Neutral Citation Number: [2020] EWCA Civ 588

Case No: A2/2019/1917

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
The Hon. Mr Justice Turner
[2019] EWHC 1920 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6th May 2020

Before:

LORD JUSTICE LEWISON
LORD JUSTICE LINDBLOM
and
LORD LEGGATT

- -

Between:

365 BUSINESS FINANCE LTD	**Claimant**
- and -	
(1) BELLAGIO HOSPITALITY WB LTD **(2) MR TANVEER SINGH HANDA**	**Defendant**

IN RESPECT OF AN APPLICATION BETWEEN

COURT ENFORCEMENT SERVICES LTD	**Applicant/ Appellant**
- and -	
MARSTON LEGAL SERVICES LIMITED **(formerly BURLINGTON CREDIT LIMITED)**	**Respondent**

- -

Hugo Page QC and Chris Royle (instructed by **Wilkin Chapman LLP**) for the **Appellant**
Stephen Ryan (instructed by **Marston Legal Services Limited**) for the **Respondent**

Hearing date: 4 March 2020

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on Wednesday 6th May 2020.

Lord Leggatt:

Introduction

1. The most common way of enforcing an unpaid money judgment is by seizing, and if necessary selling, goods of the judgment debtor. From mediaeval times until the twenty-first century, this could be done in England and Wales by issuing a writ of *fieri facias* (or *fi fa*) and delivering it to the sheriff for execution. The writ was so called because it commanded the sheriff *quod fieri facias de bonis et catallis* (that you cause to be made of the goods and chattels) of the debtor the sum to be recovered.

2. Some changes have been made to this ancient system of enforcement by the Courts Act 2003 and, more recently, by Part 3 of the Tribunals, Courts and Enforcement Act 2007 (the "TCE Act") which came into effect on 6 April 2014. By section 99 and Schedule 7 of the Courts Act, writs of execution issued from the High Court are now directed to an enforcement officer authorised by the Lord Chancellor rather than to the sheriff of a county. By section 62 of the TCE Act, writs of *fieri facias* were renamed "writs of control" and the power conferred by such a writ to recover a sum of money is now exercisable only by using the procedure in Schedule 12 to that Act. The TCE Act also replaced bailiffs by "enforcement agents", who generally require a certificate issued under section 64 of the Act to perform this role. An enforcement power under Schedule 12 may only be exercised by an enforcement agent who is either the enforcement officer on whom the power is conferred or another enforcement agent who has been authorised by the officer to act under the power (see Schedule 12, para 2).

3. The main question raised on this appeal is what, if any, rule of priority applies where two (or more) writs of control to recover different judgment debts from the same debtor are directed to different enforcement officers. In particular, is the enforcement officer who receives the second (or subsequent) writ obliged to wait until the amount outstanding under each earlier writ of control has been paid before taking steps to enforce the later writ; and if the enforcement officer does not wait and enforces the later writ, what consequences follow?

The facts

4. Mr Tanveer Singh Handa is a businessman who at the relevant time was operating a hotel and restaurant in West Bromwich. He fell into debt and two creditors obtained judgments against him.

5. On 4 June 2018 one creditor, 365 Business Finance Limited, obtained a judgment against Mr Handa and his company, Bellagio Hospitality WB Limited, in Huddersfield County Court. On 11 June 2018 a writ of control was issued from the High Court to recover the judgment debt of £22,371.06 (plus any further interest and enforcement fees). The writ was issued to Mr Christopher Badger, an enforcement officer in the firm of Burlington Credit Limited, now called Marston Legal Services Limited ("Marston"). I will refer to this writ of control as "the Marston writ". Mr Badger received the Marston writ on 12 June 2018.

6. Another creditor, Alvini (North) Limited, had obtained a judgment against Mr Handa on 2 January 2018. A writ of control to recover the judgment debt of £8,982.98 (plus

further interest and fees) was issued from the High Court on 16 July 2018 to Mr Malcolm Davies, an enforcement officer in the firm of Court Enforcement Services Limited ("CES"). I will refer to this writ of control as "the CES writ".

7. On 23 July 2018 an enforcement agent acting under the Marston writ attended Mr Handa's premises and took control of various goods found on the premises by entering into a controlled goods agreement with Mr Handa. A controlled goods agreement is an agreement under which the debtor is permitted to retain custody of the goods listed in it while acknowledging that the enforcement agent is taking control of them and agreeing not to remove or dispose of the goods, nor permit anyone else to, before the debt has been paid: see para 13(4) of Schedule 12 to the TCE Act. Under the terms of the controlled goods agreement made on 23 July 2018, Mr Handa undertook to pay £10,000 within 30 days, followed by payments of £1,000 per month, until the full amount outstanding under the Marston writ was paid.

8. The first payment, of £10,000, was accordingly due on 22 August 2018.

9. On 21 August 2018 Mr Wild, an enforcement agent acting under the CES writ, attended the premises. Mr Handa informed Mr Wild of the Marston writ and showed him his copy of the controlled goods agreement. Mr Wild spoke on the telephone to Mr Badger who asserted that the Marston writ had priority over the CES writ and must therefore be satisfied first. Mr Wild said that he would call Mr Badger back but did not do so and proceeded with the enforcement on instructions from CES.

10. Mr Wild demanded payment from Mr Handa of the amount outstanding under the CES writ on pain of removing goods from the premises. According to Mr Handa, Mr Wild said that he would be removing all goods on the premises including those covered by the controlled goods agreement with Marston. According to CES, Mr Wild only considered taking control of goods which were not listed in the controlled goods agreement. Whichever account is correct, it is not in dispute that, in order to prevent the removal of goods, Mr Handa paid £12,050 to CES, which is said to have been the total amount (including interest and fees) then outstanding under the CES writ.

11. When CES refused to pay over this sum to Marston, Mr Badger applied to the court, without notice, for an order requiring CES to do so. His application was made on the grounds that, pursuant to CPR 83.4, writs of execution must be discharged in order of priority and that the Marston writ held priority over the CES writ and must therefore be discharged first. On 13 September 2018 Master Eastman made the order sought.

The decision under appeal

12. CES applied to set aside the order of Master Eastman. Its application was referred by the Master to a High Court judge. The hearing took place before Turner J who gave judgment on 19 July 2019 dismissing the application made by CES: see [2019] EWHC 1920 (QB). The nub of the judge's reasoning (in para 40 of the judgment) was that:

> "The wording of Schedule 12 [of the TCE Act] preserves the long established principle that a debtor's goods become bound by the writ from a particular point in time, and that although the same goods can be bound by multiple writs, it is only once the first writ is satisfied out of proceeds that the surplus (if any) can

> be applied to the second writ, and so on, in accordance with writ priority."

The judge ruled that, in circumstances where the Marston writ was first in time and had not been satisfied at the time when Mr Handa paid £12,050 to CES, CES was liable to pay over this sum to Marston.

This appeal

13. On this appeal CES contends that the judge was wrong to conclude that there is a rule of law which creates priority between writs of control, at any rate where the writs are directed to different enforcement officers. Thus, the fact that the Marston writ was the first in time to be received did not preclude Mr Wild from recovering the sum payable under the CES writ before the amount outstanding under the Marston writ was paid.

14. In the alternative, CES argues that, even if there is such a rule of priority, the rule applies only to proceeds from the exercise of an enforcement power, and the money paid by Mr Handa to CES did not constitute such proceeds.

15. CES also argues that there is in any event no duty owed by one High Court enforcement officer to pay over proceeds to another enforcement officer, whether in accordance with any priority between writs or otherwise.

Priority: the statutory provisions

16. As mentioned earlier, by section 62 of the TCE Act, the power conferred by a writ of control to recover a sum of money is now exercisable only by using the procedure in Schedule 12 to that Act. The key provision in Schedule 12 which Marston contends and the judge found creates priority between writs is para 4. This states:

> "(1) For the purposes of any enforcement power, the property in all goods of the debtor, except goods that are exempt goods for the purposes of this Schedule or are protected under any other enactment, becomes bound in accordance with this paragraph.
>
> (2) Where the power is conferred by a writ issued from the High Court the writ binds the property in the goods from the time when it is received by the person who is under a duty to endorse it.
>
> …"

An "enforcement power" is defined in para 1(2) as a power to use the procedure in Schedule 12 to recover a particular sum. Pursuant to paras 3 and 7 of Schedule 7 to the Courts Act 2003, the person who is under a duty to endorse a writ issued from the High Court as soon as possible after receiving it is the enforcement officer to whom the writ is directed.

17. The effect of property in goods being bound by a writ of control is set out in para 5 of Schedule 12, which provides as follows:

"*Effect of property in goods being bound*

(1) An assignment or transfer of any interest of the debtor's in goods while the property in them is bound for the purposes of an enforcement power—

(a) is subject to that power, and

(b) does not affect the operation of this Schedule in relation to the goods …

(2) Sub-paragraph (1) does not prejudice the title to any of the debtor's goods that a person acquires—

(a) in good faith,

(b) for valuable consideration, and

(c) without notice."

The term "notice" is defined in sub-paragraph (4) for this purpose to mean notice that the writ, or any other writ by virtue of which the goods of the debtor might be taken control of, had been received by the person who was under a duty to endorse it and that goods remained bound under the writ.

18. For CES, Mr Hugo Page QC emphasised that there is nothing in these provisions or elsewhere in Schedule 12 which expressly says that, where two writs are issued from the High Court authorising the use of the Schedule 12 procedure to recover different sums owed by the same debtor, the second writ to be received by an enforcement officer may not be enforced while the property in the debtor's goods is bound by the first writ.

