Neutral Citation Number: [2024] EWHC 2235 (Ch)

Claim No: CR-2024-000622

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
INSOLVENCY AND COMPANIES LIST (ChD)
AND IN THE MATTER OF A1 COMMS LIMITED (IN ADMINISTRATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Friday, 30 August 2024

Before:

ROBIN VOS
(SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)

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Between:

(1) DAVID KEMP **(2) RICHARD HUNT** **as Joint Administrators of A1 Comms Limited (in administration)**	**Applicants**
- and -	
(1) WTB UK SPV NO. 1 LIMITED **(2) TELEFONICA UK LIMITED**	**Respondents**

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CHLOE SHUFFREY (instructed by Wedlake Bell LLP) appeared for the Applicants
SIMON MILLS and MATTHEW TONNARD (instructed by Bermans) appeared for the First Respondent
CATHERINE DORAN (instructed by Shoosmiths LLP) appeared for the Second Respondent

Hearing dates: 18-19 July 2024

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Approved Judgment

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Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Friday, 30 August 2024 at 10:30am

DEPUTY JUDGE ROBIN VOS:

Introduction

1. The applicants, in their capacity as Joint Administrators of A1 Comms Limited ("A1") have applied to the Court for directions in accordance with paragraph 63 of schedule B1 to the Insolvency Act 1986 in relation to the validity and effect of a security assignment (the "Security Assignment") made between A1 and the first respondent, WTB UK SPV No. 1 Limited ("WTB"). The Security Assignment purported to assign to WTB A1's interest in certain receivables (the "O2 Receivables") due from the second respondent, Telefonica UK Limited (which I will refer to, as the parties have done, by its trading name, "O2").

2. In essence, the question for the Court is whether WTB has a proprietary interest in the O2 Receivables (or their proceeds) or whether it only has a personal claim against A1 and therefore ranks as an unsecured creditor.

3. The reason for the uncertainty is that the agreement giving rise to the O2 Receivables prohibits any assignment of rights without the prior written consent of the other party. It is common ground that O2's consent was neither sought nor given prior to the assignment taking place.

4. WTB's position is that it does have such a proprietary right and that, as long as the Security Assignment remains in force, O2 should make payments in respect of the O2 Receivables to WTB. The Administrators are neutral but have, as is appropriate, helpfully identified factual and legal points on both sides of the issues. O2 has taken no active part in the proceedings. It is willing and able to meet its obligations but needs to know who it should be paying in order to get a good discharge.

Issues

5. In his witness statement accompanying the Administrators' application for directions, Mr Kemp suggests a list of issues for determination by the Court. One further issue was added to this list by an order made by ICC Judge Prentis at a hearing on 26 April 2024.

6. However, given the way that WTB has put its case, it is helpful to frame the issues in a slightly different way. In particular, WTB does not seek to argue that the assignment of the O2 Receivables has a proprietary effect as between A1 and WTB in the absence of any consent from O2. This is a controversial area and not one which I need to address (although I will touch on the opposing views later in this Judgment).

7. Bearing this in mind, the issues are as follows:

   7.1 Whether there has been a valid and effective assignment of the O2 Receivables as a result of O2 providing its subsequent consent to the assignment and waiving the requirement for prior consent.

   7.2 If there is no effective assignment of the O2 Receivables, whether there has nonetheless been an effective assignment by A1 to WTB of the proceeds of the O2 Receivables.

   7.3 Should there be no effective assignment of the O2 Receivables or the proceeds of those receivables, does A1 hold the O2 Receivables or their proceeds on trust (express or constructive) for WTB?

   7.4 If there would otherwise be no trust of the O2 Receivables or their proceeds, whether A1 is estopped from denying that WTB has a proprietary interest in the O2 Receivables (either on the basis of contractual estoppel or estoppel by convention) with the effect that A1 holds the O2 Receivables on constructive trust for WTB.

   7.5 In the light of the answer to these questions, whether O2 should pay A1 or WTB in order to receive a valid discharge.

8. For completeness, I should mention that the list of issues also included an issue of construction of the Security Assignment which inadvertently refers to the wrong date for a particular document. The parties do not however pursue this and are agreed that this was simply a clerical error and that the document should be interpreted as if it referred to the correct date. In the circumstances, this must be right.

9. As will be seen from what I say below, I have concluded that there has been an effective assignment of the O2 Receivables from A1 to WTB. In these circumstances,

I do not propose to address the issues relating to trust or estoppel as these raise a number of points which are not straightforward and are better left to a case in which those points need to be decided.

10. I have however briefly considered whether, if am wrong that there has been a valid assignment of the O2 Receivables, there has nonetheless been a valid assignment of the proceeds of those receivables as this is a straightforward matter of contractual interpretation. My conclusion is that there is no assignment of the proceeds of the receivables.

Background Facts

11. Before turning to consider the issues which I need to determine, it is helpful to set out the background in a bit more detail based on the evidence which I have before me. This includes a significant amount of documentary evidence as well as witness statements from Mr Bonavero and Mr Mohammad, both of WTB and from Mr Butler who was working for A1 at the time the Security Assignment was entered into.

12. As is to be expected in relation to this sort of application, the witnesses were not cross examined. There was no challenge to their evidence and I proceed on the basis that what they say is accurate subject to any inconsistencies revealed by the contemporaneous documentary evidence and making due allowance for the effect of the passage of time on the recollections of the witnesses.

