



Neutral Citation Number: [2024] EWHC 2042 (Comm) Rev 1

Case No: CL-2024-000159

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Double-click to add Judgment date

Before :

MR JUSTICE FOXTON

Between :

LAX SA

Claimant

- and -

JBC SA

Defendant

Lucian Ilie (instructed by **Consortium Legal**) for the **Defendant**
Thomas Steward (instructed by **Wikborg Rein LLP**) for the **Claimant**

Hearing dates: 19 July 2024
Written submissions: 26 July 2024

Approved Judgment

This judgment was handed down remotely at 2pm on 01 August 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE FOXTON

Mr Justice Foxton :

1. In 1982, Donaldson LJ famously described a freezing injunction as one of the law’s two “nuclear weapons” (*Bank Mellat v Nikpour* [1985] FSR 87, 92). I suspect that the extent of their proliferation over the following four plus decades would have astonished him. Four years on, in *Siporex Trade SA v Comdel Commodities Ltd* [1986] 2 Lloyd’s Rep 428, 436, Mr Justice Bingham noted:

“It was not so very long ago since ex parte applications for injunctive relief were infrequently made and even more exceptionally granted ... The advent of the *Mareva* injunction has, as is notorious, led to such applications becoming commonplace, hundreds being made every year and relatively few refused”.

And so it has continued. Further, while the reach of freezing orders has grown extensively over that period, the protections afforded to the respondent still follow lines which would have been broadly familiar to Donaldson LJ and Bingham J.

2. In this case, the claimant (“**LAX**”) obtained a worldwide freezing order under s.44 of the Arbitration Act 1996 in respect of claims under a drilling contract and associated charterparty against the respondent (“**JBC**”).
3. When seeking the order on a “without notice” basis, LAX adduced evidence that it did not have assets within England and Wales and was unable to provide fortification of its undertaking in damages pending an ongoing restructuring exercise (a disability which LAX contended was caused by JBC’s breach). The injunction was extended on the same terms by HHJ Pelling KC on the return date.
4. On 19 July, I heard an application by JBC to vary the injunction so as to require fortification from LAX. In considering that application, I proceeded on the following basis:
 - i) The general practice is for a party seeking an interim injunction to adduce evidence of its ability to honour the cross-undertaking in damages: *Smo v Hywel Dda University Health Board* [2019] EWHC 1973 (QB), [76].
 - ii) Where the applicant is unable to show sufficient assets within the jurisdiction of the court to provide substance to any undertakings given, it may be required to give security (paragraph F14.3 of the *Commercial Court Guide*, 11th edition, 2022).
 - iii) In determining whether and in what amount to require fortification, the court will seek to arrive at an “intelligent estimate” of the amount of loss the respondent might suffer from the granting of the injunction, and be persuaded that there is good arguable case of the loss occurring: *Phoenix Group Foundation v Cochrane* [2018] EWHC 2179 (Comm), [14] and *Energy Venture Partners Ltd v Malabu* [2015] 1 WLR 2309.
5. As I have stated, LAX has no assets in the jurisdiction, and the effect of its evidence was that it is unable to provide fortification while a process of financial restructuring is underway, which will take until October of this year. I was unable to reach any reliable assessment as to whether, as LAX asserts, its current financial difficulties have been

caused by JBC's alleged breach of contract, albeit they appeared to be pre-date this particular dispute, and have a wider scope.