19. There is a reference to "priority" in the Civil Procedure Rules. CPR 83.4, on which Mr Badger relied before the Master, states:

"(1) This rule applies to—

(a) a writ of control;

…

(2) A writ or warrant to which this rule applies is referred to in this rule as a 'relevant writ or warrant', 'relevant writ' or 'relevant warrant' as appropriate.

…

(5) Irrespective of whether it has been extended under regulation 9(3) of the TCG Regulations—

(a) the priority of a relevant writ will be determined by reference to the time it is originally received by the person who is under a duty to endorse it; …"

20. Mr Page submitted that this rule cannot, however, be interpreted as itself establishing a rule of priority because that would be a matter of substantive law and the power under section 1 of the Civil Procedure Act 1997 to make rules is confined to rules governing the practice and procedure to be followed in the civil courts and is not a power to change the substantive law: see e.g. *Dunhill v Burgin (Nos 1 and 2)* [2014] UKSC 18; [2014] 1 WLR 933, para 27.

21. Mr Page accepted that there are old cases which decided that writs of *fi fa* delivered to a sheriff had to be executed by the sheriff in order of receipt. But he submitted that this was a rule of the common law which was abolished by section 65 of the TCE Act. Section 65 provides that the TCE Act "replaces the common law rules about the exercise of the powers which under it become powers to use the procedure in Schedule 12".

22. During the hearing of the appeal the court was shown para 4(2) of Schedule 7 of the 2003 Act, which provides that an enforcement officer to whom a writ of execution is directed:

> "has, in relation to the writ, the duties, powers, rights, privileges and liabilities that a sheriff of a county would have had at common law if –
>
> (a) the writ had been directed to him, and
>
> (b) the district in which it is to be executed had been within his county."

However, when Part 3 of the TCE Act came into force on 6 April 2014, para 4 of Schedule 7 of the 2003 Act was amended by the insertion of a new sub-para (1A) which makes this provision subject to Schedule 12 to the TCE Act in the case of a writ conferring power to use the procedure in that Schedule. The combined effect of that amendment and section 65 of the TCE Act seems to me unequivocally to be that the exercise of the power to enforce a writ of control is, as CES contends, exclusively governed by Schedule 12 to the TCE Act and not by the common law.

23. It does not follow, however, that old cases about the effect and priority of writs of execution are no longer relevant. They may still be relevant in so far as they interpreted language used in earlier statutory provisions which has been re-enacted in Schedule 12. To see whether old cases provide such assistance, it is therefore necessary to examine both the cases themselves and the statutory provisions specifying the effect of writs of *fieri facias* which preceded Schedule 12 to the TCE Act.

The legislative history

24. At common law, a writ of *fieri facias* took effect from the *teste* (i.e. the date of issue recorded on the writ) and bound the debtor's goods from that time, such that, if the debtor afterwards sold the goods, the goods were still liable to be seized by the sheriff, even from someone who had purchased the goods from the debtor in good faith and without knowing that a writ of *fieri facias* had been issued. This is illustrated by a case decided in 1588, unearthed by the diligent researches of counsel for CES. The report of the case by Sir George Croke (Cro Eliz 174, case 4) reads:

> "Cooper desired the opinion of the Court, that if a *fieri facias* be directed to make execution of goods, and after the *teste* of the writ and before the sheriff executes it, the party sells the goods *bona fide*, if they can now be taken in execution. – The Court held they might; for by the award of execution, the goods were bound, so that they may be taken in execution, into whose hands soever they come."

25. This common law rule was supplanted by section 15 of the Statute of Frauds 1677, which enacted that:

> "No writ of fieri facias or other writ of execution shall bind the property of the goods against whom such writ of execution is sued forth but from the time that such writ shall be delivered to the sheriff, undersheriff or coroners to be executed, and for the better manifestation of the said time the sheriff, undersheriff and coroners, their deputies and agents shall upon receipt of any such writ (without fee for doing the same) endorse upon the back thereof the day of the month and year whereon he or they receive the same."

26. The effect of this statutory provision was explained by Lord Hardwicke LC in *Lowthal v Tonkins* (1740) Barn Ch 39, 42, as follows:

> "Before the Statute of Frauds and Perjuries, the defendant's goods were bound in his hands from the teste of the writ of execution. To avoid this that statute was made; whereby it is directed that the goods shall only be bound from the delivery of the writ to the sheriff. But neither before this statute, nor since, is the property of the goods alter'd, but continues in the defendant till the writ of execution [is] executed. But then it may be asked, what is the meaning of those words of the statute, whereby it is said that the goods shall be bound from the delivery of the writ to the sheriff? The meaning is, that after the writ is so delivered to the sheriff, if the defendant makes an assignment of his goods, unless in market-overt, the sheriff may take them in execution."

27. The opinion of Lord Hardwicke as to the effect of section 15 of the Statute of Frauds was endorsed in subsequent cases. For example, in *Samuel v Duke* (1838) 3 M & W 622, 629-630, Parke B stated:

> "Now it is perfectly clear to me, both upon decided cases and the reason of the thing, that after a writ of execution has been delivered to the sheriff, the defendant may convey his property; but that the sheriff has a right to the execution notwithstanding the transfer. Since the Statute of Frauds, the right which was given to the sheriff by the writ to seize property, no longer speaks from the teste of the writ, but from the time of its delivery, upon the receipt of which the sheriff is to levy; but, subject to the execution, the debtor has a right to deal with his property as he

> pleases; and if he transfers it in market overt, the right of the sheriff ceases altogether."

See also *Woodland v Fuller* (1840) 11 A & E 859, 867; and *McPherson Temiskaming Lumber Co Ltd* [1913] AC 145, 156.

28. The exception from the continued binding effect of the writ, which was presumably regarded as implicit, for sales in market overt was later expanded by section 1 of the Mercantile Amendment Act 1856 to apply to any acquisition of goods by a *bona fide* purchaser without notice that a writ of execution had been delivered to and remained unexecuted in the hands of the sheriff.

29. Section 15 of the Statute of Frauds and section 1 of the Mercantile Amendment Act 1856 were replaced by section 26 of the Sale of Goods Act 1893, which consolidated the earlier provisions in the following terms:

> "(1) A writ of fieri facias or other writ of execution against goods shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed; and, for the better manifestation of such time, it shall be the duty of the sheriff, without fee, upon the receipt of any such writ to endorse upon the back thereof the hour, day, month, and year when he received the same.
>
> Provided that no such writ shall prejudice the title to such goods acquired by any person in good faith, and for valuable consideration, unless such person had at the time when he acquired his title notice that such writ or any other writ by virtue of which the goods of the execution debtor might be seized or attached had been delivered to and remained unexecuted in the hands of the sheriff."

30. This statutory provision was re-enacted in materially similar terms in section 138 of the Supreme Court Act (now the Senior Courts Act) 1981. That provision was in turn transposed into para 8 of Schedule 7 to the Courts Act 2003. Paras 4 and 5 of Schedule 12 to the TCE Act (quoted at paragraphs 16 and 17 above), which are the provisions applicable in this case, are in materially similar terms to para 8 of Schedule 7 to the 2003 Act. (The latter provision remains in force, but no longer applies to any writ that confers power to use the procedure in Schedule 12 – such as the writs of control issued in the present case.)

31. The upshot of this legislative history is that, ever since the enactment of section 15 of the Statute of Frauds in 1677, the relevant statutory provisions have consistently specified the effect of a writ of execution as being to "bind the property of the goods" or "bind the property in the goods" of the debtor from the time when the writ was delivered to the sheriff (or now when it is received by the relevant enforcement officer). This language has been interpreted by the courts to mean that, although the delivery of a writ of execution to the sheriff / enforcement officer does not affect the title to the debtor's goods, it renders the goods liable to be seized by the officer and sold to satisfy the debt. In accordance with the principle recognised by the House of Lords in *Barras v Aberdeen Steam Fishing and Trawling Co Ltd* [1933] AC 402, it is to be presumed

that, in re-enacting words used in previous statutory provisions which have been the subject of authoritative judicial interpretation, Parliament intended those words to bear that settled meaning: see e.g. Lowe and Potter, *Understanding Legislation* (2018), para 3.53 and the cases there cited.

32. The applicable statutory provisions have, since 1856, also made it clear that the goods remain subject to the sheriff's or enforcement officer's power of seizure and sale until the writ has been executed notwithstanding any transfer of title to the goods, unless the goods are acquired by a person in good faith, for valuable consideration and without notice of the writ (or any other outstanding writ of execution).

The case law on priority

33. The statutory provisions stating that a writ of execution binds the property in the goods from the time of its receipt by the sheriff or enforcement officer have never expressly spelt out the relative status and effect of a second (or subsequent) writ which is received before the first writ to be received has been executed. However, it is logical to infer that the writs must be satisfied in the order in which they are received by the officer and bind the property in the debtor's goods. This is the only fair arrangement. It would be arbitrary and unjust to a creditor whose writ had already been delivered to the officer if it were permissible for another writ of execution received afterwards to be satisfied before the earlier writ (whether through the neglect or preference of the enforcement officer or for any other reason).

34. This is indeed how the relevant statutory provisions have been interpreted by the courts. The position was clearly established by the decision of the Court of King's Bench in *Hutchinson v Johnston* (1787) 1 Term Rep 729. In that case two writs of *fieri facias* against the same defendant were delivered to the sheriff's office on different days. An officer of the sheriff seized goods of the defendant under the second writ before any attempt had been made to enforce the writ that was delivered first. The question arose whether, when the goods were sold and the proceeds paid out, priority should be given to the creditor whose writ was delivered to the sheriff first or to the creditor under whose writ the goods had been seized. The court held that the former writ had priority. Ashurst J said (at 731):

> "The general principle of law, and which has not been contradicted by any of the cases cited, is, that the person whose writ is first delivered to the sheriff is entitled to a priority; and that the goods of the party are bound by the delivery of the writ."

