Case No: 2013-000625; 2014-000916

Neutral Citation Number: [2017] EWHC 2498 (comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

7 Rolls Building
Fetter Lane
London
EC4A 1NL

Thursday, 13 July 2017

BEFORE:

SIR JEREMY COOKE

BETWEEN:

JOHN FORSTER EMMOTT

Claimant

- and -

MICHAEL WILSON & PARTNERS LIMITED

Defendants

MR P SHEPHERD QC (instructed by Kerman & Co LLP) appeared on behalf of the Claimant

MR B DOCTOR QC and MR G BUTTIMORE (instructed by Michael Wilson & Partners) appeared on behalf of the Defendants

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JUDGMENT

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(Official Shorthand Writers to the Court)

1. SIR JEREMY COOKE: As nearly every judge who has had to deal with this matter in the past has said, this matter has a long and complex history.

2. For present purposes, I need refer to the freezing order which was made on 5 December 2014 and which prevented the defendant from removing from England and Wales any assets up to the value of some £3.9 million plus $841,000 or in any way disposing or dealing with or diminishing the value of any of his assets, whether in or outside England and Wales up to the same value. The prohibition included a number of specific assets which were set out in paragraph 9, including bank accounts in London, bank accounts in the Channel Islands, accounts in New South Wales and bank accounts in Almaty in Kazakhstan. Additionally, it referred to shares, warrants and securities in a particular company, and to a sum held by the Court Funds Office, together with various sums that might be payable to the defendant by way of costs orders.

3. The application which comes before me today, is an amended version of an application that came before Andrew Baker J. The original application was that the defendant should cause a sum of money, then thought to be around New Zealand dollars, 950,000, which was in the hands of the sheriff of the High Court in New Zealand to be paid into the Court Funds Office or into an account held by the respondent with HSBC in London. The objective of that was to enable this court to police the freezing order which had been made.

4. By an order made by Andrew Baker J, the claimant was given permission to amend the application to include an application for removing the *Angel Bell* exception in the freezing order, namely the provision that payments could be made as part of ordinary business expenditure.

5. Additionally, however, the claimant has included two further applications, first, that a declaration should be granted that various defences that the defendant has deployed in other jurisdictions, have been finally determined against it in such a way as to constitute **res judicata**, cause of action estoppel or issue estoppel: additionally, a claim for an injunction to restrain the defendant from continuing to assert the contrary.

6. The applications are essentially brought by reference to some awards in arbitration which go back to 19 February 2010 in respect of the first liability award and a quantum award of 5 September 2014. The figures to which the freezing order refer arise out of the sums awarded, together with interest and no doubt some figure included for costs. The arbitration commenced as long ago as 2006.

7. I have been faced with, as has nearly every other judge who has been involved in this matter, with extensive witness statements, much of which contain material that is irrelevant, repetitive and highly argumentative and prejudicial. That has been deprecated by judges in the past and I add my criticism. I am not sure that there is anything much that can be done by way of costs sanction, but I would like to do it if I could. Judicial patience has become strained on the part of many judges who have been involved in this matter.

8. What is extraordinary about the material that has been produced in the witness statements is the ability on the part of Mr Wilson in particular, to state that black is white. The distortions of the truth as to what has and has not been decided elsewhere are quite extraordinary.

9. There is a helpful schedule of admissions which has been drawn up by the claimant which is useful for showing what is and is not truly in issue. Counsel have behaved with total propriety I should add, but that cannot be said for other matters that lie behind the material that has been produced and upon which they have to argue their case.

10. I am going first to start, rather oddly, by saying the things that I cannot decide or will not decide today because that limits the ambit of what is properly capable of determination and what I will go on to decide.

