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Disruptive Asset Finance

Spring 2021

Recovering debts during the COVID-19 pandemic

The COVID pandemic has placed many businesses in the difficult position of needing to recover debt. However, obtaining a court judgment is only part of the process.

When a judgment debt is not paid, taking steps to enforce payment from the debtor will often be necessary.

A writ of control is one of the most popular ways of enforcing a judgment debt but the COVID pandemic has put severe constraints on this method of enforcement because it involves an enforcement agent visiting the debtor's residential property or business with the purpose of identifying and taking control of goods.

Understandably with these extraordinary times limiting contact to ensure personal safety is at the forefront of a multitude of decision-making. This has had impact on a number of legal processes, including in-person visits to enforce a judgment debt by enforcement agents, many of which were suspended as a result. Certainly, we can expect a backlog of outstanding civil enforcement cases when we return to our new normal.

However, it is not recommended that judgment creditors cease debt recovery action pending further government guidance. First, writs of control will be given priority in the order in which they are lodged with the High Court Enforcement Officer. Priority will be particularly important where a business is likely to have a number of creditors. Taking action immediately will put a creditor ahead of others who may also issue a writ.

Further, before their visit, a High Court Enforcement Officer will send a letter giving seven days' notice to the debtor of the intention to visit. This will often prompt payment (either in full or in instalments if agreed) without further action. Where this occurs, this will be a swift and relatively cheap resolution for the judgment creditor because the enforcement agent's costs for this stage are limited.

Where no such payment is made, the enforcement agent will usually then proceed to physically visit the premises of the judgment debtor (where the debtor lives or carries on business) to seek payment. If that payment is still not forthcoming, the enforcement agent will proceed to identify items of potential value which may be taken into the agent's control and ultimately taken away, liquidated and applied towards the judgment debt.

Importantly if the debtor is unable to make payment in full at the time of the agent's visit and requires time to pay a debtor can enter into a 'controlled goods agreement' with the enforcement agent.

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Welcome

to the Spring edition of Disruptive Asset Finance

Welcome to this edition of Disruptive Asset Finance. There can be no doubt that COVID-19 has changed and challenged business models but we optimistically move forward and, having COVID-19 restrictions relaxed, we hope to see opportunities for businesses to bounce back and re-build. Businesses will need financial support to move ahead and teams across Clarke Willmott are here to support the Asset Finance Industry.

In this edition I consider some of the changes that businesses can expect to cross-border litigation now the Brexit transition period has come to an end. Lyssa Reeve and Cathy Harris set out some practical advice concerning social distancing and the enforcement of a judgment debt. We are about to see a cultural shift in the way witness evidence is prepared and presented for trial - Ellen Yeates tells us what to expect. We will update you in relation to the Business Interruption insurance case bought by the FCA which has now been determined by the Supreme Court.

John Flint

Recovering debts during the COVID-19 pandemic - continued

Such an agreement will set out that the debtor is not to remove or dispose of the goods until they have made full payment of the judgment debt by a set date or completed repayment by way of an agreed instalment plan with the creditor. A controlled goods agreement can be very beneficial to all parties as it provides control and priority for the creditor but still allows, for example, a business to retain assets so that it can continue to operate its business and generate profit to pay the judgment debt in full. During the lifetime of the controlled goods agreement, the enforcement agent may inspect the goods and if the debtor defaults the enforcement agent may re-enter the property to remove and sell the goods and apply the proceeds to the debt.

A controlled goods agreement is an essential part of the debt recovery toolkit and therefore creditors should note that, following the recent case of Just Digital Marketplace Limited (enforcement – controlled goods agreements – taking control of goods) [2021] EWHC 15 (QB) an enforcement agent can enter into a controlled goods agreement with a judgment debtor virtually by means of a video conference rendering actual physical attendance unnecessary. As a result of this case, an enforcement agent can undertake a video conference 'tour' to identify goods. Once goods have been identified they can then be subject to the controlled goods agreement.

