VOISIN LAW

THE ROYAL COURT GIVES FURTHER GUIDANCE ON SECURITY ENFORCEMENT | 1

The recent case of Albion Energy Limited v Energy Investments Global Limited and Heritage Oil Limited [2020] JRC 147A clearly demonstrates that in cases where there is non compliance or a lack of co-operation by the grantor of a security interest or the issuer of the shares over which a security interest has been granted, the Royal Court is willing to exercise its wide powers under the Security Interests (Jersey) Law 2012 (the "**2012 Law**") in order to assist a secured party in exercising its power of enforcement.

This case also provides some general guidance on security interests created under the 2012 Law and helpful clarification on the issue of mergers in judgments with the Royal Court holding that a creditor is not precluded by a judgment from enforcing any collateral security which it may have taken.

Voisin Law successful acted for Albion Energy Limited in relation to these Court proceedings.

Background to the Case

The background to the case is briefly as follows:

1. In January 2018, Albion Energy Limited ("**Albion**") sold its 20% interest in Heritage Oil Limited ("**Heritage**") to Energy Investments Global Limited ("**EIGL**") on the terms of a share purchase agreement (the "**SPA**") with the consideration being payable in three instalments.
2. The first two instalments under the SPA were paid by EIGL. However, EIGL failed to pay the final instalment, asserting that there was a dispute between the parties. After some negotiation, it was agreed that a portion of the final instalment due under the SPA would be paid to Albion with the outstanding balance to be held in escrow pending resolution of the dispute between the parties.
3. Albion subsequently brought proceedings in the High Court against EIGL and was granted its application for summary judgment on its claim for the balance of the purchase consideration. An application by EIGL to appeal the decision was refused and the High Court's decision was therefore final. However, EIGL still failed to pay any part of the outstanding balance or release the escrow amount.
4. The purchase consideration under the SPA was secured by way of a Jersey law security interest agreement (the "**SIA**") over the sale shares in Heritage, with a failure to pay the outstanding balance under the SPA constituting an event of default under the SIA.
5. The security interest was created by Albion taking possession of three share certificates relating to the sale shares and undated and signed stock transfer forms relating to each certificate. Importantly, pursuant to the terms of the SIA, the parties had agreed not to perfect the security interest by registration on the Security Interest Register (for reasons of confidentiality) so that perfection under the 2012 Law was reliant entirely on possession and control.
6. Unfortunately, shortly after completion of the SPA, the original share certificates and associated stock transfer forms, possession of which constituted the security, were returned to EIGL's legal counsel in error. The significance of this is that perfection by possession or control under the 2012 Law continues only whilst the possession or control is maintained.

Why was the Court Application made?

1. Despite a number of requests, EIGL's legal counsel refused to return the share certificates and stock transfer forms in order that the security could be perfected. Upon the aforementioned summary

judgment being obtained, Albion sought to enforce its security interest and served a notice of enforcement pursuant to the terms of the SIA. In addition, Albion delivered a duly executed stock transfer form under a power to attorney to the registered office of Heritage, instructing that Albion's name be entered into the register of members of Heritage.

2. The directors of Heritage refused to comply with the request to update the register of members. This, combined with the failure of EIGL to return the original share certificates in accordance with the terms of the SIA, placed Albion in a very vulnerable position as it had lost perfection and led Albion to seek the assistance of the Royal Court pursuant to Article 52 of the 2012 Law.
3. The Court was therefore requested to consider granting, amongst other orders:
    1. an order for delivery of the share certificate which had been sent in error to EIGL back to Albion, as secured party; and
    2. an order that EIGL shall transfer the shares which formed part of the security into the name of Albion

What were the key points made by the Court?

