

Freezing Injunctions and Assets in the Hands of Third Parties

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1. Under the standard form freezing injunction a defendant must not remove, dispose of or otherwise deal with any of his assets within the jurisdiction up to the specified value. However, a sophisticated defendant may well seek to hide his assets from the claimant by arranging for them to be held by a third party, sometimes a family member, perhaps more frequently, an off the peg company or a discretionary trust.
2. As it has evolved, the *Mareva* jurisdiction has developed strategies to enable a claimant to identify the defendant's assets in the hands of third parties and preserve them pending the outcome of the litigation. This may be on the basis that the assets transferred are in fact the defendant's assets or, following more recent case law, because there is some other legal route available through which the claimant may be able to enforce against those assets (including, for example, a claim based on the fact of the transfer from defendant to third party¹).

The Development of the Jurisdiction – the Masri case

3. In the early days of the development of the *Mareva* jurisdiction, it was thought that in order to obtain an order freezing assets, it was necessary to be able to identify a cause of action against the person holding those assets. This stemmed from the House of Lords case, *The Siskina* [1979] AC 210, and in particular a passage from Lord Diplock's speech²:

“A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action.”

4. The first chink in this perceived orthodoxy came in *SCF Finance v. Masri* [1985] 1 WLR 876³. In that case the defendant owed nearly \$1m to a London futures broker. When he failed to pay, the broker obtained a freezing injunction against the defendant. The defendant's affidavit disclosed that the defendant had no money in his bank accounts. The broker discovered, however, that notwithstanding the injunction, the defendant was continuing to trade in the London futures market. They found that on at least one occasion the defendant completed a transaction by

¹ Under section 423 of the Insolvency Act 1986 – see further below.

² At p. 256.

³ And it has subsequently been pointed out that the question is not one of jurisdiction in the strict sense, but rather one of practice: see *Fourie v. Le Roux* [2007] 1 WLR 320, para 30.

producing a pre-signed cheque drawn on his wife's bank account. The broker went back to court to obtain a variation to the injunction so that it was stated to cover bank accounts held by or on behalf of the defendant in his own name or that of his wife. The wife sought to discharge this part of the injunction on the grounds that the bank accounts were hers and hers alone.

5. The Court of Appeal rejected the submission that once a third party had asserted her own interest in the assets formally held in her name, the jurisdiction to extend the injunction over those assets failed. Lloyd LJ set out the following principles, which still operate as important guidelines today:

“(i) *Where a plaintiff invites the court to include within the scope of a Mareva injunction assets which appear on their face to belong to a third party, e.g. a bank account in the name of a third party, the court should not accede to the invitation without good reason for supposing that the assets are in truth the assets of the defendant.*

(ii) *Where the defendant asserts that the assets belong to a third party, the court is not obliged to accept that assertion without inquiry, but may do so depending on the circumstances. The same applies where it is the third party who makes the assertion, on an application to intervene.*

(iii) *In deciding whether to accept the assertion of a third party, without further inquiry, the court will be guided by what is just and convenient, not only between the plaintiff and the defendant, but also between the plaintiff, the defendant and the third party⁴.*

(iv) *Where the court decides not to accept the assertion without further inquiry, it may order an issue to be tried between the plaintiff and the third party in advance of the main action, or it may order that the issue await the outcome of the main action, again depending in each case on what is just and convenient.”*

6. In the *Masri* case the court was not asked to make an order against the third party directly. The plaintiff had been content expressly to name the wife's bank account as one of the defendant's assets, which the defendant was enjoined from diminishing. In many cases such an indirect order restraining transactions relating to an asset in third party hands will be sufficient. For example, a bank faced with an order naming a particular account as containing the assets of the defendant is unlikely to permit that account to be operated, whether the account is in the name of the defendant or not.
7. Another example relates to the assets of a company owned and controlled by the defendant. The standard injunction prevents the defendant from diminishing the value of his assets. The assets of the company are not his for these purposes, but the injunction will prevent him from directing a dissipation of those assets where that dissipation will impact negatively on the value of the shares in the company: *Lakatamia Shipping Co Ltd v. Su* [2015] 1 WLR 291, para 31. In an exceptional case, the court may go further and expressly enjoin the defendant from directing or disposing of the assets held by the company: *Group Seven Ltd v. Allied Investment Corp Ltd* [2014] 1 WLR 735, para 81.⁵
8. Where one is enjoining assets that are in the hands of a third party, it will often be expedient to make that person a party to the proceedings. However, where he is outside the jurisdiction, this can give rise to problems identifying the basis upon which such a party might be brought into the action. In *JSC BTA Bank v. Ablyazov (No 11)* [2015] 1 WLR 1287, the Court of Appeal held that for the purposes of an order *against the defendant* freezing his alleged interest in an asset in a third

⁴ For an example of a case where it was manifestly unjust to prevent the third party from removing the asset, see *Galaxia Maritime v. Mineralimportexport* [1982] 1 WLR 539.