Owen Williams, head of the Commercial & Private Client Litigation team at Clarke Willmott, and co-author of the textbook 'Commercial Enforcement' (Bloomsbury, 2021) notes with caution that whilst this can be seen as a welcome interpretation of the legislation in the light of COVID-19 restrictions and social distancing, unfortunately the existing legislation does not set out a procedure for future enforcement if the debtor defaults on the virtual controlled goods agreement. There is also a lack of clarity as to the fees payable by a debtor to the enforcement agent if there is a video agreement so care must be taken for creditors not be liable for considerable sums in return for weak agreements.

'Commercial Enforcement' by **Owen Williams** and Michelle Kemp contains a detailed analysis of the legal issues and underlying case law surrounding each method of enforcement, providing essential background materials and commentary.

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Business interruption insurance:
clarity from the Supreme Court

The current pandemic has had, and continues to have, a devastating effect on businesses across the world. The Supreme Court has now handed down **its judgment** on the FCA's business interruption insurance test case on Friday 15 January 2021 in an appeal from the Commercial Court. Clarke Willmott has reported on the legal issues of the test case as it has progressed (**this earlier edition of DAF considered the Commercial Court judgment**).

On appeal the FCA was substantially successful on the majority of the points in issue. The judgment should be welcomed by policy holders as it establishes a higher degree of clarity as to how certain key policy terms and conditions should be interpreted both by insurance companies and by the lower courts. A considerable number of the more esoteric points raised and won by the insurers in the Commercial Court have been overruled. Many contentious points have been simplified by the Supreme Court and put into black and white relief.

It is beyond the scope of this note to consider each and every decision made by the Supreme Court. However, a sample of the decisions made which are helpful to policy holders are set out below.

Whilst the decision is, in most respects, favourable towards policy holders, it does not confirm cover for such policy holders; it merely provides the criteria and parameters by which the existence and extent of such cover will (or should) be determined by insurers and the courts with a view to facilitating early settlement of claims without having to involve the courts.

The true impact of the judgment will depend on the wording of each individual policy and therefore it would be naïve of business owners to sit back and assume that the Supreme Court ruling will result in its insurer paying out without dispute. The judgment dealt with a very small sample of policies and the reality therefore is that several thousands of claims will be based on policies which may not fit neatly into the 21 policies considered. As such a careful analysis will be required to assess whether a particular policy will provide cover to a business.

Decision analysis: Partial closure of businesses

Previously policy terms which were interpreted as requiring the complete closure of a business before cover could be triggered have now been opened up. For example, when looking at the terms of policies which stated that in order to obtain cover there had to be "a complete inability to use the premises for the purposes of the business" or words to this effect, the Supreme Court disagreed with the judgment of the Commercial Court and stated as follows:

"We consider that the requirement is satisfied either if the policyholder is unable to use the premises for a discrete part of its business activities or if it is unable to use a discrete part of its premises for its business activities. In both those situations there is a complete inability of use. In the first situation, there is a complete inability to carry on a discrete business activity. In the second situation, there is a complete inability to use a discrete part of the business premises. To that extent the question is indeed binary.

Whilst all cases will be fact dependent, the FCA's bookshop example would potentially be a case of inability to use the premises for the discrete business activity of selling books to walk-in customers. A department store which had to close all parts of the store except its pharmacy would potentially be a case of inability to use a discrete part of its business premises.

An example which potentially covers both cases would be a golf

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Business interruption insurance - continued

course which is allowed to remain open but with its clubhouse closed so that there is an inability to use a discrete part of the golf club for a discrete but important part of its business, namely the provision of food and drink and the hosting of functions.

We should add that the FCA accepts that there is only cover for that part of the business for which the premises cannot be used. If, for example, a restaurant which also offers a takeaway service decides to close down the whole business it could only claim in relation to the restaurant part of the business. Equally, if there was a travel agent whose business was 50% walk-in customers, 25% internet sales and 25% telephone sales, it could only claim in relation to the loss of walk-in business, even though all parts of the business may have been depressed by the effects of COVID-19 and the governmental measures taken."

This decision alone has opened up cover for many policy holders who carried on trading discretely and lawfully through the pandemic within the provisions of COVID-19 legislation whilst closing the main element or separate elements of their businesses as required by law.

Decision analysis: Commencement of cover

Where a policy refers to cover commencing upon the imposition of restrictions preventing it from trading, the Supreme Court has taken a broader approach than the Commercial Court. It views restrictions as being not the imposition of a legal restriction in the form of a law but also includes governmental recommendations which do not strictly have legal force, including the Prime Minister's recommendations made on 16, 20 and 23 March 2020. This extends the duration of cover for businesses which closed without waiting for the government recommendations to become law.

Decision analysis: The value of claims

Positive decisions in favour of policy holders were also made by the Supreme Court in relation to the effect of trends clauses for the calculation of business losses.

The Supreme Court also overruled the judgment in Orient-Express Hotels Ltd v Assicurazioni Generali SpA [2010] EWHC 1186 (Comm) which all of the insurers had relied upon in the Commercial Court as a final line of defence on the causation of loss.

Decision analysis: The interpretation of policy terms and conditions

The judgment runs to 114 pages and is therefore somewhat shorter than the judgment handed down by the Commercial Court on 15 September 2020. It is also arguably an easier read from a lawyer's perspective as much of the heavy lifting had been done by the Commercial Court over the summer. Although the content of the judgment may still be considered by many policy holders to be relatively impenetrable, the reference point of the judgment is clear when assessing the relevant policy terms and conditions:

"The overriding question is how the words of the contract would be understood by a reasonable person. In the case of an insurance policy of the present kind, sold principally to SMEs, the person to whom the document should be taken to be addressed is not a pedantic lawyer who will subject the entire policy wording to a minute textual analysis… It is an ordinary policyholder who, on entering into the contract, is taken to have read through the policy conscientiously in order to understand what cover they were getting."

The judgment succeeds in this from a lawyer's perspective. However, the Supreme Court could have taken matters a step further and distilled its conclusions concerning all of the policy terms and conditions examined into a user friendly table as an annex to the judgment. This was a missed opportunity.

The impact of the judgment

The purpose of the ruling was set out at paragraph 43 of the lead judgment of Lord Hamblen and Lord Leggatt:

"It is hoped that this determination will facilitate prompt settlement of many of the claims and achieve very considerable savings in the time and cost of resolving individual claims."

Let us hope that this is the case.

However, notwithstanding all of the above positive points, the Supreme Court's judgment will not necessarily act as a universal reference point for deciding the outcome of business interruption insurance claims for the following reasons.

The FCA was selective in the policy wordings that it originally chose to put before the Commercial Court. The policy wordings were all from larger insurers. None of them was a classic property damage only wording. Several large insurers (such as AXA and Aviva) and a very significant number of smaller insurers were not included in the test case. The FCA has estimated that there are in fact over 700 different types of business interruption policies in existence in the UK from around 60 different insurers. It would be impossible for any court to hand down a judgment concerning such a multiplicity of policy types either in good time or indeed at all. However, UK insurers will now have much less room for manoeuvre following on from the Supreme Court judgment in situations where cover should apply.

Despite this, many policy holders will remain disappointed. The suggestion via the mainstream media, a number of legal commentators and indeed law firms, that there will be a general boon for policy holders is mistaken. As we have said in previous posts, many policy terms and conditions were never going to provide cover regardless of the judgments made by either the Commercial Court or the Supreme Court. We have already taken a number of calls from policy holders who hold property damage only policies asking us to re-review their positions. Sadly the Supreme Court judgment provides them with little joy. Other policy holders have benefitted and we will now be in a position to advance their claims further.

