CA on appeal from Chancery Division (Mr Kevin Garnett QC sitting as Deputy Judge) before Ward LJ; Dyson LJ; Carnwath LJ. 1st March 2005.

JUDGMENT : Lord Justice Carnwath :

Background

1. This is an appeal against an order dated 9th July 2004 by Mr Kevin Garnett QC, sitting as a Deputy Judge of the Chancery Division, dismissing the Claimant's appeals against a number of orders of Master Moncaster. It raises an interesting issue relating to the enforcement of judgments expressed in foreign currency.

2. The relevant facts can be shortly stated. On 5th March 2002 the Claimant obtained judgment against the Defendants, who were ordered to pay US$1,431,731.50 by 16th April 2002. They failed to do so. From 18th April 2002 the Claimant took a series of steps to enforce the judgment.

3. Directly relevant for present purposes are three charging orders relating to properties of Mr Giessen and Mr Elswood (the First and Third Defendants respectively). The first applications were made on 18th April 2002, in respect of two properties, one belonging to each of them. In accordance with the relevant practice forms, the applications included a reference to the sterling equivalent of the judgment in the following terms: *"The judgment or order required the judgment debtor to pay $1,431,731.50 plus costs to be assessed if not agreed. The amount now owing is $1,421,731.50 and further interest payable on the judgment debt. At today's rate of exchange ($1 = £0.70) £1,009,519.88 is owed (plus costs and interest)".*

   On 2nd May 2002 Master Moncaster made interim charging orders for the judgment debt expressed in US dollars. Final orders for the same amount (expressed in dollars) were made by the Master on 19th June 2002, following a hearing at which both parties were legally represented. No point was taken on the currency in which the order was expressed, either at that time, or in the course of the other enforcement proceedings which ensued over the following months (which are summarised in Master Moncaster's judgment).

4. A further application was made in respect of another property of Mr Elswood, which resulted in an interim charging order dated 19th November 2002, and a final charging order dated 31st July 2003. The judgment debt was again expressed in dollars, though reduced to take account of a payment of $150,000.

5. On 2nd October 2003, an application was made for orders for sale of the properties. The witness statement in support, dated 30th September, continued to treat the judgment debt as a dollar liability. On 15th January 2004, the Master made suspended orders for sale.

6. However, in evidence served two days before the hearing, it had been submitted on behalf of the Claimant, for the first time, that the judgment debt in the charging order should be restated as its sterling equivalent at the date of the original application in April 2002. It was contended that the inclusion of a dollar amount in the charging order had been a mistake which could be corrected under the slip-rule, or an error or procedure which should be corrected under CPR3.10. On 31st March 2004, Master Moncaster rejected that contention in a detailed judgment reviewing the relevant law and practice statements. In summary he held that there had been neither slip, nor procedural error; as he said: *"I can see no reason why the court should not have made a charging order expressed in the foreign currency of the judgment, if that was what the judgment creditor asked for (as the claimant did here by asking to have made final the interim charging order which charged the security with a dollar liability) and the judgment debtor had no objection."*

7. That decision was upheld by the deputy judge in July 2004, and the Claimant appeals to this court. Lewison J granted permission to appeal the original Charging Orders to the Judge by Order of 21.4.04, and granted an extension of time for so doing, in order to enable the general issues to be fully explored. The subsequent appeals to the Court of Appeal were themselves within time.

8. We were told that the outstanding dollar amount of the judgment debt was finally paid in January 2005. It was accepted by the Claimant without prejudice to his contention that he is entitled to the

balance of the sterling equivalent as it was at rates current when the charging orders were made. The difference is of the order of £269,000.

