OUTER HOUSE, COURT OF SESSION

[2023] CSOH 36

P220/23

OPINION OF LORD SANDISON

in Petition of

MÜNCHENER HYPOTHEKENBANK eG

Petitioner

for

an administration order in terms of Schedule B1 to the Insolvency Act 1986 in respect of Seventeen Yellow Crowns SÀRL

Petitioner: DM Thomson, KC; Burness Paull LLP
Respondent (Christian Steinmetz): Ower; Brodies LLP

9 June 2023

Introduction

[1] By this petition Münchener Hypothekenbank eG asks the court to make an administration order in respect of Seventeen Yellow Crowns SÀRL ("the Company") in terms of Schedule B1 to the Insolvency Act 1986. The petition is opposed by Christian Steinmetz, who on 22 March 2023 was appointed by the second chamber of the Luxembourg district court, sitting in commercial matters, as *curateur de faillite* (*anglice*, bankruptcy trustee) to the Company.

Background

[2] The Company is a private limited liability company (*société à responsabilité limitée*) incorporated under the laws of Luxembourg, and has its registered office and a registration in the Registre de Commerces et des Sociétés there. It is an unregistered company for the purposes of Part V of the 1986 Act and a company within the meaning of paragraph 111(1A) of Schedule B1 thereto. Its centre of main interests is in Luxembourg, but its principal (and only significant) asset is a large office building in Bothwell Street, Glasgow, which it rents out to several tenants.

[3] By way of a facility agreement entered into in December 2017, the petitioner made available a term loan in an aggregate principal amount of £34,350,000 which the Company was obliged to deploy towards the partial financing of the purchase price of the Glasgow property. Security for the loan was provided by *inter alia* a first ranking standard security over that property, an assignation of rent in relation to the property, a debenture and certain pledges. The loan was be repaid in full on or before the earlier of the date falling 5 years after the drawdown of the loan (which was 13 December 2017) or 31 January 2023.

[4] The loan was not repaid in full by 14 December 2022. The Company's failure to do so constituted an event of default within the meaning of the facility agreement, which is continuing. The petitioner has certified in terms of the facility agreement that it is due £32,666,612.96 together with default interest of 4.74% a year from 14 December 2022. The Company's bank accounts have been blocked in accordance with the terms of an account pledge agreement between it and the petitioner since around 16 December 2022.

[5] The petitioner maintains that the Company is, or is likely to become unable to pay its debts in terms of sections 220 and 221(3) of the 1986 Act. It refers to the failure to pay the sums due to the petitioner under the facility agreement and to a letter sent to it by the

Company on 2 March 2023 said to contain an admission that the Company's debts cannot be paid as they fall due (although the letter ascribes that to the blocking of its bank accounts and asserts that the funds necessary to meet debts falling due in the ordinary course of business are available in the blocked accounts). The petitioner further claims that the value of the Company's assets is less than the amount of its liabilities. In that regard it notes that the Company's accounts for the financial year ended 31 December 2021 disclose that its total assets were valued by it at £68,213,610.46, including land and buildings (being the Glasgow property) valued at £57,000,000. The petitioner claims that a more accurate market valuation of that property, according to a draft valuation obtained by it in November 2022, is £15,600,000.

[6] The petitioner further maintains that the court may make an administration order in respect of the Company whether or not it is satisfied that the Company is or is likely to become unable to pay its debts, because a debenture entered into by the Company in favour of the petitioner in December 2017 is secured by charges and other forms of security which together relate to the whole or substantially the whole of the Company's property, and at least one of those charges is a qualifying floating charge within the meaning of paragraph 14(3)(c) of Schedule B1 to the 1986 Act. The petitioner therefore maintains that it is a qualifying floating charge holder in respect of the Company's property, is entitled to appoint an administrator of the Company in terms of that paragraph following upon an event of default, and is thus also entitled to make an application to the court to do so in terms of paragraph 35 of the Schedule.

[7] The petitioner submits that an administration order in respect of the Company would be reasonably likely to achieve a better result for the Company's creditors as a whole than would be likely if it were wound up without first being in administration, and further

that such an order would be reasonably likely to allow the administrators to realise the Company's property in order to make a distribution to the petitioner as a secured creditor of the Company.

