Case No: A3/2011/1934

Neutral Citation Number: [2011] EWCA Civ 1040
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
COMMERCIAL COURT
Mr Justice David Steel
Insert Lower Court NC Number Here

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/09/2011

Before :

LORD JUSTICE WARD
and
LORD JUSTICE TOMLINSON

- -

Between :

Mobile Telesystems Finance SA	**Appellant**
- and -	
Nomihold Securities Inc	**Respondent**

- -

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7404 1424
Official Shorthand Writers to the Court)

- -

Vernon Flynn QC and Tom Smith (instructed by **Latham & Watkins Solicitors**) for the **Appellant**
Simon Salzedo QC and Tony Singla (instructed by **Simmons & Simmons Solicitors**) for the **Respondent**

Hearing date : 26 July 2011

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Judgment

Lord Justice Tomlinson :

1. This application for permission to appeal and the consequent appeal raised an important point of principle and practice in relation to the granting of freezing orders in aid of the process of execution of an arbitration award. It is unfortunate therefore that it had to be heard as a matter of urgency before a court composed of only two lords justices and moreover that the circumstances demanded that our decision be rendered immediately. At the conclusion of the three hour hearing on Tuesday 26 July 2011 we announced that we would grant permission to appeal and allow the appeal, giving reasons for our decision in due course. These are my reasons for reaching that decision.

2. The Appellant is Mobile Telesystems Finance SA to whom I shall refer as "MTSF". It is incorporated in Luxembourg. MTSF is part of a wider group of companies to which I will refer where necessary as "the MTS Group". The MTS Group is the leading telecommunications provider in Russia, Eastern Europe and Central Asia, with 102 million mobile telephone subscribers, 7.5 million household customers, 1.3 million broadband internet users, 2.1 million pay-per-view television subscribers and over 36,000 employees. The immediate parent company of MTSF, by which it is wholly owned, is MTS OJSC. MTS OJSC is incorporated in Russia and listed on the New York Stock Exchange. The evidence demonstrates that MTSF is a company set up purely to secure tax benefits to MTS OJSC.

3. The Respondent is Nomihold Securities Inc, to whom I shall refer as "Nomihold". The underlying subject matter of the present dispute between Nomihold and MTSF relates to an agreement to buy and sell shares in a Seychelles company, which in turn was believed to have the benefit indirectly of a mobile telephone communications licence in Kyrgyzstan. In broad summary:-

    i) On 17 November 2005 MTSF and Nomihold entered into a sale and purchase agreement under which MTSF agreed to acquire a 51% interest in Tarino Limited from Nomihold for US$ 150 million in cash.

    ii) At the time of the sale and purchase agreement it was apparently understood that Tarino was the indirect owner, through its wholly owned subsidiaries, of Bitel LLC, a Kyrgyz company holding a GSM 900/1800 mobile telecommunications licence for the entire territory of Kyrgyzstan.

    iii) MTSF and Nomihold also entered into a put and call option agreement dated 22 November 2005 in respect of the remaining 49% of Tarino, providing for a put option exercisable by Nomihold at a price of US$ 170 million.

4. It is said by MTSF that on 15 December 2005, therefore shortly after MTSF and Nomihold had entered into the sale and purchase agreement and the option agreement, Bitel's corporate offices, presumably in Kyrgyzstan, were seized by a third party and that MTSF effectively lost control of Bitel. In November 2006 Nomihold exercised the put option. We were not told whether the shares in Tarino are alleged to have become valueless in consequence of what is said to

have occurred in December 2005, but on MTSF's account the shares in Tarino no longer carried with them any indirect interest in Bitel. MTSF resisted the exercise of the put option.

5. In January 2007 Nomihold commenced arbitration proceedings in London against MTSF before an arbitral tribunal constituted under the rules of the London Court of International Arbitration seeking, amongst other things, specific performance of the put option. MTSF contested the proceedings. On 11 November 2010 the tribunal rendered its award in favour of Nomihold. We have not been shown the award. Nomihold says that it is in a total amount of around US$ 208 million. MTSF says that there is a serious issue as to what the award means and that on its true construction specific performance was ordered. I will assume for present purposes that it is in form an award under which US$ 208 million is payable by MTSF to Nomihold. MTSF did not challenge the award which accordingly became final on 5 January 2011.

6. Section 66 of the Arbitration Act 1996 provides:-

> "Enforcement of the award.
>
> (1) An award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.
>
> (2) Where leave is so given, judgment may be entered in terms of the award.
>
> (3) Leave to enforce an award shall not be given where, or to the extent that, the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make the award.
>
> The right to raise such an objection may have been lost (see section 73).
>
> (4) Nothing in this section affects the recognition or enforcement of an award under any other enactment or rule of law, in particular under Part II of the Arbitration Act 1950 (enforcement of awards under Geneva Convention) or the provisions of Part III of this Act relating to the recognition and enforcement of awards under the New York Convention or by an action on the award."