⁵ Cited with approval by the Court of Appeal in *Lakatamia* at paras 34-35. This exceptional jurisdiction to restrict dealings in the assets of the company itself might be exercised where it can be shown that the defendant has assets in a non-trading company which he wholly owns and controls, which does not have any active business, and which he appears to treat as no more than his own pocket or wallet.

party's hands it was not necessary to join the third party, and thus not necessary to obtain permission to serve out.

TSB v. Chabra

9. These indirect methods of controlling the disposal of assets held by third parties are not always enough. In *TSB v. Chabra* [1992] 1 WLR 231, the court was asked to go a stage further and grant an injunction against the third party as well as the defendant. On its facts, *Chabra* was a strong case. Mr Chabra owed TSB £1.5m on a guarantee. On 8 April 1991, TSB issued a writ against him claiming that sum. On 3 April 1991, both Mr and Mrs Chabra, apparently acting on their doctor's advice to take "early retirement," left the jurisdiction for India. Mr Chabra and his wife owned a company called Beverley Hotels (London) Ltd, which had recently ceased to trade and had just sold a major hotel property. At the end of March 1991, Mr Chabra had owned the majority, 80,000 out of 90,000, of the shares in Beverley Hotels. More or less at the time of his emigration, he claimed to have transferred those shares to his wife.
10. TSB initially obtained a freezing injunction against Mr Chabra over his assets, and this expressly restrained him from causing or permitting or procuring the dealing with any of the assets of Beverley Hotels. But they discovered that the company had a bank account which the bank did not regard as covered by the injunction. TSB obtained a variation to injunct the company itself. The company sought to discharge the order on the grounds that there was no cause of action against the company, relying upon *The Siskina*.
11. Mummery J rejected that application. *The Siskina* was distinguished on the basis that in that case there was no cause of action available against anybody (at least within the jurisdiction). TSB had a potential cause of action against Mr Chabra. It had in turn raised a good arguable case⁶ that assets held by the company were in fact beneficially the property of Mr Chabra and/or that the company was no more than an alter ego of Mr Chabra. In the circumstances, there was jurisdiction to grant an injunction against the company ancillary to TSB's claim against Mr Chabra. An injunction against Mr Chabra alone was inadequate to protect TSB.
12. The *Chabra* jurisdiction was subsequently affirmed by the Court of Appeal in *Mercantile Group v. Aiyela* [1994] QB 366. Sir Thomas Bingham's approach was pragmatic:

"Both principle and authority persuade me that the judges who made these orders did have jurisdiction to make them. I am very pleased to reach that conclusion, for if jurisdiction did not exist the armoury of powers available to the court to ensure the effective enforcement of its orders would in my view be seriously deficient. That is in itself a ground for inferring the likely existence of such powers, since it would be surprising if the court lacked power to control wilful evasion of its orders by a judgment debtor acting through even innocent third parties. The jurisdiction is of course one to be exercised with caution, restraint and appropriate respect for the legitimate interests of third parties. But that the jurisdiction exists, both in relation to the disclosure order⁷ and the Mareva injunction, I do not doubt."

⁶ Whether there is a difference between "good arguable case" and "good reason to suppose" was left open by the Court of Appeal in *JSC BTA Bank v. Ablyazov (No 11)* [2015] 1 WLR 1287, para 68. In *Lemos v. Lemos* [2016] EWCA Civ 1181 the two formulations were described as being "very similar": para 21. However, whether they are the same or not, it seems clear that what is required is a case that is more than barely capable of serious argument, but not necessarily one that appears to have more than 50% chances of success: see *PJSC Vseukrainskyi Aktsionernyi Bank v. Maksimov* [2013] EWHC 422, para 7(2) *per* Popplewell J; cited with approval by the Court of Appeal in *Lakatamia* at para 32.

⁷ The third party, Mrs Aiyela, had been ordered to give disclosure of certain of her assets, as well as having some of them frozen.

