissible to withhold notice, even if only short informal telephone or email notice.

6. Tugendhat J made similar forceful observations in *AB v Barristers Benevolent Association Ltd* [2011] EWHC 3413 (QB) at [28]:

"I have prepared this judgment in accordance with what is now the usual practice in such case. It may also serve the purpose of reminding practitioners of the importance of giving notice, however late, of any application by telephone to the Judge on duty out of hours. In these days of mobile phones and emails it is almost always possible to do this. And it is equally almost always possible for the Judge to communicate with the intended defendant or respondent, either in a three way telephone call, or by a series of calls, or exchanges of e- mail. Cases where no notice is required for reasons given in PD 25A para 4.3(3) are very rare indeed."

7. See also *National Commercial Bank Jamaica Ltd v. Olint Corp Ltd (Jamaica)* [2009] UKPC 16, [2009] 1 WLR 1405, PC where Lord Hoffmann stated at [16]:

"First, there appears to have been no reason why the application for an injunction should have been made ex parte, or at any rate, without some notice to the bank. Although the matter is in the end one for the discretion of the judge, audi alterem partem is a salutary and important principle. Their Lordships therefore consider that a judge should not entertain an application of which no notice has been given unless either giving notice would enable the defendant to take steps to defeat the purpose of the injunction (as in the case of a Mareva or Anton Piller order) or there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act. These two alternative conditions are reflected in rule 17.4(4) of the Civil Procedure Rules 2002. Their Lordships would expect cases in the latter category to be rare, because **even in cases in which there was no time to give the period of notice required by the rules, there will usually be no reason why the applicant should not have given shorter notice or even made a telephone call. Any notice is better than none**."

8. However, it should not be thought that the giving of short informal notice absolves an applicant from the duty of candour. In *CEF Holdings Ltd & Anor v City Electrical Factors Ltd & Ors* [2012] EWHC 1524 (QB) short notice was given and counsel for one of the defendants appeared. Silber J stated at para 182:

"if a shorter period of notice (and particularly if a much shorter period of notice is given), then the respondents to the application cannot be expected to be properly prepared and to be able to put all the relevant legal and factual information before the court. In those circumstances, the obligation of full and frank disclosure continues."

This was subject to one qualification:

"Obviously, if the respondent who has been given inadequate notice, appears and then deals with *all* the factual and legal issues in the way in which the applicant for the injunction would have been obliged to have done as satisfying his obligation to give full and frank disclosure, then the applicant for the interim relief is discharged from the obligation to give any further information as it had already been supplied by the respondent."

In that case insufficient notice had been given and the injunction was discharged. Silber J ended his judgment with the following important statements of principle at para 255:

"There are some serious lessons to be learnt and they include:-

(a) remembering that without notice applications should only be granted in very limited circumstances, which are where to give notice would enable the defendant to take steps to defeat the purpose of the injunction, such as in the case of many search or freezing injunction, or where there is some exceptional urgency, which means literally there is no time to give notice (see, for example, *National Commercial Bank Jamaica Ltd v Olint Corporation Limited* (Practice Note) [2009] 1 WLR 1405);

(b) appreciating that in every application for an injunction sought without any or any proper notice, it is prudent to include a statement supported by facts explaining fully and honestly why proper notice could not have been given. A bland statement that the defendant might do something if warned is unlikely to satisfy this requirement without some particulars in support;

(c) Every witness statement made in support of an application for an injunction made without any or any proper notice should contain a statement setting out the duty to give full an frank disclosure …and then indicating how that duty has been complied with; and

(d) Any application for an injunction must be based on facts and as Tugendhat J said in the *Caterpillar* case [2011] EWHC QB 3154 "*mere suspicion is not enough"*."

Plainly these principles apply equally to financial remedy proceedings.

9. In *B v A* [2012] EWHC 3127 (Fam) an alleged child abduction case, Charles J strongly endorsed these principles where there had been flagrant disregard of them. At [16] he prescribed the following further principles:

(i) If information is put before the court to substantiate a without notice order, it should be the subject of the closest scrutiny and, if the applicant is not present in person to verify it, be substantiated by production of a contemporaneous note of the instructions. If that is not available, there may need to be a short adjournment to enable steps to be taken to verify the information relied upon.