13. A1 describes itself as a telecommunications solutions provider. Its principal business is selling mobile phones on pay monthly plans with different network providers. It receives commission from these network providers in return for sourcing customers. The commission often takes the form of a percentage of the customer's monthly tariff.

14. WTB provides supplier finance which is also known as reverse factoring or payables financing. This involves WTB paying suppliers on behalf of its customer (in this case A1). The customer then reimburses WTB the amount which it has paid on the customer's behalf plus a finance charge. The amount of the finance charge depends in part on the delay between the payment of the supplier by WTB and the reimbursement by the customer. This enables customers to optimise their cashflow.

15. WTB's credit risk lies with its customer. It will therefore carry out significant due diligence and, where appropriate, will take security for the customer's obligation to reimburse WTB for the amounts which it has paid out on the customer's behalf plus any finance charges.

16. O2 is one of the network providers with which A1 does business. It entered into a Trading Agreement with O2 on 7 February 2019 (the "Trading Agreement") under the terms of which O2 is required to make regular payments to A1. The Trading Agreement has been amended on a regular basis including on at least four occasions in 2021.

17. Clause 18.2 of the Trading Agreement prohibits both parties from assigning any of their rights (or obligations) under the agreement without the prior written consent of the other party with the exception of an assignment to another company within the same group.

18. Clause 18.5 of the Trading Agreement deals with waivers. In particular, it provides that no waiver shall be effective unless made in writing.

19. A1 and WTB entered into an agency payment facility agreement on 22 July 2021 under which WTB agreed to provide supplier finance up to a limit of £1.5m. At this stage, there was no security for A1's obligations under that agreement.

20. In October 2021, it was proposed that the facility limit should be increased to £5m on the basis that WTB would take security over the O2 Receivables. This was approved in principle by WTB in early November 2021 and a draft of the Security Assignment was sent by WTB to A1 on 12 November 2021.

21. At this stage, WTB had not seen the Trading Agreement with O2 due to confidentiality concerns. However, on 15 November 2021, WTB made it clear that it needed to satisfy itself that there were no restrictions on assignability and transferability of the receivables, as a result of which it was proposed that WTB would sign a non-disclosure agreement which would then allow A1 to share the Trading Agreement with WTB.

22. Although, on the face of it, the Security Assignment is dated 16 November 2021, it is clear from the correspondence that it was in fact signed on 17 November 2021. The order in which events took place on that day are as follows:

    22.1 A1 signed the Security Assignment and sent it to WTB.

    22.2 A1 signed the non-disclosure agreement.

    22.3 WTB then signed the Security Assignment and the non-disclosure agreement.

    22.4 On receipt of these documents, A1 sent a copy of the Trading Agreement to WTB.

23. Throughout this period, A1 had been keeping O2 informed about the proposed assignment although O2 was not, at this stage, asked to give its consent to the assignment and did not do so.

24. Under the terms of the Security Assignment, A1 assigned to WTB (as security for its obligations under the facility agreement) "all O2 Receivables" and "all Related Rights".

25. The "O2 Receivables" are defined as follows:

> "The amount (or part of the amount where appropriate) of any indebtedness or obligation, present, future or contingent (including any tax or duty payable) owing to [A1] by O2…"

26. To the extent relevant, the "Related Rights" included:

> "- The right to possession of all ledgers, computer data, records or documents or by which the O2 receivable is recorded or evidenced;
>
> - Any cheque or negotiable instrument available to [A1]."

27. The Security Assignment appointed A1 as WTB's agent for the collection of the O2 Receivables and, in particular, required A1 to instruct O2 to make all payments to a bank account in the name of WTB defined in the Security Assignment as the "Nominated Account".

28. WTB sent to A1 a notice of assignment which, it said, needed "to be incorporated in your letter to O2" requesting the redirection of any payments by O2 into the Nominated Account.

29. The notice of assignment gave notice that the O2 Receivables had been assigned to WTB, that only WTB could give a valid discharge for any payments, that cheques should be sent to WTB and that all transfers should go to the Nominated Account.

30. On 18 November 2021, A1 sent an email to O2 (copied to WTB) headed "Change of bank details" which stated:

> "As previously discussed, I have attached a letter confirming the change of bank details required to accommodate our new finance facility with WTB."

31. The letter which was attached was also headed "Change of bank details" and contained the following:

> "I would like to advise you of a new finance facility we have in place with WTB UK SPV No.1 Limited. To accommodate the facility, we therefore ask you to amend your records accordingly so that all future payments to A1 Comms Ltd are made to the following bank details: [details of nominated account]
>
> … I have attached the Notice of Assignment schedule from WTB UK SPV No.1 Limited to this letter for your information."

32. O2 responded with a request for a replacement letter which referred not only to the new bank account but also to the previous bank account to which O2 had made payments. The individual at O2 said that once they had this "I will get this changed for you".

33. The amended letter was duly provided with a further request for O2 to confirm its consent to the redirection of the payments. O2's response to this (on 19 November) was to say:

> "I have been advised that all of the information is now with Infosys to make the change. This will take five working days to complete. I will drop you a confirmation email as soon as this change has taken place."

34. A1 replied to ask if it would "be possible for you to reply to the original email from [A1] copying in WTB to say that it has O2's consent and has been actioned at your end". O2 duly sent an email on the same day (still 19 November) copying in WTB. The text of the email was the same as the original email to A1. As a result of this, WTB increased the facility limit to £2.5m.