7. The procedure under s.66 of the Arbitration Act is governed by rules of court. CPR 62.18 provides, so far as relevant:-

> "**Enforcement of awards**
>
> 62.18 – (1) An application for permission under –
>
> (a) section 66 of the 1996 Act

. . .

to enforce an award in the same manner as a judgment or order may be made without notice in an arbitration claim form

. . .

(6) An application for permission must be supported by written evidence –

(a) exhibiting –

(i) where the application is made under section 66 of the 1996 Act or under section 26 of the 1950 Act, the arbitration agreement and the original award (or copies);

(ii) where the application is under section 101 of the 1996 Act, the documents required to be produced by section 102 of that Act; or

(iii) where the application is under section 3(1)(a) of the 1975 Act, the documents required to be produced by section 4 of that Act;

(b) stating the name and the usual or last known place of residence or business of the claimant and of the person against whom it is sought to enforce the award; and

(c) stating either –

(i) that the award has not been complied with; or

(ii) the extent to which it has not been complied with at the date of the application.

(7) An order giving permission must –

(a) be drawn up by the claimant; and

(b) be served on the defendant by –

(i) delivering a copy to him personally; or

(ii) sending a copy to him at his usual or last known place of residence or business.

. . .

(9) Within 14 days after service of the order or, if the order is to be served out of the jurisdiction, within such other period as the court may set –

(a) the defendant may apply to set aside the order; and

(b) the award must not be enforced until after –

(i) the end of that period; or

(ii) any application made by the defendant within that period has been finally disposed of.

(10) The order must contain a statement of –

(a) the right to make an application to set the order aside; and

(b) the restrictions on enforcement under rule 62.18(9)(b)."

8. On 26 January 2011 Nomihold applied to Gloster J at a without notice hearing. Nomihold says that it asked for registration of the award as a judgment pursuant to s.66(2) of the Arbitration Act and also for a worldwide freezing order to be made in relation to MTSF. We have not been shown the Part 8 Claim Form which was apparently filed on 25 January.

9. So far as concerned enforcement of the award Gloster J ordered as follows:-

"3. Judgment be entered in terms of the award dated 11 November 2010 (the "award") as set out in Schedule 2 pursuant to s.66(2) of the Arbitration Act 1996.

4. In default of the Respondent applying in accordance with paragraph 5 below, the Applicant be at liberty to enforce the award in the same manner as a judgment or order of the High Court to the same effect pursuant to s.66(1) of the Arbitration Act 1996.

5. Within 14 days after service of this Order the Respondent may apply to set aside paragraph 4 of this Order."

10. There was some debate before us as to whether paragraph 3 of the Order is in the procedurally correct form. Arguably the Order should, both in terms of s.66 of the Arbitration Act and of CPR 62.18, have given leave or permission to enter judgment rather than directing that judgment be entered. We were told by Mr Salzedo QC, for Nomihold, that judgments are no longer entered in a formal manner, and he submitted that by virtue of the order made by Gloster J on 26 January Nomihold had a judgment in its favour. However he accepted that the judgment was defeasible – he described it as a judgment nisi. That is because of the provisions of CPR 62.18.(9) and (10), pursuant to which MTSF had the right to apply to set aside the order giving permission to enforce the award as a judgment. MTSF made such an application within the time prescribed for so doing, as I shall describe below, in consequence of which the award may not be enforced until that application has been finally disposed of. The precise form in which the Order was made is not material to the issue which we have to decide. It is the substance which is important.

11. Gloster J's Order was also arguably not compliant with the requirements of CPR 62.18(10)(b) in that it failed expressly to record that, in the event that

within the permitted time MTSF applied to set aside the order, the award was not to be enforced until the application was finally disposed of. On the return date, 4 February 2011, this was rectified by the addition at the end of paragraph 3 of the order of the words "subject to a stay of execution of the judgment until the later of 9 February 2011 and the date on which any application under paragraph 5 is disposed of."

12. At the without notice hearing Gloster J also granted until the return date the freezing order sought by Nomihold. That restrained MTSF from removing any of its assets from England and Wales up to the value of US$ 208 million or from disposing of, dealing with or diminishing the value of any of its other assets, whether in or outside England and Wales, up to the same value. One of the assets of MTSF specifically identified in the freezing order was a Loan Agreement concluded between MTSF and MTS OJSC pursuant to which MTSF lent US$ 400 million to its parent. I shall revert to this agreement shortly. The freezing order also contained the usual exception, derived from the decision of Robert Goff J, as he then was, in *Iraqi Ministry of Defence v Arcepey Shipping Co SA ("The Angel Bell")* [1981] 1QB 85 pursuant to which it was made clear that the order did not prohibit MTSF from dealing with or disposing of any of its assets in the ordinary and proper course of business.

