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NOTTINGHAM LAW SCHOOL

NOTTINGHAM TRENT UNIVERSITY

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Welcome to the Spring 2017 edition of the Bulletin. I am delighted to say that, once again, the Bulletin has been written entirely by Nottingham Law School PhD and LL.M students. Not only that, but for the first time it has been co-edited by one of our students, Darren Kealey, who is currently studying on the LL.M. I would like to thank Darren and all the students for their work and to congratulate them on their contributions. You can read their profiles at the back of the Bulletin.

In this edition, **PhD candidate Zoltan Fabok discusses the CJEU's** decision in *SCI Senior Home* in which the court considered the scope of Article 5 of the Insolvency Regulation in respect of secured tax claims. Dual LL.M student Sander Hendrix considers *19 Entertainment Limited* and the question of who is a foreign representative in the context of Chapter 11 proceedings. LL.M students Ray Mwiti Koome and Anusha Gondi reflect on the interface between the Judgments Regulation and the Insolvency Regulation a**nd the court's discretion in making an administration order in** *Re Marme Inversiones* and *Rowntree Ventures* respectively. Darren Kealey explores the *Duomatic* principle and the rules on validation orders under section 127 Insolvency Act 1986 and Anna Adenipekun picks up on the scope of section 423 Insolvency Act 1986.

I hope that you enjoy the read - it only remains for me to wish you all the very best for a lovely holiday over the Spring Break.

Paula
Paula Moffatt

In this Bulletin…

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CROSS-BORDER

Case C-195/15 SCI Senior Home v Gemeinde Wedemark and Hannoversche Volksbank eG ECLI:EU:C:2016:804

Executive summary

Tax claims of Member States may be protected by Article 5 of the Insolvency Regulation meaning that the Member State concerned can enforce the tax claim against an asset which, by operation of law, is subject to public charge irrespective of the insolvency proceedings opened over the assets of the debtor in another Member State.

Facts

Senior Home, a real estate company under French law, was the owner of real property located in Wedemark, Germany. The company was put into court-supervised administration (main insolvency proceedings) by the French court having jurisdiction.

Subsequently, the Wedemark local authority applied for the compulsory sale of the real property by public auction in order to recover arrears of real property tax for a time period prior to the opening of the insolvency proceedings. The local court in Germany ordered the compulsory sale of the property. The French administrator appealed to the German Federal Court asking the court to set aside the enforcement action (the compulsory sale of the real estate located in Germany) on the grounds that the main insolvency proceedings had been opened in France.

Pursuant to Article 4 of Council Regulation (EC) 1346/2000 (the "Insolvency Regulation"), as a general rule, the law of the Member State where the main insolvency proceedings are opened (the *lex concursus*) shall apply to insolvency proceedings and their effects. The *lex concursus* determines, among other things, the effects of the insolvency proceedings on proceedings brought by individual creditors, the rules governing the distribution of proceeds from the realisation of assets, the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right *in rem*. In the system of the Insolvency Regulation, the *lex concursus* has universal effect within the territory of the European Union. In the case at hand this means that, as a general rule, the French law as *lex concursus* applies to the insolvency proceedings also regarding assets located in other Member States. Under French law, the opening of the court-supervised administration procedure essentially precludes the compulsory sale of the debtor's assets outside the insolvency proceedings.

On the other hand, one of the exceptions to the application of the *lex concursus* is laid down in Article 5 of the Insolvency Regulation stating that the opening of insolvency proceedings shall not affect the rights *in rem* of creditors or third parties in respect of assets belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings. Therefore, should the law applicable to the specific *in rem* security – which is typically the law of the state where the asset is located (the *lex rei sitae*) – enable the secured creditor to initiate individual enforcement actions *vis-à-vis* the encumbered asset, then Article 5 of the Insolvency Regulation will protect this right of the secured creditor by sheltering the enforcement from the *lex concursus* and the main insolvency proceedings opened in another Member State.

The German local authority intended to enforce property tax claims in relation to the German real estate. Under German law, debts due in respect of real property taxes are *ex lege* public charges on real property which are rights *in rem* and the owner of the encumbered real property must accept enforcement of the instrument recording those debts against that property. The German court had no doubt that those "public charges" qualified as rights *in rem* pursuant to German law.

