

# THE LAW REPORTS 1998

*Queen's Bench Division*

*and on Appeal therefrom in the*

*Court of Appeal*

*and decisions in the*

*Court of Appeal Criminal Division*

*and*

*Employment Appeal Tribunal*

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*London*

THE INCORPORATED COUNCIL OF LAW REPORTING  
FOR ENGLAND AND WALES

section 14(1). In the circumstances I am satisfied that the panel is obliged to assess the annual market rent without reference to the £25,000 limit. If the resulting determination is in excess of that figure, the assured tenancy will be at an end. Accordingly, the applicant is entitled to the relief sought and I shall hear counsel on the precise terms in which the order should be drawn in the light of my findings and on any questions relating to costs.

*Application granted with costs.  
Leave to appeal refused.*

*Solicitors: Lee & Pembertons; Treasury Solicitor.*

[Reported by DURAND MALET ESQ., Barrister]

# SOINCO S.A.C.I. AND ANOTHER v. NOVOKUZNETSK ALUMINIUM PLANT AND OTHERS

1997 Jan. 22, 23; 29

Colman J.

*Execution—Equitable execution—Appointment of receiver—Judgment debtor due to receive payments from third party under existing contract—Payments to be made at indeterminate future date and not due or accruing due—Whether jurisdiction to appoint receiver of debt falling due in future*

The first defendants, who were judgment debtors of the plaintiffs, were owed or would in the future be owed money by the fifth defendants under a supply contract. A garnishee order nisi obtained by the plaintiffs and binding upon the fifth defendants was insufficient relief for the plaintiffs, since it could only apply to debts due or accruing due to them from the first defendants at the time when the order nisi was made and not to amounts becoming due at an indeterminate future time. The plaintiffs accordingly applied for the appointment of a receiver by way of equitable execution to receive payments due and which might in future become due from the fifth defendants to the first defendants.

On the application:—

*Held*, allowing the application and appointing a receiver, that, since the court had jurisdiction to grant an injunction to preserve for execution assets acquired after judgment, there was no reason why it could not appoint a receiver to preserve such assets, and to effect attachment of those assets for the benefit of the judgment creditor; that there was also jurisdiction to appoint a receiver by way of equitable execution to receive future debts as well as debts

Q.B.

## Soinco S.A.C.I. v. Novokuznetsk Aluminium

A due or accruing due at the date of the order; and that, in the circumstances, it was just and convenient to appoint a receiver in respect of all sums which were due or would in the future fall due for payment by the fifth defendants to the first defendants under the supply contract (post, pp. 420G–H, 422E–H, 423D–E).

B *Holmes v. Millage* [1893] 1 Q.B. 551, C.A.; *Harris v. Beauchamp Bros.* [1894] 1 Q.B. 801, C.A.; *Morgan v. Hart* [1914] 2 K.B. 183, C.A. and *Bourne v. Colodense Ltd.* [1985] I.C.R. 291, C.A. considered.

The following cases are referred to in the judgment:

- Bourne v. Colodense Ltd.* [1985] I.C.R. 291, C.A.  
*Bullus v. Bullus* (1910) 102 L.T. 399  
*Deutsche Schachtbau- und Tiefbohrgesellschaft m.b.H. v. R'As al-Khaimah National Oil Co.* [1990] 1 A.C. 295; [1987] 3 W.L.R. 1023; [1987] 2 All E.R. 769, C.A.; [1990] 1 A.C. 295; [1988] 3 W.L.R. 230; [1988] 2 All E.R. 833, H.L.(E.)  
*Edwards & Co. v. Picard* [1909] 2 K.B. 903, C.A.  
*Goldschmidt v. Oberrheinische Metallwerke* [1906] 1 K.B. 373, C.A.  
*Harris v. Beauchamp Bros.* [1894] 1 Q.B. 801, C.A.  
*Holmes v. Millage* [1893] 1 Q.B. 551, C.A.  
*Israelson v. Dawson (Port of Manchester Insurance Co. Ltd., Garnishees)* [1933] 1 K.B. 301, C.A.  
*Johnson v. Diamond* (1855) 24 L.J.Ex. 217  
*Maclaine Watson & Co. Ltd. v. International Tin Council* [1988] Ch. 1; [1987] 3 W.L.R. 508; [1987] 3 All E.R. 787, C.A.  
*Morgan v. Hart* [1914] 2 K.B. 183, C.A.  
*Orwell Steel (Erection and Fabrication) Ltd. v. Asphalt and Tarmac (U.K.) Ltd.* [1984] 1 W.L.R. 1097; [1985] 3 All E.R. 747  
*Parker v. Camden London Borough Council* [1986] Ch. 162; [1985] 3 W.L.R. 47; [1985] 2 All E.R. 141, C.A.  
*Stewart Chartering Ltd. v. C. & O. Managements S.A. (Practice Note)* [1980] 1 W.L.R. 460; [1980] 1 All E.R. 718  
*T.D.K. Tape Distributor (U.K.) Ltd. v. Videochoice Ltd.* [1986] 1 W.L.R. 141; [1985] 3 All E.R. 345  
*Tapp v. Jones* (1875) L.R. 10 Q.B. 591, D.C.  
*Webb v. Stenton* (1883) 11 Q.B.D. 518, C.A.

The following additional cases, supplied by courtesy of counsel, were cited in argument:

- Adams v. Cape Industries Plc.* [1990] Ch. 433; [1990] 2 W.L.R. 657; [1991] 1 All E.R. 929, C.A.  
*Co-operative Insurance Society Ltd. v. Argyll Stores (Holdings) Ltd.* [1996] Ch. 286; [1996] 3 W.L.R. 27; [1996] 3 All E.R. 934, C.A.  
*Derby & Co. Ltd. v. Weldon (Nos. 3 and 4)* [1990] Ch. 65; [1989] 2 W.L.R. 412; [1989] 1 All E.R. 1002, C.A.