13. As part of a fund raising exercise by MTS OJSC in 2005 MTSF made an issue of US$ 400 million 8% Notes due 2012 to which I will refer hereafter as "the 2012 Notes". Interest on the Notes is payable semi-annually in arrears on 28 January and 28 July. The proceeds of the issue were on-lent by MTSF to MTS OJSC pursuant to the terms of a back-to-back inter-company Loan Agreement dated 28 January 2005, which is the Loan Agreement to which I referred in the previous paragraph. Under the terms of the Loan Agreement interest is payable by MTS OJSC to MTSF semi-annually in cash in arrears two business days prior to 28 January and 28 July each year. MTSF is in turn obliged by the terms of the issue to deposit with the Paying Agent no later than the business day immediately preceding each due date the funds required to pay interest to the Noteholders. Reflecting the circumstance that the purpose of the issue of the 2012 Loan Notes was to raise capital for the business of MTS OJSC, MTS OJSC in turn guaranteed the payment of principal and interest to the Noteholders. The 2012 Notes are publicly listed and are traded on the Luxembourg Stock Exchange.

14. On 2 February 2011 MTSF made an urgent application to the Commercial Court for a declaration that the interest payment due to Noteholders on 28 January 2011 could permissibly be made. Hamblen J declared that it could, both because payment had already been made by MTS to the Paying Agent before the first freezing order was granted and because payment of interest on the Notes fell within the saving as to the ordinary course of business.

15. Two days later the freezing order came back before Gloster J on the return date. Nomihold applied for the removal of the ordinary course of business exception. MTSF did not at that stage oppose the application, but on the basis that the issue could be revisited at the further return date which was fixed for 18 February 2011. Gloster J accordingly directed the removal of the ordinary case of business exception, observing:-

> "Mr Salzedo, I accept your submission that it is appropriate for this court to continue the freezing order without the proviso as to 'ordinary course of business'. I am with you because this court, as you rightly point out, does take an adverse view of the proposition that a judgment debtor can continue in business paying one lot of creditors but not a judgment debtor or other unsecured creditors. That is something that this court regards with disfavour. It seems to me that, as a matter of my discretion, there is no reason why such an order is going to cause any prejudice, certainly not for the next two weeks. That is because, as Miss Bingham told me on instruction, there does not appear to be any need for any payment to be made in any event during the next two weeks. So I am going to continue the order, without the 'ordinary course of business' proviso, on the basis of the approach taken by Tomlinson J in the *Masri* case at para 35. It seems to me there is no justification, at least on the information presently available, why this court should permit payment of other creditors in preference to the claimant. I say 'judgment creditor': I should, more properly, say the beneficiary of an arbitration award, because of course the respondent has indicated that it is going to apply to set aside the actual judgment based on the award."

16. MTSF did not in fact seek the restoration of the ordinary course of business exception when the matter came back, this time before Burton J, on 18 February. MTSF had however in the meantime issued an application to set aside the leave granted to enforce the award in the same manner as a judgment. Moreover the judge was asked to grant relief to enable a tender offer in respect of the 2012 Notes to take place, i.e. a process whereby the Notes would be purchased by MTS OJSC and then cancelled. Burton J acceded to this request which was opposed by Nomihold. He continued the freezing order pending the determination of the application to set aside the leave to enforce the award as a judgment. Paragraph 10 of his Order of 18 February 2011 reads as follows:-

> "10. It is declared that the purchase by MTS OJSC assisted by any relevant financial institutions involved, of 2012 Notes and the surrender by MTS OJSC of any such notes to the trustee for cancellation would not constitute a breach by the Respondent of this Order provided that the Respondent does not take any step in the process or incur any liability for fees relating to such purchase."

The judge explained his thinking in making this declaration in the following passage of his judgment:-

> "45 . . . What is proposed is that . . . steps are to be taken which do not involve anything other than a reduction of the debt or potential debt of [MTSF] by independent steps taken by the parent. The result will be to eliminate simultaneously both purported asset and purported liability, but as a result of steps taken in which [MTSF] will play no part.

> 46. In my judgment, therefore, I can and should declare for the avoidance of doubt so far as third parties are concerned that any steps taken by the parent to buy in the loans or to tender in accordance with something similar to the present terms, would, provided there were no step taken by [MTSF] which I am satisfied at the moment are not intended, none of that would be in breach of [MTSF's] obligations to comply with the freezing order."

No appeal was brought against this decision.

17. We were told that at the hearing before Burton J Mr Flynn QC for MTSF additionally sought a declaration to the effect that steps taken by the parent as described in paragraph 10 of the Order would not constitute a breach by MTS OJSC of the terms of the freezing order. We do not have a transcript of the hearing before Burton J, but we were told that in the course of the argument Burton J indicated his unpreparedness to take this course in view of the reluctance of MTS OJSC to submit to the jurisdiction of the court to make the application on its own behalf.

18. On 4 July 2011 MTSF issued an application for a variation of the freezing order so as to permit it to make the US$ 16 million interest payment due to the Noteholders on 28 July 2011. Effectively, MTSF sought the reinstatement of the ordinary course of business exception for this purpose. It was this application which came before David Steel J as a matter of urgency at a hearing which lasted late into the evening on Friday 15 July. It was preceded by an exchange of evidence in support and in opposition. It was common ground before David Steel J that payment of the interest due on the Notes could properly be characterised as being in the ordinary course of business.