The actual question for the German court was whether a tax claim subject to public law and which was by operation of law a public charge on real property and one which the property owner was required to accept for enforcement purposes, fell within the scope of Article 5 of the Insolvency Regulation and thus *outside* the application of the *lex concursus*. If it did, the German tax authority had the right to enforce its tax claim against the debtor's property located in Germany disregarding the main insolvency proceedings opened over the assets of the debtor company in France.

Accordingly, the German Federal Court stayed the proceedings and referred the following question to the Court of Justice of the European Union ("CJEU"): must Article 5 of the Insolvency Regulation be interpreted to the effect that "security created by virtue of a provision of national law... by which the real property of a person owing real property taxes is, by operation of law, to be subject to a public charge and that property owner must accept enforcement, against that property, of the instrument recording that tax debt, constitutes a 'right *in rem*' for the purposes of that article"?

Decision

The European Commission (the "Commission") proposed that the question be answered in the negative. The Commission argued that Article 5 of the Insolvency Regulation, as an exception to Article 4 providing for the general application of the *lex concursus,* should be interpreted narrowly: only rights granted by a debtor to a creditor in the context of a commercial transaction should be regarded as rights *in rem*. That objective did not warrant the protection of tax authorities. Where, as in the case at hand, a public charge on immovable property took precedence over the rights of lenders in a compulsory sale procedure, it could actually have the effect of penalising lenders, whereas the intention behind Article 5 was to protect them.

By contrast, Advocate General Szpunar (the "AG") suggested that the question should be answered in the affirmative. In the AG's opinion, neither the wording of Article 5 nor the objective thereof implied that that provision related exclusively to "private claims" or purely "commercial transactions".

The judgment of the CJEU, in essence, confirmed the points made by the AG stating that Article 5 of the Insolvency Regulation must be interpreted to the effect that an *ex lege* security created by the national law by which the real property of a person owing real property taxes is to be subject to a public charge and in a situation where that property owner must accept enforcement of the tax debt against that property, constitutes a "right *in rem*" for the purposes of that article.

Comment

First, the CJEU reiterated that it is clear from previous CJEU case law that the basis, validity and extent of such a right *in rem* must normally be determined according to the law of the place where the asset concerned is situated. Therefore, in a first step, the German law as the *lex rei sitae* determines whether or not the tax claim should be classified as a right *in rem*. In a second step, however, the CJEU considered that the rights regarded as '*in rem*' by the national legislation at issue must satisfy certain criteria in order to fall within Article 5. The property tax at issue appears to be in accordance with both the domestic test of rights *in rem* and Article 5 of the Insolvency Regulation.

More importantly, the CJEU dealt with the question whether the protection provided by Article 5 may extend to rights *in rem* created by public law.

As the judgment indicates, the wording of the provisions of the Insolvency Regulation makes it impossible to interpret Article 5 to the effect that it does not cover rights *in rem* granted outside the context of a commercial transaction. Article 5 contains nothing that could limit the scope of that article on the basis of the origin of the right *in rem* concerned or the nature, whether governed by public or private law, of the debt guaranteed by that right *in rem*.

Indeed, there are strong arguments supporting the view that the Insolvency Regulation does not differentiate between claims subject to public law and those falling within the terrain of the private (commercial) law. In this regard, we may refer to the Opinion of AG Bobek in Case C-212/15. ENEFI v. DGRFP ECLI:EU:C:2016:427 stating that the Insolvency Regulation is neutral as regards its applicability to the claims of public and private law creditors.

The judgment also states that the objectives of the Insolvency Regulation support the suggestion that Article 5 covers rights *in rem* granted outside the context of a commercial transaction.

The teleological arguments raised by the court are, however, less convincing. The CJEU emphasises that it is clear from Recital 24 that the objectives of Article 5 are to protect "legitimate expectations" and the "certainty of transactions" in Member States other than those in which proceedings are opened. In other words, creditors whose claims are secured *in rem* by security in respect of assets situated in a Member State other than the state of the opening of the insolvency proceedings, are not exposed to the risks arising from the foreign *lex concursus*, particularly as to the prohibition of the individual enforcement actions. The position of the ECJ is that in that respect the nature of the rights or debts concerned – that is, whether they are of commercial or tax nature - is irrelevant.

