Neutral Citation Number: [2022] EWHC 2047 (Comm)

Case No: CL-2017-000433

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, Fetter Lane
London, EC4A 1NL

Date: 29/07/2022

Before :

CHRISTOPHER HANCOCK QC
(Sitting as a Judge of the High Court)

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Between :

LENKOR ENERGY TRADING DMCC	**Claimant**
- and -	
IRFAN IQBAL PURI	**Defendant**

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- -

Philip Jones (instructed by **Mackreil Turner Garrett**) for the **Claimant**
Nigel Cooper QC (instructed by **Hill Dickinson LLP**) for the **Defendant**

Hearing dates: 29 March 2019

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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:00 on Friday 29 July 2022

Christopher Hancock QC :

Introduction

1. The Claimant originally brought this action to obtain an interim freezing injunction and associated disclosure orders in support of proceedings brought against the Defendant in Dubai. An order was made on 11 July 2017 by HHJ Waksman QC (as he then was).

2. The Claimant has obtained judgment against the Defendant in Dubai for the sum of about £26,000,000 and now seeks to enforce that judgment in this jurisdiction using the common law. The Claimant commenced an action in debt against the Defendant on 17 January 2019 (claim no. QB-2019-000183) ("the Action") some five months after the decision of the Dubai Court of Cassation on 05 August 2018. The claim form in the Action was served on the Defendant on 08 March 2019. I was told that service was acknowledged on 29 March 2019.

3. This Court now has before it various applications by the Claimant:

    a) To continue the interim freezing injunction;

    b) To remove the "Angel Bell exception";

    c) To remove the requirement that the Claimant fortify its cross undertaking in damages, in the sum of £100,000;

    d) For a Bankers' Books Inspection Order.

The Applications to extend the Freezing Injunction.

4. The Defendant did not seek to discharge the freezing injunction but noted that in any event the Order of Mr. Justice Bryan dated 18 October 2017 continues until further order of the Court. In these circumstances the parties agreed that I did not need to make any further order.

The application to remove the Angel Bell exception.

5. The Defendant opposed the Claimant's request to remove paragraph 11(b) from the Ex Parte Order (ie to remove the so called "Angel Bell" exception). Paragraph 11(b) is the exception which permits the Defendant to deal with or dispose of his assets in the ordinary and proper course of business.

6. Mr Cooper QC, on behalf of the Defendant, made two submissions in this regard:

    a) First, the application was premature, since the Claimant had not yet obtained a judgment in England. The Dubai judgment is not enforceable in its own right in this jurisdiction. The Claimant will not have an enforceable judgment in this jurisdiction unless and until it obtains judgment in the Action. It is trite law that a foreign judgment has no direct operation in England & Wales and will be enforceable as a claim or counterclaim at common law or under statute; see *Dicey, Morris & Collins on Conflict of Laws*, 15th ed. at §14R-001. The Claimant rightly recognises that there is no statutory regime which permits enforcement

of its Dubai judgment and has therefore brought a claim at common law. However, that claim is so new that the Defendant's time to acknowledge service had not expired as at the date of the application.

b) Even if the Claimant were to obtain a final enforceable judgment in this jurisdiction, this exception should not be removed. The effect of removing the exception would be to prevent the Defendant carrying on business and to treat the Claimant as a preferential or secured creditor. It is trite law that a freezing injunction, whether in a final or interim form, is not intended to provide a claimant with any proprietary or preferential interest in the assets of a defendant. The authorities confirm that removing the 'course of business exception' is not therefore usual post-judgment particularly where there is no as yet enforceable judgment; see *Gee on Commercial Injunctions*, 6th ed at §21-037 and Mobile Telesystems Finance SA v. Nomihold Securities Inc [2011] EWCA Civ 1040, [2012] 1 Lloyd's Rep. 6 at [33] and [37] – [40].

7. Mr Jones, for the Claimant, submitted that it would be appropriate for me not to continue this exception "post judgment", for various reasons:

a) There is no evidence that its absence would embarrass or hinder the Defendant in any way.

b) The Defendant has made no effort whatever to satisfy the Dubai judgment and he has proved evasive in relation to service/acknowledgement of the QBD claim to enforce the judgment, particularly the refusal of couriered documents and the complete lack of any response notwithstanding the likelihood that the proceedings would have come to the Defendant's attention by one or other of the alternative means adopted.

c) There was a history of a troubling shifting of assets.

d) The Defendant had, it is said, a history of dishonesty/lack of probity.

e) The Defendant was in breach of the WFO which has led to the necessity of seeking disclosure from the banks.

