

COUNTERING DISSIPATION

Forcing a defendant to call in liquid assets
before and after judgment

White Paper Civil Fraud Conference: 29 November 2022

OVERVIEW

- When is a *Mareva* injunction not a **freezing** order?
 - When it requires a defendant to do something
- Old law; new interpretations and developments
- Creative solutions for proactive Claimants

PART I
THE BASICS: MANDATORY MAREVA RELIEF

MANDATORY MAREVA RELIEF

- Usual WFO terms (Commercial Court Guide, App. 11)
 - Must not remove assets from England & Wales (up to max sum)
 - May only dispose of / deal with assets abroad if above max sum
- What if valuable or liquid assets are abroad?
- Section 37(1) Senior Courts Act 1981
—Justice and convenience
- Purpose of *Mareva* relief
 - To ensure effective enforcement of Court order (money judgment) in due course

MANDATORY MAREVA RELIEF

- Mandatory order requiring assets to be moved
 - Either to England or where English judgment enforceable
- Requirements: D subject to English jurisdiction, wherever the assets are located
 - Derby v Weldon (No. 6)* [1990] 1 WLR 1139 (CA)
- AND certainty re: assets; and difficult to get local relief?
 - Vitol SA v Morley* [2015] EWHC 613 (QB)

MANDATORY MAREVA RELIEF

- Payment into Court, escrow, third party custodian etc.

...I have no doubt that the Court's jurisdiction to order a Mareva injunction extends to ordering that a specific asset, which might otherwise be dissipated, should be safeguarded in a particular way including, if it is money, payment into Court. The order should not be made, of course, if depriving the defendant of the immediate use of the asset would work unfairly or unjustly for him; that and other relevant matters will affect the exercise of the Court's discretion in the particular case...

per Evans LJ in **United Norwest Cooperatives v Johnstone** (CA 1994; unrep'd)

- Transfer into segregated or blocked account
— **3 Style Ltd v Goss** (CA 1990, unrep'd)

PART II
ACTIVE PROTECTION OF PRECARIOUS FROZEN ASSETS

ACTIVE PROTECTION OF PRECARIOUS ASSETS

- Where **freezing** an asset is not enough
—without *active* intervention, value will be lost
 - Respondent as tenant under long lease; will be forfeited without payment of modest ground rent
 - Option to acquire valuable property; deadline to exercise
 - Valuable property needing urgent repairs to avoid serious damage / avoidance of insurance cover
 - Homeowner not paying premium to renew home insurance

ACTIVE PROTECTION OF PRECARIOUS ASSETS

- ‘Normal’ respondents will want to preserve value
 - And will be able to do so under the usual WFO exceptions
 - Or a bespoke variation: classic non-dissipatory expenditure
—*Nueva v Organic Grape Spirit* [2020] 2 CLC 176 (CA)
- But not all respondents...

ACTIVE PROTECTION OF PRECARIOUS ASSETS

- Classic solution: interim (equitable) **receivership**
 - Pay the ground rent
 - Exercise the option
 - Repair the roof, *etc.*

—*Masri v Consolidated Contractors No 2* [2009] QB 450
—*BTA Bank v Ablyazov* [2010] EWCA Civ 1141
- But why not the simpler method of an **interim injunction** in aid of, or by analogy with, a WFO?

ACTIVE PROTECTION OF PRECARIOUS ASSETS

- Legal pedigree: *Standard Bank v Walker* [1992] 1 WLR 561
 - Brent Walker on brink of collapse
 - George Walker refusing to leave the board
 - Bank refinancing and company survival at stake
 - Walker's shares his only asset
 - Banks seek injunction requiring him to vote/not vote to save co.
- *i.e.*, D willing to **destroy** value of assets to 'win' the fight

ACTIVE PROTECTION OF PRECARIOUS ASSETS

Vinelott J in *Standard Bank v Walker* at 566A-B , D-E:

*...there must be a point beyond which it can be said that the conduct of a debtor in relation to his property is **so plainly injurious** that whatever motive he may have, if indeed he has any discernible motive, the court must have power to intervene and restrain him...*

*...No doubt only in an **extreme case** that the court will interfere by injunction with the exercise by the debtor who is a shareholder of a right over his own property, viz. the voting right attached to his own shares...*

ACTIVE PROTECTION OF PRECARIOUS ASSETS

- *PrivatBank v Kolomoisky* [2022] EWHC 1445 (Ch)
 - Frozen asset: a US\$926m receivable from an associate
 - One pager: no security; no interest; no deadline to pay
 - Nothing ever received
 - Why was Mr K so *disinterested* in calling in debt..?

