Neutral Citation Number: [2019] EWCA 219 (Civ)

Case No: A4/2017/1964

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Sir Jeremy Cooke

Claims No. CL-2013-000625 & 2014-000916

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/02/2019

Before :

LORD JUSTICE GROSS
LORD JUSTICE PETER JACKSON
and
LADY JUSTICE ROSE

- -

Between :

Michael Wilson & "Partners" Ltd	**Appellant**
- and –	
John Forster Emmott	**Respondent**

- -
- -

Brian Doctor QC (instructed directly by Michael Wilson "and Partners" Ltd) for the **Appellant**
Philip Shepherd QC (instructed by Kerman & Co LLP) for the **Respondent**

Hearing dates : 5th and 6th February 2019

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Approved Judgment

LORD JUSTICE GROSS :

INTRODUCTION

1. This appeal concerns the removal of the "*Angel Bell*" exception for payments in the ordinary course of business ("the exception") from a post-judgment *Mareva* (or freezing) injunction.

2. On 5 December 2014, HHJ Mackie QC granted the Respondent ("Mr Emmott") a freezing injunction ("the *Mareva*") against the Appellant ("MWP") in the terms there set out. Para. 13(2) of that order contained the exception in standard form, namely, that MWP was not prohibited from "…dealing with or disposing of any of its assets in the ordinary and proper course of business".

3. By his judgment and order dated 13 July 2017 ("the judgment" and "the order" respectively), Sir Jeremy Cooke, *inter alia*, removed the exception. Para. 4 of the order provided as follows:

> "The exception in paragraph 13(2) of the Freezing Order that formerly did not prohibit the Respondent from dealing with or disposing of any assets in the ordinary and proper course of its business is hereby deleted so that the MWP is not permitted to deal with or dispose of any of its assets as defined in paragraph 9 of the Freezing Order up to the values set out in paragraph 2 hereof."

4. MWP appeals, with permission, from that decision, to this Court.

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

6. MWP is an entity incorporated in the British Virgin Islands ("the BVI"). At all material times it has practised as a law firm and business consultancy with its headquarters in Kazakhstan. The ultimate beneficial owner and controller of MWP is Mr Wilson who is, or was, an English solicitor.

7. Mr Emmott, whether or not he still practises as such (it matters not), is an Australian and English qualified solicitor.

8. The dispute has its origins in an agreement dated 7 December 2001 ("the Emmott agreement"), made between Mr Emmott and MWP. The Emmott agreement was intended to create a "quasi-partnership" between Mr Emmott and Mr Wilson. Mr Emmott was to receive a 33% shareholding in MWP, while Mr Wilson was to retain a 67% shareholding (via a corporate vehicle). The Emmott agreement was governed by English law and contained a London arbitration clause.

9. On 20 December 2005, Mr Emmott entered into a secret agreement with two other MWP employees, Messrs. Nicholls and Slater, providing for the establishment of a rival business ("the Temujin Partnership"). Ultimately, Mr Emmott, Mr Nicholls and Mr Slater left MWP to work at the Temujin partnership.

10. Litigation ensued in several jurisdictions, including Australia, New Zealand, the Bahamas, the BVI and this jurisdiction – and has continued to this day. We were told that, aside from the matter before us, there are some 9 sets of proceedings current in the English court and litigation is continuing in New South Wales, the BVI and New Zealand. We have little doubt that the costs by now comfortably exceed any amounts in dispute.

11. The present appeal has its origins in the London arbitration proceedings. By their Second Interim Award ("the SIA"), dated 19 February 2010, the arbitrators (Mr Berry, Lord Millett, Ms Davies) found, in summary, that Mr Emmott had satisfied the conditions for obtaining his 33% shareholding in MWP. On the other hand, he had been guilty of deliberate, serious and dishonest breaches of his fiduciary obligations to MWP. By their Third Award (Quantum) ("the TQA"), dated 5 September 2014, the arbitrators held that the quantum of the former outweighed the latter. The upshot was that MWP was ordered to pay Mr Emmott approximately £3.2 million and US$841,000.