## SUMMONS

H On 1 October 1996 the plaintiffs, Soinco S.A.C.I. (a company incorporated under the laws of Argentina) and Eural Kft. (a company incorporated under the laws of Hungary), issued a re-amended summons against the defendants, Novokuznetsk Aluminium Plant ("N.K.A.P."), of Moscow, Base Metal Trading Ltd., Base Metal Trading (U.K.) Ltd., Ross Metal U.K. Ltd. and Base Metal Trading Ltd. (a company registered in

Guernsey) ("the Guernsey company"), to determine whether apparent assets of the second to fifth defendants were in fact assets of the first defendants and seeking a *Mareva* order against the second to fifth defendants. On 30 September Rix J. had granted the plaintiffs an order for leave to enforce outstanding sums due from an arbitration award made against N.K.A.P. as a judgment debt, a *Mareva* order against N.K.A.P. and an order for the disclosure of the assets of the first to fourth defendants. On 1 November 1996 Rix J. varied that order by extending the *Mareva* injunction to the Guernsey company.

On 20 December 1996 Langley J. made a garnishee order nisi in favour of the plaintiffs and against the Guernsey company in respect of debts due from N.K.A.P. and varied the order of Rix J. by restraining N.K.A.P. from receiving payment of debts that fell due or would fall due from the Guernsey company and requiring the latter to pay such debts into a separate bank account. On 8 January 1997 on an ex parte application by the defendants Butterfield J. discharged so much of Langley J.'s order as restrained N.K.A.P. from receiving payment of debts due or which would become due from the Guernsey company and required the payment of debts into a separate account. The plaintiffs applied for the appointment of a receiver by way of equitable execution. An appeal from the order of Butterfield J. was adjourned by the Court of Appeal, which left the order of Langley J. substantially in place pending the outcome of the application for the appointment of a receiver.

The case was heard in chambers and is reported with the permission of Colman J.

The facts are stated in the judgment.

*Stanley Burnton Q.C.* and *Richard Perkoff* for the plaintiffs.

*Peter Sheridan Q.C.* and *Max Mallin* for the defendants.

*Cur. adv. vult.*

29 January. COLMAN J. handed down the following judgment.

### *Introduction*

This is an application for the appointment of a receiver by way of equitable execution to receive payments due and which may in future become due from the fifth defendants to the first defendants under a contract dated 25 September 1995. I refer to this as "the supply contract." On 31 May 1996 an arbitration award was made in favour of the plaintiffs against the first defendants. Part of the amount of the award of some U.S.\$22.5m. has been satisfied by way of set-off, leaving a balance due, including interest, of approximately U.S.\$10.6m. On 30 September 1996 Rix J. made an order giving the plaintiffs leave to enforce the award as a judgment. He also made an order in the form of a *Mareva* injunction up to the amount of U.S.\$10.5m. against the first defendants and he made an order against the first, second, third and fourth defendants for disclosure of assets within the jurisdiction.

On 1 October 1996 the plaintiffs issued an originating summons against the first to the fourth defendants seeking determination of the issue

- A whether the assets apparently of the second and third defendants were in fact assets of the first defendants and seeking also *Mareva* relief. On 7 October 1996 Rix J. varied the *Mareva* injunction which he had already granted by extending it to an account with Moscow Narodny Bank London branch of which the holder was then unidentified. On 1 November 1996 Rix J. extended the *Mareva* injunction to include the fifth defendant, then joined in the action, in view of the fact that the fifth defendant was the holder of the account at Moscow Narodny Bank. I refer to the fifth defendant as "the Guernsey company."
- B

- On 20 December 1996 Langley J. varied the order of Rix J. by restraining the first defendants ("N.K.A.P.") from receiving payment of debts due from the Guernsey company and requiring that company to pay such debts into a separate bank account. The order was in unusual form inasmuch as it set up a bank account for the purpose of receiving payments which fell due or would in future fall due from the Guernsey company to N.K.A.P. Quite clearly the purpose of the order of Langley J. was to provide a fund which would be preserved for the purposes of execution by the plaintiffs as judgment creditors. Langley J. also made a garnishee order nisi against the Guernsey company in respect of debts due from it to the N.K.A.P. On 6 January 1997 judgment was entered by the
- C
- D plaintiffs against the N.K.A.P. for U.S.\$10,590,278. On 8 January 1997 upon an ex parte application on notice Butterfield J. discharged that part of the order of Langley J. which had restrained the N.K.A.P. from receiving payment of debts due or which would become due from the Guernsey company and requiring that company to pay such present and future debts into a separate bank account. I have not seen a note of the judgment of Butterfield J. but I have been told by counsel that he considered that there was no jurisdiction to make such an order having regard to the fact that it covered debts not currently due and further that it would involve undue interference in the conduct of the business of the first defendant.
- E

- The plaintiffs have appealed against the order of Butterfield J. and the matter has been before the Court of Appeal. Having regard to the fact that there was pending before me an application for the appointment of a receiver by way of equitable execution, the Court of Appeal adjourned consideration of the appeal against the order of Butterfield J. pending my determination of the issue the subject of this judgment. It also left the order of Langley J. substantially in place pending my determination of the application for appointment of a receiver. There has been put before me a very substantial body of evidence relating to the conduct of the defendants and to the control which is exercised over the defendants by the Zhivilo brothers. Due to the considerable urgency of this matter, I have omitted from this judgment detailed consideration of that very substantial body of evidence. It is right to say that practically the whole of the hearing before me was taken up by argument on the issue whether the court had jurisdiction to appoint a receiver by way of equitable execution on the facts of this case and, if so, whether that jurisdiction ought to be exercised.
- F
- G In order to provide the parties with my conclusion on this matter in a form which they can, if necessary, test further, I shall set out in this judgment the reasons which have led me to conclude that I do indeed have jurisdiction to accede to the defendants' application and in very brief outline those circumstances which have led me to exercise that jurisdiction.
- H

Before dealing with the specific submissions made by counsel and my conclusions relating to them I should say that I have assumed for the purposes of this application that it will ultimately be established that the assets of the Guernsey company are not the assets of the N.K.A.P. and that, accordingly, a fund which has been set up by the Guernsey company in a separate account within the jurisdiction for the purpose of satisfying the plaintiffs' judgment will not be available for that purpose. Title to the Guernsey company's assets and, in particular, to that fund remains an issue between the parties at this stage to be determined on a future occasion. Further, there is a pending application for discharge of the garnishee order nisi and it has accordingly therefore been necessary to proceed for present purposes on the basis that the existing garnishee order may be discharged.

