



BUSINESS & COMMERCIAL GROUP BULLETIN



We hope this finds you refreshed after the Easter break and Royal Wedding celebrations. Here at Tanfield, the bunting has been put away and it is business as usual. In this issue of the newsletter Tim Polli reports on a recent success in freezing order proceedings in which he achieved the rare feat of securing the appointment of a receiver; and Paul Stevenson brings us up to date with developments under the *Housing Grants, Construction and Regeneration Act 1996*. The Group continues to thrive, bolstered by the return to the fold of Philip Rainey QC, who brings his wide-ranging Chancery expertise to the senior end of our membership, and Michael Walsh, from 33 Bedford Row, who complements our international arbitration experience.

ANDREW BUTLER

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APPOINTMENT OF RECEIVERS BY WAY OF EQUITABLE EXECUTION

All experienced litigators will be aware that securing judgment against a Defendant may only be half the battle. Enforcement of the judgment can be just as much of a war of attrition as was obtaining the judgment, particularly against Defendants based largely overseas and refusing to satisfy the judgment. All commercial litigators must therefore be aware of the various enforcement options.

The array of mechanisms that may be used to enforce against capital assets are well known. Stock and land can be charged pursuant to the Charging Orders Act 1979. The judgment creditor can attach to the credit balance of bank accounts and other debts owed to the judgment debtor using Third Party Debt Orders. Chattels may be seized pursuant to writs of *fiери facias*.

The situation is more complicated, however, if charging orders, third party debt orders or execution pursuant to writs of *fiери facias* are not available or impractical. It might be that the assets concerned are simply not susceptible to execution in law. Alternatively, it might be that the capital value is not easily realisable. In either case, however, the assets might produce an income stream, which the judgment debtor continues to use other than to satisfy the judgment debt. Third party debt orders are of limited use in such circumstances because they can only attach to a debt that exists at the time of service of the interim order; and not to a future debt.

Such was the scenario facing the bank in the recent case of **UCB Home Loans Corporation Limited v Grace & Fitzgerald** (LTL 22/03/2011). In December 2010, UCB had obtained judgment against its borrowers, Grace and Fitzgerald, for approximately £1.9 million and £2.6 million respectively. Grace and Fitzgerald were property investors. They owned a portfolio of approximately 92 buy-to-let properties in England. The properties were, however, all in negative

APPOINTMENT OF RECEIVERS

THE REQUIREMENT FOR A WRITTEN AGREEMENT

CONTINUED OVERLEAF



ANDREW BUTLER

Andrew Butler is Head of the Business & Commercial Group at Tanfield Chambers. Also a member of the Property Group, his practice is mainly concerned with the commercial aspects of property disputes and extends to property-related insurance and professional negligence matters. He is listed in the Legal 500 and Chambers and Partners for Real Estate work. Andrew regularly appears in the Technology and Construction Court as well as the Commercial Court and Chancery Division. He is an accredited mediator. Away from work, his hobbies include a variety of sports, and trying to make his two children and newly-acquired dog less feral.

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equity, and there were other complicated issues concerning the priority of the various parties claiming to have or to be entitled to registered legal charges over the properties. Accordingly, there was no easily realisable capital in the properties.

However, at any given time, a considerable proportion of the properties were let, and producing a substantial income. Rather than use that income stream to start repaying UCB, Grace and Fitzgerald, used it entirely for their own purposes, which included sending money overseas to Grace's foreign business interests.

In those circumstances, UCB applied for a worldwide freezing injunction against Grace and Fitzgerald. A freezing injunction is not, however, a method of execution; and in any event Grace and Fitzgerald argued that much of the dissipation of the rental income was in the ordinary course of their businesses as buy-to-let landlords. It was impractical to seek to use Third Party Debt Orders to attach to the rent payable by the tenants of the properties to Grace and Fitzgerald because fresh TPDOs would be required each month against each tenant, as each tenant's rent fell due – but before each tenant had paid its rent to Grace & Fitzgerald. UCB therefore coupled its application for a freezing injunction with an application to appoint receivers of the income generated by the portfolio by way of equitable execution of its judgments.

The Court's jurisdiction to appoint receivers by way of equitable execution is rarely exercised. The statutory basis of the jurisdiction is section 37 of the Senior Courts Act 1981 – the same section that provides the Court with jurisdiction to make injunctions. Receivers can be appointed by the High Court "in all cases in which it appears to the Court to be just and convenient to do so." It is clear from the authorities, however, that 'special circumstances' must be shown to justify the appointment of receivers.

The leading authority on the appointment of receivers by way of equitable execution is **Masri v Consolidated Contractors International UK (No 2)** [2008] EWCA Civ 303. Mr Masri had obtained judgment for a sum of money which represented a share of an oil concession in Yemen. The judgment debtors did not pay, and indicated a refusal to pay, so Mr Masri obtained an order of the English Court appointing receivers to receive the oil revenue due to the judgment debtors under the oil concession, and a freezing injunction preventing them from dealing with the concession itself otherwise than in the ordinary course of business. The judgment debtors appealed to the Court of Appeal. Lawrence Collins LJ delivered the unanimous judgment of the Court, which ran to some 185 paragraphs.