[8] The petition was presented on 13 March 2023. An *ex parte* order appointing intimation, service and advertisement was made on 14 March 2023, although (perhaps due to strike action then occurring on the part of court staff) a relevant caveat was not noted and thus not honoured. The application was intimated on the walls of court on 14 March 2023, advertised in the Metro newspaper on 15 March, in the Edinburgh Gazette on 17 March, and served on the Company on the same day. The respondent, Mr Steinmetz, appeared by counsel before the court on 24 March 2023. It was accepted on his behalf at that point that had the caveat been honoured, an *inter partes* hearing would have taken place on 14 or 15 March at which the same orders in fact granted *ex parte* on 14 March would have been pronounced. He was permitted 7 days to lodge Answers to the petition, which he did.

[9] The respondent claims that the day-to-day administration of the Company was, until his appointment, carried out in Luxembourg by managers working there, with the Company's VAT and tax registration also being in Luxembourg. He claims that the Company has not, and never has had, any place of business in Scotland and has no employees here. No decisions as to the operation of the Company's business have been taken in Scotland. The Company's ownership of the Glasgow property is its only connection to Scotland. An affidavit from one of the Company's managers, Pierre-Louis Ballard, vouching those claims, was produced.

[10] The respondent maintains in essence that, given that he has already been appointed bankruptcy receiver in the context of proceedings already underway in Luxembourg, the court ought not in the exercise of its discretion to accede to the petitioner's request to

appoint administrators in these proceedings, as that would confer no benefit to the petitioner or any other creditor.

Petitioner's submissions

[11] On behalf of the petitioner, senior counsel submitted that an administration order could be made in respect of the Company because it was a company incorporated in an EEA State and, thus, a "company" for the purposes of Schedule B1: 1986 Act, section 436(1); Schedule B1, paragraph 111(1A). This court could make an administration order in respect of the Company because it had jurisdiction to wind up the Company and, thus, it was the "court" for the purposes of Schedule B1: 1986 Act, section 251 (which defined the term "court" for the purposes of the First Group of Parts of the 1986 Act, which included Part II (administration)). This court had jurisdiction to wind up the Company because it was an unregistered company for the purposes of Part V of the 1986 Act, namely an association or company which is not a company registered under the Companies Act 2006 in any part of the United Kingdom: 1986 Act, sections 220 and 221(1). The power to wind up an unregistered company was discretionary, but the existence of jurisdiction was not: *Kingston Park House Ltd* v *Granton Commercial Industrial Properties Ltd* [2022] CSIH 59, 2023 SC 82 at [26]. Any factual dispute about whether the Company had its principal place of business in Scotland or not was irrelevant. Section 221(3) of the 1986 Act was concerned only with allocating jurisdiction as between England and Wales and Scotland where a company had a place of business in one or the other or both. Against that background, there was no dispute between the parties that the court had jurisdiction to make an administration order in respect of the Company. The respondent admitted that the petitioner was a creditor of

the Company to the extent of over £32.5 million. The petitioner, thus, had standing to make this application: Schedule B1, paragraph 12(1)(c).

[12] The court could make an administration order only if satisfied that two threshold requirements were satisfied, namely: (a) the Company was or was likely to become unable to pay its debts and (b) the administration order was reasonably likely to achieve the purpose of administration. The court then retains a discretion to grant or refuse the order: Schedule B1, paragraph 11; Re *Hawkwing plc* [2023] EWHC 407 (Ch) at [56]. The requirement in Schedule B1, paragraph 11(a) was met. It was a matter of admission that the Company was, or was likely to become, unable to pay its debts. The requirement in Schedule B1, paragraph 11(b) was also met. An administration order would be reasonably likely to achieve the purpose of administration if there was a real prospect that one or more of the statutory objectives might be achieved: *Hawkwing* at [70]. The statutory objectives included realising property in order to make a distribution to a secured creditor: Schedule B1, paragraph 3(c). The Company held the Glasgow property and the petitioner held a standard security over it. Administrators would be able to realise the property. That being so, there was a real prospect that, at the very least, the property could be realised and a distribution made to the petitioner as a secured creditor of the Company.

