

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

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

Claim No: BVIHC (COM) 0032 of 2018

BETWEEN:

**INDUSTRIAL BANK FINANCIAL
LEASING CO LTD**

Claimant

and

XING LIBIN

Defendant

Appearances:

Mr. Iain Tucker of Walkers for the claimant

Ms. Laure-Astrid Wigglesworth of Appleby for the defendant

2020 January 15; 22;
January 28.

JUDGMENT

- [1] **JACK, J [Ag.]:** This matter concerns a BVI company called Firstwealth Holdings Ltd (“Firstwealth”). By an application made on 22nd November 2019, the claimant (“the bank”) sought the appointment of equitable receivers “over all issued shares in [Firstwealth], its business and undertaking and any and all rights the company may have whatsoever and howsoever found.” Firstwealth is owned 100 per cent by the defendant (“Mr. Xing”). Directions for expert evidence of Hong Kong law were also sought.

- [2] The bank is incorporated in the People's Republic of China ("PRC"). By three judgments of Supreme People's Court of the PRC (two delivered on 13th December 2015, one on 27th December 2016), the bank recovered a total of 325,374,626.58 renminbi, the equivalent of about US\$48.45 million, against Mr. Xing. To that interest at 44,571.87 renminbi (or about US\$6,600) per day and costs need to be added. By orders of the High Court of Hong Kong dated 29th October 2016 and 10th April 2018, the PRC judgments were registered there with full force and effect. The Hong Kong court also issued pre- and post-judgment freezing orders against Mr. Xing. These effectively prevent Firstwealth dissipating its assets.
- [3] On 26th February 2019, on the bank's application Green J ordered that the three judgments be recognized in this Territory. On 11th July 2019 by order of Adderley J the bank was granted a provisional charging order over the shares in Firstwealth. The charging order was made final by order of Farrara J on 18th September 2019.
- [4] The assets of Firstwealth fall into three categories. The first are 93,693,306 shares in Shougang Fushan Resources Group Ltd (formerly known as Fushan International Energy Group Ltd) ("Fushan"). Fushan is listed on the Hong Kong Stock Exchange, where in October 2019 it was trading at HK\$1.61 per share. Firstwealth's holding of Fushan shares is on this basis worth about US\$19.2 million. The second comprises two bank accounts, one with HSBC Hong Kong, the other with BNP Paribas Hong Kong. The amounts in the accounts are not known, but may be very small.
- [5] The third relates to a house ("the Peak property") at 3 Gough Hill Road on the Peak in Hong Kong. The registered owner of the Peak property is Xing Jian, Mr. Xing's son, however, there is evidence to suggest that Firstwealth made a number of payments to Xing Jian for the purpose of repaying part of the mortgage on the Peak property. There may thus be a claim by Firstwealth for ownership of, or at least a beneficial share in, the Peak property. This is a more speculative asset than the first two.

- [6] Before considering the bank's application, I should say a little about Mr. Xing. He was arrested in the PRC in March 2014 and was subject to what are, perhaps euphemistically, called "compulsory measures". He was held incommunicado, including from his wife and his lawyer, for an extended period. He was finally released from custody on 26th July 2019. His case in the PRC is that, due to his incarceration, he was unable to defend himself in the PRC proceedings which lead to the three civil judgments. There is currently no application in this Territory to set aside Green J's order for the recognition in this jurisdiction of the PRC judgments.
- [7] On 11th September 2019 Mr. Xing filed a "situation reflection" with the Supreme People's Court requesting the court of its own motion to initiate a retrial in relation the three PRC judgments. The statutory time limit for an ordinary application for a retrial had expired, hence his resort to the Chinese equivalent of what in Scotland might be called the *nobile officium*. The following day, he applied to the Tianjin Intermediary People's Court (No 2) for a stay of execution of the PRC judgments. To date, the Supreme People's Court has not initiated a retrial and the Intermediary People's Court has not granted a stay. On 17th September 2019 Mr. Xing applied to this Court for a stay of execution pending the outcome of the applications in the PRC, however, this application was not listed at the hearing of 18th September 2019 at which the final charging order was sought. At that hearing, Farara J rejected Mr. Xing's request for an adjournment and granted the final charging order. Mr. Xing has not since then sought to move the application for a stay of execution.
- [8] In the absence of such an application being before the Court, the bank is in my judgment entitled to proceed to enforce its judgment. An application for a stay would require detailed evidence from Mr. Xing as regards the prospects of his applications to the PRC courts succeeding. It would need to balance the prejudice to the bank and to Mr. Xing from respectively granting or refusing a stay of execution. Again such consideration would need detailed evidence.