12. Pausing here, the flavour of the dispute and the arbitrators' overall view of the principal protagonists appears from their trenchant observations at paras. 1 and 2 of the SIA:

> "1. It has to be recorded at the outset of this Award, that we found neither Mr Wilson nor Mr Emmott to be witnesses on whom we could rely. On any showing Mr Wilson was truculent and evasive…..Clearly he nurses a deep sense of grievance against Mr Emmott for the conduct of which he now complains and, no doubt, for the vast expense he has incurred in various jurisdictions, and in these proceedings, in pursuit of his case. However, it is clear to us that he is unwilling even to consider that there may have been explanations which might have allayed some of his suspicions about Mr Emmott's conduct. He was always prepared to assume a dishonest motive in any activity undertaken by Mr Emmott or others associated with him, some of whom MWP is now suing in various proceedings elsewhere. The over-statement of his own case, to the extent that certain of his evidence was simply unbelievable, made his evidence unsatisfactory and unreliable.
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> 2. By the same token Mr Emmott's evidence revealed….that he is a person willing to produce false, backdated, documents, that is to say forgeries, and to mislead his family trustee/bankers. He admitted in the course of his evidence that at the very least he had been less than frank with his quasi partner Mr Wilson and that he had produced wholly bogus invoices to mislead auditors and/or tax authorities. His conduct in relation to MWP at times can only be described as disgraceful."

13. In the event, MWP did not honour the award and the *Mareva* was made in aid of enforcement. At the time, the TQA was still subject to challenge and, as already indicated, the *Mareva* contained the exception. Other terms of note included the following. By para. 7, MWP was restrained from: (1) removing from England and Wales any of his assets within the jurisdiction up to the value of £3,909,613 plus US$841, 213; and (2) disposing of, dealing with or diminishing the value of any of his

assets whether within or outside the jurisdiction up to the same value. By para. 9, the *Mareva* applied "in particular" to a wide range of assets - including bank accounts in London, bank accounts in the Channel Islands, accounts in New South Wales, bank accounts in Almaty (Kazakhstan), together with shares, warrants and securities in a particular company, a sum held by the Court Funds Office, various sums that might be payable to MWP by way of costs orders and fees received or due to MWP.

14. In addition to the (*Angel Bell*) exception, there were other exceptions to the *Mareva*. Para. 13(1) provided an exception for spending "a reasonable sum" on legal advice and representation, subject to a requirement that MWP tell Mr Emmott's legal representatives where the money was to come from, before any such spending.

15. Para. 13(4) provided that the *Mareva* "will cease to have effect" if MWP provided security in the amount of the assets frozen into court or making other provision for security agreed with Mr Emmott's representatives.

16. Subsequently, by his order dated 26 June 2015, Burton J, *inter alia*, dismissed MWP's various challenges to and appeals against the TQA and gave leave to Mr Emmott to enforce the TQA "in the same manner as a Judgement or Order of this Court". Judgment was entered against MWP in the terms of the TQA and an application by MWP for a stay of enforcement of the TQA was dismissed.

THE JUDGMENT AND THE ORDER UNDER APPEAL

17. *The judgment:* In an *ex tempore* judgment, Sir Jeremy Cooke (at [7]) deprecated the extensive witness statements with which he had been faced "…much of which contain material that is irrelevant, repetitive and highly argumentative and prejudicial." What was extraordinary about the material in the witness statements was (at [8]) "the ability on the part of Mr Wilson in particular, to state that black is white". Additionally, the "distortions of the truth as to what has and has not been decided elsewhere are quite extraordinary".

18. As to the TQA, the Judge observed (at [15]) that:

> "…following every possible effort to have that award set aside by one means or another, the end of the road was finally reached for domestic purposes on 19 May 2016 when the Supreme Court dismissed the petition for permission to appeal from an order of Burton J and the Court of Appeal's refusal to permit an appeal from it. It could not by any stretch of the imagination be suggested following 19 May 2016 that the awards were not binding. Furthermore, on 26 May 2015, leave was given by Burton J to enforce the award as a judgment of the court, and that too stands as such. There is, therefore, both a binding award and a binding judgment of the court now in place."

19. As to the *Angel Bell* exception, the Judge took the view (at [19]) that this was a "clear case" for its removal. His reasons centred on the authorities, questions of principle and the particular facts of the case. He went on:

> " There is, as Mr Shepherd QC has submitted, a difference between a freezing injunction granted before and after judgment. Once liability has been established, the freezing injunction is in place to facilitate enforcement of that liability which has been established whereas before judgment it is there to avoid the dissipation of assets where there is a good arguable case before liability has been established. It is, as Mr Doctor QC says, not a remedy of execution in itself. It is, however, there to facilitate execution."