[13] The court had a discretion as to whether or not to make an administration order: Schedule B1, paragraph 13. That discretion was expressed in general terms, but in exercising it, regard should be had to a number of settled principles. Those principles included that, whilst not conclusive, the views of an overwhelming proportion of creditors in number and value should be given great weight in the absence of special circumstances. In contrast, the views of the Company itself carried no weight: *Hawkwing* at [72]-[73], principles 5 and 11. The circumstances in which the court might make a winding up order

were relevant: *ibid*. In the case of a company not registered in the United Kingdom, regard must be had to considerations of international comity and practicality. Whether to exercise the power to wind up had often been determined by reference to what have been described as three core requirements, namely (a) a sufficient connection with Scotland which may consist of assets within the jurisdiction, (b) a reasonable possibility of benefit to the petitioner if a winding up order is made, and (c) one or more persons interested in the distribution of assets of the Company being persons over whom the court can exercise a jurisdiction. Those core requirements were not hard-edged rules of law, but simply factors that might be relevant to the exercise of the court's discretion on the particular facts of the case: *HSBC Bank Plc, Petr* [2009] CSOH 147, 2010 SLT 281 at [12]-[13]; *Kingston Park House Ltd* [2022] CSOH 97, 2023 SLT 283 at [24]-[37]; [2022] CSIH 59, 2023 SC 82 at [8]-[12] and [26].

[14] A number of factors favoured the making of an administration order in respect of the Company. In particular: (1) The Company had a sufficient connection to Scotland. Its only material asset was in Scotland. It had no material assets in Luxembourg or elsewhere. (2) There was a reasonable possibility of benefit to the petitioner if an administration order was made. Administrators in Scotland would be able to realise the Company's asset in Scotland and make distributions to creditors. It could not be said that an administration order would be made in vain or serve no real purpose. It was not appropriate for the court to attempt to weigh up and compare the relative efficacy of the different options that might be available for the realisation of the Company's assets or distribution to its creditors. In any event, it was clear that there was a benefit to the petitioner in having administrators appointed to handle the realisation of the Company's property in Scotland. That would bring a greater benefit to the petitioner than the matter being handled from Luxembourg

when the Company's only material asset was in Scotland: *Kingston Park House Ltd* (OH) at [26]-[27]; (IH) at [27]. (3) The petitioner was a person who was subject to, or had submitted to, the jurisdiction of the court. It held a Standard Security over the Glasgow property. Any dispute in relation to that security would be subject to the jurisdiction of the Scottish courts by virtue of paragraph 5(1)(a) of Schedule 8 to the Civil Jurisdiction and Judgments Act 1982: *Kingston Park House Ltd* (OH) at [32]-[33] and [35]; (IH) at [29]. (4) The petitioner was the majority creditor in value of the Company. The petitioner's view (and its desire that an administration order be made) should carry considerable weight. By resisting the appointment of administrators, the respondent was not acting in accordance with the wishes, or in the interests of, the petitioner and, thus, of the majority of the creditors of the Company. There was no advantage in leaving the realisation of Scottish property to be handled by the respondent: *Kingston Park House Ltd* (OH) at [36].

[15] The respondent's resistance to the petitioner's application and the making of an administration order rested on three grounds. None of them stood up to scrutiny. Firstly, the respondent suggested that the appointment of administrators was unnecessary standing his appointment as bankruptcy trustee and was liable only to make matters more complicated, time-consuming, and expensive. That suggestion was entirely speculative and unsubstantiated. There was no obvious reason that unnecessary time or expense would be occasioned by the appointment of administrators. The Company's only material asset was situated in Scotland. The proposed administrators were experienced insolvency practitioners based in Scotland who were well versed in the marketing and sale of Scottish property. Any sale by them would be entirely orthodox and there was no reason to suspect that it could not be carried out at proportionate cost. In contrast, it was likely that a sale by the respondent, as a foreign insolvency practitioner, would be more time-consuming and

expensive than any sale by administrators. On his own evidence, the respondent would require prior approval of the supervising judge in Luxembourg. That would doubtless involve some amount of time and cost. The respondent had no apparent cash or other liquid assets available to him to fund any proceedings for recognition of his appointment in Scotland or the marketing and sale of the property. He had already required to call upon the petitioner to fund essential work which he had carried out or instructed to date. It was also likely that the respondent and any prospective purchaser would each require to retain two sets of legal advisers to advise them on both the Scots and Luxembourgish aspects of the sale and purchase transaction. Secondly, the respondent suggested that any administration order would not be recognised in Luxembourg. Even if that were the case, there was no obvious reason why the administrators would require to seek recognition of their appointment in Luxembourg in circumstances where the Company's only material asset was situated in Scotland. Thirdly, the respondent suggested that he would require to remain in office pending the conclusion of any administration in Scotland. That might be correct, but there was no reason why it should have any detrimental effect on creditors. The respondent did not explain what he would require to do pending the conclusion of the administration of the Company. Given the Company's only material asset was situated in Scotland, it was not obvious that the respondent would require to do anything other than await the outcome of the administration.

[16] The Company had elected to apply for the appointment of a *curateur de faillite* after the present application had been made, in breach of the interim moratorium that came into effect at that point in terms of paragraph 44 of Schedule B1. Had the Company applied to be wound up in the United Kingdom, its application would have had to have been dismissed under paragraph 40 of Schedule B1 upon the making of an administration order. Had the

Company been wound up in the United Kingdom, the petitioner, as a qualifying floating charge holder, would have been entitled to apply under paragraph 37 of Schedule B1 to have administrators appointed and the winding up order discharged. The petitioner had filed a claim in the Luxembourgish proceedings in order to preserve its position, given that the court had fixed a deadline for filing such claims of 21 April 2023. The fact that the petitioner filed a claim in those proceedings was irrelevant. An administration order was appropriate and would infringe no principle of international comity. It was the most pragmatic way to deal with the realisation of the Company's only material asset. It would best serve the interests of the Company's creditors as a whole and, in particular, those of the petitioner as its majority creditor. The court's discretion should be exercised in favour of the petitioner.

[17] The court should sustain the petitioner's pleas-in-law, repel the respondent's answers, and make an administration order in terms of the prayer of the petition.

Respondent's submissions

[18] On behalf of the respondent, counsel submitted that the court should refuse the petition. The Luxembourg court had already made an order declaring that the Company was bankrupt and appointing the respondent as its bankruptcy trustee. The petitioner had submitted a claim in the Luxembourg proceedings. It was accepted that no application for recognition of the respondent's appointment had been made to this court, that the petitioner was the majority creditor of the Company (and its only secured creditor), and that the Glasgow property was the Company's only heritable asset.

[19] The Luxembourgish proceedings were collective proceedings, in terms of which the respondent was required, in the exercise of his duties, to act in the interests of all of

the creditors of the Company, including the petitioner. The respondent anticipated that any administration order made by this court would not be recognised by the court in Luxembourg, and that he would require to remain in office pending the conclusion of any administration in Scotland. It would be undesirable for two concurrent insolvency proceedings to be running in relation to the same company, in respect of the same assets, but in different countries.

[20] Whilst the court had jurisdiction to wind up the Company, the question of whether or not an administration order ought to be made in respect of the Company was entirely a matter for the court, in the exercise of its discretion. Reference was made to paragraph 13 of Schedule B1 to the 1986 Act. Realisation of the Company's property and distribution of any free proceeds could just as properly and effectively be carried out by the respondent, in the exercise of his duties to the court in Luxembourg, as it could by administrators appointed by this court. The making of an administration order in respect of the Company by this court was accordingly unnecessary and would result in avoidable cost, and very possibly delay, in achieving the purposes of the bankruptcy. The respondent would require to remain in office in any event, in accordance with the laws of Luxembourg.

[21] The respondent was ready, willing and able to realise the Glasgow property for the benefit of the Company's creditors without the appointment of insolvency practitioners in Scotland to assist him. He already had the powers to do so, under the formal supervision of a *juge-commissaire*, who was required to approve certain actions of a bankruptcy trustee, including the sale of assets.

[22] Although the bankruptcy order made in Luxembourg was in breach of the moratorium which came into effect in terms of paragraph 44 of Schedule B1 to the 1986 Act on the date on which the petition was presented, no insolvency practitioner had been

appointed to administer the business and assets of the Company in Scotland when the Luxembourg court made that order. It was not in dispute that the Luxembourg court had jurisdiction to make the bankruptcy order. That order had not been challenged by the petitioner. On the contrary, the petitioner had placed the respondent in funds to take certain steps in relation to litigation which was ongoing against the Company in respect of the Glasgow property, and on 18 April 2023 it had lodged a claim in the bankruptcy with the Luxembourg court, thereby submitting to the jurisdiction of that court. It had not required to do that, as the respondent had agreed to take no steps in the Luxembourg proceedings which might prejudice the petitioner's position.

[23] There was no basis for the petitioner's claims that the respondent would not readily be able to realise the Company's assets in Scotland, that he would require to apply for and secure recognition of his appointment in Scotland, or that insolvency practitioners qualified to practise in Scotland might require to be appointed to assist him in realising any assets in Scotland. The respondent already had the legal powers to realise the Glasgow property, and had significant experience of dealing with the bankruptcies of Luxembourg holding companies with heritable property abroad.

[24] The objective of any administration of the Company, namely to achieve a better result for the Company's creditors as a whole or, alternatively, to realise property to make a distribution to the secured creditor, could be achieved in the Luxembourg bankruptcy. There was no material difference between the objectives of the two insolvency proceedings. There might be cases in which it would be helpful and desirable for ancillary insolvency proceedings to take place (see e.g. *Morris, Noter* [2007] CSOH 165, 2008 SC 111). However, in the present circumstances, such proceedings would serve no useful purpose.

[25] It was accepted that the views of the petitioner as the sole secured creditor of the Company ought properly to be taken into account, but those views were not determinative of the question of whether or not an administration order ought to be made. The court had complete discretion on the question.

[26] Any administrator appointed by this court would have an obligation to act in the interests of the creditors of the Company as a whole. The respondent was an officer of the Luxembourg court and mindful of his duties as such. He likewise was under an obligation to act in the interests of creditors as a whole. He was not appointed by the directors of the Company, but by the court, from a list of suitably qualified and experienced insolvency practitioners, who were willing and able to accept appointment as such. He was selected as a suitable appointee as a result of his experience with cross-border insolvency cases, particularly in relation to companies holding real estate overseas.

Knowledge of Luxembourg court

[27] Although the hearing on the petition and answers proceeded on the basis that the Luxembourg court had not been informed that the present application had already been made in Scotland, and first orders pronounced in it, it became apparent from documents produced by the respondent shortly after the hearing that, when the Company applied to the Luxembourg court it had in fact narrated the existence of these proceedings and produced to the court the documentation intimated to it pursuant to those first orders - indeed, apparently as a matter supporting its admission of insolvency. It is therefore to be presumed that the Luxembourg court took into account the existence of these proceedings in deciding on 22 March to appoint the respondent as *curateur*.

Decision

[28] There is no dispute that this court has jurisdiction to entertain the petition, for the reasons stated by the petitioner. Nor is there any dispute that the petitioner has standing to present the petition, given that it is accepted to be a substantial creditor of the Company. Equally, both of the threshold requirements for the making of an administration order (actual or prospective inability to pay debts and the existence of a real prospect of one or more of the statutory purposes of administration being realised) are met, again for the reasons argued by the petitioner.

[29] The real question which falls to be answered, as the parties readily acknowledged, is how the court ought to exercise its discretion to make or refuse an administration order in the particular circumstances of the case. Although reference was made in that connection to certain "settled principles" (per Judge Barber in *Hawkwing* at [73]) which can be derived from the authorities there cited, it is important to bear in mind that those authorities were not dealing with a situation where there was, in effect, a prospective competition between an insolvency practitioner already appointed by a foreign court of competent jurisdiction and administrators whose appointment was sought in our courts. Observations made outwith that context may not read over smoothly or at all into it.

[30] Further, in *Morris*, Lord Drummond Young noted at [9] the obvious desirability (at least in the winding up context) "that one court should have overall control in order to ensure that the fundamental objectives of insolvency law are realised on a consistent basis" and observed "That is why a single jurisdiction, normally that of the country or state of incorporation, should have overall control." The Inner House in *Kingston Park House Ltd* at [10], under reference to *Banco Nacional de Cuba* v *Cosmos Trading Corp* [2000] BCC 910,

[2000] 1 BCLC 813 accepted that "the principle of international comity was of fundamental importance" in this context, returning to the theme at [26] and [30].

[31] It is also appropriate to note at this stage that the submission that the views of the majority of creditors in number and value should be given great weight in the exercise of the court's discretion, almost *ut sit pro ratione voluntas*, is not quite the proposition advanced by Judge Barber in *Hawkwing*, in the course of her review of the authorities. Rather, the judge noted, under reference to *Re P & J Macrae Limited* [1961] 1 WLR 229 and *Re Demaglass Holdings Ltd* [2001] 2 BCLC 633, that opposition to the commencement of an insolvency process on the part of an overwhelming proportion of creditors in number and value was something that should be given great weight in the absence of special circumstances, but also that the court's role was not limited to a question of simple mathematics and that it would be astute to enquire into the views of the majority and to consider whether they were commercially well-founded. The judge also noted the helpful summary of the law provided by Snowden J in *Re Maud* [2020] EWHC 974 (Ch) at [78]:

> "the court will also look at the reasons advanced by the creditors on each side of the debate in order to assess whether those reasons are commercially rational and will have regard to other evidence to assess whether the weight and rationality of a particular creditor's approach is diminished by any extraneous factors".

[32] Drawing those strands together, it appears to me that this court should only install an insolvency practitioner in competition with (as opposed to ancillary to) one already put in place by a foreign court of competent jurisdiction if there is some matter attending the appointment of the foreign practitioner which this court ought not to tolerate, or if the ability of the foreign practitioner to perform his appropriate functions in this jurisdiction can be shown objectively to be likely to be attended by such difficulties as to make the installation of a domestic practitioner an expedient course of action.

[33] In the present case, the Luxembourg court exercised a jurisdiction to commence a liquidation process over a company registered in the Grand Duchy and which carried on its business there. Such an exercise of jurisdiction could under no circumstances be considered exorbitant according to ordinary principles of international law; indeed the courts of the place of registration of a company are the natural forum for its winding up. The Luxembourg court was apprised of the fact that these proceedings had commenced and chose nonetheless to appoint an officer of its own to conduct the Company's liquidation under its supervision. It is correct that that is a situation which would probably not have happened, and which would in all probability have been unwound had it occurred, within the domestic jurisdictions of the United Kingdom, because of the provisions of Schedule B1 to the 1986 Act already mentioned. However, no suggestion was made to me that the Luxembourg court's order was pronounced in breach of any applicable rule of practice or procedure in the law of Luxembourg, and this court could not properly expect the court there to abide by the laws and practices of the United Kingdom in deciding how to deal with a winding up application before it in relation to a Luxembourgish company. There is, thus, nothing exceptionable about the actions of the Luxembourg court in appointing the respondent as the Company's *curateur*.

[34] I regard the making of a claim by the petitioner in the Luxembourg process, and its co-operation to date with the respondent, as of no relevance whatsoever to the exercise of the court's discretion. These were sensible steps for the petitioner to take to preserve its position and implied no approbation of that process. However, scrutinising as I must the reasons advanced by the petitioner for favouring the appointment of administrators, I see no obvious merit in its suggestion that a realisation of the Glasgow property by the respondent is apt to be more expensive or time-consuming than its realisation by insolvency

practitioners in Scotland. The respondent claims extensive experience in similar situations and evidently enjoys the confidence of the Luxembourg court. The steps which the realisation of the property will require, and the professional advisers who will require to be engaged to that end, are the same regardless of which insolvency practitioner directs the process. If (as seems likely) funds are required to assist with the realisation, that will be a problem confronting whoever is in charge of the process, and counsel for the petitioner very properly made it clear that it had no intention of withdrawing its co-operation from the respondent should he remain in charge. The involvement of the *juge-commissaire* in supervising and approving the actions of the respondent appears to be formal in nature in ordinary circumstances and represents nothing more than an appropriate degree of judicial oversight in the liquidation process. Communication difficulties which might in years gone by have been caused by the distance between Luxembourg and Scotland have been removed by modern technology. If there is a dispute about the petitioner's Standard Security (and none presently exists or appears on the horizon) then it will require to be resolved in the Scottish courts in any event. There is in these circumstances no objectively good reason to set up an unnecessary and undesirable competition between insolvency practitioners by acceding to the petitioner's request to appoint domestic administrators in addition to the Luxembourg *curateur* already in place.

Conclusion

[35] For the reasons stated, I have refused the prayer of the petition.