35. The first payment by O2 into the WTB Nominated Account was made on 14 December 2021. As a result of this, WTB approved the increase of the facility limit up to £5m.

36. Following this, O2 continued to make all payments in respect of the O2 Receivables to WTB's Nominated Account.

37. However, WTB did not receive a payment of approximately £1.7m which was due on 31 January 2024 and so wrote to O2 on 1 February 2024 chasing the payment. It included with this letter a copy of the notice of assignment which had been sent to O2 on 18 November 2021.

38. A further letter was sent by WTB's solicitors, Bermans, to O2 on 2 February 2024, again referring to the Security Assignment and enclosing a copy of the notice of assignment. This was the same day on which A1 entered into administration and the applicants were appointed as the Joint Administrators.

39. O2's response on 5 February 2024 was to note that an assignment could only take effect with the prior written consent of O2 and that it had no record of any such request being received.

40. There followed correspondence between the solicitors acting for O2, WTB and the Administrators. In particular, WTB's solicitors threatened O2 with legal action if it failed to pay the amounts due into the Nominated Account.

41. On 26 February 2024, O2's solicitors wrote to the other parties stating that:

> "Despite no evidence of a positive consent to assignment having been forthcoming, having taken time to understand the position further, [O2] does not dispute that by course of its conduct, in paying all sums to the WTB Trust Account notified to it in November 2021 (without objection from A1) it has effectively consented to the assignment of all A1 invoices addressed to [O2] and that payments due in respect of the O2 Receivables should continue to be paid to WTB until such time as A1's liabilities to WTB have been paid in full."

42. On the same day, WTB cancelled A1's appointment as its collection agent under the terms of the Security Assignment.

43. In early March 2024, O2 paid approximately £3.6m to the Nominated Account in the name of WTB. However, it stated that it would not release any further funds pending the outcome of the Joint Administrators' proposed application for directions which was issued on 20 March 2024.

Effect of the purported assignment of the O2 Receivables – consent and waiver

44. There is no disagreement between the parties as to the extent and nature of the prohibition on assignment in clause 18.2 of the Trading Agreement. It prohibits both legal and equitable assignment (see *First Abu Dhabi Bank PJSC v BP Oil International Limited* [2018] EWCA Civ 14 at [37]) of any rights under the Trading Agreement including the right to payments due from O2 under the terms of that agreement. In the absence of any provision to the contrary, it extends to an assignment by way of security as well as outright assignment.

45. I should mention that, in certain circumstances, the effect of a prohibition on assignment is nullified by the Business Contract Terms (Assignment of Receivables) Regulations 2018. However, the parties are agreed that these regulations do not apply in this case.

46. The leading authority on the effect of a prohibition on assignment is the decision of the House of Lords in *Linden Gardens Trust Limited v Lenesta Sludge Disposals Limited* [1994] 1 AC 85. The question the House of Lords had to address was

whether Linden Gardens, as assignee of the benefit of a contract made between the assignor and the defendant, could bring a claim against the defendant in circumstances where the contract contained an absolute prohibition on assignment of the contract.

47. Having considered the relevant authorities, Lord Browne-Wilkinson concluded at [108F] that:

> "The existing authorities establish that an attempted assignment of contractual rights in breach of a contractual prohibition is ineffective to transfer such contractual rights. I regard the law as being satisfactorily settled in that sense."

48. The effect of this was that Linden Gardens (as assignee) could not maintain a claim against the defendant who was the original contractual counterparty. As far as the position of the assignor and the assignee is concerned, Lord Browne-Wilkinson had already observed at [108D] that:

> "A prohibition on assignment normally only invalidates the assignment as against the other party to the contract so as to prevent a transfer of the chose in action: in the absence of the clearest words it cannot operate to invalidate the contract as between the assignor and the assignee."

49. The Court did not however expressly address the question as to whether the assignee's claim against the assignor is a personal claim or whether, as against the assignor, the assignee has proprietary rights. This has led to much academic debate about the merits of what is described by G J Tolhurst and G W Carter in their article, Prohibitions on assignment: a choice to be made, CLJ 73(2), July 2014, pages 404-434 at [406] as the "property view" and the "contract view".

50. In summary, the property view is that the prohibition on assignment defines the property rights in relation to the relevant contractual rights so that, if the effect of the prohibition is that the rights are not transferable, an assignment in breach of the prohibition cannot confer property rights on the purported assignee. Any claim against the assignor would therefore be a personal claim.

51. On the other hand, the contract view is that the prohibition is simply a matter of contract and does not affect the status of the contractual rights as being the object of proprietary rights so that an assignor can still confer on an assignee proprietary rights, as against the assignor. However, the contractual prohibition on assignment has the effect that the counterparty still owes obligations only to the assignor and not to the assignee.

52. As I have said, this distinction is not directly relevant to the validity and effect of the purported assignment in this case as WTB does not seek to rely on the proprietary effect of the assignment as between A1 and WTB in the event that the assignment is ineffective as against O2. Ms Shuffrey does however suggest that the distinction may be relevant when considering the effect of any possible consent and waiver on the part of O2 which is why I have referred to it. I will come on to this.