13. Exercise of the *Chabra* jurisdiction requires the claimant to show that there is a real risk that the third party in question will deal with the assets in such a way as to prevent the claimant from obtaining recourse to them to enforce any judgment given against the defendant: *JSC Mezhdunarodniy Promyshlenniy Bank v. Pugachev* [2015] EWCA Civ 906, para 29. In many cases it will be possible to infer risk of dissipation by the third party where risk of dissipation on the part of the defendant can be established.⁸ The premise for the jurisdiction is often after all, that the assets are (at least arguably) beneficially owned by the defendant; and where the assets are in practice controlled by the defendant, the risk to which he gives rise will affect them too.
14. The position of third parties was again considered by the Court of Appeal in *Yukong Line v. Rendsburg* [2001] 2 Lloyd's Rep 113. The case arose out of a charterparty which the defendant had repudiated. Immediately before giving notice of the repudiation, a director of the defendant had arranged for the sum of \$245,000 to be removed from the defendant's account and transferred into the account of another company controlled by the director. The court granted a freezing order against the director personally, freezing his assets generally up to the sum of \$245,000. The Court of Appeal held that this order was a *Chabra* type order and had been correctly made. Potter LJ said:
- “Although it is plain that the Court’s Chabra-type of jurisdiction will only be exercised where there are grounds to believe that a co-defendant is in possession or control of assets to which the principal defendant is beneficially entitled, it does not seem to me that the jurisdiction is limited to cases where such assets can be specifically identified in the hands of the co-defendant. Once the Court is satisfied that there are such assets in the possession or control of the co-defendant, the jurisdiction exists to make a freezing order as ancillary and incidental to the claim against the principal defendant, although there is no direct cause of action against the co-defendant. Since the purpose of granting such an injunction against the co-defendant is to preserve the assets of the principal defendant so as to be available to meet a judgment against him, the form of the order made against the co-defendant should be as specific as the circumstances permit in respect of the principal defendant’s assets of which he has possession or control. Thus, generally, the form of injunction will be tailored to that purpose and should be no wider than is necessary to achieve it. However, subject to that requirement, if a co-defendant is mixed up in an attempt to make the principal defendant judgment-proof and the assets or their proceeds are not readily identifiable in his hands it is open to the Court, where it is just and convenient to do so, to make an order which catches the co-defendant’s general assets up to the amount of the principal defendant’s assets or which he appears to have possession and control.”*
15. What this case explicitly recognises is that it is not always necessary to identify precisely the asset that the third party has in his possession that is said to belong to the defendant. It is sufficient to put forward a reasonably arguable case that the third party has received assets to which the defendant is still beneficially entitled. If those assets are no longer identifiable in the third party's hands, usually because he deliberately does not want them to be, the court can make an order freezing the third party's assets generally.
16. It must be remembered, however, that the jurisdiction always anticipates enforcement.⁹ Where it is obvious that such enforcement would not be possible against certain assets, one would expect the court to take a more restrictive approach. It is important, when crafting the order sought, to tailor it very carefully to the circumstances. One should not simply seek a mirror-image of the freezing injunction sought against the main wrongdoer). Rather, careful thought should be given to which assets, in the name of the third party, might be available for enforcement of a judgment against the main wrongdoer. Only those assets should be caught, and care needs to be taken not

⁸ See for example the inferences drawn by the court in *Pugachev* itself: para 33; see also the *Maksimov* case at para 7(5).

⁹ See further below.

to catch assets of the third party which have nothing to do with the main respondent and which could not be enforced against in due course.¹⁰

17. The courts have made clear that the *Chabra* jurisdiction is to be exercised with caution and only where the claimant can satisfy the “good reasons to suppose/good arguable case” test. The claimant must also be able to satisfy the court that there are grounds for believing that the respondent is in possession of assets which can be caught by the order: *Ras al Khaimah Investment Authority v. Bestfort Development LLP* [2018] 1 WLR 1099.
18. However, even where the claimant cannot quite establish a good arguable case, the court may grant an order against the defendant requiring further information to be provided about the relevant assets. In *JSC Mezhdunarodniy Promyshlenniy Bank v. Pugachev* [2016] 1 WLR 160, following the making of a freezing order against him, the defendant disclosed that he was within a class of discretionary beneficiaries under a number of trusts based in New Zealand. Where a defendant is a beneficiary under a true discretionary trust, he has no right in the assets of the trust against which the claimant can enforce until the trustees exercise their discretion to appoint assets in his favour. Thus, in such a case one would have difficulty in obtaining a freezing injunction in respect of the trust assets. However, on the facts of the case there were features that suggested that all was not what it seemed and that the defendant’s interest in the trust may have been more than simply that of a discretionary beneficiary. The court held that, although the threshold test for including the assets within the scope of the order had not yet been met, there was a lower hurdle for ordering disclosure (under CPR 25.1(g)). The claimant had raised a sufficient case to enable the court to make an order that the defendant give details of the relevant trusts.

