

Rethinking the Scope of Freezing Injunctions

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The English courts routinely preface their decisions with prominent remarks about the draconian nature of freezing injunctions, frequently described as one of the nuclear weapons in the courts' armoury. However, the increasing number of cases involving wrongfully granted injunctions suggests that the courts may not be doing enough to protect defendants. The author advocates a modest shift of emphasis away from the traditional, one-dimensional view that freezing injunctions are solely designed as a weapon against unscrupulous defendants. Instead, the author argues that freezing injunctions should be seen as a reflection of the principle of equipage equality. The author argues that some of the key preconditions for granting freezing injunctions are overly claimant-friendly and need to be reformulated in order to ensure a level-playing field in litigation. Although there are a number of important safeguards for defendants and the courts are generally sensitive to the competing interests of the parties, it will be demonstrated that there is still some room for improvement.

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Introduction

The purpose of freezing injunctions

There is a well-established general rule that a creditor cannot restrain his debtor from dealing with his property before judgment.¹ The creditor should obtain his judgment first and then enforce it. A freezing injunction is an *exception* to this general rule.² However, the justifications for curtailing a defendant's activities by way of a freezing injunction are not entirely clear. The purpose of a freezing injunction is usually stated in broad terms as being to preserve any assets which might eventually be used to enforce a potential judgment against a defendant.³ If that represents the correct statement of the purpose of this injunctive relief, then there is often a mismatch with the actual reasons for making an application. The latter may well go much further than ensuring the ability to enforce a future judgment. In addition to looking ahead to enforcement, a tactically astute claimant may wish to put pressure on the defendant with the aim of improving his bargaining position to negotiate a favourable settlement. The pressure is partly financial in that the defendant's cash flow may be restricted and the defendant might have to incur significant legal costs to lift the injunction.⁴ In *Cheltenham & Gloucester Building Society v Ricketts*,⁵ the Court of Appeal recognised that a freezing injunction may have the effect of ruining a thriving business and in that context it was described as one of the nuclear weapons in the courts' armoury.⁶ The pressure is also in the form of a risk of damage to the defendant's commercial reputation.⁷ Instead of settling a claim on an unfavourable basis, the defendant may choose to relieve some of the pressure by paying money into court to lift the injunction with the practical effect that the claimant gets security for his claim. In *Energy Venture Partners v Malabu*,⁸ the Court of Appeal highlighted the fact that "in many cases...a Freezing Order has the practical if not theoretical effect of giving security to the Claimant for its claim".⁹ A further possible reason for seeking a freezing injunction may be to enable the claimant to obtain information about the location and value of the defendant's assets by means of an ancillary disclosure order.¹⁰ This is particularly common in cases involving assets in multiple jurisdictions.¹¹

Identifying the unjust element

¹ *Lister & Co v Stubbs* (1890) 45 Ch.D. 1.

² Except where otherwise stated, references to freezing injunctions in this article refer to pre-judgment freezing injunctions in respect of non-proprietary claims. This category of freezing injunctions was previously referred to as *Mareva* injunctions after the name of the second case, *Mareva Compania Naviera S.A. v. International Bulkcarriers SA ('The Mareva')* [1975] 2 Lloyd's Rep. 509, where such an injunction was granted. The first case where a freezing injunction was granted was *Nippon Yusen Kaisha v Karageorgis ('Karageorgis')* [1975] 2 Lloyd's Rep. 137. The terms freezing injunction and freezing order will be used interchangeably.

³ *Fourie v Le Roux* [2007] UKHL 1, [2]-[3].

⁴ On the general implications of litigation risk, see J Molot, "A Market in Litigation Risk" (2009) 76 *University of Chicago Law Review* 367. On the relationship between litigation risk and freezing injunctions see R Fentiman, *International Commercial Litigation* (OUP, 2nd edn., 2015), 17.03-17.08.

⁵ [1993] 1 WLR 1545.

⁶ The first use of term "nuclear weapon" to describe a freezing injunction can be traced back to *Bank Mellat v Nikpour* [1982] Com LR 158, 163; [1985] FSR 87, 92, per Donaldson LJ.

⁷ See, for example, the allegations in *Bloomsbury International v Holyoake* [2010] EWHC 1150.

⁸ *Energy Venture Partners Ltd v Malabu Oil and Gas Ltd* [2014] EWCA Civ 1295.

⁹ *Energy Venture Partners Ltd v Malabu Oil and Gas Ltd* [2014] EWCA Civ 1295, [52] per Tomlinson LJ.

¹⁰ See the English Civil Procedure Rules Part 25 rule 25.1(1)(g). There is no free-standing right to obtain a pre-judgment disclosure order.

¹¹ See, for example, *Republic of Haiti v Duvalier* [1989] 1 Lloyd's Rep. 111.

In all reported cases involving successful applications for a freezing injunction, the courts have sought to explain that the injunction was necessary to do justice.¹² While it is clear that the power to grant a freezing injunction stems from the general equitable power to avoid injustice,¹³ it is important to identify the unjust element the injunction is directed at. This is not entirely clear from the existing case law, with the type of conduct attracting relief ranging from deliberate steps to put the assets out of the court's reach to merely responding to the claimant's letter of claim with seemingly unattractive allegations.¹⁴ The resulting lack of clarity and consistency as to the relevant conduct creates a fertile ground for unmeritorious applications with a potentially devastating effect on defendants. Unless and until the unjust element is identified with sufficient precision, it would be extremely difficult for the courts to achieve consistency of their decisions in this area of the law. This article will suggest that the unjust element the courts should be focusing on is the defendant's *intention* to avoid enforcement.¹⁵ It is highly likely that the implementation of the author's proposal would lead to a reduction in the number of applications for a freezing injunction. By contrast, both the courts and the commentators have been keen to see an increase in the availability of freezing injunctions.¹⁶ One example of the judicial appetite for expanding the scope of freezing injunctions is the gradual expansion of the so called *Chabra*-style injunctions.¹⁷ In the author's view, one of the driving forces behind this desire to expand the scope of freezing injunctions is the excessive emphasis on a claimant-orientated view of the purpose of freezing injunctions. Part of this claimant-orientated view is the misconception that a freezing injunction is nothing more than a weapon against unscrupulous defendants and that the courts should assist claimants in removing any obstacles to the enforcement of judgments. This article will seek to show that, contrary to their relentless efforts to preserve any assets potentially amenable to enforcement, the courts should take a different perspective by recognising that the principle of equipage equality is the underlying foundation of freezing injunctions. This principle is concerned with ensuring a level-playing field in litigation.

A history of doctrinal instability

Due to the frequency of successful applications for freezing injunctions in the English courts, it is easy to forget that in 1975 the decisions in *Karageorgis* and *The Mareva* caught practitioners by surprise. Indeed, the doctrinal foundations of freezing injunctions are far from stable. The reasoning in the first *inter partes* case where the legitimacy of freezing injunctions was challenged, *Rasu Maritima v Perusahaan Pertambangan*,¹⁸ was inadequate to justify the creation of a freezing

¹² Section 37(1) of the Senior Courts Act 1981 provides that an injunction may be granted where it is just and convenient to do so.

¹³ See, generally, JM Paterson(ed.), *Kerr on Injunctions* (London: Sweet & Maxwell, 6th edn., 1927); ICF Spry, *Equitable Remedies*, (Thomson Reuters Australia, 9th edn., 2013); S Gee, *Commercial Injunctions* (London: Sweet & Maxwell, 6th edn., 2016).

¹⁴ See the section of this article entitled "The relevant factors".

¹⁵ The potential difficulties with this proposal are addressed in the section of this article entitled "Potential problems and the lessons from New York".

¹⁶ See, for example, P McGrath, "The Freezing Order: a Constantly Evolving Jurisdiction" (2012) *Civil Justice Quarterly* 12.

¹⁷ *PJSC Vseukrainskyi Aktsionernyi Bank v Maksimov et al* [2013] EWHC 422 (Comm). A *Chabra*-style freezing injunction involves restraining a third party against whom there is no cause of action, provided that there is good reason to suppose that the assets in the hands of a third party would be available to satisfy a judgment against the defendant.

¹⁸ *Rasu Maritima v Perusahaan Pertambangan* [1977] 2 Lloyd's Rep. 397.

injunction in respect of non-proprietary claims. In particular, the Court of Appeal did not provide convincing reasons for departing from the position that pre-judgment freezing injunctions had been restricted to proprietary claims up until 1975.¹⁹ Instead, the Court of Appeal exploited the fact that the *Lister & Co v Stubbs* line of cases had not directly dealt with non-proprietary claims.²⁰ Given the lack of any convincing reasons in the landmark cases in the 1970s, this article will start with a clean slate and explore the theoretical foundations for the development of the freezing injunction. Once the relevant principles have been identified, the author will proceed to examine their impact on the key preconditions for freezing injunctions. The two key preconditions are related to the strength of the claimant's case on the merits and the risk of dissipation of the assets. Given the close relationship between freezing injunctions and disclosure orders, the author will briefly consider the need for any adjustments to the availability of pre-judgment disclosure orders. The analysis would not be complete without a close look at some of the existing safeguards whose purpose is to ensure that the impact of freezing injunctions is not wider than is necessary.²¹ The significance of the topic of this article is highlighted by the undisputed fact that the availability and scope of freezing injunctions, including worldwide freezing injunctions,²² is one of the key attractions of London as a forum for the resolution of high-value international commercial disputes.²³

Equipage equality and freezing injunctions

The theoretical foundation

The author submits that the procedural function of any pre-judgment freezing injunction could be best explained by reference to the principle of equipage equality which has been identified in the United States as one of the central organising principles of any common law civil procedural system.²⁴ Put simply, equipage equality is one of the three different forms of procedural equality and it is the principle that the parties should be equally equipped to engage in adversarial adjudicatory procedures.²⁵ The benefit of identifying and distinguishing various forms of procedural

¹⁹ On the availability of pre-judgment freezing injunctions in respect of proprietary claims see, inter alia, *Lister & Co v Stubbs* (1890) 45 Ch.D. 1. For modern examples of freezing injunctions in respect of proprietary claims, see *Polly Peck International plc v Nadir (No 2)* [1992] 2 Lloyd's Rep 238 and *Cherney v Neuman* [2009] EWHC 1743 (Civ).