11. First, I am not going to decide the applications for relief for which permission to amend was not given by Andrew Baker J. Although the defendant has had quite enough notice to deal with such matters and if the only the basis or position for not dealing with it was that permission was not given, I might be inclined to do so. However, the reality is that the declarations which are sought relating to cause of action or issue estoppel are the sort of declarations that cannot properly be given on an application of this kind. There are some interesting questions which arise in relation to some of the matters, particularly in relation to the applicability of the rule in *Henderson v Henderson*. So far as the injunction is concerned, apart from the fact that I find it hard to see what the basis is for such an order, that too would require me to go into areas of cause of action and issue estoppel in a degree of detail which is not possible on an application of this kind.

12. Secondly, I am not going to decide anything which cuts across proceedings which are taking place elsewhere or pending elsewhere. There is, for example, a judgment given by O'Farrell J which is the subject of a pending appeal to the Court of Appeal. There are actions in New South Wales and there is an action in New Zealand which feature in the matters that I do have to decide, or in relation to the sum of money which is the subject of an application that I do have to decide.

13. In relation to the *Henderson v Henderson* point to which I have referred, there is an argument about what and was not decided both by the arbitrators and the New South Wales court in relation to what is loosely referred to as the Temujin Partnership. As to exactly what the arbitrators decided there is probably no difficulty by reference to the extensive awards they have made, and their explicit declaration that, following the liability awards, they were **functus** in that context when making their award on quantum. So far as what the New South Wales court decided, it is ultimately, it seems to me, a matter for the courts there to decide in the context of the second piece of litigation that is currently ongoing there between MWP in its role as assignee for Mr Nicholls, Mr Slater and others, against Mr Emmott in respect of supposed contributions arising out of the alleged Temujin Partnership.

14. There are some matters which it is quite clear have been decided thus far relating to double counting and particular issues of fraud that were raised before the tribunal and dismissed by them. There is likewise a decision by the tribunal as to ownership and control of KHI at the particular time the tribunal was concerned with. How far that decision extends beyond that time is, however, another matter.

15. The arbitration to which I have referred took place in London, was governed by English law, and for present purposes, it is worth simply stating 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.

16. I will come back to the suggestion that the awards and the order of Burton J can be the subject of challenge on the ground that they were procured by fraud.

17. I turn then to the particular applications with which I have to deal. As a matter of logic, it appears to me that I should start with the question of the *Angel Bell* exception. The defendant's position on that is that there is no principle being advanced for setting aside the *Angel Bell* exception that was included in the freezing injunction when it was first given on 5 December 2014. At that time, the awards were still the subject of challenge and Burton J had not yet given his decision. It is also said that the reason which is being advanced for the removal of the exception is not, as the claimants say, to police the injunction given and to facilitate execution, but is to use it as a means of enforcement in itself. It is submitted that this is an attempt to close the business down, in the sense that, if MWP does not have the wherewithal to continue in business and effectively set aside an asset of sufficient size to meet the figure in the freezing injunction, the effect would be that MWP would have to cease business altogether. Alternatively it is said that, if in fact it has such assets, then the order will be of no effect whatsoever and should not be made as making no difference at all.

18. Furthermore, it is said that insofar as the claimant relies upon various matters which have taken place in other jurisdictions, by which is meant the strenuous efforts made by MWP to resist enforcement in those jurisdictions, it is a matter for those courts to deal with questions of abuse and enforcement there. Finally, it is said that the place where enforcement should be sought, is Kazakhstan where MWP effectively carries out its business, albeit from a branch office, and where Mr Emmott himself is said to be resident. I do not ignore for these purposes the other points that are taken by MWP in paragraphs 14 through to 31 of its skeleton argument. I think without any disrespect, the main additional points there really come to this. First, that the application to remove the exception comes very late and in circumstances where MWP has been permitted to carry on business in its ordinary course since December 2014, and secondly, that this is a disguised attempt to try and get round the failure on the part of the claimants in enforcing against the sums currently held in New Zealand where Clifford J has recently held that a provisional charging order is not possible for

jurisdictional reasons on the one hand and because on the other it has not been shown that removal of the sum from New Zealand to Kazakhstan would be a disposition effected with intent to defeat creditors.