Chabra expanded

19. Since *Chabra*, it has become clear that the jurisdiction is not confined to the case in which it can be said that the third party holds assets beneficially owned by the defendant. The true principle is that assets in the hands of a third party can be frozen where it can be said that there is good reason to suppose that those assets would be amenable to some process enforceable by the courts by which the assets would be available to satisfy a judgment against the substantive defendant.
20. In *C Inc v. L* [2001] 2 Lloyd’s Rep 459, the court was prepared to grant a freezing order against a third party, not because it was thought that he was in possession of assets beneficially belonging to the defendant, but because the defendant had a cause of action against the third party that the claimant wished to enforce in order to provide a fund to satisfy the defendant’s judgment debt to the claimant. The case arose out of an unpaid debt owed by Mrs L in respect of some shares and loan stock. The claimant obtained a default judgment and a freezing order against Mrs L. However, in her affidavit of assets she said that she had none, that all the family assets were in her husband’s name and that, indeed, she held the shares and loan stock as trustee or agent of her husband. The claimant then sought a freezing order against Mr L on the basis that, if Mrs L was his agent for the purposes of holding the shares, she was entitled to an indemnity from him in relation to the debt she owed to the claimant. The claimant wished to appoint a receiver in order to enforce that indemnity so that, in turn, its judgment debt would be paid. It wanted relief directly against Mr L because it feared that he would dissipate his assets to avoid enforcement of his debt to Mrs L. Aikens J held, following the Australian case of *Cardile v. LED Builders* [1999] HCA 18, that there was jurisdiction to grant the order¹¹.

¹⁰ See Potter LJ’s comments to this effect in *Yukong Line v. Rendsburg* [2001] 2 Lloyd’s Rep 113.

¹¹ *Cardile* itself was foreshadowed by the decision in *Aiglon Ltd v. Gau Shan Co* [1993] BCLC 1321, in which a freezing injunction was granted against a third party in part on the ground that, upon insolvency, an administrator or

21. On the one hand, the decision did obvious justice. Mrs L had waited until the claimant had obtained judgment against her before revealing that she was acting as agent for her husband. By doing so she deprived the claimant of an opportunity to join the husband without losing the benefit of its default judgment. Moreover, had a receiver been appointed there would certainly have been grounds for him, standing in Mrs L's shoes, to obtain a freezing order against the husband in respect of his obligation to indemnify the wife. On the other hand, the decision significantly widened the circle of people around a defendant in respect of whom the court has jurisdiction to grant freezing orders.
22. That dilemma was the subject of anxious consideration in *HM Revenue & Customs v. Clayton Egleton* [2006] EWHC 2313¹². In that case, the court had to decide to what extent it could impose an order in support of an indirect claim: was it necessary to show, as Aikens J had thought in *C inc v L*, that there was a causative link between the cause of action against the defendant, and the claim against the third party? Or was the jurisdiction wider, enabling the grant of an order wherever a mechanism existed, such as the appointment of a liquidator or receiver, to enforce a potentially unrelated claim held by the defendant against a third party? Briggs J held that the latter approach was correct. To take a simple example, if there were a causation requirement it would operate so as to distinguish between a case in which the third party had misappropriated an asset of the defendant and held on to it and a case in which in otherwise identical circumstances the third party misappropriated the assets and dissipated it. It made no sense that the first of those third parties should be amenable to the freezing order jurisdiction whereas the second, however separately wealthy, should not.¹³
23. The expansion of *Chabra* by *C Inc*, although supported by high Australian authority, was for a long time propounded only in first instance cases in England. However, it can now be said to be well established law.¹⁴
24. One thing that must be borne in mind in the context of a case in which the claimant seeks to “piggy-back” on a cause of action that the defendant has against the third party is that risk of dissipation must be established against that third party, and fraudulent conduct on the part of *the defendant* will not, on its own, be sufficient (nor indeed always necessary) for these purposes.