19. David Steel J delivered a short but succinct judgment on the following Monday morning, 18 July. He declined to vary the freezing order to permit payment of the interest due. He gave essentially five reasons for his conclusion:-

    1. Where a defendant is a judgment debtor, an exception in a freezing order to permit payments in the ordinary course of business is not generally appropriate.

    2. Although strictly speaking MTSF is not a judgment debtor, Nomihold had in its favour an arbitration award which had not been challenged and the resistance to enforcement had already been characterised by Burton J as having "somewhat limited prospects of success".

    3. Whilst the effect of not granting the variation would probably be to force MTS OJSC to hold its subsidiary harmless against exposure to the Noteholders, this did not amount to the parent being held to ransom and was not objectionable in the same manner as this court in *Camdex International Ltd v Bank of Zambia (2)* [1997] 1 All ER 728 characterised an attempt by a judgment creditor to restrain

disposal by the judgment debtor of an asset of no value to the judgment creditor but of great value to the judgment debtor.

4. The judge was unpersuaded by the evidence that the consequences of non-payment of interest by MTSF would be catastrophic.

5. The judge thought it irrelevant either that MTSF was not insolvent or that, even if it were, the uncontradicted evidence as to the applicable insolvency law, that of Luxembourg, was that the payment of interest on the Notes would be unlikely to be regarded as an objectionable preference.

The judge was also plainly unimpressed by the failure of MTSF to apply for the variation until 4 July 2011 and he noted that no appeal had been brought against the decision of Gloster J to remove the ordinary course of business exception.

20. It is against this decision that MTSF sought permission to appeal. On Friday 22 July I directed that the application be heard on Tuesday 26 July with the appeal to follow if permission were granted. The application to set aside the leave to enforce the award as a judgment had for some time been listed to be heard on 26 and 27 July. Burton J helpfully agreed to defer the beginning of that hearing until after counsel had addressed this court on the application for permission to appeal against the decision of David Steel J.

21. We heard the application and the appeal at 10.00 on 26 July 2011 and the argument concluded at 13.00. In view of the imminence of due date for the payment of interest we announced our decision at 14.00.

22. There were two relevant developments in the interval between the decision of David Steel J and the hearing before us. First, in its skeleton argument of 20 July 2011 in support of the Appellant's Notice, MTSF indicated that MTS OJSC as guarantor of the 2012 Notes intended to make an application to the court "forthwith" for clarification that the terms of the freezing order did not preclude it from paying the Noteholders directly qua guarantor. After it had been directed that this court would hear the application for permission to appeal of MTSF on 26 July, this indication was slightly qualified to the effect that MTS OJSC would wish to make a very urgent application to the Commercial Court in the event of the appeal failing.

23. Second, on 21 July MTS OJSC by its London solicitors, Messrs SJ Berwin, confirmed to the London solicitors of Nomihold, Messrs Simmons & Simmons, that it was its intention to comply with its obligations under the Loan Agreement and to make the payment of interest due on 26 July to the designated MTSF account.

24. There were two consequences of these developments. First, they precluded an argument by MTSF, which had in any event not impressed David Steel J, to the effect that the interest payment due from MTS OJSC under the Loan Agreement was not an asset of MTSF which would be available to satisfy any debt owned by MTSF to Nomihold. This argument proceeded along the following lines. If the interest payment was not made to the Noteholders on 28 July, this would be

an event of default. The likely outcome would be that the Trustee would exercise its right to accelerate payment of all principal and interest owing under the 2012 Notes, demanding immediate payment thereof. MTS OJSC would thus be required to pay these amounts qua guarantor, but as a result of so doing would be subrogated to the rights of the Noteholders against MTSF and would have rights to an indemnity from MTSF. MTS OJSC would be entitled to set off its subrogated claims and its claims to an indemnity against any claim made by MTSF for amounts due and owing under the Loan Agreement, with the result that the receivables due from MTS OJSC under the Loan Agreement would be extinguished and thus unavailable to satisfy any debt due from MTSF to Nomihold. Second however they demonstrated that the effect of declining to permit MTSF to make the payment of interest on the Loan Notes would be that MTS OJSC would pay twice, since in the event that it carried through its confirmed intention to honour its obligation to MTSF it would nonetheless remain liable under the guarantee to the Noteholders. In the event of MTSF remaining restrained from paying interest due to Noteholders, MTS OJSC would have to pay as guarantor.

