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Disruptive Asset Finance

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Assignment and charges of contractual rights

A lender can take security over many different types of asset; physical assets, like property or a car are some of the most obvious.

However, another type of asset against which finance can be secured is contractual rights. The ability to create security over a right to receive payment, and sometimes other rights, under a contract is attractive to a lender and an important factor in structuring many asset finance transactions.

Contractual rights are a type of chose in action, i.e. something that is recoverable by legal action as opposed to something that is physically possessed.

Security over contractual rights is typically taken by an assignment by way of security, though it can also be taken by way of charge. Specific considerations apply to taking security over contractual rights and it is important to review the terms of the contract.

Assignment

When granting security for a loan, it is common for a borrower to assign to the lender the benefit of its rights under any agreements it has or will enter into. Assignment involves the transfer of an interest or benefit from one person to another.

Generally, an assignment can transfer only rights under the contract and not duties, provided they are independent of each other

Even though a right may otherwise be assigned, the ability to do so may be restricted by the terms of the contract. Many contracts exclude or qualify the right to assignment, and the courts have confirmed that a clause which provides that a party to a contract may not assign the benefit of that contract without the consent of the other party is legally effective.

There are many ways for lender to secure debt. Each has different benefits and risk to both the lender and borrower. Ultimately, taking effective security over an asset means that the bank can, on the insolvency of the borrower, take possession of that asset, sell it and use the proceeds to repay the lending.

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Welcome

to the Spring edition of Disruptive Asset Finance

In this edition of Disruptive Asset Finance, given the increasing importance alternative dispute resolution is playing in resolving disputes, Sarah O'Grady provides an insight into the lesser discussed, but critically important subject of managing when a mediation might take place. Getting it wrong can be very costly!

Where cases do not settle and go to trial it is vitally important for witnesses to know what they can expect and how to use their time effectively to prepare for giving evidence at court. You can certainly tell at trial which witnesses have done their homework and a poor witness can make or break a case – I have set out some highly practical tips on how a future witnesses might tackle getting ready for court.

It is all very well winning a case but what about recovering the judgment debt? Having dealt with countless situations to obtain information from judgment debtors of all kinds Stuart Hoysted from Clarke Willmott's Business Recovery Unit explains how the court can get involved to question both corporate and individual debtors about their assets.

Finally James Marshall takes a look at recent developments and Geraldine Stephens considers the assignment of contractual rights.

John Flint

Better late than never: delaying mediation

Refusing an invitation to mediate can be a risky approach - In *Halsey v Milton Keynes General*, it was held that a successful party can be deprived of all or part of its costs if it unreasonably refused to agree to alternative dispute resolution (ADR).

An established line of authority now makes it clear that the costs consequences of unreasonably declining to mediate can be severe. However, mediating at the wrong time, when there is not enough information available, can be a pointless and costly exercise. In many cases the parties will be able to agree the best time to mediate but if one party expresses a desire to mediate at a time when the other considers it to be premature a difficult balancing exercise may ensue.

Judges have recognised this conundrum. In *Nigel Witham Ltd v Smith [2008] EWHC 12* it was noted that premature mediation wasted time and it could lead to a hardening of positions on both sides. On the other hand, if mediation was delayed and significant work undertaken costs might become the principal obstacle to settlement. The trick was said to be to *"identify the happy medium: the point when the detail of the claim and the response were known to both sides, but before the costs that had been incurred in reaching that stage were so great that a settlement was no longer possible."* This is often easier said than done.

Getting the timing of mediation right is a complex question and will differ in each case. While a party may delay an agreement to mediate what sanctions might then be imposed by the court? In such a case it will be up to the unsuccessful party, who is alleging that the delay was unreasonable, to rebut the presumption that costs follow the event (the "loser pays" principal).

In *Witham v Smith [2008] EWHC 12 (TCC)* Mr Smith was awarded £1,683 and his costs. Witham argued that the amount of costs should be reduced as Mr Smith had refused to mediate until late in the day. Mr Smith had indicated that he would consider mediation once the claim had been set out. It was held that it could not be shown that an earlier mediation would have been successful and so no reduction was made to Witham's costs liability.

