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**Judge rules that a  
judgment creditor can take  
control of airplane even  
though wrong airport  
address was given to court  
on the Writ of Control**

Midtown Acquisitions LLP v. Essar Global Fund Limited  
[2017] EWHC 2206 (QB)

**Article by David Bowden**

### **Executive speed read summary**

Midtown obtained judgement for \$195million against Essar in New York. The High Court ordered that it could be enforced in England. Essar owned a luxury private jet worth \$60million but this was charged to Credit Suisse to support Essar's borrowings of \$101million. A High Court Enforcement Officer obtained from a Master in chambers a writ of control and warrant of entry to Lasham Airfield. However following a tip-off that the airplane was at Stansted, the HCEO went there and obtained airside access. The HCEO told the pilot and aircraft staff he was taking control of the aircraft and it could not fly away. The following day another Master amended the orders specifying Stansted Airport as the address. The judge ruled that a HCEO could not rely on a writ of control to obtain airside access where there is no warrant of entry entitling such access. A HCEO did not have lawful authority to take control of the aircraft simply under the writ of control. The judge ruled that where everything possible had been done by a HCEO to secure goods a court should uphold the action so that court judgments are enforced. Although there was no equity in the aircraft, the judge accepted the debtor's financial position could change noting a pending substantial transaction. It is not correct to see the purpose of taking control as necessarily leading to a sale but rather its purpose is to facilitate recovery of a judgment debt. Taking control of goods may enhance the position of a judgment creditor where it reduces secured debts which take priority over the judgment debt. It is not unreasonable for a judgment creditor to seek to take control over the aircraft when, absent such control, it will very likely leave this jurisdiction and not return. 3 other issues were stood over to be determined on another day including which corporate body owns the aircraft and whether Credit Suisse being a co-owner of the aircraft makes any difference. Finally the Court of Appeal has refused permission to appeal the order permitting the New York judgment to be enforced in England.

Midtown Acquisitions LLP v. Essar Global Fund Limited, Essar Shipping & Logistics Limited and White Springs Holdings Limited

David Asker (High Court Enforcement Officer) – Non party respondent

[2017] EWHC 2206 (QB) 30 August 2017

High Court, QBD, Commercial Court (Mr Justice Blair)

### **What are the facts of the case?**

Midtown obtained a judgement by confession against Essar Global Fund Limited in New York. After a hearing, Mr Justice Teare granted it permission to enforce that judgement in England - **[2017] EWHC 519 (Comm)**. Essar Global owns a Boeing 737 aircraft worth around US\$60million. The aircraft is fitted out as a private jet and is hired out for luxury travel to high rollers. Midtown instructed High Court Enforcement Officers to take control of this aircraft. The aircraft was parked up at Stansted Airport. Credit Suisse had a 1<sup>st</sup> mortgage over the aircraft securing company debts of US\$101million.

### **What sums were owed to the judgement creditor?**

The judgement creditor was owed just under US\$195million.

### **What enforcement action did the judgement creditor take?**

The judgement creditor made these applications and was granted these orders to facilitate the taking of control of the aircraft:

- **24 March 2017** – Teare J granted permission to enforce in England.
- **27 July 2017** – Master Eastman on a without notice hearing authorized the issue of these 2 court documents. In each case the aircraft location was stated to be Lasham Airfield, Alton in Hampshire:
  - a writ of control, and
  - a warrant of entry.
- **28 July 2017** – Master Cook on a further without notice hearing authorized the issue of a warrant of entry to Stansted Airport.
- **31 July 2017** – Knowles J ordered an expedited hearing, refused to grant the debtor an injunction against the creditor but accepted the debtor's counsel's undertaking in lieu not to remove the aircraft from Stansted Airport.