- [9] There are two forms of order which the Court makes for the appointment of an equitable receiver. As I discussed in **VTB Bank (Public Joint Stock Company) v Miccos Group Ltd and another**¹ (“Miccos”):

“[24] There is an important difference between an interim order for the appointment of a receiver and a final order for such an appointment. The former is made in order to preserve assets for execution. It is similar to a freezing order. The latter is a form of execution in itself. To obtain the final order, a judgment creditor must prove on balance of probabilities that the asset in respect of which the receiver is appointed is owned legally or beneficially by the judgment debtor.

[25] By contrast, the Court is willing on an interim application to appoint a receiver over assets which fall within the much wider definition of assets in the standard English freezing order. This form of order applies to:

‘all the Respondent’s assets whether or not they are in its, her or his own name, whether they are solely or jointly owned and whether the Respondent is interested in them legally, beneficially or otherwise. For the purpose of this order the Respondent’s assets include any asset which it, she or he has the power, directly or indirectly, to dispose of or deal with as if it were its, her or his own. The Respondent is to be regarded as having such power if a third party holds or controls the asset in accordance with its, her or his direct or indirect instructions.’

This makes an interim order potentially more onerous than a final order.”

- [10] Applying that difference to the current case, the position is that the assets of Firstwealth are under the *de facto* control of Mr. Xing, so that the appointment on an interim basis of an equitable receiver over those assets would be (at least potentially) legally permissible. (In practice, this will be rare, because a freezing order will generally be sufficient: see the result in **Miccos** itself, which was a case of an interim order.) The assets of Firstwealth are, however, not within the *de jure* ownership of Mr. Xing. It is trite law that the assets of a company are not the assets of even a 100 per cent shareholder. (There is an exception if the corporate

¹ BVIHC (COM) 2018/0067 (delivered 23rd January 2020). This judgment had not been handed down when argument was first made to me on 15th January 2020, so I adjourned the application and made a copy of the approved version of the judgment available to the parties for further argument on 22nd January 2020. This again pre-dated the hand-down of the Miccos judgment by a day.

veil stands to be pierced, but this will now-a-days be vanishingly rare in the light of **Prest v Petrodel Resources Ltd**.² No question of piercing the corporate veil arises in the current case.) Insofar as the bank seeks a final order for the appointment of a receiver over “any and all rights the company may have whatsoever and howsoever found”, this is misconceived in my judgment. The rights of the company are not the assets of the sole shareholder, so there is no jurisdiction to make a final order appointing a receiver over those assets.

- [11] Where a final order is made, what is legally permissible is in my judgment this. An equitable receiver can be appointed over the shares. He can then use his powers as receiver to replace the existing director with a new director, usually himself. He can then use his power as a director to convert the assets of the company into money. Alternatively, he can put the company into voluntary liquidation. In either case he has to have regard to the interests of third party creditors of the company.
- [12] An equitable receiver can be appointed over legal rights which the judgment debtor has. This is especially so, if these are rights against which other means of execution are not available. The Privy Council (on appeal from Cayman) in **Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd**³ approved the appointment of receivers over the judgment debtor’s power to revoke a Cayman trust. The exercise of the power of revocation would release assets against which the judgment creditor could execute.
- [13] The principles for making an interim order are wider than those for making a final order, in that an interim order can cover more assets than a final order (*de facto* control versus *de jure* control), but narrower in that the grant of an interim order is subject to a more restrictive exercise of the Court’s discretion. An interim appointment is a super-turbo-charged *Mareva*. It will only be granted where an ordinary freezing order will not do. By contrast, a final order will be made — always subject of course to the Court’s discretion — whenever ordinary means of

² [2013] UKSC 34, [2013] 2 AC 415.

³ [2011] UKPC 17, [2012] 1 WLR 1721.

execution fail or there is some “hindrance or difficulty” in such execution (see below). This is wider than the narrow discretion applicable to making an interim order.

[14] The ordinary method of enforcement against shares held by a judgment debtor is by way of charging order, first interim, then final. If the charging order fails to force the debtor voluntarily to pay, then the shares stand to be sold. The difficulty in the current case is that very much less than the full value of Firstwealth is likely to be obtained by way of a sale of the shares in the open market. A third party purchaser is unlikely to put any substantial value on the claim in respect of the Peak property. The purchaser would be buying a claim to litigation against Mr. Xing’s son of a speculative nature. Likewise, it is impossible to value the bank accounts without knowing what is in them. Further it is likely that a purchaser would discount the value of the Fushan shares. Why buy through Firstwealth, where litigation is, to use the German expression, *vorprogrammiert*, when one can simply buy the Fushan shares on the stock market? Any open market sale of the shares in Firstwealth is likely to be at a discount, and probably a large discount, to the true value of Firstwealth’s assets.

