International: The long arm of the liquidator: AWH Fund Ltd v ZCM Asset Holding Co Ltd (2019)

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A recent decision of Judicial Committee of the Privy Council (handed down July 29 2019), hearing an appeal of a decision of the Court of Appeal of the Bahamas, helped clarify the extent to which liquidators can exercise their powers outside of their jurisdiction in the recovery of funds credited preferentially.

AWH was a Bahamian company incorporated under the International Business Companies Act 2000 of the Bahamas, which dealt with investments listed on the Asian stock markets. ZCH was a sub-custodian holding company operating on behalf of Zurich Bank, acting as an agent for American Express Alternative Offshore Fund ("AMEX"). On behalf of AMEX, ZCR invested in AWH, and in July 2002 redeemed a portion of the shares to the value of $13m. Shortly after AWH went into compulsory liquidation. Six years later the liquidator claimed that as the liquidation happened less than three months after the payment, the payment to ZCH should be set-aside, and sought to issue a summons to ZCH in Bermuda. ZCH resisted the summons on the grounds (a) there were no statutory grounds under either bankruptcy or winding-up legislation for issuing out of the jurisdiction (b) it must be shown that there was intent to prefer fraudulently (c) that ZCH was merely operating a bare trust and (d) ZCM was an agent which required a bona fide claim for restitution in order for service outside of a jurisdiction to be permissible and (e) ZCM was not a proper party to the proceedings because the funds had been paid to AMEX, ZCM's principal.

The Court of Appeal upheld the decision of the Supreme Court of the Bahamas that a Bahamas-based liquidator could serve proceedings for recovery of nearly $13m from ZCM, who appealed to the Privy Council.

The Privy Council found the Court of Appeal was correct by considering two key questions: was there a Jurisdictional Gateway for Service and was the merits threshold reached.

In the ruling, it was found the lack of statutory grounds was not a bar to service given Order 11 of the Supreme Court Rules of the Bahamas created a "gap filler" applicable to this case, thus finding there was a gateway, accepting that business is increasingly international and that it is "settled law" that insolvency provisions can have extraterritorial effect. Furthermore, It held that an intent to defraud did not need to be shown, and rejected ZCR's bare trust and agent/principal arguments.

Secondly, the Privy Council concluded there was a significantly arguable case for ZCM to answer based on the three-fold threshold test of *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804.

It dismissed the appeal and held that AWH's liquidator was entitled to serve the claim to claw-back the July 2002 payment on ZCM in Bermuda.

In so doing the Privy Council adopted a universalist approach that the Bahamian legislation covering international business structures was intended to have extra-jurisdictional application, and that non-Bahamas based investors should expect to be subject to winding-up procedures in the Bahamas.

The Implications

The implications of this decision are clear: liquidators have a "long arm" both in terms of time and cross-jurisdictional reach. For the Bahamas, it means that the "gap" in black-letter law on the powers of

liquidators is no bar to liquidators seeking the courts' permission to serve summons on parties out of the Bahamas' jurisdiction under Order Rule 11 8(4) of the Rules of the Supreme Court of the Bahamas, where a fraudulent preference payment is alleged to have been made not more than three months prior to the payor's liquidation. This means that there is now a precedent for other common law jurisdictions without black-letter statute on extra-jurisdictional service to be subject to the "settled law" on service of insolvency provisions.

Commercial: Addlesee and others v Dentons Europe LLP [2019] EWCA Civ 1600, [2019] 10 WLUK 10

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C issued proceedings against solicitors who had acted for a now dissolved company, the company purportedly having operated a fraudulent scheme. C wished to see documents that passed between the dissolved company and D, which D asserted were privileged. The Court of Appeal overruled the decision in *Garvin Trustees Ltd v The Pension Regulator* [2015] Pens LR 1, to the effect that legal advice privilege did not survive the dissolution of a company. The proper question was not who could assert privilege but instead who could waive it and, if there was a person entitled to waive privilege, whether they had done so.

The Court of Appeal took as a basis the principles set out in *R. v Derby Magistrates' Court Ex p. B* [1996] A.C. 487 that a person had to be able to consult their lawyer in confidence, and that what was said in confidence would never be revealed without their consent.

The establishment of legal advice privilege depended on the nature and purpose of the communication and the circumstances under which it had been made. [24], [26]. Where the client's purpose was fraud, the iniquity exception did not retrospectively strip away privilege, but instead, no privilege attached the communication at all. The exception did not therefore conflict with the principle (or its underlying rationale) that, once it attached, privilege remained unless waived by the client. [28], [29].

The Court also dismissed an argument that policy supported refusing to extend privilege to a dissolved organisation, this being the wrong way to look at the question. D was not seeking to extend the scope of privilege; instead C needed to extend the circumstances in which privilege ceased to apply. The immunity from production created belonged to the person who was the client at the time of its creation and then attached to the communication. Once the client ceased to exist, the only remaining question was whether there was anyone who had the right to waive it [45] and whether they had done so.

Property: MORTGAGE: right of receivers to possession of mortgaged property

Winston Jacob

Are receivers appointed by a mortgagee entitled to claim possession against resident mortgagors?

Yes, although the mortgagors are protected by section 36 of the Administration of Justice Act 1970, said the High Court in *Menon v Pask* [2019] EWHC 2611 (Ch).

The appellant mortgagors granted a legal charge against their property. The charge enabled the mortgagee to appoint receivers as agents of the mortgagors with power to take possession of the property. The mortgagee appointed the respondent receivers, who sued the resident mortgagors for possession.

Although the receivers were deemed by the legal charge to be the mortgagors' agents for all purposes, the court concluded that they nevertheless had a right to possession as against the mortgagors, their principals, due to the special nature of the agency relationship. On the true construction of the power to take possession, it was one which the receivers could assert against the mortgagors by possession proceedings taken in their own names. Given that the mortgagors were known to be in occupation of the property, this was the only solution that made business sense. The receivers' right to sue for possession in their own names was an ancillary power impliedly given to them by the mortgage.

Section 36 of the Administration of Justice Act 1970 gives the court a statutory discretion in possession proceedings brought by a mortgagee against a mortgagor. For these purposes, a "mortgagee" includes "any person deriving title under the original … mortgagee" (section 39(1)). If the court is satisfied that the mortgagor is likely to be able within a reasonable time to pay any sums due under the mortgage or remedy any other breach of the mortgage terms, it may adjourn proceedings or stay or suspend any possession order or execution.

The receivers argued that section 36 did not apply to their possession proceedings, as they did not derive title from the mortgagee. The court accepted that in the traditional sense they did not. However, bearing in mind the nature and source of their rights, how they came to be appointed, and what their fundamental purpose was, it was right to say that they derive title from the mortgagee for the purposes of section 36. When receivers sue for possession, they make the claim for the mortgagee's benefit. As a matter of principle, therefore, the mortgagors should have the same opportunities to resist possession as they would have had the mortgagee sued them for possession.