²⁰ The *Lister & Co v Stubbs* line of cases were concerned with the limits on the power to grant injunctive relief and include, inter alia, the following key cases: *Mills v. Northern Railway of Buenos Ayres Co* (1869-70) L.R. 5 Ch.App. 621; *Robinson v Pickering* (1880-81) L.R. 16 Ch. D. 660; *North London Railway Co v Great Northern Railway Co* (1883) 11 Q.B.D. 30.

²¹ These safeguards include, inter alia, the claimant's cross-undertaking in damages, the ordinary and proper course of business proviso, the duty of full and frank disclosure, the provision for a prompt *inter partes* hearing on the return date, and the claimant's undertaking to promptly issue proceedings.

²² One of the more specific attractions is that *worldwide* freezing injunctions may be obtained even in support of *foreign* substantive proceedings: *Credit Suisse Fides Trust SA v Cuoghi* [1998] Q.B. 818.

²³ It is not a coincidence, therefore, that there are decisions relating to freezing injunctions in the majority of high-profile, high-value, long-running commercial litigation sagas involving foreign parties and allegations of international fraud. These include, inter alia, the numerous well-known cases involving Mukhtar Ablyazov, Sergei Pugachev, Konstantin Malofeev, and Munib Masri.

²⁴ W Rubenstein, "The Concept of Equality in Civil Procedure" (2002) 23 *Cardozo Law Review* 1865, 1867-1868.

²⁵ Rubenstein explains that there is not one "procedural equality" but rather a host of "procedural equalities". The three different forms of equality he identifies are equipage equality, rule equality (the principle that like cases should be processed according to like procedural rules across case types), and outcome equality (the principle that like cases should reach consistent results).

equality is to enable us to enhance our procedural system by reducing the potential for procedural injustice. As evident from the different forms of procedural equality, the procedural system contains “an intricate web of architectural decisions that promote these various forms of equality”.²⁶ Thus, for example, broad and liberal factual disclosure in the United States could be seen as equalising the information available to each side in litigation.²⁷ In broad terms, this equalises the capacities of the parties to produce their proofs and arguments.²⁸ Each procedural rule or decision which seeks to address the equality of the parties must carefully balance their rights. For this reason, there are usually safeguards to address potential inequality resulting from the unrestrained operation of the specific procedural rule in question. This explains the use of various safeguards (some of which are known as “provisos”) whose purpose is to balance the parties’ rights and ameliorate the inequality resulting from unrestrained operation of freezing injunctions. Such safeguards include a cross-undertaking in damages from the claimant and the ordinary and proper course of business proviso.²⁹

The author of this article submits that in the above-mentioned web of architectural decisions, pre-judgment freezing injunctions are an essential part of the web to ensure equality of the parties. A freezing injunction should be recognised as a device to ensure a level-playing field in litigation. The principle of equipage equality should not be seen as unique to the United States. One of the overriding objectives of the English Civil Procedure Rules is stated as “ensuring that the parties are on an equal footing”.³⁰ Without the availability of freezing injunctions, there would be an easy escape route for unscrupulous defendants and a claimant would not be equipped to close this route; equipage equality would be undermined to such an extent that litigation would be futile. One American author has asserted that “insofar as adjudicatory procedure is perceived to be adversarial and dispute resolving, the degree to which procedures facilitate equal opportunities for the adversaries to influence the decision may be the most important criterion by which fairness is evaluated”.³¹ Without the possibility for a claimant to obtain a freezing injunction, the parties would have unequal opportunities: defendants would know that they have the opportunity to make any potentially unfavourable decision practicably unenforceable. There are many examples in English case law, including high-value cases in the Commercial Court, where substantive proceedings would not have been possible but for the availability of a freezing injunction.³²

²⁶ W Rubenstein, “The Concept of Equality in Civil Procedure” (2002) 23 *Cardozo Law Review* 1865, 1868.

²⁷ W Rubenstein, “The Concept of Equality in Civil Procedure” (2002) 23 *Cardozo Law Review* 1865, 1880.

²⁸ A further example of the potential role of the principle of equipage equality is in relation to the availability of legal aid. Thus, the case of *Steel & Morris v United Kingdom* (68416/01) [2005] E.M.L.R. 15 (ECHR) has been described as providing an example of “equipage inequality”: S Shipman, “*Steel & Morris v United Kingdom*: Legal Aid in the European Court of Human Rights” (2006) *Civil Justice Quarterly* 5, footnote 36. This demonstrates that the principle of equipage equality could be linked to human rights law.

²⁹ For the avoidance of doubt, the author is not making the assumption that these safeguards are effective in fulfilling their intended purpose. A detailed analysis of the role of these safeguards will be conducted in this article in the section entitled “Equipage equality and the safeguards for defendants”.

³⁰ CPR Part 1, r.1.1(2)(a).

³¹ J Mashaw, “The Supreme Court Due Process Calculus for Administrative Adjudication in *Matthews v Eldridge*: Three Factors in Search of a Theory of Value”, 44 *University of Chicago Law Review* 28 (1976), at 52. See also: J Mashaw, “Administrative Due Process: The Quest for a Dignitary Theory”, 61 *Boston University Law Review* 885 (1981).

³² See, for example, the freezing injunction granted in *Energy Venture Partners v Malabu Oil & Gas* [2012] EWHC 853 (Comm) (a dispute about commission allegedly due from the sale of Nigerian oil-related assets where USD 215 million held by JP Morgan Chase Bank NA was frozen). In the substantive proceedings, the

Equipage equality and the need to protect defendants

As one commentator put it, “[w]ithout equipage equality, the stronger case might not necessarily be the better case. When the resources and abilities of opposing parties are lopsided, the adversarial system will fail to produce accurate results. The wealthier, sophisticated, repeat-player litigants will usually win; the poorer, outgunned, one-shot litigants will lose, regardless of the merit of their cases.”³³ If we take into account these concerns when thinking about the availability of freezing injunctions in the international context, we should aim to reduce the possibility for wealthier litigants to make multiple applications for freezing injunctions (or similar relief) in respect of the *same assets*. From the perspective of equipage equality, we cannot simply focus all our attention on dealing with unscrupulous defendants. The reality is that there are also unscrupulous claimants who can ‘outgun’ poorer litigants (defendants) through, *inter alia*, multiple applications for interim relief in different jurisdictions. In order to ensure a level-playing field in litigation, it is essential to protect defendants from unnecessary interference with their assets. Consequently, the courts need to avoid the temptation to promote a narrow, one-dimensional view that freezing injunctions are only the claimant’s weapon against unscrupulous defendants. One of the implications of placing more emphasis on equipage equality is greater care to avoid a claimant-friendly attitude towards the key preconditions for a freezing injunction. In the author’s view, the term ‘dissipation of assets’ has a pejorative connotation: it is easily associated with hiding or dealing with the assets with an *intention* to avoid enforcement.³⁴ The English courts should be focusing on protecting the claimant from this particular risk. In other words, the courts should only protect the claimant from deliberate and *wrongful conduct* rather than tip the balance in favour of the claimant by eliminating any type of obstacle to enforcement.³⁵ When balancing the rights of the parties and considering the potential for unfairness to defendants we should not underestimate the seriousness of potential consequences of non-compliance with an English freezing injunction and/or an ancillary disclosure order. A breach of these orders may result in imprisonment in the event of multiple counts of contempt of court. For example, in the long-running *Ablyazov* litigation saga, the defendant was given a 22 months prison sentence following persistent contempts and non-disclosure.³⁶ Moreover, a freezing order may even include an ancillary order for the defendant to surrender his passport and an order restraining the defendant from leaving the jurisdiction, including a Tipstaff to police any such orders.³⁷ The Tipstaff order may contain powers of arrest, entry, and seizure.³⁸ Other

Commercial Court held in favour of the claimant for the sum of USD 110.5 million: *Energy Venture Partners v Malabu Oil & Gas* [2013] EWHC 2118 (Comm), [325]).

³³ A Frost, “Limits of Advocacy” (2009-2010) 59 *Duke Law Journal* 447, 500.