### *Submissions*

The plaintiffs submit that in the special circumstances of this case it is just and convenient to appoint a receiver by way of equitable execution. The function of such a receiver would be to require the Guernsey company to pay over to him all sums that become due for payment to N.K.A.P. under the supply contract as and when they fall due. The receiver would then accumulate the payments up to the amount of the judgment debt and interest and then pay over that amount to the plaintiffs in discharge of the judgment debt. The plaintiffs' application is based on two fundamental impediments to their ability to satisfy the debt by means of the process of a garnishee order or orders. First, it is probable that further sums will become due from the Guernsey company to N.K.A.P. under the supply contract but the plaintiffs have no information as to what sums are or will become due or accruing due under that contract or when they will become due or accruing due. Secondly, they can only proceed by way of garnishee proceedings in respect of debts "due or accruing due" to the judgment debtor from the garnishee at the time when the order nisi is made: see R.S.C., Ord. 49, r. 1(1). Because of the plaintiffs' inability to ascertain when the amounts will fall due or accruing due under the supply contract, they cannot effectively use garnishee proceedings. They may either strike too soon, as the defendants allege in respect of the pending garnishee proceedings, or the Guernsey company may have paid N.K.A.P. before subsequent garnishee orders nisi have been obtained. Yet further, the plaintiffs submit that there is some evidence to suggest that the Guernsey company and N.K.A.P. are endeavouring to "smother" the debts by means of the Guernsey company making advance payments to N.K.A.P. in anticipation of debts which are not yet due or accruing due, so as to provide the Guernsey company with a pre-existing credit which can be set off against such debts to N.K.A.P. as may become due or accruing due before a garnishee order nisi is made: see *Tapp v. Jones* (1875) L.R. 10 Q.B. 591, 593.

Further, if it is assumed for present purposes that the regime prescribed by Langley J.'s order, whereby the Guernsey company was obliged to pay all debts due to N.K.A.P. into a separate account, stands discharged by the order of Butterfield J. and the money deposited in the Moscow

A Narodny Bank deposit account is not beneficially owned by N.K.A.P., it will be possible for the Guernsey company to go on discharging its future indebtedness to N.K.A.P. without any of those payments being available in practical terms for attachment by way of garnishee proceedings. For these reasons the plaintiffs submit that it is "just and convenient" within the meaning of section 37 of the Supreme Court Act 1981 for the court to appoint a receiver by way of equitable execution.

B The defendants challenge this application on two fundamental grounds and on a number of subsidiary grounds. First, they submit that there is no jurisdiction to appoint a receiver by way of equitable execution over debts which at the relevant time are neither due nor accruing due. That was the position before the Supreme Court of Judicature Act 1873 (36 & 37 Vict. c. 66) and it has been the position ever since. The jurisdiction of the court to grant this remedy has not been widened by any subsequent legislation and in particular not by section 37(1) of the Supreme Court Act 1981. They refer to a large number of authorities, including numerous decisions of the Court of Appeal, in support of this submission. I shall have to consider those cases later in this judgment. Secondly, the defendants submit that, even if there were jurisdiction, the judgment creditor must show exceptional circumstances and in particular that there is an impediment to the process of *legal* execution which would be available but for that impediment. In the present case there are pending garnishee proceedings and within those proceedings there can be obtained discovery of documents which would indicate what debts were due or accruing due at the date of the order nisi. Those debts, having then been attached by means of the order nisi, will be subject to execution. If no such debts were attached, that is not because of any impediment to the process of legal execution but because that process only operates on pre-existing debts and there is nothing to stop the plaintiffs applying subsequently for further garnishee orders in respect of debts which may have become due or accruing due after the date of the first order nisi.

E By way of further point, the defendants submit that if a receiver were appointed he would, in effect, not merely be there to receive payment of amounts due, but to manage the supply contract to see that it was performed for the benefit of the plaintiffs and in any event such a receiver could not collect in assets outside the jurisdiction, should it be held that there were no debts within the jurisdiction. I must now consider these objections to the plaintiffs' application.

#### G *Jurisdiction*

H In my view, there is much to be said for the submission that it would be both just and convenient if this court were able to appoint a receiver for the purpose of ascertaining what deliveries are to be made under the supply contract and what payments are to become due and for the further purpose of receiving payment of such amounts by the Guernsey company. I see no reason why this limited function would involve the receiver in acting as manager of the supply contract or would impose on him a duty to enforce it. If N.K.A.P. failed to perform that contract, debts would simply not be engendered, although the Guernsey company might have a claim against N.K.A.P. for unliquidated damages for non-performance.

That, however would not be a debt due or accruing due and, unless and until the Guernsey company had converted its claim into a judgment debt, the receiver would not be concerned to collect it. Furthermore, since the plaintiffs' application is made on the basis that the situs of all the debts will be England, because that is where the Guernsey company carries on business, there is no reason why the receiver should be concerned with amounts payable abroad. A

The appointment of a receiver by way of equitable execution would appear to have the effect of preventing the creation of set-offs by means of prepayments by the Guernsey company to N.K.A.P. It is distinctly possible that collusive prepayments could create equitable set-offs such as to preclude a receiver requiring payment of the due debt. However, even if that is wrong, I do not exclude the possibility that injunctive relief ancillary to the *Mareva* jurisdiction might be devised which would have the effect of curbing what is in substance if not in form an arrangement for the disposal by N.K.A.P. of assets which would otherwise be available for execution. This, however, is not a point which has been in issue or argued before me and I express no concluded view on the availability of such relief. If, therefore, my jurisdiction were simply that expressed in section 37(1) of the Supreme Court Act 1981, I should have considered that the plaintiffs had a strong case for its being just and convenient for a receiver to be appointed for the limited purpose which I have defined. Both counsel have referred me to a number of authorities which I must now consider. It is convenient to divide them into those decided before and after the Supreme Court Act 1981. B C D

