



Neutral Citation Number: [2021] EWHC 784 (TCC)

Case No: HT-2020-000003

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Royal Courts of Justice
Rolls Building
London, EC4A 1NL

Date: 31 March 2021

Before :

MR ROGER TER HAAR QC

Sitting as a Deputy High Court Judge

Between:

FLEXIDIG LIMITED

Claimant

- and -

M & M CONTRACTORS (EUROPE) LIMITED

Defendant

Rupert Choat (instructed by **Gateley Legal**) for the **Claimant**
Phillip Patterson (instructed by **Quigg Golden Limited**) for the **Defendant**

Hearing dates: 16 March 2021

Approved Judgment

Covid-19 Protocol: This judgment will handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.30am on Wednesday 31st March 2021.

Mr Roger ter Haar QC :

1. There are before me applications on behalf of the Claimant “Flexidig”) for a worldwide freezing order and/or the appointment of a receiver.
2. Flexidig is a ground and civil engineering works sub-contractor based in Lincolnshire. The Defendant (“M & M”) is based in Northern Ireland but carries out similar work (often as main contractor) in, amongst other places, this jurisdiction.
3. In March 2017 M & M engaged Flexidig to carry out civil engineering works at Louth, Lincolnshire, where M & M had been engaged by Virgin Media to carry out underground infrastructure works.
4. The price for Flexidig’s works was based on a schedule of rates. Flexidig says that the price currently stands at £2.46m excluding VAT. M & M has made payments to date of £1,721,892.97 excluding VAT. Thus the shortfall on Flexidig’s case is over £730,000 net of VAT.
5. The procedural position between the parties has been complex.
6. In a Decision dated 16 August 2018, an Adjudicator, Mr David White, ordered M & M to pay:
 - (1) Flexidig the sum of £184,516.13 including VAT in respect of an interim payment application (Application 62) plus interest; and
 - (2) His fees of £12,993.75.
7. On 6 December 2018 the High Court of Northern Ireland (Horner J.), ordered:
 - (1) M & M to pay into court by 20 December 2018 the sum of £193,146.29 comprising the sum of £184,516.13 and accrued interest; and
 - (2) M & M to pay Flexidig the sum of £12,993.75 for Mr White’s fees which Flexidig had paid.
8. The sum of £12,993.75 is the first of the sums with which I am concerned.
9. M & M:
 - (1) Did not make a payment into court until 14 November 2019, after M & M was threatened with committal proceedings. That sum was released to Flexidig after a contested application on 17 August 2020 with an order requiring M & M to pay Flexidig’s costs of that application. On the same occasion M & M was also ordered to pay the costs of the action regarding Mr White’s decision and an action concerning the decision of another adjudicator, Mr Baldwin. Those costs on Flexidig’s case totalled £152,979.63.
 - (2) Has not paid Flexidig the sum of £12,993.75.
10. The sum of £152,979.63 is the second sum with which I am concerned.

11. There was a second adjudication to which reference is made in paragraph 9(1) above in which Mr Baldwin was the adjudicator. In a decision dated 13 December 2018 he ordered Flexidig to pay M & M an “*on account*” sum of £462,456.20 (to which VAT was not applicable). This was in respect of allegedly incomplete works and defects.
12. The Defendant sought to enforce Mr Baldwin’s decision. On 2 December 2019 the High Court of Northern Ireland (again Horner J.) declined to enforce the decision in full. In his judgment Horner J. gave two alternative reasons for this:

“[12] ... the adjudicator did obviously err as he was not entitled to award any sum on account for work to be carried out

[13] ... This clause [Clause 6] does not permit the recovery of prospective costs on account. It permits only the recovery of incurred costs either by way of a set-off or by way of recovery of the debt.

[14] Under the sub-contract the adjudicator should obviously not have produced the formulae he did to estimate the prospective costs of repair of the disputed defects. He was obviously wrong in respect of awarding a payment on account. It is agreed that the balance due in respect of the actual work is the sum of £12,679.52.

...

[16] If I am wrong on the first issue and the defendant could have enforced the award straightaway for the full amount, then once the parties entered into an agreement for a standstill to allow the plaintiff to carry out the works and the plaintiff did carry out the works, the defendant then on the face of it is estopped from enforcing the award in respect of those works in respect of which an award was made on account. So again the same result is achieved. The defendant is entitled only to the sum of £12,679.52 which I order should be paid into court. It would be unconscionable in all the circumstances for the defendant to receive more.

[17] What is required is another adjudication to assess what works have been carried out defectively or not carried out at all.

[18] Having reached a settlement that required the plaintiff to carry out what were agreed works, it would be both unfair and unjust to allow the defendant once those works had been completed to turn the clock back to enforce the earlier adjudication award in respect of those very same works...”