³⁴ Gloster LJ stated that freezing injunctions “carry a reputational stigma” in her recent judgment in *Candy v Holyoake* [2017] EWCA Civ 92, [36]. It is noted that the case was primarily concerned with the so called ‘notification injunction’ but her comments were not restricted to this particular category of freezing injunctions.

³⁵ AAS Zuckerman, “Interlocutory Remedies in Quest of Procedural Fairness”, (1993) 56 *Modern Law Review* 325, 332-333. See also AAS Zuckerman, ‘Mareva Injunctions and Security for Judgment in a Framework of Interlocutory Remedies’ (1993) *Law Quarterly Review* 432.

³⁶ *JSC BTA Bank v Ablyazov* [2012] EWCA Civ 1411 (confirming the first instance decision).

³⁷ *Kuwait Airways Corporation v Iraq Airways Co and Another* [2010] EWCA Civ 741 (this was an exceptional case in that the order was made in a commercial context against a non-resident, non-party who was temporarily in the jurisdiction).

³⁸ *Kuwait Airways Corporation v Iraq Airways Co and Another* [2010] EWCA Civ 741.

potentially intrusive measures include the possibility of the court appointing a receiver in support of a freezing injunction if there is a real risk that the defendant will disobey the injunction.³⁹

Equipage equality and the conduct of the defendant

Should the author's perspective on the theoretical foundations of freezing injunctions make any difference to the threshold that a claimant needs to satisfy in relation to the conduct of the defendant? The effect of a freezing injunction is that the defendant cannot enjoy the full spectrum of rights which can be exercised by an owner in respect of his property. It takes away some of his rights even though the assets remain in his possession. This can be justified on the ground that he should not have the freedom to use his rights for a *wrongful* purpose. The purpose of a freezing order should not be to stop any dealings with the assets by the defendant prejudicial to the claimant's interests; it should operate to stop only *wrongful* forms (dissipation in the pejorative sense).

The conduct of the defendant: confusion surrounding the current position

The current test originates from *The Niedersachsen*⁴⁰ where the key questions for the Court of Appeal revolved around the type of prejudice the claimant must demonstrate (in the shape of a risk of dissipation of assets) and the degree of conviction with which it must be shown. The Court of Appeal's view was that "the test is whether, on the assumption that the plaintiffs have shown at least "a good arguable case", the court concludes, on the whole of the evidence then before it, that the refusal of a *Mareva* injunction would involve a real risk that a judgment or award in favour of the plaintiffs would remain unsatisfied."⁴¹ At first instance, Mustill J explained that the claimant had to provide "solid evidence" of such a risk.⁴² This remains part of the current requirement as to the type of conduct which justifies a freezing order. Some of the more recent authorities have made it easier for claimants to satisfy the test by allowing them, as an *alternative* option, to show that "unless the defendant is restrained by injunction, assets are likely to be dealt with in such a way as to make enforcement of any award or judgment more difficult, unless those dealings can be justified for normal and proper business purposes".⁴³

On the other hand, there is some limited evidence that judges in the High Court are demanding a higher degree of prejudice than that envisaged by the Court of Appeal in *The Niedersachsen*. For example, in *Mobil Cerro Negro Ltd v Petroleos de Venezuela SA*,⁴⁴ Walker J emphasised that the claimant must demonstrate unjustifiable conduct on the defendant's part.⁴⁵ His Lordship found

³⁹ See, for example, *Cruz City 1 Mauritius Holdings v Unitech Limited* [2014] EWHC 3131 (Comm), [50] per Males J (a case where a receiver was appointed post-judgment in respect of the defendants' foreign assets in support of a worldwide freezing order). The English court may also strike out the defence if the defendant fails to comply with its orders as illustrated in *JSC BTA Bank v Ablyazov* [2012] EWHC 455 (Comm).

⁴⁰ *Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft m.b.H. und Co K.G. ('The Niedersachsen')* [1983] 2 Lloyd's Rep. 600.

⁴¹ *The Niedersachsen* [1983] 2 Lloyd's Rep. 600, 617, per Kerr LJ.

⁴² *The Niedersachsen* [1983] 2 Lloyd's Rep. 600,, 619.

⁴³ *Congentra AG v Sixteen Thirteen Marine SA ('The Nicholas M')* [2008] EWHC 1615 (Comm); [2008] 2 Lloyd's Rep. 602, [49] per Flaux J (as he then was). This alternative test was cited with approval by Teare J in *U&M Mining Zambia Ltd v Konkola Copper Mines plc* [2014] EWHC 3250 (Comm), [16].

⁴⁴ *Mobil Cerro Negro Ltd v Petroleos de Venezuela SA* [2008] EWHC 532 (Comm); [2008] 1 Lloyd's Rep 684.

⁴⁵ *Mobil Cerro Negro Ltd v Petroleos de Venezuela SA* [2008] 1 Lloyd's Rep 684, [80]. This requirement was recently approved in *Candy v Holyoake* [2017] EWCA Civ 92.

support for this principle in the Court of Appeal's statement that "there must be a risk that [the asset] will be used otherwise than for normal and proper commercial purposes".⁴⁶ In *The Western Moscow*,⁴⁷ Christopher Clarke J (as he then was) reaffirmed his remarks from an earlier case that *The Niedersachsen* test was not a complete statement of the law and that "[s]omething more than a real risk that the judgment will go unsatisfied is required".⁴⁸ According to his Lordship, what is required is "unjustifiable disposals of assets otherwise than in the ordinary course of business with the intention, or having the effect, that any judgment against either of them goes unsatisfied or is very difficult to enforce".⁴⁹ Reluctance has also been shown to grant freezing orders in circumstances where the claimant has provided no evidence apart from mere oral assertions that the defendant is likely to dissipate or hide some unspecified assets.⁵⁰

In the light of the above strands of authorities, the author submits that the current test for the defendant's conduct is susceptible to at least two different interpretations, resulting in the possibility of a lower or a higher threshold being applied to the facts. One possible interpretation is that the test may be satisfied if the conduct is such as to make it more difficult than usual to enforce the judgment. This will become more apparent when we consider some of the relevant factors in the next section. More recent case law suggests that it is necessary to show some unjustified dealings with the assets.

The conduct of the defendant: the relevant factors

The court's assessment of the defendant's conduct is fact-sensitive and hence there is a wide range of relevant factors the court may take into account when assessing the risk of dissipation. A selection of cases will be discussed where the author is concerned that the courts may have undermined the principle of equipage equality by taking an excessively claimant-friendly approach.

The relevant factors include, *inter alia*, the reputation of the defendant, the structure of the defendant company, the nature of the assets and how easy it is to hide them. In contrast to the author's emphasis on wrongful conduct, there is a well-known passage from Lord Denning's judgment in *Third Chandris Shipping Corporation v Unimarine SA*⁵¹ where he stated that "the very fact of incorporation"⁵² of a company in a particular jurisdiction may be sufficient to establish a real risk of dissipation of the assets.⁵³ Similarly, in a recent long-running litigation involving allegations of misappropriation of assets from a Russian bank against its former chief executive Mr Pugachev, Mann J observed that:

⁴⁶ *Mediterranean Feeders LP v Berndt Meyering Schiffarts* (CA, 5 June 1997, unreported). For similar statements of principle see *Ketchum International v Group Public Relations Holdings* [1997] 1 WLR 4.

⁴⁷ *Western Bulk Shipowning III A/S v Carbofer Maritime Trading ApS & Ors ('The Western Moscow')* [2012] EWHC 1224 (Comm); [2012] 2 Lloyd's Rep. 163.

⁴⁸ *TTMI Ltd v ASM Shipping Ltd* [2005] EWHC 2666 (Comm); [2006] 1 Lloyd's Rep 401, [25] per Christopher Clarke J.

⁴⁹ *The Western Moscow* [2012] 2 Lloyd's Rep. 163, [101]. Although his Lordship uses the term "intention" and thereby goes beyond Walker J's comments in *Mobil*, there is no evidence that this formulation of the test has been approved by the Court of Appeal - the case was not mentioned at all in the Court of Appeal's judgment in *Candy v Holyoake* [2017] EWCA Civ 92.

⁵⁰ *Gravy Solutions Ltd v Xyzmo Software* [2013] EWHC 2770 (QB).

⁵¹ [1979] 2 Lloyd's Rep. 184.

⁵² [1979] 2 Lloyd's Rep. 184, 189, per Lord Denning MR.

⁵³ For similar comments see the judgment at first instance in *Refco v Eastern Trading* [1999] 1 Lloyd's Rep. 159, 164 per Rix J. The majority of the Court of Appeal disagreed with Rix J on a different issue.