1. **A security interest may describe collateral in wide terms**
   At the hearing, arguments were advanced for EIGL and Heritage that the SIA failed, as the collateral had not been sufficiently identified for the security interest to attach to it pursuant to Article 18 of the 2012 Law and that in particular, the SIA did not contain or recite any method or way in which the secured shares could be identified from the other shares in Heritage. Importantly, the Court held that a security interest may describe collateral in wide terms, with a description being sufficient if it is a description by item or type. In this case, as there was only one class of shares and numbered share certificates had been delivered up as part of the security package, the Court held that the collateral had been clearly identified by item and type and no difficulty arose in that number of shares being registered in the name of Albion. This is entirely in keeping with the view that shares of the same class are fungible and to suggest that security can only be granted over numbered shares would not be in line with international practice.
2. **Is a party precluded by a judgment from enforcing any collateral security it may have taken?**
   The Royal Court was also required to consider the issue of merger. It was argued that by Albion having elected to pursue a judgment in England, rather than the security in Jersey, the cause of action (being the unpaid monies due under the SPA) had been extinguished by the summary judgment in England, with this resulting in the termination of the secured liabilities under the SIA, and thereby extinguishing the SIA by operation of law. Importantly, from a lender's perspective, the Court held that this was a "startling proposition" as in the event that this was held to be correct, namely that by the doctrine of merger a judgment extinguishes the underlying contract and security provided under it, it would leave a lender with only an unsecured judgment to enforce. This would further mean that a secured party generally would have to enforce their security in full before proceeding to take judgment, because the taking of that judgment would extinguish the security in its entirety. The Court held that a secured party is not precluded by a judgment from enforcing any collateral security that it may have taken and that the doctrine of merger does not prevent Albion as secured party from seeking to enforce its security over the shares in Heritage.
3. **Is there a requirement for the secured party to act in a commercially reasonable manner**

in deciding to enforce its security?
The Royal Court was also required to consider whether the enforcement provisions under Part 7 of the 2012 Law required Albion as secured party to act in a "commercially reasonable manner" in deciding to enforce. In what will form useful guidance for secured parties going forward, the Royal Court held that the requirement for Albion to act in a commercially reasonable manner arises under Article 46 of the 2012 Law in the exercise of its duty to obtain a fair valuation or fair price for the collateral. That requirement does not apply to a secured party's decision to enforce the security it holds and it is not for the Court to decide whether it is commercially reasonable for the secured party to decide to do so.

4. **Is it "reasonably necessary" for the court to exercise its powers under Article 52 of the 2012 Law?**
The Court also considered the meaning of "reasonably necessary" as used in Article 52 of the 2012 Law, which states, inter alia that the Royal Court may, on the application by the secured party when an event of default occurs in relation to a security agreement, make any of the orders set out in Article 52, if it appears to the Court "reasonably necessary" to do so in order to make it possible or practicable for the secured party to exercise its rights. In this case, it was held that the Court's assistance was reasonably necessary for a number of reasons, including:

    1. The fact that Albion had lost possession of its share certificates and stock transfer forms which formed part of its security, with such lost possession being acknowledged by all parties as having been made in error; and
    2. Heritage, as the issuer of the secured shares, declining to act on the stock transfer form duly executed under a power of attorney, notwithstanding the fact that secured party friendly amendments had been made to its articles of association which removed the director's discretion to refuse to such a transfer.

Conclusion

Unfortunately, in the current climate, enforcements under security interest agreements are becoming more prevalent and when taking pre-enforcement and enforcement steps, a secured party may occasionally be faced with a lack of co-operation by the grantor or the board of directors of the issuer of the shares subject to the security interest.

This case provides helpful reassurance to secured parties (and builds upon previous cases such as In the matter of the Q Settlement [2019] JRC086) in confirming that the Royal Court is willing to exercise its wide powers under Article 52 of the 2012 Law to come to the aid of a secured party in cases where it is reasonably necessary to do so.

Some comfort is also provided to secured parties in relation to the matter of lost share certificates, as in this case, notwithstanding the accidental return of the share certificates to the grantor, the Court had no hesitation in ordering that the secured party be registered as shareholder of the shares in order to obtain perfection under the 2012 Law.

This note is intended to provide a brief rather than a comprehensive guide to the subject under

consideration. It does not purport to give legal or financial advice that may be acted or relied upon. Specific professional advice should always be taken in respect of any individual matter