The CJEU goes further. The judgment states that a limitation on the scope of Article 5 on the basis of the commercial origin of the right *in rem* concerned would be *contrary* to the objective of protecting "legitimate expectations" and the "certainty of transactions". This is problematic for a number of reasons. On the one hand, tax claims do not appear to easily fit into the category of "transactions" the certainty of which is protected by Article 5. On the other hand, the broad interpretation of the "legitimate expectations" is not without any problems, either. No one can reasonably dispute that collection of the taxes is of important public interest. At the same time, it is rather questionable whether the protection of the legitimate expectations, a principle originally protecting private law persons from public authorities, may be applied in the context of tax claims.

The judgment does not stop even here. Recital 25 provides that there is a particular need for a special reference diverging from the *lex concursus* in the case of rights *in rem*, since these are of considerable importance for the granting of credit. The CJEU, somewhat arbitrarily, notes that it cannot be inferred from Recital 25 that Article 5 covers only guarantees *in rem* in the context of commercial or credit contracts. Unfortunately, the Court does not take the opportunity to explain how the immunising of the *ex lege* public charges from the *lex concursus*, that is, granting *de facto* preference to those tax claims, affects the granting of credit. This question would have deserved some elaboration by the judicial body because these tax claims protected by Article 5 of the Insolvency Regulation will most probably compete exactly with the claims of the banks, secured by "genuine" *in rem* securities stipulated by the parties, who granted credit to the debtor. If this is true, the classification of the tax claims as rights *in rem* falling within the scope of Article 5 of the Insolvency Regulation may pretty much contradict the very objectives referred to by Recital 25.

Finally, the judgment refers to the principle of equal treatment of creditors. The Court considers that an interpretation of Article 5 to the effect that the exception which it makes provision for covers solely rights *in rem* created in the context of commercial or credit transactions would lead to unfavourable treatment of the owners of rights *in rem* granted in the context of transactions *other* than commercial transactions. The referral to the principle of equal treatment appears to be justified so long as the Insolvency Regulation does not differentiate between public law and private law creditors. It is uncertain, however, whether a tax claim can be deemed a "transaction" where the principle of equal treatment comes into play at all.

Be that as it may, from now on we need to accept that those Member States which classify their tax claims as claims *ex lege* secured by *in rem* securities (public charges) will find themselves in a better position as compared to Member States who have chosen other techniques to make efficient the collection of tax claims. Namely, states belonging to the first group will be able to satisfy their claims from the encumbered asset of the debtor irrespective of the insolvency proceedings opened in another Member State. Those states, however, whose legal system does not treat tax claims as *ex lege* rights *in rem* – although they may apply various administrative and other sanctions against the debtor, the directors or the shareholders – cannot directly enforce their tax claims against the foreign insolvent debtor's asset situated in their territory. What they can generally do is to try to collect their tax claims pursuant to the foreign *lex concursus* by lodging their claims in the insolvency proceedings opened in another Member State. Therefore, the judgment may incentivise Member States to adjust their domestic law to the case law the Court and to classify their fiscal claims as claims *ex lege* secured by rights *in rem*. By doing so, they may put those tax claims under the protection granted by Article 5 of the Insolvency Regulation.

Zoltan Fabok

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19 Entertainment Limited [2016] EWHC 1545 (Ch)

Executive summary

Recognition of US Chapter 11 Bankruptcy proceedings was granted by the English Court in respect of a company which was incorporated in England, but had its centre of main interests ("COMI") in the United States.

Facts

19 Entertainment Limited ("the Company") was an English company which went into Chapter 11 proceedings in New York. The following day, the Company and its directors, made an application to the English court seeking first, recognition of Chapter 11 Bankruptcy proceedings as foreign main proceedings under the Cross-Border Insolvency Regulations 2006 (the "Regulations"); and second, discretionary relief under the Regulations in the form of a moratorium.

In October 2010, the Company had transferred all its business and operations to Los Angeles, but still had its registered office in London. The Company was part of the 19 Entertainment Business Division of the CORE group of companies (the "CORE Group"), of which the ultimate parent, CORE Entertainment Holdings Incorporated, was incorporated under the laws of the State of Delaware. The Chapter 11 proceedings concerned not only the Company, but other entities within the CORE Group as well.

