

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)**

CLAIM NO. BVIHC (COM) 2022/0122

**IN THE MATTER OF THE APPLICATION OF WESLEY ARTHUR EDWARDS, A LICENSED
INSOLVENCY PRACTITIONER**

Determined on paper

2022 July 7

JUDGMENT

- [1] **JACK, J: [Ag.]** By an application made 1st July 2022, the applicant (“Mr. Edwards”), a licensed insolvency practitioner, seeks a “block transfer” in respect of a large number of companies of which is variously the liquidator or Court-appointed receiver. Mr. Edwards has left his employment with Begbies Traynor (BVI) Ltd (“Begbies”) and seeks to transfer his various appointments over to another insolvency practitioner at Begbies, a Mr Simpson. The application raises two issues. Apart from these issues, the application is unexceptional. The two points are: (a) Does the Court have the power to make a block transfer? and (b) Is a licence from his Excellency the Governor required to permit the transfer of receiverships over assets frozen by the sanctions imposed against Russian entities following Russia’s invasion of Ukraine?

Sealing the proceedings

- [2] Subsequently to his initial application, on 5th July 2022 Mr. Edwards issued an application for the file in this matter to be sealed and the case to be anonymised. No skeleton argument was served in respect of this application. The supporting affidavit of Nia Wyn

Statham says that Mr. Edwards “is desirous that these proceedings should be sealed given the sensitive nature of his appointment (both in his capacity as a receivers and liquidator... of the companies)...” Further he “also wishes to protect the details of his appointments, including the volume and value of each appointment from the wider public as this would be of interest to [Begbies’] competitors.... Furthermore,... several companies in receivership are affected by the present sanctions regulations which have been imposed in connection with the conflict in Ukraine. In particular, one company... is subject to a pending application for a licence which has been lodged with the Territory’s Governor and details of this application should not be disclosed to the wider public.”

- [3] In my judgment, there is no proper basis on which the Court file can be sealed. Mr. Edwards’ appointment is of public record. Indeed his appointments are effective *contra mundum*. He and Mr. Simpson obviously need to show the Court block transfer order to third parties to prove their appointments and Mr. Edwards’ relinquishing of his appointments. Indeed the block transfer order provides for Mr. Simpson to advertise his appointments in place of Mr. Edwards. Nothing is said in the evidence filed about the “volume and value” of Mr. Edwards’ appointments. Equally nothing is said about applications for licences under the sanctions regime. Even if (which is doubtful, given the restricted access the public has to documents on the Court file) there might in some cases be information which should be sealed, this case has none. Accordingly I refuse the application to seal the Court file and anonymise the case.

Block transfers

- [2] As regards issue (a) on the substantive application, the **Insolvency Act 2003**,¹ contains no express power for the Court to make a block transfer order. This was the position in England until more recent legislative changes gave an express power. Prior to that legislative change, the English Court of Appeal in **Donaldson v O’Sullivan**² examined the caselaw and held that the cases:

¹ No 5 of 2003, Laws of the Virgin Islands.

² [2008] EWCA Civ 879, [2009] 1 WLR 924.

“support the thesis that bankruptcy is a court-controlled process in relation to which the court has wide powers, exercisable for the purpose of the insolvency process as a whole, which are not limited to those conferred expressly by the relevant legislation. There are non-statutory elements in the law of bankruptcy, such as the principle in **Ex parte James**,³ even though these may result in an application of assets which is not strictly in accordance with legal rights and obligations. There is also scope for the court to direct that things be done (or not done) in apparent conflict with express provisions of the legislation. Clearly if the Act said in terms that the court could make a certain kind of order only in given circumstances, it would be a very strong construction to hold that it could do so in other circumstances as well. That is not the present case. The Act provides for the court to appoint [a trustee in bankruptcy] in certain specific circumstances, and to be able to remove in any circumstances, but is silent about replacement by the court of a removed trustee. It does include exclusive provisions in certain cases... The provisions with which this case is concerned are not of that nature.”

[3] The Court of Appeal indicated *obiter* that the same applied to company liquidations and other forms of insolvency proceedings. Block transfers had been very common since 1993 and were permissible. The alternative of holding a succession of creditors’ meetings to appoint a new liquidator was expensive and unnecessary.

