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Welcome to the Summer 2017 edition of the Bulletin. I am pleased and proud to be the first student editor of the Bulletin. Once again, the Bulletin has been written entirely by students on the LL.M programme which means that for the first time the production of the Bulletin is student-led from start to finish.

This issue covers a number of cross-border cases, touching on both the Cross-border Insolvency Regulations 2006 and the EC Insolvency Regulation.

In *Diffraction Diamonds*, the court found that a foreign-registered company could be wound up in the public interest in the UK, if it had sufficient connection to the UK.

In the *Cherkasov and Ors* case, the court found exceptional circumstances to justify ordering security for costs against a foreign liquidator.

Two of the liquidation cases serve as a useful reminder that winding up petitions are not a suitable method of pursuing debts where there is a genuine dispute over what is due. The *Kean v Lucas* case provides an insight into how a liquidator can prevent a creditors' meeting from taking place, when creditors have requested one is held for the purpose of removing the liquidator from office.

I would like to thank all of the writing team very much for all their work and to congratulate them on their contributions, most of whom are busy writing their dissertations over the summer term. You can read their profiles at the back of the Bulletin.

It only remains for me to wish you all the very best for the rest of the summer.

Darren
Darren Kealey

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CROSS-BORDER

Re Diffraction Diamonds DMCC [2017] EWHC 1368 (Ch)

Executive Summary

A company incorporated in a foreign jurisdiction can be wound up in the UK in the public interest where the company has sufficient connection to the UK.

Facts

The founder of Diffraction Diamonds DMCC ("Diffraction") previously founded another company, Diffraction Limited, which was engaged in the business of selling diamonds and carbon credits as investments, and was wound-up in the public interest in June 2014.

The bogus scheme run by Diffraction, a company incorporated in Dubai, was assisted by another UK company, IGL Labs UK Limited, which issued valuation certificates to support the purported values of the diamonds sold by Diffraction. These were sold via a network of brokers based in the UK.

Investors thought that they were purchasing valuable diamonds as an investment, but the High Court heard that the diamonds' value were substantially lower – in fact, they were sold at such exorbitant mark-ups to investors it was highly unlikely that investors could make any future profit.

Both companies were presented with winding-up petitions in the public interest by the Secretary of State for Business, Innovation and Skills.

Decision

Winding-up orders were duly made.

Pursuant to s. 221 of the Insolvency Act 1986, a foreign company may be wound-up on just and equitable grounds. In the case of a winding-up petition in the public interest, it was necessary to establish that the foreign company had a sufficient connection with the UK (*Re Titan International Inc* [1998] 1 B.C.L.C. 102).

Diffraction argued against the winding-up petition on two main fronts: first, that it was a foreign company which no longer engaged UK brokers and had no assets in the UK; and second, relying on *Stocznia Gdanska SA v Latreefers Inc* [2000] C.P.L.R. 65, that it must have had a UK connection at the time of presentation of the winding-up petition for a winding-up order to be granted.

The High Court did not agree. It deemed Diffraction had sufficient connection with the UK as its operations were run from the UK, managed sales via brokers in the UK and served UK customers.

The High Court further rejected Diffraction's other argument, distinguishing *Latreefers* and citing *Re Walter L Jacob & Co Ltd* (1989) 5 B.C.C. 244 which established that a company could still be wound-up in the public interest even though it had ceased to conduct the alleged offence in question.

In this instance, the High Court found that Diffraction's trading activities lacked commercial probity and that management was most likely aware of the scam due to the highly inflated prices. The High Court also found that a winding-up order would be beneficial so that a more detailed investigation could be carried out into Diffraction's affairs.

Comment

The decision is entirely sensible and where the company subject to a winding up petition in the public interest is foreign-registered, the court will not be persuaded that a lack of company assets in the UK should prevent a winding-up order being made. Furthermore, it was very much in the public interest for the company to be wound up given that the investors were based in the UK.

Darren Kealey and John Tan

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Cherkasov and Ors v Olegovich, the Official Receiver of Dalnyaya Step LLC [2017] EWHC 756 (Ch)

Executive summary

An application to set aside a recognition order that a liquidation proceeding was a foreign main proceeding under the Cross-Border Insolvency Regulations 2006 ("CBIR") was a 'claim or proceeding' within the meaning of Civil Procedure Rules 25 ("CPR"). Security for costs against a liquidator can be ordered as the applicants effectively become defendants to the application for the recognition order.

Facts

In August 2006 DSL, a Russian subsidiary of Guernsey unit trust "Hermitage", was placed into liquidation at the suit of the Russian tax authorities. The insolvency proceedings concluded with no asset recoveries made and, in October 2007, DSL was removed from the Russian companies register and ceased to exist. In 2015, the Russian Federal tax authority applyied to the Russian court to reverse the decision of October 2007 and DSL was brought back to life. In November 2015, DSL was put into liquidation and Mr Nogotkov was appointed as the official receiver.

