

JERSEY / JUDGMENT

Novatrust Limited v Watson 23-Oct-2020

[2020] JRC 224 (23 October 2020)

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judgment

the bailiff: 1. By an Order of Justice dated 10 th January 2020, Novatrust Limited ("the Plaintiff") obtained an interim arrêt entre mains with regard to sums owed by itself (in its capacity as trustee of the Summit Trust ("the Trust")) (the party cited) to Eric John Watson ("the Defendant"). By this application, the Plaintiff sought to have the interim order made final. On the 21 st May, 2020, we granted that application with reasons to follow. These are those reasons.

Background

2. The background facts are taken from the affidavit of Sheena Huggett of the 6 th January, 2020.
3. The Plaintiff is a trust company incorporated in Jersey and is part of the Stonehage Fleming Group ("the SF Group").
4. The Defendant is a New Zealand national who was the economic settlor of certain trusts. The Plaintiff and the party cited are the same entity, but Novatrust Limited is joined as party cited in its capacity as trustee of the Trust ("the Summit Trustee").
5. The Plaintiff was the trustee of a number of Jersey law governed trusts, of which the Defendant was economic settlor. Those trusts include the Trust.
6. The Plaintiff is a judgment creditor of the Defendant. It is not necessary to set out the detail of the way in which that indebtedness arose, but proceedings were started by the Plaintiff against the Defendant in July of 2017 by reason of the Defendant's failure to make a payment due under an indemnity. By consent order, dated the 26 th September, 2018, the Defendant submitted to judgment in those proceedings. The Act of Court reflecting that consent order provides that the Defendant owes the Plaintiff:- (i) the sum of £10,107,747.54; (ii) simple interest at the court rate on the sum in paragraph (a) above from the 14th June 2017 until payment; (iii) simple interest at the court rate on certain administrative costs from the 20 th August 2018 until payment; (iv) the Plaintiff's costs payable on the standard basis.
7. We are informed that as at the 26 th September 2018 simple interest in the sum of £230,164.70 had accrued, and as at the date of the current application, the interest was in the sum of £585,803.88 accruing at £761.54 per day.
8. By Act of Court on the 14 th January 2019, following assessment of the Plaintiff's costs, the Defendant was ordered to pay a further sum of £294,075.00.
9. At the date of the application before us, the Plaintiff had succeeded in making a modest recovery in connection with the debts owed by the Defendant, having recovered

sums of approximately CHF37,000 and £35,000. The balance of the debts significantly exceeds £10.5 million, and remains due and payable by the Defendant to the Plaintiff.

Background

10. In 2012, the Defendant and the Summit Trustee entered into a loan arrangement pursuant to which the Defendant agreed to provide a loan facility to the Summit Trustee. In the period following the loan agreement, the Summit Trustee repaid the principal loaned to it by the Defendant, but the Defendant had advanced additional funds which were undocumented at that time. There was an amendment to the original loan agreement in 2017 to reflect these additional sums, and the cumulative effect of the 2012 loan arrangements and the 2017 amendment agreement is that with regard to the loans, the Summit Trustee is indebted to the Defendant in the sum of CHF308,466, £824,606, £155,133.34 and NZD680,150 (collectively referred to as "the Defendant's advances"). 11. The trusts administered by the Plaintiff, of which the Defendant was the economic settlor are, we are informed, insolvent. There is no prospect of any distribution being made by any of the trusts to the beneficiaries, and consequently it is the concern of the Summit Trustee, amongst others, to realise the Trust's assets and administer them in the interests of the creditors. 12. There are a number of external creditors which are:- (i) the Summit Trustee, in respect of fees and disbursements; (ii) the SF Group, in relation to its fees and disbursements; (iii) a company called Ivory Castle Limited (which is a creditor of Cottian Limited, a wholly owned asset of the Trust); (iv) Miss Rosanna Von Zweigbergk (Miss Von Zweigbergk) who is a creditor of Cremona Limited, itself a wholly owned subsidiary of one of the trusts; and (v) the Defendant, with regard to the Defendant's advances and other loans he may have made to other parts of the structure. 13. In 2019, the Summit Trustee sought to enter into an agreement with the creditors set out above for the realisation and distribution of the various assets of the Trust. Amongst the terms suggested were:- (i) that the fees and disbursements of the Summit Trustee and the SF Group be paid in priority to other claims; (ii) the claims of Ivory Castle Limited and Miss Von Zweigbergk be subordinated to that debt, but would rank in priority to any claims by the Defendant, and that the Defendant would receive any surplus after the various interested parties had received their money in connection with the satisfaction of the Defendant's advances, only after the prior payments had been made. 14. The Defendant agreed to the terms suggested, as did Miss Von Zweigbergk and Ivory Castle Limited. 15. In the context of the agreement reached, the terms of which we have not set out in full, the Summit Trustee has a contractual obligation to pay to the Defendant the Defendant's share. That will depend upon the amount that is available after the payment of the amounts payable to creditors who rank ahead of the Defendant, but it is anticipated, so we are informed, that the available share will be in the order of £172,000. 16. The Plaintiff maintains that it is entitled to the confirmation of the interim arrêt entre mains, and therefore to seize the Defendant's share in the hands of the Summit Trustee. 17. We also note that by Order of Justice dated 18 th March, 2020, Kea Investments Limited ("Kea") sued the Defendant and others also seeking an arrêt entre mains in support of a judgment debt of in excess of £25m. We are not informed