#### *Earlier authorities*

In *Holmes v. Millage* [1893] 1 Q.B. 551 judgment had been obtained against a journalist working for an English newspaper in Paris. The Divisional Court allowed an appeal from the judge in chambers and appointed a receiver to receive all sums "due and payable, or to become due and payable," at p. 554, to the journalist by his employers. In the Court of Appeal, however, an appeal was allowed and the order of the Divisional Court was discharged. Lindley L.J. delivering the judgment of the court, having emphasised the importance of the issue "to every wage-earning person in the country," at p. 554, first considered the position before the Judicature Acts. The common law writs of execution did not extend to "future income" and the garnishee process did not reach it. The statutory process of a charging order was not applicable "to wages or other remuneration for personal services:" at p. 554. Because the common law process of execution did not reach an interest of the judgment debtor in future earnings, nor could an equitable remedy by way of execution be available. The relevant principle upon which Lindley L.J. based his judgment is expressed thus, at p. 555: E F G

"It is an old mistake to suppose that, because there is no effectual remedy at law, there must be one in equity. But the mistake, though old and often pointed out, is sometimes inadvertently made even now. Courts of equity proceeded upon well known principles capable of great expansion; but the principles themselves must not be lost sight of. The principle on which alone the order in this case could be H

- A supported before the Judicature Acts is well explained by Cotton L.J. in *Anglo-Italian Bank v. Davies* (1878) 9 Ch.D. 275; it is that courts of equity gave relief where a legal right existed and there were legal difficulties which prevented the enforcement of that right at law. But the existence of a legal right is essential to the exercise of this jurisdiction. The judgment creditor here has a legal right to be paid his debt, but not out of the future earnings of his debtor; and the
- B Court of Chancery had no jurisdiction to prevent him from earning his living or from receiving his earnings, unless he had himself assigned or charged them. The court could not restrain him from receiving them until his creditor could attach them under the process of garnishment; nor did the court ever presume to enlarge a judgment creditor's rights; nor, under colour of assisting him to enforce those
- C rights, did the Court of Chancery reach by its process a kind of property which was not liable to execution."

Lindley L.J. then went on to consider the effect of section 25(8) of the Judicature Act 1873 which provided:

- "A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the court in all cases in which it shall appear to the court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the court shall think just;..."
- D

He held, at p. 557, that just as this provision did not justify the granting of an injunction in a case in which no injunction would be granted by any court before the Judicature Acts came into operation, so it did not justify the appointment of a receiver in circumstances where no such appointment could previously have been made by a court of Chancery. While recognising that there was difficulty in enforcement of payment of a judgment by ordinary legal methods he went on:

- "it does not arise from any impediment which the old Court of Chancery had jurisdiction to remove. The difficulty arises from the fact that future earnings are not by law attachable by any process of execution direct or indirect."
- F

I am unable to accept the submission of Mr. Stanley Burnton, who has appeared for the plaintiffs, that this case can be explained by the fact that the judgment debtor's interest was in future *wages* as distinct from the future *debts* unrelated to a contract of employment.

- G The basis of the judgment was this. (i) Receivers by way of equitable execution were not appointed prior to the Judicature Acts in respect of interests not capable of being subject to process of execution at law (save for one exception referred to, at p. 555, which is immaterial to the present case). (ii) Future wages were not capable of being subject to process of execution at law and therefore could not be the subject matter of the
- H appointment of a receiver by way of equitable execution. (iii) Section 25(8) of the Judicature Act 1873 did not permit the courts to abandon that basic requirement of availability of the interest for execution at law. It was further emphasised by the Court of Appeal in *Harris v. Beauchamp Bros.*

[1894] 1 Q.B. 801, 809, *per* Davey L.J., that the words in section 25(8) of the Judicature Act 1873 A

“do not confer an arbitrary or unregulated discretion on the court, and do not authorise the court to invent new modes of enforcing judgments in substitution for the ordinary modes.”

That was a case where, following a fire at its premises, a partnership which was the judgment debtor was in the course of being dissolved and the court had appointed a receiver of the fire insurance policies, the firm’s book debts and moneys in any bank account to the credit of the firm or one of the partners. The judge had subsequently ordered the receiver to pay all moneys received by him into court to abide further order, stating in a note that he appointed the receiver not so much by way of execution as “to preserve the assets for the court to give effect to the rights of the parties interested.” Davey L.J. concluded his judgment with these words, p. 811: B C

“We are of opinion that the learned judge had no jurisdiction to make such an order. This is not equitable execution, but administration, which the court had no jurisdiction to order, at any rate in this action. It was in fact an irregular substitute for a receiving order in bankruptcy.” D

Mr. Burnton relied heavily on the decision of the Court of Appeal in *Goldschmidt v. Oberrheinische Metallwerke* [1906] 1 K.B. 373. The English plaintiff obtained judgment against a German manufacturing company which had no place of business in England and which traded with various English importers, and applied for the appointment of a receiver by way of equitable execution to receive all debts or sums of money due and owing, or thereafter becoming due and owing, to the German company by persons and firms in this country. Channell J. having refused to make the appointment, the plaintiffs appealed. The basis for the application appears from counsel’s answer, at pp. 374–375, to the question put by Vaughan Williams L.J. in argument as to whether the plaintiff had power to enforce his judgment by garnishee proceedings: E F

“Although the plaintiff knows the names of customers of the defendants, from whom, no doubt, debts are either due, or will shortly become due to them, he does not know the particulars of such debts; he cannot, therefore, specify any particular sum due, nor can he tell whether any sum is already due, or only will become due on the expiration of some period of credit; and there is no power to examine the defendants, who are out of the jurisdiction, under Ord. XLII., r. 32, as to their means of satisfying the judgment so as to ascertain these particulars. It appears from Appendix B to the Rules of the Supreme Court, Form No. 25, that the affidavit in support of an application for a garnishee order nisi must specify the amount of some debt due from a particular person to the judgment debtor. There are no means by which the plaintiff can compel the defendants’ customers to furnish him with particulars of their debts.” G H