(ii) If additional information is put before the court orally, there must be a direction for the filing of sworn evidence to confirm the information within a very short period of time.

(iii) Lastly, leaving the scrutiny that the court should give to without notice applications to one side, it is incumbent on those advising whether such an application is justified to consider rigorously whether an application is justified and be clear as to the evidential basis for it."

and concluded at [110]:

"It seems to me that if such failures are to be avoided in the future there is a need for judges:
(i) to refuse to make without notice orders if the established principles and procedures are not applied (I and some other judges do this), and
(ii) to treat such failures as negligent and thus as a foundation for the exercise of discretion to make a wasted costs order."

A wasted costs order in the sum of £18,000 was made against the Applicant's solicitors.

10. All these principles were reiterated in *UL v BK (Freezing Orders: Safeguards: Standard Examples)* [2013] EWHC 1735 (Fam) in a judgment approved by the President. The guidance is summarised at [51]:

- The court has a general power to preserve specific tangible assets in specie where they are the subject matter of the claim. Such an order does not necessarily require application of all the freezing order principles and safeguards, although it is open to the court to impose them.
- For a freezing order in a sum of money which is capable of embracing all of the respondent's assets up to the specified figure it is essential that all the principles and safeguards are scrupulously applied.
- Whether the application is made under section 37 of the Supreme Court Act 1981 or under section 37 of the Matrimonial Causes Act 1973 the applicant must show, by reference to clear evidence, an unjustified dealing with assets by the respondent (which would include threats) giving rise to the conclusion that there is a solid risk of dissipation of assets to the applicant's prejudice. Such an unjustified dealing will normally give rise to the inference that it is done with the intention to defeat the applicant's claim (and such an intention is presumed in the case of an application under the 1973 Act).
- The evidence in support of the application must depose to clear facts. The sources of information and belief must be clearly set out.
- Where the application for a freezing order is made ex parte the applicant has to show that the matter is one of exceptional urgency. Short informal notice must be given to the respondent unless it is essential that he is not made aware of the application. No notice at all would only be justified where there is powerful evidence that the giving of any notice would likely lead the respondent to take steps to defeat the purpose of the injunction, or where there is literally no time to give any notice before the order is required to prevent the threatened wrongful act. Cases where no notice at all can be justified are very rare indeed. The order of the court should record on its face the reason why it was satisfied that no or short notice was given.
- Where no notice, or short informal notice, is given the applicant is fixed with a high duty of candour. Breach of that duty will likely lead to a discharge of the order. The applicable principles on the re-grant of the order after discharge are set out in *Arena Corporation v Schroeder* [2003] EWHC 1089 (Ch)
- Where no notice, or short informal notice, is given the safeguards assume critical importance. The safeguards are set out in the standard examples for freezing and search orders. If an applicant seeks to dis-apply any safeguard the court must be made unambiguously aware of this and the departure must be clearly justified. The giving of an undertaking in damages, whether to the respondent or to an affected third party, is an almost invariable requirement; release of this must be clearly justified

The safeguard are set out in para [4]. The order must:

- clearly state on its face whether it is a worldwide freezing injunction or limited to England and Wales
- state on its face why no notice, not even short informal notice, has been given to the respondent
- contain an exception which allows for a specified amount to be spent by the respondent on weekly living expenses and legal advice and for the disposal of assets in the ordinary and proper course of business
- contain an undertaking by the applicant to pay damages to the respondent or any third party caused loss by the order which the court may be of the opinion ought to be paid
- contain an undertaking by the applicant to pay the reasonable costs of anyone other than the respondent which have been incurred as a result of compliance with the order
- contain an undertaking by the applicant not, without the permission of the court, to use any information obtained as a result of the order for the purpose of any civil or criminal proceedings, other than the present claim, either in England and Wales, or in any other jurisdiction
- contain an undertaking by the applicant, without the permission of the court, not to seek to enforce the order in any country outside of England and Wales
- contain a statement of the right of the respondent to apply within 7 days to set the order aside

11. These principles apply in proceedings under the Children Act 1989: *Re C (A Child)* [2013] EWCA Civ 1412 at [17] and [20].