



IMPROVING LIQUIDITY BY SELLING DEBTS – A LOOK AT ANTI- ASSIGNMENT PROVISIONS IN RECEIVABLES FINANCING.

Debts and contractual rights are generally freely assignable, unless prohibited by statute or, more often, by contract. This article will consider non-assignment clauses in the context of receivables financing by examining recent developments in this area of English law, which flag important issues for all parties to bear in mind.

“A non-assignment provision that only prohibits the right to assign will do only just that. It will not prevent a party from disposing of its rights by other means under the underlying contract.”

As the current crisis creates strains on cash-flow and liquidity, businesses are increasingly looking at ways to monetise their assets, including by selling or “discounting” accounts receivable on a non-recourse basis. But what happens (as is often the case) where the underlying sale contract contains a non-assignment clause? Whilst this hurdle can often be simply overcome by obtaining the consent of the non-assigning party, this may be commercially undesirable or simply be overlooked. What are the consequences of failing to get consent? The English Court of Appeal case of *First Abu Dhabi Bank PJSC v BP Oil International Limited*¹ demonstrates that anti-assignment provisions are often carefully negotiated at the time of conclusion of a contract and while some can prove fatal, they may not be as restrictive as they look. This case serves as a cautionary tale to financiers, suppliers and purchasers alike.

Facts

In *First Abu Dhabi Bank*, the English Court of Appeal considered whether BP Oil International Limited (BP) had breached a warranty it had given to National Bank of Abu Dhabi PJSC (later renamed First Abu Dhabi Bank PJSC) (the Bank) in a receivables

purchase agreement that it was not contractually prohibited from disposing of the receivable, despite there being a non-assignment provision in the underlying contract between BP and its debtor, the Moroccan refinery SAMIR².

The underlying contract between BP and SAMIR (the SAMIR Agreement) incorporated the following non-assignment provision from BP’s General Terms and Conditions:

“Neither of the parties to the Agreement shall without the previous consent in writing of the other party (which shall not be unreasonably withheld or delayed) assign the Agreement or any rights or obligations hereunder... Any assignment not made in accordance with the terms of this Section shall be void.”

The Bank and BP later entered into a receivables purchase agreement (the Purchase Letter), under which the Bank agreed to purchase 95% of BP’s receivable under the SAMIR Agreement (the Receivable) at a discount and on a non-recourse basis. As the purchase price for the Receivable, the Bank paid approximately USD 69 million to BP.

BP expressly warranted as follows in the Purchase Letter:

“BPOI is not prohibited by any security, loan or other agreement, to which it is a party, from disposing of the Receivable evidenced by the Invoice as contemplated herein and such sale does not conflict with any agreement binding on [BPOI]”

BP did not seek or obtain SAMIR’s consent to assign its rights, as required under the assignment provision in the SAMIR Agreement.

A few months after the receivables purchase, SAMIR’s financial difficulties worsened and it filed for insolvency protection in Morocco. The Bank’s recovery options against SAMIR looking very bleak, the Bank sought to claim that BP had breached a warranty in the Purchase Agreement and that this constituted a “recourse event” entitling the Bank to full reimbursement of the amounts paid, plus interest. The Bank issued proceedings against BP in the English courts, claiming that under the non-assignment provision of the SAMIR Agreement, BP was “prohibited” from “disposing” of the Receivable, and that BP was therefore in breach of the assignment warranty it had given in the Purchase Letter.

The Bank’s claim succeeded at first instance in the High Court and BP appealed.

1 *First Abu Dhabi Bank PJSC (Formerly National Bank of Abu Dhabi PJSC) v BP Oil International Limited* [2018] EWCA Civ 14

2 *Société Anonyme Marocaine de L’Industrie de Raffinage*

What did the assignment clause prohibit?

The Court of Appeal agreed that BP as creditor under the SAMIR Agreement was contractually prohibited from effecting a legal or an equitable assignment of the Receivable without SAMIR's prior consent and that such assignment was void as a matter of English law, as SAMIR's consent had not been obtained. However, crucially, the Court held that the non-assignment provision could not be construed as restricting BP from agreeing, as it had done, in the Purchase Letter:

- to pay the Bank amounts received from SAMIR under the SAMIR Agreement;
- to hold such sums as trustee on behalf of the Bank;
- to subrogate the Bank its rights, title, interest and claims against SAMIR under the invoice due for payment; or
- to grant the Bank a funded sub-participation in respect of the rights to receive payment of the applicable part of the Receivable.

Was BP in breach of the warranty in the Purchase Letter?

Overtaking the High Court decision, the Court of Appeal held that BP was not prohibited by any security, loan or other agreement, to which it was a party, from "disposing of the Receivable evidenced by the Invoice as contemplated herein", and therefore was not in breach of the warranty:

- the primary means of recovery by the Bank was the payment by BP to the Bank of amounts received from SAMIR, not a transfer of rights to the debt, with a trust created over the sums in the meantime;
- BP's rights, title, interest and claims against SAMIR were only assigned to the Bank to the extent that sums were not received from SAMIR and/or were not paid over by BP;
- BP and the Bank had expressly envisaged a possible invalidity of the proposed assignment, in which event the alternative means of a disposal (subrogation and sub-participation) had been provided

for, and neither of these alternative means could under English law be construed as an assignment.

Key takeaways

Whilst *First Abu Dhabi Bank* did turn on its facts, it highlights:

- A non-assignment provision that only prohibits the right to assign will do only just that. It will not prevent a party from disposing of its rights by other means under the underlying contract.
- If a debtor wishes to extend a non-assignment provision to also prohibit declarations of trust, sub-participations or other alternative forms of transfer, this should be stated clearly in the contract. Of course, the reverse is desirable for an assignor or purchaser/bank under a receivables financing.
- Construction is key and the courts will consider all relevant terms when interpreting a contract. The wording in the representations and warranties should be as specific as possible to ensure their scope adequately reflects the parties' intentions.

Business Contract Terms (Assignment of Receivables) Regulations 2018

Important UK legislation in this area was passed in 2018 to stimulate receivables finance involving businesses active in the UK. The regulations nullify non-assignment provisions which prohibit or impose a condition, or other restriction, on the assignment of a receivable arising under a contract. The regulations apply to all business-to-business contracts for the supply of goods, services or intangible assets that are entered into on or after 31 December 2018. However, the regulations do not apply to all companies and include a carve-out for any contract where none of the parties entered into it in the course of carrying on a business in the UK, even where the contract is governed by English law. If these regulations would apply to your contract, and this is not the intention, they can be expressly excluded in the contract.

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