35. Two earlier cases were distinguished. In *Smallcomb v Buckingham* (1697) 1 Ld Raym 251; (1702) 5 Mod 376, Lord Holt CJ had delivered the opinion of the Court of King's Bench that, where goods were seized and sold by the sheriff under the second writ to be delivered, the property in the goods was bound by the sale and the party whose writ was delivered first could not, by virtue of that priority, seize the goods from the purchaser, and "has only his remedy against the sheriff". This was followed in *Rybot v Peckham* (noted in *Hutchinson v Johnston* at 1347). In *Hutchinson v Johnston* Ashurst J explained these cases as follows:

> "The cases cited show clearly that though the possession of an innocent vendee shall not be disturbed, yet as to all the rest of

> the world the goods are bound from delivery of the writ. In *Rybot v Peckham* the second execution was completed; and it was for that reason that the claimant under the first execution could not recover the money out of the hands of the creditor under the second execution; and his only remedy was by an action against the sheriff. But that is not like the present case; for here the execution was not so completely executed as that the money was paid into the hands of the plaintiff claiming under the second execution."

36. *Hutchinson v Johnston* was followed in *Jones v Atherton* (1816) 7 Taunt 56, where Lord Gibbs CJ stated the principle as being that:

> "… if the sheriff has the writ in his office, though no warrant be made on it, if he afterwards gets possession of the goods, though apparently under another writ, yet his possession shall enure to the use of the first writ, and that the goods are bound by the writ in the sheriff's hands, from the time of its delivery to him."

37. In *Drewe v Lainson* (1840) 11 A & E 529, 537, Lord Denman CJ summarised the legal position as follows:

> "The duty of the sheriff, when he has several writs of execution, is clear. He is to execute them according to their priority; which, as to writs of *fieri facias*, is according to the time of their delivery to him. By 'executing' is meant, that he is to apply the proceeds of goods seized in that manner. It is not material whether he seizes the goods under the first or the last writ: as soon as they are seized, they are, in point of law, in his custody under all the writs which he then has; and, when he sells them, he sells, in point of law, under all the writs."

See also *Wintle v Freeman* (1841) 11 Ad & El 539; *Heenan v Evans and Wheeldon* (1841) 3 Man & G 398, 404.

38. In *Dennis v Whetham* (1874) LR 9 QB 345 a sheriff who received three writs of *fieri facias* failed to execute any of them, although the debtor had goods which could have been taken in execution. The value of the available goods was not enough to have satisfied the first two writs to be delivered to the sheriff. The creditor whose writ was the third in time to be delivered nevertheless successfully sued the sheriff for breach of duty in failing to levy execution. At trial the jury found that, albeit unknown to the sheriff, the first two writs were fraudulent. They awarded the value of the goods (which was also less than the amount of the third writ) as damages. The Court of Queen's Bench upheld the verdict. The reasoning was that, although the sheriff's duty was to execute the writs in order of receipt, the third creditor had been damaged by the sheriff's failure to levy execution in circumstances where the first two writs were ineffective.

39. A more modern case in which the principle of priority was recognised is *Bankers Trust Co v Galadari (No 2)* [1987] QB 222. There the sheriff took possession of the debtor's goods under a writ of *fieri facias* but relinquished possession after the underlying judgment was set aside. The judgment was later restored by the Court of Appeal. In

the meantime a second creditor had obtained a writ of *fieri facias* against the debtor. It was common ground that, as a general rule, writs of execution bind the property in the debtor's goods and must be executed in the order in which they are delivered to the sheriff. The only question was whether the order of priority was altered by the fact that the judgment pursuant to which the first writ was issued was set aside before being restored. The Court of Appeal held that it was not.

40. Again applying the *Barras* principle, this line of cases clearly shows that the wording of para 4 of Schedule 12 to the TCE Act is to be interpreted as establishing a rule of priority whereby, when two or more writs of control are issued from the High Court, they must be executed in the order of their receipt.

More than one enforcement officer

41. Counsel for CES submitted that, even if this is the rule where writs are received by the same enforcement officer, it does not apply where the writs are directed to different officers. They pointed out in their skeleton argument that all the cases I have mentioned were decided at a time when writs of execution were directed to the sheriff of the county in which the writ was to be enforced. There was only one sheriff for each county and all the cases concerned with priority between writs of *fieri facias* therefore involved writs delivered to the same officer for enforcement. When responsibility for enforcement was transferred by the Courts Act 2003 from sheriffs to enforcement officers, it became possible for the first time for a creditor to choose which enforcement officer to use. This in turn has created a situation in which two (or more) different enforcement officers may each receive a different writ of execution enforceable against the same debtor in the same district.

42. Counsel for CES argued that the cases relied on by Marston can be distinguished on this basis and go no further than deciding that there was a duty on a sheriff who received several writs to execute them in the order of their receipt. They submitted that the cases cannot be read as establishing that the provisions of Schedule 12 to the TCE Act create priority between different enforcement officers operating in the same district who each receive a writ of execution enforceable against the same debtor; nor that there is a duty on an enforcement officer who takes control of goods under a writ which was second in time to hand over the goods or pay over the proceeds of their sale to another officer who holds the first writ (according to the time of its delivery).

Payne v Drewe

43. In a note sent to the court after the hearing of this appeal counsel for CES went further. They submitted that the case of *Payne v Drewe* (1804) 4 East 523 (found by junior counsel for CES, Mr Royle, after the hearing) positively indicates that there is no priority between writs of execution delivered to different officers. In that case the Sheriff of Dorset seized goods under a writ of *fi fa* but then declined to sell the goods to satisfy the plaintiff's debt when he learnt that a writ of sequestration against the debtor had been issued and delivered to sequestrators some 18 months earlier, although nothing had been done to enforce it. The Court of Chancery held that the sheriff's duty had been to execute the writ of *fi fa*, notwithstanding the existence of the unsatisfied writ of sequestration.

44. In reaching this conclusion, Lord Ellenborough CJ, who gave the judgment of the court, assumed in favour of the sheriff that a writ of sequestration had the same effect as the delivery of a writ of *fi fa*, that is to say, that it bound the property in the goods but did not prevent the sheriff from making a valid sale. Lord Ellenborough next considered whether, if the sheriff had sold the goods in execution of the writ of *fi fa*, he would have incurred any liability to the parties interested in the sequestration or would have been in contempt of court. He concluded that the answer to those questions was "no" in circumstances where nothing had been done to enforce the writ of sequestration for at least 18 months such that the process could be considered "dormant" and the writ "virtually abandoned and waived by the parties originally interested in its execution" (see 523-4). The court concluded that, as the sheriff would not "have subjected himself either civilly or criminally to any inconveniences" by executing the writ of *fi fa*, he ought to have done so and was accordingly liable to the plaintiff.

45. It is clear that the decision in this case turned on the finding that the delay in attempting to enforce the writ of sequestration left the sheriff free to execute the writ of *fieri facias* subsequently delivered to him. That decision, however, has no application where there is a prior writ of execution which is actively being enforced. The case of *Payne v Drewe* indeed seems to me to be an authority positively adverse to CES, as it suggests that, had there not been culpable delay in enforcing the first writ, it *would* have been a breach of duty – to the parties interested in the execution of the first writ and to the court – for the sheriff who received the subsequent writ to execute it before the earlier writ had been executed.

Policy considerations

46. Apart from this authority, CES appealed to considerations of policy. A director of CES, Mr Simcox, expressed the opinion in a witness statement that a system of priority which applies between all writs of control (and not just between writs held by a single enforcement officer) would be "entirely unworkable", as it would require every enforcement agent to be in constant liaison with every other to determine whether anyone else had a 'priority' instrument. Mr Simcox suggested that it would also lead to the "absurd situation" that an enforcement officer who received a writ first might wait for a later writ to be enforced and then simply claim the proceeds without having done anything to enforce his own writ.

47. The judge dealt with these and other related arguments not now pursued under a heading "Project Fear" and explained why he was not persuaded by them. As Mr Ryan for Marston pointed out, Mr Simcox did not give any evidence that any difficulties of the kind he postulated have actually arisen in practice since the new system of enforcement officers was created by the Courts Act 2003. This is despite the fact that a current textbook and training material for High Court Enforcement Officers (quoted by the judge at paras 44 to 47 of his judgment) tell them that writs of execution, to whomever the writs are issued, hold a chronological order of priority determined by the date and time of receipt. If this arrangement were really unworkable, it is reasonable to expect that CES would have provided evidence of difficulties actually encountered in its operation. Moreover, the suggested risk that an enforcement officer who receives a writ of control might deliberately sit back and wait for a writ later in time to be enforced seems fanciful – not least because, for such a possibility even to arise, the enforcement officer would first have to learn that a later writ had been issued to another enforcement officer at the request of another creditor; in any case it does not follow (as

the old case of *Payne v Drewe* illustrates) that, if there is a rule of priority between writs, culpable delay in enforcement will have no adverse consequence.

48. Counsel for CES also submitted that it would be unjust if an enforcement agent who, without notice of a prior writ, executes a writ of control and pays the proceeds of enforcement to the creditor were then required to pay the priority creditor with his own funds. I agree that this is a valid concern. But again it is not a consequence which necessarily follows from a rule that the first writ to be received has priority. It depends also on questions of remedy which I will come to later in this judgment.