It was held that the special circumstances were sufficient to justify appointment of a receiver for which he “must show that the circumstances

- A are such as to render it practically very difficult, if not impossible, to obtain any fruit of his judgment, unless what has been called equitable execution be granted to him:" see p. 375. The order could be made where it was "for the purpose of getting in debts under circumstances which render that a more convenient mode of procuring satisfaction of the judgment than garnishee proceedings" and where it was "for the purpose of preventing someone from making away with property liable to execution:" pp. 375–376. On the facts there seemed to be a likelihood that the foreign defendants would withdraw the sums owing to them from any possibility of being made available by way of execution in this country.
- B

- C It is to be observed that the order made appointed the plaintiff receiver "of the debts due to the defendants up to the amount of £300:" see p. 376. The words included in the summons "or thereafter becoming due and owing" do not appear in the order as reported. Thus, whereas, the determination by the court, that on the facts the circumstances were such as to render it practically very difficult, if not impossible, to obtain any fruit of the judgment by garnishee proceedings, provides a useful yardstick for evaluating the nature and extent of difficulties of enforcement which would justify the appointment of a receiver, the judgment contains nothing to suggest that such difficulties will justify the appointment of a receiver to receive debts not due or accruing due at the date of the order. Indeed, the disparity between the wording of the order and that of the summons suggests the contrary.
- D

- E In *Edwards & Co. v. Picard* [1909] 2 K.B. 903 the Court of Appeal was divided on a point directly material to the issue which I have to decide. Application was made for the appointment of a receiver of all rents, profits and moneys receivable by the French judgment debtor in respect of certain English patents. It was held by Vaughan Williams and Buckley L.JJ. that a receiver could not be appointed. There was no evidence that the judgment debtor was currently receiving profits from the patents by way of royalties or otherwise. It was held that, because there was "not ... any property ... for the receiver to receive" (*per* Vaughan Williams L.J., at p. 906) and since the patents themselves were not property against which there could be execution at law and any proceeds by way of royalties would only be future earnings which, in view of the decision in *Holmes v. Millage* [1893] 1 Q.B. 551, were not an interest for which a receiver would be appointed (*per* Buckley L.J., at p. 910), no such appointment would be made. Apart from the fact that Buckley L.J. clearly treated *Holmes v. Millage* as of general application to future debts and not confined to contracts of employment, this case is highly relevant for present purposes because the majority did not concur in the reasoning in the dissenting judgment of Fletcher Moulton L.J., at pp. 907–908, where he treated section 25(8) of the Judicature Act 1873 as giving the court wider powers to appoint receivers by way of equitable execution than those of the Court of Chancery before the Judicature Acts. He was prepared to appoint a receiver in case any payments might be earned in respect of the patents for such an appointment would be "just or convenient."
- F
- G
- H

Buckley L.J. revisited the whole question five years later in *Morgan v. Hart* [1914] 2 K.B. 183, in which his judgment, with which Phillimore L.J. agreed, contains a most comprehensive review of the authorities. The

judgment debtor had put certain furniture into store in a warehouse and the evidence was that it could not readily be available for execution by seizure under a writ of fi. fa. The Court of Appeal allowed an appeal against the appointment of a receiver by way of equitable execution. Buckley L.J. concluded that the appointment of a receiver was irregular because it was “made not for the purposes of execution, but in order to keep the property where it is until the plaintiff can get discovery.” see p. 190. The judgment continues, at pp. 190–191:

“The case of *North London Railway Co. v. Great Northern Railway Co.* (1883) 11 Q.B. 30 is a case of an injunction, and is only relevant because the power to grant an injunction is given by the same section 25(8) of the Judicature Act 1873 as gives the power to appoint a receiver, and is given in the same words. It was there held that the section gave no power to the court to grant an injunction in a case in which no court could have granted one before the Act. Applying these cases, the facts here are that the debtor has property which could be reached by a fi. fa., but there is a difficulty in identifying it. The object is to obtain what is equivalent to an injunction until the creditor can get discovery. The Court of Chancery would not have made such an order before the Judicature Act. We cannot do so now.”

This judgment supports the propositions that (i) a receiver by way of equitable execution will not be appointed merely because of difficulty of identification of assets if the process of execution at law, such as discovery, will provide means of identification; (ii) inasmuch as an injunction to preserve assets pending execution would not have been ordered by the Court of Chancery before the Judicature Acts, nor could a receiver now be appointed for that same purpose. The second proposition is consistent with what was held in *Harris v. Beauchamp Bros.* [1894] 1 Q.B. 801. The result of these authorities is that, had this application been before me in the period between *Morgan v. Hart* [1914] 2 K.B. 183 and the coming into force of the Supreme Court of Judicature (Consolidation) Act 1925, I should have been bound to refuse to appoint a receiver by way of equitable execution in respect of any payments which would, after the date of the order, become due or accruing due. That is because such future debts would not, when the order was made, be amenable to execution by garnishee proceedings since such proceedings are inapplicable to future debts and because the Court of Chancery would not before 1873 give equitable relief to assist execution in a case where there was no property of a kind which could at the time be made subject to execution by legal process.

As to moneys which had already fallen due or accruing due under the supply contract, but which could not at present be precisely identified as such, it would not have been open to me to make an order for an injunction to preserve those debts until after discovery in garnishee proceedings or to appoint a receiver for that purpose. In relation both to the appointment of a receiver by way of equitable execution and to the appointment of a receiver merely to preserve the debts, strong Court of Appeal authority would have been binding upon me. The only suggestion to the contrary are certain remarks made obiter by Fry L.J., with whom

- A Lindley L.J. expressly agreed, in *Webb v. Stenton* (1883) 11 Q.B.D. 518, 530–531. On the face of it, these remarks in favour of the appointment of a receiver appear to be directly inconsistent with many subsequent Court of Appeal decisions. It may be that they can be explained on the basis that the property in that case consisted of future payments (not yet to be made) by trustees to a beneficiary with a life interest under a will and was therefore of an equitable nature which attracted the equitable remedy in question.
- B Having regard to the fact that in the present case there is no question of the property being of an equitable nature, I do not consider that these remarks have any relevance, if indeed they were correct. Moreover, with regard to the period after the Supreme Court of Judicature (Consolidation) 1925 Act, the wording of section 45(1) of the Act of 1925 is effectively the same as that of section 25(8) of the Act of 1873 and contains nothing to suggest any wider jurisdiction in relation to the
- C appointment of receivers than existed under the earlier Act.