13. Horner J. ordered Flexidig to pay only the sum of £12,679.52 which Flexidig accepted was due. Flexidig paid this amount into court.
14. There was now a third adjudication before Mr Barry Manie. In a Decision dated 29 December 2019, he decided that:
 - (1) The value of Flexidig’s works was about £2.46m (absent a pay less notice challenging the same); but
 - (2) The “*on account*” sum of £462,456.20 awarded by Mr Baldwin should be deducted; and

- (3) After deducting monies paid, M & M owed Flexidig the sum of £223,597.21 plus VAT, plus interest.
15. Flexidig applied to this Court for enforcement of this decision. In a judgment dated 11 March 2020 ([2020] EWHC 847 (TCC)) Waksman J. ordered that the Decision should be enforced. He ordered
- (1) M & M to pay Flexidig the sum of £223,597.21 plus VAT plus interest within 14 days;
- (2) M & M to pay Flexidig's costs summarily assessed in the sum of £35,960 within 14 days.
16. There has been no compliance with those orders save to the extent arising out of these applications as set out below.
17. The sums ordered by Waksman J. to be paid are the third and fourth sums which I need to consider in this case.
18. Finally, there was a fourth adjudication, this time before Mr Stephen John. The purpose of this adjudication was to assess the value of allegedly defective and incomplete work.
19. There are points which I consider below in respect of the evidence given on behalf of M & M in that adjudication.
20. In contrast to Mr Baldwin's assessment of an "on account" amount in respect of defective and incomplete work of £462,456.20 (see paragraph 11 above), Mr John directed a deduction of £121,285.04 excluding VAT. This decision was issued on 23 June 2020.
21. As I understand the position, nothing has been done since June 2020 by Flexidig to try to use this decision as the basis for a further adjudication decision ordering payment of any specified sum to be paid. As I understand the reason for this, it is in whole or in part because, on Flexidig's case, "*Mr John's decision is tainted by doctored invoices which inflated M & M's claim*".
22. For its part, M & M commenced proceedings in the High Court of Northern Ireland in July 2020 to enforce Mr John's decision.
23. On Flexidig's calculations, if Mr. John's decision is applied to correct Mr Manie's decision, Mr Manie's decision would have been higher by more than £340,000 plus VAT (£408,000 including VAT).
24. The figure of £408,000 is the fifth sum which I need to consider in this case.

The applications in this Court

25. In January 2021 Flexidig learned that M & M was expecting an advance payment for a project near Newcastle. It decided to seek a Third Party Debt Order ("TPDO") against M & M's bank (the Allied Irish Bank).

26. On 29 January 2021 O’Farrell J. granted an interim TPDO against the Allied Irish Bank (“AIB”). The effect of the order was to freeze the sum of £329,531 held by M & M in one of M & M’s bank accounts.
27. On 5 March 2021 Flexidig issued an application seeking orders described as follows:
- “(1) a Post-Judgment Freezing Order (on notice) in the terms of the first attached order or such other terms as the Court deems fit.
- “(2) an Order in the terms of the second attached draft order or such other terms as the Court deems fit, including:
- “(a) a final Third Party Debt Order (“TPDO”), further to Flexidig’s application dated 27 January 2021 and O’Farrell J’s interim TPDO dated 29 January 2021;
- “(b) an Order in a similar vein as ordered in *Blight and others v Brewster* [2012] 1 W.L.R. 2841;
- “(c) an Order for the appointment of a receiver by way of equitable execution pursuant to section 37 of the Senior Courts Act 1981 and/or CPR Part 69.”
28. A draft of the Freezing Order sought was appended to the application. The order sought included the following:
- “3. The Respondent must not remove, or deal with or diminish the funds held on behalf of the Respondent by the Third Party in account in the sum of £329,531.00 and frozen since 3 February 2021.
- “4. The Respondent must not:
- “(a) remove from England and Wales any of his assets which are in England or Wales up to the value of £[(1) if para 3 above is ordered, the additional sums owed by the Respondent to the Applicant, namely: (1) further interest to date; (2) the costs of the Claimant applying to this Court; and (3) sums owing further to the orders of the Northern Ireland High Court (including £12,993.73 for the fees of Mr White (the adjudicator in Adjudication 1) and £152,979.63 for costs further to the two orders of 17 August 2020); or (2) if para 3 above is not ordered, the sum of £329,530.03 should be added to sum (1), producing a total in excess of £500,000].”
29. The application limited the application for the Third Party Debt Order to the sum of £329,530.03.
30. Similarly the application for “an Order in a similar vein as *Blight and others v Brewster* [2012] 1 W.L.R. 2841” was limited to “*the funds held on behalf of the Defendant by*

the Third Party in account ... in the sum of £329,530.03 and frozen since 3 February 2021”.

31. The part of the draft order dealing with appointment of a receiver included the following:

“9. That the Receiver shall not without permission of the Judge receive more than the amount required to keep down the interest upon prior incumbrances, and to provide for the allowance to the Receiver and the allowed fees and costs of obtaining this order, and to pay to the Claimant what shall be due to him in respect of the debt and costs due to him, amounting to £[(1) £329,530.03 plus further interest to date; (2) the costs of the Claimant applying to this Court; and (3) sums owing further to the orders of the Northern Ireland High Court (including £12,993.73 for the fees of Mr White (the adjudicator in Adjudication 1) and £152,979.63 for costs further to the two orders of 17 August 2020). (1) + (2) + (3) total in excess of £500,000].”
32. On 12 March 2021 these applications came before Mr Alexander Nissen Q.C., sitting as a Deputy High Court Judge.
33. In the skeleton argument for that hearing, Mr Choat, for Flexidig, indicated that it would not seek a final Third Party Debt Order. Mr. Nissen ordered Flexidig to pay M & M’s costs of the application for a Third Party Debt Order, summarily assessed in the sum of £10,213.32.
34. The end result of the hearing on 12 March 2021 in which there was not time to deal with the extant applications on their merits was that by consent a Freezing Order was made freezing the sum of £329,531 held by AIB until 11.59pm on 16 March 2021 or further order. The case was adjourned for hearing on 16 March 2021.

The parties’ positions before me

35. After the hearing on 12 March 2021, M & M’s solicitors, Quigg Golden, wrote to Flexidig’s solicitors as follows:

“Our client will pay the judgement sum of £329,531.00.