20. This was a case, as the Judge underlined (at [20]), "where MWP on its own evidence can pay". What had become clear, particularly in attempts to wind up MWP in the BVI:

> "…is that it is not a case of 'Can't pay' but a case of 'Won't pay'….If regard is had to the assets of MWP, it is clear that it has significant assets. In its 2014 balance sheet there is reference to some US$14.9 million worth of assets. I have already referred to the various bank accounts that are evidenced. There is a sum of £316,000 additionally in the Court Funds Office, there is a sum of approximately Australian dollars 1.7 million in a bank account New Zealand (about £1 million I am told) and various other sums that have been referred to elsewhere."

21. The Judge then reviewed the authorities to which I shall come and (at [27]) took from them the principle:

> "…which seemed to me abundantly obvious without consideration of authority, namely that, once judgment has been given, it is not appropriate to have an *Angel Bell* exclusion in the freezing order. There is no reason why, pending the enforcement of the judgment itself by execution the judgment debtor should simply be free to carry on business in the ordinary way. It is merely, in the ordinary circumstances a matter of time before the processes of enforcement can be put into operation and the freezing injunction is there to preserve the position in the meantime."

22. The Judge went on to allude (at [28]) to the efforts made to enforce the award, and the judgment of the Court, in the BVI and New Zealand; at "every step" those efforts had met with resistance.

23. Taking as his "starting point" (at [29]) that it was "usually inappropriate to include an ordinary course of business exception in post-judgment freezing injunctions", the question was whether there were circumstances in the present case which "militate against that". Here (at [30]), the risk of dissipation was still present and it had not been suggested otherwise. The need for the injunction was plain and MWP's continuing resistance to enforcement, reinforced that conclusion.

24. The Judge then enumerated (at [31] *et seq*) a number of factors which strengthened the case for the removal of the *Angel Bell* exception:

i) The policy of the law, which was "plainly to lean in favour of enforcing judgments", very much including London arbitration awards turned into judgments.

ii) The fact that the judgment debtor simply refused to pay but claimed the ability to pay; as the Judge put it, where "no proper excuse is advanced for not paying, there should be no *Angel Bell* exception".

iii) MWP had so arranged its trading arrangements as to make it more difficult to enforce, involving a diversion of receivables from London to Kazakhstan; the only reason for that was to make execution more difficult.

iv) Enforcement had become difficult, as demonstrated in the BVI. There had been a number of attempts to wind up MWP in the BVI – and the last had failed "essentially on the basis that MWP stated that it was solvent and …..could pay its debts" as they fell due. On any view Kazakhstan was not an easy place for enforcement and the efforts to enforce in the BVI and New Zealand had not (so far) met with success.

v) Moreover:

> "33. …What is absolutely clear from the evidence is that MWP has delayed enforcement by mounting appeals that are not simply hopeless, but ones which must have been known to be hopeless. The appeals launched in respect of the awards of the arbitrators present very good examples."

vi) Furthermore:

> "34. Equally to be condemned is MWP's insistence on telling courts worldwide that the awards were under appeal in those circumstances and even on one occasion saying that those matters had been appealed after the decision of the Supreme Court dismissing the petition for permission to appeal."

vii) Since 2013, MWP had been suggesting or threatening that the awards – and the decision of Burton J - would be challenged on the basis that they had been procured by fraud. "Time and again" it had been said before foreign courts that proceedings had been or were about to be launched along those lines. However, so far as was known, no such applications had in fact been made to any court.

viii) There were, additionally, breaches of the *Mareva*, on the part of both Mr Wilson and MWP, who had both been fined for non-disclosure of assets.

25. These are coruscating factual conclusions; they comprise a devastating indictment of the conduct of MWP and Mr Wilson. I return to them in due course.

26. Finally, at [38] – [39], the Judge dealt with a submission that Mr Emmott should have sought to enforce in Kazakhstan and that he had not done so. He reached no final decision on the difficulties attendant on enforcement in Kazakhstan but observed that it was clear:

> "…beyond peradventure that Kazakhstan is not the easiest place to enforce and it is also the position that a judgment creditor cannot be compelled to take proceedings in one jurisdiction rather than another, but had the option to seek enforcement as and where he can."

Accordingly, the question of enforceability in Kazakhstan was of "no great materiality" in the context of deciding whether to remove the *Angel Bell* exception.

27. The Judge concluded (at [40]) that, both as a matter of principle and because of the circumstances of the case, it was "entirely appropriate" to remove the *Angel Bell* exclusion, regardless of the submissions on MWP's behalf as to the effectiveness or ineffectiveness of doing so. MWP might need to borrow to meet the sums caught by the freezing order and to continue in business at the same time. However (*ibid*):

> " It is of course always open to MWP to pay the money into court up to the tune of the figure in the freezing order, for the freezing injunction then to be discharged on that basis, and for it to continue merrily on its way in its business dealing. Whether it chooses to do that is, of course, a matter for itself. If it did so, that no doubt would facilitate execution, but it would also leave it open for the various arguments that it appears to wish to make as to set-offs and the like to be pursued….."