as to the state of those proceedings although are advised that Kea's UK legal advisers have been notified of this application. In any event, it appears that the arrêt entre mains obtained by Kea is over different assets than those covered by the arrêt entre mains in this case. The Law 18. The central authority on arrêt entre mains is *FG Hemisphere Associates LLC v. Democratic Republic Of Congo and La Generale des Carrieres et des Mines*

[2010] JLR 524 in which the Court said:- "148 Miss Lawrence submits that the principal features of the arrêt entre mains so far as relevant to the present case, and the key questions that arise here, can accordingly be summarized as follows (as expressed, with minor textual adaptations, in her skeleton argument): (i) The effect of an interim arrêt entre mains is to arrest or seize the named assets in the hands of the third party. This is more than just a bar from dealing. It is an appropriation of the asset by the court giving the judgment creditor immediate security in relation to the debt owed. (ii) It is clear that the extent of what is seized and owed is determined "at the time of the arrest." The purpose of bringing the third party before the court is, simply and naturally (when considering the plain and obvious meaning of the language used), to "confirm" whether the interim order was properly made. Whether the interim order was properly made can only be assessed by reference to the facts and position existing at the time of the interim arrest. In this case, the material question is: was Gécamines an organ of the state of the DRC at the time of the seizure? If it was and the order was therefore properly made, the interim order is simply made confirmée. The arrest itself is in fact made at the time of the first order. Its effect is simply suspended pending the third party being summonsed to court to have it considered and, where appropriate, confirmed. (iii) That this is the correct approach is lent further weight by the fact that steps taken by the judgment debtor after the imposition of the interim order which seek to change the landscape as between himself and his third party debtor are to be ignored. Pothier states (op. cit., at 343): "Par la même raison, le créancier pour le fait duquel l'arrêt est fait ne peut pas, au préjudice des arrêtants, décharger son débiteur arrêté de son obligation; d'où il suit que, si un créancier a arrêté les loyers échus et à échoir, sur les locataires de son débiteur, ce débiteur ne peut pas, au préjudice de l'arrêtant, annuler le bail pour l'avenir, par une convention entre lui et son débiteur, car se seroit décharger les locataires de leurs obligations pour les années à échoir, et ces années étant arrêtées, il ne peut, au préjudice de l'arrêtant, en disposer." [For the same reason, the creditor [of the third party] for whose act the arrest is made, cannot, to the prejudice of the arrestors, discharge his arrested debtor from his obligation; from where it ensues that, if a creditor has arrested rents outstanding or to fall due, on the tenants of his debtors, this debtor cannot, to the prejudice of the arrestor, annul the lease for the future, by an agreement between him and his debtor; for that would be to discharge the tenants from their obligations for the years to expire, and these years being arrested, he cannot, to the prejudice of the arrestor, dispose of them.] (iv) GTL is, by closest analogy to the English legal position, a garnishee, and whilst not identical there is clearly much similarity between the order of an interim arrêt entre mains and a garnishee order nisi (now called an interim third party debt order), albeit that an arrêt entre mains appears wider and

more flexible in its ambit (applying, for example, to all movable property of the debtor in the hands of the third party not just sums of money, and to future as well as present debts). Reference to English law regarding garnishees is therefore helpful and persuasive in light of this degree of similarity. These propositions appear to us to be soundly based. It is unnecessary to review the English authorities on garnishee proceedings (now known as third party debt orders). The following passages from the speech of Lord Millett in *Société Eram Shipping Co. Ltd. v. Cie Intl. de Navigation* (10) (

