

Insight: Disputes

October 2014

At Her Majesty's Pleasure?

Directors of 'can pay, won't pay' award debtors face the prospect of an extended stay in England should they choose to defy a receivership order granted by the English Court in aid of enforcement.

Introduction

The grant by Males J of an order for the appointment of receivers by way of equitable execution in relation to foreign assets held by two arbitration award debtors, Unitech Limited ("**Unitech**") and Burley Holdings Limited ("**Burley**"), is the most recent decision of the English Court to arise out of multi-jurisdiction enforcement action by Cruz City 1 Mauritius Holdings ("**Cruz City**") in respect of two unpaid arbitration awards now worth over US\$350 million.

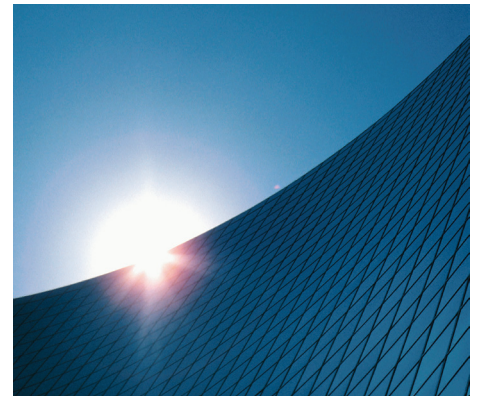
Males J's judgment is another robust reminder of the English Court's policy that English judgments and arbitration awards should be complied with and that, where possible, judgment and arbitration award creditors ought to be assisted with enforcement. In particular, the Judge made it plain that the jurisdiction to appoint receivers by way of equitable execution, if necessary backed up by sanctions for contempt, is responsive to this policy and, while not unfettered, ought not to be unduly restricted by rigid expressions of principle.

Background

Cruz City obtained a partial final award and a final award (the "**Awards**") for almost US\$300 million in July 2012 against Unitech, Burley and another affiliated company the "**Unitech Parties**") in London-seated LCIA arbitrations. To date, the Unitech Parties have refused to honour their obligations under the Awards – indeed, they have made it clear that they will do all they can to avoid meeting them – and now owe Cruz City over US\$350 million (including interest) as well as Cruz City's legal costs.

By way of brief recap, in May 2013 the English Court ordered the Unitech Parties to disclose their worldwide assets to aid Cruz City's enforcement efforts (the "**Worldwide Disclosure Order**"). The Unitech Parties' appeal of that order was struck out in December 2013 following their failure to comply with conditions imposed by Gloster LJ, namely that the appeal be conditional on the Unitech Parties paying into Court the full amount then outstanding under the Awards (the "**Conditions Order**"). Yet the Unitech Parties failed to take any steps to comply with the Worldwide Disclosure order or to explain their failure

This publication is prepared for the general information of our clients and other interested persons. It is not, and does not attempt to be, comprehensive in nature. Due to the general nature of its content, it should not be regarded as legal advice.



Jason Yardley

Partner, London

+ 44 20 7532 1804

jjardley@whitecase.com

James Woolrich

Associate, London

+ 44 20 7532 1830

jwoolrich@whitecase.com

White & Case LLP
5 Old Broad Street
London EC2N 1DW
Tel: + 44 0 20 7532 1000
Fax: + 44 0 20 7532 1001

to do so. For further information on the applications for the Worldwide Disclosure Order and Conditions Order, see our previous [Client Alerts](#).

During this period, Cruz City commenced enforcement proceedings in a number of overseas jurisdictions, including the Isle of Man, Cyprus, Mauritius and (later) India. It was met with determined resistance from the Unitech Parties, who sought to raise a host of technical arguments (some of which had already been rejected by the English Court in the original enforcement proceedings). This gave rise to some highly critical judicial comments – for example, the Isle of Man Court described the behaviour of the Unitech Parties as verging on abuse of process.

Against this background, Cruz City applied to the English Court for a worldwide freezing order against the Unitech Parties. Flaux J granted a worldwide freezing order against the Unitech Parties *ex parte*.¹ That order was continued by Flaux J following a fiercely contested return date hearing on 1 May 2014 (the “**Worldwide Freezing Order**”) despite a last-minute attempt by the Unitech Parties (one day before the *inter partes* hearing) to comply with the Worldwide Disclosure Order, which was found to be purely for tactical reasons. Flaux J found that there was a real risk of dissipation, in particular because the “*quality of the defendants’ conduct*” indicated very clearly that the Unitech Parties were prepared to take any step they could to make enforcement more difficult and that there was a real risk that, unless restrained, they would continue to take such steps.²

The receivership application

Notwithstanding the above English orders being made against the Unitech Parties, judicial criticism of their behaviour in England and elsewhere and their evident ability to pay the Awards (the group accounts for 2013 show a surplus of c. US\$1.8 billion), they continued to refuse to make payment and to resist enforcement proceedings.