49. On the other hand, if CES were right that there is no rule of priority where two (or more) writs against the same debtor are delivered to different enforcement officers, this would undoubtedly cause injustice. The consequence would be that, where a writ of execution has already been delivered to an enforcement officer, a second writ directed to the same officer could be executed only after the first writ has been executed; yet if instead the second writ is directed to a different officer, that writ could be executed immediately, enabling the creditor who chose that enforcement officer to jump the queue. It would be arbitrary and inequitable as between creditors if the enforceability of a writ were dependent in this way on the identity of the person to whom the writ is directed for enforcement.

50. Such a regime would also permit a disorderly race between enforcement agents, favouring the most aggressive and least forbearing. That in turn, as Mr Ryan for Marston pointed out, would be contrary to one of the policy objectives of the reforms implemented by Part 3 and Schedule 12 of the TCE Act, which was to encourage a proportionate and staged approach to the enforcement of judgment debts and discourage aggressive actions by enforcement agents. That aim of the legislation is reflected in the title of the consultation paper published by the Ministry of Justice in February 2012 which preceded its implementation: "*Transforming Bailiff Action: How we will provide more protection against aggressive bailiffs and encourage more flexibility in bailiff collections*". It would be a significant disincentive to adopting the less aggressive approach of entering into a controlled goods agreement rather than removing the debtor's goods and selling them at the first possible opportunity if the result might be that, just before the debtor made a payment in accordance with the agreement, the money could be diverted by pressure from another, more aggressive enforcement agent seeking to enforce a later writ – as happened in this case.

51. As Lewison LJ pointed out in the course of argument, there would also on this interpretation of the legislation be no rule for determining priority where two enforcement officers with different writs arrive at the debtor's premises at the same time. This is apparently not an uncommon occurrence. According to training material for qualifying as a High Court Enforcement Officer published by the Chartered Institute of Credit Management entitled "High Court Enforcement Writs of Control", ch 4, p19 (quoted at para 47 of the judgment below):

> "There are many cases where an officer will find another officer enforcing at the same address. In these circumstances it is the priority date [established by the date and time of receipt of the writ] that determines which officer is entitled to the goods."

If CES is right, this teaching is mistaken, as the date of receipt of the writ does not determine which officer is entitled to the goods.

52. The only answer that counsel for CES was able to give to the question of what determines which officer is entitled to the goods in such a situation was that in practice the officers would come to some agreement between themselves. But a legal rule is needed to enable enforcement officers to know what they should or should not agree consistently with their duties to the creditor whose writ they are responsible for enforcing and to the court and, if they cannot agree, for resolving the dispute between them. The alternative is lawlessness.

The position in principle

53. I recognise that pointing out that unjust and anarchic consequences would follow from the absence of a rule does not demonstrate that there is one. But in fact I think it clear that the statutory rule of priority is not (or at least is not fundamentally) a rule about the duties of an enforcement officer who receives two or more writs for enforcement. It is a rule of priority between writs which does not depend on who receives the writs concerned. The duty of an officer who receives several writs to enforce them in the order of their receipt is merely a consequence of the basic rule. The language of para 4(2) of Schedule 12 to the TCE Act, which (as discussed earlier) has not changed materially from the language used in the Statute of Frauds, is that "the writ binds the property in the goods" from the time when it is received by the person who is under a duty to endorse it. The natural and rational interpretation of how this provision applies where two or more writs are issued is that the enforcement power conferred by a writ is subject to the enforcement power conferred by any writ which has previously been received by the person under a duty to endorse it, whoever that person was. Priority in enforcement is thus determined solely by the chronological order in which the writs are received. It does not depend on the identity of the enforcement officer to whom any of the writs is directed and whether that officer is the same or different from the officer who receives any earlier or later writ.

54. I would add that I see no justification for treating any differently goods acquired by the debtor after a second writ has been received. Mr Page QC made a submission that, even if the first writ in time to be received has priority in relation to goods in which the property is already bound when the second writ is received, such priority does not apply where the debtor acquires goods – for example, cash – subsequently, at a time when there are two outstanding writs in the hands of enforcement agents. He suggested that, in such a case, the property in the goods becomes bound by both writs simultaneously such that there is no priority between them.

55. I do not consider this to be a realistic contention. If this was how priority between writs operated, it would leave some goods of the debtor 'up for grabs' with all the undesirable consequences already mentioned, and with the additional practical difficulty, uncertainty and potential for dispute caused by the need to determine when particular goods were acquired by the debtor (something which in the case of particular banknotes might be practically impossible). The fallacy underlying such an approach seems to me to be that it treats the receipt of a writ as if it created some form of proprietary interest in the debtor's goods which attaches to the goods at a particular point in time. As discussed, although the phrase "binds the property in the goods" might be thought to carry such a connotation, its established meaning is simply that the sheriff or

enforcement officer who has received the writ has the power to take the debtor's goods in execution. The rule which gives priority to the power conferred by the writ first received must sensibly be understood as applying equally to all goods of the debtor irrespective of when those goods are acquired.

Enforcement of a subsequent writ

56. Concluding that writs of control have an order of priority determined by the date and time of their receipt still leaves the question of what legal consequences follow if that order is not followed when two or more writs have been received by different enforcement officers. In principle, the rule of priority could operate in either of two ways. One way would be by prohibiting the enforcement of a subsequent writ while the property in the debtor's goods remains bound by a prior writ. The other would be by permitting a subsequent writ to be enforced but on condition that any proceeds from the exercise of the enforcement power must be used to pay the amount outstanding under the prior writ before any balance can be applied to the subsequent writ.

57. There is nothing in Schedule 12 of the TCE Act which (expressly or by implication) prohibits an enforcement agent from exercising an enforcement power conferred by a writ while the property in the goods is bound by a prior writ. However, after the hearing of the appeal the court raised and invited written submissions on the question whether taking control and disposing of goods in which the property is bound by a prior writ might render an enforcement agent liable in conversion to the enforcement officer who holds the prior writ.

Conversion

58. The basic features of the tort of conversion are deliberate dealing with goods in a manner which is inconsistent with the claimant's right whereby the claimant is deprived of the use and possession of the goods: see e.g. *Clerk & Lindsell on Torts* (22nd Edn, 2018), para 17-07; *Kuwait Airways v Iraq Airways Co* [2002] UKHL 19; [2002] 2 AC 883, para 39.

59. To sue for conversion, a claimant must at the time of the alleged interference with the claimant's right have had either actual possession of the goods or an immediate right to possession of them which was superior to the possessory right of the defendant. It is not necessary (or sufficient) that the claimant should be the owner of the goods. Thus, a bailee or even a finder of goods may sue for conversion a person who has a lesser right to possession of them. An example is the well known case of *Armory v Delamirie* (1722) 1 Str 505, where a chimney sweeper's boy who had found a jewel successfully sued the goldsmith to whom he had taken it for a valuation after the goldsmith returned only the empty socket to him.

60. For present purposes I shall assume that the money obtained by Mr Wild from Mr Handa constituted goods which could be taken control of in the exercise of an enforcement power conferred by a writ of control and could also be the subject matter of a claim for conversion. On those assumptions Marston's prior writ gave Mr Badger a right to take control of the money whilst it was in Mr Wild's possession (just as he would also have had the right take control of the money whilst it was in the possession of Mr Handa). The question is whether that amounted to an immediate right to

possession which gave title to sue for conversion. I accept the submission made by counsel for CES that it did not.

61. There can be no doubt that an enforcement officer who has taken control of goods is entitled to sue for conversion someone who removes the goods from the officer's control. As long ago as the seventeenth century, it was established in *Wilbraham v Snow* (1669) 1 Ventris 52; 2 Wms Saund 47 that a sheriff who had taken goods in execution under a writ of *fi fa* was entitled to maintain an action for conversion against the debtor who had removed the goods from the sheriff's possession. The reason was that, even though the debtor was the owner of the goods, the sheriff had a superior right to possession of them. The same would be true if the person who removed goods from the control of a sheriff or enforcement officer was another enforcement agent whose right to take control of the goods was based on a writ which was received after the claimant's writ and was therefore of lower priority.

62. Accordingly, if in the present case Mr Wild had taken in execution goods which were covered by the controlled goods agreement entered into with Marston, then Marston's enforcement officer, Mr Badger, would have been entitled to sue Mr Wild for conversion and CES would potentially have been vicariously liable for Mr Wild's wrongful act. However, it has not been suggested that the money which Mr Wild received from Mr Handa was covered by the controlled goods agreement nor that Mr Badger or any other enforcement agent acting for Marston had already taken control of the money by any other means.

63. For Marston, Mr Ryan submitted that Mr Badger nevertheless had an immediate right to possession of the money by virtue of Marston's prior writ which was superior to the possessory right of Mr Wild and gave title to sue CES for conversion when CES refused to hand over the money to Mr Badger, despite demand. Mr Ryan submitted that the position of Marston's enforcement officer was analogous to that of a person who has a lien over goods. Where goods are subject to a lien, the holder of the lien is entitled to sue for conversion (and indeed is the only person who can bring such an action as the owner's right of possession is excluded): see *Clerk & Lindsell on Torts* (22nd Edn, 2018), para 17-60; *Lord v Price* (1874) LR 9 Exch 54. Thus, in *Roger v Kennay* (1846) 9 QB 592 it was held that a person who had a lien over goods of the debtor taken in execution by the sheriff was entitled to sue the sheriff for conversion of those goods.