The limits of the Jurisdiction

25. There are limits to the *Chabra* doctrine. In *Dadourian Group v. Azuri Ltd* [2005] EWHC 1768, the court held that it was not necessary to the exercise of the *Chabra* jurisdiction that there be a sustainable claim that the defendant has a legal or equitable right to the assets in the hands of the relevant third party. What mattered was the question of substantive control. If a network of trusts had been set up by a defendant to hold assets over which that defendant had control and this had, apparently, been done to make the defendant judgment-proof, then that would be an appropriate case for the granting of a freezing injunction.

liquidator of the defendant could apply to set aside the transfer of an asset to the third party, thus allowing that asset to be regarded as beneficially an asset of the defendant.

¹² The decision is also illustrative of a different expansion of the *Mareva* jurisdiction, namely the granting of a freezing order to a creditor in the context of a winding up petition. See also *Re Ravenhart Service (Holdings) Ltd* [2004] 2 BCLC 376, and note the warnings given by Briggs J in the *Clayton Egleton* case at paras 48ff. See *Palmer v. Loveland*, 16 August 2017, Ch D, unreported, for an example of an injunction granted in the context of a s. 994 petition.

¹³ Para 41.

¹⁴ See the survey of the law in *Parbulk II AS v. PT Humpuss Intermoda Transportasi TBK* [2011] EWHC 3143 (Comm), paras 35-58; and Popplewell J's summary of the *Chabra* jurisdiction in the *Maksimov* case [2013] EWHC 422 (Comm) – see further below.

26. That was uncontroversial insofar as it was intended merely to suggest that at the interim stage the court might be invited to infer that the necessary legal or equitable rights in the assets, albeit as yet unidentified, did in fact exist. Moreover, there may exist a jurisdiction to enjoin third parties from assisting the defendant from dealing with assets in a way which would defeat the freezing order against the defendant: see *Banco Turco Română SA v. Çörtük* [2018] EWHC 662 (Comm).
27. However, insofar as *Dadourian* is to be regarded as going further to suggest some more general power to freeze assets where such an inference as to beneficial ownership could not be drawn it overlooked the fact that ultimately the claimant must be able to find a route to enforce against the assets in question.¹⁵ The absence of a legal or equitable right in the assets in favour of the defendant, or some other means by which the assets can be said to be identified as the defendant's, would make that difficult (unless some other *C Inc* type argument can be mounted). It would seem that, to this extent, *Dadourian* states the jurisdiction too widely: see the decision of Sir John Chadwick P in a decision of the Court of Appeal of the Cayman Islands in *Algozaibi v. Saad Investment Company Ltd* (CICA 1 of 2010), paras 28-32.¹⁶

Chabra in the 21st Century

28. The *Chabra* jurisdiction is now well established and there have been a run of recent cases in which it has been applied. The target of the injunction is now often referred to as an “NCAD”, a “non-cause of action defendant.” The principles that apply are neatly summarised by Popplewell J in a passage from *PJSC Vseukrainskyi Aktsionernyi Bank v. Maksimov* [2013] EWHC 422 (Comm)¹⁷:
- “(1) *The Chabra jurisdiction may be exercised where there is good reason to suppose that assets held in the name of the defendant against whom the claimant asserts no cause of action (the NCAD) would be amenable to some process, ultimately enforceable by the courts, by which the assets would be available to satisfy a judgment against a defendant whom the claimant asserts to be liable upon his substantive claim (the CAD).*
- (2) *The test of ‘good reason to suppose’ is to be equated with a good arguable case, that is to say one which is more than barely capable of serious argument, but yet not necessarily one which the Judge believes to have a better than 50% chance of success.*
- (3) *In such cases the jurisdiction will be exercised where it is just and convenient to do so. The jurisdiction is exceptional and should be exercised with caution, taking care that it should not operate oppressively to innocent third parties who are not substantive defendants and have not acted to frustrate the administration of justice.*
- (4) *A common example of assets falling within the Chabra jurisdiction is where there is good reason to suppose*

¹⁵ See *JSC BTA Bank v. Solodchenko* [2011] 1 WLR 888, para 49(1); *JSC Mezhdunarodniy Promyshlenniy Bank v. Pugachev* [2016] 1 WLR 160, 172; cf. *JSC BTA Bank v. Ablyazov (No 10)* [2015] 1 WLR 4754, in which the Supreme Court held that, under the standard Commercial Court wording, “assets” included the right to draw down loans.

