Damages, Injunctive Relief, and Other Remedies in Tort and Free Speech Cases

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Edited by

Russell L. Weaver and Duncan Fairgrieve

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To Laurence, Ben & Kate, RLW

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INTRODUCTION

RUSSELL L. WEAVER*

The papers published in this book resulted from two "discussion fora" that were held in Europe in 2022. The Free Speech Discussion Forum convened in Budapest, Hungary, in June, 2022, at Hungary's University of Public Service, and brought together prominent free speech scholars to discuss matters of common interest. The forum had three main topics: "Robotic Speech" (which focused on many different topics, including chatbots, data driven speech and "deep fakes" and speech as a threat to democratic elections), the "Role and Regulation of Social Media," and "Contemporary Threats to Speech." Also, in June, 2022, the Remedies Discussion Forum was held in Paris, France thanks to the support and assistance of the Université de Paris-Dauphine PSL. That forum brought together remedies scholars from different parts of the globe. Like the Free Speech Discussion Forum, there were three topics for discussion: "Remedies in a Digital Age" (which was broadly defined to focus on all aspects of the digital revolution including, but not limited to, the liability of digital service providers and intermediaries, so-called "smart contracts" and any other aspect of the digital revolution); "defenses invoking wrongdoing by plaintiffs or claimants in civil actions"; & "recent developments in remedies" which could have focsed on recent remedial developments from one's own country, or could have involved a comparative perspective. [1]

A number of the articles in this book examine tort remedies. For example, Professor David Capper's chapter is entitled *Consolidation and Development in Asset Freezing Orders*. He notes that some jurisdictions allow plaintiffs who have credible evidence that defendants or judgment

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[1] Special thanks to CR2D at Université de Paris Dauphine PSL for having organised & supported the event

debtors may be about to dispose of assets in order to become judgment proof, to seek asset freezing orders. He examines the dramatic growth of the "asset freezing" remedy and developing rules regarding its application and usage. He notes that in Ireland, although not in England and Wales, courts have insisted that an intention to defeat judgment is an essential requirement for the grant of these so-called *Mareva* (asset freezing) orders. He suggests that the proper approach is to ask "whether there is any other sensible explanation for the defendant's apparent disposal of assets than an attempt to defeat judgment." If there is, the injunction should not be granted."

Professor Jeffrey Berryman's *Non-Pecuniary Damages in the Financial Services Industry - In Search of a Purpose* focuses on whether damages should be awarded for "outrageous" and "shocking" conduct by financial services providers even though their conduct may not result in pecuniary loss. In analyzing that issue, Professor Berryman discusses the so-called "compensation principle" and its role in private law cases. He argues that the incommensurability of non-pecuniary losses constitutes an insurmountable argument against awarding them from a compensation principle point of view. However, he argues that damages calibrated to effect deterrence and behavioural modification may be an appropriate response where they succeed in preventing an activity that causes harm, but he regards damages that stray from the compensation principle as exceeding the limits of legitimacy and coherence. He recognizes that the law might vindicate the emotional harm by only requiring the payment of a symbolic amount, by ordering vindicatory, aggravated, or punitive damages, or by sending the defendant to prison.

Professor John McCamus' chapter is entitled *The New Illegality Defence in English Restitutionary Law: A Critical Appraisal*. The article analyzes the decision of the United Kingdom's Supreme Court in *Patel v. Mirza*, [2016] UKSC 42 (S.C.), which deals with the question of whether a restitutionary claim lies for benefits conferred under an illegal agreement. He notes that such cases involve a difficult effort to balance "the desirability of denying relief as an instrument of providing incentives to discourage people from engaging in unlawful conduct, and the desire to prevent the unjust enrichment of a defendant who has benefited from an illicit scheme." He believes that the better approach to this problem is to apply a rule "permitting restitution to the guilty party when the policies underlying the prohibition are not undermined, frustrated or stultified by the statutory scheme or where the denial of restitution to the guilty party is considered to be a disproportionate penalty under the circumstances." He notes that several jurisdictions have taken this approach, including the

United States, Australia, and Canada. He disagrees with the *Patel* decision which rejects this approach.

Professor Sirko Harder's contribution to the book is entitled *The Demaracation Line Between Contributory Negligence and the Avoidable Loss Rule*. He notes that, in both Australia and England, the contributory negligence doctrine and the avoidable loss rule may affect the plaintiff's ability to recover damages for breach of contract or tort based on the idea that the plaintiff has contributed to some or all of the loss through unreasonable conduct. He notes that the doctrines are frequently distinguished based upon whether the plaintiff's conduct occurred before the wrong (contributory negligence) or after the wrong (avoidable loss rule). He then discusses Iain Field's approach which distinguishes between the situation when plaintiff's unreasonable conduct contributes to the damage (contributory negligence) or increases the indirect losses flowing from the damage (avoidable loss rule). Professor Harder rejects both of these approaches and contends that the scope of the avoidable loss rule ought to be confined to actions taken in response to a wrong, and the failure to take such an action. Other unreasonable conduct of a plaintiff after the wrong ought to be characterised as contributory negligence or a *novus actus interveniens*.

Professor Michael Martin Losavio's *AI, Robotic Orations and Free Express: Turing's Dilemma* deals with the problem of whether robotic speech should receive constitutional protection. He begins by analyzing Alan Turing's idea that machines may one day have sufficient "intelligence" so as to justify a claim to autonomy and a "right" to free expression. He notes that robotic speech "magnifies targeted communications through algorithmic systems that can target messages to particular individuals in ways that make it more likely the message resonates with the recipient. It blends AI with cognitive psychology to make a powerful and toxic blend of advocacy and oratory." He is ultimately concerned with the "immense analytical computing power, [and] massive databases on our personal lives and human mendacity make for myriad possibilities for the future." Professor Losavio concludes that we "must address this as it impacts our lives as citizens, and the kind of a people we wish to be." Quoting Turing, he concludes that: "We can only see a short distance ahead, but we can see plenty there that needs to be done."