28. *The order:* In the light of the judgment, the Judge then made the order. For present purposes, it may be noted that the *Mareva* was varied in a number of respects (in addition to the removal of the exception). The assets were now frozen up to the amended amounts of £4,115,695 and US$1,078,964. Various other accounts were added to the prohibition contained in the original *Mareva*.

29. With regard to para. 13(1) of the original *Mareva*, which gave MWP liberty to spend a reasonable sum on legal advice and representation, para. 3 of the order narrowed the permission so that it would now:

> "…apply solely to proceedings relating to the enforcement by Mr Emmott of the Liability and Quantum Awards and/or Order of Burton J of 26 June 2015, (and any appeal from this order), and not otherwise."

THE GROUNDS OF APPEAL

30. The MWP grounds of appeal ("the grounds") assert that Sir Jeremy Cooke erred in law:

i) In holding that the starting point in the case of a post-judgment *Mareva* is that there should be no ordinary course of business exception;

ii) In concluding that the ordinary course of business exception should be removed from the *Mareva* in circumstances where it did not serve a freezing order's legitimate purpose of being in aid of execution; rather, the effect of the removal of the exception was to impose the freezing order *in terrorem*;

iii) In failing to consider that the removal of the ordinary course of business exception should be the last resort;

iv) In considering that the question of enforcement in Kazakhstan was not of great materiality to the question of the removal of the ordinary course of business exception;

v) In all the circumstances, in removing the ordinary course of business exception.

31. It was not entirely clear whether ground v) was self-standing or hinged on success of one or more of the preceding grounds but, in the view I take of the matter, nothing turns on that.

32. Instructively, it is to be underlined that the grounds do not include any challenge to:

i) The *jurisdiction* of the Judge to remove the exception;

ii) The Judge's factual conclusions, in particular those as to MWP's and Mr Wilson's conduct;

iii) Para. 3 of the order (set out above), narrowing the liberty contained in the original *Mareva* to spend a reasonable sum on legal advice and representation.

33. Some amplification is convenient at this stage with regard to the absence of any challenge to para. 3 of the order. Mr Doctor QC, for MWP, had placed some emphasis on the fact that the effect of para. 3 of the order, in conjunction with the removal of the exception, was to preclude MWP spending money (even a reasonable sum) on legal advice and representation on two sets of proceedings – and it would be wrong for MWP to be "shut out from justice". These proceedings were, first, the "Max Shares" litigation in this jurisdiction, where another constitution of this Court had overturned a first instance decision striking out the proceedings as an abuse of process: *MWP v Sinclair and others* [2017] EWCA Civ 3. Secondly, the "NSW 2" proceedings in New South Wales, where a still further constitution of this Court had varied an anti-suit injunction prohibiting MWP from pursuing those proceedings, with the effect of permitting those proceedings to continue albeit subject to certain limitations: *MWP v Emmott* [2018] EWCA Civ 51. The thrust of these submissions was that para. 3 of the order had flowed from Sir Jeremy Cooke's removal of the exception, with the result that in these two sets of proceedings – though restored or given fresh life by decisions of this Court – MWP and Mr Wilson would not be at liberty to spend even reasonable sums on legal advice and representation.

34. Mr Doctor accepted, however, that, before Sir Jeremy Cooke, MWP had not opposed para. 3 of the order. It was also apparent that there was no ground of appeal against para. 3 of the order, for example seeking a targeted carve-out in respect of the proceedings to which Mr Doctor had drawn attention. In the light of Mr Doctor's submissions, we gave him time to consider and take instructions whether to apply out of time at the hearing for permission to add such a ground of appeal. We record that at the expiry of the time given to him by this Court, Mr Doctor's response was that he had "no instructions" to apply for permission to add such a ground of appeal. Further comment is unnecessary.