Chersakov and others (the "Hermitage Parties"), who formed part of the former management of DSL, claimed that the second liquidation was unlawful, ineffective and did not serve a legitimate purpose. According to them, the liquidation was yet another step in a long-lasting abusive campaign on the part of the Russian Government to attack the Hermitage Parties. Nogotkov, on the other hand, claimed that the liquidation was reopened because of the asset stripping of DSL by the former officers.

In 2016, Nogotov had successfully applied to the High Court for a recognition order that the 2015 liquidation of DSL be recognised as a foreign main proceeding under the CBIR. He then sought an order for the production of documents from and the oral examination of the Hermitage Parties under section 236 Insolvency Act 1986, at a hearing scheduled for November 2017 (the "Hearing"). In addition to the section 236 application, the the Hearing was also due to consider an application from the Hermitage Parties to set aside the recognition order on the grounds that the making of the order was manifestly contrary to the public policy (as laid down in Article 6 of the UNCITRAL Model Law).

The present case concerned an application by the Hermitage Parties to the Court for security for costs for the planned Hearing.

Decision

Nogotkov was ordered to provide security for costs in the sum of £1 million.

A court can make an order for security for costs as laid down in Article 25.12 CPR if it is satisfied that the conditions listed in Article 25.13 CPR are met. Article 25.12 CPR states that 'a defendant to any claim may apply under this section of this Part for security for his costs of the proceedings'. The Court therefore first had to establish what a 'claim' is and what 'proceedings' are for the purposes of this Article.

Claim and proceedings

The Court made reference to several cases that provide guidance for determining what a 'claim' and 'proceedings' are in the context of Article 25.12 CPR. The Hermitage Parties argued that the Court had to look at the substance and not the form of the proceedings and therefore, it was to consider the content of the Hearing as a whole. The Court stated that it had to determine whether the Hermitage Parties were entitled to apply for security by looking at the application to set aside the recognition order.

It was first established by the Court that the recognition application brought by Nogotkov was properly described as a proceeding within the meaning of CPR 25.12. Since the recognition application was opposed by the Hermitage Parties, the Court held that they could be properly described as the defendants to this application. The Court decided, in line with the case *Diag Human SE v Czech Republic* [2013] EWHC 3190 (Comm), that the application to set aside the recognition order is part of the proceeding or claim commenced by Nogotkov when he applied for the recognition order. It was for this reason that the Court was satisfied that the Hermitage Parties became the defendants, now that they challenge the making of the recognition order and, thus, pursuant CPR r 2.3 (which defines a 'defendant' as a 'person against whom a claim is made'), the Court was fully satisfied that it had jurisdiction to order security for costs against Nogotkov.

Security for costs

When the Court turned to the matter on whether to order security for costs, it stressed that Nogotkov had no assets in the United Kingdom against which an order for costs could be enforced if the Hermitage Parties would be successful during the Hearing; that it would be practically impossible for the Hermitage Parties to enforce those costs in Russia; and that Nogotkov had substantial funds to his avail, hence an order to pay for security would not affect his ability to participate in the Hearing.

The Court considered whether in granting the order, there may be 'undesirable floodgates' of similar applications and hence disrupt the operation of the UNCITRAL Model Law in the United Kingdom [para 82]. However, because the facts of the given case were deemed 'exceptional' by the Court, it stated that it was 'clearly a case' in which the discretion to order Nogotkov to pay security for the Hermitage Parties should be exercised.

In granting £1 million as security for costs, the Court considered that the Hearing would be complicated and lengthy, and, in addition, the balance of prejudice favoured the Hermitage Parties.

Comment

This case is useful for multiple reasons. First of all, it provides an extensive and clear overview of the case law on what can constitute a 'claim' and what can constitute 'proceedings' in the context of CPR 25.12 and gives good guidance on how to determine whether there is a 'claim' or 'proceeding'.

Secondly, this judgment shows that the CBIR will not necessarily prevent the court from ordering security for costs to be made against a foreign liquidator. However, as the Court emphasized, it shall only do so when there are exceptional circumstances which justify the making of such an order. It also shows how the definition of a 'defendant' can aid in establishing jurisdiction. As a corollary to this, an application for security for costs which is accompanied by an application to set aside a recognition order is not to be seen as a freestanding proceeding in which the applications should be treated as 'claimants' and thus not as 'defendants'.

Lastly, the case teaches us how the Court may reason when asked to grant an order for security for costs against a foreign liquidator. The Court mentioned several factors which led to the judgment that it would be 'just' to grant the order. In the given case, it was especially the fact that the Hermitage Parties would not be able to enforce the costs in Russia and would hence be unable to obtain their costs from Nogotkov that made the court decide as it did.