64. In the cases involving liens, however, the holder of the lien who had title to sue was in actual possession of the goods when they were taken by the defendant and had the right to keep possession of the goods until the lien was discharged (by payment of a sum owed). In the present case, by contrast, Mr Wild did not remove goods from the possession or control of Marston's enforcement officer. Had that happened, then – as already indicated – I think it clear that Mr Badger would have been entitled to sue Mr Wild and CES for conversion. Rather, Marston's enforcement officer had not yet taken control of the money of which CES obtained and refused to relinquish possession.

65. As Mr Page QC and Mr Royle on behalf of CES pointed out in response to Marston's written submissions on this issue, the power to take control of goods using the procedure in Schedule 12 to the TCE Act is not equivalent to, and does not include, a right to require the possession of goods to be surrendered on demand. It is a power limited to taking control of goods in certain specified ways, each of which is subject to specified restrictions. So, for example, para 9 of Schedule 12 provides that an

enforcement agent may take control of goods only if they are on premises that the agent has power to enter or on a highway. Those powers may only be exercised within prescribed times of day: see Schedule 12, paras 25 and 32. There are only four permitted ways of taking control of goods, set out in Schedule 12, para 13. These are: (a) to secure the goods on the premises on which the enforcement agent finds them; (b) to secure them on the highway; (c) to remove them and secure them elsewhere; or (d) to enter into a controlled goods agreement with the debtor. The permitted ways of taking control do not include demanding that goods be delivered up. I agree with counsel for CES that there is in these circumstances a material difference between the power to take control of goods conferred by a writ (or prior writ) of control and the immediate right to possession of goods needed to found a claim for conversion.

66. I also consider that treating the power to take control of goods as sufficient to give title to sue for conversion would be inconsistent with the case law mentioned earlier about the effect of what is now called a writ of control. If receipt of the writ conferred title to sue, the logical consequence would be that a debtor who disposes of any of his goods after a writ of control has been received by an enforcement officer but before any step has been taken to enforce the writ would be liable for conversion, at any rate if the goods were sold to a purchaser for value without notice or consisted of money which passed into currency, such that the property in the goods ceased to be bound by the writ. However, authorities such as those mentioned at paragraphs 26 and 27 above make it clear that, unless and until goods in which the property is bound by the writ are taken in execution, the debtor (or anyone else to whom the goods are transferred) remains free to deal with them as he pleases; and if the goods are transferred to a person who acquires them in good faith, for valuable consideration and without notice of any writ, the property in the goods ceases to be bound by the writ and the enforcement officer has no power of enforcement against either the transferee or the debtor.

67. The right of the debtor to deal freely with the goods in his possession unless and until an enforcement agent who holds a writ of control actually takes control of the goods is implicitly recognised in the definition of a "controlled goods agreement" in Schedule 12, para 13(4) – one element of which is the agreement of the debtor not to remove or dispose of the goods, nor permit anyone else to, before the debt is paid. By implication, absent such agreement, the debtor *is* free to remove or dispose of the goods. In addition, Schedule 12, para 67, gives a right of action to the creditor if a debtor wrongfully interferes with *controlled* goods (my emphasis) and the creditor suffers loss as a result. This is inconsistent with an intention that the debtor should in any case be liable in tort if he disposes of goods which have *not* been taken into control.

68. There is no difference in principle between the position of the debtor in this regard and that of a third party (including an enforcement agent acting under a subsequent writ) who takes possession of the goods while the property in them is bound by a writ (or prior writ) of control. The fact that the enforcement officer to whom the (prior) writ was directed has the power to take control of the goods using the procedure in Schedule 12 does not mean that the enforcement officer can sue for conversion a third party who disposes of the goods or refuses to deliver up possession of them in response to a demand.

69. I therefore conclude that on the facts of this case no claim for conversion lies against Mr Wild or CES.

Application of proceeds

70. Marston did not seek to argue that it was for any other reason unlawful for Mr Wild to exercise the enforcement power conferred by the CES writ while the property in Mr Handa's goods was bound by the Marston writ (so long as Mr Wild did not interfere with goods of which Marston's enforcement officer had already taken control). The argument advanced was that priority operates in the second of the two possible ways that I have identified: that is to say, if the enforcement power conferred by the CES writ was exercised, any proceeds from its exercise had to be used to pay the amount outstanding under the prior Marston writ before any balance could be applied to the CES writ.

71. This argument rests on the effect of para 50 of Schedule 12 of the TCE Act (headed "Application of proceeds"), which states:

> "(1) Proceeds from the exercise of an enforcement power must be used to pay the amount outstanding.
>
> (2) Proceeds are any of these —
>
> (a) proceeds of sale or disposal of controlled goods;
>
> (b) money taken in exercise of the power, if paragraph 37(1) does not apply to it.
>
> (3) The amount outstanding is the sum of these —
>
> (a) the amount of the debt which remains unpaid (or an amount that the creditor agrees to accept in full satisfaction of the debt);
>
> (b) any amounts recoverable out of proceeds in accordance with regulations under paragraph 62 (costs).
>
> …
>
> (5) If the proceeds are more than the amount outstanding, the surplus must be paid to the debtor.
>
> …"

72. On behalf of Marston, Mr Ryan submitted that in this provision the "amount outstanding" means the amount outstanding under any writ which binds the property in the debtor's goods. Applying the rule of priority derived from Schedule 12, para 4(2), the effect of para 50(1) where there is more than one such writ is that proceeds from the exercise of an enforcement power must be used first to pay the amount outstanding under the first writ in time to have been received, with any remaining balance used to pay the amount outstanding under the next writ, and so on until the amount outstanding under each writ has been paid, after which any surplus must be paid to the debtor.

73. On the facts of this case Mr Wild, the enforcement agent instructed by CES to enforce the CES writ, did not sell any goods belonging to Mr Handa but obtained payment of £12,050 from him. Marston contends that this was "money taken in exercise of the power" to enforce the CES writ within the meaning of para 50(2)(b) and therefore constituted "proceeds from the exercise of an enforcement power" for the purpose of para 50(1) of Schedule 12.

74. On this basis Marston argues, and the judge accepted, that Mr Wild and CES were obliged by para 50(1) to use the sum of £12,050 to pay (part of) the amount outstanding under the Marston writ, as that writ had priority over the CES writ.

75. CES takes issue with both stages of this argument. CES maintains that the judge was wrong to find that the sum of £12,050 paid by Mr Handa was "money taken in exercise of [an enforcement] power" and therefore constituted "proceeds" as defined in para 50(2); CES also contends that para 50(1), properly interpreted, in any case required such proceeds to be used to pay the amount outstanding under the CES writ, so that CES had no obligation to pay over the money to Marston – indeed, it would have been inconsistent with the legislation to do so. It is convenient to take the latter point first.

The "amount outstanding"

76. CES does not accept that, for the purposes of para 50, the "amount outstanding" means the amount outstanding under any writ which binds the property in the goods. Mr Page QC submitted that, on the proper interpretation of the statutory provision, the phrase refers to the amount outstanding under the writ which conferred the enforcement power through the exercise of which the proceeds were obtained. Accordingly, on the facts of this case, the relevant "amount outstanding" which any proceeds from the exercise of the enforcement power conferred by the CES writ had to be used to pay was the amount outstanding under the CES writ (and not the amount outstanding under the Marston writ).

77. On any view the references in para 50 of Schedule 12 to the "amount outstanding" are elliptical. Para 50(3) defines the phrase as meaning "the amount of the debt which remains unpaid" plus any fees recoverable out of proceeds in accordance with regulations. In accordance with section 6(c) of the Interpretation Act 1978, in the absence of a contrary intention words in the singular include the plural. It is therefore consistent with the language used in para 50(3) that the "amount outstanding" may comprise more than one unpaid debt. Nowhere, however, is it expressly stated which unpaid debt or debts (and associated fees) proceeds must be used to pay in circumstances where the property in the debtor's goods was bound by more than one writ. To answer that question, in whatever way it is to be answered, some further words have therefore to be read into para 50.

78. In favour of the interpretation contended for by CES, the following argument can be made. It is natural to assume that the amount which proceeds from the exercise of an enforcement power must be used to pay is the debt which that power may be used to recover, and not any other debt. In the present case the only enforcement power which Mr Wild had was the power conferred by the CES writ to use the Schedule 12 procedure to recover the amount outstanding under that writ. He had no power to enforce the Marston writ and hence no power to take control of and sell goods (or take money) to recover the debt which was the subject of the Marston writ. It may be said that, at least

in the absence of clear words to the contrary, para 50(1) should not be construed as requiring an enforcement agent to use proceeds from the exercise of the power conferred by the writ which is the source of the agent's authority to pay an amount outstanding under a different writ which the agent has no power to enforce.

79. This argument might be irresistible if the enforcement officer to whom a writ of control is directed (and any other enforcement agent authorised by the officer to act under the power conferred by the writ) were no more than an agent of the creditor to whom the sum recoverable under the writ is owed. If that were so, the only duties owed by the enforcement officer would be the duties owed by an agent to the agent's principal and it would be inconsistent with those duties to require the agent to pay to anyone other than the principal proceeds obtained from exercising on the principal's behalf a power to recover a sum owed to the principal.