*The more recent authorities*

- In the forefront of Mr. Burnton's submissions is his argument that in recent years, particularly with and since the introduction of *Mareva* injunctions, the courts have developed a much more flexible approach to the circumstances in which injunctions, particularly interlocutory injunctions, can be granted. Section 37(1) has been treated as providing a basis for the development of an entirely pragmatic approach to such applications in the interests of justice which should now be treated as free of the constrictions laid down by the Court of Appeal in the earlier period by reference to the rules and practice of the Chancery Court prior to the
- D Judicature Acts. Mr. Burnton submits that if there has been that developing jurisprudence in relation to injunctions, then, given that section 37(1) applies equally to the appointment of receivers, similar developments ought to be permissible and might be made in the field of receivers, in particular receivers by way of equitable execution. He therefore submits that, whatever might have been the rules of the Court of Chancery before 1873 and
- E however strongly the Court of Appeal has previously adhered to those rules, the direction of development of the jurisdiction to grant injunctions is so clear that this court ought now to approach the appointment of receivers in a similarly pragmatic way, simply having regard to whether such an appointment is just and convenient in all the circumstances.
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- In support of this submission Mr. Burnton relied upon *Parker v. Camden London Borough Council* [1986] Ch. 162, in which the Court of Appeal had to consider whether a receiver and manager ought to be appointed in a case where a local authority was refusing on grounds of labour relations to employ outside contractors to mend the central heating on a housing estate during a strike by its own employees who would normally carry out the maintenance work. It was held that the power to appoint a receiver and manager under section 37(1) should not be exercised in a case where Parliament had made express statutory provision for local
- G authorities to carry out the maintenance of local authority housing. The appointment of a receiver was therefore discharged. However, in the course of his judgment Sir John Donaldson M.R. considered an argument on behalf of the local authority that, having regard to the decision in *Harris*
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*v. Beauchamp Bros.* [1894] 1 Q.B. 801, it was only open to the court to appoint a receiver in circumstances in which the Court of Chancery would have done so prior to 1873. Sir John Donaldson M.R. observed [1986] Ch. 162, 173: A

“For my part I do not accept that the pre-Judicature Act practices of the Court of Chancery or any other court still rule us from their graves. In any event that decision relates to equitable execution of a judgment and is not a matter with which we are concerned.” B

Browne-Wilkinson L.J., at p. 176, agreed with the view of Sir John Donaldson M.R. that the jurisdiction to appoint a receiver and manager was “unlimited.”

Very shortly before the decision in *Parker v. Camden London Borough Council* [1986] Ch. 162 the Court of Appeal gave judgment in *Bourne v. Colodense Ltd.* [1985] I.C.R. 291. The issue there was whether it was appropriate to appoint a receiver to recover from a trade union costs which were the subject of an order for costs against a union member made in an action in which the union had supported his claim. The basis of the application was that there was arguably an implied obligation on the part of the union to indemnify its member against any liability in costs should his claim in the litigation fail and that the judgment creditor could not obtain legal execution against the judgment debtor’s right to be indemnified, so that, only if a receiver was appointed to enforce the indemnity, could the plaintiffs recover their judgment debt. The major issues before the Court of Appeal were whether there was an enforceable agreement to indemnify the member, whether the union rules permitted such an indemnity and whether that indemnity would be ultra vires the unions’ powers. Only Dillon L.J. considered the availability of the remedy of a receiver by way of equitable execution. His judgment begins with these words, at p. 302: C D E

“The appointment of a receiver by way, as it is traditionally called, of equitable execution is a form of equitable relief to enforce payment of a judgment debt which the court may grant in the special circumstances of a particular case if, as in the present case, the recovery of the judgment debt by the more usual processes of execution or attachment of debts is not practicable. The remedy is, however, discretionary and it is plain that the court would not appoint a receiver if the court were satisfied that the appointment would be fruitless because there was nothing for the receiver to get in.” F

He concluded, at p. 305: G

“It is sufficient to say, as I do, that the defendants have an arguable case that an indemnity against liability for the defendants’ costs was impliedly granted to the plaintiff by the union at the outset when the union agreed to grant the plaintiff assistance in connection with this action, and the amount involved is such as to make it just and convenient in all the circumstances that a receiver should be appointed of the plaintiff’s right of indemnity against the union, to enforce that right, if it can be established, against the union for the benefit of the defendants.” H

A Only one of the post-Judicature Act 1873 authorities appears to have been cited in argument, namely *Goldschmidt v. Oberrheinische Metallwerke* [1906] 1 K.B. 373, in which the judgment is extremely short and does not allude to the much-emphasised principle that a receiver would not be appointed where legal process of execution was impermissible due to the absence of property amenable to fi. fa. or garnishee proceedings. That this matter was not considered by the Court of Appeal is clearly shown by the

B fact that there was apparently no citation of the decision in *Johnson v. Diamond* (1855) 24 L.J.Ex. 217, in which it was held that entitlement of an unsuccessful litigant to recover under an indemnity in respect of costs of that litigation was not to be treated as available for attachment, for it was not a debt but a cause of action. The distinction between a right of indemnity under an insurance policy and a debt was further explained by

C the Court of Appeal in *Israelson v. Dawson (Port of Manchester Insurance Co. Ltd., Garnishees)* [1933] 1 K.B. 301, in which the court set aside a garnishee order relating to such a right of action. There was no citation of that decision in *Bourne v. Colodense Ltd.* [1985] I.C.R. 291.