8. I start with the decision in *Nomihold*. That was a case where there was an arbitration Award, in relation to which the Court had given permission to enforce as a judgment of the Court, but subject to a liberty to apply. This was described by Counsel as a judgment nisi.

9. Tomlinson LJ considered that where there was such a judgment, then in principle the Angel Bell provision should be retained. He said:

> "33 In Masri v Consolidated Contractors [2008] EWHC 2492 (Comm) I was persuaded to omit an ordinary course of business exception in relation to a freezing order in respect of sums in various of the judgment debtor's bank accounts. The evidence showed positively that the absence of such an exception had

caused no disruption to the judgment debtor's business. I referred at paragraphs 24 and 35 of my judgment to a passage from the judgment of Colman J in *Soinco v Novokuznetsk Aluminium Plant [1998] QB 406* . That case was concerned with the appointment of a receiver by way of equitable execution. At page 421 (not 412 as recorded in paragraph 35 of my judgment) Colman J said this:—

"As to bringing the business of the judgment debtor to a standstill by cutting off payment otherwise available to it, I am not persuaded that this is a relevant consideration in the context of a remedy designed to effect execution and not designed merely to conserve assets pending determination of an unresolved claim. This is not the environment of a Mareva injunction prior to trial, but of execution of a pre-existing judgment. Whereas the effect of an injunction on the defendant's ability to conduct his business in the ordinary course may be relevant where his liability is yet to be determined, it cannot possibly be a relevant consideration where his liability has already been determined. Impact on the judgment debtor's business is not a consideration material to the availability of legal process of execution and there is no reason in principle why it should be introduced as material to the availability of equitable execution."

On further reflection, I am not sure that those observations do apply a fortiori to a post-judgment freezing injunction, as I said in paragraph 35 of my judgment in Masri . As I have already noted, a post-judgment freezing order is granted in aid of execution but it is not part of the process of execution itself. In that same paragraph I said:—

"In any event I am satisfied that in relation to assets such as balances in bank accounts an "ordinary course of business" exception is inappropriate in the post-judgment environment."

Again, on further reflection, it may be that that is too sweeping a statement, although I am sure that the ordinary course of business exception was inappropriate in relation to balances in bank accounts in the circumstances of that case. I am satisfied that it will sometimes and perhaps usually be inappropriate to include an ordinary course of business exception in a post-judgment asset freezing order. Of course, its omission would not preclude an application to vary or discharge. …

…37 Thus both as a matter of principle and on authority it seems to me that a freezing order granted in aid of enforcement of an arbitration award ought ordinarily to contain an ordinary course of business exception. There is no basis upon which one contractual claimant should be able to prevent the satisfaction of the claims of others in a similar position. I am not satisfied that

> the circumstance that Nomihold is also in the sense described a judgment creditor should lead to any different conclusion.
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> 38 The second conclusion I would reach is that, in the present circumstances, it cannot be said that payment by MTSF of the interest due to Noteholders would amount to dissipation of assets by it with the object or effect of denying Nomihold satisfaction of its claim. Still less can it be said that the payment of interest by MTSF, if made, would be with a view to avoiding execution of the award since execution is presently unavailable. MTSF is simply seeking to discharge an obligation which has fallen due in the ordinary course of its business. I can see no principled basis upon which it can properly be restrained.
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> 39 I agree with Mr Flynn that it is not open to Nomihold to characterise the conduct of MTSF as an attempt to prefer some creditors over others at a time when its solvency is in doubt, but even if that were a proper characterisation, as Aldous LJ pointed out in Camdex it is not the function of the freezing order jurisdiction to confer a preference for repayment from an insolvent party.
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> 40 The judge treated the position of MTSF as being analogous to that of an ordinary judgment debtor and in my view that was the wrong approach. In my view this was a case where an ordinary course of business exception would usually be appropriate. It follows that the judge exercised his discretion on a flawed basis and that we must consider the matter afresh."

