ASSIGNMENT – COMMON SENSE PREVAILS

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In *Dassault Aviation SA ("Dassault") v Mitsui Sumitomo Insurance Co Ltd (2024) EWCA Civ 5*, the Court of Appeal reversed the first instance decision (reported at (2022) EWHC 3287) which allowed Dassault's appeal against the tribunal's determination that it did have jurisdiction to deal with insurer's subrogated claims against Dassault and upheld the tribunal's decision on jurisdiction.

> "A simple prohibition on assignment will only prevent assignment and will not extend to other means of transfer."

The point in issue being whether a prohibition against assignment (save with the consent of the other party) in a sale contract between Dassault and Mitsui Bussan Aerospace Co Ltd ("MBA") caught and prohibited a statutory transfer of the claims of an insured under the sale contract to insurers by operation of Japanese law. Section 25 of the Insurance Act had the effect of automatically transferring the right to bring a subrogated claim to the insurers, once they had paid the insured's claim, who sue in their own name rather than the position under English law where the claim is brought in the name of insured by insurers. MBA never sought consent from Dassault to the transfer, maintaining that it was not needed as the transfer took place by operation of law not by any action of MBA.

The Court of Appeal upheld the majority decision of the tribunal and held that the prohibition against assignment did not prevent a transfer effected by operation of law and therefore the tribunal had jurisdiction to hear insurers' claims.

The issue of whether an assignment is caught by an anti-assignment clause in a contract is quite commonly encountered in other contexts such as the sale of a business or receivables financing.

Non-assignment clauses occur in various forms, the most common usually taking one of three forms: (1) bar assignment of debts and rights absolutely; (2) prohibit assignment save with the consent of the counterparty; or (3) limit assignment to other companies in the same group as the assignor.

In the broader context of assignment of contracts, *Linden Gardens Trust Ltd ("Linden Gardens") v Lenesta Sludge Disposals Ltd (1994) 1 AC 85* remains the rule that where there is a prohibition on assignment without prior consent, then, whilst a purported assignment without consent having been obtained will be effective as between the assignor and assignee, it will not bind the other party whose rights and obligations under the contract remain with the assignor.

Thus, in *Hendry v Chartsearch (1998) CLC 1382,* Millett LJ stated that: "*The making of such an assignment did not put the assignor in breach of the contract, let alone in repudiatory breach: it simply did not affect the other contracting parties' legal position and could be disregarded by them with impunity. …The assignment does not constitute a breach of contract and is without legal effect so far as the other party to the contract is concerned*."

Further, prior consent which is never sought can never be withheld or refused, whether reasonably or otherwise: *"Consent is not withheld if it is not asked for; and if it is not withheld, it cannot be said to be unreasonably withheld*."

The sale of assets of a business or a demerger often involves the transfer of existing contracts. These contracts may have a range of prohibitions against assignment in varying terms, all of which have to be navigated. A more commonly encountered situation is assignment of receivables in the context of receivables financing or discounting.

"The court concurred with the majority arbitrators that the transfer was not made by MBA but by operation of law."

The rule in Linden Gardens has been ameliorated, to a limited extent, by more recent decisions:

1. *Barbados Trust Co Ltd v Bank of Zambia (2007) EWCA Civ 148* established that an express declaration of trust was not caught by a covenant restricting assignments and thus the beneficiary could sue the other party in the beneficiary's name; and
2. in the context of receivables, in *First Abu Dhabi Bank v BP Oil International Ltd ("BP") (2018) EWCA Civ 14*, BP had a standard term in its General Terms and Conditions which prohibited assignment without the consent of the other party. BP sold a quantity of oil to a buyer incorporating those terms and then, without seeking the buyer's consent, sought to dispose of the receivable due to a bank without recourse by way of discounting the receivable and was duly paid by the bank. The buyer defaulted and the bank sued BP for breach of a warranty in the discounting arrangements that BP was not prohibited from disposing of the receivable. Crucially, the disposal of the receivable by assignment provided that, if it was not effective, other means of disposing the receivable were contemplated, such as by declaration of trust, subrogation and sub-participation which were held not to contravene the prohibition on assignment. BP was held not to be in breach of the warranty since the primary means of recovery was a payment by BP of the sum received from the buyer and alternative means of disposal had been provided for if assignment was not possible or was invalid.

This flexibility of disposal reflects that a simple prohibition on assignment will only prevent assignment and will not extend to other means of transfer. In Dassault, the prohibition in the sale contract at Article 15 was widely drawn and provided that: "*this Contract shall not be assigned or transferred in whole or part by any Party to a third party, for any reason whatsoever, without the prior written consent of the other Party and any such assignment, transfer or attempt to assign or transfer any interest or right hereunder shall be null and void without the prior written consent of the other Party*."

The judge concluded that there was no principle that transfers by operation of law fell outside the operation of non-assignment clauses, but rather based on a distinction in the authorities (largely concerned with insolvency) between voluntary and involuntary transfers, the issue was whether the transfer by MBA was voluntary or involuntary. The court therefore focussed on the reason for the assignment rather than the mechanism by which it took place and ruled that the transfer of claims to insurers was not an involuntary act but rather voluntary based on the decision by MBA to insure under a policy governed by Japanese law, making a claim for delay and then getting paid out for its claims.

The Court of Appeal gave short shrift to this line of reasoning based on whether the transfer was voluntary or not. Instead, based on the true construction of Article 15, the focus was placed on the words "by any Party" in the prohibition and not whether the statutory transfer was one made by MBA voluntarily or involuntarily.

The court held that the correct question was not whether the transfer occurred due to actions taken by MBA but whether the transfer was, in fact, made by MBA directly. The court concurred with the majority arbitrators that the transfer was not made by MBA but by operation of law. Both parties accepted that had the insurance been governed by English law, the prohibition would not have prevented insurers suing in MBA's name. The court declined to consider and rule independently of the concession on whether an English law subrogation would have been caught by the prohibition.

This issue though couched as one of assignment of the contract in fact turns on whether insurers could rely on the arbitration agreement in the sale contract providing for ICC arbitration in London. Accordingly, the Court of Appeal held that insurers' direct claim against Dassault could proceed by way of arbitration. That is a more orthodox and common-sense outcome and reflective of an approach based on construction of the anti-assignment prohibition. It is understood that Dassault has sought leave to appeal to the Supreme Court.

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