[2004] 1 AC 260 , at paras. 86-88), in which he spoke of the true nature and effect of such an order, will suffice: "86 It is a process of execution which enables a judgment creditor to obtain satisfaction of his judgment debt out of money owed to the judgment debtor. The court does not order the third party to pay the judgment creditor out of its own money, but to discharge the debt which it owes to the judgment debtor by payment of that debt to the judgment creditor. The subject matter of execution is a chose in action, which like land cannot be seized; but the procedure is modelled on the process of obtaining execution against land with such modifications as are necessary to reflect the difference in the nature of the asset. As in the case of land execution is effected in two stages. The first stage takes the form of an order nisi (or interim order) which creates a charge on the asset to be executed against and gives the judgment creditor priority over other claimants to the asset; and the second stage takes the form of an order absolute (or final order) which brings about the realisation of the asset and the payment of the proceeds to the judgment creditor. Two things follow. First, a third party debt order is not an in personam order against the third party; it has proprietary consequences and takes effect as an order in rem against the debt owed by the third party to the judgment debtor. Secondly, the discharge of the debt is an integral part of the scheme of the order, which first creates and then realises a proprietary interest in the debt and makes the proceeds available to the judgment creditor." 19. The matter was further considered on Appeal in *FG Hemisphere Associates LLC v. Democratic Republic of Congo and La Generale des Carrieres et des Mines* (Groupment pour le Traitement du Terril de Lubumbashi Limited as party cited)

[2011] JLR 486 in which the Court said:- "144 The earliest reference in the customary law sources to a mode of arrest "entre les mains" of the debtor to a judgment debtor is found in Terrien, *Commentaires du Droit Civil*, vol. X, ch. VIII, at 431-432 (1574) where, under the title "D'arrests, & Deliverances" it is written (in translation): "There are two kinds of arrest. One is by way of execution the other is pursuant to the privilege of bourgeois. One may employ the first to procure payment of what is due to him against the debt due to his debtor or to his judgment debtor.... which arrest is made by the Sergeant 'entre les mains de celui qui doit la dette' forbidding him to empty his hands of it or part with possession thereof without the authority of the Court ... and summoning him to appear before Court to confirm what moneys he owes. And if he defaults he is constrained to come and make the said affirmation and after this has been done he is ordered to deliver the sum due by him or it is left in his hands as depository for the Court to be delivered when and to whom it shall be due and it is ordered to the arresting party to summon his debtor or judgment

debtor to agree or cause the delivery of the said sum. And if there are several arresting parties, or opponents to the said delivery, preference is to be given according to the priority and posteriority of their obligations ... And while such arrest continues one may not pay the debt to the creditor ... one may not be condemned to pay more than once also and one cannot be constrained to pay to the said creditor until and unless he causes the arrest to be raised ... and the Sergeant [Viscount] shall not himself alone cause the sums to be paid and delivered without the authority of the Court. There are many cities in Normandy, where by special privilege, the bourgeoisie of such cities by leave of the Court can arrest any foreigner for debt, even if there is no obligation or judgment. Such arrest is a simple action and is only to force the foreigner to plead in the location where the arrest was made if he wants to defend against the debt. Also, the foreigner if he wishes to defend must furnish security.... And in this case the parties must furnish security. These arrests are generally made by the Sergeant without a mandate from the Court. In case the person arrested wishes to defend against the arrest, summons is made to the parties at the present time so as to expedite promptly, if possible, otherwise it is ordered that the arrested assets will be delivered upon payment of a security equal to their value and the election of a domicile. Sometimes the security is limited according to the quality of the case. Such a security relates only to the costs of the proceedings." It had been submitted for GTL that this text made clear that the arrest created rights against the debtor and third party in personam only. In our opinion, that is not a proper construction of the writing. Not only is the third party forbidden to part with possession, he is forbidden to part with possession without the authority of the court. He is summoned to appear before the court to confirm what moneys he owes and, if in default of that obligation, he is constrained to appear. Thereafter, he is either ordered to deliver the sum to the court or it is left in his hands as depository for the court. Thus, the obligation created by the arrest is not merely a personal one as between the arresting creditor and the subsidiary debtor, failure to fulfil which would give the arresting creditor a claim in damages; rather, it brings the sum due into the direct control of the court. It puts into abeyance the obligation to pay the judgment debtor and replaces it with the obligation either to make payment into court or to act as depository for the court. Further, although there may be only one arresting creditor, there may need to be a judicial process to determine the rights of competing claimants. Turning to the era of the Coutume Reformée, that is the period after 1583, it is clear that the remedy of arrêt continued. Advocate Robinson referred to Le Geyt, *Manuscripts sur la Constitution, les Lois et les Usages de Jersey*, 1846 ed., vol. 2, book 1, at 13-14, where it is stated (in translation): "It is an error to imagine as some do, that it is a form of insult not to arrest the movables of a debtor before arresting a debt due to him. It is supposed that this is to treat him as an insolvent person. It is true that it is in effect to treat him so by arresting his movables or active debts when he has no other asset available for execution. That is to begin the process where it should finish. However, an arrest legitimately made on a third party is of all ways of execution that which appears to offer the least assurance. It must, of course, be understood that one has first demanded payment of the debt before making an arrest." He had submitted that by indicating a remedy which "appears to offer the least