¹⁶ See in particular para 32: “*The court needs to be satisfied of two matters before granting Mareva relief. First, that there is good reason to suppose that the assets in relation to which a freezing order is imposed would become available to satisfy the judgment which the claimant seeks; and, second, that there is a good reason to suppose that, absent such relief, there is a real risk that those assets will be dissipated or otherwise put beyond the reach of the claimant.*” Chadwick’s P’s analysis was approved by Flaux J in *Linsen International Ltd v. Humpuss Sea Transport PTE Ltd* [2011] EWHC 2339 (Comm), paras 146, 152. The central message that there needs to be a route to enforcement is now reinforced by the *Maksimov* summary of the jurisdiction, see below, which itself has the approval of the Court of Appeal.

¹⁷ Para 7, cited with approval by the Court of Appeal in *Lakatamia Shipping Co Ltd v. Su* [2015] 1 WLR 291, para 32. See now also *C v. C* [2015] EWHC 2795 (Fam), *Phoenix Group Foundation v. Cochrane* [2017] EWHC 418, and *Banco Turco Română SA v. Çörtük* [2018] EWHC 662 (Comm).

that the assets in the name of the NCAD are in truth the assets of the CAD. Such assets will be treated as in truth the assets of the CAD if they are held as nominee or trustee for the CAD as the ultimate beneficial owner.

- (5) *Substantial control by the CAD over the assets in the name of the NCAD is often a relevant consideration, but substantial control is not the test for the existence and exercise of the Chabra jurisdiction. Establishing such substantial control will not necessarily justify the freezing of the assets in the hands of the NCAD. Substantial control may be relevant in two ways. First, evidence that the CAD exercises substantial control over the assets may be evidence from which the Court will infer that the assets are held as nominee or trustee for the NCAD as the ultimate beneficial owner. Secondly, such evidence may establish that there is a real risk of dissipation of the assets in the absence of a freezing order, which the claimant will have to establish in order for it to be just and convenient to make the order. But the establishment of substantial control over the assets by the CAD will not necessarily be sufficient: a parent company may exercise substantial control over a wholly owned subsidiary, but the principles of separate corporate personality require the assets to be treated as those of the subsidiary not the parent. The ultimate test is always whether there is a good reason to suppose that the assets would be amenable to execution of a judgment obtained against the CAD.”*

Section 423 of the Insolvency Act 1986

29. With a view to satisfying the requirement identified by Popplewell J for there to be “*some process, ultimately enforceable by the courts, by which the assets [held by the third party] would be available to satisfy a judgment against a defendant?*” it is worth considering in particular Section 423 of the Insolvency Act 1986. This provides a route for recovery against a third party where they have received assets from a primary wrongdoer for no consideration or at undervalue, and where the transaction was entered into for the purpose of putting assets beyond the reach of the wrongdoer’s creditors.
30. This type of potential claim was specifically envisaged by Gloster J as falling within the range of circumstances which might justify Chabra relief, in her Judgment in *Parbulk II AS v PT Humpuss & Others* [2011] EWHC 31434 (Comm) (“The Mahakam”, see para 56, footnote 4; this Judgment also contains a useful review of existing authority to that date).
31. Section 423 provides, insofar as material, as follows:

“(1) This section relates to transactions entered into at an undervalue; and a person enters into such a transaction with another person if:

- (a) He makes a gift to the other person or he otherwise enters into a transaction with the other on terms that provide for him to receive no consideration;*
- (b) ...; or*
- (c) He enters into a transaction with the other for a consideration the value of which, in money or money’s worth, is significantly less than the value, in money or money’s worth, of the consideration provided by himself.*

(2) Where a person has entered into such a transaction, the court may, if satisfied under the next subsection, make such order as it thinks fit for-

- (a) Restoring the position to what it would have been if the transaction had not been entered into, and*

(b) Protecting the interests of persons who are victims of the transaction

(3) In the case of a person entering into such a transaction, an order shall only be made if the court is satisfied that it was entered into by him for the purpose-

(a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or

(b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make.”

32. The statute can only be invoked either by a “victim” of the transaction (which is defined as “a person who is, or is capable of being, prejudiced by it” – Section 423(5)), or, where the wrongdoer has been adjudged insolvent, by the liquidator / trustee in bankruptcy - Section 424(1).