“We require your assistance to ensure that this payment is made from the frozen funds.

“This is sent in open correspondence.”
36. Following further exchanges between the solicitors, on 15 March 2021 Quigg Golden wrote as follows:

“Our client (“M&M”) is committed to paying the sums which it accepts are due to your client (“Flexidig”) and either avoiding the need for a contested hearing on 16 March 2021, or at the very least reducing the scope of the matters which remain in dispute. Flexidig’s response to these attempts thus far appears to involve

simply changing the nature and scope of what it is seeking to obtain from the Court in the Second Application.

“To be clear, M&M proposes to take the following steps at the earliest possible opportunity:

“1. To pay in full the order of Mr Justice Waksman of 11 March 2020. This is a judgment in the sum of £223,597.21 (including interest) plus VAT. Interest was ordered on this sum at a rate of 8% from 11 March 2020 to date. Costs of £35,960 were also awarded. The adjudicator’s fees to which paragraph 7 refers have already been paid by M&M. Including interest which has accrued since 11 March 2020, M&M considers the total sum payable to discharge this order is £328,898.30. This is less than the figure claimed in the application for a Third Party Debt Order. In the event that you consider a [greater] sum to be owing under the order of Mr Justice Waksman, please indicate what you consider that figure to be by return.

“2. To pay the sum of £12,993.75 ordered by Mr Justice Horner in the High Court in Northern Ireland on 13 December 2018.

“3. To pay the sum of £15,038.20 ordered by Mr Justice Horner in the High Court in Northern Ireland on 17 August 2020.

“There are two practical issues in relation to taking those steps. The first is that the sum of £329,531.00 in M&M’s account is currently frozen pursuant to the freezing order made on 12 March 2021. M&M requires Flexidig to confirm in writing that these payments can be made from the frozen funds. The second is that M&M’s account imposes a limit on the amount which can be paid out from that account in a single day. M&M, accordingly, proposes that these payments be made across a period of six days, payments on days 1-5 being used to discharge the liability under the order of Mr Justice Waksman and the liability under the order of Mr Justice Horner being paid on the sixth day.

“This leaves three matters raised in your email of 13 March 2020:

“1. By his order of 17 August 2020, Mr Justice Horner made two cost orders, one that M&M pay Flexidig’s costs of an action and an application. Both orders were made on the basis that the costs “*shall be taxed in default of agreement*”. Tughans has submitted a breakdown of those costs in the sum of £152,979. M&M will contact McIlldowies today in order to progress the discussions concerning those costs and whether taxation of them is required. M&M does not accept, however, that there is any proper basis for the High Court of

England and Wales to order any of the relief sought in the Second Application in respect of these sums.

“2. The further sum of (circa) £340,000 now being claimed by Flexidig. It is noted that this alleged debt does not arise from any court order at all, no relief was sought in respect of it in Flexidig’s submissions made before the hearing [on] 12 March 2021 and, indeed, arises from Flexidig now disputing the adjudication decision on which the order of Mr Justice Waksman was based (Adjudication 4). In the circumstances, M&M does not accept that there is any proper basis for granting any of the relief sought in the Second Application in respect of this sum.

“3. The costs of the Second Application. M&M has already raised a number of issues in relation to Flexidig’s conduct in relation to bringing and pursuing the Second Application. M&M does not accept that it is liable to pay Flexidig’s costs of the second Application and strenuously challenges the quantum of such costs which are, on any view, excessive.

“In light of these matters, Flexidig is invited to confirm by return that it will accept and facilitate the payment of the £356,930.25 set out above across a six day period and that payments may be made from funds which are presently frozen pursuant to the order of 12 March 2021. Flexidig is also invited to confirm that it will not seek any orders from the Court at the hearing on 16 March 2021 in respect of either the untaxed costs orders of the High Court in Northern Ireland of the £340,000 now claimed in relation to £340,000.”

37. This letter represented the position which was advanced before me on behalf of M & M.
38. For its part, Flexidig sought a freezing order and/or the appointment of a receiver to secure and/or gather in the sums referred to in each of the six categories in the numbered paragraphs in Quigg Golden’s letter.
39. The Third Party Debt Order application had been abandoned before Mr. Nissen, as I have indicated, and the application for “an Order in a similar vein as *Blight and others v Brewster* [2012] 1 W.L.R. 2841” was not pursued before me.
40. The amounts in respect of which relief is claimed can be grouped as follows:
 - (1) Liquidated sums the subject of orders for payment in this Court;
 - (2) Liquidated sums the subject of orders for payment in the High Court of Northern Ireland;
 - (3) A sum in respect of costs of proceedings in the High Court of Justice in Northern Ireland yet to be quantified by that Court;

- (4) A sum in respect of which there is no judgment, arbitration award or adjudicator's decision ordering payment.
 - (5) A potential costs order to be made in this Court in respect of the costs of the applications before the Court.
41. It is convenient to consider first the application for a freezing order and then consider the application for the appointment of a receiver.

Requirements for making a freezing order

42. Summarising general principles, dealing with domestic freezing orders, the court may grant an application for an injunction freezing the respondent's assets within the jurisdiction where the following matters are established:
- (1) the claimant has a good arguable case on a substantive claim over which the court has jurisdiction;
 - (2) the defendant has assets within the jurisdiction;
 - (3) there is a real risk of dissipation or secretion of assets which would render the claimant's relief nugatory;
 - (4) it is just and convenient in all the circumstances of the case to grant the relief.¹
43. The court also has jurisdiction to grant freezing orders in support of foreign proceedings which can extend to assets outside this jurisdiction (a "Worldwide Freezing Order" or WFO). In the White Book 2020² the following guidance is given in respect of the grant of WFOs:

"The granting of a freezing injunction is a matter for the discretion of the judge hearing the application. In the exercise of this discretion, in the context of English proceedings the court may grant an application for a WFO where the following matters are established:

"(1) the claimant has a good arguable case;

"(2) the claimant has satisfied the court –

"(a) that there are no assets or insufficient assets within the jurisdiction to satisfy his claim; and

"(b) that there are assets without the jurisdiction; and

"(3) there is a real risk of dissipation or secretion of those assets so as to render any judgment which the claimant may obtain nugatory.

¹ See paragraph 15-65 of Section 15 in Volume 2 of the White Book 2020.

² Paragraph 15-83 of Section 15 of Volume 2

“In addition, in exercising its discretion the court should consider whether undertakings or provisos, or a combination of both, should be requested or imposed for the purpose of protecting the defendant from oppression and for protecting the position of foreign third parties.

“The English court’s jurisdiction to grant applications for interim injunctions in support of foreign proceedings includes power to grant a WFO. Generally, the court will only be prepared to exercise its discretion to grant this relief in such circumstances if the respondent or the dispute has a sufficiently strong link with England and Wales; for detailed explanation of this point, see *Mobil Cerro Negro Ltd v Petroleos de Venezuela SA* [2008] 1 Lloyd’s Rep. 684 (Walker J) at paras 86 to 119 (refusing application for WFO in support of intended arbitration in New York). There will always need to be a careful examination of any proposed part of the order which would tend to run counter to principles of comity with courts in other jurisdictions (ibid).”

44. Specifically in respect of post-judgment WFOs, the White Book 2020 advises³:

“The arguments against granting an injunction extending to assets outside the jurisdiction are much weaker in a case where judgment has been obtained than in a case where an interlocutory order is sought before trial (*Babanaft International Co SA v Bassatne*, op. cit. per Kerr LJ, and Neill LJ, and *Republic of Haiti v Duvalier* [1990] 1 Q.B. 202; [1989] 1 All E.R. 456 at 465, CA, per Staughton LJ). In the former situation the court is no longer so concerned to protect the defendant.”

45. As unusual feature of this case is that Flexidig seeks a freezing order over assets within and outside this jurisdiction in respect of judgments inside and outside the jurisdiction, in respect of quantified and unquantified liability under court orders and in respect of a claim in respect of which there is no judgment, arbitration award or adjudicator’s decision ordering payment.
46. These features require consideration of the application of the above principles to each of the sums as to which relief is sought.
47. One issue which permeates all the relief claimed is whether there is a risk of dissipation of M & M’s assets. Mr Patterson for M & M emphasises that the question is not simply whether a judgment will remain unsatisfied: what is crucial is whether there is a real risk of dissipation or secretion of assets so as to render any judgment which the claimant may obtain nugatory (see paragraph 15-83 of Volume 2 of the White Book 2020 set out above).
48. In *Chorus Group v Berner (BVI) Ltd & Anor* [2006] EWHC 3622 (TCC) a freezing order was granted before judgment had been entered against the defendant. The case

³ Paragraph 15-85 of Section 15 of Volume 2

concerned an adjudicator's decision and a settlement agreement regarding payment of the sum awarded by the adjudicator.

49. Ramsey J held as follows at [19]-[22]:

"[19] The question which is central in this case is whether the applicant has shown a real risk of dissipation. In The Niedersachsen [1983] 2 Lloyd's Rep. 600 at 617, Kerr LJ characterised the test in respect of dissipation of assets in this way:

"In our view the test is whether, on the assumption that the plaintiffs have shown at least 'a good arguable case', the court concludes on the whole of the evidence then before it, that the refusal of a Mareva injunction would involve a real risk that a judgment or award in favour of the plaintiffs would remain unsatisfied."

"[20] Kerr LJ then cited a number of authorities from which he derived that proposition, including Third Chandris v. Unimarine [1979] 2 Lloyd's Rep. 184, in which Lord Denning at 189 referred to difficulties of foreign companies and their incorporation and said:

"In such cases the very fact of incorporation there gives some ground for believing there is a risk that, if judgment or an award is obtained, it may go unsatisfied...."

"[21] Kerr L.J. then continued in The Niedersachsen at 618 to cite from the following cases:

"(1) Montecchi v. Shimco (U.K.) Ltd., [1980] 1 Lloyd's Rep. 50; [1979] 1 W.L.R. 1180:

"... the basis of the Mareva injunction is that there has to be a real reason to apprehend that if the injunction is not made, the intending plaintiff in this country may be deprived of a remedy against the foreign defendant whom he seeks to sue" [per Lord Justice Bridge at pp. 52 and 1183.]

"(2) Barclay-Johnson v. Yuill. [1980] 1 W.L.R. 1259:

"... it must appear that there is a danger of default if the assets are removed from the jurisdiction. Even if the risk of removal is great, no Mareva injunction should be granted unless there is also a danger of default" [per Sir Robert Megarry, V.C. at p. 1265.]

“(3) Rahman v. Abu-Taha, [1980] 2 Lloyd's Rep. 465; [1980] 1 W.L.R. 1268:

"So I would hold that a Mareva injunction can be granted against a man even though he is based in this country if the circumstances are such that there is a danger of his absconding, or a danger of the assets being removed out of the jurisdiction or disposed of within the jurisdiction, or otherwise dealt with so that there is a danger that the plaintiff, if he gets judgment, will not be able to get it satisfied."