The Claimant's submissions

9. In this court, Miss Tipples has repeated in substance the submissions which she made before the judge. She relies on both legal principle and established practice. The argument can be summarised in four stages:

   i) A judgment debt expressed in a foreign currency must be converted into sterling for enforcement purposes on the date when the court authorises enforcement of the judgment: ***Miliangos v George Frank (Textiles) Ltd*** [1976] AC 443, HL.

   ii) Enforcement of a judgment debt by means of a charging order **under the Charging Orders Act 1979 is completed when the charging order is made final:** ***Ezekiel*** *v Orakpo* [1997] 1 WLR 340, CA.

   iii) Accordingly enforcement of a foreign currency judgment by means of a charging order requires the judgment debt to be converted into sterling *before* enforcement is completed, that is, before the date when the charging order is made final.

   iv) This approach is supported by the established practice in the High Court. The relevant practice direction provides that, where the judgment debt is in a foreign currency, the evidence in support of the application for a charging order must give the sterling equivalent, and that the Master will make the order expressed in that amount.

10. It will be convenient to consider first the effect of *Miliangos* and its working-out in subsequent practice directions, before considering the effect of the 1979 Act, in the light of *Ezekiel v Orakpo*.

Miliangos

11. The starting-point for these submissions is accordingly the decision of the House of Lords in ***Miliangos.*** That case established for the first time that, where a monetary obligation was expressed in a foreign currency, an English court had power to make an order for payment in the same currency. The speeches also contain observations as to the appropriate date for conversion. Lord Wilberforce in the leading speech saw the choice as being between the date of action brought, the date of judgment, or the date of payment. He commented: *"Each has its advantages and it has been noticed that the Court of Appeal in* ***Schorsch Meier*** *and in the present case chose the date of payment, meaning, as I understand it, the date when the court authorises enforcement of the judgment in terms of sterling…This date gets nearest to securing to the creditor exactly what he bargained for…"*

As to the suggested practical difficulties he said:- *"I would say as to these matters that I see no reason why this should be so: it would be inappropriate to discuss them in detail and unnecessary since the Court of Appeal has assessed the procedural implications and has not been impressed with any difficulty. I have no doubt that practitioners with the assistance of the Supreme Court can work out suitable solutions…"* (p 468-469).

The other members of the House gave similar views although in slightly different terms:- *"The latest date procedurally possible in the enforcement proceedings – i.e. the date of the affidavit leading to execution. This is illogical, but it is the nearest that one can get practically to the date of payment if execution is required."* (per Lord Simon, p 483; he had dissented on the main issue).

"…If the defendant fails to deliver the foreign currency the date for its conversion into sterling should be the date when the plaintiff is given leave to levy execution for a sum expressed in sterling." (per Lord Cross, p 497)

"…The most just rate would be that prevailing when the order was being enforced, for the plaintiff would be kept out of his money till then…" (per Lord Edmund Davies, p 501)

"The question is what the conversion date should be. Theoretically it should in my opinion be the date of actual payment of the debt. That will give exactly the cost in sterling of buying the foreign currency but theory must yield to practical necessity to this extent that, if the judgment has to be enforced in this country, it must be converted before enforcement. Accordingly I agree with (Lord Wilberforce) that conversion should be at the date when the court authorises enforcement of the judgment in sterling." (per Lord Fraser, p 501).

Miss Tipples suggests that all those statements, notwithstanding the variations, were treating the relevant date as the time of the enforcement procedure. Accordingly, where the chosen method of enforcement is a charging order, the conversion should be made at that time.

12. I cannot accept that submission. The common principle underlying all the speeches is that the conversion should be made as close as practicable to the date of payment, having regard to the realities of enforcement procedures. It is quite clear, both from the speeches and the reported arguments, that the House did not, and was not asked to, make a ruling on the application of that principle to particular enforcement procedures. There is no report of any detailed discussion before the House of different methods of enforcement.

13. Lord Wilberforce's reference to "the date when the court authorises enforcement" cannot be taken as of general application. It was, as he said, based on the Court of Appeal's decision in ***Schorsch Meier GMBH v Hennin*** [1975] QB 416 (see p 424H per Lord Denning MR, referring in turn to ***Jugoslavenska*** [1974] QB 292, 300B, a case on enforcement of an arbitration award). It takes no account, for example, of forms of enforcement for which no specific authorisation is required, most notably the ordinary writ of *fieri facias* (for which permission of the court is only required in specified circumstances - see RSC Order 46).

