

International Corporate Rescue



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Using Receivers to Recover Out of Reach Assets

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Disputes between companies engaging in international business in both onshore and offshore jurisdictions are commonplace. The variety of the multijurisdictional elements involved is as broad as the wide range of offshore structuring options available to the entities themselves or in respect of their assets. Given the sophistication and variety of the offshore involvement in international business it is not always possible to formulate an asset recovery strategy at the outset of a dispute with any certainty of its ultimate effectiveness. Once a judgment has been obtained, complicated issues may arise when a successful party is left trying to enforce a judgment in a number of different jurisdictions or where there are various obstacles in the way of making any effective recoveries.

Obtaining a judgment is often only a first step to recovering money, and where payment is not forthcoming within a reasonable timeframe, time consuming and potentially expensive enforcement proceedings can become a necessity. This process might be complicated further where the judgment creditor has been the victim of a fraud and assets have been spread across a number of jurisdictions (both offshore and onshore), or placed in structures deliberately designed to make enforcement problematic. In such cases relevant information may be scant and simply unavailable and it may be difficult to identify and value those assets, which may itself hamper the enforcement process.

The Courts in offshore jurisdictions have demonstrated an increasingly flexible attitude toward the appointment of receivers as a method of preserving or recovering such property and for asset-tracing, where other asset recovery strategies may fail. We review below a number of recent cases from these jurisdictions where the appointment of an equitable receiver has represented an increasingly attractive method by which to overcome these difficulties. This remedy may be particularly useful where the underlying assets are held by way of shares in BVI or Cayman Islands' companies or through a trust.

Circumstances in which receivers may be appointed

The appointment of a receiver is ordinarily regarded as a remedy of last resort and they are usually appointed

Receivers may be appointed where:

1. there is sufficient evidence to show a good arguable case;
2. there is sufficient evidence of property to be preserved; and
3. the claim is not frivolous or vexatious.

ex parte where the court is faced with allegations of fraud and immediate action is needed to prevent the Court's orders from being rendered futile. There are two specific cases in which appointment is classically made. First, where the applicant already has an existing right to the property to be preserved (the claimant must have good prima facie title and the property that is the subject matter of the proceedings must be at risk of dissipation and a freezing order is unlikely to be effective). Second, a receiver is often appointed 'to hold the ring' i.e. where it can be established that it is necessary in order to preserve property to ensure its proper management pending litigation to decide the rights of the parties to that property. Receivers may be appointed over any property be that shares, contractual rights, partnership interests, or even more controversially in respect of retained powers arising under a trust (where a sufficient proprietary interest may be discerned).

As shall be seen from the cases discussed below there is an increasing number of circumstances in which the appointment of receivers might be an option in order to increase the prospect of making successful recoveries.

Shareholdings

Rather than seek the appointment of receivers from the outset, the most obvious method of enforcement in relation to shareholdings might appear to be to obtain a charging order over the shares owned by the defendant as a prelude to an order for their sale. The charging order seeks to secure the judgment debt by frustrating any sale of the relevant share. Charging orders over shares are a most effective method of enforcement when there is substantial equity in the underlying assets of the company and the judgment debtor is the sole shareholder. However, there are practical difficulties in charging shares, as it requires not only identifying a company whose

shares are potentially worth enforcing against, but also then going on to identify where the assets of that company are located in order to value those shares so that a buyer can be found. It can also be difficult to obtain accurate books and records to identify other creditors of the company which may also make valuation difficult and deter potential purchasers. The appointment of equitable receivers can go some way to addressing those difficulties. In particular, as shall be seen, if the receiver's appointment includes an order that the relevant shares vest in the receiver then any voting (or other) rights attaching to the shares may be exercised and deployed to gain control of the underlying corporate structure.