THE RIVAL CASES

35. Having regard to the ambit of the grounds, we turn to the rival cases developed before us.

36. For MWP, Mr Doctor submitted that Sir Jeremy Cooke had erred in treating the removal of the exception as "the starting point" in a post-judgment *Mareva*. Authority did not justify such an approach. Even on the footing that Sir Jeremy had *jurisdiction* to make the order he did, no previous court had gone this far – effectively closing down a business as a whole. Removing the exception in respect of a specific asset, such as a bank account, was one thing; the effect here was, however, very different and this Court should tread carefully. On the facts of this case, the order amounted to a new form of execution, for which there was no precedent. In any event, the removal of the exception was a draconian step which should only be taken as a matter of last resort; in that context, the failure to seek enforcement in Kazakhstan was telling. The purpose of a post-judgment *Mareva* was as an aid to enforcement. If there was no intention of even attempting to enforce in Kazakhstan, then that purpose was being subverted – and it amounted instead to an exercise, *in terrorem*, to bring MWP's business to a halt, unless payment was made. Pressed as to why MWP did not simply pay the judgment debt, Mr Doctor's response, on behalf of MWP, was that MWP "had not been allowed to proceed to judgment on the full ramifications of Mr Emmott's disloyalty"; once those ramifications had been taken into account, MWP would be the overall winner. While Mr Doctor touched upon MWP's financial position not being as robust as suggested in the judgment (at [20]), he drew well back from asserting insolvency – understandably so, given that MWP's resistance to the winding up proceedings attempted in the BVI has been based on a submission that it was solvent and could pay its debts as they fell due.

37. For Mr Emmott, Mr Shepherd QC submitted that this was a clear, even a paradigm, case for removing the exception and Sir Jeremy Cooke's decision to do so, in the exercise of his discretion, could not be impugned. MWP could pay the outstanding amount of the award (and thus the judgment debt) but had simply refused and was determined not to do so. MWP had been "cocking a snook" at the judgment; the entire problem could be resolved by MWP paying the judgment debt into court by way of security, which would result in the discharge of the *Mareva*. Removing the exception would not prevent MWP applying to the Court to vary the *Mareva* to permit a particular obligation to be met; but, absent an agreed variation, it removed that decision from Mr Wilson and gave it to the Court. There had been no error of law on the part of the Judge; but the facts were such that, whatever the starting point, the end point had to be the same. So too, even if there was a basis (which Mr Shepherd vigorously disputed) for the removal of the exception being a measure of last resort, it was "difficult to imagine a case where the last resort is better to be applied" than on the facts of this case as found by the Judge – from which there was no appeal.

DISCUSSION

38. *(I) The law:* The development of the *Mareva* jurisdiction is a striking example of judicial development of the law. First emerging in *Nippon Yusen Kaisha v Karageorgis* [1975] 1 WLR 1093, closely followed by *Mareva Compania Naviera SA v International Bulk Carriers Ltd* [1975] 2 Lloyd's Rep 509 – the case which gave the injunction its name – injunctions were obtained *ex parte*, pre-judgment, against defendants resident

outside the jurisdiction, restraining them from removing out of the jurisdiction assets which were within the jurisdiction. Thereafter and over time, the injunction was extended to defendants within the jurisdiction and in other ways. This evolutionary extension of the *Mareva* jurisdiction, in keeping with the common law method (described by Sir John Laws in his 2013 Hamlyn Lectures, *The Common Law Constitution* (CUP, 2014), preface at p. xiii) did not, however, proceed unchecked.

39. Thus, consideration of the true purpose of the *Mareva* led to the introduction of the exception for the payment of expenses in the ordinary course of business, namely, the *Angel Bell* exception: *Iraqi Ministry of Defence v Arcepey Shipping* (*The Angel Bell*) [1981] 1 QB 65. There, Robert Goff J (as he then was), in terms appropriate to the then limit on the injunction's applicability to foreign defendants, underlined (as summarised in the head note, at p.65):

> "…that the purpose of the *Mareva* jurisdiction was not to improve the position of any claimants to the property of an insolvent debtor but to prevent the injustice of a foreign defendant in English proceedings causing assets to be removed from the jurisdiction in order to avoid the risk of having to satisfy a judgment in pending proceedings in this country; that, therefore, as the plaintiffs had not yet proceeded to judgment but were merely claimants for an unliquidated sum, the defendants should not be prevented from using their assets to pay their debts as they fell due…."

The payment of such ordinary business expenses did not conflict with the policy underlying the *Mareva* jurisdiction. It was not to be forgotten (at p.72) that the plaintiff's claim might fail or that the damages claimed might prove to be inflated. In the meantime, prior to obtaining judgment, the mere establishment by the plaintiff of a *prima facie* case ought not to preclude the *bona fide* payment of the defendant's debts (*ibid*). Were it otherwise (*ibid*), "…a jurisdiction which found its origin in the prevention of an abuse has been transmuted into a rewriting of our established law of insolvency".