In *Car Giant v Mayor and Burgesses of the London Borough of Hammersmith [2017] EWHC 464 (TCC)* it was noted that a court should be slow to conclude that a delay to mediate was unreasonable or, if slow, to order indemnity costs. Here the delay was due to experts legitimately holding different views - one party's position was that mediation was more likely to be successful once the experts' views had been fully set out.

In *Beechwood House Publishing T/A Binleys v Guardian Products [2012] All ER (D) 43 (Mar)* a claimant refused to mediate prior to issuing proceedings. This was held to be reasonable. At that time the costs were very low. Mediation was cost effective but there would be a cost attached to it. Further, a key issue was disclosure concerning information in a database which the defendant had refused. This disclosure was the only real issue between the parties and the claimant's position was that efforts were best focused on that issue.

How then might a party react when invited to a mediation which it does not yet wish to attend? Some practical tips are set out below.

- **Respond** - Staying silent and simply ignoring the invitation is very unlikely to be a wise move. *PGF II SA v OMFS [2013] EWCA Civ 1288* confirmed that generally silence in the face of an offer to mediate will be, by itself, unreasonable. Paragraph 11 of the Practice Direction Pre-Action Conduct and Protocols now incorporates the essence of this dicta into the Civil Procedure Rules.
- **Be prompt** - Dragging the process along and frustrating the process through poor engagement in an attempt to delay matters will likely do more harm than good. Frustrating the process by delaying for no good reason may merit a costs sanction. In *Thakkar v Patel [2017] EWCA Civ 117* the Court of Appeal upheld an order that the defendants were to pay 75% of the claimants' costs in a case where both parties achieved a measure of success at trial but the original judge considered that the case could have settled through mediation much earlier. Here the claimants had been proactive in making arrangements for a mediation but by contrast the defendants were slow to respond to letters and raised all sorts of difficulties. Ultimately it was the defendants' conduct which had caused the claimants to lose confidence that a mediation could be arranged.
- **Engage** - Ensure you actively engage in ADR discussions – Explain, so far as appropriate and keeping in mind the Halsey principles, to the other party your reasons for not proceeding with mediation at this stage. Be pragmatic.
- **Review the decision** - While a case may not be suitable for ADR at a particular time this may change once matters have progressed. Ensure that any decision not to mediate is kept under review. Express that you will be doing this to the other party. In *Murray v Bernard [2015] EWHC 2395 (Ch)* the claimants (who were ultimately successful) initially refused to mediate but 'had a change of heart' and proposed mediation. It was held that there was not a failure to mediate. The claimants were not to be 'fixed with a once stated but changed intention in relation to mediation. The relevant question is not a game in which the claimants will have one and one opportunity only to mediate for the purposes of the cost rule'.
- **Make appropriate settlement offers** - Consider making other settlement proposals such as a Part 36 offer which may settle the matter or provide additional costs protection.
- **Consider other forms of ADR** - Consider if any other forms of ADR will have any benefit at this time (for instance, a without prejudice meeting may have some of the benefits of a mediation but without the additional cost of the mediator).
- **Be pro-active** - Do not wait for judicial encouragement to mediate - if given judicial encouragement take it very seriously.

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Enforcement: Getting to know your debtor better

"As many a claimant has learned to his cost, it is one thing to recover a favourable judgment; it may prove quite another to enforce it against an unscrupulous defendant. But an unenforceable judgment is at best valueless, at worst a source of additional loss." - Société Eram Shipping Co. Ltd. v Cie Internationale de Navigation [2003] UKHL 30.

Judgment debtors can be evasive. Judgment debts can be enforced in a wide variety of ways and knowing which route is most likely to result in recovery can be difficult. Knowledge is key – The more that is known about the debtor's assets the greater the chances of recovery because enforcement methods can be targeted appropriately.

Prior to proceedings there are numerous public sources available which allow a potential claimant to investigate assets: from land and insolvency searches to Companies House documentation through to ships registers and searches at the DVLA. As the case progresses more details relating to assets and income may also become apparent. Following judgment another possible source of information opens up to creditors: they are able to ask the judgment debtor about their assets with the support of the court at an information hearing.

