

JERSEY / JUDGMENT

Rep re Estates and General Development Ltd [2013] JRC 027 (04 February 2013)

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judgment

the bailiff: 1. This is an application by the representors in their capacity as Joint Fixed Charge Receivers for recognition of their appointment and authority to manage and sell certain immovable property in Jersey which belongs to Estates and General Developments Limited, an English company. It appears to be the first occasion on which the Court has considered an application by such receivers in respect of Jersey immovable property. 2. The Court granted their application at the conclusion of the hearing and now gives its

reasons.

Factual background 3. Estates and General Limited ("E&G") is a company incorporated in England carrying on business as a property investment company. It has a number of subsidiaries, amongst which is Estates and General Developments Limited ("the Company"). The Company has only one asset of any significance, namely property in Jersey situated at 17½, 19 and 21 Beresford Street, St Helier ("the Property") which it acquired by contract passed before the Royal Court on 5th May, 2006. 4. Pursuant to a trust deed dated 31st December, 1983, (as amended and supplemented by a number of supplemental trust deeds (together "the Trust Deed")) E&G issued two classes of mortgage debenture stock ("the Stock"). The current trustee of the Stock is Capita IRG Trustees Limited ("Capita") and the Stock was originally listed on the London Stock Exchange. The Trust Deed confers the usual powers for Capita, on behalf of the Stock holders, to appoint receivers in certain circumstances. The Stock is secured by a floating charge over the assets of E&G. The Company became party to the Trust Deed by means of the tenth supplemental trust deed. It granted Capita a first ranking judicial hypothec over the Property together with a first floating charge over its undertaking and all its property and assets as further security for the Stock. 5. The E&G Group has got into financial difficulties. On 21st January, 2011, E&G and the Company (together with certain other subsidiaries of E&G) were placed in liquidation by way of shareholders' resolution and representatives of the accountancy firm Begbies Traynor ("the Joint Liquidators") were appointed as joint liquidators of those companies. Thus the Company has been in liquidation since that date. 6. On 8th February, 2011, Capita exercised its power under the Trust Deed to appoint the representors as joint administrative receivers of E&G. 7. On 11th March, 2011, pursuant to the powers contained in the tenth supplemental trust deed Capita also

appointed the representors as joint fixed charge receivers ("the Joint Fixed Charge Receivers" and the "Fixed Charged Receivership") of the Property. 8. On 5th April, 2011, following an application by the Joint Fixed Charge Receivers, a letter of request was issued by the Registrar in Bankruptcy of the High Court of Justice in England requesting that this Court ratify and recognise the appointment of the representors as Joint Fixed Charge Receivers of the Property and grant all and any powers conferred on the Joint Fixed Charge Receivers by the Trust Deed or otherwise by law within the jurisdiction of the Island of Jersey, including power to effect the sale of the Property. 9. There has been some delay since then because of the need to deal with other assets within the E&G Group but the representors, as Joint Fixed Charge Receivers, have now applied to this Court for recognition of their appointment and for authority to exercise the powers vested in them by the Trust Deed, including the management and in due course sale of the Property. The position of the Joint Fixed Charge Receivers at English law 10. The Court has seen a helpful letter from Slaughter and May to Ogier dated 17th October, 2012, explaining the position of receivers under English law. The letter shows that, for the purposes of our decision, there are two relevant forms of receivership. 11. Firstly there is 'administrative receivership', where a receiver is appointed pursuant to a floating charge over the whole or substantially the whole of the assets of a company and has a broad range of powers to manage the company's affairs. That is the position in relation to E&G itself. 12. Secondly, there is a 'fixed charge receivership', where a receiver is appointed pursuant to a fixed charge over specific property and has powers only in relation to that property. That is the position of the Joint Fixed Charge Receivers in this case. 13. A fixed charge receiver is appointed by the holder of a charge ("the chargee") and not by a court. The chargee's entitlement to appoint a receiver arises as a matter of contract pursuant to the terms of the charge. The circumstances in which the power to appoint becomes exercisable are also determined by the terms of the charge. The appointment of a receiver does not preclude the appointment of a liquidator. Similarly, the appointment of a liquidator does not prevent a chargee from appointing a receiver. A liquidator is however not entitled to deal with assets that are subject to fixed security; the power to deal with those assets rests in the receiver. 14. Once appointed, a joint fixed charge receiver becomes the receiver only of the property charged. The charge will normally confer a broad range of powers to deal with and manage the charged property (including a power of sale). The charge will normally state that the receiver acts as the agent of the chargor. However, the appointment of a liquidator terminates the receiver's ability to act as agent of the chargor, although he will still retain all his powers to deal with the charged property but this time as principal pursuant to the terms of the charge. 15. It follows that, in this case, liquidators of the Company having been appointed, the Joint Fixed Charge Receivers may not, under English law, act as agents of the Company. They do however have full power to manage and sell the Property pursuant to the terms of the Trust Deed. Under English law, they have that power to the exclusion of the liquidators. The nature of this application 16. Advocate Sanders submitted that this application comes within Article 49 of the Bankruptcy (Désastre)(Jersey) Law 1990 which provides as follows:- "49 Assistance for other courts in insolvency matters (1) The court may, to the extent it thinks fit, assist the courts of a relevant country or territory in all matters relating to the insolvency of a person, and when doing so may have regard to the extent it considers appropriate to the provisions for the time being of any model law on cross border insolvency