40. It is now settled law that *Mareva* injunctions can be granted post-judgment in aid of execution, whether or not an initial (pre-judgment) *Mareva* had been obtained. Here too, the purpose of the *Mareva* is to prohibit the dissipation of assets. This purpose was highlighted in *Camdex International Ltd v Bank of Zambia (No. 2)* [1997] 1 WLR 632, admittedly a case involving most unusual facts concerning a foreign Central Bank and unissued bank notes for issue in that foreign country. In the event, the Central Bank's appeal was allowed and the injunction was varied to exempt the bank notes from its ambit.

41. Sir Thomas Bingham MR (as he then was) expressed both the context and the relevant policy as follows (at p.636):

> "This application arises in what is…a novel situation, where the enforcement of a claim is said to threaten, or certainly jeopardise, the economic survival of a state…..

> It seems to me that in a situation such as this, it is important to go back to first principles. A *Mareva* injunction is granted to prevent the dissipation of assets by a prospective judgment debtor, or a judgment debtor, with the object or effect of denying a claimant or judgment creditor satisfaction of his claim or judgment debt."

42. Aldous LJ put the matter tersely (at p.638):

> "The purpose of *Mareva* relief is, and always has been, to prevent a defendant from removing from the jurisdiction his assets or dissipating them. It is not, and never has been, an aid to obtaining preference for repayment from an insolvent party."

43. Phillips LJ (as he then was) said this (at pp. 639-640):

> "A *Mareva* can properly be granted after judgment in circumstances, which must be rare, where this is necessary to prevent the removal or dissipation of an asset before the process of execution can realise the value of that asset for the benefit of the judgment creditor. That is not this case. The reality here is that the unissued bank notes, which are the subject matter of the application, are not assets which would be of any interest or benefit to a sheriff executing a writ of fi. fa…..
>
> …..In these circumstances, it seems to me that the *Mareva* is being used in relation to these bank notes not for the purpose of preserving an asset that will be of value in the process of execution, but in an attempt to pressurise the defendant into discharging part of its liability under the judgment. That is not a legitimate use of the *Mareva* injunction…."

44. Accordingly, the mere fact that a *Mareva* is sought post-judgment does not mean that the Court is relieved from considering whether the application accords with the purpose underlying the grant of such relief. That said, there can be no doubt that the fact of an unsatisfied judgment debt – as contrasted with a pre-judgment claim for unliquidated damages – does make a difference. Given the policy of the law weighing heavily in favour of the enforcement of judgments, it would be surprising if it did not.

45. *Soinco SACI v Nookuznetsk Aluminium Plant* [1998] QB 406 was not a case concerning a *Mareva* injunction. The issue there went to the appointment of a receiver by way of equitable execution, in respect of all sums due or which would in the future fall due for payment by the fifth defendant to the first defendant, in circumstances where the first defendant was a judgment debtor of the plaintiff. One of the objections was that the appointment of a receiver would bring the first defendant's business to a standstill. In the course of dismissing that objection, Colman J said this (at p.421):

> "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…."

46. In *Masri v Consolidated Contractors* [2008] EWHC 2492 (Comm), the claimant was a judgment creditor and the defendants his judgment debtors. Tomlinson J (as he then was) made reference (at [24]) to Colman J's observations in *Soinco* and (at [34]) to Court of Appeal authority to the effect that *Mareva* injunctions would be granted more readily after judgment than before. It was sufficient for the grant of such relief that there was a real risk that the judgment would remain unsatisfied if injunctive relief was refused; that was the basis on which the jurisdiction was routinely exercised.

47. Tomlinson J then turned (at [35]) to the *Angel Bell* exception. With regard to a *Mareva* in respect of receivables, the exception was to be continued, so as to allow the contracts to continue to be performed in the usual manner. However, a *Mareva* in respect of bank accounts had not contained such an exception and there was no evidence that its absence had caused any actual disruption to the defendant's business. Tomlinson J continued (*ibid*) as follows:

> "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. I respectfully adopt the reasoning of Colman J at page [421] of the *Soinco* case….That was of course a case concerned with a receivership order rather than a freezing order, but it seems to me that those considerations apply *a fortiori* to a post-judgment freezing order."

48. In *Mobile Telesystems Finance SA v Nomihold Securities Inc* [2011] EWCA Civ 1040, this Court allowed the appeal of Mobile ("MTSF") and restored the exception. The respondent ("Nomihold"), had an unchallenged arbitration award in its favour against MTSF. Having referred to the observations in *Camdex* as to the rarity of post-judgment *Marevas*, Tomlinson LJ observed (at [32]) that the:

> "….availability of freezing orders in aid of execution is now so well-established that I doubt whether it can still be said that the circumstances in which such a freezing order can properly be granted must be rare."

