The Gray's Inn and City of London Law Society Joint Annual Lecture

"The Enforcement of Court Judgments of England and Wales After 31 December 2020"

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1. To your right, and my left, the great Gray's Inn judge Lord Bingham is looking benignly down on us. He observed in Société Eram Shipping Co Ltd v Cie Internationale de Navigation [2004] 1 AC 260, [10] that:

"As many a claimant has learned to its cost, it is one thing to recover a favourable judgment; it may prove quite another to enforce it against an unscrupulous defendant, But an unenforceable judgment is at best valueless, at worst a source of additional loss".

2. The interest of litigating parties in ensuring that the judgments they obtain from English courts have value is, naturally, a matter of acute interest and concern for the judiciary. However, you will not be surprised to learn that, as serving judge, I am not planning to pass comment either on what the policy of UK should be so far as acceding to the Lugano Convention in its own right is concerned, or the merits or otherwise of the response adopted to the UK's application by the European Commission. Those are essentially political rather than judicial questions, and I am pleased to have been able to leave them to Sarah Garvey to talk about.

3. What I do plan to do is two things. First, to look at what steps a litigating party can take to improve its prospects of enforcing any English judgment it may subsequently obtain, whether we find ourselves in a world of Lugano, or Luga-No-No. Second, to consider whether there are any steps which are being taken, or which might

be taken, within the judicial sphere, further to facilitate the process of enforcement.

A WHAT CAN A CLAIMANT DO?

A1 Freezing order and proprietary injunctive relief

4. In those cases where the defendant has assets within or without jurisdiction, and a claimant with a good arguable claim can establish "a real risk, objectively, that a future judgment would not be met because of an unjustified dissipation of assets", it may be possible to obtain freezing order relief. That formulation of the requirement for freezing order relief is taken from Gloster LJ in Holyoake v Candy [2017] EWCA Civ 92. If the claimant is seeking to recover its own property or property into which it claims it can trace, it will only need to show that there is a serious issue to be tried, and that the American Cyanamid requirements are otherwise met.

5. Such an order will frequently require the defendant to provide disclosure of its assets up to the value of a claim, allowing notice of the order to be given to banks at which the defendant has credit balances, or to allow saisie conservatoire relief to be taken in other jurisdictions.

6. There can be little doubt that the development of the freezing order jurisdiction, and the readiness of the English courts to update the orders they make to keep pace with anti-enforcement strategies, have been a singularly attractive feature of litigation in this jurisdiction over recent decades.

A2 Prepare to enforce

7. In addition, a claimant should be conscious from the outset of litigation of where enforcement proceedings might need to be brought, and what the requirements for effective enforcement might be. That involves liaising with lawyers in the anticipated enforcement jurisdictions from an early stage as to the form of relief sought, the

process of service, and whether it should seek judgment in default or through summary determination if the defendant does not engage.

8. So far as the issue of service is concerned, claimants are usually very keen to obtain orders for alternative service. This is so even in respectof defendants domiciled in countries which are signatories to the "Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters" signed at the Hague on 15 November 1965 who have stipulated under Articles 8 and 10 that only service through the designated Central Authority is accepted. Even if the claimant has a valid reason for seeking alternative service at the start of the proceedings, the process of attempting to effect Hague Convention-compliant service should normally continue, with a view being taken as to whether judgment should be entered before it has taken place.

9. Second, many countries will not enforce a judgment which has been entered by default. So, a claimant needs to consider whether it should proceed with the action anyway, even if the defendant is in default, in order to get a judgment on the merits. My own view, where this course is followed, is that a claimant who wishes to obtain a judgment on the merits at a trial must come to court ready to establish its claim on the merits, rather than simply hoping the court will nod the case through because the defendant has failed to engage.

A3 Post-judgment orders

10. In addition to taking steps pre-judgment to maximise their enforcement prospects, a claimant should be astute to the need to take prompt post-judgment steps.

11. This might include a post-judgment freezing order, an issue to which I will return in a moment. In addition, an order can be made appointing receivers by way of equitable execution, which can have the effect of placing the defendant's rights under a contract, a trust or an insurance policy under the control of an officer answerable to the court.

12. The processes of the court can be used to cross-examine a defendant, or the director of a corporate defendant, as to the judgment debtor's assets under CPR 71, a provision about which I will say a little more in a moment.