The judgment is to be applauded since it shows a great deal of fairness and understanding.

Sander Hendrix

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Re International Bank of Azerbaijan OJSC (Ch)

Executive Summary

Restructuring proceedings in Azerbaijan can be recognised as foreign main proceedings under article 2 of the Cross-Border Insolvency Regulations 2006 ("CBIR"), where the English court is satisfied for the purposes of Article 17 (*decision to recognise a foreign proceeding*) that the requirements of Article 2 are met. Furthermore, an administration moratorium could be imposed under paragraph 43 Schedule B1 of the Insolvency Act 1986, where the court was satisfied that the interests of creditors and other interested persons were adequately protected.

Facts

The International Bank of Azerbaijan (the "Bank") had its head office in Baku and was regulated by the financial laws of and under the supervision of the authorities in Azerbaijan. The Bank was struggling financially and entered into a debtor-in-possession rescue procedure in Azerbaijan, which triggered a moratorium for 180 days in Azerbaijan. The Bank's financial distress meant it failed to perform on its loan obligations timely and fully. Many of these loans were governed by English law. Fearing enforcement of these obligations, the Bank sought relief at the English High Court (the "court") asking the court to impose a moratorium on the enforcement proceeding, now that the management of the Bank had already presented a restructuring proposal, which was to be put to the Bank's creditors, under the supervision of the court.

Decision

The court recognised the proceedings in Azerbaijan as foreign main proceedings and granted the moratorium sought.

The proceedings entered into in Azerbaijan could be recognised in the United Kingdom as a foreign main proceeding under Article 17, CBIR. The court was satisfied that the Bank's centre of main interests was in Azerbaijan, that recognition of the foreign main proceeding was not contrary to public policy and that there was adequate evidence of the opening of the proceedings in Azerbaijan and the appointment of a foreign representative.

In granting the moratorium, the court noted that under Article 20(2) the effect of recognition is a stay that takes effect similar to a winding-up order. The court can, however, choose to deviate from this and modify the moratorium under Article 22 CBIR if it is satisfied that the interests of the creditors and other interested persons, are adequately protected.

It granted the Bank an administration moratorium in accordance with the terms set out in paragraph 43 Schedule B1 of the Insolvency Act 1986. The court found that this was the appropriate solution, given that the proceedings in Azerbaijan were aimed at rescue and because the procedure was a debtor-in-possession procedure.

Comment

Taking into consideration the aims of administration as laid down in paragraph 3(1)(a) Schedule B1 Insolvency Act 1986, the administration moratorium is, indeed, the most appropriate kind of moratorium to protect the Bank.

The case shows how the court can take a helpful approach and grant a protective moratorium when a company has opened insolvency proceedings elsewhere and which become recognised as foreign main proceedings. The court has attributed great weight to the nature and, more importantly, the aim of the foreign main proceedings.

Sander Hendrix

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Ronelp Marine Ltd v STX Offshore and Shipbuilding Co

[2016] EWHC 2228 (Ch)

Executive summary

An automatic stay imposed under the Cross-border Insolvency Regulation 2006 ("CBIR") can be lifted to ensure the continuation of an action before the English Commercial Court where there are factors of sufficient weight to make it an exceptional case.

Facts

STX Offshore & Shipbuilding Co Ltd ("STX") is a Korean shipbuilding company with a wholly owned Chinese subsidiary ("Dalian"). Dalian had entered into contracts with the five applicants to build five vessels for them. STX entered into performance bonds ("the

Guarantee") with the applicants to guarantee the performance by its subsidiary Dalian. Both the original contracts and the Guarantee are subject to English law. Due to the state of the shipbuilding market, Dalian entered into a Chinese insolvency process before any of the ships were built.

The applicants commenced proceedings before the English court against STX based on the Guarantee STX had provided them. STX filed a defence, claiming that the Guarantee was unenforceable because it was illegal. The illegality was based on the fact that they reduced the price by $6 million for each of the ships to mislead third parties. The English Commercial Court had given directions for the conduct of the litigation.

In May 2016, the directors of STX presented a petition to the Seoul Central District Court for the commencement of Korean rehabilitation proceedings. These proceedings were recognised by the English court as a foreign main proceeding under the CBIR. The petition to the Seoul court resulted in an automatic stay, affecting the litigation against STX. No legal process could be continued against STX unless the duly appointed administrator consented to it, or the Korean court permitted it. After the Korean administrator rejected the applicants' claim based on the Guarantee, they subsequently applied to the English court to lift the stay.

Decision

The judge granted permission to continue the Commercial Court action, lifting the stay.

