Dispute Resolution

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DISPUTE RESOLUTION BULLETIN

Enforcing judgments: a victory for certainty

On 24 October 2012, the much anticipated judgment of the English Supreme Court in *Rubin and another v Eurofinance SA and others* was handed down. The decision reaffirms years of settled law and is a victory for certainty, not just in relation to the enforcement of insolvency judgments, but in relation to dispute resolution more generally.

The issue before the Supreme Court concerned whether, and if so in what circumstances, an order or judgment of a foreign court in proceedings to set aside prior transactions such as fraudulent conveyances, preferences or transactions at an undervalue (avoidance proceedings), will be recognised and enforced by the English Courts.

The case involved a company in Chapter 11 of the US Bankruptcy Code. Proceedings were brought against Eurofinance in the New York court and judgment obtained. Rubin then brought proceedings in the English courts under the UNCITRAL Model Law enacted by the Cross Border Insolvency Regulations 2006 (CBIR 2006) for an order for recognition and enforcement of the New York judgment.

Eurofinance was neither present in the US, nor had it submitted to the jurisdiction of the New York court and the judgment against it was a personal one - known as *"in personam"*. The position under English common law is that a foreign *"in personam"* judgment will only be capable of enforcement in England if the person against whom it was made was present in the relevant country at the time proceedings were instituted; brought a claim or counterclaim in the foreign proceedings; submitted to the jurisdiction of the foreign court by voluntarily appearing at proceedings; or, had agreed to submit to the jurisdiction of the foreign court.

In its decision, the Court of Appeal had acknowledged this common law rule, held that insolvency proceedings were different, that insolvency judgments could be enforced at

common law, and that insolvency judgments could be enforced because they were central to the international collective enforcement regime in insolvency. In effect, the Court of Appeal's decision created a unique category for insolvency judgments under English law, making them capable of automatic enforcement.

By a 4:1 majority, the Supreme Court overturned this decision and held that there should not be special rules for insolvency judgments.

As a matter of policy, the Supreme Court did not agree that, in the interests of the universality of insolvency proceedings, there should be a more liberal rule for judgments given in foreign insolvency proceedings. To make such a significant change would require legislation rather than a judgment of the court.

There was nothing expressly or by implication in the CBIR 2006 that applied to the recognition or enforcement of foreign judgments against third parties which would affect the Supreme Court's finding.

This decision puts a welcome end to the uncertainty created by the Court of Appeal's decision in relation to judgments in insolvency proceedings (although many insolvency practitioners would perhaps have preferred the availability of automatic enforcement). It also closes off any argument for the universal recognition and enforcement of foreign judgments in dispute resolution more generally. It will be interesting to see whether the legislature will make any changes going forward.

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A more detailed briefing on this decision is soon to be published by HFW. If you would like to receive a copy, please contact mailings@hfw.com.

Injunctions: the ongoing duty of disclosure

All applicants for injunctions owe a continuing duty of disclosure. This applies whether or not the injunction was initially obtained without notice. The recent decision in *Speedier Logistics & Others v Aardvark Digital & Another (4 September 2012)* has highlighted this duty: the Court discharged the injunction in this case because the party that had obtained it had failed to disclose a material change in the circumstances forming the basis on which the injunction had been granted.

In December 2007, the Defendant ("Aardvark") agreed to purchase a consignment of fitness equipment from a Chinese manufacturer ("Ningbo"). Ningbo engaged the Claimants ("SL") to transport Aardvark's consignment to Felixstowe, England. On arrival at Felixstowe, the goods were mistakenly released to Aardvark's carriers, contrary to Ningbo's instructions. They were subsequently delivered to Aardvark's premises.

Fearing that Ningbo would sue them for negligence and/or breach of contract, SL applied for and obtained an injunction in the English Court precluding Aardvark from moving the cargo from its location or dealing or otherwise diminishing its value. During the injunction application, SL submitted that the balance of convenience favoured the grant of the relief sought because SL faced potential liability to Ningbo for the loss of the cargo in contract and/or tort and/or bailment.

Following the injunction, the English proceedings were stayed by agreement to allow time for Ningbo and Aardvark to negotiate. There were no further communications between SL and Aardvark. Meanwhile, Ningbo commenced proceedings against SL in China. The Chinese proceedings concluded in September 2009. Ningbo was unsuccessful. Aardvark only discovered this in July 2012, after it had written to SL requesting the discharge of the injunction.

On becoming aware of the Chinese proceedings, Aardvark applied to the Court for the discharge of the injunction, arguing that SL had been under a continuing duty of disclosure in respect of the Chinese proceedings and had breached that duty.

The key question for the Court related to the duty of a claimant in circumstances where events occur after the date of the injunction which leave information previously given to the Court no longer correct. The Court was unable to see any reason in principle why, in those circumstances, the claimant should not be under a duty to inform the Court that there had been a relevant change, or, at the very least, to inform the defendant of

the new circumstances. The Court emphasised that the main reason why a claimant must revert back to the Court in such circumstances was because the Court had exercised its discretion on a particular basis and as a matter of principle, the Court ought to be informed of any change to that basis.

