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CHARTERPARTIES, CONSCIONABILITY AND COMITY: THE ENGLISH COURTS CAN PROTECT THE ASSETS OF A COMPANY IN ADMINISTRATION FROM FOREIGN ATTACHMENTS AND EXECUTIONS

By Devi Shah and Catherine Pedler

The Court of Appeal has confirmed that the English courts have jurisdiction to protect assets of a company in administration where those assets are outside the UK from foreign process, but that the court will only make orders protecting those assets in exceptional circumstances. Creditors that seek to attach assets outside the UK may therefore face injunctions effectively requiring them to give up claims advanced in any foreign process.

The case also serves as a reminder to administrators that they should consider making applications for recognition of an administration order in foreign jurisdictions in which the company has assets or may be transferring assets during the course of the administration, where that process is available to them.

The facts

On 7 January 2009, the Companies Court made an administration order in respect of Oilexco North Sea Limited (**"Oilexco"**) and appointed the first four respondents as administrators (**"Administrators"**). On the application of the Administrators, the Companies Court also made an order authorising them to enter into a loan agreement with specified lenders and to draw down funds under that loan agreement to enable them to pay post-administration expenses such that they could achieve the purpose of the administration.

The Appellants were pre-administration creditors of Oilexco pursuant to time charterparties of two vessels. The charterparties were governed by English law and included an arbitration agreement requiring any dispute arising under them to be referred to arbitration in London.

On the date of their appointment, the Administrators wrote to the creditors of Oilexco, including the Appellants, informing them that it had entered administration and that the Administrators were carrying on Oilexco's business with a view to realising a sale of Oilexco, its business or its assets.

On 9 January 2009, without notice to the Administrators, the Appellants commenced proceedings in the United States District Court for the Southern District of New York (the **"District Court"**) under its admiralty and maritime jurisdiction seeking judgment for the sums due from Oilexco under the charterparties and attachment and garnishment of Oilexco's property in New York sufficient to satisfy that judgment. The Appellants' complaint before the District Court made no mention of Oilexco's administration or of the London arbitration agreements in the charterparties. On 21 and

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26 January 2009, the District Court made *ex parte* orders attaching the property of Oilexco within New York, which extended to property held for its benefit or moving through or within the possession of 19 named banks. The Appellants did not notify the Administrators of the US proceedings or the orders they had obtained for some two months after the orders were made.

In ignorance of the orders, the Administrators made a significant payment to a post-administration supplier's account that was held with one of the banks that had been served with the attachment orders. That payment was consequently attached.

The Administrators sought a mandatory injunction from the Companies Court requiring the Appellants to use their best endeavours to procure the release of the attachment orders made by the District Court. The Administrators contended that the release of the attachment orders was necessary for them to be in a position to vacate office and complete the sale of the shares of Oilexco that was to be effected as part of a company voluntary arrangement. The Administrators also separately sought an order from the US Bankruptcy Court that the attachment orders be vacated on the basis that the Bankruptcy Court in New York should recognise the administration order under principles of comity embodied in Chapter 15 of the US Bankruptcy Code[1].

At first instance, the Companies Court granted the mandatory injunction sought by the Administrators and also made an order restraining the Appellants from taking any steps in the substantive proceedings they had commenced in the District Court for judgment of the sums due from Oilexco. The appeal was heard urgently on 20 May 2009, the same day that the US Bankruptcy Court was due to hear the Administrators' separate application. The Administrators' application before the US Bankruptcy Court was successful and the Court made an order granting recognition of Oilexco's administration as a foreign main proceeding under Chapter 15.

The issues on appeal

The Appellants contended that the stay of legal process against a company in administration pursuant to the Insolvency Act does not have extra-territorial effect and that the assets of a company in administration (unlike those of a company in liquidation) are not subject to a trust that would justify anti-suit injunctions against creditors of that company. Further, the Appellants argued that the principles of comity (or reciprocity between the English courts and the US courts) require the English courts to refrain from interfering with proceedings before the US courts.

Counsel for the Administrators submitted that the actions of the Appellants interfered with the Administrators' exercise of their functions and that the subject matter of the US proceedings had no connection with that jurisdiction. Accordingly, it was appropriate for the Companies Court to grant the mandatory injunction in these circumstances.

The decision

The Court of Appeal referred to the long established principle that the statutory prohibition against creditors bringing proceedings against a company being wound up by the court does not have extra-territorial effect. However, where a company is in liquidation, it is accepted that the property of that company is subject to a trust such that the property may be protected from legal process in any jurisdiction. The Court of Appeal did not see any reason why that protection should not be afforded to the assets of a company in administration and, therefore, concluded that it had jurisdiction to protect the assets of a company in administration even where those assets are outside the UK.

The Court of Appeal went on to say that whether that jurisdiction will be exercised in any particular case will depend on the facts of the case and "*must be tempered by considerations of comity*". While the Court of Appeal accepted that there is a strong presumption that the English courts will not interfere with the proceedings of a foreign court, the conduct of the Appellants before the District Court and subsequently justified the English courts acting in this case. In particular, the Court of Appeal relied on, among other things, the fact that the District Court made the attachment orders in ignorance of the administration of the Company and the arbitration agreements and that, by failing to promptly inform the Administrators of the orders of the District Court, the Appellants effectively set a "*trap*" for the Administrators who allowed funds to be transferred into the US which were then attached by the orders. In this regard, the Court of Appeal found the conduct of the Appellants to be unconscionable. Further, the Court of Appeal noted that the funds transferred by the Administrators were the proceeds of a loan entered into pursuant to an order of the Companies Court that was made to allow the Administrators to continue to trade the Company and pursue the purposes of the administration. Accordingly, the attachment orders interfered with the performance by the Administrators of their functions and duties.

For these reasons, the Court of Appeal was prepared to uphold the injunction granted against the Appellants.

Comment

It is clear that the Court of Appeal was persuaded to exercise its jurisdiction to protect Oilexco's assets in this case by the conduct of the Appellants before the District Court and subsequently. However, it seems that the District Court may have approached the Appellants' application differently had they been made aware of all the relevant facts relating to Oilexco's administration. In any event, the Court of Appeal has demonstrated that it will be prepared to exercise its jurisdiction to protect the assets of a company in administration where those assets are outside the UK and where the court is persuaded that a creditor has acted in a manner that interferes with the orderly administration of that company's assets.

The Court of Appeal also commented that administrators generally should be aware of the jurisdiction of the District Court to make orders attaching payments passing through New York and that, as such, it may well be unsafe for administrators to make payments through New York bank accounts without first having obtained recognition of the administration as a foreign proceeding under Chapter 15 of the Bankruptcy Code.

ENDNOTES

1 By which USA has adopted the Model Law on Cross-Border Insolvency promulgated by the United Nations Commission on International Trade Law in 1997.