Norris J stated that a creditor asking for the continuation of the proceedings bears the burden of proving their case for relief. The creditor should establish, at least, the following requirements: first, the nature of the interests they seek relief for; second, proof that granting such relief will not impede the purpose of the insolvency proceedings; and third that the creditor must enable the court to make a fair balance between their interests and that of the other creditors. The court stressed that this was not an exhaustive list of considerations.

It was established that the applicants' claim was an unsecured money claim, which would only in "exceptional" cases be the type of a claim that would lead to the court deciding to continue the underlying procedure and lift the stay. An "exceptional" case, was described by Norris J, as "a circumstance, or a combination of circumstances, of sufficient weight to overcome the strong imperative to have all claims dealt with in the same way".

The court based its final conclusion on the following facts. First, that the unsecured money claim of the applicants was a particularly complex claim. This was due to the unenforceability of the contract on the ground of illegality. The English law of illegality was complex because it was an ever-changing area of law. It was thus found that the English courts could better decide on the issue, rather than the Korean insolvency court by way of summary review. It is thus an exceptional case. Second, the proceedings in the English Commercial Court were already at an advanced stage, with significant amounts having been spent in preparation for the trial. Third, the English court would decide the case more speedily compared to the confirmatory review and objection proceeding process in Korea. Finally, lifting the stay would assist the Korean rehabilitation plan, instead of impeding it. It would do so by providing a solution on a genuinely difficult issue of foreign law, which the Korean court subsequently can adopt, promote or ignore.

The court had to balance the interests of the applicant and the other creditors of STX. Based on the four key reasons set out above, and the fact that lifting the stay would not

in any way alter the priorities of the Korean insolvency proceedings, the court found that the stay should be lifted and the underlying proceedings in the English Commercial Court should be presumed.

Comment

Based on Article 20(1)(a) CBIR, a recognised foreign insolvency proceeding by the English court leads to an automatic stay on other proceedings against the insolvent company. There is an exception to this general rule, found in Article 20(6) CBIR. Based on this Article the court can modify or terminate this stay. This is what we saw in this case as well.

The case of *Ronelp Marine v STX* is not the first case in which the English court was faced with the fall-out from Korean insolvencies in the shipping market. Another, recent, case is that of *Seawolf Tankers Inc and another v Pan Ocean Co. Ltd* [2015] EWHC 1500 (Ch). In this case, the court held that the test for lifting a stay under the CBIR 2006 is the same test applicable when deciding whether to lift a stay in administration proceedings. Due to the nature of the stay in the case of *Ronelp Marine v STX*, the court applied another threshold. Although all these cases are unique, the latter case can provide us with some useful guidance as to what an applicant must provide to the court before permission can be granted to continue existing proceedings.

In addition to the three factors especially important when deciding whether to lift a stay and continue proceedings, it was important for the court to establish that the priorities of creditors would not be disturbed if the stay is lifted. These factors can be a useful tool for future cases to help decide whether to lift a stay or not.

Yorrick Zaat

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Vinyls Italia SpA v Mediterranea di Navigazione SpA

EU: Case C-54/16

Executive Summary

Under Article 13 of the Council Regulation (EC) No 1346/2000, concerning avoidance actions in insolvencies, a choice of law clause in a contract can prevent transactions from being set aside.

Facts

This case concerns two Italian registered companies, Vinyls Italia SpA ("Vinyls") and Mediterranea di Navigazione SpA ("Mediterranea"). The dispute is about an action to set aside two payments made by Vinyls to Mediterranea before the former was made subject to a special administration procedure, which subsequently led to it being put into liquidation.

The administrator of Vinyls claimed that the contested payments were made after the contractual deadlines, at a time when Mediterranea knew of the insolvency of Vinyls. Mediterranea objected, arguing that the contract was subject to English law and that English law did not provide for a ground to challenge the contested payments. Mediterranea based its argument on Article 13 of **regulation no. 1346/2000 ("Arti**cle 13**").** According to the administrator of Vinyls, Article 13 is a procedural objection, one that must be raised by the party concerned within the time limit laid down by the procedural law of

the Member State of the court hearing the action to set aside the payments. The objection by Mediterranea was raised out of time.

The Italian court stated that by virtue of Article 4(2)(m) of the insolvency regulation the applicable rules on voidness, voidability and unenforceability of legal acts detrimental to all the creditors are those laid down by the *lex fori concursus*. According to Italian law, the contested payments could be set aside if Mediterranea knew of the insolvency of Vinyls at the time the payments were made. On the other hand, the Italian court also noted that, in accordance with article 14, article 4(2)(m) of the insolvency regulation is not applicable where the person who benefitted from the act detrimental to all the creditors, provides proof that the act is governed by the law of a Member State other than that of the state of the opening proceedings and that the law does not provide for a ground to challenge the act. Mediterranea did raise an exception to the administrator challenging the act, but it did so after the time limit had passed. The court found it clear that English law does not exclude the possibility of challenging the contested payments, but does require the challenge to meet certain requirements which differ from the *lex fori concursus*. English law requires the administrator to provide proof of the debtor's specific intention to provide the creditor in receipt of the payment with an advantage, rather than requiring knowledge of the debtor's insolvency.