The main reason for the Directors and the Company asking for a moratorium was to prevent the Company from going into liquidation. One creditor was owed a substantial sum of money by the Company and he had already served a statutory demand upon the Company. If the Company did not satisfy the demand forthwith, the given creditor would be able to present a petition to wind up the Company.

Decision

The court held that the Company's COMI was in the United States as all its business, direction and operation was conducted in the United States, even though the Company had its registered office in London. This followed the European Court of Justice decision in the case of *Eurofood IFSC Limited* [2006] Ch 508, that the COMI of a company is not necessarily in the state in which that company has its registered office, which may be in particular the case of a 'letterbox' company. The Company qualified as a 'letterbox' company in the United Kingdom and the court concluded that the Company's COMI was in the United States.

Having considered the Company's COMI, the court proceeded to compare the US Chapter 11 proceedings with the English administration scheme, drawing parallels between these two procedures. It concluded that the concepts were broadly equivalent to one another. Reciting the purpose of the UNCITRAL Model Law, the court stated that it may grant relief if the foreign proceedings were recognised.

The court went on to decide whether the US Chapter 11 proceedings were to be recognised under the Regulations. Firstly, the court concluded that the Chapter 11 proceedings qualified as a 'foreign proceeding' in a foreign state based on the evidence provided by an expert report. The court then considered whether the applicants were 'foreign representatives'. The court held that they were, referring to s1107 of the US Bankruptcy Code which bestows broad rights upon the debtor in possession, which are equivalent to those of a trustee in Chapter 11 proceedings. The court emphasised that the Directors had been appointed as representatives of the Company under the Chapter 11 court order and for the purposes of the foreign proceedings. Finally, for the sake of completeness, the court concluded that the evidential requirements were met and that the court had jurisdiction to decide on this matter.

As all the requirements for recognition had been met, the court held that it was bound to recognise the Chapter 11 proceedings.

The court recognised the urgency of the matter, since the Company had been served a statutory demand by one of its creditors. Because of this urgency, the court granted relief, similar to a moratorium.

Comment

The judgment was fairly brief, but nonetheless useful for two reasons. First, it gave a clear overview of the requirements for recognising a foreign non-main proceeding and secondly, which is of greater importance, in this case, the court concluded that directors that retain control of the company after Chapter 11 proceedings have commenced, are to be regarded as 'foreign representatives' for the purpose of the Regulations. I shall limit myself to discussing solely this last aspect in this comment.

Article 2(j) sch.1 of the Regulations defines the term 'foreign representative' as "a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding." The English courts have decided upon the scope of this definition in several cases, for example in *Rubin v Eurofinance* [2009]

EWHC 2129 (Ch) and in *Re Stanford International Bank Ltd* [2010] EWCA Civ 137. In both of those cases, the court had a rather restrictive approach, refusing to recognise the trust and the receiver respectively as foreign representatives under the Regulations.

I am of the opinion that the court has rightfully decided in the present case, since in proceedings under Chapter 11, it is exceptional that a trustee is appointed. A trustee will only be appointed for the purposes mentioned in s1104(a) US Bankruptcy code. As the court correctly notes, in the United States, the debtor in possession has all rights and powers and shall perform all of the functions and duties as the trustee [para 16]. Therefore, the Directors in the present case perform the same function as a trustee, making them the representatives of the proceedings.

Sander Hendrix

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Re Marme Inversiones 2007 SL v Royal Bank of Scotland Plc & Ors [2016] EWHC 1570

Executive Summary

An application to stay English proceedings under Article 28 of the Judgments Regulation was rejected as the possibility of an inconsistent and irreconcilable decision being made in parallel Spanish insolvency proceedings was not seen as a great enough risk to justify a stay being granted.

Facts

The applicant, Marme Inversions 2007 SL ("Marme"), was a special vehicle purpose incorporated in Spain for the purpose of the acquisition of property in Spain, Ciudad Financiera, as the global headquarters of the Santander bank group. To complete the acquisition, Marme took out a significant loan from a syndicate of banks totalling €1.575 billion. The lead bank was Royal Bank of Scotland ("RBS") with a contribution of €366 million. The syndicate banks also entered into interest hedging agreements with Marme under ISDA Master Agreements (the "swap agreements") for (approximately) fifteen year terms with Marme as the fixed rate payer. Interest was pegged to EURIBOR. The swap agreements were governed by English law and subject to an exclusive jurisdiction clause in favour of the English courts. Completion took place in September 2008, broadly coinciding with the failure of Lehman Brothers, resulting in significant losses for Marme under the swap agreements.