Professor Michael Epstein's article, *Fact-Checking Remedies in the Developing World: The Fight Against Misinformation and Disinformation in Sierra Leone*, tackles the problems that arise from misinformation and disinformation. In particular, he looks prospectively at a U.S. State

Department-funded Fulbright project designed to increase the effectiveness of an independent fact-checking service known as Salone Fact-Checker ("SFC") in advance of Sierra Leone's June 2023 presidential election. At the heart of this project are two objectives: 1) to increase capacity of SFC's fact-checking operations and 2) to increase the reach of SFC's fact-checked content to urban and, especially, rural populations, including those who are illiterate. Ultimately, Epstein provides an interesting look at how one country is trying to respond to disinformation and misinformation.

Professor András Koltay's chapter is entitled *The Right of Reply in Media Regulation and Its Possible Applicability in the Case of Social Media Platforms*. In this chapter, Professor Koltay examines how different legal systems handle the right of reply, and notes that the concept of an imposed right of reply is utilized in certain legal system, but is completely alien to the U.S. legal system (except in the case of the broadcast media under FCC imposed reply requirements). Nevertheless, he argues that a right of reply should be imposed for several reasons. First, in the case of statements that harm reputation, the right of reply constitutes an efficient mechanism for restoring reputation. Second, the right of reply is consistent with the societal interest in promoting robust public discussion and allows disparaging statements to be met with rebuttal. Finally, the right of reply provides the opportunity for correction of falsehoods.

Professor Luke Milligan's chapter is entitled *To Be Secure: Speech Protections*. In this chapter, Professor Milligan examines the relationship between freedom of speech and the "right to be secure" against unreasonable searches and seizures. Milligan explains that as persons in a political community grow more secure against unreasonable searches and seizures, their speech becomes, as a practical matter, freer. Professor Milligan describes this constitutional dynamism through the lens of a series of interpretive frameworks, including originalism, living constitutionalism, and Common Good Constitutionalism.

The final chapter is my contribution entitled *Contemporary Threats to Free Speech: Are There Remedies for Social Media Platform Censorship?* I note that, while U.S. jurisprudence is more protective of free speech than the jurisprudence in other countries, the U.S. Bill of Rights applies only against the government, and much speech repression now occurs through social media platforms. My chapter places social media platforms in historical perspective and discusses how their censorship is inconsistent with the U.S. free speech tradition. It concludes by raising questions about where social media censorship is headed. Will European regulation force social media platforms into greater censorship? Will there be legislation or

litigation in the U.S. which forces U.S. First Amendment values on social media companies? And how will Elon Musk's purchase of Twitter affect the future of social media platform censorship?

CONSOLIDATION AND DEVELOPMENT IN ASSET FREEZING ORDERS

DR DAVID CAPPER

Introduction

Where a civil claimant can present credible evidence that the defendant it is suing, or the judgment debtor against whom it has obtained judgment, may be about to dispose of assets with the probable effect that it becomes judgment proof, the claimant may seek an asset freezing order against that party.[1] In view of the risk that the defendant may dispose of assets if given warning of the application for relief, these orders are usually sought without notice.[2] The order, if granted, is notified to the defendant and any third parties the claimant is aware probably hold assets on the defendant's behalf. These persons will be in contempt of court if they knowingly allow assets subject to the order to be disposed of.[3] The order will be limited to the maximum realistic amount of the claim, or to the judgment debt and costs, and generally contains clauses allowing the defendant to spend reasonable amounts on living expenses, legal advice, and to make payments in the ordinary course of business. These allowances reflect the *in personam* nature of the order that confers no security on the claimant. However, and as will be discussed further below, an asset freezing order often feels like a security encumbrance from the defendant's perspective. The court will fix a return day, usually within five working days, for a review of the order. On this occasion the defendant will be able to apply for the discharge of the

[1] Asset freezing orders were previously known as *Mareva* injunctions, named after the Court of Appeal decision in *Mareva v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509 (CA). The order is still known as a *Mareva* injunction (or order in Australia, see *Cardile v LED Builders Pty Ltd* [1999] HCA 18) in most other common law jurisdictions outside England and Wales.

[2] The applicable procedural rules in England and Wales may be found in the Civil Procedure Rules 1998, Part 25 (interim remedies).

[3] Third parties would not likely be civilly liable, see *Customs and Excise Commissioners v Barclays Bank Plc* [2007] 1 AC 181 (HL).

order on the ground that the conditions for granting it have not been satisfied, or for a variation of its terms.

The *Mareva* injunction has experienced phenomenal growth in the nearly half century of its existence. The initial cases enjoined foreign defendants from removing assets from the jurisdiction. This was extended to defendants within the jurisdiction in *Barclay-Johnson v Yuill*[4] and in *Rahman (Prince Abdul) bin Turki al Sudairy v Abu-Taha*[5] the Court of Appeal extended it further to assets within the jurisdiction. At the end of the 1980s four decisions of the Court of Appeal extended the *Mareva* injunction to assets outside the jurisdiction,[6] initiating what became known as the worldwide freezing order. Since those heady days development has not been quite so rapid but development has occurred. In *TSB Private Bank International SA v Chabra*[7] Mummery J enjoined a third party holding assets there was good reason to believe would be amenable to execution of a judgment obtained against the defendant. These *Chabra* injunctions have been the subject of a powerful critique by Dr Saranovic.[8] Essentially the argument is that unless the claimant is asserting a proprietary claim to the assets in the hands of the third party non cause of action defendant (NCAD) a *Chabra* injunction should not be issued absent evidence the NCAD has been involved in wrongdoing. The *Mareva* injunction was created as a weapon against abuse of process, not just difficulty in enforcing judgment. Interim proceedings do not readily allow for the kind of evidential analysis required to determine if there has been wrongdoing, particularly where complex corporate structures are used.

