

# Foiling 'judgment proof' debtors

**The key to successful litigation is identifying the risks and finding a way to control them. What steps can a litigant take to ensure that their opponent will actually pay any judgment debt with interest and costs?**

Not all disputes are genuine commercial disputes. Some are actions for the recovery of money with the underlying risk that the creditor's claims will be defeated by the judgment debtor making himself 'judgment proof'. The debtor places his assets out of reach by adopting one or more of the following techniques:

- taking money out of the jurisdiction - possibly to a jurisdiction that does not recognise judgments of English Courts
- using nominees - property can be put into the joint names of husband and wife or written into trust for children or grandchildren
- entering into sham transactions and passing them as genuine (including sham mortgages or other borrowings)
- setting up companies with similar names through which to divert funds
- acquiring easily movable or disposable assets, examples of this are high value motor vehicles, precious stones and metals, works of art, coins, or stamps.

Until relatively recently, the judicial approach was encapsulated in the observation by James LJ in *Robinson & Pickering* - "You cannot get an injunction to restrain a man who is alleged to be a debtor from parting with his property."

However, over the past 30 years the law has been developed by the judiciary to meet the needs of the commercial world by exercising the inherent jurisdiction of the Court to restrain a party from disposing of assets if this will have the effect of depriving the opposing party of the fruits of the judgment of the Court. This is done by obtaining an injunction where it is apparent that there is a risk that the defendant is going to dispose of his assets. It is only in cases where substantial sums are at stake that the procedure will be cost-effective.

An injunction for the preservation of assets once called a Mareva Injunction, took its name from *Mareva Compania Naviera SA v International Bulk Carriers*

## "A freezing order maintains the status quo"

SA. It is now called a 'freezing injunction' and is available at any time before or during proceedings, and even after judgment has been handed down by the Court. This is one of the most useful applications of the injunction because:

- it is frequently only after judgment has been given that the judgment debtor fully appreciates the need to make himself judgment proof and starts to take steps to that end
- it is no longer necessary to demonstrate the justice of the case or that the balance of convenience favours the party making an application for the freezing injunction because that has already been demonstrated in the litigation

- there will be less uncertainty over the value of the assets to be frozen because the sums have been fixed by the Court.

A freezing order obtained after judgment will protect recovery of the costs of the proceedings. When judgment is handed down by the Court, an order for costs will not have been made, but the result will be plain to the parties. The judgment debtor will know that he will probably be found liable to pay costs, but the judgment creditor will have no enforceable order for some time to come and hence no means to enforce. A freezing order maintains the status quo. It achieves fairness and justice by making sure that the judgment debtor does not evade the just outcome of the dispute.

A freezing order is not issued by the Court for the purpose of reinforcing a judgment. It does not give priority to the judgment debt or security for it. There is no reason why the debtor should not use his assets to satisfy other legitimate creditors. It does not protect the creditor applying for the injunction from the debtor's insolvency before payment or in any case of genuine insolvency. A freezing injunction is only effective against a solvent debtor intent on evading his debt or whose actions will deprive a judgment debtor of the fruits of the litigation.

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