The loan was due to be repaid on September 2013. Marme defaulted on the loan, and was put into voluntary insolvency under Spanish insolvency law in March 2014. A year later, in March 2015, Marme entered liquidation in Spain.

In June 2014, the banks brought a claim in Spain in relation to the Insolvency Administrator's proposed method for dealing with the accruing payments due under the swap agreements.

In October 2014 Marme filed a counterclaim pursuant to Art. 61.2 of the Spanish Insolvency Law 22/2003 for the termination of the swap agreements (the "Insolvency Counterclaim").

Marme also filed a claim in the English court that the banks had made a misrepresentation which manipulated it into entering the swap agreements and sought their recission. This claim was based on a finding by the European Competition Commission that RBS had colluded in manipulating EURIBOR rates at the time that the loan had been put in place.

The banks lodged a defence claiming that the swap agreements had already been terminated by them via notice in November 2014 and that as Marme owed the debt under the swap agreements, the Spanish insolvency court should decline jurisdiction in respect of the Insolvency Counterclaim.

Marme thereafter applied for a stay of the banks' claims in the English court under Article 28 of the Judgments Regulation (Council Regulation (EC) No 44/2001 of 22 December 2000) on the basis that the claims should be settled in Spain as the part of the Spanish insolvency proceedings.

The case concerned the inter-relationship between the Insolvency Regulation (European Insolvency Regulation (EC) 1346/2000) and the Judgments Regulation.

Decision

Following *Gourdain v Nadler* C-133/78 [1979] ECR 733, all matters deriving from the insolvency proceedings or closely connected to them were a matter for the Spanish court, which had jurisdiction over the insolvency proceedings by virtue of the fact that Marme's centre of main interests under Art 3(1) of the Insolvency Regulation was in Spain. The Insolvency Counterclaim was therefore a matter exclusively for the Spanish court and fell within the "carve out" for insolvency matters under the Judgments Regulation.

The court with reflection upon Marme's application for a stay found that, although the cases in each jurisdiction arose out of the same factual matrix, nevertheless there was no conceptual overlap between the cases. The proceedings in Spain involved the good of the insolvent estate and the appropriate remedies, whereas the proceedings in the English court concerned a contractual claim. The Spanish court would find it useful to rely on a decision of the English court in this matter as it would assist the insolvency proceedings. The possibility of inconsistent and irreconcilable decisions being made in the Spanish and English courts could not be ignored, but it was not seen as a great enough risk to justify a stay being granted; following *Research in Motion UK Ltd v Visto Corporation* [2008] EWCA Civ 153, the effect of Article 28 was not entirely mechanical.

Comment

In the case of *Fondazione Enasarco v Lehman Brothers Finance SA* [2014] EWHC 34(Ch) the court had the same issue to consider regarding the question of a stay. In that case, the stay was also refused even though the claimant in the English proceedings had previously filed a claim in Swiss bankruptcy proceedings challenging the rejection of its proof of debt. The court reached its decision on the basis of the exclusive jurisdiction clause in the swap agreement, and the fact that it was likely that the judgment of the English court as to English law would assist the Swiss court, given that the agreement was governed by English law.

In the present case, the court added that the English exclusive jurisdiction clause contained in the swap agreements strongly supported the refusal of a stay, as the clause reflected the bargain struck between the parties. Although the banks had begun a claim in Spain, this had not required the courts to determine the contract law point currently before the English courts. The court also noted that it was Marme itself who had initiated proceedings in England.

The judge also observed that he did not exclude the possibility of appropriate case management orders in the future, depending on the course of the proceedings in the two jurisdictions.

Ray Mwiti Koome & Paula Moffatt

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ADMINISTRATION

Rowntree Ventures Ltd and JM Print Services Ltd v Oak *Property Partners Ltd and Oak Forest Partnership Ltd [2016] EWHC 1523 (Ch)*

Executive Summary

Although the two preconditions for an administration order under Schedule B1 to the Insolvency Act 1986 were satisfied in respect of two companies (each company being or likely to become unable to pay their debts and an administration order being likely to achieve the purpose of administration) it was nonetheless inappropriate in the circumstances for the court to exercise discretion to appoint administrators.