6. JBC contended that there was a risk it would suffer significant loss in relation to its involvement in a particular drilling project, providing various estimates of its loss of ranging from a few million dollars to in excess of one hundred million dollars.
7. On the material before the court, I concluded that JBC had failed to establish a good arguable case that it would suffer loss in the medium term, and I found that it had not provided the court with the material necessary to arrive at an intelligent estimate of what that loss might be. However, I did not rule out the prospect of a further application for fortification at some future date, because there was a sufficient risk that loss might become apparent as the drilling project progressed, and because LAX's own financial position might well change by the end of the year.
8. Nonetheless, I was concerned at the apparent asymmetry in the fact that LAX had obtained an injunction, and come under a contingent liability under the undertaking in damages, without adducing any evidence as to its assets, while obtaining a coercive order for disclosure of JBC's assets, and a freezing order, in support of its own claim. A common complaint about the freezing order jurisdiction is that the applicant is able, on a without notice application, to obtain information as to the identity and location of the respondent's assets, and thereby obtain an information advantage which cannot effectively be reversed (even if the injunction is later set aside).
9. That issue may merit further consideration as we approach the 50th anniversary of the *Mareva* injunction in May 2025. The particular circumstances of this case raised a rather narrower issue: whether an applicant who does not have assets in the jurisdiction to meet any liability under its cross-undertaking, and does not, on the evidence, have sufficient liquid assets to provide fortification in one of the conventional forms, should itself be required to provide some form of asset disclosure as a condition of obtaining or maintaining the freezing order relief. I asked the parties to serve supplemental submissions on that issue.
10. I should immediately acknowledge the different positions of the applicant and respondent so far as asset disclosure is concerned. First, for a freezing order to be ordered at all, the applicant must have established a real risk of dissipation by the respondent of its assets absent freezing order relief. Second, the principal purpose of the affidavit of assets in this context is to enable the applicant to "police" the injunction – to give notification of the order to certain asset holders such as banks, and to monitor other assets to ensure that they are not dissipated (*Angola v Perfectbit Ltd* [2018] 2 WLUK 76, [8]). Third, any asset disclosure by an applicant will necessarily have a transient quality because, unlike the respondent, the claimant is not restrained from disposing of its assets.
11. Nonetheless, an applicant in the position of LAX who comes to the court seeking a coercive order but who is unable to provide the degree of assurance a court normally requires that it can make good on its undertaking in damages if it is later held that the injunction should not have been granted, is less well-placed to complain about the invasive nature of a disclosure order of this kind or its interference with rights of privacy or confidence than a respondent. By contrast, the respondent's interests of that kind must be considered as part of the balancing exercise when the terms of any coercive disclosure

order are fixed (*Public Institution for Social Security v Al Wazzan* [2020] EWHC 1498 (Comm), [19]).

12. On the facts of this case, I do not think that LAX could have had any legitimate complaint if, when it sought the without notice injunction, it had been required to provide some form of asset disclosure in the absence of any assets in this jurisdiction and any ability to fortify its cross-undertaking. That would have been appropriate even though, at the without notice stage, the court would not have been able to reach any reliable view as to risk of JBC suffering loss, or as to its extent.
13. I have held after argument that JBC has yet to establish a sufficient risk of loss, while allowing for the possibility that it may in due course be able to do so. In those circumstances, LAX understandably contends that an order for disclosure of assets would serve no utility.
14. However, if LAX had been able to fortify its undertaking in damages and been required to do so as a condition of obtaining the injunction, I would not have released it from that undertaking – both because of the fact that JBC might suffer loss through mechanisms which have not yet been identified, and because of the fluidity of the position so far as the injunction's impact on JBC's ongoing drilling project is concerned. In these circumstances, I am not persuaded that imposing a condition of some form of asset disclosure on LAX now would serve no purpose. It would, at least to some extent, ameliorate the consequences of its inability to identify assets within the jurisdiction or provide fortification for its cross-undertaking in damages in the manner normally required if interim injunctive relief is to be obtained.
15. The financial limit of any asset disclosure is much more difficult to determine, in circumstances in which JBC put forward wildly varying and essentially unsupported estimates of loss.
16. I am satisfied that the interests of the parties would be appropriately balanced by the following order:
 - i) LAX must provide disclosure of assets worldwide exceeding US\$10,000 in value.
 - ii) To the extent that LAX has disclosed assets in which LAX has an equity interest with a cumulative unencumbered value of US\$1 million, it shall not be required to disclose any further assets.
 - iii) That disclosure should give a brief description of the assets disclosed and their estimated value, including the location of any real property, shareholdings or bank accounts (but not of any equipment).
 - iv) Such disclosure would only be provided if JBC undertakes to use it only for the purpose of these court proceedings.
 - v) LAX will have until 4pm on 6 September 2024 to provide this disclosure, in a schedule supported by a statement of truth. If this is not done, the injunction granted by the Court will lapse.