prepared by the United Nations Commission on International Trade Law. (2) For the purposes of paragraph (1), a request from a court of a relevant country or territory for assistance shall be sufficient authority for the court to exercise, in relation to the matters to which the request relates, any jurisdiction which it or the requesting court could exercise in relation to these matters if they otherwise fell within its jurisdiction. (3) In exercising its discretion for the purposes of this Article the court shall have regard in particular to the rules of private international law. (4) In this Article "relevant country or territory" means a country or territory prescribed by the Minister." 17. In our judgment, that submission is correct. We accept that this is not the normal case where a court has made an order declaring a company bankrupt or insolvent, because the appointment of the Joint Fixed Charge Receivers was made by Capita as a matter of contract. However, it is clear from the evidence that E&G and the Company are all hopelessly insolvent and we have received a letter of request from the English High Court asking this Court to assist in the matter of that insolvency. England is 'a relevant country' pursuant to Article 49(4) and in our judgment this request is one 'relating to the insolvency of a person'.

Exercise of discretion 18. Advocate Sanders referred us to a helpful passage in Dicey Morris and Collins, *The Conflict of Laws* (15th edition) Volume II as follows:- "30-134 English receivers acting outside the United Kingdom. Rule 180 is not concerned with the powers of an English receiver to act outside the United Kingdom. But it may be of some value to offer some observations on this question. In general, a receiver appointed under the law of England in respect of the property of an English company which is situated in a foreign country and in consequence of the company having created a charge which, as created, is a floating charge will be able to exercise his powers in the foreign country only to the extent that the foreign country recognises the validity and effect of the charge and the power of the receiver so to act. ... 30-136 However it does not follow that the charge will be entitled to, or obtain, recognition abroad. First, the charge may be repugnant to the law of the place where the assets of the company are situated. Secondly, the charge may be ineffective under the *lex situs* because of a failure to comply with certain mandatory requirements of that system of law, such as registration provisions. In such a case not only will the charge fail to gain recognition in the foreign country but also the English court will not, at the instance of the debenture holders, restrain a creditor from bringing proceedings to recover his debt in the foreign country out of assets which are situate there. Accordingly, it is important to ensure that the charge complies with the registration requirements of the *lex situs*. ... Finally the English receiver may be faced with the difficulty that the foreign jurisdiction does not recognise his capacity to sue in its courts. In principle, for the purposes of the conflict of laws, a receiver may be regarded as an officer of the company and, accordingly, his powers and capacity to act should depend on the law of the place of incorporation, i.e., in the case of English companies, English law: but there can be no guarantee that he will be accepted as such in a foreign court, particularly if the recognition of the receiver's powers would operate to the prejudice of local creditors." 19. Taking these three points in turn, it is clear that the charge is not repugnant to the law of the place where the assets of the Company are situated i.e. Jersey. Capita as trustee obtained a judicial hypothec in accordance with Jersey law. 20. Secondly, the charge complies with the requirements of the system of law of the *lex situs* in that the judicial hypothec has been duly registered and validly established under Jersey law. 21. As to the third point, it