### **What was the position taken by the High Court enforcement officers?**

When Mr Asker of The Sheriffs Office® (the HCEO) was on his way to Lasham Airfield, he found out that the airplane was in fact at Stansted Airport instead. He met the airport Duty Operations Manager and was driven to the Security Processing Centre to be given both security clearance and permit documents to allow him access to the airside section of the airport under escort. He gave a copy of the writ of control to

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the NATS Deputy Manager and explained why he was there. The Deputy Manager told him that the aircraft had just filed a flight plan with NATS. It was about to fly off to Mumbai via Lisbon at 13:00 the next day (28 July 2017). The HCEO arrived at the jet centre terminal at 22:00 and saw the airplane standing on an adjacent apron. This jet centre was operated by Inflight Engineering Services Ltd and the HCEO explained to Inflight that he was attending to take control of the airplane. He then handed the pilot (Captain Amit Sirohi) a copy of the writ of control at about 11 pm on 27 July 2017.

The HCEO told the pilot that he had now taken control of the airplane and it was not to be removed. The pilot refused to sign a controlled goods agreement. The pilot refused to allow the HCEO access to the aircraft so he could obtain and remove documentation issued by the Civil Aviation Authority without which the airplane would not be able to fly. Instead the pilot left the airport and returned to his hotel.

**What does the Civil Procedure Rules 1998 provide on this?**

These 3 provisions of the CPR are relevant here:

- **CPR 23.10** - Application to set aside or vary order made without notice – ‘(1) A person who was not served with a copy of the application notice before an order was made under rule 23.9, may apply to have the order set aside(GL) or varied. (2) An application under this rule must be made within 7 days after the date on which the order was served on the person making the application.’
- **CPR 83.2(3)(e)** - Writs and warrants of control, writs of execution, warrants of delivery and warrants of possession – permission to issue certain writs or warrants – ‘(3) A relevant writ or warrant must not be issued without the permission of the court where...(e) under the judgment or order, any person is entitled to a remedy subject to the fulfilment of any condition, and it is alleged that the condition has been fulfilled, or (f) the permission sought is for a writ of control or writ of execution, and that writ is to be in aid of another writ of control or execution.’
- **CPR 83.9** - Issue of writs of execution and writs of control - ‘...(2) Issue of a writ of execution or control takes place on it being sealed by a court officer of the appropriate office..... (4) The request must be signed.. (b) by or on behalf of the solicitor of the person entitled to execution. .... (6) Every writ of execution or control will bear the date of the day on which it is issued.’

**What does the Tribunals, Courts and Inquiries Act 2007 say?**

Schedule 12 deals with ‘*Taking control of goods*’. Paragraph 3(1) defines ‘*premises*’ as meaning ‘*any place, and in particular includes (a) a vehicle, vessel, aircraft or hovercraft; (b) a tent or movable structure*’. ‘*Co-owner*’ is defined as ‘*in relation to goods of the debtor means a person other than the debtor who has an interest in the goods, but only if the enforcement agent (a) knows that the person has an interest in the particular goods, or (b) would know, if he made reasonable enquiries*’.

Paragraph 9 sets out ‘*Goods which may be taken*’ as follows:

- ‘9 An enforcement agent may take control of goods only if they are—
- (a) on premises that he has power to enter under this Schedule, or
  - (b) on a highway.’

Paragraph 10 provides also that an ‘*enforcement agent may take control of goods only if they are goods of the debtor*’. Paragraph 13 sets out the ‘*Ways of taking control*’ as follows:

- ‘(1) To take control of goods an enforcement agent must do one of the following—
- (a) secure the goods on the premises on which he finds them;
  - (b) if he finds them on a highway, secure them on a highway, where he finds them or within a reasonable distance;
  - (c) remove them and secure them elsewhere;
  - (d) enter into a controlled goods agreement with the debtor.
- (2) Any liability of an enforcement agent (including criminal liability) arising out of his securing goods on a highway under this paragraph is excluded to the extent that he acted with reasonable care.
- (3) Regulations may make further provision about taking control in any of the ways listed in sub-paragraph (1), including provision—
- (a) determining the time when control is taken;
  - (b) prohibiting use of any of those ways for goods by description or circumstances or both.
- (4) A controlled goods agreement is an agreement under which the debtor—
- (a) is permitted to retain custody of the goods,
  - (b) acknowledges that the enforcement agent is taking control of them, and
  - (c) agrees not to remove or dispose of them, nor to permit anyone else to, before the debt is paid.’