Even so, while a post-judgment *Mareva* was granted in aid of execution, it was not immediately concerned with any question of execution itself.

49. Revisiting his own judgment in *Masri* (at [24] and [34]), Tomlinson LJ, upon further reflection, now said (at [33]) that he was "not sure" that the observations of Colman J in *Soinco* did apply *a fortiori* to post-judgment freezing orders. Moreover, his own unqualified observation in *Masri*, that in relation to assets such as balances in bank accounts, the exception "is inappropriate" in a post-judgment environment, may itself have been "…too sweeping a statement" – though the exception had been inappropriate in relation to the bank accounts in *Masri*. Continuing (at [33]), Tomlinson LJ then expressed the matter in more nuanced terms:

> "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."

50. The question which arose in *Nomihold* was (at [34] and following) whether MTSF, against whom the judgment debt was for the time being unenforceable, should be prevented from meeting an obligation falling due in the ordinary course of his business. Although, as already indicated, Nomihold had in its favour an unchallenged arbitration award, the judgment of the court in its favour was not presently enforceable – as explained by Sir Jeremy Cooke (at [24] of the judgment here under appeal), although the judgment had been registered under s.66 of the *Arbitration Act 1996*, an application had been made to set it aside and that application had not yet been heard. Tomlinson LJ accepted (at [35]) that the touchstone for these purposes was "enforcement or the availability of enforcement". Accordingly (*ibid*):

> "…whilst the freezing order can be said to be granted in aid of execution it cannot currently be said to be a remedy designed to effect execution, since execution is unavailable. In any event that is not the nature of a freezing order…."

In these circumstances, the impact of the exception (or its removal) on MTSF's continuing business was a material consideration. Ultimately (at [37]), Tomlinson LJ concluded:

> "….both as a matter of principle and on authority….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…."

51. Furthermore, on the facts in *Nomihold* (at [38]), the interest payment which the appellant sought to make would not amount to a dissipation of assets, with the object or effect of denying Nomihold satisfaction of its claim. Still further (*ibid*), that payment could not be characterised as being made with a view to avoiding execution – as execution was presently unavailable.

52. Pausing here, there is no doubt that in *Nomihold*, Tomlinson LJ retreated somewhat from the width of Colman J's observations in *Soinco* and his own endorsement of them in *Masri*. To my mind, however, there is equally no doubt that underlying the decision of this Court in *Nomihold* (at [37]) was the temporal consideration that execution was

presently unavailable against MTSF. The Court plainly drew a distinction between a claimant with a contractual arbitration award in its favour and a judgment creditor enjoying the benefit of an enforceable judgment. The problem for Nomihold was that its judgment remained "defeasible" (as described by Sir Jeremy Cooke, in the judgment at [24] and [26]).

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.

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.

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.

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.

58. *(2) The facts:* On the facts, the present case presents no difficulty. My view on the law is as already expressed. However, whatever the test in law for removal of the exception – whether it is a starting point, a matter turning on all the facts in the light of Tomlinson LJ's general guidance in *Nomihold*, or a remedy of last resort – on the facts here, I entertain no doubt that Sir Jeremy Cooke was amply entitled to remove the exception. That conclusion suffices to require dismissal of the appeal; for that matter, however, I go further – in my judgment, he was right to do so. I accept the Respondent's submission that this was a paradigm case for removing the exception. My reasons follow.

59. First, Sir Jeremy Cooke's decision to remove the exception was a discretionary decision. That is so, both as a matter of analysis (set out above) and because, as already underlined, there is no challenge to the jurisdiction of Sir Jeremy to come to the decision he did. It follows that this Court would not intervene unless MWP can establish some error of law or principle in the judgment. That, in my judgment, MWP singularly fails to do. MWP's first ground of appeal (set out above) complained that Sir Jeremy had erred in law in holding that the starting point in the case of a post-judgment *Mareva* was that it should not include the exception. With great respect, that ground does not fairly reflect the judgment. The "starting point" to which Sir Jeremy did refer (at [29]) was the test given by Tomlinson LJ in *Nomihold*, at [33] – a test which Mr Doctor himself, in argument, accepted as correct, subject only to his separate contention that its application was limited to balances in bank accounts. Elsewhere in the judgment (for example, at [27]) Sir Jeremy expressed himself robustly as to the inappropriateness of the exception in post-judgment *Marevas*; I can, however, discern no error of law in any of those observations (in an *ex tempore* judgment) and even if error of law there was, it would be immaterial given the facts of the present case.