Saranovic has also provided a critique of the numerous cases where English courts have been asked to grant asset freezing orders, often *Chabra* orders, in support of foreign proceedings.[9] The argument here was that a freezing injunction should only be issued by a court in the jurisdiction where the assets are located. There does not appear to be much evidence of courts actually issuing freezing orders over foreign assets but the reasoning in

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[4] [1980] 1 WLR 1259 (Ch.D).
[5] [1980] 1 WLR 409 (CA).
[6] *Babanaft International Co SA v Bassatne* [1990] Ch 13 (CA); *Republic of Haiti v Duvalier (No 2)* [1990] 1 QB 202 (CA); *Derby & Co Ltd v Weldon (No 1)* [1990] Ch 48 (CA); *Derby & Co Ltd v Weldon (Nos 3 & 4)* [1990] Ch 65 (CA).
[7] [1992] 1 WLR 231 (Ch.D).
[8] F. Saranovic, 'The scope of *Chabra* freezing injunctions against third parties: a time for a more cautious approach?' (2021) 40(3) *Civil Justice Quarterly* 225.
[9] F. Saranovic, 'Jurisdiction and freezing injunctions: a reassessment' (2019) 68(3) *International & Comparative Law Quarterly* 639.

some cases has suggested that the decision not to enjoin was in the exercise of the court's discretion rather than for want of jurisdiction.

In the context of extra-territorial asset freezing orders the English courts have had significant recourse to section 25 of the Civil Jurisdiction and Judgments Act 1982. The 1982 Act as amended implemented the Brussels and Lugano Conventions in the United Kingdom. Brexit has not resulted in the repeal of this legislation; in fact the Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997 extended the reach of section 25 by allowing United Kingdom courts to grant interim protective measures such as asset freezing injunctions in support of proceedings almost anywhere. Section 25 statutorily reverses the decision of the House of Lords in *Owners of Cargo Lately Laden on Board the Siskina v Distos Compania Naviera SA, The Siskina*.[10] In this case it was held that a *Mareva* injunction could not be granted over assets within the jurisdiction if the claimant had no right to sue the defendant within the jurisdiction. In other words, the court had to have jurisdiction to decide the substantive issues in dispute between the parties and could not freeze assets in support of proceedings ongoing in another jurisdiction. In *Mercedes-Benz AG v Leiduck*[11] the Privy Council confirmed by a 4-1 majority (Lord Nicholls dissenting) that this remained the law for jurisdictions retaining the right of final appeal to the Privy Council which had no domestic legislation the equivalent of the Civil Jurisdiction and Judgments Act 1982. However in *Broad Idea International Ltd v Convoy Collateral Ltd*[12] a 4-3 majority of the Privy Council held obiter that common law courts had power to freeze assets in support of litigation ongoing in another jurisdiction provided the judgment could be enforced in the jurisdiction where the assets are located.

So there has been development in the law relating to asset freezing orders in recent years, albeit not at the pace of the 1970s and 1980s. The developments noted above include the extension of *Chabra* orders to cases where abuse of process on the part of the NCAD is less than clear, the assertion that asset freezing orders may be granted over assets located in other jurisdictions, and the assertion of a common law power to freeze assets within the jurisdiction in support of proceedings in another jurisdiction. The

[10] [1979] AC 210 (HL).
[11] [1996] AC 284 (PC).
[12] [2021] UKPC 24. D. Capper, 'The Siskina Doctrine: Much Ado About Nothing?' (2022) 138 *Law Quarterly Review* 181; P. Devonshire, 'Clearing the Decks: *The Siskina* in the Privy Council' [2022] *Lloyds Maritime & Commercial Law Quarterly* 193; M. Paterson, 'Finally Laying *the Siskina* to Rest? And Expanding the Court's Power to Grant Freezing Injunctions' [2022] *Lloyds Maritime & Commercial Law Quarterly* 200.

justification for these developments was expressed by Beatson LJ in *JSC BTA Bank v Ablyazov* as follows:-

> " … the jurisdiction to make a freezing order should be exercised in a flexible and adaptable manner so as to be able to deal with new situations and new ways used by sophisticated and wily operators to make themselves immune to the courts' orders or deliberately to thwart the effective enforcement of those orders."[13]

This essay is not primarily about developments. The courts seem to believe that they need the powers to freeze assets and need to respond to more innovative ways of evading enforcement. At the same time there is a need to recognise that asset freezing orders are extremely draconian remedies. They are not designed to provide security for the claimant but, as Tomlinson LJ acknowledged in *Energy Venture Partners v Malubu Oil and Gas Ltd*,[14] such is the tactical advantage provided by an asset freezing order that the defendant may be effectively compelled to provide security in order to re-acquire use of its assets. They are also initially granted without giving the defendant any opportunity to be heard in its defence. In the specific context of the claimant's duty of full and frank disclosure in applying for a without notice injunction[15] Males J had this to say about the potential consequences of breaching this duty:-

> "The potentially devastating consequences of a freezing order have often been recognised. It is only just that those who obtain such orders to which they are not entitled, a fortiori when they are guilty of serious failures to disclose material facts and have pursued claims described by the trial judge as "obviously unsustainable", should be ordered to provide appropriate compensation for losses suffered."[16]

A senior practitioner has claimed that the courts balance the need for development of the asset freezing order against a careful scrutiny of whether the claimant has satisfied the criteria for granting the order.[17] This essay

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[13] [2013] EWCA Civ 928, [36].
[14] [2014] EWCA Civ 1295, [2015] 1 WLR 2309, [52].
[15] In *Fundo Soberano de Angola v Jose Filomena dos Santos* [2018] EWHC 2199 (Comm), [51], Popplewell J said this duty "is necessary to enable the Court to fulfil its own obligations to ensure fair process under Article 6 of the European Convention on Human Rights."
[16] *SCF Tankers Ltd v Privalov* [2016] EWHC 2163 (Comm), [2018] 1 WLR 5623, [144].
[17] Paul McGrath, 'The freezing order: a constantly evolving jurisdiction' (2012) 31(1) *Civil Justice Quarterly* 12.

seeks to test this thesis – that the courts believe they need extensive powers to counteract judgment evasion, but that those powers have to be exercised very carefully to avoid oppression of the defendant – in the specific context of the requirement to show a real risk that the defendant will *dissipate* assets and leave the claimant with an unenforceable judgment. Two overlapping questions will come in for discussion. First, what actually constitutes *dissipation* of assets, and secondly, has a real risk of dissipation been shown on the evidence? A related question concerned with the terms of the asset freezing order in post-judgment freezing injunctions will also be discussed.