However, a successful claim requires success on not only liability but also success on quantum. As the FCA stated itself when the appeal from the Commercial Court was announced, even if the Supreme Court judgment provided clarity in relation to the policy wordings in question, the assessment of damages "provides a huge element of uncertainty that is likely to delay the adjustment and payment of claims even where cover has been accepted or found". Even though insurers have come off badly at the hands of the Supreme Court, they are still likely to raise a second line of "defence" over the actual value of individual claims. The good news is that their scope for mischief in this regard has been reduced.

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Important changes to trial witness evidence in the Business and Property Courts

If you have ever experienced being a witness in a civil case you may have been surprised at how your evidence was prepared and presented to the court.

A witness does not give their account of the relevant facts for the first time orally in court. A written document (known as a witness statement) is usually prepared in advance and is used as the basis of a witness's evidence. Witness statements are a vital as they inform the parties and the court of the evidence a party intends to rely on at trial.

Any witness should be able to say they were suitably involved in the witness statement process and had control over the preparation and content of their statement. A witness statement should set out the witness's own story in the way that they would naturally tell it.

However, unfortunately, time and time again judges have found witness statements to be overly lawyered and bursting with blatant or poorly disguised inappropriate argument. This has led to some serious reforms in the Business and Property Courts. These reforms will apply (subject to limited exceptions) to all trial witness statements for cases in the Business and Property Courts signed on or after 6 April 2021. However, you may see them having an impact on the way witness evidence is produced now.

While there is no change to the basic foundation, that a witness statement must only contain evidence in relation to facts that need to be proved at trial by witness evidence, these reforms will undoubtedly result in a much tighter application of this principle. The new rules (made up of a new Practice Direction to the Court Rules and a Statement of Best Practice) expressly set out that documents should not be quoted in the witness statement and, contrary to existing practice, generally need not be attached to it in the form of an exhibit.

The reforms make it abundantly clear that witness statements must be concise: The days of a witness taking the court through the relevant documents step by step, pointing out their relevance, meaning or significance and expressing an opinion about them, are long gone. While this was never the role of a witness such practice had slowly crept in. With greater monitoring of appropriate practice no doubt we will start to see this content being moved out of witness statements and into other documents which are created to assist the court - such as agreed chronologies. Argument is strictly the domain of the advocate and as a result we may start to see longer written submissions.

Further a key driver for the reforms is the fact that human memory is not a simple mental record of a witnessed event that is fixed at the time of the experience. It fades over time. Memory is fluid and impressionable. Therefore, memory can be vulnerable to being altered by a range of influences (even without the individual being aware of any alteration). For this reason an important new addition to the Court Rules is the requirement for witnesses to expressly state in their witness statement whether his or her recollection of facts has been refreshed by considering documents. Often looking at documents can be a great aid to provide context and helping assist when facts took place many years before. However, as a result of this rule a witness may now find that they are asked by their supporting lawyer not to look at documents to refresh their

mind until they are asked to do so. It is unclear what weight a judge hearing a case will give to this information. For example, will a witness who has looked at many documents be treated as being less reliable than a witness who has not?

A further fundamental change to the Court Rules is that, where there is an important disputed matter of fact which is relevant to the witness, the witness will need to say whether they can remember the events in question and, if so, how well. Crucially human-nature will mean that different people will judge their own level of recollection differently – some will be overconfident of their recall ability, some will be unnecessarily cautious. At this stage it is unclear how this information will be applied by the judge assessing the evidence and we are likely to see some judicial inconsistency.

In the past lawyers may have enthusiastically pre-drafted witness evidence, often using documents as their guide, but the new rules make it clear that an interview is the ideal standard for proper witness statement preparation. The mode of the interview needs to be stated (e.g. by telephone or face-to-face) and if an interview is not possible the process used to gather the evidence must be stated. Leading questions (a type of question that suggests a desired answer or puts words into the mouth, or information into the mind, of a witness) should always be avoided and are not to be used in relation to important matters in dispute (unless seeking clarification or additional detail about prior answers).