Facts

The respondent companies were the freehold owners of two hotels and carried on business as property developers and providers of hotel rooms on long leases. The applicants were leaseholders who were entitled to repurchase the lease property from the relevant respondents under the terms of the lease in specified circumstances.

Some of the leaseholders gave notice exercising their right to repurchase. The applicants in the instant case contended that when they purchased their respective leasehold interests, they were given what they now considered to be extravagant promises of a guaranteed return, which appeared to have been more than optimistic and possibly misleading. As a result, the applicants sought the appointment of administrators in respect of both respondent companies.

Decision

The application was refused. Even though the preconditions for making administration orders under para 11 of Schedule B1 to the Insolvency Act 1986 were met in respect of both companies (namely that each company was or was likely to become unable to pay their debts; and that an administration order was likely to achieve the purpose of administration), it was premature in the given circumstances to appoint administrators. It was also stated that the court would have probably exercised its discretionary power to make such orders if there had been clear and firm evidence that those in control of the companies had in some way misappropriated assets or were likely to do so in some intervening period between the hearing and the onset of a formal insolvency process.

Comment

This case emphasises the court's discretionary power in relation to the appointment of an administrator for an administration procedure under Schedule B1 to the Insolvency Act 1986.

In respect of one of the respondent companies, the judge explains the provision deeply. He concludes that it is better that the company is kept out of any insolvency process currently. He says that if there was firm evidence of misappropriation of assets in the past or of a likelihood in the intervening period between the instant hearing and the onset of the formal insolvency process he would exercise his discretion to appoint an administrator.

Secondly, it was stressed that the other respondent company was presently paying its debts as they fall due and whilst it looked likely that it may not do so at some future time, the possibility of the company's future recovery could not be ruled out.

In conclusion, this judgment makes it clear that a company should be given adequate opportunity to turn the business around in time and without the costs that ensue from administration.

Anusha Gondi

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Re BW Estates Limited [2016] EWHC 2156 (Ch)

Executive Summary

The appointment of administrators by a sole director was valid even though he was the only one in attendance at the board meeting resolving to appoint administrators and the articles of association of the company demanded that at least two directors be present at the meeting for it to be quorate.

Facts

The applicants were judgment creditors against Robert Williams and held a charging order over his beneficial ownership of 75% of the shares in BW Estates Limited. Following the bankruptcy of Robert Williams, the applicants obtained title to the shareholding via the trustee in bankruptcy. The remaining 25% shareholding was held by an Isle of Man company which had been dissolved in 1996.

Robert Williams' son, David Williams, had been the sole director of the company since 2009, though it appeared that Robert Williams was running the company. At a board meeting held on 28 August 2013 a directors' appointment of administrators was made with the appointment taking effect on 11 September 2013.

The articles of association stipulated that the requisite quorum for a directors' meeting was two. The quorum for shareholders was also two.

The applicants duly asserted that the appointment of administrators was invalid because the meeting appointing them was inquorate.

Decision

The application was dismissed. The judge applied the *Duomatic* principle, concluding that the actions and conduct of both father and son were such that they had informally sanctioned the exercise of all directors' powers by one director alone and that such actions operated as an informal amendment to the articles. Therefore, the appointment of administrators was valid.

Comment

The judge noted that the appointment of administrators took effect with the full acquiescence of Robert Williams even though the minutes of the directors' meeting recorded that only David Williams had been in attendance and had signed the paperwork. It was also noted that Robert Williams had attended a meeting with one of the prospective administrators in July 2013 when the conclusion was reached that the company should be placed into administration.

The conduct of Robert Williams from 2009 onwards as a beneficial shareholder was persuasive in demonstrating the acquiescence of all shareholders to the extent of sufficiently binding the company under the *Duomatic* principle. Furthermore, there was also the acquiescence of David Williams as the registered 75% shareholder.

In the light of the actions of Robert Williams since 2009 and also of David Williams, the judge concluded that both father and son had informally provided for the exercise of all directors' powers by a single director and that informal provision operated as a variation of the articles of association. On that basis, it was the judge's view that the appointment of administrators was valid.