What Constitutes Dissipation of Assets?[18]

We need to begin by explaining why this question is so important. The claimant is not entitled to pre-judgment security or priority for its claim. The mere fact that the claimant could end up with an unenforceable judgment because the defendant disposes of assets and becomes insolvent is a risk that every person trading with the defendant has to live with. Professor Zuckerman pointed out more than a quarter-century ago that asset freezing injunctions can have devastating effects upon someone's business.[19] It may be starved of cash, deprived of the ability to obtain credit, and its creditors may make a run for its assets. In *Candy v Holyoake*[20] Gloster LJ referred to "reputational stigma", an illustration of which may be found in *Mobil Cerro Negro Ltd v Petroleos de Venezuela SA*.[21] Although the claimant's worldwide freezing order obtained at the without notice hearing was subsequently discharged at the *inter partes* hearing, an article published in Reuters about the freezing order could well have caused the defendant significant damage.[22] In light of these potential consequences it is vitally important that any asset freezing order can be justified as a legitimate restraint on the defendant's freedom. That legitimacy comes from demonstrating that the defendant is likely to use assets in a way that is an abuse of the process of the court. To put it another way it should seem that

[18] D. Capper, 'The Concept of Dissipation in Freezing Orders' [2021] *Lloyds Maritime & Commercial Law Quarterly* 590.
[19] AAS Zuckerman, 'Mareva Injunctions and Security for Judgment in a Framework of Interlocutory Remedies' (1993) 103 *Law Quarterly Review* 432; AAS Zuckerman, 'Interlocutory Remedies in Quest of Procedural Fairness' (1993) 56 *Modern Law Review* 325.
[20] [2017] EWCA Civ 92, [2018] Ch. 297, [36].
[21] [2008] EWHC 532 (Comm).
[22] F. Saranovic, 'Jurisdiction and freezing injunctions: a reassessment' (2019) 68(3) *International & Comparative Law Quarterly* 639, 644.

the defendant is actually trying to make itself judgment proof, as opposed to engaging in legitimate business or other transactions that involve a degree of risk of negative financial consequences. It is no good thinking that asset freezing orders are only granted without notice until a return day when they can be discharged or varied because it may only take a few days before significant damage is done.

As Christopher Clarke J expressed it in *Perry v Princess International Sales and Services Ltd*[23] "dissipation implies some use of his assets by the person sought to be enjoined, in a manner which is, in the circumstances, improper or unjustifiable." It is important to explain how the court goes about determining this question. When an applicant for a freezing injunction presents their case for relief at the without notice stage they are unlikely to be in a position to give the court full details of how the defendant is likely to use their assets. However it must be possible to point to some substantial basis for believing that the defendant will dissipate assets unless restrained. If the applicant presents deliberately misleading information to the court or fails to draw the court's attention to something unfavourable to its case that it ought to be aware of the injunction may well be discharged even if the court thinks it probably would have enjoined the defendant anyway.[24] Even where the applicant fully complies with this duty of full and frank disclosure there will remain, at the without notice stage, a great deal that is unknown about how the defendant proposes to deal with their assets. If an asset freezing order is granted there will be provision made for the defendant to spend money on ordinary living expenses and legal advice, as well as a liberty to make payments in the ordinary course of business.[25] But the claimant will not be able to give the court anything like full detail on how much the defendant should be allowed to spend on these matters or what sort of payments would count as made in the ordinary course of business. Recognising these practical realities, in *JSC BTA Bank v Ablyazov*[26] Maurice Kay LJ said that the court should impose a blanket restriction on the defendant's disposing of assets up to a maximum amount at the without notice stage. There should be a narrowly construed exemption for the disposal of assets in the "ordinary and proper course of business" and a general right for the defendant to apply to the court for permission to make an asset disposal not falling within this description on the ground that it does

[23] [2005] EWHC 2402 (Comm), [28].
[24] *Brink's-Mat Ltd v Elcombe* [1988] 1 WLR 1350 (CA); *Behbehani v Salem* [1989] 1 WLR 723 (CA); *Memory Corp Plc v Sidhu (No 1)* [2000] 1 WLR 1443 (CA).
[25] *Iraqi Ministry of Defence v Arcepey Shipping Co SA, The Angel Bell* [1981] QB 65 (QBD).
[26] [2010] EWCA Civ 1141, [48-58].

not constitute dissipation of assets. A without notice freezing injunction framed in these terms will clearly impose significant hardship and inconvenience on defendants, making it all the more important that any final order restrain the *dissipation* of assets.

Certainly, before *JSC BTA Bank v Ablyazov* there was a tendency to squeeze non-dissipatory disposals of assets into the ordinary course of business box. Thus in *Normid Housing Association Ltd v Ralphs and Mansell*[27] the defendant architects were permitted to settle a professional indemnity claim against their insurers for a sum which the claimants, who were suing the defendants for the negligence the indemnity was covering, considered to be well short of the claim's true value. The claimants argued that this was dissipation of assets because it was likely to leave the defendants unable to satisfy any judgment the claimants obtained against them. Slade LJ acknowledged that in one sense this was not an asset disposal in the ordinary course of business because the defendants were not in the business of settling insurance claims.[28] But it would stretch the *Mareva* jurisdiction beyond its purpose to restrain this payment. Today it is likely that this payment would be permitted because it involved no dissipation of assets. Much the same could be said of *Halifax Plc v Chandler*.[29] Here the defendant managed to get an asset freezing order varied so as to allow him to mortgage a property to raise money to meet legal expenses. Clarke LJ's judgment treated this as an ordinary business expense but today it would be described as a non-dissipatory use of assets.