Next, the Italian court noticed that the clause making the contract subject to English law might fall within the scope of the Rome I Regulation. It is, however, unclear whether there is a conflict of law, required by article 1(1) of the Rome I Regulation.

The District Court in Venice referred the following questions to the Court of Justice for a preliminary ruling:

1) Where a person benefits from an act to the detriment of creditors, does the proof required under Article 13, to prevent a challenge to that act, include raising a procedural objection within the time limits set out by the rules of the *lex fori* or can Article 13 also be applied by the court of its own motion, if necessary, after the time limit allowed to the party concerned has expired?
2) Should Article 13 be interpreted to the effect that the party bearing the burden of proof must show that, in the specific case, the *lex causae* does not provide any means to challenge an act which was considered detrimental, or to mean that the party must show that, where the *lex causae* allows an act of that type to be challenged, the conditions to be met in order for that challenge to be upheld, and which differ from those of the *lex fori concurcus*, have not been fulfilled?
3) Is the derogation provided for in Article 13 applicable even when the parties to a contract have their head offices in a single Member State, whose law can therefore be expected to be intended to become the *lex fori concursus* if one of the parties becomes insolvent, and the parties, via a contractual clause designating the law of another Member State as the law applicable, exclude the setting aside of acts performed under the contract from the application of the mandatory rules of the *lex fori concursus* imposed in order to protect the principle that all creditors should be treated equally, to the detriment of all the creditors in the event of insolvency?
4) Must Article 1(1) of the Rome I Regulation be interpreted as meaning that 'situations involving a conflict of laws' for the purposes of the application of that regulation also include a situation involving a charter contract concluded in a Member State between companies with their head offices in the same Member

State, with a clause designating the law of another Member State as the law applicable?
5) If the answer to question 4 was in the affirmative, must article 3(3) of the Rome I Regulation be interpreted as meaning that, where the parties choose to subject a contract to the law of a Member State other than that in which 'all the other elements relevant to the situation' are located, that does not affect the application of mandatory rules under the *lex fori concursus*, for the purpose of challenging acts performed before the insolvency to the detriment of all the creditors, thereby prevailing over the derogation provided for in article 13 of the insolvency regulation

Decision

Question 1

Article 4(2)(m) of the insolvency regulation does not apply where the person who benefited from an act detrimental to all creditors proves that such an act is subject to the law of another Member State, other than that of the opening of the proceeding ("*lex causea*") and that the *lex causea* does not provide any means of challenging the act.

The court further held that Article 13 of the insolvency regulation governs the allocation of the burden of proof. Specific procedural aspects are not set out in Article 13. With no harmonisation of the rules, it is up to each Member State to establish such rules. The Member State, however, must comply with the principles of equivalence and effectiveness (*Nike European Operations Netherlands BV v Sportland Oy, C-310/14)*. This means that in this particular case, the procedural law of the Member State on whose territory those proceedings are pending, namely Italy, governs the form and time limits for relying on Article 13 and the issue whether the court may apply that article of its own motion. The exception under the *lex causea*, introduced in Article 13, does not affect this conclusion since this article is a *lex specialis* in relation to other legislation governing the international law of a Member State and should thus be interpreted in the light of the objectives of the insolvency regulation (*Lutz, C-557-13*). The objective pursued by the regulation is to protect the legitimate expectations of a person who has benefited from an act detrimental to all the creditors by providing that the act will continue to be governed by the law that was applicable at the date on which it was concluded, namely the *lex causea*.

The court found that Article 13 does not provide grounds to base the form and time limits on the *lex causea* since Article 13 does not protect the litigant against the usual risk of having to defend himself in such proceedings. Therefore, the court held that Italian legislation could be applied in this proceeding concerning the requirement to set aside a payment, as long as the principles of equivalence and effectiveness are complied with.

Question 2

The court held that under the aims of Article 13, all circumstances of the case should be taken into account. If a broad interpretation of Article 13 is allowed, a person who has benefited from an act detrimental to all the creditors can avoid the application of the *lex fori concursus* by relying solely on the unchallengeable character of the act at issue on the basis of a provision of the *lex causea*. Instead, the court found that for the defendant relying on a provision of the *lex causea* under which the act could be challenged only in the circumstances provided for in that provision, the burden is on that defendant to prove that such circumstances are not met in that case.

