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MAREX FINANCIAL LIMITED V GARCIA, AND THE ECONOMIC TORTS

By Sam Cheesbrough, Associate, Nicholas Woolf & Co

The case of *Marex Financial Ltd v Garcia [2017] EWHC 918 (Comm)* arose following a judgment made in the Marex's favour against two companies of which Mr Sevilleja was a director. Rather than satisfy the judgment debt, Mr Sevilleja allegedly transferred some US$9.5 million held in his company's name out of the companies' bank accounts and into his own. The result was that, when Marex applied to freeze the companies' bank accounts, the companies disclosed assets of only US$4,392.48.

Marex then issued a claim against Mr Sevilleja for "*inducing or procuring the violation of Marex's rights under the judgment*" and/or for "*intentionally causing loss to Marex by unlawful means*". Mr Sevilleja made an application challenging the jurisdiction of the Court, and also alleged that there was no claim in law.

These issues were determined at an interim stage, with the Court dismissing Mr Sevilleja's application. Amongst the reasons that the Judge gave for this decision was that Marex had a better argument for the existence and application of the aforementioned torts.

Discussion

Whilst the Judge did not determine Marex's claim, it is nevertheless important to keep an eye on this case, should it progress to a final hearing. Should the Court ultimately decide that Mr Sevilleja has breached one or other of the torts, the scope of such torts will have been extended. In that regard:

1. The alleged tort of "*inducing or procuring the violation of Marex's rights under the judgment*" does not, at present, exist. The tort set out in the first leg of *Lumley v Gye (1853) 2E&B 216* was the tort of inducing or procuring a breach of contract. Whilst the Judge acknowledges that a breach of contract is a different actionable wrong to a judgment debt, he nevertheless suggests that it is at least arguable that a party may get over the line with this tort if the initial cause of action was for a breach of contract. There is, however, no reason in principle why (if that extension is granted) a distinction ought to be made

between different judgment debts, solely because they may have arisen out of different causes of action.

2. The definition of "*unlawful means*" was considered in detail by the House of Lords in *OBG v Allan [2007] UKHL 21*. In addition to the two paragraphs set out at [31] of the present judgment, Lord Hoffman also said, at [135] of the *OBG* judgment, that "*…the way to keep the tort within reasonable bounds is not to extend the concept of unlawful means beyond what was contemplated in Allen v Flood [1898] AC 1…*" What was contemplated in *Allen v Flood* is set out at pages 97-98 as "*means which in themselves are in the nature of civil wrongs*." The alleged "unlawful means" in the present case amount to various breaches of fiduciary duty that were owed by Mr Sevilleja to his companies. That these wrongs are not "civil wrongs" is acknowledged by Lord Nicholls at [150] of the *OBG* judgment. The present judgment therefore appears to envisage a conception of "unlawful means" that has more in common with the minority, rather than majority, view in *OBG*.

Such an approach is not without difficulty. The approach of the Court when considering the extension of torts has generally been to extend a tort incrementally, and only if no other remedy is available.

In this instance, however, there are already remedies available to the injured party. If a company is unable to pay its debts (including judgment debts), then the company is insolvent. If the company is formally made insolvent, liquidators would be appointed, whose job it is to scrutinise the financial dealings of the company. If there has been a breach of fiduciary duty by a director, then it is the prerogative of the liquidator to bring a claim to recover the monies from the director. Once the money has been recovered, the debts will then be paid in accordance with English Law.

Whilst this is a roundabout way of obtaining payment by the judgment creditor, they can nevertheless exercise a degree of control by positioning themselves as the petitioning creditor.

There is, however, a related difficulty with extending these torts into pastures new. If a judgment creditor is given a direct cause of action against the director of a company, and obtains a judgment against that director, then such a creditor is effectively being placed in a preferential position in comparison to other creditors of the company. Whilst it may be possible for other creditors to be joined to any such action, the following ought to be borne in mind:

1. Stripping the company of assets does not necessarily induce a breach of contract. If, for example, a company has not paid a contractual debt by the due date, that in itself is a breach of contract. A creditor in this position may face an uphill struggle to show that the director induced a breach of contract, when the breach has already taken place.

2. Intention is a limiting factor to the unlawful means tort, and becomes increasingly important as the definition of "unlawful means" is expanded. If a director can show that he did not turn his mind to the consequences of his actions for a particular creditor, then he cannot be said to have intended to cause such creditor loss.

The result is that a judgment debtor may gain a further weapon in his arsenal which other creditors are unable to call upon. Such creditors may find themselves in a position where their debts remain unpaid, not only because a director has stripped the assets from the company, but also because those assets have then been paid to a judgment creditor. It is hoped that, should this matter reach a final trial, the Court will consider this (and other) potential difficulties in the extension of the economic torts.

15th August 2017