The ordinary course of business exception to an asset freezing order remains important. In *Emmott v Michael Wilson and Partners Ltd*[30] Lewison LJ said that disposals falling within this exception must be in the ordinary and *proper* course of business. These are separate and cumulative requirements. In *Koza Ltd v Akcil*[31] Floyd LJ, with whose judgment Peter Jackson LJ and Patten LJ agreed, set out the following propositions about the meaning and ascertainment of "ordinary and proper course of business": (a) this was a mixed question of fact and law; (b) "ordinary" and "proper" were separate, cumulative requirements; (c) the test was objective and had to be considered against accepted commercial standards and practices for the running of a business; (d) the question was not whether the transaction was ordinary or proper, but whether it was carried out in the ordinary and

[27] [1989] 1 Lloyds Rep 274 (CA).
[28] *Ibid*, 278.
[29] [2001] EWCA Civ 1750.
[30] [2015] EWCA Civ 1028, [19].
[31] [2019] EWCA Civ 891, [2020] 1 All ER (Comm) 301, [22-27].

proper course of the company's business; (e) the questions were to be answered in the specific factual context in which they arose.

The likelihood is that the ordinary and proper course of business exception to an asset freezing injunction will be more an exercise in applying objective criteria than the wider and more elastic exception of the asset disposal just not being a dissipation of assets. The uncertainty that comes with applying a case by case test may require more focus on the defendant's intention if the abuse of process rationale for restraining dissipation is to be respected.

The thesis which this essay is testing is whether, along with the continuing development of the *Mareva* jurisdiction, the courts recognise the need for care in the exercise of this jurisdiction in a particular case. These orders are draconian in their effects and heavy-handed use could give rise to significant injustice. The *Mareva* injunction's twin 'nuclear weapon',[32] the *Anton Piller* order, required some readjustment because it was over enthusiastically issued.[33] The price that may have to be paid for the use and continued development of this order is that defendants' interests are very carefully weighed in the balance. A balanced approach to asset freezing injunctions might be expressed as – the power is needed but great care must be taken in how it is used. There does seem to be some evidence that in relation both to the question of what constitutes dissipation and whether it has been proved in a particular case this balanced and cautious approach has taken root.

The recent decision of the Court of Appeal in *Organic Grape Spirit Ltd v Nueva IQT SL*[34] is indicative of a cautious approach to the question of dissipation, one which asks if the defendant's conduct is an abuse of the court's process as opposed to something that might make the claimant's task in enforcing judgment more difficult. The claimant company (Nueva) loaned €12 million to the defendant (Organic Grape) to finance the production of an organic spirit in England. The defendant's sole shareholder was the son of the claimant's managing director at the time the loan was made. Changes in the composition of the board of the claimant resulted in the instigation of proceedings in Spain, where the claimant company was based, seeking to challenge the validity of this loan. A worldwide freezing order was sought in England against the defendant under section 25 of the Civil Jurisdiction and Judgments Act 1982. By the time of the institution of

[32] As these two forms of relief were described by Donaldson LJ in *Bank Mellat v Nikpour* [1985] FSR 87 (CA), 92.
[33] The issue is discussed in M. Dockray and H. Laddie, 'Piller Problems' (1990) 106 *Law Quarterly Review* 601.
[34] [2020] EWCA Civ 999, [2020] 2 CLC 176.

the proceedings €1.6 million of the loan had been spent on plant and machinery to get the business venture started. The claimant's case was that the expenditure of any further sums in pursuit of this venture would amount, not to the expenditure of assets in the ordinary and proper course of business, but to the improper dissipation of those assets. It pointed to what it said was the speculative nature of this business venture and the 25-year-old proprietor of the defendant company's lack of practical business experience.[35] At first instance Morgan J accepted this argument and granted the worldwide freezing order. He held that the applicant for a freezing injunction did not have to show that the defendant was attempting to evade enforcement. One asked whether the effect of the apparent dealing with assets was liable to reduce the assets available for execution. Some dealings with assets having that effect would be justifiable and not subject to restraint but the defendant's dealings here were not. This was a 'soft' loan to an inexperienced business person which no commercial lender would have been likely to extend.[36]

The Court of Appeal, in a judgment delivered by Newey LJ (Arnold LJ and David Richards LJ agreeing), reversed this decision and lifted the worldwide freezing order over the remainder of the €12 million loan. The expenditure of what remained of the loan did not fall within the ordinary and proper course of business exception as there were no routine business transactions that a business at this early stage of its life could be engaging in.[37] However it did not involve any dissipation of assets. The defendant was clearly not pursuing this business venture in bad faith or with the object of making itself judgment proof. As regards the judge's concern that there was a significant risk the business would fail this was something which only in very exceptional circumstances would be relevant.[38] If the prospects of success were so low as to merit the disqualification of a company director for unfitness a freezing order might be appropriate but that was not this case.[39]

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[35] He was educationally well qualified in business.

[36] In fairness to the judge it should be stated that he found support for the approach he took in the Australian decision *Harrison Partners Construction Pty Ltd v Jevena Pty Ltd* [2005] NSWSC 1225 (Brereton J).

[37] [2020] EWCA Civ 999, [28-29].

[38] *Ibid*, [31].

[39] *Ibid*, [21], citing Company Directors Disqualification Act 1986 and *Re Synthetic Technology Ltd* [1993] BCC 549 (Ch.D).