assurance" the views of the learned author should be construed as indicating a remedy that was conservatory only. We do not agree. It seems to us that the learned author is making a comparison between the arrestment of the debtor's movables and the arrestment of his active debts. The arrestment of movables gives some degree of certainty as, doubtless, the fact of possession by the judgment debtor leads to a presumption of ownership and the nature of the asset can be appraised and valued. On the other hand, where a debt is owed by a third party to the judgment debtor, the precise value of the debt may not be immediately obvious-as suggested by Terrien-and the third party might even have defences which could have been pleaded against the judgment debtor had he claimed payment. Pothier, writing in his *Traité de la Procédure Civile*, at Part IV, c. II, Section III and IV, deals with, among other matters, the procedure and effect of what he refers to as "la saisie-arrêt." We do not need, at this point, to quote at length his description of the procedure of saisie-arrêt. Whilst the writing is slightly more detailed, it is clear that he is writing on the same subject as Routier and Terrien. The writings are expressed in the sense of general principles by contrast to certain other parts of Pothier's writings where specific Coutumes, such as that of Orleans, are identified. What Pothier makes particularly clear, in Section IV, in the passage quoted by the learned Commissioner (2010 JLR 524 , at para. 148(iii)), is that the juristic act of saisie-arrêt precludes the common debtor from discharging the subsidiary debtor from his obligation. It is therefore an act which affects the debt itself and creates more than a mere personal obligation as between the arrestee and the arresting creditor. We therefore agree with Advocate Lawrence that the remedy described by Terrien, Routier and Pothier is the same remedy and is one which takes effect not just as a personal order but has an effect on the debt itself as against the world. Were it not to be so, the result would be surprising: the third party would have a personal liability towards the arresting creditor but would also be liable to the judgment debtor. Logic and justice seem to us to demand that the arrestment have effect on the debt itself and the customary sources to which we have referred indicate that it comes within the control of the court. In our opinion, the solution to this apparent dilemma is found in the remainder of Section III of Pothier, where the subsidiary debtor is summoned to make the declaration of that which he owes and, thereafter, to make the appropriate payment. This is consistent with Terrien and Routier. In other words, that which can be arrested must be something capable of identification and solemn declaration. It is also consistent with Section IV of Pothier, where he identifies that the arrestee who, contrary to the arrest, pays his creditor is liable to sentence to deliver to the arrestor "the sum that he owed at the time of the arrest." Without a declaration or affirmation, there could be no precision as to that amount (whether ascertained or to be ascertained). And without knowledge of the transaction and the debt arising there could be no declaration." 20. We summarise the principles from the above case for our purposes as follows:- (i) The effect of the arrêt entre mains is to seize assets. (ii) It affords to a judgment creditor a proprietary interest in and security over the assets in question for the discharge of the debt. (iii) The nature and extent of the debt and, indeed, what is seized, is determined at the time of the arrest and any application to confirm made subsequently is really an application to determine that the interim arrest

was appropriately granted. 21. As the effect of the arrêt entre mains is to discharge the third party from liability to the former creditor, this Court will generally only grant an arrêt entre mains where it has jurisdiction to order the discharge of the debt due from the third party to the judgment debtor. This would require that the debt be situated in Jersey.

22. In *Tepe Insaat Sanayii AS v. Boru Hatlari Ile Petrol Tasima AS* (also known as *Botas Petroleum Pipeline Corporation*), *Turkish Petroleum International Company Limited* and *Botas International Limited*

- [2016] (1) JLR 218, the Court considered the test for ascertaining where a debt is situated and said:- "iv) The test for ascertaining where a debt is situated This topic was the subject of detailed consideration by both the Royal Court (2010 JLR 524 , at paras. 152-174) and the Court of Appeal (2011 JLR 486 , at paras. 178-194) in *Hemisphere*. Both courts in turn referred, amongst other cases, to the leading authorities of *New York Life Ins. Co. v. Public Trustee*
- (16) and *Kwok Chi Leung Karl v. Estate Duty Commr.* (13). We would summarize the position as established in *Hemisphere* as follows (with the reference in brackets being to the paragraph in the judgment of the Court of Appeal (CA) or Royal Court (RC) which establishes this proposition): (i) The situs of a debt owed by a company is the place where the company resides (CA 184). (ii) A company is resident in the place where it is incorporated and has its registered office (CA 190). (iii) A company is also resident where it carries on business. In order to be carrying on business in a place, a company must have a physical presence within the jurisdiction in question in the form of an identifiable place with a degree of permanence about it from which it carries on business; a branch or office (RC 171; CA 192). (iv) A company may carry on business in a number of jurisdictions in which event it is resident in each of those jurisdictions (CA 184). ((v) Where a company is resident in more than one jurisdiction and it is expressly provided that payment of the debt is to be made in one of those jurisdictions, then that will be regarded as the situs of the debt (RC 153; CA 187). (vi) Similarly, if one of the places where the company is resident is impliedly selected as the place where the debt is payable, that will be regarded as its situs (RC 153; 2 Dicey, Morris & Collins, para. 22-029). (vii) Where the debtor company has more than one place of residence but there is no express or implied promise to pay at any one of them, then the debt is situated at that place of residence where it would be paid in the ordinary course of business; Dicey, Morris & Collins, para. 22-029." 23. It appears to us that there can be little argument but that the debt was situated in Jersey. Applying the test set out in *Botas* above, the party cited is a Jersey incorporated company with its registered office and place of business in Jersey. It has no other place of business and therefore is clearly resident in the Island. There appears to be no contractual provision that stipulates where the debt is to be discharged. In our judgment the debt was situated in Jersey and therefore the Court has jurisdiction to grant an arrêt entre mains . 24. The process of obtaining and confirming an arrêt entre mains is that followed in both the *Hemisphere* and *Botas* cases. As indicated above, the effect of the arrêt entre mains is to arrest the assets in the hands of a third party and gives the judgment creditor immediate security in relation to the debt owed. The interim arrêt

can, of course, only be confirmed following an inter partes hearing in which the Defendant has the opportunity to challenge the arrêt entre mains before its confirmation. 25. The English case of *Roberts Petroleum Ltd v Bernard Kenny Ltd*

[1982] 1 WLR 301 and [1983] 2 WLR 305 was put before us. In that case, the plaintiff supplied petroleum products wholesale to the defendant who came to owe large sums of money to their various wholesalers, including the plaintiff. The plaintiff issued a writ claiming money from the defendant. The defendant did not enter an appearance. After a meeting of the defendant's directors, instructions were given for a statement of affairs to be prepared, notice was given of an informal meeting of all creditors to be held on March 26th, 1979, and creditors were asked not to begin or continue any legal proceedings against the defendant. Nevertheless, the plaintiff entered judgment against the defendant in default of appearance for the sum claimed. On the same day, they sought and obtained a charging order nisi. The statement of affairs showed that the defendant was insolvent. As a result, an extraordinary meeting of the defendant was held at which extraordinary resolutions were passed that the defendant be wound up and a liquidator appointed. An order that the charging order nisi should be made absolute was obtained but the defendant's appeal was allowed. 26. In the Court of Appeal (see

[1982] 1 WLR 301) Lord Brandon of Oakbrook said as follows:- "Cases like the present one involve a conflict between two well-established principles of law. The first principle is that a judgment creditor is in general entitled to enforce a money judgment which he has lawfully obtained against a judgment debtor by all or any of the means of execution prescribed by the relevant rules of court. Such rules provide, among other things, for the enforcement of a judgment debt by means of charging order on the judgment debtor's lands or interests in land and the appointment of a receiver. The second principle is that, when a judgment debtor, whether he be a natural person or a corporate body, has become insolvent, all the unsecured creditors should be treated equally, each receiving the same proportionate share of inadequate fund available as all others. The judge, as appears from the passage from the agreed note of his judgment which I quoted earlier, treated the circumstances that Kenny were insolvent and irretrievably on the road to liquidation, as sufficient reason by itself for refusing to make absolute the charging order nisi. He further stated that that was the conclusion to which he was led by the authorities to him. With great respect to the judge, I am of opinion that, in approaching the question which he had to decide in this way, he was misdirecting himself in law. The authorities do not, in my view, establish that the insolvency of a company, followed or to be followed inevitably later by liquidation, is enough of itself to justify the court in exercising its discretion by refusing to make an order nisi absolute. There must, as I indicated earlier when trying to summarise the collective effect of the authorities, be some further factor in the situation, the most common such factor being that a scheme of arrangement has been set on foot by the main body of creditors and has a reasonable prospect of succeeding." 27. Lord Brandon went on to set out the principles to apply in cases of that nature on page 307 of the judgment as follows:- "(1) the question of whether a charging order nisi should be

made absolute is one for the discretion of the Court. ... (4) in exercising its discretion the Court has both the right and duty to take into account all the circumstances of any particular case whether the circumstances arose before or after the making of the order nisi. (5) The Court should exercise its discretion as to do equity, so far as possible, to all the various parties involved, that is to say the judgment creditor, the judgment debtor and all other unsecured creditors. (6) The following combination of circumstances, if proved to the satisfaction of the Court, would generally justify the Court in exercising its discretion by refusing to make the order absolute: (i) the fact that the judgement debtor is insolvent; and (ii) the fact that the scheme of arrangement has been set on foot by the main body of creditors and has a reasonable prospect of succeeding. (7) In the absence of the combination of circumstances referred to in (6) above, the Court will generally be justified in exercising its discretion by making the order absolute." 28. On appeal to the House of Lords in *Roberts Petroleum Limited v Bernard Kenny Ltd*

[1983] 2 WLR 305 the Court said:- "The basic question, therefore, which confronts the court when it is faced with an application by an execution creditor to convert an order nisi into an order absolute in a case such as the present is whether the asset in question should fall outside the statutory scheme which, by virtue of the liquidation, is then in existence, or should be subject to that scheme. In the absence of persuasive authority to the contrary, and it will of course be necessary to consider the authorities, I would myself have thought that the court should exercise its discretion so that the asset falls within the statutory scheme. The purpose of the further consideration of the order nisi is to enable the court to review the position inter partes. At the date of the order nisi the court has made no irrevocable decision. If therefore the statutory scheme for dealing with the assets of the company has been irrevocably imposed on the company, by resolution or winding up order, before the court has irrevocably determined to give the creditor the benefit of a charging order, I would have thought that the statutory scheme should prevail. Unquestionably that would be the position if the winding up order or resolution had preceded the order nisi: see section 228 (compulsory liquidation) and *Westbury v. Twigg & Co. Ltd.*

[1892] 1 QB 77 (voluntary liquidation). To my mind the position should be the same if liquidation commences after the order nisi but before the court has committed itself to a final order. I do not see why a creditor should gain an advantage merely because he has a revocable order for security at the time when the statutory scheme comes into existence. The main thrust of Roberts's argument is that the order nisi imposes an immediate charge, which is correct, and that therefore at the date of the commencement of the liquidation the assets were already outside the statutory scheme. That proposition, by reference to that date, is also correct. The liquidator was unable, at that date, to collect those assets by going into possession, because the receiver was already in possession. But the weakness of the argument to my mind is that Roberts had no more than a defeasible charge at the date of the commencement of the liquidation, so that the right of the receiver to retain the asset as against the liquidator was only a defeasible right. Neither the precarious existence of

the charge nor the precarious possession of the receiver seems to me to afford a convincing reason for consolidating the position of the judgment creditor vis-à-vis the general body of unsecured creditors and thereby defeat quoad that asset the statutory scheme which was already in full force and effect. So, unless there is convincing authority pointing to a different conclusion, I would regard the intervention of the statutory scheme as a sufficient and indeed decisive "cause to the contrary." I can see no logic in an additional requirement "such as a scheme of arrangement, formal or informal, agreed or being negotiated amongst creditors"; I have taken these words from *Burston Finance Ltd. v. Godfrey* [1976] 1 W. L. R. 719, 734, to which I refer later." 29. In *BSC Corporate Acceptances Limited BCS Offshore Funding Limited v Daniel Terry*

- [2018] EWHC 2349 (QB) the Court set out the procedure for making a charging order absolute:-
- "49. There is a two stage procedure: first the making of an interim order obtained without notice which has the effect of holding the position pending an inter partes hearing; then a full inter partes hearing involving the judgment creditor, the judgment debtor and the third party to decide whether a final third party order should be made or rather whether the interim order should be discharged. 53. If at the time of service, there is also money due from the judgment debtor to the third party which amounts to a set-off against the money due from the third party, then to that extent, there is no debt due from third party. 54. Significantly, the effect of an interim order is to create a defeasible charge in favour of the judgment creditor in respect of the debt the subject of that order. It operates not just "in personam" - unlike a freezing injunction. That charge might be discharged on the application for the final order (so that in that sense the charge is "defeasible") or it could be made final. If and when the interim order is made final, it has priority to payment from the fund over any other judgment creditor who had not yet obtained any interim third party debt order: see *FG Hemisphere Associates LLC*, supra, citing *Société Eram Shipping Co-Limited v. Cie Internationale de Navigation*
- [2004] 1 AC 260. 55. CPR 72.8 addresses the second stage, the inter partes hearing. It is for the judgment debtor or third party to raise objections to the making of a final third party order, by the service of written evidence. At the hearing the court may make a final order, discharge the interim order and dismiss the application, decide any issues in dispute or "direct a trial of any such issues...": CPR 72.8(6). 56. The making of a final order is discretionary. In this regard there is no material difference between third party debt orders and charging orders under CPR 73 (*The White Book Service* 2018 §73.4.5(2)). A final order will be refused where it would be inequitable: *Roberts Petroleum Ltd v Kenny* [1983] 2 AC 192. In considering whether or not to exercise its discretion to make a final order the court must bear in mind not only the position of the judgment creditor, the judgment debtor and the third party, but also the position of other creditors. It may be inequitable to prefer one creditor (the judgment creditor) over another." 30. Lastly, in *the State Bank of India and Others v Dr Vijay Mallya and Others*