13. And of course, third party debt orders can be sought, if the debtor is amenable to the jurisdiction of the court, under CPR 72. So long as London remains a major financial centre, and English jurisdiction clauses continue to proliferate in international transactions, this should provide an effective means of enforcement in many cases.

B WHAT CAN THE COURTS OR THE RULES COMMITTEE DO TO HELP?

B1 The test for post-judgment freezing injunctions

14. There has long been a debate as to whether the court should be more ready to grant a freezing injunctions post-judgment against the judgment debtor than in a pre-judgment context. I stress the words "against the judgment debtor" to make it clear that this discussion is not intended to encompass applications for freezing orders against third parties based on their unlawful interference with an existing judgment – the so-called Marex tort – which are pre-judgment applications so far as the respondent is concerned.

15. Of course, in a sense it is inevitably easier to obtain a post-judgment freezing injunction. The good arguable case threshold will amply be met, as will the broad "just and convenient" test. In addition, there will be less scope for exceptions from the order so far as living and business expenses are concerned: Masri v Consolidated Contractors Co SA [2008] EWHC 2492 (Comm), [35].

16. But what of the risk of dissipation? Some first instance decisions had suggested that the risk might more readily be found in the case of a judgment debtor, who had now "run out of road", and was no longer concerned about upsetting the judge: for example Orwell Steel (Erection and Fabrication) Ltd v Asphalt and Asphalt and Tarmac (UK) Ltd [1984] 1 WLR 1197, 1100; Distributori Automatici

Italia v Halford General Trading [1985] 1 WLR 1066, 1073 and Great Station Properties SA v UMS Holding Ltd [2017] EWHC 3330 (Comm), [63]. While the attempts to rationalise the conclusion that a risk of dissipation should more easily be satisfied in a post-judgment context do not entirely persuade, the view that it should be easier to establish a risk of dissipation post-judgment has an intuitive appeal to many first instance judges.

17. That issue has now been considered by the Court of Appeal in Les Ambassadeurs Club Ltd v Mr Songbo Yu [2021] EWCA Civ 1310. The judgment was given by Lady Justice Andrews, a Master of Gray's Inn, and the co-author of the first English treatise on what were then known as Mareva injunctions. Master Andrews rejected the suggestion that a different test applied when determining whether there was a real risk of dissipation in a post-judgment context. In reaching this conclusion, she observed that a freezing order was not "just another standard means of securing enforcement of a judgment … like a charging order or a third-party debt order" ([14]) and the "drastic interference with a person's right to do as they please with their own property that a freezing injunction entails" ([15]).

18. Those two comments are interesting, because when the conventional enforcement processes are invoked, they do interfere drastically with a defendant's right to do as they please with their own property: whether the measure is a charging order, a third-party debt order or a process for attachment of property. And while it is, of course, correct, that a freezing order is not a method of enforcement in itself, it can be an important adjunct to enforcement. The policy issue is whether it is an adjunct which should be more freely available.

19. Lady Justice Andrews distinguished between a defendant who can pay but refuses to pay her debts until she is forced to do so, and a defendant who is so determined not to pay that she would take active steps to frustrate the recovery of sums due to her creditors by transferring or concealing assets or by some other form of

unjustified dissipation ([19]). There are cases, however, where those two spheres of activity overlap. In Stronghold Insurance Co Ltd v Overseas Union Insurance Ltd [1995] CLC 1268, a pre-award freezing order was granted in respect of a claim against a solvent defendant against whom the award could ultimately be enforced by straightforward and satisfactory methods. At p.1274, Potter J held that:

"If the claim is of a size or otherwise of a nature whereby, if Mareva relief is not granted or continued, the removal abroad by the defendants of assets within the UK may in practice give rise to the risk that the plaintiffs claim and associated costs will not be met in full, then the court should be ready to provide Mareva relief, not simply by way of execution in advance, but so as properly to prevent removal of assets which are available and appropriate to meet the plaintiffs claim."

