

Laurence Page successful in rare application for a freezing injunction in support of ongoing adjudication enforcement proceedings- *Nicholas James Care Homes Ltd v Liberty Homes (Kent) Limited* [2022] EWHC 1203 (TCC).

The Technology and Construction Court handed down its judgment on 19 May 2022 in the case of *Nicholas James Care Homes Ltd v Liberty Homes (Kent) Limited* [2022] EWHC 1203 (TCC). [Laurence Page](#) represented the successful Claimant in a rare application for a freezing injunction in support of ongoing adjudication enforcement proceedings.

Liberty had issued a ‘smash and grab’ adjudication in November 2020, following which the Claimant paid to it £290,567.28. In October 2021 NJCH issued a ‘true value’ adjudication, to recover the sum of £2,387,005 allegedly overpaid to Liberty. In an adjudication decision dated 18 February 2022, Dr Cyril Chern directed Liberty to pay NJCH £2,589,737.76, together with interest and the adjudicator’s fees.

That sum remains outstanding, and adjudication enforcement proceedings are ongoing. However, in March 2022 NJCH discovered that, whilst Liberty’s most recent audited accounts showed that, as at 31 October 2020 it had stocks of £5,764,597 and total assets less current liabilities of £4,628,413, there was evidence that many of its assets had been removed from the company.

Following a without notice application, on 22 April 2022 NJCH obtained an interim freezing injunction against Liberty in support of the enforcement proceedings. See [2022] EWHC 1071 (TCC).

On 19 May 2022 Mrs Justice O’Farrell continued the injunction following a fully contested return date hearing. See [\[2022\] EWHC 1203 \(TCC\)](#).

The case represents an important extension to the principles discussed in *Gosvenor London Ltd v Aygun Aluminium UK Ltd* [\[2018\] EWHC 227 \(TCC\)](#). There, the freezing injunction principles were used to protect the defendant as a shield against enforcement. In NJCH the principles have been used to protect a claimant. To do so, an applicant must establish that it satisfies the three stage test summarised in *Broad Idea International Limited v Convoy Collateral Ltd* [\[2021\] UKPC 24](#) at [101]:

“In summary, a court with equitable and/or statutory jurisdiction to grant injunctions where it is just and convenient to do so has power – and it accords with principle and good practice – to grant a freezing injunction against a party (the respondent) over whom the court has personal jurisdiction provided that:

i) the applicant has already been granted or has a good arguable case for being granted a judgment or

order for the payment of a sum of money that is or will be enforceable through the process of the court;

ii) the respondent holds assets (or ... is liable to take steps other than in the ordinary course of business which will reduce the value of assets) against which such a judgment could be enforced; and

iii) there is a real risk that, unless the injunction is granted, the respondent will deal with such assets (or take steps which make them less valuable) other than in the ordinary course of business with the result that the availability or value of those assets is impaired and the judgment is left unsatisfied.”

Further guidance as to the proper application of the test can be found in *AH Baldwin and Sons Ltd v Sheikh Saud Bin Mohammed Bin Ali Al-Thani* [2012] EWHC 3156 (QB) at [31]:

(1) The purpose of the Mareva jurisdiction is not to provide a claimant with security for its claim but to restrain a defendant evading justice by disposing of assets otherwise than in the ordinary course of business so as to make itself judgment proof, with the result that any judgment or award in favour of the claimant goes unsatisfied (per Colman J in *Gangway Ltd v Caledonian Park Investments (Jersey) Ltd* (2001) 2 Lloyd’s Rep 715).

(2) Where an order is obtained ex parte and the matter comes back before the court for an inter partes hearing on the return date, the claimant must demonstrate that he is entitled to the relief sought.

(3) Evidence of actual dishonesty is not essential to the exercise of the jurisdiction and there is no need to show an actual intention to dissipate assets (*The Niedersachsen*, supra; *National Australia Bank Ltd. V. Bond Brewing Holdings Ltd.* (1990) 169 CLR 271, 277).