80. It would, however, be wrong to regard an enforcement officer to whom a writ of control is directed simply as the agent of the creditor whose judgment debt the writ is issued to recover. A creditor who is seeking to recover a judgment debt cannot simply instruct an enforcement officer or agent to take control of and sell goods of the debtor. The creditor must request the court to issue a writ of control – which takes place when the writ is sealed by a court officer of the appropriate court office: see CPR 83.9. It is that writ issued by the court which confers the power, and responsibility, on the enforcement officer to whom it is directed (and any agent to whom the officer delegates the exercise of the power) to use the Schedule 12 procedure to recover the judgment debt. Such an enforcement agent is therefore acting on the court's behalf (with the court itself in constitutional terms acting on behalf of the sovereign). This is reflected in the prescribed forms of writs of control which command the enforcement officer in the Queen's name to take control of the debtor's goods and raise therefrom the sums detailed in the schedule to the writ.

81. In *Hooper v Lane* (1857) 6 HL Cas 443 at 549-550, the Lord Chancellor, Lord Cranworth, giving the judgment of the House of Lords, said that:

> "the sheriff, though for some purposes an agent of the party who puts the writ into his hands, is not a mere agent. He is a public functionary, having indeed duties to perform towards those who set him in motion analogous, in many respects, to those of an agent towards his principal; but he has also duties towards others, and particularly towards those against whom the writs in his hands are directed."

See also *In re A Debtor (No 2 of 1977)* [1979] 1 WLR 956 at 961, where this passage was quoted and the point made that, in a case where the debtor is bankrupt, the duties of the sheriff also include duties towards the Official Receiver or trustee in bankruptcy.

82. Once it is recognised that an enforcement officer is not merely an agent of the judgment creditor but is a public official performing a role in the administration of justice who also owes duties towards others whose interests are affected by the exercise of the powers conferred by the court's writ, the inference that the person to whom proceeds of enforcement must be paid is always and necessarily the party who (in Lord Cranworth's phrase) "set [the enforcement officer] in motion" loses its force. It is not inconsistent with the role of an enforcement officer or agent to require proceeds from

the exercise of an enforcement power to be used to discharge another, prior liability of the debtor before any surplus may be used to pay the creditor whose debt the enforcement agent has been directed to recover.

83. Interpreting the "amount outstanding" in such a way accords with how priority between writs of execution has historically been held to operate. The cases referred to at paragraphs 34 to 39 above show that, where the property in the debtor's goods was bound by several writs of execution, it did not matter under which writ the sheriff seized and sold goods provided that the proceeds were applied according to the order in which the writs had been delivered. There is no reason to attribute to Parliament in enacting the TCE Act an intention to depart from that established law and good reason to assume (in the absence of express wording to the contrary) that Schedule 12 is intended to operate in a similar manner.

84. Adopting the interpretation of the "amount outstanding" contended for by CES would stand the order of priority between writs on its head. It would mean that an enforcement agent who, as in this case, enforces a writ despite having notice that the property in the debtor's goods was bound by a prior writ would come under a duty to pay the proceeds to the lower priority creditor, with any surplus to be paid to the debtor – leaving the prior writ unsatisfied. Furthermore, it is difficult if not impossible to see how the judgment creditor whose prior writ was bypassed in this way (or the enforcement officer to whom the prior writ was directed) could have any remedy, given that the use of the proceeds to pay the amount outstanding under the second writ first would on this hypothesis be a statutory obligation. The result would be to subvert the rule of priority in the enforcement of writs which, as I have concluded, was intended to be preserved by the legislation. It would also lead to all the unjust and disorderly consequences which that rule is designed to prevent.

85. These reasons all lead to the conclusion that, on the proper interpretation of para 50(1) of Schedule 12 of the TCE Act, the "amount outstanding" which proceeds from the exercise of an enforcement power must be used to pay is the amount outstanding under each writ which bound the property in the goods which the proceeds represent. Where there is more than one such writ, the rule of priority requires the proceeds to be used to pay the amount outstanding under each writ in the order in which the writs were received.

Was the money paid to CES "proceeds"?

86. As mentioned, CES has a further argument that the sum of £12,050 paid by Mr Handa did not constitute "proceeds from the exercise of an enforcement power" which had to be used in the way required by para 50(1) of Schedule 12. For this purpose, "proceeds" are defined in para 50(2) as any of: (a) proceeds of sale or disposal of controlled goods; and (b) money taken in exercise of the power, if para 37(1) does not apply to it. There is no suggestion that (a) is applicable in this case. The issue is whether the sum paid to CES fell within the scope of para 50(2)(b).

The method of payment

87. At the hearing before the judge there was no evidence to show how the payment by Mr Handa was made. After the hearing Mr Simcox made a further witness statement on behalf of CES in which he said that "the debtor, Mr Handa, paid CES in full (including

debt and costs), £2,000 by credit card and £10,050.00 in cash." The judge rejected an argument made by CES that a bank payment did not constitute "money taken" within the provisions of Schedule 12 and took the view that the method of payment used did not matter. He said (at para 62 of the judgment below) that "[t]here would be no justification in artificially limiting the definition of money so as, for example, to include only cash and one would be entitled to question the purpose, fairness and utility of any such distinction."

88. In their grounds of appeal and in oral argument, CES sought to challenge this conclusion arguing that the judge ought to have held that the reference to "money taken" in para 50(2)(b) only applies to coins and banknotes bound by a writ and so did not apply to the sum of £2,000 which, according to Mr Simcox, was paid by credit card.

89. I have some hesitation in regarding this point as properly open to CES in circumstances where the only evidence of the method of payment was given after the hearing in the court below by someone who had no first-hand knowledge of the relevant facts and provided no supporting documents. Furthermore, counsel for CES in their skeleton argument for this appeal themselves stated that it is now too late to investigate how the money was paid. However, it seems to me a matter of some general importance both to the parties to this case and to other enforcement agents to know what means of recovering a judgment debt are or are not legitimate in a situation of the present kind. Moreover, with the assistance of additional written submissions filed since the appeal hearing, the court is in a position to address a wider range of legal issues than were originally raised. I am persuaded that it is in the overall interests of justice that the court should proceed on the basis that £10,050 was paid by Mr Handa in cash and the other £2,000 by credit card, as CES asserts, and decide what, if any, difference the method of payment makes.

The meaning of "money taken"

90. The term "money" is capable of being used in the narrow sense contended for by CES to denote only physical objects which are accepted within a legal system as having value and as a medium of exchange. But the term can also be used in a broader sense to include what is sometimes referred to as "bank money" – that is, sums credited to a bank account which are also accepted as having those characteristics. Unlike coins and banknotes, bank money has no physical existence. In legal terms it consists solely of obligations owed by banks to their customers (and vice-versa) and, when a payment is made from one bank account to another, no item of property is transferred: all that happens is that an amount is subtracted from the balance of one bank account and an equivalent amount added to the balance of another.

91. The definition of "money" in para 3(1) as "money in sterling or another currency" does no more than clarify that the term includes money denominated in a foreign currency and does not indicate whether, as it is used in Schedule 12, the term "money" refers only to physical money or also encompasses bank money.

The nature of the enforcement power

92. In answering this question, it is relevant to consider the nature of the power conferred by a writ of control to recover a sum of money and how it is exercisable. Pursuant to section 60 and para 1 of Schedule 12 of the TCE Act, such an enforcement power is a

power to take control of goods and sell them to recover the relevant sum in accordance Schedule 12 and regulations under it.

93. In the standard case where this power is exercised by taking control of and selling goods, the proceeds fall within the first limb of the definition in para 50(2), being proceeds of sale of "controlled goods" – defined in para 3(1) to mean "goods taken control of" subject to certain exceptions. Where goods taken control of consist of money, however, no sale is generally necessary in order to generate proceeds that can be used to pay any outstanding amount. Thus, para 37 of Schedule 12 provides:

> "(1) An enforcement agent must sell or dispose of controlled goods for the best price that can reasonably be obtained in accordance with this Schedule.
>
> (2) That does not apply to money that can be used for paying any of the outstanding amount, unless the best price is more than its value if used in that way."

94. It can be seen that there are two circumstances in which, pursuant to para 37, controlled goods consisting of money do not fall within the exception in sub-para (2) and must therefore be sold for the best price that can reasonably be obtained. One is where the money is not of a kind that can be used for paying any of the outstanding amount. The other is where the best price that can reasonably be obtained for the money is more than its value if used as a means of payment. An example of the former would be cash denominated in a foreign currency which cannot be used for paying any of the outstanding amount without being sold in exchange for sterling. An example of the latter might be gold coins or coins that are a collectors' item which could reasonably be expected to fetch a price greater than their value as currency.

95. It is clear that the second limb of the definition of "proceeds" in para 50(2) at least includes, whether or not it is limited to, money taken control of by an enforcement agent exercising an enforcement power. That is confirmed by the proviso in para 50(2)(b) which, to recap, covers "money taken in exercise of the power, *if para 37(1) does not apply to it*" (emphasis added). The proviso implies that there are cases in which para 37(1) *does* apply to "money taken in exercise of the power". Para 37(1) is only applicable to controlled goods. It follows that para 50(2)(b) applies to controlled goods consisting of money. The proviso is needed because in those exceptional cases where, pursuant to para 37(1), controlled goods consisting of money must be sold, it will be the proceeds of sale of the money and not the money itself that will constitute the proceeds from the exercise of the enforcement power.