53. Given that it is common ground that O2 did not provide its consent to the assignment of the O2 Receivables contained in the Security Assignment prior to that document being signed, the question is whether it is possible for the counterparty in such circumstances to provide its consent at a later date and to waive the requirement for prior consent.

54. The authorities I have been referred to certainly suggest that this can be done. In *Barbados Trust Co Limited v Bank of Zambia* [2007] EWCA Civ 148, the Court of Appeal concluded at [58] that a requirement for prior written consent was not satisfied by actual or deemed consent occurring after the date of the assignment. This led Lord Justice Rix to say at [59]:

> "Thus, where an assignment precedes written consent, then, subject to waiver in circumstances where the debtor knows that the assignment has jumped the gun, it will always be open to the debtor to argue that the assignment is ineffective."

55. The suggestion therefore seems to be that it is open to the counterparty to waive the requirement for prior consent as long as it knows that the assignment has already taken place.

56. Millett LJ took a somewhat equivocal view in *Hendry v Chartsearch* [1998] CLC 1382 at [1394]. Noting that an assignment in breach of a prohibition on assignment is without legal effect so far as the other party that the contract is concerned, he observed that:

> "It is not too late for the assignor to ask for consent. But the contract requires the assignor to obtain the prior consent of the other party; retrospective consent if given, may operate as a waiver, but cannot amount to the consent required by the contract. The proper course is for the assignor to ask for consent to a new assignment and to wait until it is given or unreasonably refused before proceeding to make it."

57. Again, this does however appear to confirm that a waiver of the requirement for prior consent is a possibility even though it may be preferable to obtain consent and then to make a new assignment with the benefit of that consent.

58. This is supported by the fact that the Court of Appeal concluded in *Musst Holdings Limited v Astra Asset Management UK Limited* [2023] EWCA Civ 128 at [86] on the basis of the comments of Millet LJ in *Hendry* that:

> "A breach of a provision requiring prior consent to a transfer is capable of waiver by the other contracting party, in the form of retrospective consent, albeit that that consent would not be the prior consent contemplated by the clause."

59. The Court found, in that case, that Musst should be treated as having waived the requirement for prior consent.

60. Although the observations in *Hendry* and *Barbados* are not binding, in the light of these authorities it cannot seriously be doubted that, where an assignment of contractual rights can only be made with the prior written consent of the other party, that party may give consent after the assignment and may waive the requirement for prior consent.

61. This is in my view consistent with the principles explained by the House of Lords in *Linden Gardens* where Lord Browne-Wilkinson notes at [105E] that:

> "The reason for including the contractual prohibition viewed from the contractor's point of view must be that the contractor wishes to ensure that he deals, and deals only, with the particular employer with whom he has chosen to enter into a contract."

62. Given that the prohibition on assignment is purely for the benefit of the counterparty, there is no reason in principle why that counterparty should not be free to waive the strict requirements of the prohibition and to give consent after the assignment has taken place.

63. As far as waiver is concerned, I accept Mr Mills' submission that the nature of the waiver in this case is the category sometimes referred to as waiver by estoppel. The requirements for this were set out by the Court of Appeal in *Persimmon Homes (South Coast) Limited v Hall Aggregates (South Coast) Limited* [2009] EWCA Civ 1108. Lord Justice Aikens explained at [52] that:

> "A party to a contract (A) may waive the obligation of the other party to the contract (B) to perform a stipulation in the contract that is for the benefit of A. A may waive the obligation without any request by B that A do so. But A will only be taken to have waived the obligation of B to perform that stipulation of the contract if, (in the absence of a request to do so by B), A has made an unequivocal representation to B that A does waive the performance of the stipulation. That unequivocal representation can be by words or conduct, but does not have to be as blunt as 'I hereby waive' the other party's obligation to perform the stipulation. For the waiver to be effective, B must either act on the unequivocal representation of A to his detriment; or he must conduct his affairs on the basis of the waiver."

64. Aikens LJ went on to note at [56], that almost all decisions on waiver depend on their facts and, at [57], that whether an unequivocal representation has been made must be viewed objectively in the light of what was known by both parties at the time.

65. One further point in relation to waiver is that, as I have mentioned, clause 18.5 of the Trading Agreement requires any waiver to be in writing. As the Supreme Court confirmed in *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 24, a contractual provision requiring a variation to be in writing should be enforced subject to arguments based on estoppel.

66. In principle, it is difficult to see why the reasons given by the Supreme Court should not apply equally to a requirement for a waiver of contractual rights to be in writing. Indeed, this was the conclusion reached by Mr Richard Salter KC in *GPP Big Field LLP v Solar EPC Solutions SL* [2018] EWHC 2866 (Comm) at [203.3].

67. Before going on to consider the facts of this case, the last point to deal with is whether subsequent consent coupled with a waiver of the requirement for prior consent to the assignment has the effect of conferring proprietary rights on the assignee. It is in this context that Ms Shuffrey suggests that there may be a difference depending on whether the property view or the contract view of the effect of a prohibition on assignment is correct.

68. Ms Shuffrey acknowledges that there is no problem if the contract view is correct as the only effect on the prohibition is to prevent the assignee from acquiring direct rights against the counterparty. It does not otherwise affect the proprietary nature of the rights in question.

69. However, if the property view is correct, the prohibition on assignment does affect the proprietary nature of the contractual rights and so, said Ms Shuffrey, could affect the ability to confer any proprietary rights on the assignee if the requirements of the prohibition on assignment are not complied with.