“merely pointing to offshore holdings in some generalised way would not be enough. However, in some cases the quality and nature of the arrangements may be a pointer towards a risk of dissipation. The sort of elaborate structures which Mr Pugachev seems to have set up would, in my view, be evidence of a desire to shield assets from view.”⁵⁴

Such observations suggest that the current threshold relating to the defendant’s conduct may be straightforward for the claimant to satisfy. Namely, it may be sufficient to show that there are some obstacles making it more difficult than usual to enforce a potential judgment against the defendant. This does not seem to be entirely consistent with some of the authorities considered in the previous section which highlighted the requirement of unjustified dealings with the assets. Further evidence of a claimant-friendly approach is the court’s reasoning in *Stronghold Insurance Co Ltd v Overseas Union Insurance Ltd*.⁵⁵ The claimants relied on the alleged possibility of “increased difficulty, delay and cost” in enforcing a possible arbitration award in Singapore which might have had the effect of pushing them to accept a compromise in order to avoid further unrecoverable costs. Potter J agreed that there was a risk of dissipation and specifically took into account the “substantial risk” that the claimants would have to “chase” the assets for the purposes of enforcement.⁵⁶ Potter J explicitly accepted that “[s]o far as enforcement in Singapore is concerned, I accept there is no evidence that, if the plaintiff were obliged to go there (and incur extra costs and delays), it would do [nothing] other than belatedly recover the amount of its award.”⁵⁷ It is submitted that this overly-liberal interpretation of the requirement to show a real risk of dissipation provides a powerful illustration of the discrepancy between the current position and the author’s proposal that the courts should only be focused on assisting claimants in preventing deliberate evasion.⁵⁸

A further category of factors in respect of which the author has some concerns is that the court will look at any patterns of evasiveness or refusals to participate in negotiations with the claimant. The conduct of the defendant at the pre-action stage may be sufficient to lead the court to make an inference that there is a real risk of dissipation of the assets as demonstrated by the successful *ex parte* application for a freezing order in *Nadera Ahadi and others v Abdullah Ahadi*.⁵⁹ The intended claim by Mrs Ahadi and her four sons against the defendant (the deceased’s son from the first marriage) was for an alleged share of the assets from the deceased’s estate. With regards to the defendant’s conduct, Snowden J stated that:

“In this case there is no direct evidence to suggest that Abdullah Ahadi is in the habit of frustrating litigation against him, but I believe that it is right to infer from the reaction in the correspondence to this claim that there is a risk that if the proposed defendant learns that a claim has been issued against him (or to be issued against him) he may take steps to put assets beyond the reach of the claimants. I draw that

⁵⁴ *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2014] EWHC 4336 (Ch).

⁵⁵ [1995] CLC 1268.

⁵⁶[1995] CLC 1268, 1274. For a potentially inconsistent decision, see *IOT Engineering Projects Ltd v Dangote Fertilizer Ltd et al* [2014] EWCA Civ 1348 where, it is submitted, the Court of Appeal was correct to disregard the claimant’s arguments about the alleged difficulties of enforcing the arbitration award in Nigeria.

⁵⁷[1995] CLC 1268, 1274.

⁵⁸ The fact that this thesis does not represent the current position is clear from *The Niedersachsen* [1983] 2 Lloyd’s Rep. 600.

⁵⁹ [2015] EWHC 3912 (Ch).

inference because of the response which Porter & Co asserted to the claim made on behalf of Nadera Ahadi which seems on the face of it to be entirely misguided and to make serious allegations of forgery against Mrs. Ahadi and to dispute a marriage which at least on the material which I have seen seems to be a legitimate marriage. In reaching that conclusion I do not lose sight of the fact that Mrs. Ahadi has a conviction for benefit fraud.”⁶⁰

The author believes that there was insufficient evidence for Snowden J to conclude that there was a real risk of dissipation of the assets. Alternatively, if Snowden J was right to make such a conclusion, the threshold is too easy to satisfy and needs to be reconsidered. His Lordship made an inference from the nature and apparent weakness of the defendant’s argument in relation to only one of a number of issues which would be relevant for the purposes of establishing the claimants’ allegations. It is also noted that the claimants failed to put forward a convincing argument that they had a share in another (more substantial) asset. As a matter of principle, Snowden J was wrong to blur the distinction between the need for a good arguable case on the merits and the requirement of a real risk of dissipation.⁶¹ Any conflation of the two substantive preconditions undermines the protection of defendants as it allows claimants to circumvent an important precondition. It is submitted that these two requirements perform separate functions. The primary purpose of the good arguable case test appears to be to reduce the risk of a later finding that it was wrongful to grant the order because the claimant had not been successful on the merits. Reducing the risk of wrongfully granting injunctions is important to ensure a level-playing field in litigation. On the other hand, the requirement relating to the conduct of the defendant is central to establishing the unjust element. A good practical example of the need to separate the enquiry relating to the strength of the claimant’s case on the merits from the assessment of the defendant’s conduct relating to dissipation is the risk associated with cases involving allegations of dishonesty. The current trend seems to be that allegations of dishonesty need to be carefully scrutinised to see whether they justify an inference that the assets will be dissipated unless the defendant is restrained by way of injunction.⁶² Consequently, as the law currently stands, a finding of dishonesty may be sufficient or insufficient to found the necessary inference of a real risk of dissipation of the assets.⁶³ This was confirmed in *Madoff Securities International Ltd v Raven*⁶⁴ where there was

“a sufficiently arguable case of deliberate wrongdoing, the issuing of sham invoices and the disguising of the true nature of the payments of millions of dollars made to the Kohn defendants over many years. This demonstrates in itself a serious risk of dissipation.”⁶⁵

It is interesting to note that in a subsequent judgment on the substance of the dispute the claimants actually failed to prove dishonesty and wrongdoing on the defendant’s part.⁶⁶ This illustrates the risk of wrongfully granting an injunction when the court makes inferences at the interlocutory stage

⁶⁰ [2015] EWHC 3912 (Ch).

⁶¹ See the section of this article entitled “The link between the two key preconditions”.

⁶² *Thane Investments v Tomlinson* [2003] EWCA Civ 1272, [28] per Peter Gibson LJ. See also *Andrews v Stanway* (QBD, 29 June 2017, unreported).

⁶³ Per Patten J in *Jarvis Field Press Ltd v Chelton* [2003] EWHC 2674 (Ch), [10].

⁶⁴ [2011] EWHC 3102 (Comm).

⁶⁵ [2011] EWHC 3102 (Comm), [169] per Flaux J (as he then was).

⁶⁶ *Madoff Securities International Ltd v Raven* [2013] EWHC 3147 (Comm).

about the risk of dissipation based on mere allegations of dishonesty. If the precondition relating to the conduct of the defendant had been independently assessed, the risk of wrongfully granting the injunction would have been reduced.⁶⁷

The conduct of the defendant: a principled way forward

The author submits that in the context of non-proprietary claims, when assessing whether the conduct of the defendant warrants a freezing injunction, we need to remind ourselves that the touchstone for any equitable relief is injustice. There is nothing unjust about the bare fact that the circumstances of the case (e.g. the location of the assets) are such as to make it more difficult than usual to enforce a future judgment.⁶⁸ The court's focus should be on the presence or absence of wrongful conduct on the defendant's part. Equity's helping hand in the form of a freezing injunction to strengthen equipage equality should not be extended to commercial parties who were sufficiently cautious, consciously took risks, or simply made a bad bargain. The term dissipation is easily associated with hiding assets with an intention to avoid enforcement and it has been expressly acknowledged by the courts that a freezing injunction carries a reputational stigma. For these reasons, in the author's view, the claimant should show objective evidence of the defendant's conduct consistent with an intention to evade any future judgment. It is sufficient if the court can draw an inference of such intention from the objective evidence. The conduct should be such that it cannot be capable of being explained other than as an attempt to put the assets beyond the reach of the courts. The conduct relied upon by a claimant should be closely linked to the assets in the defendant's possession. The courts should avoid relying on the strength of the claimant's case on the merits to make inferences about the risk of dissipation.⁶⁹ Adoption of the author's proposal would constitute a departure from the more flexible present practice. For example, it would no longer be sufficient to rely on mere evidence of additional enforcement costs and delays arising from the defendant's transfer of assets overseas. The proposal, it is submitted, is a principled way forward in order to bring the freezing injunction in line with the principle of equipage equality: preventing intentional evasion of judgments as opposed to assisting claimants with overcoming potential difficulties with enforcement arising without any wrongdoing from defendants. In the absence of any wrongdoing it is difficult for equity to justify such a draconian form of relief before judgment.

Potential problems and the lessons from New York

What are the potential problems if we adopt this author's proposal for the requirement of intention to dissipate the assets? The main concern is the practical difficulties that the claimants may have in satisfying the evidential threshold of intention. How could any claimant show that the defendant intends to dissipate his assets in order to avoid satisfying a future judgment? The New York courts have successfully managed to overcome a similar practical problem in one category of cases on pre-judgment attachment. Under New York law, one of the alternative requirements for pre-judgment attachment is the defendant's intention to defraud creditors or frustrate the enforcement of

⁶⁷ The risk of wrongfully granting a pre-judgment freezing injunction cannot be eliminated and will always exist as the full evidence only comes before the court at trial.

⁶⁸ An example of a case broadly consistent with this proposal in the context of an application for a *Chabra*-style freezing injunction is *IOT Engineering Projects Ltd v Dangote Fertilizer Ltd et al* [2014] EWCA Civ 1348.