[2019] EWHC 995 (QB) the Court said:- "20. I now turn to the further consideration of the application. In exercising my discretion under CPR 72.8, it is common ground that I must apply the principles set out in *Roberts Petroleum Ltd v Bernard Kenny Ltd*

[1982] 1 WLR 301 (CA) "(1) The question whether a charging order nisi should be made absolute is one for the discretion of the court.

- (2) The burden of showing cause why a charging order nisi should not be made absolute is on the judgment debtor.
- (3) For the purpose of the exercise of the court's discretion there is, in general at any rate, no material difference between the making absolute of a charging order nisi on the one hand and a garnishee order nisi on the other.
- (4) In exercising its discretion the court has both the right and the duty to take into account all the circumstances of any particular case, whether such circumstances arose before or after the making of the order nisi.
- (5) The court should so exercise its discretion as to do equity, so far as possible, to all the various parties involved, that is to say, the judgment creditor, the judgment debtor, and all other unsecured creditors.
- (6) The following combination of circumstances, if proved to the satisfaction of the court, will generally justify the court in exercising its discretion by refusing to make the order absolute:
(i) the fact that the judgment debtor is insolvent; and (ii) the fact that a scheme of arrangement has been set on foot by the main body of creditors and has a reasonable prospect of succeeding.
- (7) In the absence of the combination of circumstances referred to in (6) above, the court will generally be justified in exercising its discretion by making the order absolute." 31. In our judgment, there is sufficient similarity in an *arrêt entre mains* and a third party debt order to accept that similar principles apply. We take, as argued by the Plaintiff, the principles to be as follows:- (i) The Court should not be reluctant to grant an interim *arrêt entre mains* for fear of creating an irreversible priority in favour of the Plaintiff and imposing some court sanctioned preference over the Defendant's other creditors. The interim *arrêt entre mains* simply holds the position and creates a prospective but defeasible charge over relevant assets; (ii) The Court retains the discretion at the inter partes hearing seeking confirmation of the interim *arrêt entre mains* to determine the equity of making the order final, which can take into account the interests of the Defendant's other creditors. That does not mean the existence of other creditors will defeat the application for confirmation of the interim *arrêt entre mains* but it is a matter that can be taken by the Court into account; (iii) It may be open to the other creditors of the Defendant to argue that the *arrêt entre mains* should not be confirmed if they have taken full steps to place the Defendant into some form of bankruptcy or insolvency proceedings in the intervening period; (iv) There is nothing inherently improper in a judgment creditor using all proper means to enforce its judgment,

