Neutral Citation Number: [2020] EWHC 1433 (Ch)

Case No: CR-2015-005573

IN THE HIGH COURT OF JUSTICE
IN THE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF AKKURATE LIMITED (IN LIQUIDATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 04/06/2020

Before:

SIR GEOFFREY VOS, CHANCELLOR OF THE HIGH COURT

- -

BETWEEN:

(1) GRAHAM STUART WOLLOFF
(2) LIAM ALEXANDER SHORT
(Joint Liquidators of AKKURATE LIMITED)

Applicants

-and-

(1) CALZATURIFICIO RODOLFO ZENGARINI SRL
(2) ITALIAN LUXURY SRL

Respondents

- -

Mr James Pickering QC (instructed by **Spring Law**) for the **Applicant Liquidators**

Mr Matthew Parfitt (instructed by **Howard Kennedy LLP**) for the **Respondents**

Hearing date: 19th May 2020

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JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.30am on 4 June 2020.

Sir Geoffrey Vos, Chancellor of the High Court:

Introduction

1. These applications raise the question of whether the court has the power under section 236(3) of the Insolvency Act 1986 ("IA 1986") to require persons resident in the EU to produce books and papers and an account of their dealings with a company being compulsorily wound up in England and Wales. There is divergent authority at first instance. In *Re MF Global UK Ltd* [2015] EWHC 2319 (Ch) ("*MF Global*"), David Richards J decided that section 236 did not have extraterritorial effect, whilst in *Re Omni Trustees (No 2)* [2015] EWHC 2697 (Ch) ("*Omni*") and in *Re Carna Meats (UK) Ltd; Wallace v Wallace* [2019] EWHC 2503 (Ch) ("*Wallace*"), HHJ Hodge QC (in *Omni*) and Adam Johnson QC, sitting as a deputy judge of the High Court, (in *Wallace*) decided that it did.

2. The applications are complicated by the fact that, in this case, Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (the "2000 Regulation") applies to the winding-up, whereas in *MF Global* and *Omni*, it did not.

3. The two applications were made by the joint liquidators (the "liquidators" or the "applicants") of Akkurate Limited ("Akkurate" or the "Company") against Calzaturificio Rodolfo Zengarini S.r.l. ("Zengarini") on 3 October 2019 and against Italian Luxury S.r.l on 9 December 2019 ("Luxury") (together the "respondents"). Zengarini and Luxury are both incorporated and operating in Italy. Mr Wolloff was appointed a liquidator on 29 October 2015 and Mr Short was appointed on 25 June 2018.

4. The issues which arise for determination seem to me to be as follows:

    i) Do section 236(3) and/or the 2000 Regulation give the court jurisdiction to make the orders sought?

    ii) If so, how should the court exercise its discretion?

5. The liquidators submitted that, even if section 236(3) did not itself have extra-territorial effect, the 2000 Regulation automatically conferred the jurisdiction of the member state in which insolvency proceedings could be opened (in this case, the UK) "in relation to insolvency matters in other member states". The respondents argued, however, that (a) section 236(3) did not allow an order to be made against persons outside the UK, (b) article 25 of the 2000 Regulation only provided for UK judgments to be recognised and enforced with no further formalities, so that (c) if the court had no power to make an extra-territorial judgment in the first place, the 2000 Regulation did not assist the liquidators.

6. If the court does have jurisdiction to make orders of the kind sought, questions of discretion arise as to the breadth of the actual orders sought. For that reason, I shall need to go into the factual background rather more than might otherwise have been necessary. In outline, it appears that the liquidators have already brought and compromised misfeasance proceedings in relation to events prior to the liquidation of the Company against one of its two directors, Mr John Richmond ("Mr Richmond"). They want access to documentation in the possession of the respondents in order to

decide whether it is appropriate to bring further proceedings in Italy against the directors, the respondents or others in relation to what occurred after the Company was wound up. In broad terms, it is suggested that there may have been some kind of impropriety leading to a seamless transition in the respondents' use of licenses under the Company's trademarks. In fact, the Company's original liquidators sold (most of) the Company's trademarks on 20 November 2015 (some 6 months after the Company was compulsorily wound up) to Fashioneast SARL ("Fashioneast"), a company incorporated in Luxembourg. The liquidators now, however, wish to know how it came about that the respondents were using those trademarks between 1 April 2015 to 31 December 2016[1] without paying anything to the Company for doing so. It seems that both Zengarini and Luxury have entered into licence agreements with Fashioneast.

7. I shall return to these matters and the issues I have mentioned, after setting out the necessary factual background.

Factual background

8. Akkurate was incorporated in England on 2 April 1998. Its business consisted of the ownership of a number of trademarks associated with the John Richmond fashion brand, which it licensed to manufacturers of clothing and fashion accessories. Mr Saverio Moschillo ("Mr Moschillo") and Mr Richmond were directors of Akkurate. Akkurate was wound up on 18 May 2015 following a petition presented by Her Majesty's Revenue and Customs based on the non-payment of tax and penalties amounting to some £1.6 million.

9. Zengarini is owned by Mr Rodolfo Zengarini ("Mr Zengarini"). It designs, manufactures and markets footwear and accessories. It entered into design agreements with Akkurate in 2008 (the "2008 agreements") and again in 2014 (the "2014 agreements"), which gave it licences to use Akkurate's trademarks. Luxury is also owned by Mr Zengarini.

10. Under the 2014 agreements, Zengarini allegedly paid Akkurate an upfront fee of €2 million for 14 fashion seasons, just a year or so before its winding up.

11. The liquidators contend that they have made concerted attempts to obtain information from Zengarini and Luxury, but that they have refused to provide it and have sought to frustrate their efforts.

12. The liquidators rely on the fact that Zengarini and Luxury initiated proceedings against Akkurate in Italy on 29 May 2019, claiming some €3.79 million. As a result, the liquidators applied to the court for a stay of those proceedings under section 130(2) of the IA1986 and articles 4 and 17 of the 2000 Regulation. That stay was granted on 29 November 2019 by ICCJ Prentis.

13. The documents sought by the liquidators from both Zengarini and Luxury are as follows:

> "1. In relation to [Mr Richmond]

[1] Even though new licence agreements were entered into in June 2016.

a) An account of the [respondents'] dealings with Mr Richmond in relation to the Trademarks and/or other Company business from 1 April 2015 to 31 December 2016; and

b) Copies of all correspondence with Mr Richmond from 1 April 2015 to 31 December 2016, including all letters, emails and attachments.

2. In relation to the New Trademark Owners

a) details of any payments made, or credits given, to any of them on account of the [respondents'] use of the Trademarks for Spring/Summer 2015, Fall/Winter 2015/16 and Spring/Summer 2016, including how much was paid, when and to whom;

b) copies of all licence or design agreements that the [respondents have] entered into with any of the New Trademark Owners, or any other party as licensor of the Trademarks, since November 2015; and

c) in relation to the above agreements:

(i) the total revenue and profits generated by the [respondents] to date; and

(ii) The total licence or design fees paid pursuant to such agreements.

3. In relation to payments to the Company under Article 2.4 of the 2014 Agreements

a) an account of the basis on which these payments were agreed between the parties, with supporting evidence;

b) an account of all communications with Mr Richmond or the New Trademark Owners concerning these payments, with copies of related correspondence; and

c) confirmation as to whether the [respondents have] made any payments (or given other forms of credit) to Mr Richmond or the New Trademark Owners that was the same or similar in nature and purpose to these payments, with details of any such payments made.

4. In relation to marketing activities in 2015 relating to the Trademarks:

a) an explanation as to why payments to Moschillo srl (a marketing company and a party to the 2014 Agreements) continued from April 2015 to July 2016

whilst no payments were being made to the Company; and

b) details of the products purportedly sold to the Company after the Company had been wound up, including in June, September and November 2015 under invoices 1565, 2363 and 2767, with documents evidencing who ordered the products, when and for what purpose.

5. In relation to alleged breaches of the 2014 Agreements:

a) an explanation as to why the [respondents] stopped payment licence fees to the Company in April 2015, before the Company had been placed in liquidation and long before the Company is alleged to have committed any breach; and

b) an account of the breaches the Company is alleged to have committed in 2015, on which the [Zengarini] relied in purporting to terminate the 2014 Agreements, with precise dates on which the breaches are alleged to have taken place.

6. In relation to samples and unsold stock:

a) an account of what happened to all samples and unsold stock after the (purported) termination of the 2014 Licence Agreements, including details of who they were delivered to and copies of all related documents and correspondence;

b) an account of the 5% of 'Net Turnover' (as defined in the 2014 Agreements) or other proceeds generated from the sale of stock sold in 2016 or later".