In consideration of the principle in *Duomatic Ltd, Re* [1969] 2 Ch. 365, whilst there is no issue of a distinction between different classes of shares in this case, there is a distinction between the shares beneficially owned by Robert Williams and those owned by the dissolved Isle of Man company. The articles provide for registered members only being able to vote. As the Isle of Man company no longer existed nobody could vote for the company's shareholding in BW Estates Ltd leaving only David Williams able to vote as the registered shareholder. The judge therefore concluded that the acquiescence of either David Williams as the registered 75% shareholder or Robert Williams as the beneficial owner was sufficient to satisfy the *Duomatic* principle. As both father and son acted in agreement with each other, there was no need to decide whether it was the beneficial ownership that mattered or the registered ownership.

If it was necessary to decide between the two, the judge noted that in previous and separate proceedings regarding a challenge to the administrators' remuneration, Judge Cooke had concluded that the Isle of Man company was in any event controlled by Robert Williams and he was therefore beneficially entitled to those shares too making him the sole beneficial owner of all the voting shares in BW Estates Ltd. Hence if unanimous consent was required to satisfy the *Duomatic* principle, then it is the beneficial ownership that counts because only 75% of the shares have registered owners.

The judge added that the applicants previously challenged the administrators' remuneration on the footing that they had been validly appointed and that directions and costs orders had been made on that basis. The judge thought it unconscionable that the applicants now asserted the administrators' appointment was invalid in new proceedings in response to their previous failed application.

Darren Kealey

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LIQUIDATION

Re Express Electrical Distributors Limited v Beavis [2016] EWCA Civ 765

Executive Summary

Where a payment has been made to a creditor after the presentation of a winding up petition, a validation order should only be made where there is some exceptional circumstance in which the disposition will be, or has been, for the benefit of the general body of unsecured creditors.

Facts

The appellant had supplied wholesale electrical goods to Edge Electrical Limited ("Edge") since 2011 on credit terms. Edge typically paid on the last permissible date. From November 2012 onwards, Edge were taking longer to settle their payments and in May 2013 the appellant placed Edge's credit facility on hold. On 29 May 2013 Edge made a payment of £30,000 to the appellant which was £4,839 ahead of its contractual payment terms at that time. The appellant lifted the restriction on Edge's credit facility and supplied further goods worth £13,000.

Another creditor issued a winding up petition on 22 May 2013 which was advertised on 17 June 2013, therefore after the payment of £30,000 was made to the appellant. A winding up order was made on 15 July 2013.

In December 2013, the appointed liquidator sought repayment of the sum of £30,000 from the appellant. In February 2014, the appellant made an application for a validation order under the Insolvency Act, s127 on the basis that the transaction was entered into in good faith and without knowledge of the winding up petition. The application was refused on the basis that a validation order would be to the detriment of the general body of unsecured creditors. A subsequent High Court appeal was dismissed with the judge concluding that the first instance decision was legitimate.

Decision

The appeal was dismissed. The Court of Appeal looked to the leading case of *Gray's Inn Construction Co. Ltd [1980] 1 WLR 711, CA ("Grays Inn")* where Buckley LJ said that the *pari passu* principle of a rateable distribution of free assets existing at the commencement of the liquidation amongst unsecured creditors was fundamental to insolvency law and that the court could not validate a transaction that results in one creditor being paid in full at the expense of other creditors. Any departure from that principle could only be possible in circumstances where a transaction could benefit the general body of creditors. For example, where the profits from a contract exceed the value of the assets consumed then that would be for the benefit of all creditors and a validation order would be appropriate. A validation order may also be appropriate where a company continues to trade with a view to achieving a sale of the business as a going concern and that such a sale is beneficial to the general body of creditors.

The court also said that whether the disposition was made in good faith or not and with or without knowledge of the outstanding winding up petition was not a relevant consideration.

Comment

Lord Justice Sales was persuaded that the principle of *pari passu* considered in the *Grays Inn* case overrides any consideration of good faith and that the consideration of good faith in the *Grays Inn* case was never meant to give rise to a binding rule that such a disposition should result in a validation order.

The key question for consideration by the Court of Appeal was whether the payment of £30,000 was in the interests of the general body of unsecured creditors. The court unanimously agreed that there was no evidence that the payment related to a contract where the eventual profits would exceed the consumption of assets and therefore be in the best interests of the general body of creditors. Nor was there any suggestion that Edge continued to trade after the winding up petition was issued with a view to the business being sold as a going concern.