33. Further, pursuant to Section 423 (2) (see above) the Court has an extremely broad discretion in terms of the remedies available. Section 425 further provides as follows:

“

(1) Without prejudice to the generality of section 423, an order made under that section with respect to a transaction may (subject as follows)-

(a) require any property transferred as part of the transaction to be vested in any person, either absolutely or for the benefit of all the persons on whose behalf the application for the order is treated as made;

(b) require any property to be so vested if it represents, in any person’s hands, the application either of the proceeds of sale of property so transferred or of the money so transferred;

(c) release or discharge (in whole or in part) any security given by the debtor;

(d) require any person to pay to any other person in respect of benefits received from the debtor such sums as the court may direct;

(e) provide for any surety or guarantor whose obligations to any person were released or discharge (in whole or in part) under the transaction to be under such new or revived obligations as the court thinks appropriate;

(f) provide for security to be provided for the discharge of any obligation imposed by or arising under the order, for such an obligation to be charged on any property and for such security or charge to have the same priority as a security or charge released or discharged (in whole or in part) under the transaction;

(2) An order under section 423 may affect the property of, or impose any obligation on, any person whether or not he is the person with whom the debtor entered into the transaction, but such an order –

(a) Shall not prejudice any interest in property which was acquired from a person other than the debtor and was acquired in good faith, for value and without notice of the relevant circumstances, or prejudice any interest deriving from such an interest; and

(b) Shall not require a person who received a benefit from the transaction in good faith, for value and without notice of the relevant circumstances to pay any sum unless he was a party to the transaction”

34. Drawing this together and factoring in the case law, a number of features emerge:

- a. Other than claims by office-holders (where, notably, there does not even need to be a crystallised “victim” in order for an order to be made: *Hill v Spread Trustee Ltd* [2006] EWCA Civ 542), proceedings under this section can only be brought by “victims” of the transaction(s) in question, which is a broad category that includes persons who are or are capable of being prejudiced by it (Section 423(5)). This includes and indeed goes beyond creditors (see *Clydesdale Financial Services v Smaill* [2009] EWHC 3190 (Ch)). For practical purposes the easiest route to qualifying as a victim is to be a creditor of the transferor – typically this will require establishing liability against them. In most cases the injunction will of course be sought well before a judgment on liability has been rendered (and indeed in most cases prior to service of proceedings) – the Chabra jurisdiction can be invoked at that stage in support of a prospective Section 423 claim, contingent on the main action succeeding;
- b. Beyond the standing of the claimant, the requirements to be satisfied in order for the Section 423 jurisdiction to be invoked in relation to any given asset transfer or transaction are two-fold:
 - i. That the debtor received no consideration for the transaction in question or alternatively that the transaction was at undervalue;
 - ii. That the debtor entered into the transaction in question for the purpose of putting assets beyond the reach of a claimant or potential claimant or otherwise prejudicing the interests of such a person. As to this requirement:
 1. First, the wording of the statute (Section 423(3)) makes it clear that it is the transferor’s purpose that matters; and see, for example, *Moon v Franklin* [1996] BPIR 196 (at 202E) which makes it clear that the recipient’s belief or understanding as to the purpose of the transactions is irrelevant;
 2. Second, it is not necessary that the impugned transaction was entered into for the purpose of prejudicing the particular claimant pursuing the proceedings – rather, the statute requires merely that the transaction was entered into for the purpose of prejudicing *any* person who had made or might make a claim against the transferor / debtor (see *Fortress Value Recovery Fund v Blue Skye Special Opportunities Fund* [2013] EWHC 14 (Comm));
 3. Third, the Court of Appeal has confirmed in *Inland Revenue v Hashmi* [2002] EWCA Civ 981 that it is perfectly possible for the debtor to harbour more than one purpose in relation to a particular transaction, and it is sufficient if the statutory purpose (i.e. to put assets beyond the reach of, or otherwise prejudice, creditors) is one such purpose. There is no requirement for that purpose to be the “dominant” purpose, so long as it is not a mere “by-product”. As Hart J observed at first instance in the *Hashmi* case (cited with apparent approval by Arden LJ at para 10 of the Court of Appeal decision):

“...in the classic type of case to which this section is intended to apply it will frequently be the case that the motive to defeat creditors and the motive to secure the family for the future will co-exist...”

This approach has very recently been re-confirmed by the Court of Appeal in *JSC BTA Bank v Ablyazov* [2018] EWCA 1176, where Leggatt LJ clarified that there is no basis for reading into the statute the concept that the purpose must be a “substantial” one: “*It is sufficient simply to ask whether the transaction was entered into by the debtor for the prohibited purpose*”.

