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Can airline leasing companies use third party debt (garnishee) orders to enforce debts against airlines? It all depends.

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(September 30, 2021) - Ian Mann and Moesha Ramsay-Howell of Harneys discuss cross-jurisdictional issues that prevailing parties should consider when using a third-party debt order to collect payment.

"As many a claimant has learned to his cost; it is one thing to recover a favourable judgment; it may prove quite another to enforce it against an unscrupulous defendant. But an unenforceable judgment is at best valueless, at worst a source of additional loss." (Lord Bingham in *Société Eram Shipping Co Ltd v Cie Internationale de Navigation* [2004] 1 AC 260 (HL) [1] at paragraph 10).

Lord Bingham's word of caution resonates today for airline leasing companies seeking to enforce debts against COVID-hit airlines. Any modern litigator's toolkit of course now includes the third party debt order to enforce judgments, which is a means to allow a judgment creditor to obtain an order for the payment to her of money, which a third party, who is within the jurisdiction, owes to the judgment debtor.

The procedure in England is governed by Part 72 of the Civil Procedure Rules and materially provides: "Upon the application of a judgment creditor, the court may make an order … requiring a third party to pay to the judgment creditor (a) the amount of any debt due or accruing due to the judgment debtor from the third party; or (b) so much of that debt as is sufficient to satisfy the judgment debt and the judgment creditor's costs of the application …"

The process of obtaining a third party debt order is straightforward where the debt is, under English private international law, situated in England; but what if the debt is situated in another jurisdiction as in so many airline leasing cases?

If an English third party debt order is made and complied with by the third party, would the third party be exposed to the risk of double liability, by remaining subject to an enforceable liability to the debtor for the debt in the foreign jurisdiction, or will the law of the foreign jurisdiction regard the English third party debt order as discharging the third party's liability for the debt? If a third party debt order can in principle be made in respect of a foreign debt, in what circumstances can such an order be made, and what are its limitations?

These issues were considered by the English Commercial Court in the recent case of *Ross Leasing Ltd v Nile Air*, and, as third party*, International Air Transport Association* [2021] EWHC 2201.

Facts

Back to top

aircrafts to the defendant. The defendant failed to pay the rent among other payments due under the relevant lease agreements and subsequently proceedings were commenced.

The claimants obtained a summary judgment against the defendant; however, no part of the judgment debt was paid. The claimants accordingly commenced enforcement proceedings in England in respect of the judgment debt.

The third party, International Air Trade Association (*IATA*) owed money to the defendant under various schemes it operated in relation to air travel. It was formed under the laws of Canada, and had a UK establishment and an England and Wales registered office. The debts owed by IATA to the defendant were governed by Canadian law, and subject to a Canadian exclusive jurisdiction clause.

Third party debt orders are a proprietary remedy

CPR 72.1 does not say that the debt to be attached must be situate within the jurisdiction, but it is well-established that this is a requirement. In *Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil Iraq* [2018] AC 690 (SC) Lord Clark held at paragraph 64 that:

It is common ground that all property, whether tangible or intangible, has a situs for legal purposes. It is further common ground that … a third party debt order is a proprietary remedy, which, when complied with, operates to discharge the debt and to release the debtor from his obligation. Since it involves dealing with property, the English courts do not have jurisdiction to make such an order in respect of debts situated outside the jurisdiction, unless by the law applicable in that place an English order would be recognised as discharging the liability of the third party to the judgment debtor.

Governing law of a debt affects its discharge

In *Ellis v M'Henry* (1871) LR 6 CP 228, 234, Bovill CJ held that:

In the first place, there is no doubt that a debt or liability arising in any country may be discharged by the laws of that country, and that such a discharge, if it extinguishes the debt or liability, and does not merely interfere with the remedies or course of procedure to enforce it, will be an effectual answer to the claim, not only in the courts of that country, but in every other country. This is the law of England and is a principle of private international law adopted in other countries. Secondly, as a general proposition, it is also true that the discharge of a debt or liability by the law of a country other than that in which the debt arises, does not relieve the debtor in any other country.

This statement remains good law.

Further, *Dicey, Morris & Collins on The Conflicts of Laws* (15th ed, 2014) Rule 129(1) states that "choses in action generally are situate in the country where they are properly recoverable or can be

Back to top

normally the place where the creditor can enforce payment".

Accordingly, under English private international law, the *prima facie* position is that the debts are situate where the debtor resides. However, that general presumption can be displaced where there is a foreign exclusive jurisdiction clause.

The English approach to exercising powers over those outside the jurisdiction

It is also worth noting a line of authority not directly related to third party debt orders but bearing on the exercise by the English court of powers affecting the conduct of foreigners outside its jurisdiction. *R v Grossman* (1981) 73 Cr App R 302 concerned an application made against Barclays Bank in London to obtain inspection of an account held at a branch of the bank in the Isle of Man.

The Civil Division of the Court of Appeal (Lord Denning MR, Shaw and Oliver LJJ), which determined the application, was later held to have lacked jurisdiction to do so, [2] but no doubt has been thrown on the opinions expressed at pages 308-309 of the judgment.

The Manx branch was to be considered a different entity from the bank's head office in London and any order in respect of the production of the books should be made by the Manx court and not the English court. Otherwise there was a risk of jurisdictional conflict which must be avoided.

R v Grossman was cited and relied on by Hoffmann J (as he then was) in *Mackinnon v Donaldson, Lufkin and Jenrette Securities Corporation* [1986] Ch 482, where a plaintiff in an English action had obtained an order against an American bank, served on its London office, requiring production of books and papers at its New York head office.