14. A similar view of the limits of the speeches in ***Miliangos*** was taken by Oliver J in ***Re Dynamics Corporation*** [1976] 1 WLR 757 in the context of a company liquidation. Although some comments had been made in the speeches in *Miliangos* about the position of a company in liquidation, Oliver J (rightly in my view) declined to treat those as binding. As he said: *"The essence of the decision is that judgment may be entered for a sum in foreign currency or the sterling equivalent as of date of payment. How that would operate in the hypothetical situation of a company in liquidation was not, as far as I can gather, argued and was certainly not a matter which was before the House for decision…"* (p 773G).

The same could be said with even more force of charging orders, which were not even mentioned in the speeches. Lord Wilberforce envisaged that the detailed application of the principles to particular forms of enforcement would be worked out by the courts and the professions.

Practice directions

15. This is indeed what happened. A Practice Direction was issued in 1976, covering all three divisions of the High Court, making specific provision for different forms of enforcement procedure (Practice Direction (Judgments: Foreign Currency) [1976] 1 WLR 83). For example, paragraph 11 dealt with enforcement of a judgment debt in foreign currency by writ of *fieri facias*. It provided (paragraph 11(a)) that the *praecipe* for the issue of the writ should be endorsed and signed by the solicitor certifying the sterling equivalent of the judgment debt at the close of business on the day "nearest or most nearly preceding" the date of the issue of the writ. Paragraph 13 dealt with enforcement foreign currency judgment debts by other modes of enforcement, including charging orders. It provided:- *"…The affidavit made in respect of any such application shall contain words similar to those set out in paragraph 11(a) above. The Master will then make an order for the sterling equivalent of the judgment expressed in foreign currency as verified by such affidavit."*

16. In 1983, the Law Commission issued a report "***Private International Law Foreign Money Liabilities***" (Law Com No. 124) in which it reviewed in detail a number of issues arising out of the *Miliangos* decision. By this time the Charging Orders Act 1979 had been passed. The Commission recommended a change to the present practice. They said:- *"The present practice should be changed so that no conversion into sterling is made in relation to the enforcement of a foreign currency judgment by means of a charging order; the order would be expressed in the currency of the judgment. This would have the consequence that, where the judgment debtor voluntarily takes payment after a charging order had been made or whether the property comprised in the charge is sold by way of enforcement of the charge, conversion into sterling would be made at the date of the actual payment to the judgment creditor." (para 5.84)*

17. This recommendation was not put into effect. However, a new Practice Direction was issued in 1992, which came into effect on 20th April 1993 "superseding the previous Practice Direction". (According to the researches of counsel, the most up-to-date version of the text is in the 1999 edition of the Supreme

Court Practice.) In relation to charging orders the substance of the Direction followed that of its 1976 predecessor, including both the requirement for an affidavit stating the sterling equivalent of the judgment debt, and the statement that the Master "will then make" an order for the sterling equivalent as verified by the affidavit. This Direction, like its predecessor, was stated to be applicable in all three divisions.

18. That appears to the most recent formal Direction on the subject. The current Civil Procedure Rules and Practice Directions contain no express reference to the enforcement of judgments in foreign currency. This may be attributable to the fact that the subject of enforcement generally is the subject of continuing review. CPR 70 contains general rules about enforcement of judgments and orders. The Practice Direction contains a list of methods of enforcing money judgments (70 PD.1), some of which continue to be governed by the old procedure rules.

19. The only relevant statement of practice, following the new CPR, appears to be in the current edition of the Queen's Bench Guide. That contains a reference to charging orders (para 11.6.2.) with the following statement:- *"If the judgment debt is expressed in a foreign currency, the evidence in support of any application for a charging order should contain a similar provision to that set out in paragraph 7.5.4 above."* (Paragraph 7.5.4 refers to the requirement for an affidavit verifying the sterling equivalent of the judgment debt).

    Missing from this is the statement as to the form in which the Master "***will make***" the order.