4. Fourth, consistent with this, it is not necessary to establish dishonesty on the part of the transferor: see *Arbutnot Leasing v Havelet Leasing (No.2)* [1990] BCC 636 at 644 C and *In re Brabon*, [2000] BCC 1171 at 1,199E.
- c. Finally, the Court has an unfettered discretion where relief is concerned, subject to the protection of *bona fide* third parties conferred by Section 425 (and for an interesting example of the exercise of that discretion see *Bataillon v Shone* [2016] EWHC 1174 (QB) at paras 118 – 121).

Chabra in support of overseas proceedings and international arbitrations

35. As is well known, freezing orders can be obtained in support of litigation proceeding overseas, pursuant to Section 25 of the Civil Jurisdiction and Judgments Act 1982 (as amended). The prevailing view is that the Chabra jurisdiction extends to such circumstances (and difficulties with service out do not arise because applications under Section 25 have their own service out gateway under CPR 6BPD para 3.1(5)).
36. All of the usual requirements will apply, and in addition the applicant will need to establish that the fact that the main claim is taking place abroad does not make it “inexpedient” for the English Court to interfere. Typically one will need to establish that relevant assets are located in, or controlled by a party located in, England, in order for it to be attractive for the English Court to step in. General principles of comity will also need to be considered.
37. The English Court also has jurisdiction to grant interim injunctions in support of arbitrations pursuant to Section 44 of the Arbitration Act 1996. A number of points arise:
 - a. First, this is a section that can be contracted out of – an applicant will want to check that this is not the case before proceeding (see Section 4(1) and (2) of the Act and Schedule 1);
 - b. Second, the English Court can only interfere if the arbitral tribunal does not have the power to do so – Section 44(5) of the Act. In Chabra cases this may be relatively straightforward to establish, given that the third party is (by definition) not a party to the arbitration. However an applicant will need to be comfortable that the tribunal (if constituted) is not able to make an alternative order against one of the parties to the arbitration that could have the same effect as that sought against the third party;
 - c. Third, where the arbitration is seated overseas the applicant will have to establish (by analogy with Section 25 applications) that this fact does not make it “inappropriate” for the English Court to intervene – see Section 2(3) of the Act. Again, to satisfy this one is ideally looking to point to assets located in, or controlled by third parties located in, England. Broader comity issues will also again need to be borne in mind.

38. In addition where Section 44 orders are concerned, there is a controversy as to whether this extends to orders against third parties at all i.e. whether Chabra relief is available under Section 44 as a matter of principle. This has, so far, only been considered at first instance:

- a. In *Cruz City 1 Mauritius Holdings v Unitech* [2014] EWHC 3704, Males J concluded (possibly on a *obiter* basis, although it is not entirely clear) that Section 44 did not extend to orders against third parties (notwithstanding the express wording in Section 44(1) to the effect that the English Court has “*for the purposes of and in relation to arbitral proceedings the same power of making orders...as it has for the purposes of and in relation to legal proceedings*”);
- b. This has since been followed by Sara Cockerill QC, sitting as a Deputy High Court Judge, in *DTEK Trading v Morozov* [2017] EWHC 94 (Comm) in which, at the *ex parte* stage, she rejected arguments challenging the reasoning in *Cruz City*;
- c. One of the authors has however subsequently been involved in an application of this kind (the details of which remain confidential at this stage) in which a Commercial Court Judge has been persuaded to disagree with *Cruz City* and *DTEK*, and to conclude that the correct analysis is that Section 44 does extend to injunctions against third parties, with the Court of Appeal (at the permission stage) observing that it was highly doubtful that the reasoning in *Cruz City* was correct.

39. This is important because (as with Section 25 CJA) an application under Section 44 can be served out of the jurisdiction under its own gateway (CPR 62.5(1)(b)). If Section 44 does not extend to third parties, then there is no gateway available for service out of an application for an injunction against a third party out of the jurisdiction, in support of an arbitration.

40. In any case, there is an alternative route where the third party is in England: regardless of the position under Section 44, in these circumstances Section 37 of the Senior Courts Act remains available (the Supreme Court having confirmed that Section 44 of the Arbitration Act does not abrogate the breadth of Section 37 of the Senior Courts Act - *UST-Kamenogorsk Hydropower v AES* [2013] UKSC 35). This argument was also accepted in the recent confidential matter referred to above.

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“Absolutely outstanding. He is the complete counsel: he has a brilliant intellect, he’s always able to find one extra first-rate point of argument, he’s excellent at paperwork and he’s a particularly outstanding advocate” – Chambers & Partners

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