10. In that case, therefore, the Court of Appeal considered that the fact that there was no final enforceable English judgment meant that the Angel Bell exception should be retained.

11. Both Counsel also referred me to the decision of the Court of Appeal in *Emmott v Wilson* [2019] EWCA Civ 219 as the most recent guidance on this question. There, the facts were as follows:

    a) There had been an arbitration between the parties. As a result of that arbitration, there was an award in favour of the Claimant, Mr Emmott.

    b) Mr Emmott had made an application to convert the Award into a judgment of the Court.

    c) A freezing order had been granted to Mr Emmott before the Award was converted into a judgment.

    d) Burton J heard the application under s.66, and granted that application. At that moment, the Award became a judgment of the Court.

e) Thereafter, the question was whether the Angel Bell exception, which had been part of the order prior to the Award being converted into a judgment, should be removed.

f) Sir Jeremy Cooke decided that it should be removed. It was his decision that then went to the Court of Appeal.

12. Gross LJ, delivering the judgment of the Court, considered the various authorities and then said, at paragraphs 53 to 57:

> "53 It is time to draw the threads together. First, post-judgment *Mareva* injunctions are granted to facilitate execution, by guarding against a risk of dissipation over the period between judgment and the process of execution taking effect, where the judgment would remain unsatisfied if injunctive relief was refused: *Masri* , at [34]. With respect to the *dicta* in *Camdex* , post-judgment *Mareva* injunctions can no longer be described as rare: *Nomihold* , at [32]. Whether pre-or post-judgment, a *Mareva* injunction is not intended to confer a preference in insolvency (*Camdex* , at p.638) and does not form a part of execution itself.
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> 54 Secondly, by reason of its nature and as a matter of realism, a post-judgment *Mareva* will increase the pressure on a defendant to honour the judgment debt. The mere increase in such pressure does not make it illegitimate or *"in terrorem"* . The facts in *Camdex* were extreme, concerning as they did the Central Bank of a friendly foreign State and the freezing of an asset of no value in the process of execution.
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> 55 Thirdly, in the light of Tomlinson LJ's further reflections in *Nomihold* , it cannot be said that, *without more* , the (*Angel Bell*) exception *would* be inappropriate in a post-judgment *Mareva* . In this regard, the observations of Colman J in *Soinco* and Tomlinson J in *Masri* , went too far.
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> 56 Fourthly, it *can* be said, however, on the basis of *Nomihold* (at [33]), that "it will sometimes and perhaps usually be inappropriate" to include the exception in a post-judgment *Mareva* injunction. Given the policy of the law strongly in favour of the enforcement of judgments, as already remarked, it would indeed be curious were the position otherwise - leaving the judgment debtor free to carry on business and ignore the outstanding judgment. The context is that a risk of dissipation must already have been demonstrated, as otherwise no *Mareva* injunction (with or without the exception) would have been granted at all. Accordingly, over the period between judgment and execution taking effect, a *Mareva* , without the exception, serves to hold the ring: Sir Jeremy Cooke, judgment, at [27].

> 57 Fifthly, I would prefer not to characterise refusal of the exception in a post-judgment *Mareva* as either a "starting point" or a presumption. For that matter, I would be equally reluctant to pigeon-hole refusal of the exception as a remedy of last resort; there is no warrant for so confining such a decision, save that the more draconian the relief, the greater the need for its justification. Instead and while it strikes me as an obvious matter to consider when granting a post-judgment*Mareva* , the appropriateness or otherwise of the exception in such a *Mareva* should be treated as a question turning on all the facts in the individual case. In addressing this question, Tomlinson LJ's test in *Nomihold* , at [33] ("it will sometimes and perhaps usually be inappropriate" to include the exception in a post-judgment *Mareva*), furnishes helpful and appropriately nuanced general guidance. Thus analysed, the decision by a Judge to permit or refuse its inclusion is a discretionary decision reached on a fact specific basis, with which this Court will be slow to interfere. Furthermore, while a Judge, when considering refusal of the exception, would no doubt have regard to the ambit of the *Mareva* sought, the assets thus frozen and the impact on the judgment debtor's business, I am not at all attracted to the distinction which Mr Doctor attempted to draw between bank balances and other assets; nor do I think that the test for refusal favoured by Tomlinson LJ in *Nomihold* , at [33], was in any way confined to balances in bank accounts. In some circumstances, removal of the exception in respect of bank balances could readily prove as destructive of a defendant's business as removal of the exception across the board."