Paragraph 14 sets out the conditions for ‘*Entry without warrant*’ as follows:

- ‘(1) An enforcement agent may enter relevant premises to search for and take control of goods.
- (2) Where there are different relevant premises this paragraph authorises entry to each of them.
- (3) This paragraph authorises repeated entry to the same premises, subject to any restriction in regulations.

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(4) If the enforcement agent is acting under section 72(1) (CRAR), the only relevant premises are the demised premises.

(5).....

(6) Otherwise premises are relevant if the enforcement agent reasonably believes that they are the place, or one of the places, where the debtor—

(a) usually lives, or

(b) carries on a trade or business.'

Paragraph 15 sets out the conditions for 'Entry under warrant' as follows:

'(1) If an enforcement agent applies to the court it may issue a warrant authorising him to enter specified premises to search for and take control of goods.

(2) Before issuing the warrant the court must be satisfied that all these conditions are met—

(a) an enforcement power has become exercisable;

(b) there is reason to believe that there are goods on the premises that the enforcement power will be exercisable to take control of if the warrant is issued;

(c) it is reasonable in all the circumstances to issue the warrant.

(3) The warrant authorises repeated entry to the same premises, subject to any restriction in regulations.'

**What points did the debtor rely on to prevent its airplane being seized?**

In addition to the 3 points left over for another day, the debtor made these 2 submissions:

- Enforcement over the aircraft would be futile because all the judgment creditor would obtain (even if it sold the aircraft) would be proceeds of sale that would have to be paid to Credit Suisse as first charge holder. It maintained there was no equity in the aircraft for the judgement creditor.
- It disputed that the aircraft was either legally or beneficially owned by Essar Global Fund Ltd.

**What submissions did the judgement creditor make?**

The judgement creditor said it was entitled to enforce its judgement in the manner it did. As soon as it established that the airplane was at Stansted Airport it returned to court the next day to have the address on the writ of control amended.

**What did the judge say were the issues he had to determine?**

The judge said these were the 4 issues:

- Can a writ of control be set aside under CPR 23.10?
- Could the HCEO take lawful control of the aircraft?
- Did the HCEO have power to take control of the aircraft at Stansted on 27 July 2017?
- Was it unreasonable to allow the HCEO to take control of the aircraft?

**What ruling did the judge make on setting aside the writ of control?**

He ruled that the judgment creditor was entitled to apply either under CPR 23.10 (or under the inherent jurisdiction of the High Court) to vary the address on the order authorizing the issue of the writ of control.

**What ruling did the judge make on lawful control?**

The judge referred to paragraphs 9, 14 and 15 of schedule 12 to the 2007 Act. He observed that the HCEO did have a warrant of control 'but for a different airport'. However he said that 'aircraft are uniquely mobile and apt to fly off if targeted by creditors' but nevertheless that 'observing the rules is of the utmost importance' and that a HCEO could not 'rely on a writ of control to obtain airside access where there is no warrant of entry entitling such access'. The judge described the situation on the evening of 27 July as 'ambiguous'. Further the judge rejected the HCEO's submission that because paragraph 3 defines 'premises' as 'including aircraft' the HCEO was entitled to enter premises without a warrant of entry.

**What ruling did the judge make on the HCEO's powers?**

This started quite badly for the HCEO with the judge observing that there was a 'statutory requirement for a notice to be given' by the HCEO to the debtor and that this form 'has a choice of boxes to tick, one stating that the officer has not taken control of any goods, the other stating that the officer has taken control of goods' but he observed that neither box had been ticked. The judge rejected the HCEO's contention that this was a mere 'oversight' and he also found that the HCEO had 'thought appropriate to backdate' a further notice but that 'nothing turns on this'.