25. Mr Flynn submitted that the ordinary course of business exception is an important safeguard which underlines that a freezing order is ordinarily a measure designed to conserve assets. Where a freezing order is granted in aid of execution the exception can he suggested properly be removed, but a freezing order in that form should be granted only to a judgment creditor. Whether a claimant is in the position of a judgment creditor should be determined by a bright line test. Either a party is a judgment creditor or he is not. There is a world of difference between the beneficiary of an arbitral award and a judgment creditor. The beneficiary of an arbitral award is in no different position from that of any party to whom a contractual obligation or debt is owed. Praying in aid the approach of CPR 62.18(9) Mr Flynn submitted that the touchstone of the distinction is the ability to enforce. He submitted that, whatever the mechanics of Gloster J's Order of 26 January 2011, i.e. whether it amounted to the granting of judgment or simply leave to enter judgment, it did not give rise to a judgment debt because it was not an enforceable order. Even if it was properly to be regarded as giving rise to a judgment debt, still the freezing order regime was not yet available in aid of execution since execution is impermissible until resolution of the challenge to enforcement. Accordingly, Mr Flynn submitted that there was no proper basis for the approach of the judge. He should not have treated MTSF as a judgment debtor. The balance of convenience simply did not arise. However, if it did, the judge had been wrong also to reject the uncontradicted evidence that failure by MTSF to pay the interest due would be very likely to lead to acceleration of the payment of both principal and interest with demand for immediate payment of the entire sums due with cross-defaults declared under various other financing arrangements to which members of the MTS Group were party. Mr Flynn also submitted that the judge had been wrong to approach the application on the basis that MTSF's challenge to enforcement of the award was simply devoid of merit. The only principled basis upon which that aspect could properly have been approached, short of examining the realms of challenge, was to assume that they were arguable points.

26. Central to Nomihold's resistance to the variation sought was its assertion that, at a time when its solvency was in doubt, MTSF was seeking to prefer one class of creditor, the Noteholders, over Nomihold. The judge had failed to grapple with MTSF's answer to this point, submitted Mr Flynn, which was that the uncontradicted evidence was to the effect that pursuant to the applicable insolvency regime, that of Luxembourg, MTSF was not insolvent and moreover that even if it were it was unlikely that the proposed payment of interest to the Noteholders would be regarded as a preference.

27. Further, Mr Flynn submitted that the judge had been wrong to be critical of the failure of MTSF to apply for relief before 4 July, bearing in mind that it had always been known that the interest payment would fall due on 28 July and that, unless the ordinary course of business exception was reinstated, MTSF would be unable to pay it. This was because had MTS OJSC been able to complete the tender offer envisaged by paragraph 10 of Burton J's Order of 18 February 2011, no further interest payment would have been due from MTSF. However the successful completion of that tender offer had been frustrated by Nomihold, by their solicitors, warning financial institutions that implementation by them of a tender of the sort envisaged would constitute a breach of the freezing order both by MTS OJSC and by the financial institutions themselves. An example of such a warning was before us in the shape of a letter dated 24 February 2011 from Messrs Simmons & Simmons to Lucid Issuer Services Limited. That letter reads:-

> "**Nomihold Securities Inc v Mobile Telesystems Finance SA, 2011 Folio 95**
>
> We refer to the Freezing Orders of Mrs Justice Gloster dated 26 January and 4 February, and the Freezing order of Mr Justice Burton of 18 February 2011. We enclose a copy of all these orders. We draw your attention in particular to the restrictions in paragraphs 2 to 5 of the most recent Order.
>
> Paragraph 10 of the Freezing order made by Mr Justice Burton contains a declaration that the purchase by Mobile TeleSystems OJSC ("MTS OJSC"), assisted by any relevant financial institutions, of the US$400,000,000 8% notes due 2012 issued by the Respondent would not constitute a breach by the Respondent of the Freezing Order, provided that the Respondent does not take any step in the process or incur any liability for fees relating to such purchase.
>
> We are not aware that any such purchase has been announced. However, we draw to your attention that the terms of the declaration relate solely to the Respondent. Our client considers that any further tender offer would constitute a breach of the Order by MTS OJSC and the relevant financial institutions which implement such offer. All our client's rights are reserved."

Finally, and as a matter of overarching principle, Mr Flynn argued that it was simply wrong that the removal of or failure to reinstate the ordinary course of business exception should be permitted successfully to exert commercial pressure upon MTS OJSC which would have the effect that it would be compelled to pay the interest due twice.

28. Mr Salzedo for his part submitted that MTSF's application for permission to appeal against a discretionary decision of an experienced Commercial Court judge should be seen as part of its attempt to delay and to obstruct enforcement of a London arbitration award worth over US$ 200 million. Mr Salzedo pointed out that the alleged catastrophic consequences of an event of default could very easily be averted either by MTSF paying or securing payment of the award or by MTS OJSC putting its subsidiary in funds to enable it to do so. There was no suggestion that MTS OJSC was unable to do so and realistically it could very readily make the funds available. MTS OJSC was said without contradiction to have "vast funds at its disposal". There was no merit in the challenge to enforcement and Burton J had already said as much at the hearing on 18 February. Insofar as the challenge relied upon the inappropriateness of taking enforcement steps in England when MTSF has no assets here, MTSF submitted to the jurisdiction of the English court for the purposes of arbitration in London and could not object to the use of Commercial Court procedures for enforcing a London arbitration award. Unlike the situation in the *Camdex* case, Nomihold was not seeking to restrain the dissipation of something from which it could derive no benefit – it was simply seeking to ensure that MTSF did not prefer one set of creditors over another. MTSF had shown that it had no intention of voluntarily complying with the award yet it wished to be permitted to operate other parts of its business normally, relevantly by paying its obligations to its Noteholders.