This decision is consistent with long standing principle. It is not the proper function of the courts to second guess business decisions.[40] In *Halifax Plc v Chandler*[41] Clarke LJ, with whose judgment Dyson LJ agreed, said this about the proper approach to ordinary business expenses:-

> "In cases of what may be called ordinary business expenses the court does not usually consider whether the business venture is reasonable, or indeed whether particular business expenses are reasonable. Nor does it balance the defendant's case that he should be permitted to spend such monies against the strength of the claimant's case, or indeed take into consideration the fact that any monies spent by the defendants will not be available to the claimant if it obtains judgment."

This approach is correct because asset freezing injunctions are a species of interim injunctions. Ever since the landmark decision of the House of Lords in *American Cyanamid Co v Ethicon Ltd*[42] judicial policy has been to avoid mini-trials in proceedings where an interim injunction is sought. The initial threshold that an applicant has to surmount is the demonstration of a serious question to be tried. In applications for freezing injunctions it is a little more, a good arguable case, but still one which Mustill J in *Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft GmbH (The Niedersachsen)*[43] considered to be:-

> " … one which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success."

The strength of the claimant's case, both in relation to the substantive merits and the question of dissipation, cannot be the subject of detailed forensic inquiry. Because of the risk that the claimant could end up with an unenforceable judgment if no relief is granted the risk has to be taken that the court grants relief that might eventually prove to be unjustified. This needs to be balanced against the hardship defendants would suffer if a freezing injunction were wrongly granted. The hardship is not just that, as is the case with interim injunctions that attempt to hold the fort until trial, the defendant is enjoined from doing what it was entitled to do, but that the defendant's business is seriously incommoded in all the ways outlined

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[40] In *State Bank of India v Mallya* [2022] EWHC 617 (Comm) approval was granted for the realisation of assets to remortgage a property.
[41] [2001] EWCA Civ 1750, [18].
[42] [1975] AC 396 (HL).
[43] [1983] 2 Lloyds Rep 600 (QBD), 605

above.[44] It is only when the claimant can give the court good reason to believe that the defendant's conduct is likely to be not just unreasonable but an abuse of the process of the court that the granting of this kind of relief can be justified.

This decision is in keeping with long standing principle and clearly indicative of the cautious approach to the granting of freezing injunctions described above. It should be understood as a restatement of the fundamental principle in light of the approach to the normal course of business exception explained by Maurice Kay LJ in *JSC BTA Bank v Ablyazov*.[45] It will be recalled that Maurice Kay LJ recommended a without notice injunction of wide application with a narrow ordinary and proper course of business exception. This is an acknowledgement that the court will lack the information, because a claimant acting in accordance with its duty of full and frank disclosure will be unable to supply it, to issue an injunction that permanently settles what assets the defendant is restrained from using. There will be no alternative but to wait until the *inter partes* hearing to make decisions about what expenditure the defendant is to be permitted to incur either in the ordinary and proper course of business or because the expenditure can be shown to be non-dissipatory. This brings into focus that, at least until the *inter partes* hearing the defendant is likely to be subject to significant interference in the operation of its business. The *inter partes* hearing may fix a lot for the future but cannot undo the effects of an injunction which can now be seen to have gone further than necessary even if it remained justifiable. In that context the Court of Appeal's reminder that freezing injunctions are concerned with abuse of process is timely.

There is undoubtedly a parallel to the *Organic Grape* decision in the decision of the Court of Appeal in *Vneshprombank LLC v Bedzhamov*.[46] This decision concerned another exception to freezing injunctions, allowing the defendant to spend reasonable sums on living expenses. The defendant was a Russian businessman now living in England after he had been accused of involvement in a fraud on a Russian bank of which his sister had been President. He had neither job nor income but plentiful amounts of capital and appeared to be making serious efforts to launch a new career in exile from his homeland. He wished to spend sufficient money from his capital to keep himself and his family in the style to which they were accustomed. It was clear that unless the defendant were able to get himself a new source of income his current spending would eventually become unsustainable.

[44] See ns 19-22 and text.
[45] [2010] EWCA Civ 1141.
[46] [2019] EWCA Civ 1992, [2019] 2 CLC 792.

The first instance judge, HHJ Jarman QC, refused to allow the defendant to spend these amounts but the Court of Appeal reversed this decision. A freezing injunction is designed to maintain the *status quo*, which means the defendant is prohibited from making asset disposals that serve no purpose other than making enforcement of judgment difficult or impossible. It is not sufficient for the claimant simply to prove that if the defendant goes on spending money this way judgment will be unenforceable. The Court of Appeal did recognise that if the defendant did not find a new source of income the living expenses exception to the freezing injunction would eventually have to be revised downwards. The parallel with *Organic Grape* is the strict insistence that the defendant's use of assets is an abuse of process.

The discussion so far has concentrated overwhelmingly on pre-judgment freezing injunctions. The position with regard to post-judgment orders was recognised to be significantly different in *Emmott v Michael Wilson & Partners Ltd*.[47] The Court of Appeal upheld a decision of Sir Jeremy Cooke, sitting as a deputy High Court judge, to remove the ordinary and proper course of business exception from the freezing injunction in that case. There was no normal rule that this exception should be removed from post-judgment orders but neither would it be an unusual course. It would frequently be the appropriate thing to do. The claimant still had to demonstrate a real risk that the defendant would dissipate assets and the injunction was not to be used to provide the claimant with priority in the defendant's insolvency. But in this case there was no evidence of insolvency. On the contrary the defendant was a 'won't pay' artist who had made strenuous efforts to evade enforcement. If the defendant could show a need to use frozen assets in order to make a legitimate business or other payment it was open to it to apply to the court to vary the freezing injunction to enable it to do so. Outside of this sort of circumstances the defendant should pay the judgment debt. Steadfast refusal to do so was the very kind of abuse of process the *Mareva* injunction was designed to prevent. The inclusion of an ordinary course of business exception in this case was only giving the defendant a tool to evade paying its adjudicated debt. First impression may suggest that this decision is something of an outlier but a closer look makes it apparent that it is on all fours with the thesis that freezing injunctions are concerned with abuse of the legal process.