The judge noted too that the HCEO's witness statement before Master Cook stated that he 'needs the order' from which the judge went on to hold that this meant that control of the airplane had 'not been taken'. However the judge said that he was 'reluctant to read' Schedule 12 of the 2007 Act 'in a limited way' because it 'has to be flexible enough to apply to goods of very different kinds'. The judge then ruled that where 'everything possible' had been done by a HCEO 'to secure the goods' then 'the court should



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*uphold the action*' because the policy of the court is *'to see that its judgments are enforced'*. Nevertheless the judge ruled that the judgment debtor was correct that that the HCEO *'did not have lawful authority to take control of the aircraft simply under the writ of control'*.

**What ruling did the judge make on unreasonableness?**

The judge noted that Credit Suisse had confirmed its security over the airplane and had said that any forced sale proceeds *'would be applied upon receipt towards satisfaction of the outstanding indebtedness'* or held *'on suspense account'*. The judgment debtor submitted that *'enforcement procedure is to be used for genuine enforcement purposes'* and should not be used *'merely to put pressure on the judgment debtor to pay'* and the judge said that he agreed with these submissions.

However the judgment creditor submitted that there was evidence about a substantial forthcoming transaction which might lead to the judgement debtor's credit lines being extended. The judge accepted the judgment creditor submissions that it was *'not correct to see the purpose of taking control as necessarily leading to a sale'* but rather its purpose was *'to facilitate recovery of the judgment debt'* and that *'taking control of goods may enhance the position of the judgment creditor where it reduces secured debts which take priority over the judgment debt'*.

Concluding on this the judge ruled in the judgement debtor's favour ruling that *'this aircraft is a very substantial asset and the position as regards the secured creditors may change'* and that it was not *'not unreasonable'* for the judgment creditor to *'seek to take control over the aircraft when, absent such control, it will very likely leave this jurisdiction and not return'*.

**What issues did the judge leave open to be decided on another day?**

The judge left these 3 issues open:

- which corporate body actually owns the aircraft,
- whether Credit Suisse is a co-owner of the aircraft (so as to fall within *'goods of the debtor'* in Schedule 12 of the 2007 Act), and
- whether the previous orders for enforcement made in the High Court in England should in any event be discharged for non-disclosure by Midtown.

**Will there be an appeal?**

On 11 August 2017 the Court of Appeal refused permission to appeal on the papers - **A3/2017/1086**. This was in relation to Mr Justice Teare's order of 24 March 2017 permitting enforcement in an English court. It is not clear if the judgement debtors will seek permission to appeal this judgment of Blair J. They have until 20 September to lodge an application with the Court of Appeal.

**What learnings can other judgement creditors take from this ruling?**

This was a finely balanced ruling.

The judge emphasized the importance of complying with the rules and stating that possession of the aircraft had not been taken under the writ of control because it did not contain the correct address. The HCEO had a lucky escape here with the judge finding not only that regular enforcement paperwork was not filled in correctly but that some had been backdated. In the end the judge gets to a sensible result. The HCEO did everything he could on 27 July when he found that the aircraft was not at Lasham Airfield but at Stansted airport instead. The HCEO sought promptly the next day to have the orders amended. Indeed there was no other option on this not least because these were orders obtained without notice.

Disputes about who owns an asset are very common with HCEOs wanting to see proof especially where there have been purported transfer between 'phoenix' companies. The point about co-ownership is an interesting one but it is not clear where this will take judgement debtors and we will have to see if this point is pursued and determined at a later date in this case. Finally the case serves to demonstrate how enforcement powers were codified or consolidated in the 2007 Act and the schedules to it are essential reading for those involved in contentious enforcements.

**9 September 2017**

David Bowden is a solicitor-advocate and runs <a href="http://DavidBowdenLaw.com">David Bowden Law</a> which is authorised and regulated by the Bar Standards Board to provide legal services and conduct litigation. He is the cases editor for the Encyclopedia of Consumer Credit Law. If you need advice or assistance in relation to consumer credit, financial services or litigation he can be contacted at <a href="mailto:info@DavidBowdenLaw.com">info@DavidBowdenLaw.com</a> or by telephone on (01462) 431444.
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