The facts of the recent English case of *Cruz City 1 Mauritius Holdings v Unitech Limited and others* [2014] EWHC 3131 (Comm) illustrate some of the benefits that can result from the appointment of equitable receivers. In that case the defendants' assets included shares in various companies in a number of countries and the claimant attempted to obtain a charging order in the Isle of Man over shares held in a Manx company. It was not possible to tell from the company accounts of the various companies what underlying assets existed, in which jurisdiction those assets were located, and by which company they were held. The company accounts suggested that the principal assets of these companies comprised their investments in their own subsidiaries or loans due from other companies in the group. The claimants were therefore presented with a confusing and uncertain background against which realising any significant value for the shares would be almost impossible.

However, the English Court held that this was a classic case for the appointment of equitable receivers. The receivers could take steps to exercise the defendants' rights as a shareholder in order to resolve the difficulties and seek to recover the true value of the shares: they were able to exercise shareholder rights to place the companies into liquidation, with any surplus being distributed to the receivers. It is important to note here that whilst enforcement by the more conventional methods was shown to be impracticable, it was not impossible. The decision appears to be consistent with a growing willingness on the part of the Courts to appoint an equitable receiver in an appropriate case even where other options are – theoretically at least – available. That is a highly practical approach, and recognition that although judgment creditors will often be in a position to enforce against assets, maximising the recovery from those assets is a less straightforward matter.

Tangible assets

The appointment of equitable receivers over a company through which a judgment debtor's assets are held can be a useful tool to realise those assets for full value and for the benefit of the judgment creditor. Frequently, and

particularly where fraud has occurred, such companies may be held in the name of a nominee. The Cayman Islands Court of Appeal, and subsequently the Privy Council, confirmed in *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Company (Cayman) Limited and others* [2011] UKPC 17 ('TMSF') the principles stated in *Masri v Consolidated Contractors International UK Ltd. (No.2)* [2009] UKHL 43 as to the basis of the jurisdiction to appoint a receiver in those circumstances, and crucially the following:

1. a receiver by way of equitable execution may be appointed over an asset whether or not the asset is presently amenable to execution at law; and
2. the jurisdiction to appoint receivers by way of equitable execution can be developed incrementally to apply old principles to new situations in order to achieve justice.

In TMSF, receivers were appointed over a settlor's power to revoke the trust in question. This advancement of the law has been acknowledged in numerous subsequent cases. The recent decision in *JSC VTB Bank v Skurikhin and others* [2015] EWHC 2131 has opened the door further in the use of equitable receivers where assets are held through a trust or foundation. In that case, the High Court appointed receivers over a company in which a foundation held the beneficial ownership, on the basis that the defendant had a right to call for assets of the foundation or had de facto control of those assets. Unlike a trust, a foundation (which is an entity existing under the laws of a number of jurisdictions including Jersey), is a body corporate and is the legal and beneficial owner of its assets, just like a company. On the face of it, therefore, the beneficial interests in the company were the absolute property of the foundation. The appointment of a receiver by the High Court suggests that a right or power to call for an asset to be transferred to a debtor, where the debtor otherwise has no beneficial interest in it, equates to ownership of the asset.

Whilst this proposition is controversial, it is arguably consistent with the modern approach adopted by the Courts regarding the scope of assets that can be frozen at an interlocutory stage, and confirms the willingness of the Courts to look through corporate structures to the practical reality of who actually controls an asset in appointing equitable receivers. That is an approach which is invaluable to a claimant looking to enforce over assets which are in reality owned by a judgment debtor, albeit that matters might appear rather different at first glance.

The recent approach of the BVI Courts

BVI companies are often utilised as holding vehicles in a structure and therefore appointing a receiver to take

control of the corporate structure and move ‘downstream’ to the assets can be a particularly successful strategy to enforce a judgment.

In the case of *Dalemont Limited v Senatorov et al* (BVIHC(COM) 2011/149), the BVI court was faced with similar arguments to those in TMSF: that the appointment by way of equitable execution that was requested was in fact an appointment over a power, as opposed to property. Dalemont Limited (‘Dalemont’) a judgment creditor in the amount of approximately US\$40 million, sought the appointment of receivers over the shares in three BVI companies beneficially belonging to Mr Senatorov, the judgment debtor. The beneficial interest was not disputed. Counsel for Mr Senatorov argued that the Court did not have the jurisdiction to make the order sought because Dalemont was seeking an appointment over a power and not an asset and therefore did not come within the parameters identified in TMSF.

