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The Angel Bell post-judgment – the exception and not the rule?

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In a decision handed down last week, *Michael Wilson & Partners Ltd v John Forster Emmott* [2019] EWCA Civ 219, the Court of Appeal has reviewed the authorities relating to removing, following judgment, the so-called *Angel Bell* exception in a freezing order; that is, the carve-out that allows a respondent to deal with assets in the ordinary course of its business. The Court confirmed earlier guidance that "*it will sometimes and perhaps usually be inappropriate*"[1] to exclude the *Angel Bell* exception in a post-judgment freezing order, but that each case should turn on its own facts.

"Only the briefest of reference needs to be made to the seemingly interminable, unhappy, background saga"

The present appeal originated from the recognition of two London-seated arbitral awards, resulting in a judgment debt to be paid by the Appellant (MWP) to the Respondent (Emmott).

Emmott sought, and at first instance obtained, a post-judgment freezing order to replace an earlier *Mareva* injunction obtained several years earlier. The terms of the original injunction contained an exception allowing MWP to deal with its assets in the ordinary course of business (the *Angel Bell* exception, from *Iraqi Ministry of Defence v Arcepey Shipping Co SA (The Angel Bell)* [1981] Q.B. 65). The exception was then removed by Sir Jeremy Cooke at first instance, and MWP appealed its removal.

The Court of Appeal was asked to determine whether the first instance judge erred in law, most significantly by: (i) holding that "*the starting point*" in the case of a post-judgment freezing order is that there should be no ordinary course of business exception; and (ii) concluding that the ordinary course of business exception should be removed from the freezing order in circumstances where it did not serve the order's legitimate purpose of being in aid of execution (but was rather *in terrorem*).

The Angel Bell

The Courts have long acknowledged that freezing orders are not intended to prevent a defendant from carrying out its ordinary business dealings, according to the principles laid down by Goff J in the *Angel Bell*. This exception now forms part of the Commercial Court standard form freezing order (at paragraph 11(2)). In a pre-judgment environment, where a respondent's liability has not been established, that must normally be the appropriate approach: the claimant's claim may ultimately fail, and interim relief should not render the defendant unable to meet its ongoing business obligations.

The approach to freezing orders post-judgment is less clear. Certainly, the law weighs heavily in favour of the enforcement of judgments, and preventing the judgment debtor carrying on its business while deliberately

[1] *Mobile Telesystems Finance SA v Nomihold Securities Inc* [2011] EWCA Civ 1040, §33.

refusing to pay the outstanding judgment debt (so, a "won't pay" rather than "can't pay" scenario). There has nevertheless been some conflicting judicial comment as to how restricted the Courts should be in their approach to removing the exception.[2]

The decision

Giving the leading judgment, Gross LJ considered the case law regarding post-judgment freezing orders:

1. Whether awarded pre-or post-judgment, a freezing order is not intended to confer a preference in insolvency and does not form a part of execution itself. The Court grants post-judgment freezing orders to facilitate execution of a judgment by guarding against a risk of dissipation in the period between judgment and execution, where the judgment would remain unsatisfied if injunctive relief was refused (§53). They are not rare.

2. By their very nature, post-judgment freezing orders will increase the pressure on a defendant to honour the judgment debt (§54). However, the mere increase in pressure does not in itself make the order illegitimate or *in terrorem*.

3. In view of the Court of Appeal's reasoning in *Mobile Telesystems Finance SA v Nomihold Securities Inc* [2011] EWCA Civ 1040, it cannot be said that the *Angel Bell* exception would always (i.e., "*without more*") be inappropriate in a post-judgment freezing order. However, in line with what the Court nevertheless concluded in *Nomihold*, "*it will sometimes and perhaps usually be inappropriate*" to include the exception in a post-judgment freezing order (§56). Gross LJ endorsed that test (of Tomlinson LJ) as representing "*helpful and appropriately nuanced general guidance*" (§57).

4. Thus, the starting point or presumption should not be to remove the *Angel Bell* exception, but nor should it be a remedy of last resort. Rather, each case should turn on its facts.

In this case, the Court of Appeal held that the judge at first instance had not made an error of law in ordering the exception to be removed; indeed, this was a paradigm case for doing so.

"*Pathological litigation*"

Somewhat unusually, the Court of Appeal also made several comments as to the questionable conduct of the litigating parties. Emmott and MWP had been engaged in litigation in several jurisdictions relating to a dispute over a quasi-partnership agreement, in which neither party covered themselves in glory. Jackson LJ went as far as to highlight the "*shameful waste of time and money*" caused by the "*pathological litigation*" between the parties, who were both solicitors: "*[i]t appears that Mr Wilson will stop at nothing to prevent Mr. Emmott from receiving the award, to which, for all his deceit, he is entitled*" (§70).

Conclusion

The Court of Appeal's guidance is indeed "*nuanced*" and deliberately avoids creating any default rules for the removal (or not) of the *Angel Bell* exception. The lack of specific guidance reflects the varying nature of these types of cases, and the burden that the *Mareva* injunction places on a respondent, even in a post-judgment context. Nevertheless, the Court's clarification does – without saying so in terms – continue to suggest that freezing orders in a post-judgment context that allow a judgment debtor to deal freely with assets in the course of business will remain exceptional.

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[2] *Masri v Consolidated Contractors* [2008] EWHC 2492 (Comm); *Mobile Telesystems Finance SA v Nomihold Securities Inc* [2011] EWCA Civ 1040.

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