14. The liquidators' evidence asserts that there are several important issues concerning the 2014 Agreements that warrant a full investigation. They say they are particularly concerned about the following:

i) Zengarini's failure to pay €736,642 in licence fees to Akkurate from April 2015 to July 2016, despite the continuation of the 2014 Agreements and Zengarini continuing to use the Company's trademarks during that period. This is said to indicate that Zengarini was the first to commit a serious breach of the 2014 Agreements. Even on Zengarini's case, Akkurate did not commit a serious breach that would have warranted termination until December 2015. The liquidators suggest that the issue will identify the party liable for early termination of the 2014 Agreements. Each side claims damages amounting to some €5 million.

ii) Zengarini's failure to account for its continuing liabilities to Akkurate in 2015 and 2016. Zengarini's conduct allegedly prevented the liquidators from

claiming licence fees at the time, and contributed to their subsequent disposal of the Company's trademarks on unfavourable terms.

iii) Zengarini's continuing to do business with the directors of the Company in 2015 and 2016, when it should have been dealing with the liquidators in relation to the Company's business.

iv) Zengarini entered into licence agreements with the new owners of the Company's trademarks, including Fashioneast, the Arav Group and/or AM.VI srl (collectively "the New Trademark Owners"), and allegedly conferred benefits on them instead of Akkurate. The liquidators contend that this affects the question of Zengarini's entitlement to the €2 million credit it claims.

v) Zengarini's alleged failure to return samples, materials and unsold stock to Akkurate in 2016 in alleged breach of the 2014 Agreements.

vi) Zengarini's conduct in 2015 and 2016 generally, which allegedly suggests a level of collusion with Mr Richmond and/or Fashioneast in ensuring that the Company's trademarks were acquired by Fashioneast at an undervalue.

vii) Zengarini's claim for €3,790,000 in lost income from Akkurate on the basis that it lost the right to use the Company's trademarks in 2015, when in fact it has retained the right to use them, and continues to generate income from them under licence agreements with the New Trademarks Owners.

15. The correspondence between the parties in the run up to the issue of these applications will be relevant to the applications if the liquidators succeed on the question of jurisdiction. The respondents have, as they submitted, already provided some information to the liquidators. The correspondence exhibited to the liquidators' evidence is summarised in **appendix 1** to this judgment.

The IA 1986

16. Sections 133 and 134 of the IA 1986 provide as follows:

> "**133 Public examination of officers**
>
> (1) Where a company is being wound up by the court, the official receiver or, in Scotland, the liquidator may at any time before the dissolution of the company apply to the court for the public examination of any person who—
>
> (a) is or has been an officer of the company; or
>
> (b) has acted as liquidator or administrator of the company or as receiver or manager or, in Scotland, receiver of its property; or
>
> (c) not being a person falling within paragraph (a) or (b), is or has been concerned, or has taken part,

> in the promotion, formation or management of the company. …
>
> (3) On an application under subsection (1), the court shall direct that a public examination of the person to whom the application relates shall be held on a day appointed by the court; and that person shall attend on that day and be publicly examined as to the promotion, formation or management of the company or as to the conduct of its business and affairs, or his conduct or dealings in relation to the company. …
>
> **134 Enforcement of s. 133**
>
> (1) If a person without reasonable excuse fails at any time to attend his public examination under section 133, he is guilty of a contempt of court and liable to be punished accordingly.
>
> (2) In a case where a person without reasonable excuse fails at any time to attend his examination under section 133 or there are reasonable grounds for believing that a person has absconded, or is about to abscond, with a view to avoiding or delaying his examination under that section, the court may cause a warrant to be issued to a constable or prescribed officer of the court—
>
> (a) for the arrest of that person; and
>
> (b) for the seizure of any books, papers, records, money or goods in that person's possession.
>
> (3) In such a case the court may authorise the person arrested under the warrant to be kept in custody, and anything seized under such a warrant to be held, in accordance with the rules, until such time as the court may order."

17. Sections 236 and 237 of the IA 1986 provide as follows:

> "**236 Inquiry into company's dealings, etc**
>
> (1) This section applies as does section 234;[2] and it also applies in the case of a company in respect of which a winding-up order has been made by the court in England and Wales as if references to the office-holder included the official receiver, whether or not he is the liquidator.

[2] Section 234(1) provides that it applies where the company enters administration, an administrative receiver is appointed, a company goes into liquidation, or a provisional liquidator is appointed.

(2) The court may, on the application of the office-holder, summon to appear before it –

(a) any officer of the company,

(b) any person known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or

(c) any person whom the court thinks capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the company.