“[22] Steven Gee, QC in his book on Commercial Injunctions (4th Edition) deals with this requirement at paragraph 12-039. He lists nine factors which may be relevant to the question of whether there is a real risk of dissipation. He emphasises that unsupported statements are not enough, but says that if there is a good arguable case [that] a respondent has acted with an unacceptably low standard of morality, giving rise to a feeling of uneasiness about him, then it is often unnecessary for there to be any further specific evidence on risk of dissipation.”

50. I was referred to the seventh edition of Mr. Gee's book. The nine factors to which Ramsey J. referred in paragraph [22] of the above judgment are now to be found in paragraph 12-041 of the seventh edition:

“The defendant is not obliged to put in evidence in response, is not obliged to provide any explanation or answer any questions posed, and nor can a purported failure to do so be held against him. It is only if the applicant has raised material from which a real risk of dissipation can be inferred, that the defendant will be expected to provide an explanation. For there to be an adverse inference from the absence of explanation there must be “...an inference to be displaced...”

“Since each case depends on its own facts and the court looks at the totality of the evidence, it is impossible to lay down any general guidelines on satisfying this burden, but some of the factors which may be relevant are as follows:

“(1) The nature of the assets which are to be the subject of the proposed injunction, and the ease or difficulty with which they could be disposed of or dissipated. Risk of dissipation will not be established in relation to an asset which is unsaleable and where its value cannot be realised.....

“(2) The nature and financial standing of the defendant's business

“(3) The length of time the defendant has been in business. Stronger evidence of potential dissipation will be needed where the defendant is a long-established company with a reasonable market reputation than where little or nothing is known or can be ascertained about it.

“(4) The domicile or residence of the defendant. At one time, Mareva injunctions were granted to prevent only foreign defendants from removing their assets from the jurisdiction to defeat a judgment or arbitration award. While the jurisdiction has widened to include domestic defendants, the court will be less ready to infer that a defendant who is based in England, and has a home or established business here, will remove or dissipate his assets....

“(5) If the defendant is a foreign company, partnership or trader, the country in which it has been registered or has its main business address, and the availability or non-availability of any machinery for reciprocal enforcement of English judgments or arbitration awards in that country. If such machinery does exist, the length of time it would take to implement it may be an important factor.

“(6) The defendant’s past or existing credit record. A history of default in honouring other debts may be a powerful factor in the claimant’s favour – on the other hand, persistent default in honouring debts, if it occurs in a period shortly before the claimant commences his action, may signify nothing more than the fact that the defendant has fallen upon hard times and has cash-flow difficulties, or is about to become insolvent. The possibility of insolvency does not justify the granting of Mareva relief. As a factor it may weigh against it, on the grounds that an injunction would be oppressive because it might deprive the defendant of a last opportunity to put his business affairs in good order again. The fact that a Mareva injunction has been granted over the defendant’s assets may well discourage a bank or other company from lending him money or otherwise coming to his aid.

“(7) Any intention expressed by the defendant about future dealings with his English assets, or assets outside the jurisdiction. A threat to dissipate assets is indicative of risk of dissipation, and will not be protected by “Without Prejudice” privilege because of the unambiguous impropriety exception, based on abuse of a privileged occasion.

“(8) Connections between a defendant company and other companies which have defaulted on arbitration awards or judgments

“(9) The defendant’s behaviour in respect of the claims, including that in response to the claimant’s claims: a pattern of evasiveness, or unwillingness to participate in the litigation or arbitration, or raising thin defences after admitting liability, or total silence, or promises to pay and persistent defaults with implausible excuses, or running up liabilities and not paying them, or incurring liabilities beyond his means, or transferring assets or engaging in other conduct which may prevent enforcement. An offer of an undertaking may indicate absence of risk. Failure to give proper disclosure of assets under a court order is indicative of risk.

“Mere unsupported statements to the effect that the deponent to an affidavit fears that assets may be dissipated do not comply with the requirements of CPR PD 32 (Evidence) para 4.2, can be of no evidential weight and do not satisfy the requirement of evidence of risk of dissipation.”

51. In my judgment whilst no such list of factors can be exhaustive, this is a helpful check list of factors.

The nature of the assets over which the freezing order is sought

52. The application when issued was supported by an affidavit from Flexidig’s Managing Director, Mr Alistair Bett.
53. His affidavit makes it clear that what triggered the application was the discovery that M & M was engaged to carry out works near Newcastle on a prestigious project for a Norwegian company called NO-UK. The purpose of the project is to provide access for the UK and USA to data centres in Nordic countries, where the climate and green energy provide cooling.
54. He also established that M & M had monies in an account or accounts with AIB at its Belfast branch.
55. In his witness statement Mr Bett also draws attention to M & M’s filed accounts for the year ended 31 October 2019, filed on 30 October 2020, which indicate that M & M is still a going concern and at that time had net assets of £1,353,132.
56. Those accounts show that at that date M & M had relatively limited cash (less than the amounts owed to Flexidig) and that the assets consisted mainly of “trade and other receivables.”
57. I have an affidavit from M & M’s Chief Executive Officer, Mr Gareth Loye. He says in that affidavit:

“32. I have addressed this in my evidence in relation to the First Application, but would summarise the position as follows:

“32.1 M&M was incorporated in Northern Ireland;

“32.2 Its registered office is in Northern Ireland;

“32.3 It is operated primarily from Northern Ireland;

“32.4 It carries on the majority of its business in Northern Ireland or the Republic of Ireland.