seems to us that, as this is a company incorporated under English law, we should have primary regard to whether the Joint Fixed Charge Receivers are recognised as having power and capacity to act under English law. It is clear from the evidence that they do. There appears to be no question of prejudice to any local creditors as there are none. However, the Joint Fixed Charge Receivers have undertaken to advertise for any claims in respect of the Property and to liaise with the Comptroller of Income Tax with regard to any taxes that might be due in respect of the Property. The order which we propose to make will confer liberty to apply on any persons who consider themselves adversely affected by the order. 22. In all the circumstances, we see nothing in the matters raised in Dicey which would cause us not to give the assistance requested in this case. 23. However, we have given careful consideration to the fact that we are dealing with Jersey immovable property. Under Jersey law, a creditor does not have power to sell immovable property belonging to his debtor and the Court may not confer such a power. A creditor must follow one of the established remedies of *dégrèvement*, *désastre* etc. Thus, if this were an entirely domestic situation, this Court could not simply confer authority on Capita (or the Joint Fixed Charge Receivers whom Capita has appointed under the Trust Deed) to sell the Property on behalf of the Company. 24. It would in theory be possible for alternative methods of achieving realisation of the Property to have been pursued. In the first place, Capita could have taken the matter to *dégrèvement*. However, this would require proceedings against the Company (including obtaining leave to serve out of the jurisdiction) in order to obtain judgment. Thereafter there would be the time periods involved in obtaining an order for *Vicomte chargé d'écrire*, an application for renunciation and appointment of attorneys, the conduct of the *dégrèvement* etc. Ultimately, as there are no other creditors, Capita, as the party with the judicial hypothec, would no doubt take as *tenant après dégrèvement*. It would then own the Property and could sell it. But this would clearly be quite a lengthy process and would be inconsistent with the fact that, under English law, the relevant powers are conferred upon the Joint Fixed Charge Receivers. 25. An alternative would be for the Company to be declared *en désastre*. The Company is of course already in liquidation in England, although the Viscount's task would no doubt be confined to dealing with the asset in Jersey. The Viscount would need to manage the Property and then sell it. The entire proceeds would go to Capita as trustee on the basis that the amount owing in respect of the Stock greatly exceeds the value of the Property. The costs however would be considerable as the Viscount's fees would be paid in priority to Capita. The Viscount was consulted prior to the hearing of this representation and did not indicate that he considers a *désastre* to be a more appropriate means of dealing with the Property. 26. The third alternative might be for the joint liquidators to seek recognition in Jersey with a view to their then selling the Property. However, the difficulty with this is that the only asset in Jersey is subject to the fixed security in favour of Capita and, as a matter of English law, the joint liquidators are not entitled to deal with the Property. 27. It seems to us therefore that, although a *dégrèvement* or a *désastre* would be a possible way of proceeding, they are each more disadvantageous than what is requested at present. Given the existence of an insolvency, the Court's first duty must be to try and keep costs to a minimum so that the maximum amount is recovered for creditors, who will in any event be out of pocket. Article 49(2) is specific in conferring upon this Court authority to exercise powers not only that this Court has but also powers which the requesting court would have. It is clear

that under English law the Joint Fixed Charge Receivers have the power to sell the Property and they could accordingly no doubt obtain an order from the English court to that effect; and of course the English court has requested this Court to allow the Joint Fixed Charge Receivers to sell the Property. 28. In all the circumstances, we do not think it would be helpful to force the Joint Fixed Charge Receivers and/or Capita to pursue an alternative course which would be slower and more expensive. On the contrary, we think that the interests of comity suggest that we should exercise the power conferred on us under Article 49 to accede to the letter of request from the English High Court and to authorise the Joint Fixed Charge Receivers to sell the Property and to manage it in the meantime. In this connection, it is relevant that the amount secured by judicial hypothec exceeds the value of the Property so that, whatever course was followed, no one would benefit from the Property other than Capita as trustee of the Stock. 29. We have however, amended the draft order presented to us in two respects:- (i) As mentioned earlier, now that liquidators have been appointed to the Company, the Joint Fixed Charge Receivers are not treated as agents of the Company under English law. We do not consider that that can be the case under Jersey law. If the Joint Fixed Charge Receivers are to be given power to sell the Property and to manage it in the meantime, they can only do so on behalf of the Company, which is the legal owner of the property. They will therefore be acting as agents of the Company and the Act of Court will make this clear. (ii) As already mentioned, the Joint Fixed Charge Receivers have undertaken to advertise for creditors and we require the existence of that undertaking to be recited in the Act of Court. We also give liberty to apply to any person affected, in case it should emerge that, by conferring the power to sell the Property on the Joint Administrative Receivers, we have inadvertently prejudiced some local creditor. Authorities Bankruptcy (Désastre)(Jersey) Law 1990. Dicey Morris and Collins, The Conflict of Laws (15th edition) Volume II. Page Last Updated: 26 Aug 2015 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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