

Dissipation of assets

How willing is the Court to accept evidence of dissipation of assets in freezing injunction applications?

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The purpose of a freezing order: “*the enforcement principle*”

- The “*important but limited purpose*” for which freezing injunctions are granted is “*to prevent a defendant **dissipating his assets** with the intention or effect of frustrating enforcement of a prospective judgment*”

Lord Bingham in *Fourie v Le Roux* [2007] 1 WLR 320

- See also Beatson LJ and Lord Clarke in *BTA Bank v Ablyazov* (No 10) [2014] 1 WLR 1414 and [2015] 1 WLR 4754 respectively
- And now Lord Leggatt in *Convoy Collateral v Broad Idea* [2021] UKPC 24; [2022] 1 All ER 289

“*The purpose of the injunction is to prevent the right of enforcement from being rendered ineffective by the **dissipation of assets** against which the judgment could otherwise be enforced.*”

The enforcement principle in closely related orders

- Chabra orders: *TSB Private Bank v Chabra* [1992] 1 WLR 231
- Proprietary injunctions
- Third party disclosure orders
- Bankers Trust orders: *Bankers Trust v Shapiro* [1980] 1 WLR 1274

Real risk of dissipation must be shown

- Freezing order is made to prevent (or hinder) dissipation
- Must be a risk of dissipation to protect against
 - *Thane Investments Ltd v Tomlinson* [2003] EWCA Civ 1272
 - *National Bank Trust v Yurov* [2016] EWHC 1913 (Comm)
- Claimant must show a real risk that a future judgment would not be met because of an **unjustified dissipation of assets**
- Dissipation: “*putting the assets out of reach of a judgment whether by concealment or transfer*”

Lakatamia Shipping Co v Morimoto [2019] EWCA Civ 2203

How to establish a real risk?

- Real not fanciful risk
- Standard is good arguable case
- *Risk can only be demonstrated with **solid evidence...***
- *Mere inference or generalized assertion is not sufficient.*

Lakatamia Shipping Co v Morimoto [2019] EWCA Civ 2203

Dishonesty as evidence of dissipation

- Dishonesty not enough on its own
- Allegations of dishonesty certainly insufficient
- Does the dishonesty in question justify conclusion that assets likely to be dissipated?

Thane Investments Ltd v Tomlinson (No 1) [2003] EWCA Civ 1272

Lakatamia Shipping Co v Morimoto [2019] EWCA Civ 2203

Relevance of the cause of action

- If there is a good arguable case that a respondent engaged in wrongdoing against the applicant relevant to the issue of dissipation, that holding will point powerfully in favour of a risk of dissipation.
- That might (but will not necessarily) suffice
“Wrongdoing which is the subject of the substantive cause of action comprises the dissipation itself”

Lakatamia Shipping Co v Morimoto [2019] EWCA Civ 2203

Past dishonesty, past dissipation

- Search is for current risk
- History could be evidentially relevant
- Past events – current risk

National Bank Trust v Yurov [2016] EWHC 1913 (Comm)

“unfocussed allegation of dishonesty” v “wrongdoing going to the very heart of the question of risk of dissipation”

Lakatamia v Morimoto [2019] EWCA Civ 2203

Threats to dissipate made in without prejudice discussions

- Sanctity of 'without prejudice' rule
- Cloak cannot be abused so as to hide perjury, blackmail or other 'unambiguous impropriety'.
- Importance of the public interest in the rule of privilege
- Exceptions not readily made
- Without prejudice meetings, mediations, cultural differences, heat of the moment comments

Motorola v Hytera [2021] EWCA Civ 11

Ease of dissipation, wherewithal to dissipate

- Opportunity / knowledge not same as propensity

“the authorities demonstrate that the nature of the identified assets and the ease with which they can be moved, as well as the use of offshore or corporate structures, are factors that are relevant to consideration of the risk of dissipation;

“but the fact that Mr Yu has the wherewithal to move his assets out of reach of his creditors, and the ease with which he might be able to do so, are not matters which in and of themselves indicate that there is a real risk that he would do so.”

Les Ambassadeurs Club v Yu [2021] EWCA Civ 1310

- Lack of engagement, continued non-payment for long periods, bounced cheques etc
- Able to pay but unwilling: not the same as frustrating enforcement
- Not paying and not moving assets: evidence counting against risk of dissipation
- Not every recalcitrant debtor is susceptible to freezing order

Companies and their owners

- The general rule
 - *Salomon v A Salomon & Co, Ltd* [1897] AC 22
- One-man companies
- Wallets, pockets and money-boxes
- *Prest v Prest* [2013] 2 AC 415
- *Lakatamia Shipping Co v Su* [2015] 1 WLR 291
 - Shareholders diminishing the value of their shareholdings

Offshore companies

- Webs and networks
- Nominees and trustees
- Not trading
- 'Parking' assets
- Secrecy
- Familiarity with offshore companies

VTB v Nutritek [2012] 2 Lloyd's Rep 313

Post-judgment freezing order

- Greater incentive to put assets beyond the reach
- Does not mean court will more readily infer risk of dissipation
- Distinction between debtors who refuse to pay, and those who frustrate recovery by dissipation

Les Ambassadeurs Club v Yu [2021] EWCA Civ 1310

Conclusions

- Real risk – judged objectively
- Unjustified dissipation of assets
- Solid evidence
- Mere inference, generalised assertion insufficient
- Good arguable case on dishonesty insufficient
- Does dishonesty point to risk of dissipation
- Wherewithal to hide assets not the same as risk
- All factors to be considered cumulatively
- Ex parte duties:
 - Full and frank obligation
 - Fair presentation

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