19. In my judgment, this is a clear case where the *Angel Bell* exception should be removed. There are a number of reasons for that which centre in part on the authorities and questions of principle and in part on the particular facts of the case. 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 is a case where MWP on its own evidence can pay. What has become quite clear, particularly in attempts to wind up MWP in the British Virgin Islands, is that it is not a case of "Can't pay" but a case of "Won't pay", as Wallbank J there specifically said. 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 $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 in New Zealand (about £1 million I am told) and various other sums that have been referred to elsewhere.

21. I turn then to the authorities. These I need not go through in any great detail, but simply refer first of all to the decision of Colman J in *Soinco v Novokuznetsk Aluminium Plant* [1998] QB 406.

22. In that case, Colman J was dealing with an appointment of a receiver by way of equitable execution and to that extent it is, of course, different from the granting of a freezing injunction or the amendment of it. Nonetheless, in that context where there was discussion about the effect of such an order bringing the business of the judgment debtor to a standstill, the judge said that he was not persuaded that that was 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. The distinction that he drew, therefore, was between an execution remedy on the one hand and a freezing injunction prior to trial. He said this:

> "Whereas the effect of an injunction on the defendant's ability to conduct his business in the ordinary course of business 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. The impact on the judgment debtor's business is not a consideration material to the availability of legal process of execution. There is no reason in principle why it should not be introduced as material to the availability of equitable execution." (Quote unchecked)

23. In *Masri v Consolidated Contractors International* [2008] EWHC 2492 (Comm), Tomlinson J (as he then was) referred with approval to the comments of Colman. In that case, he was dealing with a freezing injunction granted in 2008 following judgment in the action in 2006. A receiver had been appointed over the receivables of the defendant in execution of the judgment. There were three freezing orders, one over bank accounts, one over receivables and one over shares. In that context, the ordinary course of business proviso was in place in the receivables freezing order and continued because that receiving order was considered the best form of execution in terms of getting money in under the contract and continuing with the contract in such a way as to maximise the results for execution purposes. It was said specifically that it was "obviously necessary in order to allow the contracts to continue to be performed in the usual manner." The freezing order in respect of the bank accounts contained no such proviso since granted on 19 May 2008 and there was no evidence that the absence of that proviso had caused any actual disruption to the defendant's business. What Tomlinson J said was this:

> "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 412 of the *Soinco* case which I have set out above. 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 injunction."

24. I was taken then to his later decision after his elevation to the Court of Appeal in *Mobile Telesystems Finance SA v Nomihold Securities Inc* [2011] 2 CLC 857. There, a two judge court had cause to consider the form of a freezing injunction in the context of a judgment which had been registered under section 66 of the Arbitration Act 1996 but where an application had been made to set it aside and that application had not been heard. This was described effectively as a defeasible judgment of the court. It was a judgment that was in place but which specifically under the terms of the Act and the order made could not be enforced until such time as the application to set it aside had been determined.

25. Tomlinson LJ at that point confirmed his earlier decision in *Masri* in relation to the sums in the bank accounts, but expressed himself more cautiously in relation to the comments that he had earlier made. At page 871D to F, he stated that he was not sure that Colman J's observations did apply **a fortiori** to a post-judgment freezing injunction. A post-judgment freezing order was granted in aid of execution but was not part of the process of execution itself. Then, in relation to his comment that he had been satisfied in *Masri* that in relation to assets such as balances in bank accounts an ordinary course of business exception is inappropriate in the post-judgment environment, he commented that that might be too sweeping a statement. Nonetheless, he went on to say that:

> "... 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."

26. He went on then to set out the question for him and for Ward LJ in that case as being whether a judgment debtor, against whom a judgment debt was for the time being unenforceable, should be prevented from meeting an obligation falling due in the ordinary course of business. He went on to find that in that case the judgment itself being defeasible, there should in fact be an *Angel Bell* exclusion in the order itself.

27. I take from that, however, 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 circumstance 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.

28. What has happened in the present case is that efforts have been made to enforce the award and the judgment of the court in relation thereto, in the British Virgin Islands where the defendant is incorporated and now in New Zealand where assets are to be found. At every step that has met with resistance.