Mr Justice Hoffmann (page 493) pointed out the distinction between "personal jurisdiction, ie who can be brought before the court" and "subject matter jurisdiction, ie to what extent the court can claim to regulate the conduct of those persons".

He held (page 493):

In principle and on authority it seems to me that the court should not, save in exceptional circumstances, impose such a requirement upon a foreigner, and, in particular, upon a foreign bank. The principle is that a state should refrain from demanding obedience to its sovereign authority by foreigners in respect of their conduct outside the jurisdiction.

Is the debt automatically discharged by the order of the English court?

In the House of Lord case of *Société Eram,* the third party was the Hong Kong and Shangh [illegible] Corporation Limited, a company incorporated in Hong Kong and carrying on a banking business there

Back to top

The judgment creditor was a Romanian shipping company. The judgment debtors were a company and an individual resident in Hong Kong. One or other of the judgment debtors held an account in Hong Kong with the third party. The debt due from the third party to the judgment debtors on this account was situated in Hong Kong and is governed by the law of Hong Kong.

The judgment creditor could have obtained a third party debt (or garnishee) order in Hong Kong against the third party in respect of the debt due from the third party to the judgment debtors. Under the law and procedure of Hong Kong it was open to the judgment creditor to obtain such an order after applying to the Hong Kong court for registration and enforcement of its judgment or after suing in Hong Kong on the judgment registered in the Queen's Bench Division.

The judgment creditor did not adopt those procedures. Instead, it applied to the High Court in England for an interim third party debt order (then called a garnishee order nisi) in respect of the debt owed by the third party to the judgment debtors in Hong Kong.

The undisputed evidence was that under the law and procedure of Hong Kong a third party debt (or garnishee) order made in England did not have the effect of extinguishing the third party's (or garnishee's) Hong Kong debt to a judgment debtor in Hong Kong. Nor would the Hong Kong court give effect to an English third party debt (or garnishee) order by reciprocal enforcement or action. Having reviewed the authorities, the judge declined to make a final third party debt order.

The House of Lords, overturning the Court of Appeal and agreeing with Mr Justice Tomlinson, held that the third party was at risk of having to pay twice (once in London in compliance with the English order if made, and again in Hong Kong at the suit of the judgment debtors). Further, it was reluctant to exercise jurisdiction over foreigners in relation to their conduct outside the territorial jurisdiction of the court.

As stated by Lord Millet in *Société Eram*, it is unusual for a foreign court to recognise a debt situated within that court's jurisdiction as automatically discharged by an order of the English Court unless the foreign court regards the debt as discharged by an English third party debt order.

Unless the foreign court regards the debt as discharged, there is a "real and substantial risk" that the third party might be called upon to pay the debt twice (ie both in England and in that jurisdiction). If the foreign court regards the debt as discharged, then there is no remaining debt situated in that jurisdiction and accordingly, there is no risk of double payment by the third party.

In *Balengani v Sharifpoor* [2020] EWHC 3888 (QB). Master Cook held that a debt situated in the British Virgin Islands would be regarded by the BVI courts as automatically discharged by the order he made. That was because of two factors.

The first factor was that no party had adduced evidence of BVI law and therefore in the absence of satisfactory evidence of foreign law, the court will apply English law to such a case.

The second factor was that the BVI is a UK Overseas Territory with a legal system closely m[...] that of England and Wales and which would be highly likely to regard a third party debt order made by

Back to top

Is the third party within the jurisdiction? What if the debt is situated in another jurisdiction?

In the present case, IATA was formed under the laws of Canada but had an establishment and registered office in England. As a result, the Judge, High Court Master Davison, was satisfied that IATA was within the jurisdiction. He outlined a "route map" of steps to be followed in order for the court to be satisfied that a final third party debt order should be made:

•Is the third party within the jurisdiction?

•Is there a debt due from the third party to the judgment debtor?

•Is the debt situated in the jurisdiction?

•If the debt is situated outside of the jurisdiction, would the foreign court regard the debt discharged by a third party debt order of the English Court?

•If not, is there a real and substantial risk that the third party might be called upon to pay the debt twice?

•Should the Court exercise its discretion to make a final third party debt order?

The Judge was satisfied that there were debts owed by IATA to the judgment debtor that was situate in Canada, *prima facie* where the debt is recoverable. However, because the debts owed by IATA to the judgment debtor are governed by Canadian law, and are subject to a Canadian exclusive jurisdiction clause, the presumption was displaced.

The Judge was satisfied that Canadian law would not regard the debt owed by IATA to the defendant as discharged by an English third party debt order, and accordingly there was a real and substantial risk that IATA could be called upon to pay twice if a third party debt order was made final. Accordingly, he declined to make the order sought by the claimants.

In what circumstances can third party debt orders extend to foreign debts?

The conclusion to be drawn from *Ross Leasing* is that for an English third party debt order to be made, the debt owed by the third party to that judgment debtor must either be situated within the jurisdiction or situated in a foreign jurisdiction if the law of that jurisdiction would regard the debt as discharged by the third party debt order.

The decision in *Ross Leasing* comes as a welcome clarification for English and other common law jurisdictions with similar third party debt regimes of the long range, in certain circumstan third party debt order weapon in the court's armoury to assist judgment creditors. It will be welcome,

Back to top

For future litigants, a solution to the conundrum that the third party may have to pay twice might simply be an order against the judgment debtor enjoining it from pressing for payment from the third party on a worldwide basis, as a form of anti-suit injunction. Another argument, although unsuccessful in *Société Eram,* might be that if the foreign jurisdiction has a restitutionary remedy then any "double payment" is probably avoidable. Food for thought.

Notes

1 https://bit.ly/3F4CKd5

2 *Bonalumi v Secretary of State for the Home Department* [1985] QB 675

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