20. There was some discussion before us as to whether the 1993 Practice Direction has been supplanted in some way by the current Queen's Bench Guide. In my view, this discussion was misdirected. The purpose of the Queen's Bench Guide, and other similar publications, is simply guidance. It cannot be taken as supplanting or contradicting the formal Practice Directions. I can see no reason why we should not treat the 1993 Practice Direction as remaining effective. We were shown nothing in the CPR, or in the accompanying Practice Directions, which can be taken as expressly or impliedly revoking or superseding it. It was made clear, at the time of the introduction of the new CPR in April 1999, that they were not comprehensive, and that aspects of the existing rules and directions would remain in force pending their progressive review.

21. I would add this. It seems unfortunate that there is no mention of the 1993 Direction in the present Practice Directions, or elsewhere in the White Book. That omission cannot by itself be taken as implying revocation. However, I hope that consideration can be given to the inclusion of an appropriate reference in future editions. There may also be a need for this subject to be re-considered, as part of the current review of enforcement, taking account both of the recommendations of the Law Commission, and of modern financial conditions. However, this is not an exercise which it would be appropriate for the court to attempt in the context of an individual case.

22. In any event, this seems to me wholly consistent with the view I have expressed of ***Miliangos*****.** The House of Lords was not laying down binding rules, applicable regardless of the enforcement procedure. It was stating a general principle the detail of which would have to be worked out in procedural rules. I would therefore reject Miss Tipples' primary submission that the charging orders made by the Master in this case offended some mandatory rule derived from ***Miliangos*****.**

23. The next question therefore is whether there is something in the Charging Orders Act 1979 itself, or in the interpretation put upon it by the Court of Appeal in *Ezekiel v Orakpo* [1997] 1 WLR 340, which assists Miss Tipples' argument.

The Charging Orders Act 1979

24. The 1979 Act was a modern statement of principles largely reproduced from earlier enactments. Section 1(1) provides:- *"Where under a judgment or order of the High Court or County Court a person (the 'debtor') is required to pay a sum of money to another person (the 'creditor') then, for the purpose of enforcing that judgment or order, the appropriate court may make an order in accordance with the provisions of this Act imposing on any such property of the debtor as may be specified in the order a charge for securing the payment of any money due or to become due under the judgment or order".*

By section 3 (4) it is provided:- *"Subject to the provisions of this Act, a charge imposed by a charging order shall have the like effect and shall be enforceable in the same courts and in the same manner as an equitable charge created by the debtor in writing under his hand."*

25. There is nothing in those provisions which assist the argument that a charging order may not be expressed in a foreign currency. Section 1 indicates that the charge is to be for securing the payment of "any money due…under the judgment or order". If anything this might be thought to indicate that, where the judgment is expressed in a foreign currency, the charging order should be expressed in the same way. Mr Mawrey, for the defendants, did not go as far as to submit that this *obliges* the Master to make an order in the same currency as the judgment debt. However, he is clearly right to submit that it does not exclude that possibility. Similarly, Miss Tipples accepts that an equitable charge over property in this country can be expressed in foreign currency, so that an order in similar form will not offend section 3(4).

26. ***Ezekiel v Orakpo*** was an unusual case because of the long time intervals involved. A charging order absolute on the defendant's property to secure a sum of some £20,000 had been obtained in 1982 following a judgment in 1979. The plaintiff did not seek to enforce it until 1993, by which time the total sum due, if interest were included, was over £75,000. The issue, which the court decided in favour of the plaintiff, was whether interest was impliedly included in the order even though not expressly mentioned. The case therefore has no direct relevance to the enforcement of a judgment in foreign currency.

27. Miss Tipples relies on Millett LJ's statement as to the characteristics of a charging order. He said:- *"It is important to recognise at the outset what was the true nature of the plaintiff's application in 1993. He was not bringing an action upon the judgment debt which he had obtained in 1979.* ***He was not even seeking to enforce execution of that judgment. He did that when he applied for and obtained the charging order in 1982****. In 1993 he was a secured creditor with the statutory equivalent of an equitable charge. He was taking action to recover what was due to him, not as a judgment creditor, but as a secured creditor. He was in the same position as any other creditor with an equitable charge which had been created in 1982 and which he wished to enforce in1996. Of course he had to apply to the court for orders for possession and sale, not because he was executing a judgment – as I say so far as this property was concerned that process had come to an end when he obtained the charging order – but because he needed an order for possession in order to effect a sale…"* (p 346H-347B, emphasis added)