This case reinforces the law as laid down in the *Grays Inn* case. Creditors seeking a validation order under the Insolvency Act 1986, s.127 will need to demonstrate in precise terms that the disposition benefits the general body of creditors or that the payment was made with a view to achieving a sale of the business as a going concern and at a price beneficial to the general body of creditors. The case also serves as a strong reminder of the importance of the *pari passu* principle in English insolvency law.

Darren Kealey

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ANTECEDENT TRANSACTIONS

BTI 2014 LLC v Sequana SA & Ors [2016] EWHC 1686 (Ch)

Executive summary

A dividend payment can fall within the scope of section 423 of the Insolvency Act 1986 provided that the payment is made with a section 423 purpose of either putting assets beyond the reach of a claimant or otherwise prejudicing a claimant's interests.

Facts

AWA Limited ("AWA") was a subsidiary of Sequana SA ("Sequana"). The directors of AWA authorised the payment of two interim dividends to Sequana from AWA. After the second dividend was paid, AWA was sold.

BAT industries PLC ("BAT") was liable to pay part of the costs an environmental clean-up operation in the USA. AWA was liable to indemnify BAT part of that liability.

Before the dividends were paid, the directors of AWA signed a solvency statement stating that there were no grounds whereby AWA would be unable to pay its debts and that AWA would be able to pay or discharge its debts when it necessary.

BAT brought three claims against the directors of AWA. First, that the directors had breached Part 23 of the Companies Act 2006 in paying the dividends on the grounds that there were insufficient distributable reserves; second, that the directors were in breach of their fiduciary duties in deciding to pay out the dividends; and third, that the dividends constituted transactions defrauding creditors under section 423 of the Insolvency Act 1986 (the "423 claim").

Decision

The first and second claims were dismissed. The payment of the dividends was not in breach of Part 23 of the Companies Act 2006 and the directors had not breached their fiduciary duties in making the payment. The 423 claim was upheld in part. The court dismissed the claim that the first scheduled dividend payment satisfied the section 423 purposes, but held that the second scheduled dividend payment did satisfy the section 423 purposes of placing the money out of reach of BAT or of otherwise prejudicing BAT's interests and that BAT was a victim of the transaction within the meaning of section 423(5).

Comment

This case highlights the issues faced in relation to section 423 of the Insolvency Act 1986 with the applicability of its wide discretion when complex cases arise. The case shows that a dividend can constitute a transaction under section 423 of the Insolvency Act 1986. The judge commented that this case was "very different" from previous cases which indicates the changes in this area of insolvency.

In considering BAT's claim under section 423 of the Insolvency Act 1986, the court referred to *Inland Revenue Commissioners v Hashmi* [2002] EWCA Civ 981 and *Hill v Spread Trustee* [2006] EWCA Civ 542 to understand the nature of the purpose under section 423 and to establish the intention of AWA and if indeed the intent was to defraud BAT and make the monies used to pay the dividends inaccessible. Section 423 provides the ability to recover assets for victims and protect their interests. In this case, the court would restore the position that the company would have been in before the last of the two dividend payments.

The court construing section 423, established that the wording in that section is deliberately wide in favour of protecting creditors from assets being moved by the debtor out of their reach. This gives the courts a broad discretion to apply a remedy.

Anna Adenipekun & Paula Moffatt

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Contributors' profiles

Zoltan Fabok

Zoltan is a counsel of DLA Piper (Budapest). He is working on his PhD on European insolvency law at Nottingham Law School, NTU.

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.

Ray Mwiti Koome

Ray is a postgraduate student on the LL.M programme at NTU.

Anusha Gondi

I have obtained a B.B.A.LL.B from Karnataka State Law University, India and I have an academic credential of securing 7th rank to the State University. I am currently studying on the General LLM at NTU. My interests evolved in company law and insolvency law during my internship under a well-known senior Advocate back in India. I am keen on teaching insolvency law in a well-known college. I believe that having an edge in the respective subject area would give me an opportunity to boost my confidence in teaching and spreading knowledge to my future students.

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.

Anna Adenipekun

Anna is a postgraduate student on the LL.M programme at NTU.