

International Corporate Rescue



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Appointing Receivers in Aid of Equitable Execution in the Cayman Islands

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A recent decision of the Cayman Islands Grand Court in *Y v R* (9 January 2018) has confirmed the applicable principles concerning the appointment of receivers to aid enforcement of a Cayman Islands' judgment. Equitable execution is a means of enforcing judgment debts where other methods of enforcement are not possible or have not been successful. *Y v R* clarifies the requisite nexus between the judgment debtor and the assets over which the appointment is sought in order for the jurisdiction to exist. Ultimately, the decision highlights the availability of this equitable remedy in appropriate circumstances as an effective tool in making recoveries from judgment debtors otherwise successfully avoiding satisfaction of the judgment against them.

In this case the Plaintiff had registered a foreign arbitral award for c.USD 2 million under the Foreign Arbitral Awards Enforcement Law as a judgment of the Grand Court and sought to appoint receivers over, what it claimed were the judgment debtor's Cayman Islands' assets (namely the debtor's future distributions from a Cayman Islands' discretionary trust). However, the Grand Court refused to appoint receivers over this 'interest' finding that: (i) a discretionary beneficiary has no discernible property right over which receivers could be appointed; and (ii) there were other alternative (and likely effective) remedies available to the Plaintiff which would militate against the Grand Court exercising the wide discretion afforded to it under this equitable remedy. The Grand Court also found that much of the affidavit evidence concerning the trust was inadmissible (itself a further ground for refusing the relief sought) as the Plaintiff had failed to obtain permission to disclose that information under the Confidential Information Disclosure Law.

Appropriate assets

Whilst the judgment creditor was unsuccessful in this instance, the decision is nevertheless useful for Cayman Islands' practitioners not least in marking certain boundaries of the jurisdiction. In particular it affirms that receivers can be appointed in aid of execution over: (i) tangible assets which include future receipts from defined assets within the reach of the Grand Court (as

in *Masri v Consolidated Contractors International UK Ltd.* (No. 2) [2009] UKHL 43 ('Masri')); (ii) assets which can be considered in equity as the assets of the judgment debtor provided that the judgment debtor has the right to de facto control and ultimately receive the relevant asset (as in *JSC VTB Bank v Pavel Skurikhin & Others* [2015] EWHC 2131 (Comm)). The leading case in the Cayman Islands for the appointment of receivers over an interest in a trust is *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Company (Cayman) Limited and others* [2011] UKPC 17 ('TMSF') which was a case on appeal from the Cayman Islands, and which is discussed below.

Future receipts

In reaching its decision the Grand Court was guided by the principles stated in *Masri* where the English Court of Appeal had appointed receivers in relation to foreign debts (monies owed and future debts arising under a number of international construction contracts). The judgment in *Masri* marked a notable departure from previous practice and made it clear that the jurisdiction to appoint receivers by way of equitable execution (and the jurisdiction to appoint equitable receivers generally) is to be developed incrementally to apply old principles to new situations with the primary aim of achieving justice. The jurisdiction has consequently evolved significantly. Whilst accepting this evolution the Grand Court also noted that 'the ... [English Court of Appeal] ... was not saying that the jurisdiction is limitless or ... unfettered ...'.

The judgment creditor in *Y v R* had sought to rely on the argument that when the trustee makes a future distribution in favour of the judgment debtor (which was almost inevitable in the circumstances) such distribution would be amenable to enforcement under *Masri* principles. It argued that it was therefore appropriate for receivers to be appointed over any (potential) future distributions from the trust. The Grand Court disagreed. In *Masri* the receivers were appointed over future payments of debts owed to the judgment debtor whereas in this scenario any future payments from the trust were entirely within the trustee's discretion. The

Grand Court finding that ‘this is not a case in which there is evidence that there is no genuine discretion exercised by the trustee over the assets’.

Beneficial interests

Property held on discretionary trusts has long been held not to represent the property of a discretionary beneficiary. It was on this basis that the Grand Court distinguished the decision of the Privy Council in TMSF on the basis that the settlor’s retained power of revocation of the trust in TMSF was regarded by the Privy Council as ‘tantamount to ownership’ and thus a proprietary interest was recognised. However, in the present case where there was no evidence that the relevant trust was a sham, the Grand Court was unable to identify a proprietary interest of the judgment debtor in the trust. In circumstances where the only discernible ‘right’ of the judgment debtor was to require the trustee to periodically consider whether or not to apply the whole or some part of the trust fund for his benefit, the Grand Court concluded:

‘It is clear that where there are no available assets to be viewed as the Judgment Debtor’s assets in equity, then there can be no question of appointing a receiver over them ... to grant the relief sought by the Plaintiff in this case would amount to a radical, impermissible extension of the law’.

‘Just and convenient’: the court’s discretion

The application in *Y v R* also fell at the hurdle of the discretionary factors to be taken into account. An applicant must satisfy the Grand Court that it is ‘just and convenient’ that receivers be appointed. This discretion

is afforded by section 11(1) of the Grant Court Law which adopts the English statutory provision articulating the English High Court’s jurisdiction to ‘appoint a receiver in all cases in which it appears to the court to be just and convenient to do so’. In particular, it is relevant to the exercise of the discretion whether the judgment creditor could obtain satisfaction of his judgment through other available legal remedies. If such avenues are not available or are otherwise ineffective then receivers may be appointed. This is often summarised as a requirement that the appointment of a receiver is the only realistic prospect available to the judgment creditor to enforce its judgment (see *Cruz City 1 Mauritius Holdings v Unitech Ltd (No. 2)* [2015] All ER (Comm) 336). In this scenario, the Grand Court found that other adequate enforcement remedies were available to the judgment creditor in the United States and it had therefore also failed to establish this element of the test.

Our view

We consider that this decision albeit brief demonstrates the Grand Court recognising appropriate limits to this important remedy. There was some discussion following TMSF that this line of authority could lead to discretionary interests in a trust being exposed to enforcement, but those fears have proved misplaced. Overall, the jurisdiction of the Grand Court to appoint equitable receivers to preserve property or to assist with the satisfaction of judgment debts has developed significantly in the past decade. It represents a particularly valuable and increasingly employed tool in the context of litigation and enforcement where assets of significant value are held in complex structures with vehicles established in a number of different jurisdictions.

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