⁶⁹ In practice if the claim on the merits is one of fraud it may be easier to draw inferences about the risk of dissipation – see the section of this article entitled “The link between the two key preconditions for a freezing injunction”.

judgment.⁷⁰ The district courts in the second circuit have recognised that intention to defraud is rarely susceptible to direct proof. Consequently, the approach of the district courts established in a number of cases is to examine whether allegedly suspicious transactions exhibit “badges of fraud” that give rise to a sufficient inference of intent.⁷¹ The badges of fraud identified by the courts include the following: (1) gross inadequacy of consideration, (2) a close relationship between the transferor and the transferee, (3) the transferor’s insolvency as a result of the conveyance, (4) a questionable transfer not in the ordinary course of business, (5) secrecy in the transfer and (6) retention of control of the property by the transferor after the conveyance. Limits have been imposed as to how far the courts can go to make an inference of intent. In New York, allegations raising a mere suspicion of fraudulent intent have been held insufficient, as well as “conclusory allegations” without any supporting evidence.⁷² Past misconduct will generally be inadequate for an inference of intent to defraud. This was illustrated in *Signal Capital Corp v Frank*⁷³ where the claimant tried to point to the defendant’s past misconduct involving fraudulent transfers and argued that such misconduct gives rise to a presumption of the danger of dissipation of assets that would frustrate a judgment in the claimant’s favour but the court held that it was not sufficient. A further illustration of the rigorous approach of the New York courts is the reasoning in *City of New York v Citisource Inc*⁷⁴ where the plaintiff sought attachment of funds in several bank accounts. The claim was for treble damages under the well-known Racketeer Influenced and Corrupt Organizations Act (RICO).⁷⁵ The plaintiff made allegations of bribery of the deputy director with the intention of influencing the award of a multi-million dollar municipal contract to the defendant. The court stated that:

P cannot show such an intent merely by adducing evidence that Ds have sought to withdraw money from their bank accounts. P must show that defendants somehow have attempted to conceal their property or to place it beyond the reach of the Court’s judgment...While an attempt to dispose of assets, standing alone, will not justify an attachment, the timing of defendants’ actions raises an inference that defendants intended to frustrate enforcement of a judgment.”⁷⁶

If the English courts were to import the approach of the New York courts, the author’s proposal for a requirement of intention to avoid enforcement would be workable in practice. In cases where the claimant is concerned that the defendant may have already taken steps to conceal his assets but the claimant cannot produce the evidence to satisfy the evidential threshold of intention to dissipate, there is a possibility of a gap in the protection for claimants from unanticipated wrongful conduct by unscrupulous defendants despite the lack of any ‘visible’ warning signs. In the next section, the

⁷⁰ New York Civil Practice Law and Rules (CPLR) 6201, paragraph 3. See generally D Siegel, *New York Practice*, (West, 5th edn, 2011), chapter 12.

⁷¹ *BFP v Resduction Trust Corp* 511 U.S. 531 (1994); *Encore Credit Corp* (2006) WL 148909 (E.D.N.Y.); *Bank of China v NBM* 192 F. Supp. 2d 183 (S.D.N.Y. 2002).

⁷² See *DLJ Mortgage Capital Inc v Kontogiannis et al* (2009) WL 1652253 (E.D.N.Y.) where there was only a suspicion of defendant’s intent to defraud and the court held this was insufficient to obtain attachment. See also *National Audubon Society v Sonopia Corp* (2009) WL 636952 (S.D.N.Y.).

⁷³ 895 F. Supp. 62 (S.D.N.Y. 1995).

⁷⁴ 679 F. Supp. 393 (S.D.N.Y. 1988). This case was distinguished in the context of attachment proceedings in *Buy This Inc. v. MCI Worldcom Communications* 178 F.Supp.2d 380 (S.D.N.Y. 2001).

⁷⁵ See in particular 18 U.S. Code §1962(c) and (d) (1982).

⁷⁶ 679 F. Supp. 393 (S.D.N.Y. 1988), 396.

author will consider modest changes to the current rules on disclosure orders as a possible solution to this gap in order to ensure a level-playing field.

Equipage equality and the need for free-standing disclosure orders

Although the regulation of the parties' balance of rights using freezing injunctions is essential, it is not sufficient to ensure complete equipage equality. For example, in order to have the ability to effectively restrain a defendant using a freezing injunction, it is necessary to have the power to grant disclosure orders which enable claimants to obtain information on the location and value of the defendant's assets.

In order to reduce the risk of inadequate protection of claimants resulting from the proposed evidential threshold, one possible option advocated by the author is to enable claimants to obtain free-standing disclosure orders. Armed with information about the value and location of the defendant's assets, the claimants would be in a stronger position to prevent concealment. Moreover, the author submits that the proposed solution would not represent a big jump from the present position adopted by the courts. Namely, the courts have already been flexible in their interpretation of CPR para 25.1(1)(g) which enables a court to make

“an order directing a party to provide information about the location of relevant property or assets or to provide information about relevant property or assets which are *or may be* the subject of an application for a freezing injunction.”⁷⁷

Although it is well established that there is no free-standing right to a pre-judgment disclosure order, the emphasised words have been relied upon to grant a disclosure order in circumstances where the claimant had not yet made an application for a freezing order.⁷⁸ It is sufficient that there might be an application for a freezing order in the future and the claimant needs to show “some credible material” that would justify such an application.⁷⁹ The latter threshold is lower in comparison to that required for the purposes of an application for a freezing order. This leads us to make the following observation about claimants' freedom to use CPR 25.1(1)(g): as evident from the Court of Appeal's analysis in *Pugachev*, the courts are flexible in allowing claimants (in certain cases) to use this provision to obtain information that would help them to decide whether or not to make an application for a freezing order.⁸⁰

Apart from privacy, one of the concerns with liberalising the ability to obtain a disclosure order is the potential for claimants to embark on 'fishing expeditions' with a view to testing the strength of their allegations or, to use the words of Patten LJ, to “investigate the truth of the claim”.⁸¹ Given their full awareness of the problem, the author submits that the English courts are capable of dealing with the

⁷⁷ Emphasis added.

⁷⁸ For a recent example, see *Gerald Metals SA v Vasile Frank Timis* [2016] EWHC 2136 (Ch). In *JSC Mezhdunarodniy Promyshlenniy Bank & Anr v Pugachev* [2015] EWCA Civ 139, at this stage of the litigation there was no freezing order in respect of the assets subject to discretionary trusts but the Court of Appeal nevertheless confirmed the disclosure order.

⁷⁹ *Parker v CS Structured Credit Fund Ltd* [2003] EWHC 391 (Ch), [23].

⁸⁰ [2015] EWCA Civ 139.

⁸¹ *JSC BTA Bank v Solodchenko* [2010] EWCA Civ 1436, [39] per Patten LJ.

risk of speculative applications for a disclosure order. This was confirmed by the Court of Appeal's judgment in *Pugachev* where the court was satisfied that the case before them did not fall into the fishing expedition category because there was more than a "remote possibility" on the facts. The Court of Appeal's judgment will serve as a helpful clarification of the boundaries for the lower courts. The author further submits that the most effective mechanism to deter claimants from making unmeritorious applications for free-standing disclosure orders would be a rigorous approach when dealing with the costs of any application. A related point is that the courts should demand a cross-undertaking in damages from the claimant and, at least as a default rule, the claimant should provide security.⁸² The author's proposed mechanisms for dealing with unmeritorious applications do not involve the creation of new remedies and they are consistent with the need for a level-playing field in litigation.⁸³

The precondition as to the strength of the claimant's case on the merits

The use of the good arguable case test in relation to the required strength of a claimant's case on the merits in freezing injunction cases was first confirmed by the Court of Appeal in *Rasu Maritima*.⁸⁴ The test was explained by Mustill J at first instance in *The Niedersachsen* as "a case which is more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than a 50% chance of success ..."⁸⁵ The standard of a good arguable case was not newly invented for freezing injunction cases. Prior to *Rasu Maritima*, it had been used in the context of applications for permission to serve a claim form out of the jurisdiction.⁸⁶ However, while the test is still being used in relation to service out of the jurisdiction, the Court of Appeal in *Canada Trust Co v Stolzenberg (No 2)*⁸⁷ added what has been described as a "gloss" on the good arguable case test, stating that in the interlocutory context, the test "reflects...that one side has a much better argument on the material available".⁸⁸ This gloss on the test was subsequently approved by the Privy Council in *Bols Distilleries BV (trading as Bols Royal Distilleries) v Superior Yacht Services Ltd*.⁸⁹ Whether one side has a much better argument on the material available may be difficult to decide at the interlocutory stage especially in cases involving numerous factual disputes where the credibility of witnesses is a crucial factor.⁹⁰ Hence it is not surprising that judges have been uncomfortable with

⁸² For an analogous argument in the United States see DB Dobbs, "Should Security be Required as a Pre-Condition to Provisional Injunctive Relief" (1974) 52 *North Carolina Law Review* 1091. As for the current position under English law, it is necessary to show a "good arguable case" that the defendant will suffer loss as a result of the freezing order in order to obtain fortification of the cross-undertaking: *Energy Venture Partners v Malabu Oil & Gas* [2014] EWCA 1295, [52].

⁸³ In *Gerald Metals SA v Vasile Frank Timis* [2016] EWHC 2136 (Ch), [35] Rose J expressly recognised the need for a cross-undertaking in damages due to "a general principle of the need for the courts to be even-handed between parties when intrusive relief is granted at an early stage in proceedings without the court having had the opportunity to consider the merits". The reasoning of Rose J is consistent with the author's emphasis on the principle of equipage.