96. It was suggested in argument by Mr Page on behalf of CES that only physical money, and not bank money, is capable of being taken control of using the procedure in Schedule 12, thereby becoming "controlled goods". I think this is right. Although the definition of "goods" in para 3(1) as "property, of any description, other than land" is broad enough to include intangible property such as a debt owed by a bank to its customer, the ways of taking control of goods available under Schedule 12 (mentioned at paragraph 65 above) all involve securing the goods in a particular physical location. (While entering into a controlled goods agreement does not directly involve this, it presupposes that the goods covered by the agreement can be physically removed and secured if the agreement is not made or is not complied with.) It therefore seems to me

that the only goods which it is possible to take control of are tangible property or "securities" – defined in para 3(1) as including "bills of exchange, promissory notes, bonds, specialties and securities for money" – which are embodied or represented in some tangible form. Thus, an amount credited to a bank account, which is merely a legal obligation and is not represented by any physical object, is not amenable to enforcement by a writ of control. To enforce a judgment against such an asset, it is necessary to obtain a third party debt order.

97. If the only way in which money can be "taken in exercise of the power" to enforce a writ of control is by taking control of the money so that it becomes "controlled goods", then it follows that only physical money can constitute "proceeds" as defined in para 50(2).

Reasons for a broad interpretation of para 50(2)(b)

98. Although the word "taken" in para 50(2)(b), if given a purely literal interpretation, might be thought apt only to apply to physical objects, the term "proceeds" would naturally be understood to include bank money. It is unlikely in the modern world that, when controlled goods are sold by an enforcement agent at a public auction (or in another way authorised by the court) in accordance with para 41 of Schedule 12, purchasers will always or even usually pay in cash, and it would make no sense to interpret the words "proceeds of sale or disposal of controlled goods" in para 50(2)(a) as not including bank money. Other things being equal at least, this may militate in favour of interpreting the other type of "proceeds", specified in para 50(2)(b), as having a similar scope and as also including bank money.

99. As for the notion that the words "money taken in exercise of the power" should be interpreted to mean "money taken [control of] in exercise of the power", the point can be made that the words "control of" are not used in para 50(2)(b). Nor does para 50(2)(b) use the wording that appears in para 58(4), which refers to "controlled goods consisting of money." It may be inferred that a deliberate choice has been made not to limit "proceeds" falling within para 50(2)(b) to money which is taken control of.

100. The question then is whether, and if so how, bank money can be taken in exercise of the power conferred by a writ of control, even though – being purely intangible – it cannot be taken control of. The answer, as it seems to me, is illustrated by the facts of this case. If an enforcement agent acting under the power to enter premises and take control of goods threatens to remove goods unless the debtor pays a sum of money, and to avoid that outcome the debtor makes the payment by debit or credit card or bank transfer thereby causing the sum to be credited to a bank account, I do not think it a strained use of language to describe the credit to the account as "money taken in exercise of the [enforcement] power." It also makes rational sense to treat equally as proceeds from the exercise of the power money paid to avoid the seizure and sale of goods and money realised by actually seizing and selling them. Indeed, I can see no rhyme or reason for distinguishing in terms of the use to which they should be put between payments obtained in these two ways.

101. Nor do I think that interpreting para 50(2)(b) as encompassing bank money is inconsistent with the fact that para 37(1) applies only to controlled goods and that money can only come within para 50(2)(b), "if para 37(1) does not apply to it." There are two different reasons why para 37(1) may not apply. One is that, although the

money taken constitutes controlled goods, para 37(1) does not apply to the money because it falls within the exception created by para 37(2). The other possible reason is that the money taken does not constitute controlled goods because it consists of bank money and not physical money. I cannot conceive of a situation in which money which is not embodied in any physical object could be sold for more than its value if used as a means of payment. The statutory scheme therefore seems to me to work perfectly well on the footing that para 50(2)(b) encompasses bank money.

102. Although I have reached this conclusion without reference to authority, I draw additional support from the decision of the Court of Appeal in *Smith v Critchfield* (1885) 15 QBD 873. In that case the claimant paid to the sheriff under protest the amount owed by the judgment debtor in order to prevent the sheriff from removing from the claimant's premises goods which the sheriff believed on information to be goods of the judgment debtor but which the claimant maintained were his. The claimant then sought repayment from the sheriff. The sheriff applied to interplead and so leave the dispute as one between the claimant and the judgment debtor. Under the rules of court at that time, interpleader relief could be granted where "a claim is made to any money, goods, or chattels taken or intended to be taken in execution under any process, or to the proceeds or value of any such goods or chattels, by any person other than the person against whom the process issued."

103. The Court of Appeal held that the claim fell within this rule. All three members of the court were inclined to the view that the money paid to the sheriff by the claimant under protest came within the words "money … taken in execution". They found it unnecessary to decide this point, however, as they were satisfied that the money was in any case "proceeds" of goods taken in execution. Brett MR said (at 877):

> "But is this money any less the proceeds of the goods, because, instead of being produced by a sale of the goods, it is paid in order that the party paying it may keep his goods? It is money paid to represent the goods, and paid with the intention that it should be paid to the execution creditor if the goods were the execution debtor's. It seems to me that in substance this money is as much proceeds of the goods and chattels taken in execution as if it had been the proceeds of a sale by the sheriff."

Brett MR added that to take the opposite view "would make the law ridiculous".

104. While the wording of the rule of court applicable in *Smith v Critchfield* was not identical to that of para 50(2) of Schedule 12 of the TCE Act, the approach of the Court of Appeal reinforces my view that proceeds from the exercise of an enforcement power are rationally regarded as including money paid to prevent goods from being seized by the sheriff or enforcement agent, and that the words "money taken in execution" (or "money taken in exercise of the power") are capable of being interpreted, if necessary, to achieve that result.

The cash payment

105. Even if the narrow interpretation of para 50(2)(b) were correct and its scope is limited to physical money, that would not assist CES in relation to the sum of £10,050 which Mr Handa paid over to Mr Wild in cash.

106. Counsel for CES submitted that this sum did not fall within para 50(2)(b) for two reasons: first, the cash was not "taken" by Mr Wild: it was paid to him, which is not the same thing; and second, there was no "exercise of the power" because the money was paid to avoid enforcement with the result that the power was never actually exercised.

107. Those submissions, in my view, are without merit. I have already held that money obtained by threatening otherwise to remove goods from the premises under the authority conferred by a writ of control is just as much an exercise of the enforcement power conferred by the writ as the carrying out of such a threat by actually removing and selling the goods. The suggestion that money is not "taken" if it is demanded and handed over by the debtor to avoid the removal of his goods is equally untenable. It would be an absurd distinction if the answer to the question whether, for example, banknotes removed from the debtor's premises were "money taken", and hence "proceeds" from the exercise of an enforcement power, depended on whether the enforcement agent took hold of the banknotes without any intermediate act of the debtor or whether the debtor handed over the banknotes in response to the agent's threat before the enforcement agent took hold of them himself.

108. There is equally no rational basis for distinguishing in this context between cash which is expressly tendered as payment by the debtor in response a threat to remove goods and cash which is simply handed over to avoid removal of other goods or which is seized by the enforcement agent without any express mention of payment. Apart from creating serious evidential difficulties, such a distinction would be pointless. Even on the narrowest interpretation of para 50(2), "proceeds" include cash of which an enforcement agent takes control, however control of it is taken and whether or not it is expressly tendered as payment.

109. Hence I think it irrefutable that the sum of £10,050 which Mr Handa paid to Mr Wild in cash to avoid the removal of other goods was "money taken in exercise of the enforcement power" under which Mr Wild was acting for the purpose of para 50(2)(b) and was therefore required to be used to pay the "amount outstanding" in accordance with para 50(1).

The credit card payment

110. I have already explained why the term "money" in para 50(2)(b) is in my view properly interpreted as including not only coins and banknotes but also bank money. I also agree with the judge that it would be arbitrary and irrational if the use to which money paid over by a debtor to an enforcement agent to avoid the removal of goods must be put depended on the method of payment adopted and on whether the money is paid in cash (which will then almost inevitably be deposited in a bank account) or by some form of electronic transfer of funds directly to the designated account. As the judge put it, "one would be entitled to question the purpose, fairness and utility of any such distinction."

111. The unfairness and unreasonableness of the distinction is compounded by my earlier conclusions that the "amount outstanding" which para 50(1) requires proceeds to be used to pay is the amount outstanding under any unsatisfied writ of control and that proceeds must be applied according to writ priority. If only cash and not bank money was caught by para 50(2)(b), there would be no statutory obligation to use money paid by debit or credit card or some other form of bank transfer in that way. Instead, there would be nothing in the statutory scheme to stop an enforcement agent from using bank

money obtained by threatening to take control of goods to satisfy a lower priority writ, thereby bypassing the order of priority between writs (as CES have sought to do in this case).

112. Parliament cannot reasonably be taken to have intended such an arbitrary and unjust dispensation. Given the diminishing use of cash and the increasing prevalence of bank money, such an interpretation of the legislation would render it increasingly unfit for purpose. It would also create an incentive to enforcement agents to manipulate the system by demanding payment in electronic form rather than cash.

113. I conclude that the term "money" in para 50(2)(b) comprises bank money as well as physical money and that the sum of £2,000 paid by credit card as well as the sum of £10,050 paid by Mr Handa in cash was "money taken in exercise of the power" to enforce the CES writ.

114. It follows from my earlier conclusion as to the meaning of para 50(1) that the full sum of £12,050 had to be used to pay the amount outstanding under the prior Marston writ and could not lawfully be used to satisfy the CES writ.

Remedy

115. CES has confirmed that, until the money received from Mr Handa by CES was paid to Marston pursuant to the order of Master Eastman, it was held in a CES bank account. Accordingly, none of the money was disbursed to Alvini (North) Limited, the judgment creditor whose writ of control CES was instructed to enforce. Nor was Alvini entitled to require CES to pay over to it the amount needed to satisfy the judgment debt, as such payment would have been unlawful, being contrary to para 50(1) of Schedule 12 of the TCE Act as I have construed it. From this last point it also follows that the payment by Mr Handa to CES did not satisfy the claim of Alvini: see *In re A Debtor (No 2 of 1977)* [1979] 1 WLR 956, 961.