Question 3-5

The court examined the third to fifth questions together. The court stated that the Rome I Regulation is not applicable in this case because the contract was concluded before the regulation became effective on 17 December 2009. Based on article 2 of the First Protocol on the interpretation by the Court of Justice of the European Communities of the Rome Convention the referring court does not have the jurisdiction to submit questions concerning the interpretation of that convention. The court should therefore consider whether the parties could rely on Article 13 to make their contract subject to English law while their head offices are located in a single Member State. In this regard, it is clear that the insolvency regulation does not contain provisions derogating from article 3(3) Rome I. The court found that parties could rely on Article 13 of the insolvency regulation, even when the parties have their head offices in the same Member State where all the other elements relevant to the case are situated. The parties to such a contract can therefore chose the law of another Member State to be applicable to the contract, as long as the parties did not choose that law for abusive or fraudulent reasons.

It is settled case law that a finding of abuse requires a combination of objective and subjective elements. With regard to the first, it must be clear from objective circumstances that even though there was compliance with Article 13, its purpose has not been achieved. Secondly, it must be clear from objective circumstances that the aim of the transaction is to obtain an undue advantage. The court held that it was up to the referring court to establish if the actions constituted abusive practise or not.

Comment

With regard to the first two questions, the court's ruling is clear and follows its earlier held cases *Nike European Operations Netherlands* and *Lutz.* Based on Article 13, questions concerning the form and time limit to challenge an action to set aside transactions, as well as the question whether the court can do so on its own accord, must be answered by the procedural law of the Member State on whose territory the dispute is pending. The local law, however, must comply with the principle of equivalence and effectiveness. The burden of proof is on the party relying on the *lex causea* to proof that the action cannot be challenged in the underlying circumstances.

The third to fifth question was more difficult for the court to answer since the Rome I Regulation was not applicable to this case. The Insolvency Regulation did not yet cater for the scenario where two companies based in a single Member State chose another State's law to govern their contract. Since there was no clear exclusion of such a choice of law, the court held it was open for the parties to do so. This did mean that Article 13 was applicable to Vinyl's insolvency. The court excluded such a power to choose another State's law to govern the contract in cases of abusive or fraudulent motives.

In conclusion, it is possible for parties to elude the avoidance provisions of the *lex fori concursus* by selecting a legal system with insolvency transaction avoidance provisions that will not be met, or are hard to be met in the given circumstances. This means that the court allows some sort of forum shopping. The burden of proof that such a transaction is not voidable is on the party relying on the *lex causea*.

Yorrick Zaat

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LIQUIDATION

Wilson and Sharp Investments Ltd v Harbour View Developments Ltd [2015] EWCA Civ 1030

Executive summary

A debt upon which a winding-up petition was presented was substantially in dispute and not suited to be decided upon in the winding-up proceedings.

Facts

A construction contract was entered between a property developer, Wilson and Sharp Investments Ltd (the **"Appellant"**) and a contractor, Harbour view Developments Ltd (the **"Respondent"**).

Under the contract, the Appellant was, as per industry practice, responsible to make periodic payments to the Respondent as and when works were certified. The contract also included an *ipso facto* clause to the effect that the developer would no longer be immediately bound to pay any outstanding sums arising from the interim certificate(s) should the contractor become insolvent.

The Appellant eventually failed to pay for certain interim certificates of work, although it acknowledged that the debt was indeed due and outstanding. The Appellant then attempted to enter into settlement negotiations with the Respondent and although an agreement was eventually reached, obligations under the settlement were not honoured.

The Appellant then appointed a new contracts administrator who formed an opinion that the works done were substantially overvalued and therefore refused to pay the Respondent on that basis. The Appellant also set out certain cross-claims against the Respondent following findings by the new contracts administrator.

The Respondent then proceeded to file a winding-up petition against the Appellant for the sums due. The Appellant filed an application to restrain the same but it was dismissed by the High Court. Shortly thereafter, the Respondent was placed into **creditors' voluntary** liquidation. The Appellant took the stance that under the contract, it was no longer bound to pay the interim amounts owing once the Respondent became insolvent.

Decision

The Court of Appeal ruled in favour of the Appellant and granted a permanent stay of the winding-up petition against it.

The unanimous decision was based on a consideration of the following three issues: first, whether the petition debt was disputed on substantial grounds; second whether the Appellant's refusal to pay the interim amount was in line with the Technology and Construction Court's ("TCC") practice and third, whether there were genuine cross-claims which exceeded the alleged outstanding sum claimed.

The Court of Appeal referred to *Tallington Lakes Ltd and another v Ancasta International Boat Sales Ltd* [2012] EWCA Civ 1712 and *Re Bayoil SA* [1999] 1 WLR 147 for the principles on which a court would strike out or restrain a winding-up petition presented. Essentially, if a petition debt is in substantial dispute and the petitioner cannot establish a *locus standi* position necessary to present a winding-up petition under S124(1) of the Insolvency Act 1986, it would have to be struck-out. In this instance, the Court of Appeal found that Section 111(10) of the Housing Grants, Construction and Regeneration Act 1996 (as amended by the Local Democracy, Economic Development and Construction Act 2009) allowed both parties to agree upon the *ipso facto* clause mentioned above.