⁸⁴ *Rasu Maritima v Perusahaan Pertambangan* [1977] 2 Lloyd's Rep. 397, 404 per Lord Denning MR.

⁸⁵ [1983] Com LR 234, 235. The statement was approved by the Court of Appeal in the same case: *The Niedersachsen* [1983] 2 Lloyd's Rep. 600.

⁸⁶ *Vitkovice Horni a Hutni Tezirstvo v Korner* [1951] AC 869.

⁸⁷ [1998] 1 WLR 547.

⁸⁸ [1998] 1 WLR 547, 555.

⁸⁹ [2007] 1 Lloyd's Rep. 683, [28].

⁹⁰ This was acknowledged by Nugee J in *Holyoake v Candy* [2016] EWHC 970 (Ch), [13]. The judgment of Nugee J was reversed by the Court of Appeal but this point was not challenged. The *Canada Trust* gloss has been

the *Canada Trust* gloss and even showed reluctance to apply it in the context of freezing injunctions as evident from the *obiter* observations of the Court of Appeal in *Kazakhstan Kagazy plc v Zhunus*.⁹¹

“‘Much the better of the argument’ has recently emerged as a test on applications for service out of the jurisdiction. But I see no reason why that test should apply to freezing injunctions”⁹²

This view has been recently approved by the Commercial Court in *PJSC Tatneft v Bogolyubov and others*⁹³ where Picken J accepted the logical possibility that in some cases both sides may have a good arguable case on the material available.⁹⁴ In the author’s view, this current trend (disregarding the *Canada Trust* gloss in the case law on freezing injunctions) is justified by the potential complexity of the exercise at the interlocutory stage and the need to deal with the matter in a cost efficient, proportionate and timely manner.⁹⁵ Disregarding the *Canada Trust* gloss would make it easier for legal advisers to give clear advice on the merits of the application for a freezing injunction. However, for the avoidance of doubt, this author is not advocating that the courts should adopt a lower threshold than that of the good arguable case for a claimant to satisfy whenever faced with factually or legally complex cases. The author is concerned that in some cases, such as *Finurba Corporate Finance Ltd v Sipp SA*,⁹⁶ the courts seem to be in favour of relaxing the requirement to show a good arguable case on the merits when faced with difficult points of substantive law and evidence.⁹⁷ In *Finurba*, Lord Neuberger MR (as he then was) observed that:

“In the light of the increasing sophistication of fraudsters, and their extensive use of companies and other entities to mask their activities and assets, the court should adopt a robust and realistic approach to technical points of substantive law or evidence raised against the grant of a freezing order, in cases where there is good reason to believe that the fraud has occurred.”⁹⁸

While there is no doubt that the courts should be alert and take into account the sophisticated methods employed by modern fraudsters, that represents an issue which is already catered for by the courts’ wide interpretation of the provisions of freezing orders.⁹⁹ The author submits that taking a more relaxed approach to the preconditions for obtaining a freezing injunction when faced with allegations of fraud creates the risk of pre-judging the merits of the claimant’s application for relief. A failure to properly give weight to the technical points of substantive law or evidence raised by a

extensively criticised outside the context of freezing injunctions – see, for example, J Weale, “A Good Arguable Case for Restricting the Canada Trust Gloss” [2010] *Journal of Business Law* 36.

⁹¹ [2014] 1 CLC 451. See also *Petroleum Investment Co Ltd v Kantupan Holdings Co Ltd* [2002] 1 All ER (Comm) 124, [38] (where Toulson J (as he then was) noted the limitations of the interlocutory process and the resulting difficulties with the *Canada Trust* gloss).

⁹² [2014] 1 CLC 451, [25] per Longmore LJ.

⁹³ [2016] EWHC 2816 (Comm).

⁹⁴ [2016] EWHC 2816 (Comm), [110].

⁹⁵ See the overriding objective of the English Civil Procedure Rules, rule 1.1.

⁹⁶ [2011] EWCA Civ 465.

⁹⁷ For similar concerns about the use of the good arguable case test in other areas of the law, see P Rogerson, “Problems of the Applicable Law of the Contract in Common Law Jurisdiction: the Good Arguable Case” (2013) *Journal of Private International Law* 387.

⁹⁸ [2011] EWCA Civ 465, [31]. It is noted that the injunction was discharged on the facts of this case.

⁹⁹ See, for example, the Supreme Court’s decision in *JSC BTA Bank v Ablyazov* [2015] 2 Lloyd’s Rep. 546.

defendant may increase the risk of wrongfully granted injunctions. This undermines the aim of achieving a level-playing field in litigation.

The uncertainty surrounding the application of the good arguable case test in the context of applications for freezing injunctions was illustrated by the Court of Appeal's reversal of the first instance decision to discharge the two injunctions in *Sukhoruchkin v Van Bekestein*.¹⁰⁰ The Court of Appeal held that Morgan J was not entitled at the interlocutory stage to come to firm conclusions about certain disputed issues of law and fact such as in relation to the circumstances in which shadow directors owe fiduciary duties – the legal principles in this area were not settled, the legal issue was highly fact-sensitive and the parties relied on conflicting evidence.¹⁰¹ The Court of Appeal's reversal of Morgan J's application of the good arguable case demonstrates that it may be difficult to predict how a court would apply the test. This reinforces the author's argument that disregarding the *Canada Trust* gloss would help to reduce the uncertainty and that, consistently with the principle of equipage equality, both parties would be in a better position to know where they stand.

The link between the two key preconditions for a freezing injunction

What is the likely attitude of a court to the link between the two main preconditions for freezing injunctions? In a recent case,¹⁰² the claimants unsuccessfully argued that the defendants' concession that the claimants have a good arguable case on the merits had the effect of establishing a propensity to dissipate the assets.¹⁰³ It is evident from the judgment that the argument could have been successful if an inference had been drawn from the pleaded case that the defendants' breach of duty was dishonest. That was not the case on the facts. Consistently with the author's views relating to the conduct of the defendant, a mere finding of dishonesty should not be a sufficient trigger for a freezing injunction. In order to adequately protect defendants, claimants should show a link between the conduct of the defendant and the assets sought to be restrained. One may seek to challenge the author's proposed approach by pointing to the fact the courts have always been prepared to grant a proprietary freezing injunction where the claimant has only established a good arguable case on the merits of a proprietary claim. The problem with this counter-argument is that, in the context of non-proprietary claims, the conduct of the defendant relevant to the strength of the claimant's case on the merits is not necessarily the same as the conduct relevant to the risk of dissipation. By contrast, in the context of proprietary claims, it can be observed that there is an inextricable link between the risk of dissipation and the strength of the substantive claim. There is a clear link between a proprietary claim and the assets sought to be restrained. For this reason there is no need to show a risk of dissipation in order to obtain a freezing injunction in respect of a proprietary claim.¹⁰⁴ In non-proprietary cases, the claimant should always *positively* demonstrate that the defendant intends to avoid enforcement in order to bring the case within the exception to the general rule. The judges inevitably find some attraction in the argument that where there is

¹⁰⁰ [2013] EWHC 1993 (Ch); [2014] EWCA Civ 399.

¹⁰¹ [2014] EWCA 399, [41].

¹⁰² *Dinglis Properties Limited and others v Dinglis Management Limited and others* [2016] EWHC 818.

¹⁰³ *Dinglis Properties Limited and others v Dinglis Management Limited and others* [2016] EWHC 818, [22]. There is further evidence from the case law that the courts are tempted to conflate the two key preconditions – see, for example, the Court of Appeal's observations in *VTB Capital v Nutritek* [2012] EWCA Civ 808, [178] per Lloyd LJ, and more recently in *Candy v Holyoake* [2017] EWCA Civ 92, [61] per Gloster LJ.

¹⁰⁴ *Polly Peck International plc v Nadir (No 2)* [1992] 2 Lloyd's Rep 238; *Cherney v Neuman* [2009] EWHC 1743 (Civ).

evidence that a defendant has defrauded the claimant, an inference could be made that the defendant would try to make himself judgment proof. The courts should, however, be cautious about allegations of fraud and protect defendants against the risk of concocted claims. For this reason, the courts have developed a specific test for pleading fraud.¹⁰⁵ When dealing with applications for freezing injunctions, the test can be a useful weapon because the defendant may apply to strike out the claimant's plea of fraud (and apply for a summary judgment) if it does not meet the requirements of the test.¹⁰⁶

Equipage equality and the safeguards for defendants

The provisos and undertakings (collectively "the safeguards") in the standard form freezing injunction are central to equipage equality as they are designed to ensure that the injunction does not tip the balance of power in favour of the claimant in a manner that gives him an unfair advantage over the defendant. In other words, they seek to ensure that the operation of freezing injunctions does not itself generate a new form of inequality between the parties. The defendant should only be deprived of his freedom to the extent it is necessary to stop him from making himself judgment proof. We will consider selected examples of provisos and undertakings to the freezing injunction on an individual basis.¹⁰⁷ We will see that, from the perspective of equipage equality as the underlying function of freezing injunctions, the current operation of certain provisos and undertakings is insufficient to ensure a level-playing field in litigation. This is because they do not sufficiently protect the interests of defendants.