In the event the Court of Appeal appointed a receiver by way of equitable execution in a case where there was no debt due or accruing due to the judgment debtor, but merely a cause of action for an indemnity

D which on well-established authority could not be the subject of garnishee proceedings. In *MacLaine Watson & Co. Ltd. v. International Tin Council* [1988] Ch. 1 Millett J. considered the decision in *Bourne v. Colodense Ltd.* [1985] I.C.R. 291 and, indeed, was prepared to treat it as authority justifying the appointment of a receiver in a case where he had concluded that the claim of the International Tin Council to be indemnified by its

E members was not amenable to garnishee proceedings: see p. 21. He concluded that there was “no technical objection” to the appointment of a receiver. There can be no question but that Millett J. reached that conclusion having considered in his judgment most of the authorities which reiterated the pre-1873 rule of the Court of Chancery.

There are thus at least two decisions in recent years in which receivers by way of equitable execution have been considered appointable in spite of

F there being no debt due or accruing due. The plaintiffs further emphasise that recent developments in the law as to the availability of injunctions, both final and interlocutory, show that the law has not been treated as frozen by reference to the practice of the Court of Chancery prior to the Judicature Acts. It is unnecessary to refer to the various authorities relied on in any detail. The fact is that the entire *Mareva* jurisdiction would have been stillborn if the practice of the Court of Chancery had been a relevant

G consideration. Mr. Burnton relies further on *Deutsche Schachtbau- und Tiefbohrgesellschaft m.b.H. v. R'As al-Khaimah National Oil Co.* [1990] 1 A.C. 295. In that case upon giving leave to enforce an I.C.C. arbitration award as a judgment Bingham J. made an order ex parte restraining the judgment debtor from:

H “removing outside the jurisdiction, disposing of, charging or otherwise dealing with any moneys owned by them or deposited by them within the jurisdiction, or any debts due or to become due to them within, or from any person within the jurisdiction [and in particular from directing, accepting or receiving payment of the debt or debts due or

to become due to them from Shell International Petroleum Co. Ltd. or any other company or corporation resident in England and Wales] up to the amount of U.S.\$8,500,000:" see p. 307.

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The plaintiffs rely on this order as an example of an interlocutory conservatory injunction relating in terms to future debts as an aid to execution. It is, however, clear from the report of the Court of Appeal judgment that, when that order was made, there was some evidence that Shell, the garnishee, had already purchased oil from the judgment debtor and would presumably be paying for it. When the matter came before the Court of Appeal, Shell had been given leave to intervene and had adduced much fuller evidence of its purchases of oil from the judgment debtor. That evidence demonstrated that at the date of the orders the price of the oil was a debt accruing due. The point was discussed by Sir John Donaldson M.R. at p. 321C–E. It was therefore never necessary to consider whether an injunction relating to debts which were neither due nor accruing due was a proper order. Nevertheless, the plaintiffs are entitled to draw some support from the fact that at the time when Bingham J. first made the order (that part not in square brackets) he had not limited its application to amounts due "or to become due" from Shell but extended it to "any person within the jurisdiction."

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### *Matters of principle*

One approach to the authorities is to conclude that this court is bound by the earlier Court of Appeal authorities to which I have referred and should as a matter of law refuse to appoint a receiver to receive debts unless they are due or accruing due at the date of the order and should in any event decline to treat the difficulty of identifying such debts as a sufficient impediment to execution by garnishee proceedings to justify the appointment of a receiver. That would involve wholly ignoring the decision in *Bourne v. Colodense Ltd.* [1985] I.C.R. 291 on the basis that it was arrived at per incuriam. Such a conclusion would involve treating the rules of the Court of Chancery before the Judicature Acts as carved in stone and as expressing immutable principles incapable of development beyond 1873 unless changed by Parliament. This must be wrong in principle. English law has traditionally developed by means of identifying broad but established juridical principles which have been extended incrementally to new factual situations when the interests of justice required such extension. The development of the law relating to *Mareva* injunctions amply demonstrates that this developing process applies to equitable remedies as to any other.

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I therefore approach the issue as to the availability of receivers by way of equitable execution on the basis that in at least one case, *Bourne v. Colodense Ltd.*, the Court of Appeal has in recent times been prepared to make such an appointment in respect of property not amenable to execution by legal process, albeit that case was not concerned with future debts. Is it therefore justifiable to extend the availability of the remedy to future debts? Once it is accepted that availability of the property for execution by legal process is not a precondition to the appointment of a receiver by way of equitable execution, the question that has to be

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- A answered is whether future debts have intrinsic characteristics which would justify excluding them from this remedy. In approaching this question it is necessary to keep in mind that the purpose of such a remedy would be to supplement legal process of execution by garnishee proceedings. Since that process does not apply to future debts and since it cannot be commenced in anticipation of debts becoming accruing due at a later stage, there is much to be said for the availability of a remedy which would enable the judgment creditor to acquire information as to future debts to enable him to effect collection from third parties as and when they fell due.
- B Mr. Sheridan has submitted that (i) such a remedy would involve a receiver taking over the management of the contractual relationship between the judgment debtor and the party from whom the debts will in future fall due and (ii) it would bring the business of the judgment debtor to a standstill, which would be contrary to principle.