The Court of Appeal agreed that the Respondent's insolvency meant that the Appellant was no longer bound to pay the interim sums immediately and had a genuine basis for disputing the petition debt.

With regard to the second matter, the Appellant had contended that the High Court's decision was inconsistent with established TCC practice to not enforce interim payment obligations in favour of insolvent contractors. In this regard, the decision in *Bouygues (UK) Ltd v Dahl Jensen (UK)* Ltd [2000] EWCA Civ 507 was primarily cited.

The Court of Appeal agreed that the decisions in *Bouygues (UK) Ltd v Dahl Jensen (UK) Ltd* and the other cases cited firmly established that "in appropriate circumstances, including where the contractor is insolvent, the provisional nature of an employer's obligation to make payment of an interim payment will lead to the court refusing summary judgment on an adjudication in favour of the contractor" (Gloster LJ, para 58).

The contractor's insolvency meant that the mutual set-off rule per Rule 4.90 of the Insolvency Rules 1986 would apply, requiring the taking of an account between both parties to a contract which meant all cross-claims would have to be considered prior to achieving a final position.

In this regard, the Court of Appeal found that the Respondent's insolvency and cross-claims filed by the Appellant were key factors that the High Court should have considered in deciding whether or not to grant the winding-up petition. It was quick to point out however that it is not an absolute rule of the TCC to reject summary judgment merely based on the fact that the contractor was insolvent, but rather, the court would take into account whether the counterclaim by the employer possessed substantial merit. The Court of Appeal therefore did not find in favour of the Appellant on this argument.

On the matter of the cross-claims, the Court of Appeal took the view of *Re Bayoil SA* which established that a winding-up petition should be restrained in the event the company had genuine cross-claims.

In this context, the High Court took the view that the Appellant did not have a genuine cross-claim as it had earlier acknowledged that the interim sums were due and payable. The High Court felt that the cross-claims were raised to delay the winding-up proceedings.

The Court of Appeal did not agree with this. Citing *Re Bayoil SA* and *Rupert Morgan Building Services (LLC) Ltd v. Jervis* (2004) 1 WLR 1867, it held that (1) the mere fact that the petition debt was undisputed does not prevent the company from making a cross-claim and (2) the employer's obligation to pay the amounts under the interim certificate(s) does not prevent him from later disputing the said amounts.

Based on the Appellant's arguments the Court of Appeal found that its cross-claims were genuine and ordered in favour of the Appellant for this reason.

Overall, the Court of Appeal's view was that High Court failed to fairly weigh the various factors involved in this case. It also reiterated an established principle that where there were substantial disputes between both parties, it should not be determined in the winding-up proceedings. Instead, the winding-up proceedings should be struck out.

Comment

The various points emphasised by the Court of Appeal in this case are in line with established practice. A bona fide dispute supported by substantial grounds forms a basis for resisting a winding-up petition and a winding-up order should not be made should there be substantial disputes or cross-claims which are material versus the petition debt.

Overall, the Court of Appeal's decision brings greater clarity to the construction industry, that while a contractor's insolvency can be used to form a substantive dispute by an employer, the mere fact that the contractor is insolvent does not mean that the employer is simply released from its immediate obligation to pay – it must have its own genuine and substantial counterclaim(s) against the contractor.

John Tan

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Breyer Group PLC v RBK Engineering Ltd [2017] EWHC 1206 (Ch)

Executive Summary

A winding-up petition is not the appropriate legal process for pursuit of a disputed debt under a construction contract. Pursuit of a disputed debt by way of a winding-up petition constitutes an abuse of process and such a debt should be pursued by way of adjudication or court proceedings.

Facts

The applicant, Breyer Group plc ("Breyer"), engaged the services of the respondent, RBK Engineering Ltd ("RBK"), as a sub-contractor on a construction project. Formal contractual terms were drawn up, including payment terms and an express dispute resolution clause. RBK continued to work on the project beyond the contract term. A draft contract extension was later drawn up which neither party signed but with both understanding they were working according to the original contract terms. The contract provided for RBK to submit an application for payment and for Breyer to submit either a payment notice or pay less notice.

In late 2016 both parties were in dispute and they agreed to draw their relationship to a close and enter into a settlement agreement. The applicant alleged that the respondent had carried out work of insufficient quality which they would be required to put right at their own expense. The respondent alleged that the applicant issued late payment notices and was owed £258,729.16. At dispute therefore, was RBK's ability to fulfil its obligations and Breyer's late paying.