[4] In my judgment, the same applies in this Territory. Liquidations (under section 273 of the 2003 Act), receiverships (at common law) and bankruptcies (under section 354 of the 2003 Act) are all under the ultimate control of the Court. The *ratio* of **Donaldson** applies equally here. Accordingly, there is in my judgment a power to make a block transfer order.

The impact of Russian sanctions

[5] As to (b), regulation 11 of **The Russia (Sanctions) (EU Exit) Regulations 2019**,⁴ applied to this Territory by **The Russia (Sanctions) (Overseas Territories) Order 2020**,⁵ provides, so far as material:

³ *Ex parte James*, in re Condon (1874) 9 Ch App 609.

⁴ SI 2019 No 855.

⁵ SI 2020 No 1571.

“(1) A person (‘P’) must not deal with funds or economic resources owned, held or controlled by a designated person if P knows, or has reasonable cause to suspect, that P is dealing with such funds or economic resources.

...

(3) A person who contravenes the prohibition in paragraph (1) commits an offence.

(4) For the purposes of paragraph (1) a person ‘deals with’ funds if the person—

(a) uses, alters, moves, transfers or allows access to the funds,

(b) deals with the funds in any other way that would result in any change in volume, amount, location, ownership, possession, character or destination, or

(c) makes any other change, including portfolio management, that would enable use of the funds.

(5) For the purposes of paragraph (1) a person ‘deals with’ economic resources if the person—

(a) exchanges the economic resources for funds, goods or services, or

(b) uses the economic resources in exchange for funds, goods or services (whether by pledging them as security or otherwise).”

[6] “Funds” and “economic resources” are defined in section 60 of the **Sanctions and Anti-Money Laundering Act 2018** (‘SAMLA’).⁶

[7] Mr. Edwards is currently appointed as receiver of shares in six companies. The appointments are in support of execution of judgment debts obtained by designated persons. As such the judgments in my judgment constitute “funds” within the meaning of SAMLA. A receiver has no ownership of the property which is the subject of the receivership: **Kerr & Hunter on Receivers and Administrators**.⁷ However, a receiver will have possession, even if only constructive possession, of the property over which he is appointed receiver.

[8] In **JSC VTB Bank v Taruta**, I discussed the question whether a receivership made by way of execution of a judgment in favour of a designated person could be lifted without a licence from the Governor:⁸

⁶ 2018 c. 13.

⁷ 21st Ed (2020) Chapter 8.

⁸ [2022] ECSCJ No 85, BVIHC (COM) 2014/0062 (22nd March 2022) at [34].

“This leads to the question whether the receivership order can be discharged without a licence having been obtained. In my judgment there are three reasons why not. First, a judgment debt which has the advantage of partial execution in the form of a receivership is ‘altered’, if the receivership is discharged... Second, for the same reason a judgment debt’s ‘character’ changes. A partially executed judgment is very different to unexecuted judgment... In both these cases, the value of the judgment debt drops — potentially dramatically — if the receivership order is discharged. That amounts in my judgment to an alteration to, or change in the character of, the judgment debt. Thirdly, the receivership order itself is a ‘benefit’ or ‘financial benefit’ within the meaning of section 60(1) of SAMLA. The receivership order in itself has a substantial value to the judgment creditor. I reject [the judgment debtor’s] submission that receivership has no effect on the nature of the judgment debt, so that discharge of the receivership changes nothing. That is a wholly uncommercial approach, whereas the sanctions legislation looks to the substance of dealings.

- [9] A change in the identity of the receiver shares none of these characteristics. Regulation 11(4)(a) and (c) is expressly directed at “user” of the funds frozen, so that the funds cannot be used for the benefit of the designated person. Regulation 11(4)(b) is effectively an anti-avoidance provision. In a case like **Taruta**, if lifting the receivership were not a breach, it would have been open to the bank to do a deal with the judgment debtor for the latter to make a payment to the former (*via* non-sanctioned routes, like payments through India or China) in return for the lifting of the receivership. Here, a change of receiver would in no way avoid the effect of regulation 11. It is completely neutral.
- [10] I have to look at the “substance of the dealings”. Applying that test, there is in my judgment no commercial dealing at all where one receiver is merely replaced by another. Accordingly, in my judgment there is no breach of the Regulations in such a case and no need for Mr. Edwards to obtain a licence from the Governor.

Conclusion

[11] Accordingly, there is no bar to my making the block transfer order and I do so order.

Adrian Jack

Commercial Court Judge [Ag.]

By the Court

Registrar