Witnesses already need to sign a statement of truth when their statement is in its final form but going forward they will also need to sign an certificate of compliance. This certificate confirms that the witness understands the purpose of the witness statement, that they have identified documents used to refresh their memory, advised the court about how well they have recalled events and that they have only given evidence about matters that they have personal knowledge. The lawyer assisting the witness must also sign their own statement of compliance focusing on compliance with the Court Rules. These formalities are all vital because failure to comply can result in significant penalties being imposed - such as denying a witness the opportunity to give evidence or the making of an adverse costs order.

The new rules do formalise many things which are already done by lawyers and witnesses. However, the changes do require a cultural shift requiring a greater focus on how statement are prepared and being transparent about that process. While these reforms are starting in the Business and Property Courts but, in due course, no doubt they will impact the wider civil justice system.

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Brexit and your intellectual property rights

On 31 December 2020 the Brexit transition period came to an end and this meant EU Trade Marks ("EUTMs") and Registered Community Designs ("RCDs") no longer extend to, and are enforceable in, the UK. But what does this mean for rights holders?

EUTM and RCD registrations and applications

All EUTMs and RCDs registered before 1 January 2021 were automatically cloned into UK national registrations. These then need to be managed and renewed separately.

All EUTM and RCD applications pending before the end of the transition period have not been automatically cloned into UK national trade mark applications and rights holders have nine months within which to re-file the application in the UK and maintain the original filing date of the corresponding EUTM application.

Where an international registration has registered protection designating the EU, this right has been automatically cloned into a UK national registration rather than a UK designation of an international mark. Pending EU designations have the same nine month window as EUTM applications within which to re-file in the UK.

EUTM and RCD renewals

Where an EUTM or RCD was due for renewal on or before 31 December 2020 and the renewal is completed, then the UK clone will be created as a renewed registration and no further action is required.

However, if the renewal date of the EUTM or RCD is after 31 December 2020, then both the EUTM and the UK clone need renewing separately.

EUIPO disputes

Pending EU oppositions have not transferred to the UK so it will be necessary to file an opposition to the UK clone application (if such an application is made).

Pending invalidity and cancellation actions at the EU Intellectual Property Office ("EUIPO") may result in cancellation of the new UK clone only if the grounds for cancellation applied in the UK at the time of filing the action.

While the EUIPO will disregard UK rights, even for pending actions, the UK Intellectual Property Office ("UKIPO") will not disregard EUTMs in pending actions. Hence, any EU right relied on in pending UKIPO opposition proceedings will be valid for those proceedings.

UK litigation

From 1 January 2021, the UK courts have no longer acted as EU courts and are no longer be able to grant EU-wide injunctions or grant other remedies in respect of EUTMs or RCDs, nor can they revoke them or declare them invalid.

Any ongoing UK court proceedings will continue solely on the basis of cloned UK rights arising from EUTMs and RCDs, and remedies will relate solely to those UK rights.

Existing EU-wide injunctions remain in force in the UK but subject to any UK court order to the contrary so these can be challenged. However, future EU-wide injunctions no longer cover the UK.

Additional points

Unregistered design rights – Designs that were protected in the UK as an unregistered Community design ("UCDs") before 1 January 2021 are protected as a UK continuing unregistered design. Such UCDs will continue to be protected in the UK for the remainder of the three year term attached to them. The fact that a corresponding UCD was established before 1 January 2021 through first disclosure in the EU but outside of the UK will not affect the validity of the continuing unregistered design.

Rights of representation – UK representatives can continue to act in all "ongoing proceedings" before the EUIPO.

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Litigating in Europe after Brexit

No doubt Brexit will spark disputes but how will cross-border litigation work post-Brexit where one party is based in the UK but the other party is based in an EU member state or where the dispute has a connection to an EU member state?

Following the end of the implementation period on 31 December 2020 the relationship is governed by the EU-UK Trade and Cooperation Agreement. However, this agreement does not cover cross-border litigation so (subject to transitional provisions) what is the present position?