116. I mentioned earlier an argument raised by counsel for CES that interpreting the legislation as imposing priority between writs received by different enforcement officers would potentially cause injustice to an enforcement agent who takes control of goods without notice of a prior writ. As it was put in their skeleton argument: why should an enforcement agent who, unwittingly, holds a lower priority instrument and takes the proceeds of enforcement and disburses them *bona fide* to his creditor be required to repay the priority creditor with his own funds?

117. This question is not directly raised by the facts of the present case, as CES had notice that the property in Mr Handa's goods was bound by the prior Marston writ and did not disburse the proceeds of enforcement to its creditor. Nor have we heard argument on the point. I therefore express no positive opinion on it. It is, however, far from obvious to me that in the situation postulated by counsel for CES the enforcement agent would be liable to repay the priority creditor. A claim in restitution for unjust enrichment would potentially be met by a defence of agency (or, as it is sometimes called, 'ministerial receipt') and/or change of position. It is also far from clear that the priority creditor would have any right to sue for loss caused by a breach of statutory duty; and even if it did, such a loss would only be sustained if and in so far as the sum paid over could not be recovered from the lower priority creditor to whom the proceeds were disbursed. I am not in these circumstances prepared to accept or assume that the

objection raised is one to which any weight should be given in interpreting the relevant statutory provisions.

Conduct expected of court officers

118. There is a further issue on which the court invited written submissions after the hearing. This was whether the court's jurisdiction over officers of the court recognised in the case of *Ex parte James* (1874) LR 9 Ch App 609 and subsequent authorities is applicable and should be exercised in this case.

119. In *Ex parte James* (1874) LR 9 Ch App 609 the sheriff had seized and sold goods under a writ of *fi fa* and paid the proceeds to the judgment creditor. Afterwards the debtor was adjudicated bankrupt and the trustee in bankruptcy demanded the proceeds of the sale of the debtor's goods from the judgment creditor, who paid the proceeds to the trustee in the mistaken belief that the trustee was legally entitled to them. The trustee sought to retain the proceeds. The Court of Appeal affirmed an order of the Registrar which required the trustee to repay the money to the judgment creditor. The court did so, not on the basis that the trustee had a legal duty to repay the money but on the basis that, as an officer of the court, the trustee "ought to set an example to the world by paying it to the person really entitled to it" and that the court "ought to be as honest as other people" (per James LJ at 614).

120. This decision and cases which have followed it were recently reviewed by the Court of Appeal in *Lehman Brothers Australia Ltd v MacNamara* [2020] EWCA Civ 321. David Richards LJ (with whom Patten and Newey LJJ agreed) at para 35 of the judgment identified the governing principle as being that:

> "the court will not permit its officers to act in a way which, although lawful and in accordance with enforceable rights, does not accord with the standards which right-thinking people or, as it may be put, society would think should govern the conduct of the court or its officers."

121. Further points made in the *MacNamara* case were these:

(1) The standard is an objective one: the question is not whether the individual concerned is consciously departing from the standard set by the court, but is only whether the conduct of the officer, on an objective basis, falls below that standard (para 38).

(2) The principle is not confined to cases of money paid under a mistake of law but is a general principle applicable to any acts of the court's officers (para 43, citing *Re Tyler* [1907] 1 KB 865).

(3) The test is not one of unconscionability (as the judge at first instance in the *MacNamara* case had held). It is one of fairness, the underlying principle being that the court will not permit its officers to act in a way in which it would be clearly wrong or improper for the court itself to act (paras 61-68).

122. Despite the attempts made on behalf of CES to argue otherwise, I have no doubt that an enforcement officer (and any other enforcement agent acting under an enforcement

power) is for relevant purposes an officer of the court. The essential reason is that, as discussed at paragraph 80 above, the enforcement agent is acting at the direction of the court to enforce a judgment or order of the court, exercising authority conferred by the court's writ.

123. As pointed out by Mr Ryan on behalf of Marston, before sheriffs were replaced by enforcement officers, it was well established that sheriffs when engaged in executing writs were not simply agents for the judgment creditor, but were acting on behalf of the court. As it was succinctly put by Vaughan B in giving his opinion to the House of Lords in *Garland v Carlisle* (1837) 4 Cl & F 693 at 769, the sheriff "acts ministerially as the servant and officer of the court which commands him to execute its process".

124. This is reflected in section 10 of the Criminal Law Act 1977, which expressly classifies a sheriff or bailiff engaged in executing a writ as an officer of the court. Although an enforcement officer or agent is not included in the definition of an "officer of the court" in this provision, I cannot see any functional or other reason for drawing a distinction between the role of the sheriff and that of an enforcement agent when carrying out the same task. Furthermore, the fact that this provision and para 68 of Schedule 12 of the TCE Act make it a criminal offence intentionally to obstruct an enforcement officer or agent engaged in executing a writ issued by the High Court is a further manifestation of the fact that such a person is performing an official function in the administration of justice.

125. I have concluded that para 50(1) of Schedule 12 of the TCE Act imposed a statutory obligation on CES to apply the money obtained from the debtor to pay the amount outstanding under the prior Marston writ before any balance could be applied to the amount outstanding under the CES writ. It is therefore not necessary to decide whether, in the absence of such a statutory obligation, the jurisdiction of the court over its officers could have been invoked to achieve a similar result.

126. There is, however, another aspect of the facts of this case. Separate from the question of how CES was required to apply the money taken from Mr Handa is the question whether it was legitimate for Mr Wild to induce Mr Handa to pay over money to him at all on 21 August 2018 by threatening to remove goods. At the time when Mr Wild made this threat and took the money from Mr Handa, he was on notice that there was a writ of control which had been received by Mr Badger of Marston before the CES writ was received. He had also been shown a copy of the controlled goods agreement entered into between Mr Handa and Marston on 23 July 2018. Mr Wild therefore knew that Mr Handa had agreed to pay the amount outstanding under the prior Marston writ in instalments, with the first instalment of £10,000 due to be paid the very next day. Despite that knowledge, Mr Wild induced Mr Handa to pay over to CES funds which plainly included money that Mr Handa was intending to use to make that payment. He did so by threatening otherwise to remove goods belonging to Mr Handa there and then. It is also clear that Mr Wild was acting throughout with the authority and on the instructions of Mr Davies, the enforcement officer to whom the CES writ was directed.

127. I have found earlier that this conduct did not infringe any legal right of Marston or its enforcement officer, Mr Badger. But it was conduct that no fair-minded person would regard as an acceptable way for someone exercising the court's enforcement powers to act. It was conduct deliberately calculated to disrupt the orderly process of enforcement of writs of control and to undermine the restrained and proportionate approach to the

collection of judgment debts which the legislation aims to encourage and which Mr Badger had adopted.

128. No relief has been sought in this case other that an order for payment over to Marston of the sum received by CES. But it is in my view an additional justification for making an order to that effect that the money ought not to have been taken by the enforcement officer and agent acting under the CES writ. I see no reason why the court should not have remedied that misconduct by ordering the enforcement officer to whom the CES writ was directed (Mr Davies) to procure the payment to Marston of the amount which by the time of the order had become due under the controlled goods agreement (with any sum not yet due under that agreement to be returned to Mr Handa).

129. The principle established by the *Ex parte James* line of cases could also be relevant in other situations. For example, I noticed earlier that it is said to be not uncommon for an enforcement agent to find another agent enforcing at the same address. Although I have rejected the case advanced by CES that there is no rule of priority between writs received by different enforcement officers, I have accepted that the agent acting under the lower priority writ would not be acting unlawfully if he proceeded to take control of goods in such a situation, provided that the proceeds of sale were used in the way required by para 50 of Schedule 12. I nevertheless consider that it would be inconsistent with the standard of conduct expected by the court of its officers for the agent with the lower priority writ to attempt to enforce that writ unless it was clear that to do so would not interfere with the enforcement action which the agent with the prior writ was taking or proposing to take.

Conclusion

130. For the reasons given, I conclude that the sum of £12,050 paid by Mr Handa to CES on 21 August 2018 constituted proceeds from the exercise of an enforcement power which, pursuant to Schedule 12, para 50(1) of the TCE Act, was required to be used to pay the amount outstanding under each writ by which the property in the debtor's goods was bound, starting with the first writ to have been received by the enforcement officer who was under a duty to endorse it. As that writ was the Marston writ, under which the amount outstanding substantially exceeded the sum of money received from Mr Handa, the whole of that sum had to be applied to the Marston writ. As those acting for CES refused to pay the money to Marston so that it could be used for that purpose, it was necessary for the court to order this to be done so as to procure compliance with the legislation.

131. I have also concluded that, in attempting to enforce the CES writ when they were aware of the controlled goods agreement with Marston and on notice that the Marston writ had priority, Mr Wild and the CES enforcement officer, Mr Davies, acted improperly and in a manner inconsistent with the standards of conduct expected of officers of the court. I consider that in these circumstances the court also had power to remedy the effect of their misconduct by ordering the CES enforcement officer to procure that the money obtained in this way be paid over to Marston (insofar as it had by the time of the order fallen due under the controlled goods agreement).

132. I would therefore hold that the judge was right to dismiss the application made by CES to set aside the Master's order which required it to pay the sum of £12,050 to Marston, and that this appeal should likewise be dismissed.

Lord Justice Lindblom:

133. I agree.

Lord Justice Lewison:

134. I also agree.