

Liability for interfering with a chose in action

Banks should take note that it may still be possible for an invalidly appointed receiver to be found liable for interfering with a chose in action, such as a contract, despite the Lords' decision in *OBG Ltd v Allan*. **Stephen Moriarty QC** and **Marcus Smith** explain why

IN *DOUGLAS AND OTHERS V HELLO! LTD and others*, the House of Lords restated the English law regarding the relationship between the torts of inducing breach of contract and causing loss by unlawful means, and what is meant by confidential information. However, another aspect of the decision merits consideration. The issue – whether it is possible to convert a 'chose in action', such as a receivable or some other right to sue – arises out of one of the actions argued before the House of Lords at the same time as *Douglas: OBG Ltd and others v Allan and others*.

The issue is relevant to the position of receivers appointed by a bank or other debenture holder, which turn out to have been invalidly appointed. At first sight, the position may seem clear, but appearances can sometimes be deceptive.

KEY FACTS

The facts of the case raised the issue quite starkly. The claimants, a civil engineering company (OBG) and an associated company, got into severe financial difficulties. Acting on the advice of its solicitors, a creditor appointed joint administrative receivers over the assets of the claimants, under a debenture which gave a floating charge. The receivers took control of the claimants' business, and took a number of steps affecting the companies. As well as taking control of the premises and the

other physical assets of the business, they terminated the contracts of the majority of the claimants' subcontractors, and settled claims under the contracts which OBG had made.

Unfortunately, the solicitors had got it wrong. The creditor had no power to appoint receivers at all in the circumstances which had arisen. When the claimants subsequently went into liquidation, the liquidator brought legal proceedings against the two receivers, as well as against the creditor which had purported to appoint them, and the hapless solicitors on whose advice it had acted. In suing for the loss and damage arising from this invalid appointment, one of the causes of action relied upon was the tort of conversion. Plainly, it was argued, there had been a conversion of the physical assets wrongly interfered with by the receivers. The same must be true, it was said, of the contracts which had been interfered with as well. If that was so, the receivers were strictly liable, even though they were acting entirely in good faith. One of the questions the House of Lords had to grapple with, therefore, was whether it is possible to convert a 'chose in action' as a matter of English law.

REASONING OF THE HOUSE OF LORDS

In the House of Lords, as at first instance and in the Court of Appeal, the conversion claim failed. It was held that,

under English law, there could be no conversion of a 'chose in action'. Leaving aside leases (so-called 'chattels real'), chattels fall into two classes:

- 'choses in possession' – things of which physical possession can be taken (ie tangible things); and
- 'choses in action' – things which can only be claimed or enforced by action, and not by taking physical possession (ie intangible things).

(This distinction is fundamental in the law of personal property. See *Colonial Bank v Whinney*.³)

In effect, the House of Lords held that there could be conversion only of a 'chose in possession'. This conclusion was reached, however, only by a bare majority of Lord Hoffmann (at 94-97), Lord Walker (at 271) and Lord Browne (at 321-322). Lord Nicholls (at 219-238) and Lady Hale (at 308-317) dissented.

The majority in the House of Lords based its conclusion on the fact that historically, the tort of conversion had been confined to 'choses in possession', and had never been extended to 'choses in action', and that to do so now would require legislation. In particular, it was pointed out that the legislation in this area (notably s234(3) of the Insolvency Act 1986, which protects an administrative receiver who 'seizes or

disposes of any property which is not property of the company' from liability; or the Torts (Interference with Goods) Act 1977) was predicated on the view that strict liability for conversion could not exist for anything other than 'choses in possession'. Against this argument for the status quo, the dissenters in the House of Lords could make three, powerful, points.

First, the minority argued, the distinction between choses in possession and choses in action was completely unjustifiable in principle. The point was neatly put by Lord Nicholls:

'In this case the receivers, acting in good faith but without any lawful right, took over OBG's business and assets. They sold the company's land, its plant and its equipment. They wound down its outstanding contracts and negotiated a deal with its biggest customer. The receivers are liable for their unauthorised dealings with the company's land and chattels. That is not in dispute. But, it is said, they are not liable for their unauthorised dealings with the company's debts and other contractual rights.

'This prompts the question: why not? The receivers took over the entirety of the company's business and assets. Why should they be liable strictly in respect of their unauthorised dealings with some parts of the company's property but not others? This distinction makes no sense. It lacks any rhyme or reason.' (paras 220-221)

In short, where a remedy such as conversion exists for vindicating property, the law should extend that remedy to everything that the law recognises as property, be it tangible or intangible.

Secondly, the minority argued, the distinction between chattels and 'choses in action', so far as the applicability of the tort of conversion is concerned, has already substantially been breached. Because the law provided, in respect of the misappropriation of intangibles, no remedy equivalent to that provided by conversion for the misappropriation of tangibles, the courts have long since resorted to a legal fiction. They have held that, in appropriate cases, a

document embodying or recording a debt or obligation should be treated as having the same value as the debt or obligation itself (see, for example, *Morison v London County and Westminster Bank Ltd* at 365 (per Reading CJ), 375 (per Buckley LJ) and 379 (per Phillimore LJ); *International Factors v Rodriguez* at 358-9 (per Sir David Cairns); and *Smith v Lloyds TSB Group plc* at 551 (per Pill LJ) and 557 (per Potter LJ)).