60. Secondly, as already underlined, there is no challenge in the grounds to the factual conclusions set out in the judgment. Again, as already intimated, those factual conclusions – which I reiterate in the paragraphs which follow - comprise a devastating indictment of the conduct of MWP and Mr Wilson.

61. Thirdly, as the Judge recorded (at [30]), a risk of dissipation remained, and it had not been suggested otherwise.

62. Fourthly, this was not a case of "can't pay"; this was a case of a most emphatic "won't pay". It is unnecessary to delve into the detail of MWP's accounts, though there is more than sufficient material there to support the Judge's conclusions in this regard at [20] and [31] of the judgment. Importantly, MWP has resisted winding-up in the BVI on the ground that it is solvent. It cannot be permitted to both approbate and reprobate. In any event, it is amply clear from the stance taken by MWP before the Judge and before this Court that it is determined not to pay the judgment, regardless of its ability to do so.

63. Fifthly, every effort had been made to resist enforcement and make it more difficult. Tellingly (as found at [31]), MWP had diverted receivables from London to Kazakhstan for this very reason. Furthermore, MWP had sought to delay enforcement by mounting appeals which were and were known to be hopeless (at [33]) and presenting a distorted picture of those appeals to foreign courts (at [34] – [35]). For completeness and with respect to Mr Doctor, the mischief which the Judge found in this regard (at [34]) has not been cured by the terms of the injunction as varied by this Court in relation to the NSW 2 proceedings. For my part, such conduct of litigation by MWP has been deplorable and, by itself, gives rise to the plainest possible inference of a risk of dissipation and the need to remove the exception if there is to be any realistic chance of enforcement of the judgment.

64. Sixthly, I am wholly unable to accept the submission (ground 4 of the grounds) that the question of enforcement in Kazakhstan was of great materiality. I agree with the Judge's approach as set out at [38] – [39] of the judgment. A judgment creditor can choose where to seek enforcement and is under no duty to proceed in one jurisdiction rather than another. Further and as already indicated, I do not agree that removal of the exception is a matter of last resort; but, even if it was, on the facts already outlined, that test would be satisfied. It is plain beyond peradventure that MWP would and will do anything it is at liberty to do to seek to delay or prevent enforcement.

65. Seventhly, neither the Judge nor this Court takes lightly the suggested risk of the closing down of MWP's business in consequence of the removal of the exception. The remedy, however and as found by the Judge (at [40]), lies in MWP's own hands. The injunction is limited to a maximum sum. No case of insolvency is advanced. MWP could resolve the entire matter by paying the judgment sum into Court as security, so resulting in the immediate discharge of the *Mareva* in accordance with para. 13(4) thereof (set out above). Any debate as to set offs or a reduction in the sums due (from the figures in the order) could be resolved once the judgment debt has been paid into Court. Further still, even a post-judgment *Mareva*, without the exception, does not preclude an application to Court to make a specific payment in the ordinary course of business, if there is some particular justification for doing so.

66. Eighthly, whether in fact the removal of the exception will prove to aid execution, only time will tell but, for the reasons already given, the complaint in ground 2 of the grounds that its removal was *in terrorem* does not bear scrutiny. So too and for the reasons already given, ground 5 goes nowhere; the Judge was right and, on any view, amply entitled to remove the exception.

67. I would dismiss the appeal.

68. I add only that I would permit the order of this Court to be served on MWP and Mr Wilson by email.

Lord Justice Peter Jackson

69. I entirely agree with the reasons given by Gross LJ for dismissing this appeal.

70. Having listened to the history of the litigation between these two solicitors, I protest at the shameful waste of time and money caused by their private dispute, which has now continued for 13 years and left their reputations in tatters. We were told that Mr

> Emmott's global costs amount to £2.5 million, and Mr Wilson's several times that. Courts in four countries have been (and in at least two cases are being, with no end in sight) plagued with their proceedings and counter-proceedings. It 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. Against that background, the robust and principled approach taken by Sir Jeremy Cooke was entirely appropriate. Any court in this jurisdiction that has to consider this dispute in future would do well to remember that the overriding objective in civil proceedings includes a duty on the court to save expense, deal with the case expeditiously and fairly, and allot to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; further, that the parties have a duty to help the court to achieve this. This pathological litigation has already consumed far too great a share of the court's resources and if it continues judges will doubtless be astute to allow the parties only an appropriate allotment of court time.

Lady Justice Rose

71. I agree with both judgments.