70. I do not however accept that this follows even where the property view is correct. Proponents of the property view (such as Tolhurst and Carter - see [49-51] above) accept that there is a difference between an absolute prohibition on assignment and a clause which, as in this case, imposes a restriction on assignment such as a

requirement for prior consent or only allowing an assignment in favour of certain identified assignees (such as group companies).

71. As Tolhurst and Carter note at [406 – footnote 3]:

> "Based on the property view put forward in this paper, a unilateral waiver of a prohibition cannot of itself change the nature of the chose in action and give it the character of transferability although it may operate as a form of estoppel. Hence the importance of an express or implied provision for assignment with consent to be incorporated into the contract from the moment of formation."

72. It is clear from this that a contractual right that is assignable with consent does have the character of transferability (albeit subject to restrictions). It follows from this that it can properly be the subject of property rights. This being the case, it is difficult to see how there can be any principled objection to a transfer of those rights even if the precise requirements of the restriction are not complied with as long as the person who controls the transferability of the rights gives its consent and waives any non-compliance.

73. This conclusion is of course supported by the observations made by the Court of Appeal in each of *Barbados*, *Hendry* and *Musst* which I have already referred to. There would be no point referring to subsequent consent coupled with a waiver of the requirement for prior consent if that was not capable of resulting in an effective assignment of the contractual rights to the assignee.

74. Mr Mills drew attention by analogy to the decision of Pearson J in *Butterworth v Kingsway Motors* [1954] 1 WLR 1286. That case has nothing to do with an assignment in breach of a prohibition against assignment without consent but is an example of a situation where subsequent events validated a purported previous defective transfer of title.

75. *Butterworth* concerned a car which was the subject of a hire purchase agreement. The hirer sold the car to A before she had paid all the instalments due or exercised the option to purchase under the hiring agreement and so was not therefore the owner of

the car when it was sold. A subsequently sold the car to B who sold it to the defendant. The defendant then sold the car to the plaintiff. After all of these transactions took place, the original hirer paid the outstanding instalments and exercised her option to purchase the car under the hire purchase agreement.

76. The judge held at [1295] that once the original hirer acquired ownership of the car from the hire purchase company this "went to feed the previously defective titles of the subsequent buyers and inured to their benefit". The result was that the defendant was held to be the owner of the car as, on the facts, the plaintiff had rescinded the contract of sale between the plaintiff and the defendant.

77. Whilst, as I say, the context for this decision is very different to the present case, there is some similarity in that a transaction which, initially, could not pass any title to the transferee was effective to pass that title once the transferor was in a position to do so as a result of subsequent events. This supports the conclusion which the judges in *Hendry*, *Barbados* and *Musst* appear to have reached that, even where there is a requirement for prior consent, subsequent consent coupled with a waiver of the requirement for prior consent will validate an otherwise ineffective assignment as between the counterparty and the assignee.

78. In my view, this is the right result. In circumstances where the person for whose benefit the prohibition on assignment exists has given their consent and has waived the requirement that the consent should have been given prior to the assignment, that person should be bound to recognise and give effect to the assignment. It may of course be that the same result could be achieved by some sort of estoppel but that is not a reason for denying the effect of the assignment in the first place.

79. The key questions therefore are whether O2 has consented to the assignment which took place on 17 November 2021 and, if so, whether it has waived the requirement for the consent to have been given before the assignment took place. There must also have been some detrimental reliance by A1 on the waiver or it must have conducted its affairs on the basis of the waiver.

80. WTB accepts that the consent and the waiver must be in writing. It does not for example seek to argue that the consent and waiver can be inferred from O2's conduct alone.

81. As we have seen, the question as to whether there has been a waiver must be considered objectively taking into account what was known by both parties at the time (*Persimmon* at [57]). I can see no reason why the question as to whether consent has been given should not be determined on the same basis. The question is how, objectively, the communications passing between the parties should be viewed, taking into account all the surrounding circumstances.

82. On behalf of WTB, Mr Mills submits that, taken as a whole, the correspondence in November 2021 shows that O2 both consented to the assignment and waived any requirement that the consent should be given before the assignment took place.

83. Ms Shuffrey, on the other hand, observes that O2 was not specifically asked to consent to the assignment or to waive any rights and that, on the face of it, the correspondence between A1 and O2 relates primarily to the redirection of the proceeds of the O2 Receivables and not the assignment of those receivables to WTB.

84. Ms Shuffrey also suggests that the requirement for any consent or waiver to be in writing carries with it an inference that the consent/waiver must be more explicit. However, I cannot accept this. As the Court of Appeal made clear in *Persimmon* at [52], in the context of a waiver where there must be an unequivocal representation, there is no requirement to use explicit words such as "I hereby waive". The question is simply whether, objectively, there is an unequivocal representation.

85. Similarly, in my view, the question as to whether O2 has given its consent to the assignment must depend upon whether, objectively, the correspondence amounts to such consent, whether the word "consent" is used or not.

86. Looking first at the question of consent, the evidence clearly shows that the proposed assignment was discussed with O2 before it took place. This is apparent from the witness statements of both Mr Bonavero and Mr Butler. It is also confirmed by the email sent by A1 to O2 on 18 November 2021 attaching the letter requesting that future payments go to the nominated account and the notice of assignment as the email notes that the change is "as previously discussed".