If a person converts a piece of paper such as cheque, therefore, the measure of the loss is the value of the debt itself. Thus, the limit imposed on the tort seems even more unreasonable. If the tort only extends to physical property that can be lost or found – and so *ex hypothesi* excludes intangibles – why, if a cheque is converted, should damages be assessed on the face value of the cheque, rather than the piece of paper it actually is? Again, Lord Nicholls made the point very aptly:

'This prompts a further question: why should this extension of the tort of conversion be confined to cases where the intangible rights are specifically recorded in a document? I would like to think that, as a mature legal system, English law has outgrown the need for legal fictions. There was a time when John Doe and Richard Roe were popular characters. They had to be parties to some forms of action. When they were in their prime their names appeared again and again in the law reports. English law has moved on. John Doe and Richard Roe are no more. So here, if there is to be a limit to the types of intangibles which attract a remedy in conversion, this limit should be capable of being articulated and justified openly, not by reference to fiction piled upon fiction.' (para 229)

Thirdly, moreover, intangible property is already protected by the tort of conversion in other jurisdictions. Thus, in the US, it has been held that contractual rights can be converted, and some states extend the tort more generally to other intangibles such as computer records and data.

Nevertheless, despite these (it is suggested) compelling points, the

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majority was clear. As a matter of English law, conversion does not extend to contractual rights or other 'choses in action'. That's an end to it then, it would seem. The receiver acting in good faith is safe – at least so far as their interference with intangible assets is concerned – even if their appointment turns out to have been invalid.

INTERNATIONAL DIMENSION

But are things really so clear? In the world of international commerce in which we live, what happens when a foreign element is introduced into the legal equation? We already know that there are foreign jurisdictions – such as the US – where a very different approach is taken, and where intangibles can be converted. Suppose, for example, OBG had entered into contracts to buy and sell abroad; contracts perhaps even governed by the law of the foreign country in question. If the receivers had interfered with those contracts, would they still have been protected by the law, as laid down by the majority in that case? If only the position were that simple.

We now have reached the point at which 'conflicts of law' principles introduce a wholly new dimension. In any case that involves a foreign element, it may prove necessary to decide what system of law is to be applied, either to the case as a whole, or to a particular

Douglas and others v Hello! Ltd and others, OBG Ltd and others v Allan and others [2007] UKHL 21

Colonial Bank v Whinney (1885) 30 ChD 261

Morison v London County and Westminster Bank Ltd [1914] 3 KB 356

International Factors v Rodriguez [1979] 1 QB 351

Smith v Lloyds TSB Group plc [2001] QB 541

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issue or issues in the case. In English law, the process of determining the law governing a case, or an issue in a case, involves three stages. First, it is necessary to 'characterise' the issue that is before the court – eg is the question one regarding the interpretation of a contract? Secondly, the court must identify the 'connecting factor' for the issue in question. That connecting factor is the rule of (English) conflict of laws which ties the issue before the court to a particular legal system. Thirdly, having identified the connecting factor, the court must apply it, so as to identify the applicable legal system (*MacMillan Inc v Bishopsgate Investment Trust plc* at 391-2 (per Staughton LJ); *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC* at 26 (per Mance LJ)).

This process 'falls to be undertaken in a broad internationalist spirit in accordance with the conflict of laws of the forum' and it should not be over-mechanically applied (*Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC* at 27 (per Mance LJ)). Thus, for example, even though an agreement is unsupported by consideration, it ought nevertheless to be characterised as a contract (and is so characterised by the English courts). However, against the background of this kind of approach, there are at least two respects in which determining what law is applicable to a person's interference with a contract or other 'chose in action' may turn out to be extremely problematic.

In the first place, the tort of conversion is a very good instance where even the correct 'characterisation' of the issue may prove to be difficult. There is absolutely no doubt that English domestic law treats claims for interference with chattels as part of the law of tort. The same is true of other Commonwealth jurisdictions and the US. But civil law jurisdictions view the matter rather differently. Whilst chattels are undoubtedly protected from unjustified interference, this protection arises out of the law of property, not the law of torts.² Thus, under French law, the claim is one for 'revindication', not damages.

No doubt much will depend upon how a claim is formulated before the English court, which must choose the

applicable law. However, as Fawcett, Harris and Bridge note:

'Suppose that a claimant brings an action for revindication under the Code civil, and seeks to establish that his claim is governed by French law. Although the process of classification is one for English and not French law, it would be absurd to ignore the nature of the claim and its classification by its law of origin. Accordingly, this should lead to the action being classified as proprietary and subject to property choice of law rules'.³

The force of this point is difficult to deny. But if so, then what law would an English court choose if faced with a foreign-law, property-based claim alleging interference with a receivable governed by that foreign law? The English conflicts rules relating to tangible and intangible property are 'perhaps the most intractable topic in English private international law'.⁴ It would be a brave lawyer indeed that would not concede that English conflicts rules might well select the foreign law in such a case.