[15] Now, it would be possible to give directions for sale of the Firstwealth shares on the open market (either by auction or tender), with a provision allowing the bank to bid or tender for the shares. This would, however, potentially give the bank a windfall. It could offset part of its judgment debt against the discounted open-market price of Firstwealth shares (so it did not need to part with any cash at all) and then realise the full value of Firstwealth’s assets. By this means it would make a substantial turn on the initial purchase price with no duty to account to Mr. Xing for the profit on the subsequent liquidation of Firstwealth’s assets. In fact, the bank says that there are regulatory problems with its owning a BVI company, so it does not want to pursue this possibility. I therefore do not need to consider it further.

[16] It should be noted that appointing a receiver to take control of Firstwealth and then realise the full value of the company in fact aids Mr. Xing. The more his assets realise, the greater the reduction in his judgment debt. Moreover, in the event that he sets aside the PRC judgments, the bank will be obliged to repay him the monies the bank has recovered. The more the bank recovers, the more it has to disgorge if Mr. Xing has a viable defence to the PRC claims. If (as Ms. Wigglesworth submits) the Firstwealth shares should be sold by auction or tender, and if the PRC judgments are subsequently set aside, then all the bank would be obliged to repay to Mr. Xing would be the discounted price that the shares in Firstwealth had obtained on the open market, not any turn made by the purchaser on the sale of the underlying assets.

[17] The test for the appointment of equitable receivers by way of execution was set out by Males J (as he then was) in **Cruz City I Mauritius Holdings v Unitech Ltd**⁴:

“The jurisdiction will not be exercised unless there is some hindrance or difficulty in using the normal processes of execution, but there are no rigid rules as to the nature of the hindrance or difficulty required, which may be practical or legal, and it is necessary to take account of all the circumstances of the case. That is all that is meant by *dicta* which speak of the need for ‘special circumstances’: see... **Masri (No 2)**⁵ and also the decision of Arnold J in **UCB Home Loans Corporation Limited v Grace**⁶, holding that there were sufficient ‘special circumstances’ rendering it just and convenient to appoint a receiver by way of equitable execution when it would be ‘difficult for the claimant to enforce its judgment by other means’ and that the appointment of a receiver was the only realistic prospect available to the judgment creditor to enforce its judgment in the short term.”

[18] In the current case, a sale of the shares by auction or tender would prejudice both the bank and Mr. Xing because only a discounted recovery would be made. This

⁴ [2014] EWHC 3131 (Comm), [2015] 1 All ER (Comm) 336 at para [47(c)], permission to appeal refused [2015] EWCA Civ 33.

⁵ *Masri v Consolidated Contractors International (UK) Ltd (No 2)* [2008] EWCA Civ 303, [2009] QB 450.

⁶ [2011] EWHC 851 (Ch).

is in my judgment a “hindrance or difficulty”, which makes it expedient to appoint receivers by way of a final order.

[19] I am reinforced in my conclusion on this, by the decision of Bannister J in **Dalemont Ltd v Senatorov et al.**⁷ The shares of three companies were held on bare trusts established under Cypriot law for the judgment debtor. The judge appointed receivers on the basis that they would “replace the current directors of the companies with their own nominees... cause the new directors to replace the current nominees of [a foundation which held assets which could be appointed to the judgment debtor]” and take various other actions which would assist asset recovery. Although there is little discussion in the judgment of the legal principles, the **Tasarref** case was cited to him and he applied the considerations which I have outlined above.

[20] Part of the application before me is to give directions for expert evidence of Hong Kong law. The proposed issue is: would the Hong Kong court recognize the powers of an equitable receiver appointed by this Court? It seems to me that this question arises only if this Court were to appoint a receiver over “any and all rights the company may have whatsoever and howsoever found”. I can well see that the Hong Kong court might raise its eye-brows at an order of a foreign court giving powers to a person who was not an officer of the company to deal with the company’s assets situate in Hong Kong. That would indeed be an exorbitant exercise of a foreign court’s long-arm jurisdiction. However, I have refused to make such an order.

[21] Under the order which I do make for the appointment of receiver, the receiver will appoint a new director. The new director will take steps to administer Firstwealth so as to maximalise value. It is very unlikely that an English-law based jurisdiction such as Hong Kong would refuse to recognize the appointment of a director which has the approval of the Court of the place of incorporation of the company. Accordingly, I do not consider there is any need for expert evidence of Hong Kong

⁷ BVIHC (COM) 149 of 2011 (delivered 4th July 2013).

law at present. The Court being sadly deficient in powers of vaticination (or at any rate accurate vaticination), I cannot rule out the need for such evidence in the future, but at present there is in my judgment no need for expert evidence.

Conclusion

[22] Accordingly, I conclude:

- (a) It is appropriate to appoint equitable receivers over the shares in Firstwealth, but not over any and all rights Firstwealth may have whatsoever and howsoever found; but
- (b) there is no need for expert evidence of Hong Kong law.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar