OUTER HOUSE, COURT OF SESSION

[2017] CSOH 129

P931/17

OPINION OF LORD DOHERTY

In the Petition of

BANK LEUMI (UK) PLC

Petitioner

for the making of an administration order under and in terms of the Insolvency Act 1986 in respect of

SCREW CONVEYOR LIMITED

Petitioner: Walker QC, Ower; Clyde & Co (Scotland) LLP

19 October 2017

Introduction

[1] The petitioner is a secured creditor of Screw Conveyor Limited ("the company"). On 25 September 2017 it lodged a petition seeking the making of an administration order in respect of the company. On the same day, at an *ex parte* hearing (there being no caveat), I granted an order for intimation and service of the petition and certain interim orders. Thereafter, the petition was duly intimated and served, and the matter came before me again on 29 September 2017 on the petitioner's motion for the prayer of the petition to be granted. On that occasion Mr Walker very properly alerted me to an issue as to whether the court had jurisdiction to make an administration order. He sought to persuade me that it had. Having

heard him on the matter, I was not satisfied that the court did have jurisdiction. I recalled the interim orders and dismissed the petition. Since there does not appear to be any judicial authority on the point which was discussed, I thought it appropriate to issue this Opinion.

Place of Registration

[2] The company is incorporated in England and Wales, being registered in the Register of Companies, Companies House, Cardiff. Its registered office is in Birmingham.

The Relevant Statutory Provisions

[3] Section 8 of the Insolvency Act 1986 ("the 1986 Act") provides:

> "**8 Administration**
> Schedule B1 to this Act (which makes provision about the administration of companies) shall have effect."

Schedule B1, paragraph 2 stipulates:

> "2. A person may be appointed administrator of a company –
> (a) by administration order of the court under paragraph 10,
> …"

Schedule B1, paragraphs 10 and 11 provide:

> "**Administration order**
> 10**.** An administration order is an order appointing a person as the administrator of a company.
> …
> **Conditions for making order**
> 11. The court may make an administration order in relation to a company only if satisfied—
> (a) that the company is or is likely to become unable to pay its debts, and
> (b) that the administration order is reasonably likely to achieve the purpose of administration."

In terms of section 251 of the 1986 Act (as substituted by the Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009/1941, Sch 1,

para 77(2)), for the purposes of *inter alia* section 8 and Schedule B1 the expression "the court" in relation to a company means a court having jurisdiction to wind up a company.

Section 120 of the 1986 Act states:

> "**120.— Court of Session and sheriff court jurisdiction.**
> (1) The Court of Session has jurisdiction to wind up any company registered in Scotland.
> …
> (6) This section is subject to Article 3 of the EU Regulation (jurisdiction under EU Regulation)."

Section 436(1) provides:

> "(1) In this Act, except in so far as the context otherwise requires …
> …
> *"the EU Regulation"* means Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings;…"

The EU Regulation

[4] Regulation (EU) 2015/848 ("the EU Regulation") is a recast version of Council Regulation (EC) No 1346/2000 ("the EC Regulation"). The preamble to the EU Regulation includes the following recitals:

> "Whereas:
> (1) On 12 December 2012, the Commission adopted a report on the application of Council Regulation (EC) No 1346/2000. The report concluded that the Regulation is functioning well in general but that it would be desirable to improve the application of certain of its provisions in order to enhance the effective administration of cross-border insolvency proceedings. Since that Regulation has been amended several times and further amendments are to be made, it should be recast in the interest of clarity.
> …
> (8) In order to achieve the aim of improving the efficiency and effectiveness of insolvency proceedings having cross-border effects, it is necessary, and appropriate, that the provisions on jurisdiction, recognition and applicable law in this area should be contained in a Union measure which is binding and directly applicable in Member States.
> …
> (23) This Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of its main interests…
> …

> (26) The rules of jurisdiction set out in this Regulation establish only international jurisdiction, that is to say, they designate the Member State the courts of which may open insolvency proceedings. Territorial jurisdiction within that Member State should be established by the national law of the Member State concerned.
> (27) Before opening insolvency proceedings, the competent court should examine of its own motion whether the centre of the debtor's main interests or the debtor's establishment is actually located within its jurisdiction.
> …"

Article 3 of the EU Regulation is in the following terms:

> **"Article 3**
> **International jurisdiction**
> 1. The courts of the Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings ('main insolvency proceedings'). The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.
> In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary. That presumption shall only apply if the registered office has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings …"

The corresponding parts of the EC Regulation were in substantially similar terms.

The Averments as to Jurisdiction in the Petition

[5] The petitioner avers, under reference to Article 3.1 of the EU Regulation, that the company's "centre of main interests" ("COMI") is "in Scotland", and that by virtue of that fact the court has jurisdiction. Further specification is provided of facts said to support the company's COMI being in Scotland, but it is unnecessary to narrate those averments.

Counsel for the Petitioner's Submissions

[6] Mr Walker submitted that on a proper construction of section 120(6) of the 1986 Act it incorporated Article 3 of the EU Regulation (and formerly, Article 3 of the EC Regulation) into domestic law (as, he submitted, did section 117(7) in relation to the law of England and

Wales). The result, he maintained, is that the provisions of Article 3 had been adopted in national law and were applicable for the purposes of determining jurisdiction between the constituent parts of the United Kingdom. Thus, where, as here, a company had its COMI in Scotland, the Court of Session had jurisdiction by virtue of section 120(6) and Article 3. Were it otherwise there would have been no need for section 120(6) to have been enacted, because the EU Regulation has direct effect (as had the EC Regulation).

[7] Mr Walker recognised that there was no judicial authority which directly supported his submission: but he sought to derive some indirect assistance from *In re BRAC Rent-A-Car International Inc* [2003] 1 WLR 1421 and *In re Salvage Association* [2004] 1 WLR 174. He candidly acknowledged that, so far as he could see, none of the academic writers who expressed a view bearing upon the issue supported the construction of section 120(6) and section 117(7) which he put forward. Indeed, most writers expressed opinions which were at odds with his submission (eg *Dicey, Morris and Collins on the Conflict of Laws* (15th ed), paragraphs 30R-069 and 30-070; *Sheldon, Cross-Border Insolvency* (4th ed), paragraph 5.78). Notwithstanding this difficulty, he submitted that section 120(6) and section 117(7) ought to be construed in the way which he suggested.

Decision and Reasons

[8] In my opinion the construction of section 120(6) and section 117(7) which Mr Walker advanced is untenable.

[9] Part of the legislative context of those provisions is that the EU Regulation only applies to establish international jurisdiction. The position was the same under the EC Regulation. The Member State the courts of which may open insolvency proceedings is designated, but territorial jurisdiction within that Member State is established by the

Member State's national law. The component parts of the United Kingdom are treated as one jurisdiction for the purposes of the EU Regulation. In my opinion that is all plain from the operative parts of the Regulation and from the recitals in its preamble.

[10] A further aspect of the legislative context is that sections 120(6) and 117(7) were amendments effected in 2002 by regulations made by the UK Government in the exercise of power conferred by section 2(2) of the European Communities Act 1972 (see the Insolvency Act 1986 (Amendment) (No 2) Regulations 2002/1240 ("the 2002 Regulations"), regs 6 and 7). (At that time those subsections referred to the EC Regulation. They were further amended in 2017 (see the Insolvency Amendment (EU 2015/848) Regulations 2017/702, Sch 1(1), paras 4 and 5) to make reference to the EU Regulation). Section 2 of the European Communities Act 1972 provides:

> **"2.— General implementation of Treaties.**
> (1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable EU right" and similar expressions shall be read as referring to one to which this subsection applies.
> (2) Subject to Schedule 2 to this Act, at any time after its passing Her Majesty may by Order in Council, and any designated Minister or department may by order, rules, regulations or scheme, make provision—
> (a) for the purpose of implementing any EU obligation of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or
> (b) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above;
> and in the exercise of any statutory power or duty, including any power to give directions or to legislate by means of orders, rules, regulations or other subordinate instrument, the person entrusted with the power or duty may have regard to the objects of the EU and to any such obligation or rights as aforesaid…"

[11] Section 120(1) confers jurisdiction on the Court of Session to wind up a company registered in Scotland. On an ordinary reading of section 120, subsection (6) qualifies subsection (1). The use of the words "subject to" makes that very clear (see e.g. *Craies on Legislation* (11th ed), paragraphs 8.1.18 and 8.1.19). The qualification is that in circumstances where a company registered in Scotland has its COMI in the territory of another Member State, it is the courts of that Member State, rather than the Court of Session, which have jurisdiction to open insolvency proceedings. The same observations apply *mutatis mutandis* to section 117(1) and section 117(7). Section 117(1) confers jurisdiction on the High Court to wind up a company registered in England and Wales. There is no indication, in the language of section 120(6) or section 117(7), or in their legislative context, of a legislative intention to innovate to any greater extent upon the domestic law applicable for determining jurisdiction as between the jurisdictions comprising the United Kingdom. It would have been extraordinary if such a major change in domestic law had been introduced, unheralded and undiscussed, by way of the insertion of a saving provision. Moreover, in my view section 2(2) of the European Communities Act 1972 does not authorise the Government to alter national law governing territorial jurisdiction as between the component parts of the United Kingdom. Regs 6 and 7 of the 2002 Regulations would be *ultra vires* if, and to the extent that, they purported to do that.

[12] In my view it is perfectly understandable, in the interests of clarity, that the legislature should wish to expressly qualify the domestic rules of jurisdiction for proceedings coming within the scope of the EU Regulation, even though the Regulation has direct effect. In that regard it is interesting to note that the explanatory note to the 2002 Regulations states:

> "…These Regulations provide amendments to the Act to ensure that provisions of domestic law do not conflict with the EC Regulation and generally to provide for it. Amendments to the Act made by these Regulations provide that—
> …
> • the jurisdiction of the courts is clarified (Regulations 6, 7 …); …"

(See also *Lightman & Moss, the Law of Administrators and Receivers of Companies* (4th ed), para 333-115; *Fletcher, the Law of Insolvency* (5th ed), para 31-040).

[13] I base my conclusions on an ordinary reading of section 120(6) having regard to its legislative context, but I am comforted by the knowledge that my reading of section 120 (and of the corresponding English provision, section 117(7)) appears to be shared by an impressive array of academic writers: see, eg *Dicey, Morris and Collins on the Conflict of Laws* (15th ed), paragraphs 30R-069 and 30-070; *Sheldon, Cross-Border Insolvency* (4th ed), paragraph 5.78; *Maher and Rodger, Civil Jurisdiction in the Scottish Courts,* para 11-13; *Anton, Private International Law (*3rd ed), paras 25.95 and 25.181; *Crawford & Carruthers*, *International Private Law; A Scots Perspective* (4th ed), para 17-45; *St Clair and Drummond Young, The Law of Corporate Insolvency in Scotland* (4th ed), para 22-05, footnote 21; *Goode, Principles of Corporate Insolvency Law* (4th ed.), para 15-19; *Sealy & Milman: Annotated Guide to the Insolvency Legislation 2017,* vol 2, page 106; *Muir Hunter, Kerr and Hunter on Receivers and Administrators,* First supplement to the Eighteenth Edition, para 30-16.

[14] For the foregoing reasons I concluded that this court does not have jurisdiction to make an administration order. I dismissed the petition, exercising the power conferred by Sched B1, para 13(1)(b) of the 1986 Act.