29. Mr Salzedo recognised that putting on one side the technical point whether Nomihold in fact had a judgment in its favour, as opposed to defeasible leave to enter judgment, it did not on any view have an immediately enforceable judgment in respect of which execution could be levied. At best it had a defeasible judgment. However, he submitted, there was no rule of law to the effect that there must be an ordinary course of business exception in every freezing order, it is only pursuant to a rule of practice that such an exception is habitually included in a freezing order which is not granted in aid of execution. Mr Salzedo submitted that the fundamental question here is simply one of the balance of convenience. Is it just or convenient to permit this interest payment to be made by MTSF in the circumstances which prevail? He identified the key factor in that balance of convenience as being the balance of prejudice which would be suffered by either party should it lose the application to vary the freezing order but then succeed on the application to set aside leave to enforce the award as a judgment. Although in his short judgment David Steel J did not use the expression "balance of convenience" this was the basis of the argument presented to him and his reasoning amounts to an acceptance that the balance falls in favour of Nomihold. Resolution of the appeal thus involves no issue of principle and the judge's exercise of discretion should be respected and upheld.

30. Finally, on the question of delay, Mr Salzedo pointed out that MTSF had not applied on 18 February to reinstate the ordinary course of business exception and that it had not thereafter returned to court to complain about the letters written to financial institutions such as that which I have set out above. He submitted that Burton J had acceded to the argument that if the parent MTS OJSC was not prepared to submit to the jurisdiction, the court should not declare in its favour that it would not be in breach of the order by making the proposed tender offer. Moreover, submitted Mr Salzedo, it had not been the intention of Burton J to sanction a tender offer and no particular documented proposed transaction had been placed before him.

Discussion

31. MTSF is merely a vehicle of MTS OJSC set up to procure tax benefits to the parent. MTS OJSC, or at any rate the Group of which it is a part, is well able to meet the award in favour of Nomihold and to discharge the obligations which it has procured MTSF to undertake to the Noteholders. MTS OJSC will clearly ensure, in its own interests and those of the Group, that the Noteholders do not go unpaid. Nomihold is the beneficiary of an unchallenged London arbitration award. In these circumstances it is tempting to accede to Nomihold's submission that the balance of convenience tilts heavily in favour of preserving in the hands of MTSF the US$ 16 million which it will receive from its parent with a view to that being a fund available against which execution in respect of the unpaid award can in due course be levied. I am however satisfied that this would be a wrong and unprincipled approach.

32. In *Camdex* Phillips LJ, as he then was, observed at page 735:-

> "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 and realise the value of that asset for the benefit of the judgment creditor."

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, as Sir Thomas Bingham MR, as he then was, pointed out in the same case at page 732:-

> "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."

Sir Thomas Bingham also observed at page 733 that the court is not at the stage of granting a freezing order, even one in aid of execution as the Mareva injunction in that case was, immediately concerned with any question of execution itself. Aldous LJ in the same case observed at page 734:-

> "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."

33. In *Masri v Consolidated Contractors* [2008] EWHC 2492 (Comm) I was persuaded to omit an ordinary course of business exception in relation to a freezing order in respect of sums in various of the judgment debtor's bank accounts. The evidence showed positively that the absence of such an exception had caused no disruption to the judgment debtor's business. I referred at paragraphs 24 and 35 of my judgment to a passage from the judgment of Colman J in *Soinco v Novokuznetsk Aluminium Plant* [1998] QB 406. That case was concerned with the appointment of a receiver by way of equitable execution. At page 421 (not 412 as recorded in paragraph 35 of my judgment) Colman J said this:-

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

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

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

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

34. There is a helpful discussion of the different considerations which apply before and after judgment in Gee, Commercial Injunctions, 5th Edition at paragraphs

3.023-3.026. As Mr Steven Gee QC there points out, "the purpose for which the injunction has been granted or is being maintained is an essential consideration in the exercise of a discretion as to whether that injunction should be varied or discharged so as to release assets to be dealt with by the enjoined party". What Mr Gee there says is obviously of direct relevance to the question whether in any given case a post-judgment freezing order should contain an ordinary course of business exception. I have also since the hearing looked at the decision of this court in *Deutsche Schachtbau und Tiefbohrgesellschaft GmbH v R'as Al-Khaimah National Oil Company (No 1)*, [1990] 1 AC 295, which was not directly cited to us, although it is of course referred to in both *Camdex* and *Soinco*. It was a case in which this court upheld the grant of a Mareva injunction in aid of enforcement of an arbitration award against a foreign company where leave had been granted on the ex parte application to enforce the Geneva arbitration award in the same manner as a judgment for the sum awarded, but where enforcement remained impermissible by reason of the then current rule of court because of a pending challenge. The case is thus on all fours with the present. Furthermore I note that at page 317 Sir John Donaldson MR (with whom Woolf and Russell LJJ agreed) said this:

> "Once Bingham J had given DST leave to enforce the award as a judgment, as he did in the same order as that granting the injunction, DST became judgment creditors of Rakoil, albeit subject to a suspension of their right to levy execution and subject to the possibility that the order giving them this status might be set aside on the application of Rakoil. It was not the case that DST would become judgment creditors if and when Rakoil failed to set the order aside. Once the order was made, DST were in precisely the same position as any plaintiff who has obtained judgment, subject to a stay pending an application to the Court of Appeal to set the judgment aside."

However in that case no question arose of the "judgment debtor" Rakoil wishing to make a payment in the ordinary course of business. It was on the contrary, a case in which "if the injunction is set aside, any assets of Rakoil in this country will disappear overseas in the twinkling of a telex" – see per Sir John Donaldson MR at page 307F. Furthermore, the Master of the Rolls went on to say, at page 321G:-

> "In administering the *Mareva* jurisdiction, the courts have rightly been mindful that the object of the exercise has been to prevent "cheating" by defendants – dissipating assets, causing them to "disappear" into the pockets of others, removing them from the jurisdiction and so on. It has not been to provide advance security for the satisfaction of a judgment debt which has not yet arisen. Accordingly, in appropriate cases injunctive orders have been drawn so as to permit ordinary trading debts to be incurred and discharged and the use of assets for living expenses. However it is for the defendant to apply for such exceptions to the generality of the injunctive order and Rakoil has made no such application."

It is apparent therefore that the problem which arises in this case did not there fall for consideration. Should a "judgment debtor" against whom the judgment debt is for the time being unenforceable be prevented from meeting an obligation falling due in the ordinary course of his business?

35. The circumstance that Nomihold has in its favour an unchallenged award does not in my view mean that MTSF should for all purposes be treated as a judgment debtor. If there is a judgment of the court, as the *DST* case demonstrates that there is, it is not presently enforceable, and I agree with Mr Flynn that for present purposes the touchstone is enforcement or perhaps the availability of enforcement. That to my mind leads to two conclusions, although perhaps they are two different ways of expressing the same notion. The first is that 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. It remains a freezing order designed to prevent the dissipation of assets with the object or effect of denying Nomihold satisfaction of its contractual claim. I note that in the *DST* case at page 322A the Master of the Rolls said that "the purpose of the injunction was thus to maintain the status quo during the period covered by the stay of execution and not to preserve assets against the probability that DST might at some later date be able to establish its claim – the ordinary Mareva situation". But that does not answer the question whether in this period payments in the ordinary course of business should be permitted. In answering that question impact on MTSF's continuing business is a material consideration.

36. In *Gidrxslme Shipping Co Ltd v Tantomar-Transporters Maritimos* [1995] 1 WLR 299 Colman J was concerned with the grant of Mareva relief in aid of enforcement of two English arbitration awards. The relevant enabling statutory provision was at that time s.12(6)(f) of the Arbitration Act 1950, to the following effect:-

> "The High Court shall have, for the purposes of and in relation to a reference, the same power of making orders in respect of - . . . (f) securing the amount in dispute in the reference . . . as it has for the purpose of and in relation to an action or matter in the High Court . . ."

At page 304 Colman J said this:-

> "As recognised by Brandon J in *The Rena K* [1979] QB 377, there is thus created a jurisdiction to grant *Mareva* injunctions in respect of pending or anticipated arbitrations. The court's jurisdiction in such cases is analogous to the jurisdiction which it has in relation to a pending or anticipated action: see *The Rena K*, at p 408. In view of the fact that, as is now firmly established, the court has jurisdiction to grant a *Mareva* injunction in aid of execution upon application after judgment has been obtained (see *Orwell Steel (Erection and Fabrication) Ltd v Asphalt and Tarmac (UK) Ltd* [1948] 1 WLR 1097), there is, in my judgment, no reason in princip[le] why the

> jurisdiction under section 12(6) of the Act of 1950 should not be exercised in aid of enforcement of English arbitration awards, provided that there are grounds for believing that there is a real risk that the party against whom the award has been made may dispose of his assets to avoid execution of the award."

It is plain from the report that the injunction originally granted in that case contained the usual exception in respect of disposal in the ordinary course of business. At page 303 Colman J said this:-

> "The owners subsequently applied, ex parte, to extend the injunction so that it applied on a worldwide basis. That application failed since there was no evidence that, if the charterers had any assets abroad, they would dispose of them otherwise than in the ordinary course of their business in order to avoid enforcement of the arbitration awards against them."