ACTIVE PROTECTION OF PRECARIOUS ASSETS

- ...Because (real risk that) Mr K preferred not to receive cash that could be subject of enforcement in due course
- Can C require D to convert an asset C **dislikes** (the receivable from a third party) to an asset C **likes** (cash)?
 - Other examples?

ACTIVE PROTECTION OF PRECARIOUS ASSETS

...real risk that, if further steps are not taken, the proper and appropriate preservation of that asset for the purposes of any future enforcement may be jeopardized...

per Trower J in Privatbank v Kolomoisky at [65]

Order:

- D must demand share of dividends already paid
- D must use reasonable endeavours to get paid balance
- D must disclose location of and comms with associate

PART III
APPLYING SIMILAR PRINCIPLES POST-JUDGMENT

MANDATORY ASSET ORDERS POST-JUDGMENT

Principle: Court will make orders to ensure effectiveness of other orders, including actual or potential money judgments
—s. 37(1) SCA 1981; Demands of justice; *Masri (No. 2)*

- **Potential** assets conditional upon D's choices and actions
—*e.g.*, assets previously placed in trust
- Classic solution: **receivership** (again)
—*Tasarruf v Merrill Lynch* [2012] 1 WLR 1721 (PC)

MANDATORY ASSET ORDERS POST-JUDGMENT

- Why not simply grant a **mandatory** injunction ordering the debtor to revoke the trusts?
- PC in *Tasarruf* expressly declined to answer that question —but cast doubt on *Field v Field* [2003] 1 FLR 376:
 - Wilson J. refused to order husband to exercise right to elect for a lump sum under his employer's pension scheme
 - Held this would amount to "*free-standing enforcement procedure in its own right*", not permitted by s. 37 SCA.

MANDATORY ASSET ORDERS POST-JUDGMENT

- Recent authorities, now including CA, make it clear that receivership can be avoided in such cases
- *Blight v Brewster* [2012] 1 WLR 2841 (Gabriel Moss QC)
 - Judgment D's pension fund; power to elect for 25% lump sum
 - C sought order requiring election, to be subject to TPDO
 - Demands of justice required s.37 in aid of a potential TPDO
 - D ordered to delegate power to C's solicitor to make election
 - C authorized to effect delegation itself, if D failed to comply

MANDATORY ASSET ORDERS POST-JUDGMENT

- *Bacci v Green* [2022] EWHC 486 (Andrew Hochhauser QC)
 - Another pension case: fraudster D (bankrupt) had £8.5m fund
 - D had claimed “*enhanced protection*” from lifetime allowance
 - If revoked, lump sum would increase from £375,000 (tax-free)
 - to more than £3m (taxable at c. 55%)
 - D ordered to delegate to Cs right to revoke EP, which right was not to be viewed “*in isolation... [but as] an integral part of the means of obtaining immediate access to Mr Green’s property.*”
 - NB WFO standard form: “...Respondent is to be regarded as having such power if a third party holds or controls the asset in accordance with his direct or indirect instructions.”

MANDATORY ASSET ORDERS POST-JUDGMENT

- *Bacci* upheld by CA [2022] EWCA Civ 1393
 - Were Cs seeking to force D to **create** property, rather than **protect** existing property?
 - No parallel between writing to HMRC and *e.g.*, writing a book: [27]
 - D had a contingent right to receive the increased lumpsum; fact of contingency (election to revoke EP) does not mean that the **totality** of rights could not be subject of receivership [20]
 - Order requiring revocation (or to delegate power) could be made ancillary to receivership [21]
 - But why bother with receivership? Mandatory injunction [28-29]

CONCLUSIONS

- When you receive asset disclosure under a WFO, consider:
 - Whether valuable existing assets are **where** you want them (in jurisdictions where they can be effectively frozen and made amenable to enforcement of English judgment)
 - Whether there are assets that could be **converted** from one form to another to make eventual enforcement more likely
 - Whether there are **potential** assets that could be created, called in, or crystallised, were D to choose (or be ordered) to do so

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