20. I followed a similar course in the post-judgment context in Ivanhoe Mines Limited v Gardner [2020] EWHC 144 (Comm), observing at [19]:

"Particularly when considering a claim or judgment with a relatively low value, the Court is entitled to find a risk of dissipation is made out where there are assets which there is a real risk of the respondent dissipating, even if there are other assets which it would be more difficult to dissipate, but which would involve the claimant in a more onerous enforcement effort … In deciding whether the test for freezing order relief has been made out, the Court is entitled to have regard to the practicalities of enforcement against assets of different kinds, a consideration which may be particularly pertinent when, as here, the costs of enforcement may soon reach a point where they are out of proportion to the size of the judgment debt."

21. However, there may well be scope to develop the law further in a post-judgment context. I offer the following possibilities for consideration.

22. Once judgment has been entered, it might be asked whether the judgment debtor should be in a position to move assets out of the jurisdiction at all, save in respect of an amount exceeding the

judgment debt? Within the current freezing order framework, the importance of assets within the jurisdiction, and the need for the defendant to meet legal and other expenses from outside the jurisdiction, have long been recognised, for example in A v C (No 2) [1981] 1 QB 961.

23. In addition, it could be argued that the claimant's status as a judgment creditor might justify a so-called "notification" injunction (prohibiting the defendant from disposing of assets without prior notification to the claimant) without satisfying the pre-judgment risk of dissipation test. It is clearly established in the pre-judgment context that the same test applies to a notification as to a freezing injunction: Holyoake v Candy [2018] Ch 297, [34] and [41]. Songbo Yu at [30]-[33] strongly supports the application of the same test for notification orders in a post-judgment context. So, it would require a change in the law at Supreme Court level, or a change to the CPR, for the law to develop along these lines.

24. Or, on still more radical lines, it would be possible to reformulate the requirement of a risk of dissipation in a post-judgment context altogether, to remove the requirement for an "unjustified dissipation", leaving the "ordinary course of business" exception to minimise the interference with the respondent so far as assets outside the jurisdiction are concerned. An "unjustified dissipation" is said to be necessary before freezing order relief will be granted because:

"If the defendant is not threatening to change the existing way of handling their assets, it will not be sufficient to show that such continued conduct would prejudice the claimant's ability to enforce a judgment. That would be contrary to the purpose of the WFO jurisdiction because it would require defendants to change their legitimate behaviour in order to provide preferential security for the claim which the claimant would not otherwise enjoy"

(Popplewell J in Fundo Soberano de Angola v dos Santos [2018] EWHC 2199 (Comm), [86(6)] approved in Lakatamia Shipping Co Ltd v Morimoto [2019] EWCA Civ, [35]).

25. However, it might be argued that the existence of a judgment debt, established after a fair trial, does justify requiring a defendant to change its behaviour – not to provide the claimant with security (which it would not), but because "it is the policy of English law that English judgments should be paid" (Touton Far East Pte Limited v Shri Mahal Limited [2016] EWHC 1765 (Comm), [4]).

B2 Information orders

26. The CPR provides various mechanisms by which a judgment creditor can obtain information about the judgment debtor's assets from the judgment debtor or, if it is a body corporate, its officers. In particular:

a. S.37(1) of the Senior Courts Act 1981 gives the court power to make such orders, either as an ancillary order to the granting of an injunction or on a free-standing basis, including requiring the defendant to provide information about its assets.

b. CPR r.25.1(g) allow the court to direct a party to provide information about the location of relevant property or assets, or property or assets which may be the subject of a freezing order application.

c. And the judgment debtor or its officers may be cross-examined under CPR 71.

27. However, what about obtaining information from non-parties? The answer is that the courts have been very inventive in ensuring, so far as possible, that information relevant to the enforcement of a judgment can be obtained.

28. First, and most obviously, the court is able to make non-party disclosure orders under CPR 31.17 in support of enforcement, just as it is able to make such orders for the purpose of resolving the dispute on the merits. That is clear from a number of authorities, including North Shore Ventures Ltd v Anstead Holdings Ltd [2011] EWHC 178 (Ch) and Abela v Baadarani (No 2) [2018] 1 WLR 89. However, that requires the non-party in question to be in the jurisdiction, and the judgment creditor to be able to identify the

documents sought with the degree of specificity which CPR 31.17 requires. The Abela decision also confirms that the court can make a search order against a non-party for the purpose of preserving documents which are relevant to enforcement against the judgment debtor. The court can also issue a witness summons against a non-party who is within the jurisdiction.