87. Although this email asked for "consent of redirection of payments to the new bank account", it is clear that this was in the context of the assignment of the O2

Receivables to WTB, which had previously been discussed with O2. This is apparent from the fact that the assignment had previously been discussed with O2, the reference in the letter attached to the email to the new finance facility with WTB and that the letter attached the notice of assignment.

88. O2's response on 18 November was to request a slightly different form of letter which included the previous bank account details, following receipt of which O2 confirmed that they would "get this changed over for you".

89. When the revised letter was sent by A1 to O2, A1 once again asked O2 to "confirm O2's consent of redirection of payments". However, again, this attached the letter referring to the new finance facility as well as the notice of assignment.

90. The following day, O2 confirmed that "all of the information is now with Infosys to make the change". A1 requested that O2 copy in WTB "to say that it has O2's consent and has been actioned at your end. Hopefully that will be enough for us to start using the facility today". This is of course tied in with the letter which A1 had sent to O2 requesting the redirection of the payments, which referred to the new facility and attached the notice of assignment.

91. O2 did send an email on the same day copying in WTB but, again, all this said was that all of the information was now with Infosys to make the change which would take five working days to complete.

92. In my view, a number of points emerged from this correspondence when read as a whole:

    92.1 A1 was notifying O2 that it had entered into a new facility with WTB.

    92.2 That facility involved an assignment of the O2 Receivables to WTB.

    92.3 As a consequence of the assignment, it was necessary to arrange for the proceeds of the O2 Receivables to be paid to a different bank account.

    92.4 O2 was aware of all of this as a result of its previous discussions with A1.

93. In these circumstances, although the specific request was for O2 to consent to the redirection of the payments and O2 did not explicitly give its consent but simply

confirmed that the redirection had been actioned, the correspondence cannot objectively be understood as anything other than O2 giving its consent not only to the redirection of the payments but also to the assignment which resulted in the need for the payments to be redirected.

94. I therefore find that O2 consented to the assignment either on 18 November 2021 when it first confirmed that it would give effect to the change of payment details or, at the latest, on 19 November 2021 when it confirmed that it had given the necessary instructions for this to happen.

95. Turning to waiver, the first question is whether there is an unequivocal representation by O2 that it waived any requirement for prior consent. Mr Mills refers to Chitty on Contracts (35th edition chapter 8, section 3 at 28-061) which contrasts waiver by election and waiver by estoppel. As previously mentioned, the waiver in this case is waiver by estoppel. The authors of Chitty note that:

> "...in the case of waiver by estoppel neither knowledge of the circumstances nor of the right is required on the part of the person estopped; the other party is entitled to rely on the apparent election conveyed by the representation."

96. Ms Shuffrey suggested that in order for there to be a valid waiver, O2 must be shown to be aware of the rights which it was waiving. However, she did not put forward any authority in support of that proposition.

97. Based on the statement made in Chitty and the authorities mentioned in the relevant footnote, I accept Mr Mills' submission that it is not necessary for O2 to be aware of the rights which were being waived as long as it was clear from the representations made that the relevant rights are being waived.

98. In my view, this is consistent with the observation of the Court of Appeal in *Persimmon* at [57] that the question as to whether or not there has been an unequivocal representation must be determined objectively based on what was known by both parties at the time. There is no suggestion that the party which is alleged to have given the waiver must have been aware of the right which was being waived

although, depending on the circumstances, it may, no doubt, be a factor to take into account.

99. Turning to the present case, I have found that O2 gave its consent to the assignment by confirming that it would change the bank account to which it made payments in the knowledge that this was required as a result of the new facility with WTB and the assignment of the receivables which that entailed. It also knew that the assignment had already taken place as the notice of assignment stated that the O2 Receivables "have been assigned to WTB".

100. It follows from this that O2's consent to the assignment as evidenced by the emails sent by it on both 18 November 2021 and 19 November 2021 constitute an unequivocal representation that O2 waived the requirement for prior consent as the assignment would otherwise be invalid and O2 would not have given effect to it.

101. Ms Shuffrey noted that O2 was entitled to terminate the Trading Agreement if A1 purported to assign the agreement without obtaining O2's prior written consent. Whilst clause 18.5 of the Trading Agreement confirms that failure by a party to enforce its rights under the agreement is not to be deemed to be a waiver of such rights, the existence of this right together with the fact that O2 continued to treat the agreement as fully effective as well as giving effect to the assignment by redirecting the payments in my view supports the conclusion that the correspondence from O2 not only evidenced its consent to the assignment but also comprised an unequivocal representation that it waived any requirement for prior consent.

102. There is no direct evidence as to whether, in November 2021, O2 was conscious of the requirement for its prior written consent to any assignment of the O2 Receivables by A1 to WTB. However, in line with the submissions made by Mr Mills, it would in my view be right to infer that O2 was aware of its rights.

103. There are two pieces of evidence which are relevant in relation to this. The first is that the Trading Agreement had been amended on a regular basis including on four occasions in 2021, the most recent occasion prior to the assignment being 19 October 2021. This shows that the agreement was not something which was signed and then put in a drawer but was something which was reviewed on a regular basis. I accept that the amendments may have had nothing to do with the prohibition on assignment

(much of the detail of the amendments has been redacted as being commercially sensitive) but regular reference to the agreement would tend to indicate that the parties were likely to be aware of its contents.