The first major issue was whether the English Court, even though it had *in personam* jurisdiction over the judgment debtor, was entitled to appoint receivers in relation to foreign assets. He concluded that it did. A receivership order acts *in personam* against the debtor, in that it has effect as an injunction restraining the judgment debtor from receiving any of the property that it covers. The receivership does not create an equitable charge – at least until the property is in the

receiver's hands. Any foreign third parties would be protected by the *Babanaft* provisos in the order. Since the 19th Century, the English Courts had recognised the legitimacy of the appointment by the Court of receivers over foreign property and there was no reason to suppose that the appointment of receivers by way of equitable execution was any different.

The second major issue was whether the receivership order was inconsistent with Article 22(5) of the Brussels I Regulation (Council Regulation (EC) No 44/2001), which provides that "The following Courts shall have exclusive jurisdiction regardless of domicile: ... (5) in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced." The debtor argued that each time a customer of the concession paid the receiver (rather than the debtor), enforcement was taking place in the country in which each such customer was based, and therefore the making of the order inherently breached Article 22(5). The Court disagreed. The appointment of a receiver was not the enforcement of a judgment within Article 22(5); it paved the way for execution (which actually took place when the funds collected by the receiver were handed over to the judgment creditor), but (perhaps somewhat surprisingly) they were not proceedings concerned with the enforcement of judgments.

The final major issue was whether, under English law, receivers by way of equitable execution could be appointed in respect of future debts. Having considered the authorities, the Court of Appeal approved the judgment of Colman J in **Soinco SACI v Novokuznetsk Aluminium Plant** [1998] QB 406, that receivers could be appointed over choses in action that were not available for legal execution, and therefore that they could be appointed in respect of future debts. He referred with apparent approval to the reasoning of Millet J (as he was then) in **Maclaine v Watson** [1988] Ch 1, which included the following:

"First, the court has no jurisdiction to appoint a receiver by way of equitable execution merely because in all the circumstances it would be a more convenient mode of obtaining satisfaction of a judgment than the usual modes of execution ... Second, the special circumstances which would justify the making of an order must be such circumstances as would have enabled the Court of Chancery before the Judicature Acts to have intervened by way of injunction or the appointment of a receiver at the suit of the judgment creditor ... Third, ... what was required was that there should be some hindrance arising from the nature of the property which prevented the judgment creditor from obtaining execution at law, but which the appointment of a receiver could overcome ..."

UCB submitted to Mr Justice Arnold that those requirements were satisfied for two reasons. Firstly, UCB argued that it could not easily obtain execution at law. Charging Orders were inappropriate; the properties were probably in negative equity, and the issues concerning the priority of the various claims to registered charges were complicated. Third Party Debt Orders were inappropriate



TIM POLLI

Tim Polli specialises in all aspects of real property and both commercial and residential landlord and tenant law. He has particular experience of boundary and easement disputes, claims for adverse possession, claims arising out of mortgage

fraud and right-to-buy fraud, actions to enforce mortgages and other security over property (including issues concerning the rights and obligations of LPA Receivers), claims to beneficial interests pursuant to resulting or constructive trusts, the enforcement of restrictive covenants, the renewal of business tenancies, dilapidations claims, residential possession claims and enfranchisement.



PAUL STEVENSON

Paul has a broad-based commercial practice and advises and appears in High Court and County Court disputes in trials and interim applications at all stages, including applications for injunctive relief. His recent work has included a substantial claim based on an FOB contract and a dispute arising from

negligent bailment of goods on a trans-Atlantic crossing. Paul has a particular interest in salvage and the application of international conventions such as UNCLOS. Paul also retains an interest in the enforcement of commercial debts and frequently acts in interpleader actions involving High Court Enforcement Officers. In addition to general commercial work, Paul has a thriving insolvency practice (both corporate and personal) and has given seminars on the subject. Outside Chambers Paul enjoys wine, photography and his attempts to learn Italian.



THE REQUIREMENT FOR A WRITTEN AGREEMENT - TAKING A CONSTRUCTIVE APPROACH TO CONSTRUCTION CONTRACTS

Construction disputes are commonplace for anyone with a commercial litigation practice. This article examines the Housing Grants, Construction and Regeneration Act 1996 ("HGCRA") and focuses on two features of the Act which have been the subject of recent judicial comment: the requirement for the agreement to be in writing and the right, if it is, to refer disputes to adjudication.

HGCRA's potential has never fully been realised in relatively low-level construction disputes despite the fact that the Act can provide a more expert and cost-effective forum for resolving disputes. The Act covers "construction operations" which is defined very broadly to apply to almost all work except where the property has or is intended to have a residential occupier.