Secondly, however, even if the preliminary 'characterisation' question does not raise problems of its own, what law would an English court apply to the conversion of a contract, or other 'chose in action', which has a foreign element? Suppose now, for example, OBG's contracts included contracts to buy and sell from companies in the US; suppose further that at least some were governed by the law of states which **did** admit of those contracts being converted.

It is at this point that we hit Part III of the Private International Law (Miscellaneous Provisions) Act 1995 (the Act). The 'general rule' laid down by the Act is that the law applicable to issues in tort is the law of the country in which the events constituting the tort in question occur (s11(1)). However, that 'general rule' can be departed from (under s12) if it appears that it is 'substantially more appropriate' for the law of another country to be the applicable law for determining the issues (or any particular issue) in the case. That involves making a comparison

of the significance of the factors connecting the tort to the country provided for by the 'general rule' (that is to say, the country where the events constituting the tort occur) with the significance of the factors connecting it with the other country. Factors that can be taken into account as connecting a tort with a particular country include those relating to the parties themselves, those relating to the events which constitute the tort, and those relating to the circumstances or consequences of those events (s12(2)).

And that is just where the events constituting the tort do all occur in the same country. Where this is not so, the 'general rule' is that provided for in s11(2). In cases of personal injury or death (which we can ignore) it is the law of the country where the individual was when they sustained the injury. Where the cause of action is in respect of 'damage to property', it is the law of the country where the property was when it was damaged. In any other case, it is the law of the country in which 'the most significant element or elements of those events occurred'. All this, of course, only

NOTES

- 1) See also *The Law of Assignment* (1st ed), Marcus Smith (Oxford University Press, 2007), paras 2.09-2.10.
- 2) See, for example, *International Sale of Goods in the Conflict of Laws* (1st ed), James Fawcett, Jonathan Harris and Michael Bridge (Oxford University Press, 2005), para 17.55.
- 3) *Op cit*, para 17.56.
- 4) *Private International Law* (5th ed), GC Cheshire (Clarendon Press; Oxford University Press, 1957), p428. The sentiment is reiterated in *Cheshire & North's Private International Law* (13th ed), Peter North and James Fawcett (Butterworths, 1999), p938. The observation was made in the context of tangible property, but the point applies with equal, if not greater, force to intangible property.

MacMillan Inc v Bishopsgate Investment Trust plc (No 3) [1996] 1 WLR 387

Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC [2001] QB 825

gets us as far as establishing the 'general rule' again. That, in turn, can be displaced by the law of some other country being 'substantially more appropriate', just as it can when all the relevant events have occurred in the same country.

Although it may be easier – as has been noted above – to describe the correct analytical approach in questions of tort than in cases where the relevant issue is 'characterised as being one of property', this does not necessarily mean that coming to the right answer is any simpler. In the case of our hypothetical contracts to sell to, and buy from, customers in the US, where do the events constituting the conversion occur? If, as seems likely, they are not confined to one country, is the cause of action one for 'damage' to the contract; and, if so, where was the contract when it was damaged? Self-evidently, we are not looking to identify the place where some physical copy of the agreement can be found. Each party, after all, might have their own copy; or the contract may be evidenced by an exchange of correspondence in different places; or the contract may be entirely oral. Presumably, therefore, a court would be trying to identify a location for the inchoate contractual right/obligation itself. But although civilian countries recognise the idea of the location, or situs, of such a right/obligation (such as, for example, in the case of an insurance risk), it is not something that the English courts are as used to dealing with.

Perhaps, therefore, that particular aspect of the 'general rule' takes matters

no further. But if what we are left with is the 'sweep-up' provision which applies in all remaining cases, where did 'the most significant elements' of the events occur? And, even if the answer to one or more of these questions gets us as far as English law being the 'general rule', is it still to be displaced because a comparison of all the relevant factors demonstrates that the law of the American state in question is 'substantially more appropriate'? In this context, for example, does it matter that the relevant contract which has been interfered with is governed by the law of that other state – perhaps as a factor 'relating to the parties' – or is that utterly irrelevant to the choice of the governing law?

COMMENT

These are difficult questions on which the approach that would be taken by an English court is, to say the least, far from clear. Suffice it to say, however, that, in any case where an invalidly appointed receiver interferes with a 'chose in action' which has a significant link to a country whose law admits of it being converted, there must be a real risk that the comfort provided by the *OBG* case will be scant. More generally, the whole issue provides a salutary illustration of how, in spite of the very best attempts to lay down a clear and coherent code for determining what law to apply to a dispute with a foreign element, the sought-after certainty can still be more apparent than real.

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Far from putting to rest, therefore, the prospect of an English court ever finding a person strictly liable in conversion for interfering with a contract or other 'chose in action', it is likely that is only a matter of time before it happens, in spite of the views of the majority in the *OBG* case. When it does, it may be that, strictly speaking, this is only because English law has chosen to apply a foreign law instead. That, however, will be little consolation for the defendant to English proceedings. **IHL**

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