“33. It is for this reason that M&M’s bank accounts were all opened at branches either in Northern Ireland or in the Republic of Ireland. It has not opened any bank accounts at branches in England and Wales because it has no need to do so. It has no assets within the jurisdiction of England and Wales because it has never accumulated any assets there. It has not, to the best of my knowledge, recently transferred any assets from England and Wales to Northern Ireland. Each of these matters are true because M&M is a Northern Irish company and not because it has ever consciously sought to keep assets out of the jurisdiction of the High Court of England and Wales.”

58. In my view the evidence shows that M & M is a cash-based business whose centre of gravity is on the island of Ireland but with a substantial part of its business in England, particularly the NO-UK contract.
59. There is nothing in the location of M & M’s assets to suggest that there is a risk of dissipation of those assets, although any earnings from projects in this country will, entirely legitimately, be received in M & M’s Northern Ireland bank account.

The nature and financial standing of M & M’s business

60. Other than the fact that M & M’s business is cash based, which makes disposal of its principal asset relatively easy, there is nothing in the nature or financial standing of M & M’s business to suggest that there is a risk of dissipation of M & M’s assets.

The length of time M & M has been in business

61. M & M was incorporated on 10 September 2012.
62. It was suggested on behalf of Flexidig that this was a factor which I should take into account in support of making the order sought. I do not accept that submission. Whilst M & M is not a particularly longstanding company, it is not newly created, and I can see no connection between the length of time it has been in business and the risk of dissipation of assets.

The domicile of M & M

63. M & M is a Northern Irish company.
64. There is evidence before me that principally because of Covid created problems there are delays in enforcement procedures in Northern Ireland. This is not a problem of M & M’s making, nor is there good evidence to suggest that M & M is using such difficulties to enable it to dissipate its assets.

M & M's past or existing credit record

65. Here Flexidig is on much stronger ground.
66. Mr Bett gives evidence that M & M has been the subject of two recent winding up petitions. Whilst one was dismissed, the other is extant, although Mr Loye says M & M is seeking to get that also dismissed.
67. Mr Bett also gives evidence of a sub-contractor to M & M having to resort to serving a statutory demand and of M & M's failure to pay sums due to some of the adjudicators.
68. This pattern of behaviour has not been explained by M & M.
69. Whilst not in itself determinative of M & M's intention to dissipate assets, this pattern is something which I take into account.

M & M's statement of intent

70. In Mr Bett's affidavit he says this:

“37. We sought to address the matters for which Mr Baldwin had ordered the on account payment.

“38. I gave evidence on this in my affidavit to the Northern Ireland High court dated 20 November 2019, at paragraphs 13-29.

“39. In summary, M & M issued several spurious stop work notices (which as the name suggests forced us to stop work immediately), which we robustly challenged.

“40. Much of our work was signed off by the local authority, Lincolnshire County Council. While it was Virgin Media who engaged M&M, Lincolnshire County Council was the owner of the footpath/road assets in which we were excavating. Therefore the Council had final say on the quality of our works.

“41. Virgin Media and Lincolnshire County Council seemed happy with our works.

“42. Unfortunately M & M's Chief Executive, Gareth Loye, was not happy, as we were diminishing M&M's claim against Flexidig.

“43. Mr Justice Horner referred to what happened in his judgment on 2 December 2019 He stated at paragraph 6 of his judgment:

“Mr Lloye [sic – Loye] of the defendant on 28 August 2019 allegedly told Mr Bett of the plaintiff that he could not allow the plaintiff to proceed with any remedial work because it was diminishing the value of the adjudication award and that he

intended to instruct other contractors presumably to run up costs until the plaintiff was “buried.” Mr Lloye’s response to this allegation from the plaintiff was, to put it as neutrally as possible, anodyne.”

“...

“45. I understand Mr Loye’s threat to bury Flexidig as a threat to force us into liquidation so that M&M did not have to pay us the sums due for our work. As I have indicated above, in late 2018 M&M had relied upon Flexidig’s then financial position to avoid paying out the sum ordered in Decision 1.

“46. Against the above background we sought to negotiate a settlement with M&M.

“47. The settlement discussions went nowhere. Mr Loye said that if I did not agree to no further payments by M&M he would create costs so that the dispute never ended and Flexidig would go bust. I would later see in Spring 2020 just how far M&M was prepared to take this – by doctoring invoices to inflate the costs claimed for addressing defects in our works.”

71. Mr Loye does not deny making the threat to bury Flexidig, but says that it was in the context of a without prejudice conversation. Further he says in respect of Mr Bett’s suggestion that M & M was threatening to force Flexidig into liquidation:

“13. I find this allegation particularly surprising in the current context because I do not understand how the liquidation of Flexidig could possibly benefit either me personally or M&M. The dispute between Flexidig and M&M has persisted for a considerable period and has not yet concluded. I understand that if Flexidig were to enter liquidation (or some other insolvency process) M&M would still be liable for any debts owed to Flexidig and could be pursued by the liquidator (or other office-holder) to recover those debts.

“14. Conversely, if Flexidig entered liquidation, M&M would, in my experience, be faced with limited prospects of recovering anything from the liquidation as an unsecured creditor in respect of liabilities from Flexidig to M&M.

“15. In fact, not only do I expressly hope that Flexidig remains solvent, I am particularly concerned, on behalf of M&M, that Mr Bett intends, over the coming months, to liquidate Flexidig and to transfer its business and assets to another company.”