104. However, perhaps the more telling evidence is that, in February 2024 when WTB and its solicitors chased O2 for the payment which was due on 31 January 2024 (the chasing letters being sent on 1 February 2024 and 2 February 2024 respectively), O2's immediate response on 5 February 2024 was that an assignment could only take place with its prior written consent. It is notable that 2 February 2024 was a Friday and 5 February 2024 was a Monday so the reaction was pretty much instantaneous.

105. It is clear from this that O2 were well aware of the terms of the Trading Agreement and, in particular, the prohibition on assignment at that time. It would be surprising if it were not similarly aware of the terms of the agreement in November 2021.

106. I therefore find that O2 was in fact aware of the need for its prior written consent to any assignment at the time it gave that consent in November 2021. It is clear from the evidence that WTB and A1 were equally aware of this given that WTB had specifically asked A1 about any restrictions on assignment and both parties had seen the Trading Agreement prior to the correspondence with O2.

107. Therefore, looked at objectively, and taking into account what both O2 and A1 knew, there can be little doubt that the correspondence from O2 amounted to an unequivocal representation that it waived the requirement for prior consent.

108. Although A1 only requested O2 to consent to the redirection of the payments and O2 simply confirmed that it had given effect to this request, for the reasons I have explained, I do not accept that the representations made by O2 were equivocal in the light of the surrounding circumstances and what I have found was known to the parties.

109. The last point is whether A1 acted on the representation to its detriment or conducted its affairs on the basis of the waiver (*Persimmon* at [52]).

110. Mr Mills submitted that WTB acted to its detriment by increasing the facility limit in the belief that it had good security. However, that is not the test. It is A1 which must

have acted to its detriment. No specific detriment has been identified on the part of A1.

111. It is however clear that A1 conducted its affairs on the basis of the waiver. This is apparent primarily from the fact that it allowed the O2 Receivables to be paid to the Nominated Account until its administration in February 2024 which in turn allowed it to utilise the WTB facility during that period. It would not of course have been able to do so had it thought that the assignment was ineffective (if the requirement for prior consent had not been waived) as it would be in breach of its obligations to WTB.

112. In addition, the evidence shows that in September 2022, A1 entered into a deed of priority with WTB and with another finance provider, MarketFinance Limited which held a fixed and floating charge over A1's assets. The deed of priority proceeded on the basis that the O2 Receivables had been assigned to WTB. Again, this shows that A1 conducted its affairs on the basis of the waiver.

113. My conclusion therefore is that O2 consented to the assignment of the O2 Receivables from A1 to WTB and waived the requirement for prior consent. The consent and the waiver were both in writing and do not therefore fall foul of the requirements in that respect contained in the Trading Agreement.

114. As I have already explained, the effect of the subsequent consent and the waiver of the requirement for prior consent is that the assignment was effective to pass property rights in the O2 Receivables to WTB. As Mr Mills submits, I do not need to decide whether the transfer of rights took effect on the date of the assignment (17 November 2021) or whether it only took effect on the date the consent/waiver were given, being 18 or 19 November 2021 as the difference of one or two days makes no difference in this particular case. I therefore express no view on this point.

115. The conclusion I have reached in relation to the assignment of the O2 Receivables is sufficient to enable me to give the directions requested by the Joint Administrators. As I have said, I do not propose to deal with the arguments put forward by WTB in relation to trusts and estoppel given that these raise issues which are not straightforward and, based on the submissions made, raise issues where the law does not appear to be settled. It is better for these points to be left to a case where they need to be decided and more detailed submissions can be made.

116. I will however deal briefly with the question as to whether the Security Assignment constitutes not only an assignment of the O2 Receivables but also of the proceeds of the O2 Receivables as this is a reasonably straightforward matter of contractual interpretation.

Assignment of the proceeds of the O2 Receivables

117. Although it is a matter of interpretation of the relevant provision, a prohibition on the assignment of rights under a contract will not normally prevent the assignment of any proceeds of those rights in the hands of the assignor (see Smith, The Law of Assignment (3rd edition) at paragraphs 25.10-25.12; re *Turcan* [1888] 40 ChD 5 at [10-11]; *First Abu Dhabi Bank PJSC v BP Oil International Limited* [2018] EWCA Civ 14 at [26]).

118. The parties are agreed that, in this case, clause 18.2 of the Trading Agreement does not prohibit the assignment by A1 of any proceeds received from O2, as distinct from the contractual right to those proceeds (the assignment of which can only take place with the prior written consent of O2).

119. Mr Mills submits that, as a matter of contractual interpretation, the Security Assignment is an assignment not only of the right to payments from O2 but is also an assignment of the proceeds of that right.

120. Ms Shuffrey questions whether this can be right given the clear words of the assignment provisions contained in the Security Assignment which relate to the "O2 Receivables" and the "Related Rights", neither of which refer in terms to the proceeds of A1's rights under the Trading Agreement. She quite fairly makes the point that, if there was an intention to assign not only the receivables but also the proceeds, it would have been open to the parties to say so specifically.

121. There is no difference of opinion between the parties as to the principles which the Court should apply in interpreting a contract. Ms Shuffrey refers to the well-known explanation of Lord Hodge in *Wood v Capita Insurance Services Limited* [2017] AC 1173 at [8-15]. Mr Mills refers to a more recent summary of the principles provided by the Court of Appeal in *Lamesa Investments Limited v Synergy Bank Limited* [2020] EWCA Civ 821 at [18].