13. In that case, the Court of Appeal was considering whether the decision of Sir Jeremy Cooke to remove the exception where there was a judgment of the Court should be reversed. They concluded that it should not. Accordingly, that case was considering the position after the Claimant had obtained an English judgment, a matter which is an important distinction from *Nomihold*.

14. Mr Jones, for the Claimant, submitted that this was a case where there was already a judgment, namely the Dubai judgment. Thus, the exception should be removed, in accordance with the principles set out in the case law considered by Gross LJ. Mr Cooper QC, for his part, submitted that this case was one where there was as yet no judgment. The position was akin to that which appertained where there was an obligation (as was the case in relation to the obligation to honour the arbitration award in the *Emmott* case) which was not yet the subject of a judgment. Hence, he submitted, the exception should not *yet* be removed.

15. I have concluded that, on the facts of this case, the submissions of Mr Cooper QC are to be preferred. At this stage, there is no enforceable English judgment. Accordingly, at present, the freezing order is not in aid of execution; it is, just as was the order in support of arbitration prior to conversion to a judgment, in aid of preserving assets. Therefore, I decline to order the removal of the Angel Bell exception, although I wish to make it clear that the terms of the order made by Waksman J remain in place, and

that the Defendant must inform the Claimant of the sums that it is proposed are to be spent.

The application to discharge the requirement for fortification.

16. Neither Counsel could identify any authority which was of any assistance to me in relation to this issue. However, Mr Cooper QC argued that the principle laid down in relation to the Angel Bell exception applied equally to this question. Since there was not yet a binding English judgment, and there was (he told me) an intention to challenge the validity of the Dubai judgment, then the position in the order should be maintained.

17. Mr Jones, for his part, submitted that there had here been a material change in circumstances since the grant of the order by Waksman J, since there was now a judgment of the Dubai court. As a matter of discretion, therefore, there was less to be said in favour of requiring fortification for the undertaking, since the likelihood of it being called on must now be reduced. Indeed, he argued, any loss which the Defendant had suffered was now far outweighed by the debt the Defendant owes pursuant to the Dubai judgment.

18. Again, on reflection, I have concluded that there is insufficient material before me to justify removing the requirement for fortification, at least pending the decision as to whether the Dubai judgment should be enforced.

    a) First, Mr Jones' set off assumes that the Dubai judgment will be enforced and that is not yet known.

    b) Secondly, although I accept that the £100,000 was the result of an intelligent estimate of possible loss, as was stated in *Energy Ventures Partners Ltd v Malabu Oil and Gas Ltd* [2015] 1 WLR 2309, then I have no material with which to conclude that this estimate should be altered in any way.

Permission to use information for purposes of enforcement proceedings.

19. Mr Cooper QC submitted that the Claimant has not sought to identify any steps which it proposes to take to enforce the Dubai judgment or where it intends to seek such enforcement, and that if the Claimant wishes to use information obtained as a consequence of the freezing injunction for the purposes of enforcement, it should identify precisely the intended use of the information. I agree with this.

20. However, Mr Jones indicated that the only purpose is to aid in relation to the *English* enforcement proceedings, and submitted that on this basis this is an appropriate order. On any view, therefore, the permission should be limited to the steps to be taken to enforce in England.

21. In support of his submission, Mr Jones referred me to the decision in *Vitol SA v Capri Marine* [2011] 1 All ER (Comm) 366. That was again a case where there was a judgment in England, and the application was to be able to use information obtained in England for the purposes of enforcement abroad (in Maryland). Tomlinson J made clear in that case that, in such circumstances, it might to be appropriate to allow the use

of information to assist the judgment debtor in proceedings abroad against a third party or, as in that case, an asset (there a ship).

22. Again, however, the problem for the Claimant is that there is no enforceable judgment in England. In my judgment, therefore, this application is also premature. Pending such a judgment, the freezing order will remain in place, as I have said. Once an English judgment is obtained, then the information obtained in order to ensure that such a judgment is effective is also likely to be of materiality; but that moment has not yet come.