Part 71 of the Civil Procedure Rules (CPR) provides a procedure 'for a judgment debtor to be required to attend court to provide information, for the purpose of enabling a judgment creditor to enforce a judgment or order against him'. This procedure is a tool which will enable a judgment creditor to obtain information about the judgment debtor's assets so that it can be best decided which enforcement procedure to use. The Part 71 procedure is not available before judgment has been given.

An application for an order under CPR Part 71 may be made without notice and is usually made in the court where the judgment was obtained. An individual judgment debtor is straightforward but where the judgment debtor is a company an officer of that company can be ordered for questioning (a search at Companies House will provide a full list of the company directors and the secretary). Service of the order for the debtor to attend court will usually be by way of personal service and an offer to pay travel expenses must be made.

The questioning is usually undertaken by a court officer using a standard set of questions but in more complex cases questioning can be done by the judgment creditor themselves in front of a judge. Questions usually focus on, in the case of an individual, employment, income, property, investments and other debts. If the judgment debtor is a corporation, the officer will be asked about the company's operational and financial status and the company's assets and relationships with other group companies. However, the questions can be broader and additional questions can be filed. Questions that do not relate to the judgment debtors ability to pay may be disallowed as the judge retains control over the process. The answers will be written down and provided to the judgment creditor by the court officer who conducts the examination or where the hearing is taking place before a judge the answers will be recorded.

An order requiring the debtor to attend for questioning will also oblige the judgment debtor to produce certain specified paperwork. This could be just a few documents but, as the High Court has observed where the debt and the assets are counted in the millions the potential relevant documents might require a trolley (rather than an envelope) for the debtor to bring them to court.

How effective the Part 71 is will depend on the questions asked and the debtor giving truthful answers. Answers are given on oath and it is this, combined with a sanction of committal if there is non-compliance with the order, that makes this tool powerful. The order sent by the court requiring the debtor to attend questioning should contain the correct penal notice. Failing to attend court, refusal to take part or otherwise failing to comply could result in imprisonment.

Once the information is obtained it can be used to identify and action one or more of the enforcement methods that are open to judgment debtors such as a writ of control or a charging order or a third party debt order. Alternatively, if the information obtained shows the judgment debtor is asset rich and they are simply being obstinate over payment of the judgment, insolvency action can focus the debtor's attention.

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The good witness

Attending a trial has few similarities with the typical court room dramas you usually see on the television - The reality is rather different.

Do not expect someone to run in to court with a key document in the last few moments of trial or for a witness, during a feisty cross examination, to break down crying and admit that they were lying all along. While some drama is not totally unknown the best cases are prepared so that there are no real surprises.

A key part of trial preparation is supporting any witnesses so they are ready and know what to expect. It is regularly clear in the court room which witnesses have done their "homework" and those who have not - Witnesses who are prepared are able to present their evidence in a much more appropriate and compelling way.

Unlike in the movies, a witness in a civil case does not attend trial to give their evidence for the first time. Their evidence will already be contained in a witness statement which often would have been finalised many months ago. The activities in question may have taken place in the distant past. Therefore, the most important part of trial preparation for a witness will be revising what they have already put on paper in their existing witness statement. The other party will have already seen this statement (and likely they will have analysed it in depth) and it will form the basis for the questions the witness will be asked at court.

If a witness is certain with what they have said previously they will have greater control and confidence while being questioned and this will show – they will be less likely to make contradictory statements and damage credibility.

A witness may find it helpful to bring their own copy of their witness statement to court (they have written notes or comments on it to help them). However, once they are giving evidence they will only be able to view a copy of their witness statement which will be in the trial bundle. A witness does not need to know their statement "off by heart" - but the more confident they are about its content the better they are likely to perform under pressure.

Of course, it is not unknown to get flustered in court. It can be intimidating – A witness can take comfort from the fact that they can always ask the person who is questioning them to repeat a question. They can also ask the judge if they may have the time to look at their witness statement about a certain issue to refresh their memory. If a witness does not know an answer to a question they you should say that they "don't know".

Where a witness statement is long a witness who knows their way around their statement (for example, where certain key events are set out) is less likely to be flustered when giving evidence as they will be able to refer back to their statement with greater fluidity. However, help can be given to locate the relevant part where needed.

If a witness has papers relevant to their evidence these should also form part of their review. Once a witness feels that they know their witness statement very well they should review it again and keep doing so. If anything is wrong a witness should immediately advise their lawyer.