particularly where no formal insolvency process is in train. 32. In this case, the Plaintiff is involved in more than one capacity and we keep in mind the Trusts (Jersey) Law 1984 at Article 31, which provides:- "31 Trustee acting in respect of more than one trust (1) A trustee acting for the purposes of more than one trust shall not, in the absence of fraud, be affected by notice of any instrument, matter, fact or thing in relation to any particular trust if the trustee has obtained notice of it by reason of the trustee's acting or having acted for the purposes of another trust. (2) A trustee of a trust shall disclose to his or her co-trustee any interest which he or she has as trustee of another trust, if any transaction in relation to the first mentioned trust is to be entered into with the trustee of such other trust. (3) Subject to this Law (including in particular Articles 21 and 23), but despite any other enactment or rule of law to the contrary, a person may in the capacity of a trustee of one trust enter into a contract or other arrangement with himself or herself in the person's capacity as a trustee of one or more other trusts." Mr Watson's submissions 33. The Defendant was not legally represented before us and gave us the benefit of his submissions by telephone link. 34. Mr Watson was concerned that all creditors might not have been advised that claims could be made by them. He thought that other creditors might indeed have claims. He was not able to agree the list of liabilities and believed that the Plaintiff and Kea were operating in collaboration but he could not say that for sure. 35. He did not know what the current assets were in the Trust - he did not have the full picture and was not aware of the balance sheet. He disputed that anyone is trying to make him bankrupt, but he agreed that he would have been bankrupt if Kea had filed for bankruptcy. This had been avoided, he thought, by the collaboration between Kea and the Plaintiff, and he indicated that in his view a bankruptcy would have inevitably followed but for the cooperation to avoid it and, by implication, for the Plaintiff to secure an advantage. 36. He raised a number of factual disputes and he disputed some of the figures. He did not have any visibility on the position of the other creditors and felt strongly that all creditors should be treated equally and that the Plaintiff should not be able to secure an advantage through cooperation with Kea or otherwise. He was considering declaring himself bankrupt. As he did not have visibility on the various assets and liabilities, he could not tell the creditors himself. 37. It is fair to say that in response to these factual assertions, the Plaintiff through Counsel disputed much of what Mr Watson said. Mr Harvey-Hills indicated that he had no knowledge that Kea had paid off any money to avoid Mr Watson's bankruptcy, but if Kea had made a payment then that would be to Mr Watson's benefit as he would no longer owe that debt. It is pointed out to us that Mr Watson could have at any point petitioned to make himself bankrupt over the last two years but had not done so. He confirmed to us, however, that the Plaintiff had advised those creditors he knew were pursuing claims of the steps that it was taking. 38. The Plaintiff points out that it has the benefit of a judgment of the Court, which was a judgment by consent. 39. It did not appear to us that Mr Watson's allegations were established and indeed it seems to us that the evidence pointed clearly to support the assertions made by the Plaintiff through Counsel. 40. Although in our judgment it is not incumbent upon a Plaintiff who has the benefit of an arrêt entre mains to conduct a type of mini-insolvency process for the benefit of other creditors, nonetheless we note that, in this case, the Plaintiff has not

only notified the Defendant of this application (and the Defendant could thereby, had he wished to, notified other creditors of which he was aware) but has also notified Kea and other creditors known to the Plaintiff. We cannot say whether all of the relevant creditors are aware of the application, but in our view, for the reasons set out in the judgments mentioned above, it is not incumbent upon a Plaintiff to notify all creditors. 41. The Plaintiff's case is a simple one, in the sense that it informs us that it has the benefit of a judgment, has the benefit of an *arrêt entre mains*, it is entitled to enforce its judgment applying the principles set out above, and accordingly it wishes the *arrêt entre mains* to be confirmed.

Conclusion

42. The Plaintiff has the benefit of a judgment debt, and is entitled to enforce it. The Plaintiff has obtained, as the first stage in enforcing that debt, an *arrêt entre mains*. 43. There is no bankruptcy process or procedure in train and there is nothing in principle wrong with the Plaintiff, in those circumstances, seeking to enforce, for its benefit, its judgment debt. 44. In any event, the Plaintiff has taken steps to notify the creditors as set out above, and whilst Kea appears to have taken steps in this jurisdiction, it has not thought to interfere in any manner with the Plaintiff's application. 45. For these reasons, we saw no reason not to confirm the *arrêt entre mains*, and accordingly did so. Authorities *FG Hemisphere Associates LLC v. Democratic Republic Of Congo and La Generale des Carrieres et des Mines*

[2010] JLR 524 . *FG Hemisphere Associates LLC v. Democratic Republic of Congo and La Generale des Carrieres et des Mines (Groupment pour le Traitement du Terril de Lubumbashi Limited as party cited)*

[2011] JLR 486 . *Tepe Insaat Sanayii AS v. Boru Hatlari Ile Petrol Tasima AS (also known as Botas Petroleum Pipeline Corporation), Turkish Petroleum International Company Limited and Botas International Limited*

[2016] (1) JLR 218. *Roberts Petroleum Ltd v Bernard Kenny Ltd*

[1982] 1 WLR 301 *Roberts Petroleum Ltd v Bernard Kenny Ltd* [1983] 2 WLR 305. *Roberts Petroleum Limited v Bernard Kenny Ltd* [1983] 2 WLR 305. *BSC Corporate Acceptances Limited BCS Offshore Funding Limited v Daniel Terry*

[2018] EWHC 2349 (QB) . *State Bank of India and Others v Dr Vijay Mallya and Others*

[2019] EWHC 995 (QB) . *Trusts (Jersey) Law 1984* Page Last Updated: 06 Nov 2020 BAILII: [Copyright Policy](#) | [Disclaimers](#) | [Privacy Policy](#) | [Feedback](#) | [Donate to BAILII](#)

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