72. In relation to the ninth of Mr Gee’s listed factors, I refer to some other aspects of this case which are more than a little concerning. It has to be said that if the intent of M & M was to avoid Flexidig going into liquidation it adopted a somewhat clumsy way of attempting to achieve its objective.

73. On the evidence before me, I am satisfied that the threat to bury Flexidig was made and that there was a further threat to create costs so that the dispute never ended and Flexidig would go bust.
74. Whilst these matters are not determinative, they are matters which I can take into account in assessing whether there is a risk of dissipation of assets.

Connections between M & M and other companies

75. Mr Gee's eighth factor is not relevant.

M & M's behaviour in respect of the claims

76. This is where Flexidig is on the strongest ground.
77. The first point is that the history of the proceedings themselves, and particularly M & M's failure to honour successive court judgments, show at the least a marked reluctance on M & M's part to pay what is due to Flexidig.
78. Secondly, and more seriously, Flexidig alleges that M & M has been guilty of "doctoring" invoices.
79. It is Flexidig's allegation that in the adjudication before Mr Stephen John M & M presented invoices which were false. Mr Choat took me through two sets of documents, one concerning invoices from or purporting to come from a sub-contractor, MGM, and the other set concerning invoices from or purporting to come from a consultant, Mr Nigel Daly.
80. Mr Loye strongly denies that there was any dishonesty in connection with these or any other invoices.
81. It would be inappropriate for me to reach a conclusion one way or the other as to whether M & M was guilty of dishonesty. However I do come to the conclusion that there is a good arguable case that falsely doctored invoices were presented to Mr John for the purpose of increasing the amount which Mr John would find due from Flexidig to M & M. In coming to that conclusion I accept that paragraphs 87 to 96 of Mr Choat's skeleton argument demonstrate a strongly arguable case to that effect.
82. It follows from that conclusion that I also come to the conclusion that it is strongly arguable that Mr Loye was not telling the truth about the invoices in his affidavit. I emphasise that in due course it may be found that there was no dishonesty and that Mr Loye has been truthful, but I have no hesitation in finding that a strongly arguable case has been made out.
83. I have already cited a significant part of Mr Gee's book, but in this context the following passage at pages 451 to 454 is relevant:

"Good grounds for alleging that the defendant has been dishonest is relevant, taking into account any answers to the allegations. If and to the extent the substantive claims cast any light on the risk of dissipation, the fact that a defendant has respectable defences to those claims has a bearing on the

existence of a real risk of dissipation. Dishonesty is not essential to the exercise of the jurisdiction and there is no need to show an intention to dissipate assets. But if there is a good arguable case in support of an allegation that the defendant has acted fraudulently or dishonestly (e.g. being implicated in an ingenious scheme for the misappropriation of funds belonging to the claimant), or with an unacceptably low standard of commercial morality, whether dishonest or not, giving rise to a feeling of uneasiness about the defendant, then it is often unnecessary for there to be any further specific evidence on risk of dissipation for the court to be entitled to take the view that there is a sufficient risk to justify granting Mareva relief. For this the dishonesty or other misconduct must be relevant to risk of dissipation, pointing to the conclusion that assets may be dissipated. Not every act of dishonesty is relevant to this. Once the risk of dissipation is shown, the limit of the Mareva relief will take into account claims for which the claimant has a good arguable case, including those which do not involve such an allegation.”

Conclusion as to risk of dissipation

84. In my judgment Flexidig has made out its case that there is a risk of M & M disposing of its assets so as to avoid making payment to Flexidig of sums due to it.
85. In reaching that conclusion I am conscious that so long as M & M channels the receipts from its projects through its AIB accounts there is little opportunity for M & M to do so. However the lengths to which M & M has gone to avoid paying Flexidig sums found due and its arguable history of dishonesty coupled with M & M’s history of non-payment to others and the threats made in respect of Flexidig persuade me that the risk of dissipation is made out in this case.
86. I turn now to consider the sums in respect of which relief is sought.

The sums in respect of which judgment has been given and conceded by M & M

87. I have set out at paragraph 36 above the contents of Quigg Golden’s letter of 15 March 2021. That sets out an intention to pay the following sums “at the earliest possible opportunity”:
- (1) The sum of £223,597.21 plus VAT (£44,719.44) for which Waksman J. gave judgment;
 - (2) The interest ordered on the above;
 - (3) Costs of £35,960 ordered by Waksman J.;
 - (4) The sum of £12,993.75 ordered by Horner J in the High Court in Northern Ireland on 13 December 2018;

- (5) The sum of £15,038.20 ordered by Horner J. in the High Court in Northern Ireland on 17 August 2020.
88. In light of the principal sums listed in Quigg Golden’s letter of 15 March 2021 and the proposal therein to pay the sum of £356,930.25, I have concluded that M&M has conceded a liability to pay interest in respect of the judgment debts listed at paragraph 87 above in the sum of £24,681.65.
89. On my calculations this comes to a total of £356,930.25.
90. What I am asked to do is to grant relief in respect of assets principally outside this jurisdiction and in part the subject of a judgment of a court outside this jurisdiction. It is clear from the passages in the White Book that I have set out above that I have jurisdiction to grant such relief.
91. In deciding whether or not to grant such relief, I am assisted by authority.
92. In *Great Station Properties SA v UMS Holdings Ltd* [2017] EWHC 3330 (Comm), Teare J said the following at [63] in the context of a Worldwide Post-Judgment Freezing Order:
- “These dicta all show that the policy of the law is to enforce judgments (and particularly so where the judgment enforces a London arbitration Award) so that freezing orders can, in an appropriate case, be granted after judgment. They also show that such orders may more readily be made after judgment than before. That may be because it is easier to infer a risk a dissipation. Thus, in *Distributori Automatici Italia v Holford General Trading* [1985] 1 WLR 1066 at p.1073 Leggatt J. cited with approval the dictum of Farquharson J. in *Orwell Steel v Asphalt and Tarmac* [1984] 1 WLR 1097 that "in one sense it could be said that there is greater justification for restraining a defendant from disposing of his assets after judgment than before any claim has been established against him." Leggatt J. agreed that "grounds for believing that the judgment debtor would dispose of his assets before execution might perhaps be more readily established after judgment than before." It may also be because factors which are said to weigh against the making a freezing order (for example delay or the absence of assets within this country and the presence of related proceedings in another jurisdiction, two of the factors relied upon in this case) have less weight where judgment has already been obtained. **In circumstances where judgment has been given and there is solid evidence of a real risk of dissipation there would have to be particularly strong grounds for refusing freezing order relief.**” (emphasis added)
93. Mr Choat submits, and I agree with his submission, that with regard to “*particularly so where the judgment enforces a London arbitration Award*” the same goes for a judgment enforcing an adjudicator’s decision (especially one requiring payment in

respect of a payment application, ie. triggering the payment regime in the Housing Grants, Construction and Regeneration Act 1996).

94. In *National Bank Trust v Yurov* [2021] EWHC 164 (Comm) Daniel Toledano QC sitting as a Deputy High Court Judge referred to the following principle regarding freezing orders at [16]:

“... in a post-judgment context, the policy of the law weighs heavily in favour of the enforcement of judgments. This is clear from the decision of the CA in *Emmott v Michael Wilson & Partners Ltd* [2019] 4 WLR 53, at paragraphs 44 and 53-56 (Gross LJ).”

95. I have no hesitation in deciding that a freezing order is justified in respect of the sum of £356,930.25, subject to matters to which I refer below.

The Order for Costs in the High Court of Northern Ireland

96. By his order of 17 August 2020, Horner J. made two costs orders on the basis that the costs should be taxed in default of agreement.
97. Unlike what would be usual practice in this court, Horner J. made no order for any payment on account of those costs.
98. On 18 September 2020 Flexidig’s solicitors, Tughans submitted a breakdown of the costs claimed in the sum of £152,979. There was no response from M & M to that until 15 March 2021.
99. I am satisfied that it is right that the relief I grant should extend to encompass some part of the outstanding costs, but I do not think it would be right to grant relief in the full amount of £152,979.
100. I have no evidence as to what the approach of the Northern Ireland courts is in taxing costs and I have no information to enable me to judge even what an English court would regard as a reasonable sum.
101. In those circumstances I take what I regard as a conservative figure, namely £100,000.

The sum of £340,000 plus VAT claimed

102. The basis upon which this figure is justified is set out at paragraphs 23 and 24 above.
103. If I understand the history of this matter correctly, the first time that it was suggested that the order should extend to this amount was after the hearing before Mr Nissen on 12 March 2021. Certainly it is not something that is encompassed by the application itself which I have set out at paragraphs 27 and 28 above.
104. I think it would be wrong to allow the scope of the order sought to be expanded at this late stage.

105. Further it is material that there has not been any decision holding that this sum is due to Flexidig, and it is clear that there is a substantial argument as to what figure is due from M & M to Flexidig.

106. For these reasons the freezing order will not extend to reflect any part of this sum.

Costs of this application

107. Flexidig wishes to have the freezing order extend to the costs of the application before me.

108. I will consider whether this is appropriate when I have heard submissions as to costs.

Credit for payments made

109. When the matter came before me, there was already in place the freezing order which had been made by consent on 12 March 2021. M & M's position was that it wished to make payments to Flexidig, but this was prevented by the freezing order.

110. Flexidig's position was that it wanted the monies secured by the freezing order to be paid into court. The reason for this was that Flexidig wished to reserve its position as to how the money should be appropriated.

111. After discussion before the court a fresh freezing order was made which was varied to allow payments to be made without prejudice as to how it should be appropriated.

112. It seems to me likely that payments will have been made by the time that this judgment is handed down. The amount which I have held should be secured is £456,930.25, but this will be reduced by the amount of any payments already made.

Business expenses are not allowed for

113. In respect of pre-judgment freezing orders it is customary for there to be a carve out for the ordinary business expenses of the business which is the subject of the order: it is by no means necessarily the same in respect of post-judgment orders.

114. In this case I have no evidence upon which to base any such exception. If M & M wish such a provision to be included it would need to be the subject of evidence demonstrating the amount for which allowance is sought.

Receivership

115. In my judgment this is not an appropriate case for the appointment of a receiver in addition to the grant of a freezing order.

116. As Mr Gee says in paragraph 16-008 of his book in respect of the appointment of a receiver:

“The nature of the remedy is more intrusive, more expensive, and less reversible than the granting of an injunction. The receiver has to be paid. The defendant no longer has control of

the assets. Irreparable damage may be done to the business of the defendant through the publicity”

117. I have pointed out above that M & M has declared its intention of making payments in excess of £328,000. If that has by now happened, then the amount being secured would be of the order of £145,000. In my view the freezing order is a sufficient form of relief: to appoint a receiver would be disproportionate for the reasons set out by Mr Gee.