Application for a Bankers' Books Inspection Order

23. The Defendant apologised to the Court that he has not provided the bank statements identified in an earlier promise made to the Court. Certain of these statements had now been obtained (being those having account no. 00330434 held with the Habibsons Bank Ltd in London) and these were provided to the Claimant on 14 March 2019.

24. However, other bank statements identified as having existed at the date of the freezing order had not been produced. The explanation given by the Defendant was that his bank was not prepared to provide the statements to him.

25. The Claimant therefore applied for an order that the banks be required to give disclosure of the documents directly, under the Bankers Books Inspection regime.

26. The Defendant again maintained that this application is premature given that the Claimant does not yet have a judgment, which is enforceable in this jurisdiction. No authority was cited in support of this proposition, and I reject it. The provisions of the relevant regime contain no such limitation; and it is clear that applications may be made during the course of litigation under the Act.

27. The Defendant also argued that a number of general principles apply in relation to applications for Bankers' Books Inspection orders, relying on *Matthews & Malek on Disclosure*, 5th ed at §§10.46 – 10.53, as follows:

    a) They are by definition an order made against a non-party and the Court should therefore be cautious to grant any order which imposes an onerous burden on that non-party. I accept this submission. However, the banks in question have not objected to the making of the order, and I will make an order against the banks relating to the bank accounts identified.

    b) Such an order should only be made with great caution and only clearly established and sufficient grounds. Again, I accept this. However, in my judgment, it is clear that the documents should be provided so that the Defendant can be assisted in complying with the order that the Court has already made.

    c) The Court may dismiss or cut down an application if not satisfied as to relevance or on the basis that it may be oppressive. Again, I accept this. However, as regards the application in relation to the bank accounts

identified in response to the freezing order, I can see no reason for supposing that this would be oppressive.

d) Any order sought which is a fishing exercise is objectionable and there must be evidence of material entries or documents. Again, I accept this; but here there is no really supportable suggestion that the documents sought do not contain material entries.

e) Any order for inspection should be clear and in respect of a limited period of time. Again, I accept this. The books in question should at this stage be limited to the documents held by the identified banks, in relation to a clearly defined period. The order currently sought is, in my view, too broad since I view the start date of 2012 as too early. I did not hear detailed submissions on the point and thus I order that any submissions on this particular point be addressed to me in writing, at the same time as a draft Order designed to give effect to this judgment is produced.

f) Save in exceptional circumstances, orders should not be granted against foreign banks or the foreign branches of banks for the production of documents held outside the jurisdiction; Mackinnon v. Donaldson Lufkin & Jenrette Securities Corp [1986] Ch. 482 and R v. Grossman (1981) 73 Cr. App. R 302. Mr Jones accepted this, and I confirm that my order should be limited to English branches of English banks, at least at the moment.

g) I accept Mr Cooper QC's submission that paragraphs 3 and 4 of the Draft Order are too wide and should be refused in any event. The Claimant has not provided any evidence to suggest that the Defendant has other accounts with the banks or to go behind the Defendant's Affidavit of Disclosure. Further, the Claimant has not sought to identify which it means by 'directly or indirectly'. It is in substance seeking a general disclosure order in respect of accounts held by third parties. There is no basis for any such order; see *Disclosure* at §10.53 and DB Deniz Nakiyati TAS v. Yugopetrol [1992] 1 WLR 437.

   i) The Claimant has not provided evidence of any accounts held by third parties which are in substance the accounts of the Defendant;

   ii) The Claimant has not provided evidence, let alone firm evidence amounting to almost certainty that there are material items in the account;

   iii) The Claimant has not provided any evidence as to its intended use of any information obtained.

h) Finally, as to the use to which this information is to be put, I have already said that I regard this as designed to ensure that any judgment which is obtained in this jurisdiction is enforceable. If and when an English judgment has been obtained, it will of course be open to the Claimant to

make a further application in relation to the use to be made of information obtained pursuant to this Order. Nothing I say in this judgment is intended to limit any future judge in any respect in this matter.

28. I would be grateful if the parties could liaise to draw up an Order designed to give effect to this judgment.