

Court guidance on whether “first past the post” is really a legal principle

Thursday, May 3, 2018

The Commercial Court has recently handed down its judgment in the case of *Midtown Acquisitions LP v Essar Global Fund Limited and Others* [2018] EWHC 789. The decision provides useful guidance on whether “first past the post” is really a legal principle when it comes to charging orders.

Background Facts

Two creditors, Midtown Acquisitions LP (“M”) and ICICI Bank Limited (“ICICI”) had lent funds to the debtor (Essar Steel Minnesota LLC) in respect of the same project, guaranteed by the defendant (Essar Global Fund – “Essar”) under loan agreements.

M secured a US judgment against Essar in respect of those funds on 25 August 2016, which it then used to obtain a summary judgment totalling USD 171 million, from the English Commercial Court on 17 March 2017. M then obtained an interim charging order on 11 September 2017 and on 16 January 2018, appeared before Mr Justice Robin Knowles CBE in order to seek a final charging order.

ICICI followed a similar path, however, was slightly behind M, with ICICI commencing proceedings in the US on 2 September 2016 and obtaining a US judgment on 27 April 2017. The US judgment was used to obtain a summary judgment (also in the Commercial Court) on 10 November 2017, in the sum of USD 588 million. ICICI then filed a charging order application on 28 November 2017 and obtained its interim charging order on 20 December 2017. ICICI was also seeking a final charging order at the hearing on 16 January 2018.

It is important to point out that whilst Essar’s solvency was clearly debatable (given the sums owed to M and to ICICI), insolvency proceedings were not in contemplation at the time of the Commercial Court hearing and Essar did not oppose either M or ICICI’s request for final charging orders. The issue in question was the fact that ICICI considered that its charging order should rank equally to that of M, irrespective of the fact that its interim charging order was granted some three months’ after M’s interim charging order.

Representations

Neither M nor ICICI was seeking equality of all creditors. The judgment refers to the clear “objective” of both M and ICICI to “*obtain priority over the general body of unsecured creditors of Essar*”.

Counsel for M sought to rely upon the “first past the post” rule – which was relied upon in *British Arab Commercial Bank plc v Ahmad Hamad Algosaibi and Brothers Coin* 2011. It was submitted that “first past the post” was a “default rule” which had been around some time. However, Counsel for ICICI pointed out that Lord Goddard in *James Bibby Ltd v Woods & Howard* (1949) expressed himself “*not in language of articulating a principle, but rather in language of observation of what can happen*”.

Mr Justice Knowles in the present case had regard to the fact that precedent (particularly Mr Justice Flaux in the *British Arab Commercial Bank* case referred to above), made it clear that “first past the post” was the type of “rule” to which there would be exceptions and indeed, Counsel for M did accept that it was not an absolute principle.



Article By [Helen Cain](#)
[Garon Anthony](#)
[Squire Patton Boggs \(US\) LLP](#)
[UK Finance Disputes and Regulatory](#)
[Investigations Blog](#)
[Financial Institutions & Banking](#)
[Global](#)
[United Kingdom](#)

Judgment

Mr Justice Knowles therefore decided that the “rule” could be taken into account, however, what was important was to achieve an equitable outcome having regard to all the circumstances of the case. He referred in his judgment to the fact that The Charging Orders Act 1979 itself sets out that “all the circumstances” must be considered before the making of a charging order.

Other factors considered by Mr Justice Knowles were:

- That both M and ICICI are significant commercial parties – i.e. equally able to look out for their own commercial interests;
- M secured its interim charging order first and this is not a case where the debtor (Essar) did anything to “engineer” that outcome;
- ICICI was not seeking equality of all creditors – simply, equality of itself and M;
- The material in the case suggests that Essar sought to delay M – a factor to be considered in circumstances where M was procedurally ahead of ICICI in terms of the Court process.

In weighing up his conclusion, Mr Justice Knowles states that it is not “*inequitable to prefer one diligent party over another diligent party, if in all the circumstances that seems appropriate*”. After balancing all of the factors, it was decided that M’s charging order would rank above ICICI’s in order of priority. As such, in this case, the party that was “first past the post” is the party who enjoys priority.

Comments

The important message from this judgment is that “first past the post” cannot be relied upon as a principle where final charging orders are being sought. However, a party can have some confidence that if all other circumstances are equal/equitable, being the first to have been granted an interim charging order could afford that party the benefit of priority when a final charging order is sought. As such, the underlying message is not to unduly delay in getting on with the court process in circumstances where a decision has been made to seek the award of a charging order.

© Copyright 2019 Squire Patton Boggs (US) LLP

Source URL: <https://www.natlawreview.com/article/court-guidance-whether-first-past-post-really-legal-principle>