29. Taking the starting point as that set out by Tomlinson LJ that it is usually inappropriate to include an ordinary course of business exception in post-judgment freezing injunctions, the question is here whether there are circumstances which militate against that. There may be cases where it may assist in the process of execution to maintain such a proviso as appears to have been the case in *Mobile Telesystems* in relation to the ongoing contracts. If one stops for a moment to consider, however, the position where an enforceable judgment has been entered and there are assets in this country and a continuing risk of dissipation, then there should in the ordinary way be no *Angel Bell* exception unless its continuance in the freezing order would aid execution by allowing further monies to be brought in in circumstances where they otherwise might not. As Mr Shepherd said in submission, if it may assist in execution, then there could be good reason for keeping it in. If it may assist in execution to have it out, then it should be out.

30. In these circumstances, it seems that the claimants have come to the conclusion that it would assist to have it out. The risk of dissipation is still present. It has not been suggested otherwise in the present case. The need for the injunction is, therefore, plain and the continuing resistance on the part of MWP to efforts to enforce reinforces that conclusion. The fact that there are foreign assets involved, only makes it more difficult to enforce but does not change the underlying principle.

31. Mr Shepherd QC relied on the following factors, which to my mind strengthen the case for the removal of the *Angel Bell* exception in circumstances where that is what the claimant seeks. First, the policy of the law is plainly to lean in favour of enforcing judgments. It certainly will do so in aid of awards in arbitrations in London which are

turned into judgments. In a case where the judgment debtor simply refuses to pay but claims the ability to do so, the point is likewise strengthened. Where no proper excuse is advanced for not paying, there should be no *Angel Bell* exception. Where a judgment creditor so arranges its trading arrangements so as to make it more difficult to enforce, that too reinforces the argument for removal of the *Angel Bell* exception. Whilst there is some dispute about this, the figures that have been produced to the court show that there has been a change in the way the invoicing of MWP takes place, whereas previously a large proportion of its receivables came into London, they now no longer do so. The bank accounts in London are bereft of income that they used to receive. It now goes to Kazakhstan. There can, in truth, be only one good reason for that and that is to make execution more difficult. As to the position in Kazakhstan, I will have more to say in just a moment.

32. It is particularly appropriate to remove such an exception in cases where enforcement has become difficult or is assumed to be difficult. The position in the British Virgin Islands is a good example. There have been, I think, at least three attempts, it may even be five, to wind up MWP in the British Virgin Islands. Some have failed for jurisdictional reasons, but the last failed simply on the basis or essentially on the basis that MWP stated that it was solvent and that it could pay its debts as it fell due. In those circumstances, the judge was not persuaded that it was right to wind the company up, the just and equitable ground not being one which he was prepared to go accept for that purpose.

33. Whatever the evidence ultimately amounts to in relation to enforcement in Kazakhstan, no-one could say that that was an easy place to carry out enforcement and the attempts both in the British Virgin Islands and in New Zealand have so far not met with success. 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. Not only was there a rejection of an initial section 68 and 69 challenge to the liability award by Andrew Smith J where he awarded indemnity costs against MWP, but in May 2015, as I have already said, there was a rejection of section 67, section 68 and section 69 challenges by Burton J in the context of fraud allegations which had been pursued that far, but which were not pursued before him. He gave leave to enforce the awards as a judgment of the court. It is well-known to anybody who practises in the arbitration sphere, that the effect of section 67(4), section 68(4) and section 69(6) is that the decision of the first instance court on the question of further appeal and permission to appeal is conclusive. Nonetheless, attempts were made to take this matter to the Court of Appeal and indeed to the Supreme Court, which found unsurprisingly on 19 May 2016 it had no jurisdiction to deal with the issue. The effect was two years' delay on hopeless grounds of appeal.

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.