REQUIREMENT FOR WRITING

The TCC has recently clarified the requirement for writing: see **Durham County Council v. Jeremy Kendall (t/a HLB Architects)** [2011] EWHC 780 (TCC). The Act (s 107) requires that an agreement is "in writing" where it is made in writing, evidenced in writing or made by an exchange of communications in writing. This can be achieved by contracting with reference to written terms or where an agreement made orally is recorded by one of the parties or a third party with the authority of the parties to the agreement. The price, if orally agreed, must be recorded in writing if the agreement is to come under HGCRA: see **ROK Building Limited v. Bestwood Carpentry Limited** [2010] EWHC 1409 (TCC) per Akenhead J.

Citing **Allen Wilson Joinery Limited v. Privetgrange Construction Ltd** [2008] EWHC 2808 (TCC), Akenhead J stressed that tribunals need to be robust in severing trivial matters which may have been agreed orally from what would otherwise be a written contract. This would be an objective test in light of a particular contract. As Akenhead J put it: "What may be trivial in one contract may not be in another...an oral agreement on a million pound project as to which of two mildly differing shades of light blue paid might be used may be trivial on one development but not on another".

In **Kendall**, Akenhead J concluded that all of the terms were in writing, paying particular attention to a minute of a meeting held between the parties which recorded the detailed steps which were to be taken in order to implement part of the agreement.

The requirement for writing can, therefore, be satisfied without the

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because fresh orders would have to be obtained each month, against each tenant. Those impediments would be overcome by the appointment of a receiver. Secondly, UCB argued that in all the circumstances, it was inappropriate for Grace and Fitzgerald to continue to receive the income from those properties at the expense of UCB, a judgment creditor of theirs – even if they proposed to use that income not only for their personal purposes, but also for the purposes of their business.

In the circumstances, Mr Justice Arnold was satisfied both that he had jurisdiction to make an order that receivers be appointed, and that it was just and equitable to do so. Concerns he had that the position of any chargees over the properties should not be prejudiced were met by an order expressly providing that the appointment of the receivers was to be without prejudice to the rights of any incumbrancer upon the properties who may think proper to receive the rents by virtue of their respective securities or if any incumbrancer is in possession then without prejudice to such possession.

Given the need for there to be special circumstances justifying the appointment of receivers by way of equitable execution, it will inevitably be rare for such appointments to be made. The relative rarity with which such receivers are appointed makes it easy to overlook an appointment of such a receiver as a means of enforcement. In an appropriate case, however, an order for the appointment of receivers by way of equitable execution can be an extremely effective means of enforcement and therefore a very valuable weapon in a commercial litigator's armoury.

TIM POLLI

presence of a formal written agreement (such as a JCT Minor Works Contract). Advisers will need to ensure that they are provided with all paper and electronic communication in order to determine whether the paper trail satisfies the test or whether they should make a jurisdictional challenge.

JURISDICTIONAL CHALLENGE

Adjudicators, like arbitrators, are entitled to enquire into their own jurisdiction. A party who wishes to make a jurisdictional objection to adjudication must reserve its position appropriately and clearly: see **CN Associates v. Holbeton Ltd** [2011] EWHC 43 (TCC). It will be an unusual case where the party making the objection could not reasonably have ascertained its grounds of challenge before the decision was issued.

Where there is an express agreement, the parties will be bound by the adjudicator's decision even where the decision is plainly wrong.

The ingredients of a successful jurisdictional objection were set out in **Aedifice Partnership Ltd v. Shah** [2010] EWHC 2106:

- i. An express agreement is best and a clear reservation will usually be made by words such as "I fully reserve my position about your jurisdiction" but such words are not absolutely essential;

- ii. The entire course of a party's conduct is relevant to the question of whether an objection has been made;
- iii. To find an implied agreement the Court would look at everything that has been said and done by a party. It is sensible to ask: was/should it have been clear to all concerned that a reservation on jurisdiction was being made; and
- iv. A party can waive an objection by participating in an adjudication where he knows or should have known of grounds for a jurisdictional challenge but participates anyway.

A general, as opposed to a specific, objection to jurisdiction will suffice, i.e. where no particular ground is given. If adjudication proceedings are on foot, a party must, therefore, take immediate steps to formulate a jurisdictional challenge (if one may validly be made) or else be at risk of having waived their objection.

The above comes with a small health warning: the requirement for writing has been prospectively repealed by the Local Democracy, Economic Development and Construction Act 2009 but there is no indication when it will be brought into force.

PAUL STEVENSON

FORTHCOMING SEMINARS

International Commercial Arbitration in the Energy sector Theory and Practice

St Andrews 20 – 24 June 2011

This five day course is designed to introduce both lawyers and non-lawyers alike to the theories and practice of international commercial arbitration.

Contact: stevenwalker@tanfieldchambers.co.uk

Oil, Gas and Minerals International Arbitration and Advocacy Skills

London 5 – 9 September 2011

This 5-day conference on International Arbitration in oil, gas and minerals industry is intended to be of interest to lawyers and non-lawyers alike.

The conference will provide perspectives from legal experts, trial and in-house counsel, international arbitrators, and academics.

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