- C As to the receiver becoming manager of the supply contract, there is nothing in this point. The function of the receiver would be to receive payment of the amounts payable by the Guernsey company, which is a party to these proceedings. No doubt a receiver would be entitled to be provided with such discovery and other information as was necessary for him to ascertain what payments were due. In the event of the Guernsey company not making such payments, it could be amenable to the orders of this court by which any issue as to its liability could be resolved.
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- E As to bringing the business of the judgment debtor to a standstill by cutting off payment otherwise available to it, I am not persuaded that this is a relevant consideration in the context of a remedy designed to effect execution and not designed merely to conserve assets pending determination of an unresolved claim. This is not the environment of a *Mareva* injunction prior to trial, but of execution of a pre-existing judgment. Whereas the effect of an injunction on the defendant's ability to conduct his business in the ordinary course may be relevant where his liability is yet to be determined, it cannot possibly be a relevant consideration where his liability has already been determined. Impact on the judgment debtor's business is not a consideration material to the availability of legal process of execution and there is no reason in principle why it should be introduced as material to the availability of equitable execution. The defendants further submit that, whereas the remedy of a garnishee order absolute is subject to an underlying discretion which, as the decision of the House of Lords in *Deutsche Schachtbau- und Tiefbohrgesellschaft m.b.H. v. R'As al-Khaimah National Oil Co.* [1990] 1 A.C. 295 shows, may be exercised against an order where there is on the evidence a serious risk of the third party debtor being placed in jeopardy of being sued to judgment for the garnished debt in another jurisdiction, there would be no such protection on a debt-by-debt basis if a receiver could be appointed in respect of all future debts. This argument is, in my judgment, quite unconvincing. Half the attraction of the remedy of the appointment of a receiver is that it is inherently capable of great flexibility. In particular, if any question of double jeopardy arose in respect of any particular debt when it fell due for payment, that matter could be referred to the court for further consideration, a fortiori where, as in this case, the third party debtor, the Guernsey company, is already a party to the action. The court could then
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satisfy itself as to how real the danger of double jeopardy was and, if necessary, vary the receiver's mandate. I would only add that in the present case there is, at least at present, no real evidence of risk of double jeopardy.

Is there any further positive justification for such an order? The conservatory jurisdiction of the court by means of *Mareva* injunctions has the purpose of preservation of the defendant's assets so as to prevent their dissipation to avoid execution of an eventual judgment against him. Although I do not wish to trespass on the territory of the pending appeal against the order of Butterfield J. to the effect that the injunction granted by Langley J. went beyond his jurisdiction inasmuch as it had the effect of intercepting future payments, I am bound to say that, in my experience, the standard form of *Mareva* injunction has consistently been treated in the Commercial Court for many years as applicable to assets brought into the jurisdiction throughout the currency of the order but subject always to the overall monetary ceiling incorporated in the order. If the assets of a trading company caught by the order were to be confined to those in existence at the date of the order, but subject always to dissipation in the ordinary course of business, much of the value of the *Mareva* jurisdiction would be destroyed. Every time further funds were received by a trading company in such a case it would be necessary to apply for another injunction. The view on this matter expressed obiter by Skinner J. in *T.D.K. Tape Distributor (U.K.) Ltd. v. Videochoice Ltd.* [1986] 1 W.L.R. 141, 145B-D reflects the assumption which has consistently been adopted in this court.

The availability of conservatory injunctions to preserve the assets of a judgment debtor for execution, having been recognised at an early stage in *Bullus v. Bullus* (1910) 102 L.T. 399, seems to have been largely ignored until the decision of Robert Goff J. in *Stewart Chartering Ltd. v. C. & O. Managements S.A. (Practice Note)* [1980] 1 W.L.R. 460, in which a *Mareva* injunction granted before trial was continued after trial in aid of execution. That was followed in respect of the granting of a fresh injunction in *Orwell Steel (Erection and Fabrication) Ltd. v. Asphalt and Tarmac (U.K.) Ltd.* [1984] 1 W.L.R. 1097. If pre-trial *Mareva* injunctions can apply, as, in my judgment, they do, to assets brought into the jurisdiction subsequently to the making of the order, there can be no reason, in principle, why post-judgment conservatory injunctions should not also be capable of applying to after-acquired assets, provided that they are within the overall monetary ceiling incorporated in the order. If that is correct, and there is a jurisdiction to preserve for execution by injunction assets acquired and yet to be acquired after judgment, there would seem equally to be no reason in principle why a receiver should not also be appointed to preserve such assets. And if a receiver may be appointed to *preserve* such assets, why not to effect attachment of those assets for the benefit of the judgment creditor, provided that the court is satisfied that the debtor can be adequately protected against double jeopardy? In these circumstances I can see no reason whatever why, 124 years after the Judicature Acts, the court should deny to itself a jurisdiction which is self-evidently likely to be extremely useful as an ancillary form of execution. I would therefore hold that there is jurisdiction to appoint a receiver by way of equitable execution to receive future debts as well as debts due or accruing due at the date of the order.

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A *Conclusion*

The plaintiffs have satisfied me that this is a case in which the court ought to exercise its jurisdiction in favour of the appointment of a receiver to receive payment of all sums which are now due or in future fall due for payment by the Guernsey company to N.K.A.P. under the supply contract. For this purpose I shall make an ancillary order for disclosure forthwith by the first and fifth defendants of all documents relating to the performance of the supply contract and relevant to the obligation of the fifth defendants to make payment to the first defendants and to the discharge of such obligation. In reaching this conclusion I have had regard in particular to the evidence that (i) there is a recent history of substantial unexplained payments by the fifth defendants to the first defendants from within the jurisdiction; (ii) it appears that the fifth defendants may be endeavouring to smother their indebtedness by making prepayments which they hope can be set off against the amounts due under the supply contract; (iii) the first defendants and the fifth defendants are both controlled by the Zhivilo family, who are in position to manipulate performance of the supply contract to shield the assets of the first defendants from execution in this country; (iv) information as to the operation of the supply contract and what payments are already due or accrued due or will in future become due would be unobtainable without such an order.

The appointment of a receiver to receive all the amounts due under the supply contract and all the amounts which in future fall due under that contract is, as I conceive it, the most efficient and effective way of enabling the plaintiffs to obtain satisfaction of the judgment debt while adequately protecting the fifth defendants. The appointment will be a just and convenient method of satisfying the outstanding judgment debt. In order to protect the fifth defendants against any serious risk of double jeopardy which may in future arise, they will have liberty to apply to vary this order. The payments which the receiver is empowered to receive will be limited to the amount of U.S.\$10.6m.

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*Order accordingly.*

*Solicitors: Rakisons; Allison & Humphreys.*

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[Reported by DURAND MALET ESQ., Barrister]

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