35. There is a further point which Mr Shepherd makes which is in one sense difficult to characterise. What it comes to is this. Since 2013, MWP has been, in correspondence

and elsewhere, putting forward the suggestion that the first liability award was procured by the fraud of Mr Emmott and others giving evidence as part of his case. Those matters were raised before the tribunal and concluded against MWP by the tribunal. There is a schedule in bundle D pages 1 and 2, which sets out the occasions upon which threats have been made to seek to challenge the awards and in due course the decision of Burton J on the basis that they were procured by fraud. Time and again before foreign courts, it has been said in witness statements and in affidavits that proceedings are being launched, are about to be launched, will be launched imminently, or words to that effect, on clear evidence, including evidence from accountants, that frauds have taken place "including accountancy fraud". No such applications have been made to any court that this court is aware of. Quite recently, in March or May of this year, it was said to a court that an application would be made before 19 June this year. No such application has been made.

36. As I have already said, I am not determining today any question of cause of action estoppel or issue estoppel, but it is tolerably clear to me that a number of the points that have been made in resisting enforcement in one way or another, are points which are not open to be taken because of the doctrines of cause of action estoppel, issue estoppel and the applicable rule in *Henderson v Henderson*.

37. Finally in this connection, it is necessary perhaps to mention the breaches of the freezing order by Mr Wilson and MWP who have both been fined for non-disclosure of assets under the terms of the freezing order. My understanding is that each was fined £25,000 together with an order for costs.

38. I said earlier I would come back to the question of enforceability of the award in Kazakhstan. At the forefront of Mr Doctor's submissions was the contention that Mr Emmott should proceed to execute in Kazakhstan, that he had not done so and that there was in reality in difficulty in doing so. I was taken through conflicting evidence on the topic from lawyers in Kazakhstan, some of whom were connected in one way or another to MWP and some were not. I can reach no final decision on the matters raised therein, but it is 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 has the option to seek enforcement as and where he can.

39. It does not, therefore, seem to me that, at the end of the day, the question of enforceability in Kazakhstan is of great materiality in the context of the application for the removal of the *Angel Bell* exclusion.

40. For those reasons not only as a matter of principle but because of the circumstances of this case, it seems to me entirely appropriate that the *Angel Bell* exclusion should be removed from the freezing order, whatever the ultimate impact of that may be, and whether or not Mr Doctor is right in what he says as to its effectiveness or ineffectiveness. It is possible to envisage a situation where MWP might need to borrow, whether from KHI or anyone else, to have sums available to meet the figure that is caught by the freezing order and to continue in business at the same time. 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. I need say nothing, I think, about such arguments save that, even on the best of cases that it is possible realistically to envisage, the set-offs could only amount to a fraction of the sums that have been the subject of the award and judgment. Quite ridiculous amounts have been claimed in the various witness statements.

41. I turn then to the question of the original application and the order sought for transfer of the money in New Zealand to this country. I can deal with that very shortly. In circumstances where this is a sum of money which is in New Zealand and there has been an application in New Zealand to register the judgment of Burton J there, it is a matter for the New Zealand courts as to how enforcement takes place in that jurisdiction. If there are means by which that sum can be attached beyond those which have already been attempted in New Zealand, then it is open to the claimant to pursue such remedies there. I am not going to interfere with anything that is going on in New Zealand in that context. It is fair to say that the evidence that has come before this court may well differ from that which was before Clifford J, whether by reason of the absence of representation on Mr Emmott's part there or not I do not know.

42. Although there is jurisdiction to do what Mr Shepherd has asked for, which arises out of *Derby v Weldon* and the dictum of Kerr LJ in *The Niedersachsen*, it does not seem to me that it would be appropriate in this case for me to make an order of that kind. It is only in, it seems to me, an exceptional case that the court will order money to be brought into the jurisdiction in order that it can police the injunction, and I do not see this as being an appropriate remedy here in circumstances where I am prepared to and have just removed the *Angel Bell* exclusion.

43. The only remaining question I think for me in those circumstances is what then happens in relation to the existing orders made by Andrew Baker J and I will hear submissions on that.

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This transcript has been approved by the Judge