(4) But if there is a good arguable case in support of an allegation that the defendant has acted fraudulently or dishonestly, or with unacceptably low standards of morality giving rise to a feeling of uneasiness about the defendant (*Thane Investments Limited v. Tomlinson* [2003] EWCA Civ 1272 at [28]), then it is often unnecessary for there to be any further specific evidence of dissipation for the court to be entitled to take the view that there is a sufficient risk to justify granting Mareva relief (*Standard Chartered Securities v. Lai Arthur* [1993] HKC 375; *Armco Inc v. NPV Ltd* [1998] HKCFI 632; *Gee on Commercial Injunctions*, 5th edition, para. 12.040).

(5) Although it is not necessary to establish that the defendant is likely to act with the object of putting his assets beyond reach, it is necessary to show e.g. the defendant dealing with assets in a manner other than in the usual or ordinary course of business or life, so as to render enforcement more difficult or impossible (see the analysis of Christopher Clarke J in *TTMI v ASM Shipping*, at [25-26]).

(6) The court may infer the necessary risk of the judgment going unsatisfied from the behaviour of the defendant if, e.g. he keeps promising to pay but persistently defaults with implausible excuses (*Gee on Commercial Injunctions*, 5th edition, para. 12.025).

(7) The fact that a claimant has a claim which is unanswerable, or virtually incapable of being defended, may be a powerful factor in favour of granting a Mareva injunction, though it cannot of itself be decisive (*Gee on Commercial Injunctions*, 5th edition, para. 12.025).

It is important to note that the risk of dissipation is judged objectively. A large number of factors must be examined, as summarised in *Lakatamia Shipping Company Ltd v Toshiko Morimoto* [2019] EWCA Civ 2203 by Popplewell J (as he then was) at [86]:

“(1) The claimant must show a real risk, judged objectively, that a future judgment would not be met because of an unjustified dissipation of assets. In this context dissipation means putting the assets out of reach of a judgment whether by concealment or transfer.

(2) The risk of dissipation must be established by solid evidence; mere inference or generalised assertion is not sufficient.

(3) The risk of dissipation must be established separately against each respondent.

(4) It is not enough to establish a sufficient risk of dissipation merely to establish a good arguable case that the defendant has been guilty of dishonesty; it is necessary to scrutinise the evidence to see whether the dishonesty in question points to the conclusion that assets [may be] dissipated. It is also necessary to take account of whether there appear at the interlocutory stage to be properly arguable answers to the allegations of dishonesty.

(5) The respondent’s former use of offshore structures is relevant but does not itself equate to a risk of dissipation. Businesses and individuals often use offshore structures as part of the normal and legitimate way in which they deal with their assets. Such legitimate reasons may properly include tax planning, privacy and the use of limited liability structures.

(6) What must be threatened is unjustified dissipation. The purpose of a freezing order is not to provide the claimant with security; it is to restrain a defendant from evading justice by disposing of, or concealing, assets otherwise than in the normal course of business in a way which will have the effect of making it judgment proof. A freezing order is not intended to stop a corporate defendant from dealing with its assets in the normal course of its business. Similarly, it is not intended to constrain an individual defendant from conducting his personal affairs in the way he has always conducted them, providing of course that such conduct is legitimate. If the defendant is not threatening to change the existing way of handling their assets, it will not be sufficient to show that such continued conduct would prejudice the claimant’s ability to enforce a judgment. That would be contrary to the purpose of the freezing order jurisdiction because it would require defendants to change their legitimate behaviour in order to provide preferential security for the claim which the claimant would not otherwise enjoy.

(7) Each case is fact specific and relevant factors must be looked at cumulatively.”

Laurence Page is a leading junior barrister ranked by the directories. He is recognised as a “tier 1” barrister by Legal 500 and Chambers in Middle East disputes, encompassing a significant domestic and international commercial and professional negligence practice. He has acted in some of the largest disputes before Commercial Court and DIFC Court, along with major DIFC-LCIA, LCIA, DIAC and QICCA arbitrations.