To settle the nerves it also helps to know what to expect in the actual court room so any witness should ensure that they have been fully briefed about this by their lawyer – witnesses are frequently surprised that frequently in civil cases they are permitted to be in the court room prior to giving their own evidence to watch evidence given by others before them. Being able to watch others is often an excellent way to see how the process works and to observe first-hand the characteristics of a good or poor witness. Arriving early means that a witness may be able to get the chance to do this but those who are anxious or particularly curious may look to sit in the public gallery of any trial in the months or weeks leading up to your case to observe how evidence is given and how the court room operates as generally all court proceedings are open to the casual observer.

In essence preparation, preparation and preparation often makes an otherwise average witness a great one.

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Case note book

Dominant purpose test applies to legal advice privilege - *Civil Aviation Authority v Jet2.Com Ltd, R. (on the Application of) [2020] EWCA Civ 35*

The Court of Appeal has recently considered whether a claim for legal advice privilege required the proponent of the privilege to show that the relevant document or communication was created or sent for the dominant purpose of obtaining legal advice. During pre-action correspondence Jet2 sought disclosure of copies of all drafts and discussions concerning a pre action letter to it from the Civil Aviation Authority (CAA). The CAA's position was that although there were further drafts of the letter and internal discussions they were protected by legal advice privilege because, although the communications were sent to non-lawyer staff to seek their commercial views, in-house legal advisers were also involved. The Court accepted that the jurisprudence was far from straightforward and the authorities did not speak with a single, clear voice but concluded it was correct that for legal advice privilege to apply to a particular communication or document, the proponent of the privilege must show that the dominant purpose of that communication or document was to obtain or give legal advice. The court also held that where one multi-addressee email is sent to various people (including lawyers) for comment if one purpose is to obtain commercial views of the non-lawyers then legal advice privilege will not attach to that email (even if the purpose is to obtain legal advice from the lawyer). The response by the lawyer to a multi-address email will however generally still be covered by legal advice privilege - if it contains legal advice. This remains a complex area - Mixing legal and commercial advice is risky and may lead to a loss of privilege.

"Please go ahead" inadvertently creates commitment to purchase of over £1.3m - *Athena Brands Ltd v Superdrug Stores Plc [2019] EWHC 3503 (Comm)*

Contracts can be unwittingly formed via casual email exchanges. Even intended complex arrangements can be overridden by emails. In this case a buyer for a high street retailer was emailed by a manufacturer who asked for commitment to an order and quantity. The buyer responded to "go ahead". The retailer in fact had a method of contracting via the placement of purchase orders as set out in a supplier's guide. The court did not hesitate to find that the exchange of emails could form a contract in the terms as expressed. There was nothing in the supplier pack to suggest that the buyer could not agree such a term. It was the sort of perfectly normal commercial term that a buyer would be discussing. There was nothing to indicate that what was agreed by the buyer was in any way subject to ratification or confirmation by anyone else. The manufacturer was successful. Even where complex procedures may be intended they can be overridden by fairly causal emails. Caution is needed.

Brexit and GDPR

At the end of January the Information Commissioner issued a press release concerning the GDPR in the light of the UK's withdrawal from the European Union. During the transition period, which runs until the end of December 2020, it will be business as usual for data protection. The GDPR will continue to apply. It is noted that it is not yet known what the data protection landscape will look like.

Interest when offering to settle - *King v City of London Corporation [2019] EWCA Civ 2266*

A Part 36 offer cannot be exclusive of interest - In this recent Court of Appeal decision it was held that Part 36 offers to settle which specifically exclude interest are not valid. It was common ground between the parties that *"an offer which fails to comply with the requirements of CPR Part 36 in an essential respect will not take effect as a Part 36 offer even if it is expressed to be one"*. The Civil Procedure Rules made it clear that an offer *"which offers to pay or offers to accept a sum of money will be treated as inclusive of all interest"*. This was "mandatory" and could "perfectly well be read" as indicating that an offer which is not to include interest cannot be a valid Part 36 offer. Lord Justice Arnold stated that the issue should be considered by the Civil Procedure Rule Committee. Offers to settle need to be drafted appropriately to ensure maximum costs protection if they are not accepted.

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