122. In the summary, the task is to ascertain objectively the meaning which the relevant provision would convey to a reasonable person having all the background knowledge available to the parties at the time of the contract, taking into account the language used, the contract as a whole, the surrounding circumstances, the purpose of the contract and commercial common sense.

123. The starting point must be the definition of the rights which have been assigned. The O2 Receivables are defined as:

> "The amount (or part of the amount where appropriate) of any indebtedness or obligation, present, future or contingent (including any tax or duty payable) owing to [A1] by O2 under a Contract of Sale, whether or not an invoice has been raised."

124. This therefore refers only to the contractual right to payment and not to the proceeds of the payment itself. In isolation, it might not be thought that the Security Assignment could therefore constitute an assignment of the proceeds as opposed to just the receivables.

125. However, as Mr Mills points out there can be little doubt, looking at the purpose of the Security Assignment that WTB was intended to have security not only over the contractual rights but also over the proceeds of those rights, once received. This is apparent from the fact that the Security Assignment contains a provision (clause 12) headed "Application of proceeds" which sets out the order in which any proceeds held by WTB must be applied (being first of all payment of costs, then satisfying liabilities with any surplus being paid to A1).

126. The suggestion that the Security Assignment is an assignment not only of the receivables but also the proceeds also finds some support in the language of other provisions of the Security Assignment. For example, the Security Assignment envisages that the proceeds of the receivables should be paid into a separate account under the control of WTB. This is referred to as the "Nominated Account" which is defined as:

> "The account held by WTB … into which O2 Receivables are to be collected in accordance with this deed."

127. Arguably, the contractual rights cannot, themselves, be collected into a bank account. It is only the proceeds of those contractual rights which can be collected into a bank account.

128. In a similar vein, clause 5.8 of the Security Assignment provides that, as long there has not been an event of default:

> "WTB shall remit … to [A1] the O2 Receivables paid into the Nominated Account."

129. Again, it is not the contractual rights which can be paid into the Nominated Account and then paid to A1. It is only the proceeds of those contractual rights.

130. Both of these provisions might suggest that the definition of the O2 Receivables was intended to encompass not only the contractual rights but also the proceeds from those contractual rights.

131. On the other hand, there are other provisions of this Security Assignment which refer specifically to the proceeds of the O2 Receivables. For example, clause 7.2 permits WTB, once the security has become enforceable to:

> "Take possession of and hold or dispose of all or any part of the proceeds of the O2 Receivables."

132. This might suggest that the definition of the O2 Receivables was not intended to include the proceeds of those contractual rights as there would otherwise be no need to refer separately to the proceeds of the O2 Receivables. Having said that, the ability for WTB to "take possession of and hold or dispose of" the proceeds of the O2 Receivables might be taken as an indication that the Security Assignment was intended to include an assignment of the proceeds as well as the receivables.

133. Other provisions of the Security Assignment refer to "remittances relating to the O2 Receivables" (clause 5.4.1.6), "remittances … on account of the payment of O2 Receivables" (clause 5.5.1) and "payments in respect of an O2 Receivable" (clause 5.5.2).

134. These provisions shed little light on the true interpretation of the Security Assignment. The words used could be consistent with the O2 Receivables comprising only the contractual rights or also comprising the proceeds from those contractual rights.

135. Despite the ambiguities I have highlighted, I bear in mind that the starting point is normally the language used by the parties (particularly in the case of complex agreements drafted by professionals, as is the case here) and that, where the language used is unambiguous, the Court must apply it and should not search "for drafting infelicities in order to facilitate a departure from the natural meaning of the language used" (see Lamesa at [18 (iii) – (v) and (vii)] and the authorities referred to in those passages).

136. In my view, the definition of the O2 Receivables is clear and unambiguous. It includes the contractual right to receive payments from O2 but it does not include the proceeds of those contractual rights. In the light of this, the other points I have mentioned cannot be relied on to override or amend the clear words of that provision.

137. I should mention that Mr Mills also drew attention to the definition of the Related Rights which were also assigned. However, the closest this gets to suggesting that the assignment included the proceeds of the receivables is a reference to "any cheque or negotiable instrument available to [A1]".

138. I can see that, in substance, this is an assignment of one form of the proceeds of the O2 Receivables but, again, there is no ambiguity and no basis on which this limited provision can be interpreted as a more general assignment of any proceeds of the O2 Receivables.

139. My conclusion therefore is that there was no assignment to WTB of the proceeds of A1's contractual rights against O2. However, as I have already said, I am satisfied that there was a valid and effective assignment of the O2 Receivables for the reasons I have explained.

Directions

140. In the light of my findings, the Court's directions to the joint Administrators are as follows:

140.1 There has been a valid assignment of the O2 Receivables by A1 to WTB. As notice of the assignment has been given to O2, the assignment is effective not only between WTB and A1 but also as between WTB and O2.

140.2 In the circumstances, O2 should make payments to WTB in accordance with the notice of assignment and O2 will be validly discharged in respect of its payment obligations if it does so.

141. I have not been asked to give any directions as to the circumstances in which the Security Assignment will come to an end and WTB will be required to reassign the O2 Receivables to A1 and I express no view on this.

142. I would invite the parties to agree an order giving effect to this judgment and dealing with any consequential matters including the costs of the application.