28. So, says Miss Tipples, the obtaining of a charging order is a form of enforcement, which is complete when the charging order is made, not when payment is subsequently made following and order for sale. If, as she submits, *Miliangos* establishes that the relevant date is the date of enforcement, then by analogy the relevant date in the case of a charging order is the date when the charging order is made. However, that submission depends on the proposition, which I have rejected, that ***Miliangos*** contains a binding rule applicable to all forms of enforcement. Without of course questioning the authority of Millett LJ's words, in the context in which they were expressed, they do not assist the argument in this case. It is notable also that Law Commission saw no inconsistency between ***Miliangos*** and their own recommendation that, where payment takes place after the making of a charging order, conversion should be at the date of payment.

29. Miss Tipples also claims support from a decision of Walton J in ***A and M Records Inc v Darakdjian*** [1975] 1 WLR 1610, in which the issue had been whether a charging order could be made to secure litigation costs ordered by the court before the amount had been ascertained by taxation. Walton J considered that it was not possible to impose a charge before there is "an ascertained sum". He thought that if the power were not restricted to ascertained sums – *"… but could be imposed for any sums which are unascertained at the date of the imposition of the charging order, for example, sums due under an enquiry as to damages, or even merely, without going outside the boundaries of the present case, in respect of unascertained costs, it seems to me that the most alarming results would follow. It would mean, in substance, that the charge having been imposed, the asset, whatever it was, on which the charge was imposed, was in the hands of the judgment debtor completely sterilised, because he could not dispose of it or raise money upon it in any way, since it would be utterly impossible for the intending purchaser or lender of money – mortgagee – to*

know what the amount of the equity remaining in the debtor might or might finally turn out to be. It would be an absolutely crushing burden upon the judgment debtor."

30. That case, with respect, again provides no assistance in the present circumstances. The judgment debt here is "ascertained", albeit in a foreign currency, which also happens to be the currency in which the parties chose to deal. The fact that the sterling equivalent of that debt may fluctuate according to current exchange rates seems to me no more relevant to the underlying principles, than is the fluctuation of the value of the land on which it is charged.

Exercise of discretion

31. It is unnecessary and inappropriate to debate these issues on the unusual facts of this case, particularly at a time when the law in this area is under review. For present purposes, it is enough in my view to hold that the Master clearly had jurisdiction to make a charging order in the form he did. At the most it can be said that in doing so he departed from the practice as stated in the 1993 Practice Direction, which would have led to the order being expressed in the terms of the sterling equivalent given in the application.

32. However, that is a matter of practice rather than law. The 1993 Direction was expressly stated to be "subject to any order or direction which the court may make or give in a particular case". It was not in terms mandatory. Assuming that the Master had a discretion to revise his order retrospectively, he made clear that he would have refused it. He did so, as I understand his judgment, on the grounds that the claimant had given no indication at any time that he was seeking an order specifically in sterling, and, in particular, that when applying to make the interim order final he took no objection to the dollar form in which it had been expressed. He only sought to go back on this position when it became clear some months later that currency fluctuations had worked substantially to his disadvantage. In my view the Master was fully entitled to refuse to exercise his discretion to amend in these circumstances, and the judge was correct to uphold that refusal. I see no grounds on which this court could properly interfere.

Conclusion

33. For these reasons, which substantially follow those of the judge, I would dismiss this appeal. Finally, I would urge those responsible for the Civil Procedure rules to review this issue generally in light of modern conditions, and in any event to give consideration to the inclusion of substance of the 1993 Practice Direction (or an updated version) in the relevant part of the current CPR Practice Directions.

Lord Justice Dyson

34. I agree.

Lord Justice Ward

35. I also agree.

ORDER: Appeal dismissed; order as agreed in terms lodged with the court (Order does not form part of approved judgment)

Ms Amanda Tipples (instructed by Messrs Speechly Bircham) for the Appellant

Mr Richard Mawrey QC and Mr Jonathan Steinert (instructed by Messrs Girlings) for the First and Third Respondents