[47] [2019] EWCA Civ 219, [2019] 4 WLR 53.

Proof of Dissipation

A preliminary question to proof that the defendant may dissipate assets is whether there are assets to dissipate. It is a pretty elementary proposition that an asset freezing order cannot be granted against a defendant who has no assets. There can be no abuse of process through asset dissipation where there are no assets to dissipate. The court's order would also be pointless and equity will certainly hesitate if it seems that granting relief would be acting in vain.[48] It will, however, seldom be clear that the defendant has no assets anywhere against which judgment can be enforced. So what this requirement comes to is a question of what evidence the claimant has to produce that there are assets that could be frozen, and what degree of particularity as to the nature and extent of those assets has to be shown. Early cases from the period when freezing injunctions were only applicable to assets within the jurisdiction,[49] indicated that pointing to a bank account in the name of the defendant would generally be sufficient to satisfy this requirement. However if the account were overdrawn an injunction would be refused, notwithstanding the injunction's ambulatory effect that made capture of assets coming into the account in future possible.[50] If there had recently been money in the account which the defendant had withdrawn it may be reasonable to infer that the defendant still has it[51] and to make an order for the disclosure of its whereabouts.[52]

In the context of the courts' concern to exercise their power to grant freezing orders carefully and only where there is good reason to fear that the defendant will abuse the process of the court by dissipating assets the decision of the Court of Appeal in *Ras al Khaimah Investment Authority v Bestfort Development LLP*[53] is significant. The only evidence that the limited liability partnerships against whom freezing injunctions were sought had assets was that they had filed financial statements recording cash balances with the registrar of limited liability partnerships in the past.

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[48] *South Buckinghamshire District Council v Porter* [2003] 2 AC 558 (HL), [32] (Lord Bingham); *Titanic Quarter v Rowe* [2010] NI Ch 14; *Aranbel Ltd v Darcy* [2010] IEHC 272.
[49] *MBPXL Corpn v Intercontinental Banking Corpn Ltd* [1975] CAT 411 (CA); *Third Chandris Shipping Corpn v Unimarine SA* [1979] QB 645 (CA).
[50] *Cretanor Maritime Co Ltd v Irish Marine Management Ltd, The Cretan Harmony* [1978] 1 WLR 966 (CA).
[51] *Derby & Co Ltd v Weldon (Nos 3 & 4)* [1990] Ch 65 (CA), 81 (Lord Donaldson of Lymington MR).
[52] *A v C* [1981] QB 956 (QBD).
[53] [2017] EWCA Civ 1014, [2018] 1 WLR 1099.

Longmore LJ, with whose judgment Henderson LJ and Sir Patrick Elias agreed, held that this was insufficient. Recent dealings with assets might suffice but the last indications of dealings with assets here occurred two or three years ago. Proof to mathematical precision was not required but there had to be grounds for believing that the defendant had assets sufficient to meet the claim that can be caught by the order. It would not be enough to show that the defendant was an apparently wealthy individual who must have assets somewhere.[54]

This is the test that will have to be applied at the without notice stage of proceedings. As noted above the claimant is not likely to have full details about the defendant's assets or the risk of dissipation. The claimant has to show some reasonable basis for the belief that the defendant has assets that could be amenable to enforcement and that there is a risk that the defendant may dissipate them. Full details of the defendant's assets will usually have to wait until the defendant gives discovery of assets pursuant to the court's order to do so.[55] What this requirement on the claimant does is to require the provision of evidence showing some basis for making a discovery order, not a fishing expedition to see what might come up. There is no basis for an investigation of the defendant's private financial affairs when there is insufficient basis for believing that the court's process will be abused.

If the claimant can point to sufficient evidence of assets against which judgment could be enforced, and can show that the defendant's likely disposal of assets is fairly to be regarded as an abuse of process, the next step is to prove that the defendant is likely to make the disposal indicated. An instructive case on evidence of dissipation is *Les Ambassadeurs Club Ltd v Songbo Yu*.[56] Judgment was awarded against the respondent for £16.54 million in respect of dishonoured cheques presented to purchase gambling chips. The respondent made about £10 million of payments towards the debt before both payment and communication with the creditor effectively stopped. The deputy judge was not satisfied that there was a real risk that assets would be dissipated and refused the appellants a worldwide freezing order. The appellants' appeal to the Court of Appeal was dismissed. Andrews LJ, with whose judgment Nicola Davies LJ and Birss LJ agreed, first addressed the question of the meaning of a real risk that the judgment

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[54] *Ibid*, [39].

[55] *Bankers Trust Co v Shapira* [1980] 1 WLR 1274 (CA); *AJ Bekhor & Co Ltd v Bilton* [1981] QB 923 (CA); *PCW (Underwriting Agencies) Ltd v Dixon* [1983] 2 All ER 697 (QBD); *Derby & Co Ltd v Weldon (No 1)* [1990] Ch 48 (CA); CPR r.25.1(1)(g).

[56] [2021] EWCA Civ 1310, [2022] 4 WLR 1; D. Capper, 'Proving Dissipation in Freezing Orders' [2022] *Lloyds Maritime & Commercial Law Quarterly* 171.

would go unsatisfied. Her ladyship refused to put a gloss on the test or to identify different categories of cases in which higher or lower risks of dissipation might apply. She expressed agreement with some observations of Gleeson CJ in the New South Wales Court of Appeal decision of *Patterson v BTR Engineering (Aust) Ltd* that sometimes justice and equity might require freezing assets when the risk of dissipation fell below a balance of probabilities.[57] However that was not the usual case. The test was whether overall "on the facts and circumstances of the particular case, the evidence adduced before the court objectively demonstrates a risk of unjustified dissipation which is sufficient in all the circumstances to make it just and convenient to grant a freezing injunction."[58]