The ordinary and proper course of business proviso

Without this proviso the defendant could be faced with a choice between defaulting on his payments on the one hand and providing security on the other. Indeed, the solvency of the defendant and/or his ability to meet the judgment debt may depend on transactions in the ordinary and proper course of business. The claimant should not be able to use a freezing injunction to hold the defendant to ransom. Transactions in the ordinary and proper course of business carry the usual business risk of loss but they do not amount to *wrongful* conduct. They are not intended to prejudice the claimant and make the process of litigation futile. While the author is not concerned about the theoretical justification for this proviso, it is still necessary to investigate whether there is any evidence of unfairness to defendants.

In particular, are there any potential obstacles for defendants in continuing their business? Although freezing orders do not normally prohibit transactions in the ordinary and proper course of business, there is evidence that defendants can experience difficulties in implementing such transactions because of the reactions of third parties to a freezing order.¹⁰⁸ It is also important not to make an assumption that every freezing order contains an ordinary and proper course of business proviso. In

¹⁰⁵ See *Three Rivers District Council v Bank of England* [2001] UKHL 16.

¹⁰⁶ See, for example, *JSC Bank of Moscow v Vladimir Abramovich Kekhman et al* [2015] EWHC 3073 (Comm) (on the facts of this case, the defendant's applications – to strike out and for summary judgment – were dismissed).

¹⁰⁷ This article will focus on the cross-undertaking in damages, the ordinary and proper course of business proviso, and the duty of full and frank disclosure – compliance with these safeguards is frequently the subject of disputes and hence their selection.

¹⁰⁸ See, for example, *Kevin Taylor v Van Dutch Marine Holding Limited et al* [2016] EWHC 2201 (Ch), [37].

the high-profile *Fiona Trust* litigation,¹⁰⁹ one of the freezing orders specifically prohibited the conclusion of newbuilding (shipbuilding) contracts even though that would have been in the ordinary and proper course of business of the defendant. In that case, security was provided by the defendants but it was agreed that the secured funds could not be used in the ordinary and proper course of business without a prior successful application for permission to the court. The court effectively acknowledged that the need for an application to court was of little or no value to the defendants and effectively made it impossible to use the secured funds in the ordinary course of business.¹¹⁰

There is a further and related concern about the practical value of the safeguards contained in a standard form freezing injunction. Although in theory defendants against whom a non-proprietary freezing order has been granted would normally be free to spend a reasonable amount of funds on legal representation,¹¹¹ it has been recognised that in practice it is “not an uncommon occurrence” that a bank holding the defendant’s assets is unwilling to release any part of the assets.¹¹² The unfairness to defendants in such a scenario was demonstrated in *Appleyard* where the defendant was forced to incur further costs in making an application to the court “for an explicit order authorising or even requiring release of funds by a bank”.¹¹³ Another potential burden on a defendant’s use of funds towards legal representation (or in the ordinary and proper course of business) may be a requirement of prior notice to the claimant’s legal representatives.¹¹⁴

Despite some of the above criticisms, the Court of Appeal should also be applauded for strengthening equipping equality by ensuring that the lower courts do not interpret the ordinary and proper course of business proviso too narrowly. This was demonstrated in *Emmott v Michael Wilson and Partners*¹¹⁵ where the Court of Appeal overturned the first instance decision that two payments had been made in breach of a freezing injunction. The court emphasised the fact that the payments were made in good faith and related to pre-existing liabilities. A useful clarification was made that an ad-hoc transaction is not necessarily inconsistent with the ordinary course of business proviso. The court also underlined the fact-sensitive nature of the exercise of determining whether a transaction is in the ordinary course of business. Overall, the Court of Appeal’s decision provides evidence that the English courts have made progress in protecting the defendants’ right to continue with any genuine commercial dealings.

Cross-undertaking in damages

In order to obtain a pre-judgment freezing injunction, the claimant must give an undertaking to the court to comply with any future order of the court to compensate the defendant for any loss caused by the freezing injunction. The usual wording of the undertaking is on the following terms:

¹⁰⁹ [2016] EWHC 2163 (Comm). See further discussion of this case in the next section of this article. The decision of Males J was upheld by the Court of Appeal in *SCF Tankers Limited (formerly known as Fiona Trust & Holding Corporation) and Others v Yuri Privalov and Others* [2017] EWCA Civ 1877.

¹¹⁰ [2016] EWHC 2163 (Comm), [83]-[85].

¹¹¹ See, for example, paragraph 11(1) of the standard form freezing injunction (adapted for use in the Commercial Court) in Appendix 5 of the Admiralty and Commercial Court Guide.

¹¹² *Appleyard (Trustee) v Reflex Recordings Ltd* [2013] EWHC 4514 (Ch), [1] per HHJ David Cooke.

¹¹³ *Appleyard (Trustee) v Reflex Recordings Ltd* [2013] EWHC 4514 (Ch), [1] per HHJ David Cooke.

¹¹⁴ The option to insert the relevant wording is found in para 11(1) of the standard form freezing injunction (adapted for use in the Commercial Court).

¹¹⁵ [2015] EWCA Civ 1028.

“If the court later finds that this order has caused loss to the respondent, and decides that the respondent should be compensated for that loss, the applicants will comply with any order the court may make”.¹¹⁶

The claimant may be required to provide a bank guarantee in respect of any such order.¹¹⁷ The rule in paragraph 5.1 of CPR PD 25A is that a cross-undertaking in damages should be unlimited unless the court orders otherwise. Only in exceptional circumstances will the court, on a discretionary basis, place a cap on the cross-undertaking in damages.¹¹⁸ A failure by the claimant to comply with the undertaking would amount to contempt of court. However, in the event of a wrongfully granted injunction, the defendant cannot enforce the undertaking as of right: the court has discretion whether to enforce it at all.¹¹⁹ The court will take into account, *inter alia*, the defendant’s conduct. It is only after the exercise of discretion to enforce the undertaking that the court needs to assess whether the defendant has suffered any loss as a result of the injunction. The principles of causation, remoteness and mitigation are all relevant when measuring the amount recoverable by the defendant. The requirement to give a cross-undertaking in damages is an invaluable safeguard for the defendant. Its primary purpose is to protect the defendant against the injustice of any loss caused by a wrongfully granted freezing injunction.¹²⁰ A cross-undertaking in damages will be required to obtain an injunction *ex parte* despite the fact that there is no evidence that defendant may suffer loss. In *Energy Venture Partners v Malabu Oil & Gas*, the Court of Appeal observed that:

“since the Claimant has obtained a Freezing Order preserving assets over which it may be able to enforce on the basis of having shown the court that it has a good arguable case, it is only appropriate that if the Defendant can show that it too has a good arguable case that it will suffer loss in consequence of the making of the Order, it should equally be protected. It may be said that what the Defendant in such circumstances obtains is security whereas the Claimant obtains something less, but in many cases, of which the present is probably one, a Freezing Order has the practical if not theoretical effect of giving security to the Claimant for its claim.”¹²¹

A secondary purpose of a cross-undertaking is its potential deterrent effect in that, at least in theory, it reduces the possibility of opportunistic applications by claimants.¹²² In the author’s view, however, a more effective deterrent would be a default requirement for the claimant to pay money into court or provide a third party guarantee (e.g. a bank guarantee), unless the claimant can show some exceptional circumstances. The same solution has been adopted for pre-judgment applications for the so called European Account Preservation Order (‘EAPO’).¹²³ As a matter of principle, such a

¹¹⁶ Para (1) of Schedule B of the standard form freezing injunction.

¹¹⁷ Para (2) of Schedule B of the standard form freezing injunction.

¹¹⁸ See the following examples of cases where a limit was imposed: *Re DPR Futures Ltd* [1989] 1 WLR 778 and *RBG Resources Ltd v Rastogi* [2002] BPIR 1028.

¹¹⁹ *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295.

¹²⁰ *Graham v Campbell* (1878) 7 Ch D 490.

¹²¹ [2014] EWCA 1295, [52].

¹²² *Cheltenham & Gloucester Building Society (formerly Portsmouth Building Society) v Ricketts* [1993] 1 WLR 1545, 1554.