The Court, however, found that the subject over which the appointment was sought was the beneficial interests in the shares of the BVI companies and were plainly assets, even if the shares were themselves of no value. The Court found that the receivers would be entitled to make what use they could of the rights ancillary to or consequential upon having this beneficial interest in the property. The mere existence of uncertainties did not mean that the receivership itself would be in any way precarious or that the property over which the appointments had been made was not property of Mr Senatorov.

The application was made under rule 51 of the Eastern Caribbean Supreme Court Civil Procedure Rules which also required the Court to have regard to the amount likely to be obtained by the receivers, the amount of the judgment debt, and the probable costs of appointing and remunerating the receivers. In his judgment, these requirements do not require that the Court work out precisely what will be the likely recovery or the expenses of the receivership: the proposed appointment simply needs to be proportionate in all the circumstances.

The BVI Courts’ willingness to appoint receivers in such circumstances was further demonstrated in the recent case of *Jinpeng Group Limited* (BVIHC (COM) 2016/ 0047). In that case, Jinpeng Group Limited (‘Jinpeng’) had been awarded significant damages against an individual under an arbitration award under the rules of the Hong Kong International Arbitration Centre. The arbitral award, enforced by way of an order of the BVI Court, and thus converted to a BVI judgment confirmed that Jinpeng had a valid and enforceable equitable charge over certain shares in General Hotel Management (the ‘GHM Shares’). Jinpeng subsequently successfully applied for the appointment of a receiver over the GHM Shares in order to enforce Jinpeng’s

rights under the equitable charge, towards satisfaction of the amounts due from the debtor.

In having a receiver appointed, Jinpeng has gained much greater control of the asset and the process for reliable identification and ultimate realisation of their inherent value in that the appointed receiver now controls the process for sale of the GHM Shares. The appointment has also clearly reduced any risks that the GHM Shares might otherwise be rendered valueless.

The BVI Court’s discretion to appoint receivers is subject to the requirement, pursuant to part 51.3 of the BVI Civil Procedure Rules (2000) (as amended), that the court be satisfied that there is an advantage to be gained by the applicant from the appointment of receivers. In this instance, the Court held that there was a clear advantage to Jinpeng on the basis that:

- a) the shares represented the only immediately apparent significant assets of value out of which Jinpeng might be able to enforce payment of the arbitration award; and
- b) the GHM Shares themselves might be rendered valueless if equitable receivers were not put in place to check any possible attempts to denude GHM of value.

It is clear from the Decision in *Jinpeng* that the BVI Courts view the remedy of appointing a receiver as a flexible one – the Court will consider the overriding demands of justice. Where there is an appreciable risk of dissipation, it is possible to front-load the appointment to allow the receiver to protect the value of the assets (including those further down the corporate structure) pending execution. This step is very advantageous to creditors.

Conclusion

These cases arguably indicate that the Courts are proactively developing their jurisdiction in relation to equitable receivership in circumstances where there are potentially sham entities involved, attempts being made to conceal assets from the reach of creditors, or the very structure of the asset is such that there are difficult obstacles to overcome in order to realise the value of any judgment. As a result, the appointment of an equitable receiver is an increasingly useful enforcement tool against complex protective corporate structures, and one that can be considered as an alternative or adjunct option to more traditional routes, rather than simply as a last resort.

Walkers acted for Jinpeng Group Limited in the successful application for appointment of equitable receivers in the BVI, in *Jinpeng Group Limited*.

International Corporate Rescue

International Corporate Rescue addresses the most relevant issues in the topical area of insolvency and corporate rescue law and practice. The journal encompasses within its scope banking and financial services, company and insolvency law from an international perspective. It is broad enough to cover industry perspectives, yet specialized enough to provide in-depth analysis to practitioners facing these issues on a day-to-day basis. The coverage and analysis published in the journal is truly international and reaches the key jurisdictions where there is corporate rescue activity within core regions of North and South America, UK, Europe Austral Asia and Asia.

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