29. Second, there is the long-standing power under s.7 of the Bankers' Books Evidence Act 1879 to require a bank within the jurisdiction to provide a copy of the statement of the judgment debtor's account. For such an order to be made, there must be grounds for believing that the judgment debtor has assets with the respondent bank (A v C [1981] QB 856, 960), so that a Micawberesque search is not possible. And the order does not extend to documents outside the jurisdiction (Mackinnon v Donaldson, Lufkin & Jenrette Securities Corp [1986] 1 Ch 482).

30. Third, there is jurisdiction under the Norwich Pharmacal principle which has been held to encompass orders directed to locating assets for the purposes of enforcement (Mercantile Group (Europe) AG v Aiyela [1994] QB 366). However, that requires the non-party to have become "mixed up" in the transaction with the defendant about which disclosure is sought, and there must be evidence that such a transaction is wrongful, for example because it represents an attempt to put assets beyond the reach of processes of enforcement.

31. There are, of course, practical limits to the terms and reach of orders of this kind. In particular, there is the territorial limit, because, as matters stand, applications for such relief cannot be served out of the jurisdiction. I will return to that issue in respect of CPR 71 shortly.

32. It may be for that reason that the courts have been inventive in formulating orders which are focussed on the judgment debtor but seek to take the issue of asset disclosure out of the judgment debtor's hands.

33. Thus, the court can make an order requiring the judgment debtor to sign letters of authorisation to go to non-parties holding

information on the judgment debtor's behalf or to which it has a right of access, such as telephone or social media providers, banks and investment funds etc, and authorising the senior master to sign such letters in the defendant's place if they refused to do so. I made an order of this kind in Lakatamia Shipping Co Ltd v Nobu Su [2020] EWHC 865 (Comm), following well-established principles established in Hayer AG v Winter [1986] 1 WLR 497.

34. And where documents within the judgment debtor's control are obtained from a non-party in this way, the court can appoint independent lawyers to review them on the defendant's behalf. Once again, I made an order to this effect in Lakatamia Shipping Co Ltd v Nobu Su, building on statements made by Mr Justice Teare in Nolan Family Partnership v Walsh [2011] EWHC 535 (Comm). The benefit of this approach is that the applicant is relieved from the burden of specific identification which would apply if it applied directly under CPR 31.17, and the authorised letters requesting documents can be sent out of the jurisdiction.

B3 CPR 71 and corporations

35. I have already referred to CPR 71 under which the court can order a judgment debtor to attend court to provide information for the purpose of enabling the judgment creditor to enforce a judgment. Where the debtor is a corporation, a CPR 71 order can be made against an "officer" of the corporate body. The addressee can be required, on penalty of committal for contempt, to attend court and to produce documents described in the CPR 71 order.

36. I want briefly to discuss two features of CPR 71.

37. The first concerns the natural persons to whom an order might be addressed in respect of a corporate judgment debtor. It has been held under a previous version of the rule that "officer" included former officers (Société Generate v JM Farina & Co [1904] 1 KB 794). However, the status of the present rule in this respect is unclear, Lord Mance suggesting in Masri v Consolidated International (UK) Ltd

(No 4) [2010] 1 AC 90, [23] that "on the face of it" the Rule means "a current officer at the time of the application or order".

38. It is also unclear whether it applies to de facto directors, or to persons who in practice control the company's activities – so-called shadow directors. This issue has been considered in the context of what was once CPR 81.4, which allowed a committal application in respect of a company to be made against "any director or other officer of that company". In Integral Petroleum SA v Petrogat FZE [2019] 1 WLR 574, Moulder J endorsed a previous statement by Leggatt J in Touton Far East Pte Ltd v Shri Lal Mahal Ltd [2017] EWHC 621 (Comm), [5] that this provision extended to de facto directors. She rejected, however, an argument that it extended to shadow directors – those "in accordance with whose directions or instructions the company is accustomed to act" – which was a special rule of English company law of limited application.

39. It is not clear whether CPR 71 would be held to apply to de facto directors. It has been described as "very different" from the court's committal powers (Dar Al Arkan Real Estate Development Co v Refai [2015] 1 WLR 135, [42), and the wording of the section is narrower. Further, it has been held that CPR 71 does not extend to the director of a corporate director of a judgment debtor in Masri v Consolidated International (UK) Ltd (No 4) [2008] EWCA 876, [20], although Clarke LJ said he could see "why it might be desirable for the rule to be widened to include such a case".