In failing to inform Aardvark or the Court of the Chinese proceedings, SL had not complied with its duty to disclose the information within a reasonable time and it was therefore just for the injunction to be discharged.

Aardvark had also contended that SL's failure to disclose the Chinese proceedings should lead to the striking out of SL's claim for the return of the consignment. The Court found that SL's failure was not so prejudicial to Aardvark as to warrant such a draconian measure. This was particularly so as it was always open to Aardvark to bring the matter before the Court to lift the stay and continue the proceedings.

Claimants obtaining an injunction must bear in mind their ongoing duty of disclosure. This is not always easy in fast-moving litigation, particularly where more than one set of proceedings is underway. Defendants should be aware of the opportunities that a failure in a claimant's duty may present to seek relief from an injunction in place against them.

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Practical considerations in novation of contracts (2) - Partial novation

In the second of their two articles on novation, Michael Buffham and Damian Honey consider the availability of partial novation under English law.

The accepted view is that a novation operates by extinguishing the original contract and replacing it with a completely new one. This analysis precludes the possibility of novating part of a contract (some, but not all, of a party's rights and obligations). However, there is some authority to suggest that the courts may be willing to allow an interpretation which makes partial novation possible. Extreme caution should be exercised in relation to this: the courts are still yet to give clear guidance on the issue and there is a risk that a purported novation of part of an existing contract will in fact create an entirely new contract between the new parties and extinguish the existing contract between the original parties.

A possible departure from the traditional interpretation

In *Langston Group Corporation v Cardiff City Football Club Limited (March 2008)*, the High Court considered that the novation of a particular obligation under a contract containing other obligations, which were not novated, did not necessarily constitute a termination of the contract itself.

Cardiff City Football Club (C) entered into a Conditional Development Agreement (CDA) with Cardiff City Council (the Council), which set out a contractual framework for the development of a new football stadium. The CDA obligations were conditional on various conditions (the Conditions). A £24 million loan (the Loan) was subsequently made by a financier (L) to C. C and the Council were of the opinion that there was no prospect of satisfying the Conditions within the timeframe set out in the CDA. In addition, the Council took the view that C was not financially stable without the Loan being significantly reduced and postponed. As a result, in October 2006, C and L entered into an agreement (the 2006 Agreement) to alter the terms of the Loan. Under the 2006 Agreement, L and C decided that part of the Loan was to become interest free and would be repayable using only certain sponsorship income, with repayment of the remainder of the Loan being postponed until 31 December 2016. These variations were only to become effective on satisfaction of the Conditions.

The Council and C also entered into a variation of the CDA (the CDA Variation). The CDA Variation substituted Cardiff City Stadium Limited (CCS) - a joint venture between C and its development partner - as the obligor in place of C in respect of most, but not all, of C's obligations under the CDA. L sought immediate repayment of the Loan (in accordance with its terms) on the basis that the CDA Variation was a novation and therefore extinguished the CDA. L applied to the Court for summary judgment.

L's application was dismissed. The Court held that:

- The substitution of one obligor for another can take place only by way of a novation agreement.
- The CDA Variation did not use the word "novation" and was not described as a novation

agreement. However, substituting CCS for C could only be effected by way of a novation of contract. The CDA Variation was therefore a novation agreement.

- A variation agreement that substituted one party for another in respect of some, but not all, of the obligations under a pre-existing contract did not automatically extinguish the whole of the original contract and replace it with another. (The judge illustrated this point using the example of a contract between A and B containing ten distinct obligations owed by B to A. Replacing B with C in relation to one of those obligations, leaving the other nine unaffected as between A and B, was a novation. However, the second agreement did not necessarily extinguish the whole of the original contract and create a new one.)

- As a matter of construction, the Court held that to treat the CDA Variation as giving rise to a 'termination' of the CDA within the meaning of the 2006 Agreement would give rise to a commercial absurdity. The CDA Variation merely implemented by way of contract something which had been in the contemplation of all the parties before the 2006 Agreement was made.

This decision suggests that the Courts may be prepared to interpret a novation agreement in way that does not always extinguish one contract and create another. If that is the case, it may be possible to novate part of a contract.

Comment

Langston has not yet been applied - or even considered - in subsequent decisions. Doubt remains about whether partial novation of a contract is possible under English law.

On the one hand, the decision supports the idea that the Court will give effect to the clearly documented intention of the parties. On the other, the general principles of novation suggest that the parties' intention is really only relevant in determining whether one party is to be substituted for another party. If that is the parties' intention, then the law must characterise the effect of the arrangement as a novation. On a traditional view, it is not possible to novate part of a contract, as a novation necessarily involves extinguishing the original agreement.

Whilst doubt persists over the efficacy of a partial novation, a safer approach would be to enter into two new agreements:

1. An agreement between the original parties to vary the original contract's scope.
2. A new contract between the continuing party and the new third party dealing with the transferred part of the original contract.

From a practical point of view, this solution may not always be a viable option. For example, circumstances may prevent the parties from entering into a new contract or mean that a variation of the agreement, as opposed to a novation, may have unintended consequences, such as tax, corporate governance or commercial implications.

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