The disclosure which had been provided to Cruz City by the Unitech Parties gave only a limited picture of the way in which the Unitech group held its assets, their value and where they were held. This posed a significant, continuing, obstacle to Cruz City’s enforcement efforts and underlined the real risk that the Unitech Parties would take advantage of such opacity to act in breach of the Worldwide Freezing Order.

Cruz City therefore sought to have receivers appointed pursuant to section 37 of the Senior Courts Act 1981 to assist the enforcement process, principally over Unitech’s 100% shareholdings in four directly-held subsidiaries in India, Cyprus and the Isle of Man. Although the receivership order would not confer proprietary rights over the relevant property, if granted it would enable the receivers to exercise the rights of Unitech as a shareholder in those companies. As such it would allow the receivers to take steps to obtain information about the underlying assets of the companies and to assess the value of those underlying assets. Cruz City also sought ‘ancillary’ orders requiring Unitech not to impede the

receivers from acting and to appoint the receivers as its representative for the exercise of shareholder rights.

The Unitech Parties’ objections to the application were threefold. First, they argued that a receivership order is an exceptional remedy, citing a number of nineteenth and early twentieth century cases in support. As such, they said, it was inappropriate where Cruz City had other, more regular means of enforcement available to it, such as charging orders and orders for sale over the relevant shares in jurisdictions where the companies were incorporated. Secondly, that the receivership order would be of no utility since (on the Unitech Parties’ evidence (which was contested by Cruz City)) it would not be recognised in India, the Isle of Man or Cyprus. Thirdly, that the grant of the ancillary orders would, unjustly, place Unitech on the horns of a dilemma: either disobey the English order and be in contempt of court or give up on its resistance to Cruz City’s foreign enforcement proceedings.

The judgment

Males J agreed with counsel for Cruz City that this was a “*classic case*” for the appointment of receivers, finding that it was “*just and convenient*” to grant the receivership order sought. Even assuming that ordinary means of enforcement were available abroad, they would be blunt instruments since “*[i]t is impossible to tell from the information currently available what the underlying assets are which represent the value of the shareholdings held by Unitech or how the value of those*

1 [2014] EWHC 1131

2 [2014] EWHC 1323 (Comm)

shareholdings can best be realised.” In any event, given the Unitech Parties’ clear intention to frustrate foreign enforcement efforts, enforcement abroad was not currently practicable in any reasonable timescale and the prospect of receivers being appointed by Manx or Cypriot courts, unchallenged by the Unitech Parties, was inherently unlikely. Further, the receivership would support the Worldwide Freezing Order – without it there was a real concern that the Unitech Parties would act in breach of the Worldwide Freezing Order undetected. Finally, even where the assets over which the receivership order was sought were located overseas, Males J noted that the order, reinforced by the ‘ancillary’ elements,³ would have a coercive edge: “[i]n circumstances where directors of the defendants may wish to come to this country on business or for pleasure, the prospect that their next visit may be for a more extended duration and in less comfortable accommodation than anticipated should provide a real incentive to comply [...] [l]ikewise if the defendants wish or need to do business here, whether by raising money on the international capital markets or otherwise.”

The above largely put paid to the Unitech Parties’ objections. In relation to the first, Males J was quick to identify the contradiction which lay at its heart – on the one hand the *Unitech Parties* argued that the receivership order was unnecessary since legal methods of execution were available overseas, but on the other hand, in the foreign proceedings where Cruz City sought such execution, they were fighting tooth and nail to resist enforcement. In relation to the second and third objections, as set out above, Males J did not consider the appointment would be fruitless and,

as far as resisting enforcement in foreign jurisdictions was concerned, indicated that: *“if that has the consequence of making it harder for a respondent to resist enforcement abroad, that should be regarded as a good thing and not a bad thing.”* It would be otherwise where there was clear evidence that the receivership order would require the defendants to act in a way which would expose them to criminal liability in another jurisdiction, but that was not the case here. Were a situation to arise in the future where the receivers sought to take a step or required the Unitech Parties to take a step which the latter considered to be illegal, there could be an application to the English Court to resolve the matter in light of the specific facts in issue.

Comment

Males J’s careful review of the relevant authorities makes plain that the English Court will – in appropriate cases – grant receiverships in aid of equitable execution to promote the ready enforcement of English arbitral awards and court judgments. Furthermore, although the present case fell squarely within the existing principles, Males J’s judgment contains a clear indication that the receivership jurisdiction can and ought to be developed incrementally to be *“responsive to the demands of justice in the contemporary context”*. This, combined with the ‘coercive edge’ offered by the English Court’s contempt jurisdiction, makes receivership a useful weapon in the enforcer’s armoury.

Cruz City is represented by White & Case LLP and was represented at the Worldwide Freezing Order and Receivership Order hearings by Alain Choo Choy QC and Nehali Shah of One Essex Court.

³ Males J granted a number of ancillary orders against the Defendants in order to render the appointment of receivers effective, including by requiring Unitech (under pain of contempt) to confirm the authority of the receivers to third parties, even if the receivership order may not be eligible for recognition in the foreign jurisdictions where the assets are located.