¹²³ Regulation 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters (“the EAPO Regulation”). See esp. Recital 18 of the EAPO Regulation which provides that: “Such circumstances could be, for instance, that the creditor has a particularly strong case but does not have

default rule would ensure a fairer distribution of rights between the parties in comparison to the current default position. It would reflect the seriousness of the risks of injustice to defendants associated with a *pre-judgment* freezing injunction. It would be a fair price to pay for interfering with the defendant's assets before judgment. The flexibility of principles such as remoteness, and a lack of a more rigid causation rule on recoverable losses, can lead to complex and costly litigation on the defendant's entitlement to compensation, as illustrated by the judgment of the court in *Abbey Forwarding (in liquidation) and another v Hone and others*.¹²⁴ There are even examples from case law, such as *Yossifoff v Donnerstein*,¹²⁵ where the claimant openly admitted that any cross-undertaking in damages would be "of limited value in practice" due to his financial circumstances.¹²⁶

The risk of unfairness to defendants from placing reliance on the claimant's allegations at the interlocutory stage and the potential for significant losses from wrongfully granted injunctions in high value commercial cases is illustrated by the *Fiona Trust* litigation.¹²⁷ At the outset of this long-running litigation brought by the Russian state-owned shipping companies, a worldwide freezing order was made in respect of assets up to the value of 225 million USD and a similar amount was paid into court by the defendants to discharge the injunction. That was in August 2005. Five years later, in December 2010, the claimants obtained a judgment for roughly 16 million USD – a substantial difference compared to the sum frozen. The defendants were successful in enforcing the cross-undertaking and obtained substantial damages for the loss suffered as a result of the 2005 freezing order. It is notable that the claims in *Fiona Trust* involved wide ranging allegations of bribery, corruption and diversion of assets. With the benefit of hindsight, it is the author's view that something needs to be done to reduce the risk of wrongfully granting freezing injunctions in high value commercial cases based on such serious allegations. It is also notable that in *Mobil Cerro Negro* the claimant was initially successful (at the *ex parte* stage) in obtaining a freezing order which covered 12 billion USD worth of assets. In this high-profile case the claimant was later successful only in relation to roughly 2.6 billion USD.¹²⁸ This underlines the author's argument that the English courts need to introduce a deterrent against exaggerated claims in applications for freezing orders. An effective deterrent would be a *default* requirement for claimants to fortify their cross-undertaking in damages, unless exceptional circumstances can be shown.¹²⁹ Apart from the potential losses that the defendant may suffer, the level of security should take into account, *inter alia*, the value of the claim and any losses that may be suffered by third parties.

sufficient means to provide security, that the claim relates to maintenance or to the payment of wages or that the size of the claim is such that the Order is unlikely to cause any damage to the debtor, for instance a small business debt." The author agrees with this approach.

¹²⁴ [2012] EWHC 3525 (Ch).

¹²⁵ [2015] EWHC 3357 (Ch).

¹²⁶ [2015] EWHC 3357 (Ch), [49].

¹²⁷ *Fiona Trust & Holding Corporation v Yuri Privalov & Others* [2016] EWHC 2163 (Comm). See also the author's discussion of this case (in relation to the ordinary and proper course of business proviso) in the previous section of this article. The decision of Males J was upheld by the Court of Appeal in *SCF Tankers Limited (formerly known as Fiona Trust & Holding Corporation) and Others v Yuri Privalov and Others* [2017] EWCA Civ 1877.

¹²⁸ See 'Exxon owed \$1.6bn by Venezuela for 2007 nationalisation', 10th October 2014, BBC News: <http://www.bbc.co.uk/news/business-29561345>

¹²⁹ Further support for this argument is found in the minority judgment of the US Supreme Court in *Grupo Mexicano de Desarrollo S.A. v Alliance Bond Fund Inc.* 119 S.Ct. 1961 (1999), 1978 where it was suggested that in order to protect defendants, "[a]s an *essential condition* for a preliminary freeze order, a district court could demand sufficient security to ensure a remedy for wrongly enjoined defendants" (emphasis added).

Notwithstanding the requirement for a cross-undertaking in damages by claimants, defendants who suffer financial loss as a result of a wrongfully granted injunction may have practical difficulties in recovering their loss. For example, in the *Pugachev* litigation, concerns were raised not only about the potential loss that Mr Pugachev could suffer in the event of a failure by the DIA (acting as the liquidator of the bank) to succeed on its substantive claims but also about his ability to recover any loss.¹³⁰ The DIA did not have any assets in England and the bank was in insolvent liquidation. Moreover there was no formal mechanism for enforcing orders of the English court in Russia. Mr Pugachev therefore obtained, at first instance, a fortification of the cross-undertaking in damages; in practical terms the DIA was ordered to pay 25 million USD into court. The DIA appealed against the fortification on the ground that Mr Pugachev failed to produce evidence about the potential loss that would result from the freezing order. The Court of Appeal observed that there was evidence of “the collapse of a joint venture investing in real estate in Russia which, according to the evidence, would have given Mr Pugachev a profit of USD \$25 million or more”.¹³¹ Such evidence shows the degree of damage which a worldwide freezing order may have especially if its coverage extends to all of the defendant’s assets and the defendant is engaged in large scale business ventures as in the *Pugachev* litigation. However, the Court of Appeal overturned the fortification order because Mr Pugachev failed to show an established and continuing pattern of business enterprise in the period after his exile from Russia.¹³² The evidence about the collapsed joint venture was not sufficient to show a continuing pattern.

While there is no doubt that a cross-undertaking in damages is necessary to ensure equipage equality, it is the author’s view that equipage equality will not be achieved unless the courts impose a *default* requirement to fortify the cross-undertaking. The courts should no longer adopt the view enunciated in *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd*¹³³ that “justice, convenience and fairness might well justify an injunction even where the cross-undertaking is frail”.¹³⁴ The author submits that the difficulties faced by the defendant in *Pugachev* to prove an established and continuing pattern of business enterprise and the fact that the issue of fortification had to be resolved by the Court of Appeal is inconsistent with the principle of proportionality in civil procedure and the need to streamline interlocutory proceedings.

The duty of full and frank disclosure

A further safeguard to reduce unfairness to defendants is that a claimant has a duty of full and frank disclosure to the court on all matters material to the court’s discretion on an *ex parte* application. These include matters which may be adverse to an application for a freezing order. A defendant may apply to the court to discharge the injunction on the basis of a failure to comply with this duty. The court has a discretion to discharge the injunction on this basis and would usually do so for deliberate non-disclosure or misrepresentation. The court’s discretion to discharge a freezing injunction for non-compliance with this duty is necessary “to deprive a wrongdoer of an advantage improperly obtained and to serve as a deterrent to others to ensure that they comply with their duty to make

¹³⁰ *JSC MP Bank v Pugachev* [2015] EWCA Civ 139, [88].

¹³¹ *JSC MP Bank v Pugachev* [2015] EWCA Civ 139, [92].

¹³² *JSC MP Bank v Pugachev* [2015] EWCA Civ 139, [99].

¹³³ [1973] QB 609.

¹³⁴[1973] QB 609, 626.

full and frank disclosure on *ex parte* applications".¹³⁵ It is submitted that the duty of full and frank disclosure is sufficiently onerous to achieve its purpose.¹³⁶ There is no evidence to suggest that any amendments should be made to the manner in which the courts have been dealing with applications to discharge freezing injunctions on the basis of a failure to comply with this duty.¹³⁷ In order to properly deal with any tactical and unmeritorious applications to discharge the injunction for the alleged non-compliance with this duty, the author submits that the availability of discretion is appropriate. Any attempt to introduce a more rigid approach would undermine the equality of the parties.

Conclusion

The common denominator of the problems with the key preconditions for freezing injunctions is that they are currently geared towards maximising assistance to the claimants. The underlying reason for the excessively claimant-friendly approach is the courts' narrow perception of the function of freezing injunctions as a weapon against unscrupulous defendants. In some cases the courts are keen to remove any obstacles to the enforcement of a future judgment, even in the absence of any wrongdoing in relation to the assets. This article has advocated a change in the courts' view of the function of freezing injunctions. Namely, if the courts were to give more prominence to the role of equipage equality in freezing injunctions, there would be a greater emphasis on protecting defendants from unnecessary interference with their assets in order to achieve a level-playing field in litigation. One of the highlighted problems with the current thresholds for the preconditions is that they are open to different interpretations. This is potentially unfair to defendants as it favours financially strong claimants who are prepared to make a tactical application for a freezing injunction simply to put pressure on defendants. One of the author's proposals for reducing the uncertainty is for the courts to disregard the *Canada Trust* gloss on the good arguable case test. The author's main proposal for dealing with the potential unfairness to defendants is to raise the current threshold relating to the conduct of the defendant by introducing the requirement of intention to avoid enforcement. The adoption of this proposal would bring the law in line with the negative connotation of the term dissipation. While the existing safeguards and provisos go some way towards promoting the equality of the parties, evidence suggests that some of these devices do not go far enough to protect defendants. The default position should be a requirement for the claimant to provide security for his cross-undertaking in damages unless the claimant can demonstrate exceptional circumstances. The combined effect of the author's proposals would be to restrict the current scope of freezing injunctions and bring down the number of applications. Such a reduction should be welcomed by the courts as the burden of long lists together with the shortage

¹³⁵ *The Nicholas M* [2008] EWHC 1615 (Comm), [62] per Flaux J (as he then was), relying on the Court of Appeal's statement about this in *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350. See also *Memory Corporation v Sidhu* [2000] 1 WLR 1443.

¹³⁶ It should be added that the duty of full and frank disclosure is a *continuing* duty in the sense that it continues to apply until the injunction has been implemented.

¹³⁷ For a recent example of the application of this safeguard see *Roman Frenkel v Arkadiy Lyampert and another* [2017] EWHC 3121 (Ch) where a freezing injunction was discharged due to the claimant's failure to inform the court about a successful application for a preliminary injunction against the same defendant in the United States.

of judges is all too familiar.¹³⁸ All of the proposals in this article take into account the exceptional nature of freezing injunctions and the fact that the claimant's successful application would normally represent an important tactical (and possibly irreversible) victory at a very early stage of litigation.

¹³⁸ These burdens were expressly acknowledged by the Court of Appeal in *Ecobank Transnational Incorporated v Thierry Tanoh* [2015] EWCA Civ 1309, [132] per Christopher Clarke LJ.