Another issue preliminary to the main one decided in this case concerned the significance of the injunction applied for being post-judgment. Andrews LJ disagreed with a comment made by Leggatt J in *Distributori Automatici Italia SpA v Holford General Trading Co Ltd*[59] that it may be easier to infer a risk of dissipation in a post-judgment case. She accepted that the judgment may provide a greater incentive for the defendant to dissipate assets than a mere claim but this said nothing about the risk of this happening.[60] The judgment was significant in relation to the question whether it was just and convenient to grant the order, a test that must be satisfied even where a risk of dissipation was established. As the policy of the law is generally to enforce judgments, there would have to be particularly good reasons for refusing the order on this ground.[61]

Moving on to the assessment of the evidence Andrews LJ addressed two sets of factors which the appellants called 'propensity' and 'opportunity'. In relation to 'propensity' the appellants argued that the respondent's delay in making payment indicated an unwillingness to pay. Andrews LJ was unimpressed by the suggestion that an unwillingness to pay a debt voluntarily indicated any propensity to put assets beyond the reach of creditors.[62]

In relation to 'opportunity' the appellant pointed to the respondent's use of a complex web of offshore corporate structures to hold assets. Andrews LJ said that account would have to be taken of these but in and of themselves they proved nothing about the risk of dissipation. They might be significant

[57] (1989) 18 NSWLR 319, [2021] EWCA Civ 1310, [23].
[58] [2021] EWCA Civ 1310, [36].
[59] [1985] 1 WLR 1066 (QBD), 1073.
[60] [2021] EWCA Civ 1310, [18].
[61] *Ibid*, [17].
[62] *Ibid*, [40].

if added to further propensity factors.[63] Among these was the respondent ceasing to make payment under the judgment debt but a ready enough alternative explanation for this lay in another creditor getting a freezing order against the respondent in Hong Kong.[64] The conclusion could not be drawn that another court granting a freezing order was indicative of the English court underestimating the risk of dissipation as the evidence used in the Hong Kong proceedings was unknown.[65] The dishonoured cheques were also relied upon by the appellant as evidence of a lack of commercial probity, there being evidence to suggest that the respondent at least suspected the cheques would be dishonoured. But this was negated by two matters. First these cheques had not been presented in payment of a pre-existing debt, and secondly the respondent had paid off the greater part of the debt to which the cheques went to discharge the remainder.[66] The appellant also tried to make something of the respondent having an English company that was the subject of a pre-pack administration. But this could be explained as a perfectly legitimate business transaction entered into to achieve a better result for the company's creditors than would likely be achieved in a winding up.[67] Against the matters that the appellant relied upon was the fact that the respondent had money in bank accounts in England and Hong Kong, but had never apparently moved any of it in the four months that passed between the appellant obtaining summary judgment and applying for a freezing injunction.[68]

This judgment is much to be welcomed. It shows a very sound appreciation of the draconian effects of a freezing injunction and the need for clear signs that the defendant's conduct involves dissipation of assets in abuse of the process of the court. This was a post-judgment freezing order the appellants were seeking so the difference between 'can't pay' and 'won't pay' debtors highlighted in *Emmott v Michael Wilson & Partners Ltd*[69] is very significant. *Emmott* was clearly a case of a 'won't pay' debtor but *Les Ambassadeurs v Songbo Yu* was nothing like as much. In view of the draconian effects of freezing orders courts should not be quick to place the worst construction on the defendant's conduct when another one presents itself. In post-judgment freezing orders the claims of other creditors and the need to ensure the debtor retains the means of subsistence consistent with

[63] *Ibid*, [42].
[64] *Ibid*, [44].
[65] *Ibid*, [47].
[66] *Ibid*, [54-55].
[67] *Ibid*, [48-53].
[68] *Ibid*, [45-46].
[69] [2019] EWCA Civ 219, [2019] 4 WLR 53.

human dignity mean that sometimes enforcement does not automatically follow. Where the creditor has not yet obtained judgment these considerations carry even greater weight.[70]

Another useful example of not being unduly quick to conclude that the defendant intends to dissipate assets is *Motorola Solutions Inc v Hytera Communications Corp Ltd*.[71] This was also a post-judgment freezing order application. The claimant respondents sought to rely on statements made by the appellants in the course of pre-trial settlement negotiations. These statements were apparently to the effect that if the litigation went against the appellants they, a Chinese corporation, would 'withdraw' from commercial activity in the West and retreat to their more natural hinterland of Asia and Africa. The main issue in the case was whether these statements came within the 'unambiguous impropriety' rule so that the usual inadmissibility rule relating to without prejudice negotiations did not apply.[72] Reversing the trial judge the Court of Appeal held that these statements were neither evidence of unambiguous impropriety nor dissipation of assets. Focusing upon the latter, and bearing in mind also that English was not the first language of the appellants' representatives, statements to the effect that the appellants would withdraw from the West probably meant that they would concentrate business operations in future in their more natural hinterland. This would have been an entirely legitimate business decision and in no way indicative of an intention to dissipate assets in abuse of process. A decision offering an interesting contrast is *Eastern European Engineering Ltd v Vijay Construction (Pty) Ltd*.[73] In this case Butcher J regarded the defendant's indication that it would prefer to be wound up than pay an arbitration award as an indication that assets would be dissipated and not a legitimate business decision.

The Notification Injunction

If there was the thought that the need for a strong case on dissipation could be avoided by applying for a notification injunction as an alternative to an asset freezing order this idea has probably been quashed by the decision of the Court of Appeal in *Holyoake v Candy*.[74] Notification

[70] D. Capper, 'Proving Dissipation in Freezing Orders' [2022] *Lloyds Maritime & Commercial Law Quarterly* 171, 176.
[71] [2021] EWCA Civ 11, [2021] QB 744.
[72] D. Capper, 'Without Prejudice Communications, Unambiguous Impropriety and Asset Freezing Orders' [2021] *Lloyds Maritime & Commercial Law Quarterly* 575.
[73] [2018] EWHC 1539 (Comm), [2018] BLR 555.
[74] [2017] EWCA Civ 92, [2018] Ch 297.