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

38. The second conclusion I would reach is that, in the present circumstances, it cannot be said that payment by MTSF of the interest due to Noteholders would amount to dissipation of assets by it with the object or effect of denying Nomihold satisfaction of its claim. Still less can it be said that the payment of interest by MTSF, if made, would be with a view to avoiding execution of the award since execution is presently unavailable. MTSF is simply seeking to discharge an obligation which has fallen due in the ordinary course of its business. I can see no principled basis upon which it can properly be restrained.

39. I agree with Mr Flynn that it is not open to Nomihold to characterise the conduct of MTSF as an attempt to prefer some creditors over others at a time when its solvency is in doubt, but even if that were a proper characterisation, as Aldous LJ pointed out in *Camdex* it is not the function of the freezing order jurisdiction to confer a preference for repayment from an insolvent party.

40. The judge treated the position of MTSF as being analogous to that of an ordinary judgment debtor and in my view that was the wrong approach. In my view this was a case where an ordinary course of business exception would usually be appropriate. It follows that the judge exercised his discretion on a flawed basis and that we must consider the matter afresh.

41. I agree with Mr Flynn that in such circumstances there is in fact very limited room for an examination of the balance of convenience. As a matter of first principle MTSF should be permitted to meet obligations falling due in the ordinary course of its business. In my judgment Nomihold has not come close

to demonstrating that there is here some exceptional circumstance which should lead to the court adopting a different course. On the contrary, Nomihold invites the court to adopt an unusual course with the express purpose of putting commercial pressure on the parent company to act in a way in which it would not otherwise act. Whether this is properly described as holding either MTSF or MTS OJSC to ransom may be a moot point but it is not something to which the court should lend its aid.

42. In view of these conclusions I can deal quite shortly with the discretionary considerations. In my view the judge was wrong to treat as relevant his conclusion, based on Burton J's remarks, that MTSF's challenge to enforcement had "somewhat limited prospects of success". Mr Flynn explained to us the basis upon which the challenge is brought. I express no view whatever upon either the availability or the merits of the arguments which he outlined. Burton J is seised of those issues. Moreover Burton J did not himself say at the earlier hearing that the challenge to enforcement was devoid of merit. He did not hear full argument. True he did not put any wind into MTSF's sails, observing, at paragraphs 49 and 50 of his judgment:-

> "It seems to me that there may well be nothing whatsoever in the challenge to the s.66 application . . . There may be other matters which could be raised on a s.66 application but, particularly given that evidence has only very recently been served by the Defendant and the Claimant may well want to produce some evidence as to what has happened in the Seychelles, in relation to the share transfer, I conclude that there is just about enough for the challenge to go forward and, in any event, a s.66 application is one of discretion and should be considered by the court on the next occasion."

Nonetheless, the challenge having been allowed to go forward, the only principled approach on this application would in my view have been to assume that it had a worthwhile prospect of success.

43. Likewise I do not consider it relevant that MTSF had not appealed against Gloster J's decision to remove the ordinary course of business exception. MTSF had not opposed its removal at that stage. True it did not thereafter revisit the issue until 4 July, but again its failure so to do was informed, at least initially, by its belief that the tender offer process would render it unnecessary so to do. As to that, I appreciate that we have not seen a transcript of the argument before Burton J on 18 February, but I can see no point in making an order in terms of paragraph 10 of the Order then made unless the judge had come to the conclusion that the making and the implementation of a tender offer by MTS OJSC would not amount to a breach of the Order or to a contempt of court either by MTS OJSC itself or by any other financial institution notified of the Order. Whilst I also appreciate that neither MTSF nor MTS OJSC appears to have taken any step to seek clarification from the court following the sending of letters by Nomihold's solicitors such as that of 24 February 2011 set out above, I would not in the circumstances consider it a factor weighing in the balance against reinstatement of the ordinary course of business exception that MTSF did not apply for it earlier than it did.

44. Finally, I can understand why the judge was sceptical of the notion that the consequences of non-payment of interest by MTSF would in fact be catastrophic. The evidence ignored the reality that MTS OJSC would pay as guarantor. However non-payment of interest by MTSF might without more amount to an event of default even if the interest was paid by MTS OJSC as guarantor. In the current financial climate, which has markedly worsened since the hearing, I would for my part be cautious about expressing a view as to the likely consequences of even a technical default. The evidence did not address this point at all. The criticism of the judge that he should not have rejected uncontradicted evidence is therefore to my mind somewhat wide of the mark. However the judge's first answer to the point about default causing irremediable damage to the Group was that such damage was readily avoided either by paying or securing the award, if necessary using funds advanced for that purpose by the parent who is in any event highly indebted to the subsidiary. I have already given my reasons for thinking that the court should not by preventing the payment of an obligation incurred in the ordinary course of business bring pressure upon the parent company to fund its subsidiary for this purpose.

45. It was for these reasons that I concluded that permission to appeal should be granted and the appeal allowed.

Lord Justice Ward :

46. I agree.