How is the applicable law decided?

The applicable law means the law that will be applied when determining a dispute. Prior to leaving the EU Rome I governed the choice of law for contractual obligations in EU member states and in the UK. Rome II applied in respect of non-contractual disputes. These Regulations provide that parties' choice of law should generally be respected. With some minor exceptions, Rome I and Rome II are part of the retained EU law. The UK has brought the provisions into its domestic law. Rome I and II must also be applied by EU member state courts (not Denmark) even if the chosen law is not the law of a member state. The rest of the EU should continue to give effect to English governing law clauses because the Rome Regulations require Member States to give effect to the governing law chosen by the contracting parties, irrespective of whether it is the law of a Member State, or whether the parties are from outside the EU.

Which court will hear the dispute?

When the UK was part of the EU Regulation the Brussels and Lugano rules applied to the UK and EU member states in relation to determining the relevant court to hear a dispute. The rules respected the parties' choice of court. Where no such choice had been made specific rules determined which court would have the power to hear the dispute. While some transitional provisions might apply those frameworks no longer apply to the UK going forward. Now, where the parties have agreed to an exclusive choice of court the key rules are found in the Hague Choice of Court Agreements Convention 2005. This convention is limiting because certain types of dispute are excluded and it applies only to situations where there is an exclusive choice of court agreement. Further there is a divergence of views between the UK and the EU as to the application of the Convention for agreements concluded between 2015 (when the UK was a member of this Convention by virtue of its EU membership) and 2021 (when the UK acceded to the Convention in its own right). Where the Convention does not apply national courts will apply their national laws to determine the correct court to hear the dispute.

How are judgments enforced?

Brussels and Lugano also dealt with the reciprocal enforcement of judgments across the EU. Now, subject to transitional rules for proceedings started before 1 January 2021, these rules no longer apply. If the English courts have taken jurisdiction and the Hague Choice of Court Agreements Convention 2005 applies the judgment will be enforceable in the EU under the Hague Convention. If this does not apply the national rules of the country where enforcement is sought will apply.

Local law advice will be required in relation to whether enforcement is possible. Older bilateral treaties might also apply. Prior to joining the EU, the UK had entered into bilateral treaties for the reciprocal recognition and enforcement of judgments in civil matters with a number of European states. So, for example, bilateral treaties were made with France (1934), Germany (1961), Austria (1962), Italy (1964) and the Netherlands (1969). These potentially could be revived to provide a mechanism for recognition and enforcement. Ultimately the process will be slower, less uniform and more expensive.

How are claims served?

Previously the UK benefitted from a Service Regulation dealing with the service of court documents in civil or commercial matters. Now, subject to transitional provisions for cases begun prior to 1 January 2021, this is no longer applicable between the UK and the EU member states.

The Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil and commercial matters has instead become applicable between the UK and the EU member states (all 27 are signatories). Previously this was the convention which regulated the service of documents between the UK and the EFTA member countries (not Liechtenstein) and Denmark. The Convention is applicable to all civil and commercial cases and provides for three basic methods of service: through a central authority, through competent persons and through the mail. Each signatory has the right to state its opposition, if any, to the service methods provided for under the Convention, other than service through the central authority (most of the 27 EU states have rejected service via post). While similar the Hague Convention is potentially less efficient and more expensive than the previous regime.

How is cross-border evidence taken?

Subject to transitional provisions, Council Regulation (EC) No 1206/2001 on cooperation between the courts of the member states in the taking of evidence in civil or commercial matters is no longer applicable between the UK and the EU member states. The Hague Convention of 18 March 1970 on the taking of evidence abroad in civil or commercial matters (evidence convention) will instead become applicable between the UK and those EU member states that are part of the convention. Where the convention is not applicable, letters rogatory will have to be sent to the national courts via diplomatic channels. The process for obtaining evidence under the Hague Evidence Convention is a similar, but more complex, mechanism to that provided for in relation to EU Member States under the previously applicable Regulation.

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