40. I would tentatively suggest that CPR 71 ought to apply to those who are or were at the relevant time functionally directors, whatever their de jure position. While the concept of a de facto director will capture many of those persons, there will be many cases – for example in a typical offshore SPV – when there are local directors performing the relevant executive functions, but doing so entirely at the behest of someone else. There will also be cases of the kind considered by Clarke LJ when the natural persons are kept at one remove from the corporate judgment debtor through the use of corporate directors. There seems a plausible case for making such

individuals susceptible to CPR 71-type orders, their control over the company over whom the court has jurisdiction giving rise to a sufficient nexus with the judgment to make them appropriate objects of ancillary orders, just as third party costs orders can be made against those who fund and direct the defence of litigation under s.51 of the Senior Courts Act 1981.

41. The second concerns the status of the officers of foreign companies. The House of Lords in Masri v Consolidated International (UK) Ltd (No 4) [2010] 1 AC 90 held that CPR 71 did not, on its proper construction, give the court power to make orders against the foreign directors of foreign companies, albeit the House of Lords accepted that the statutory power conferred on the rule-making body was in principle wide enough to have authorised the making of a rule to this effect. The Court also found, approving a decision of Tomlinson J in Vitol SA v Capti Marine Ltd [2009] Bus LR 271, that there was no gateway under which service out could be effected.

42. It is now clear that, in an appropriate case, a CPR 71 order can be made against the foreign officer of a foreign company provided that the order is served on that officer within the jurisdiction. A concession to that effect was made before Field J in CIMC Raffles Offshore (Singapore) PTE Ltd v Schahim Holdings SA [2014] EWHC 1742 (Comm). The correctness of that concession was upheld by Cooke J, after hearing argument, in Deutsche Bank AG v Alexander Vik [2015] EWHC 2773 (Comm). In Masri, Clarke LJ had made a statement to similar effect, at [14].

43. The position we have ended up in equates the position of the directors or controllers of a foreign corporate defendant with that of a witness ordered to give evidence for a trial. There has long been no power to serve a witness summons out of the jurisdiction, whereas it is possible to serve a summons on someone domiciled abroad but temporarily in the jurisdiction when served. Lord Mance in Masri expressly referred to the territorial limits of the court's power to order witnesses to give evidence (at [12] and [17]) in support of his conclusion as to the scope of CPR 71. If an amendment to the rule

was under consideration, there is scope for a legitimate debate as to whether that analogy is apt in all cases. In particular, where the foreign company has submitted to the jurisdiction on the merits, there is force in Clarke LJ's observation (at [16]) that:

"It is not a breach of international law or comity to order the examination of a foreign director of a company which has submitted to the jurisdiction, has defended the case on the merits and has failed to pay the judgment debt".

44. That limitation to cases of a submitting defendant may not go far enough. There might be scope for distinguishing between those with a formal position as directors, but limited control over the company, and those in effective control of the corporate detor. Indeed there is a suggestion of such a distinction in the discussion in Masri of the decision in The Ikarian Reefer (No 2) [2000] 1 WLR 603. And it might be important to determine the date at which such control mattered. If it is the corporate defendant's submission which counts, that would seem to be the relevant date.

45. I have recently learned, to my cost, that it is much easier to come up with abstract ideas for procedural reform than to find a workable wording to implement them. It may well be that the definitional difficulties inherent in any revised formulation mean that maintaining the status quo is the only option. But for what they are worth, I offer these thoughts for wiser heads to consider.

C CONCLUSION

46. Now none of these observations are intended in any way to detract from the need for the debate, between those able to participate in it, as to the desirability of the UK being party to an international convention on the enforcement of civil and commercial judgments.

47. However, we must look to our own laurels in ensuring that this remains an attractive jurisdiction for parties to litigate international disputes, rather than waiting for a new multilateral judgment convention to ride to the rescue. An important part of that will

involve lawyers having an eye to the issue of enforcement from the outset, and the civil justice system providing an appropriate panoply of measures to aid the enforcement process.

48. Thank you.