Having failed to reach settlement, RBK issued a winding up petition against Breyer on 22 March 2017. The petition stated that Breyer had advised RBK that it was insolvent and that it was unable to pay its debts as they fell due for payment. Breyer told the court that it was not insolvent and that the debt in question was disputed and that it had a substantial counterclaim.

Decision

The petition for the winding-up of Breyer was struck out.

The court was satisfied that Breyer was not insolvent. It had cash in the bank, made profits in six figures in each of the previous five years and had a bank overdraft facility of £4 million which it had not used. The judge was therefore satisfied that Breyer had the means to pay the debt and that the reason for non-payment was because of a dispute and a counterclaim which had yet to be quantified.

The judge said that he did not believe RBK to be a creditor of Breyer with standing to present a winding-up petition, and was merely a claimant on a disputed invoice. He added that the court in insolvency proceedings was not the appropriate place for resolving the disputed debt and counterclaim and they should be considered either by way of Adjudication under the Scheme for Construction Contracts or ordinary proceedings.

Comment

The principles under which a winding-up petition can be made under English law are well established. A creditor's petition can only be presented by a creditor who is able to establish his position as a creditor.

A winding up petition should not be presented as a tool to pressurise a company into paying if there is a genuine dispute. Presenting a petition in circumstances where a company ***won't*** pay rather than ***can't*** pay was seen by the court as both oppressive and an abuse of process.

Darren Kealey

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Kean v Lucas [2017] EWHC 250 (Ch)

Executive Summary

Where creditors request that a meeting of creditors is held for the purpose of voting to remove a liquidator from office, the court has jurisdiction to prevent such a meeting being held. The liquidator is subject to a burden of proof that preventing the meeting taking place is just and beneficial to the liquidation of the company.

Facts

Muriel Kean, a director, shareholder and creditor of J&R Builders (Norwich) Limited, requested that the liquidator call a meeting of creditors so that the liquidator could be removed from office. The applicant asserted, amongst other things, that creditors had lost confidence in him because he had failed to answer queries and provide information in a timely manner.

Kevin Lucas, the liquidator of the company, did not wish to call the meeting and made an application to court seeking a direction not to requisition such a meeting. The liquidator argued that the applicant was wanting only to frustrate his investigations into past transactions that could result in actions being brought by the liquidator against the applicant and others.

Decision

The application was refused.

The liquidator's application for direction that a meeting should not be called was made under s.112 of the Insolvency Act 1986. The court held that it was able to prevent a meeting of creditors from taking place but that the requisite test for making such a decision was that it was just and beneficial to the winding-up of the company. The Registrar pointed out that the court had discretion but not a duty to make an order or direction.

In this case, the liquidator did not successfully demonstrate to the satisfaction of the court that not calling the meeting was just and beneficial to the liquidation process. Furthermore, there was insufficient evidence that the liquidator was actively conducting an investigation given his time-records showed that only 20 hours had been spent on investigation in the second year of the liquidation and with no claims having been made against any party. In addition, there was no evidence that any subsequently appointed liquidator in his place would not be able to bring claims if they were deemed to be good claims.

Comment

The case **serves to demonstrate that a liquidator can put a stop to creditors' demands for** a meeting of creditors to be called but only where the liquidator can show it is just and beneficial to the winding-up that such a meeting is prevented from being convened. What is just and beneficial will depend upon the facts of the case.

Darren Kealey

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Contributors' profiles

Yorrick Zaat

It was during my semester abroad (in the US) that I got interested in corporate and insolvency law. I therefore decided to apply for the dual LL.M. Insolvency Law at Nottingham Trent University and Radboud University in the Netherlands. Currently, I'm writing my dissertation on secured transactions law in America, Australia and the U.K.

John Tan

John is based in the Cayman Islands with Kalo as a senior accountant. He was previously with KPMG, Malaysia and has more than five years of professional restructuring and insolvency experience. He is presently undertaking NTU's LLM in Corporate and Insolvency Law via distance-learning.

Sander Hendrix

It was my job as a paralegal at a smaller law firm that first sparked my interest in insolvency law. I found that I had a particular interest in the interdependence of insolvency and corporate law. Given this interest, I decided to do the Dual LL.M. in Insolvency law at Radboud University Nijmegen and Nottingham Trent University. After finishing my studies here in Nottingham, I will be doing two traineeships at leading law firms in the Netherlands. I hope to work in this field of law at a leading law firm after finishing my Masters.

Darren Kealey

I am an accounting and finance graduate and have spent all of my career working in insolvency on the practitioner side of the profession. I am studying for an LL.M in Corporate and Insolvency law here at NTU to deepen my knowledge and understanding of the law that underpins the work I do every day. I enjoy the academic rigour of my studies on this course and am considering continuing to a PhD following graduation.