(3) The court may require any such person as is mentioned in subsection (2)(a) to (c) to submit to the court an account of his dealings with the company or to produce any books, papers or other records in his possession or under his control relating to the company or the matters mentioned in paragraph (c) of the subsection.

(3A) An account submitted to the court under subsection (3) must be contained in — (a) a witness statement verified by a statement of truth (in England and Wales) …

(4) The following applies in a case where—

(a) a person without reasonable excuse fails to appear before the court when he is summoned to do so under this section, or

(b) there are reasonable grounds for believing that a person has absconded, or is about to abscond, with a view to avoiding his appearance before the court under this section.

(5) The court may, for the purpose of bringing that person and anything in his possession before the court, cause a warrant to be issued to a constable or prescribed officer of the court—

(a) for the arrest of that person, and

(b) for the seizure of any books, papers, records, money or goods in that person's possession.

(6) The court may authorise a person arrested under such a warrant to be kept in custody …

237 Court's enforcement powers under s. 236 …

(3) The court may, if it thinks fit, order that any person who if within the jurisdiction of the court would be liable to be summoned to appear before it under section 236 or this section shall be examined in any part of the United Kingdom where he may for the time being be, or in a place outside the United Kingdom".

The 2000 Regulation

18. The 2000 Regulation was replaced by Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (the "2015 Regulation"). The 2015 Regulation is not materially different from the 2000 Regulation for present purposes, but the 2000 Regulation anyway still applies to this case, because the winding up of Akkurate was before 26 June 2017.

19. The 2000 Regulation included the following provisions:

> "**Article 3 International jurisdiction**
>
> 1. The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. 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…
>
> **Article 4 Law applicable**
>
> 1. Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as the "State of the opening of proceedings".
>
> 2. The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. It shall determine in particular …
>
> (c) the respective powers of the debtor and the liquidator …
>
> **Article 16 Principle**
>
> 1. Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings …
>
> **Article 18 Powers of the liquidator**
>
> 1. The liquidator appointed by a court which has jurisdiction pursuant to Article 3(1) may exercise all the powers conferred on him by the law of the State of the opening of proceedings in another Member State, as long as no other insolvency proceedings have been opened there nor any preservation measure to the contrary has been taken there further to a request for the opening of insolvency proceedings in that State …
>
> 3. In exercising his powers, the liquidator shall comply with the law of the Member State within the territory of which he intends to take action, in particular with regard to procedures for the realisation of assets. Those powers may not include coercive measures or the right to rule on legal proceedings or disputes.

> **Article 25 Recognition and enforceability of other judgments**
>
> 1. Judgments handed down by a court whose judgment concerning the opening of proceedings is recognised in accordance with Article 16 and which concern the course and closure of insolvency proceedings, and compositions approved by that court shall also be recognised with no further formalities. Such judgments shall be enforced in accordance with Articles 31 to 51, with the exception of Article 34(2), of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Conventions of Accession to this Convention".

20. It is not disputed that Akkurate's centre of main interests ("COMI") was in England and Wales, so that the courts of England and Wales had jurisdiction to open insolvency proceedings in respect of Akkurate under article 3 of the 2000 Regulation.

Issue 1: Do section 236(3) and/or the 2000 Regulation give the court jurisdiction to make the orders sought?

21. Much confusion has already been caused by the competing first instance decisions on section 236(3). In my judgment, the current legal position must be determined by the strict application of the doctrine of precedent.

22. There are certain basic parameters to the debate. First, it is important to ensure that all relevant decisions have been drawn to the court's attention. I believe that has been achieved in this case. In addition, the parties have provided me with extracts from the main insolvency textbooks.[3] If I do not cite any authority that I have been referred to, it is because, having considered it, I do not think it adds materially to the principles otherwise to be derived.

23. Secondly, section 236 cannot be construed in a vacuum. For that reason, I have set out above the provisions of sections 133 and 134 of the IA 1986, concerning public examinations. Section 133 has been held by the Court of Appeal to have extra-territorial effect in *Re Seagull Manufacturing Co Ltd* [1993] Ch. 345 ("*Seagull*"), but the court there rejected the submission that it would be a surprising anomaly if section 133 applied extra-territoriality if section 236 did not as a result of the effect of the decision in *Re Tucker (a bankrupt)* [1990] Ch. 148 ("*Tucker*").

24. I propose to deal with the cases briefly, but in the following order: First, *Tucker* itself to see what precisely it decided, secondly, the trilogy of inconsistent cases (*MF Global*, *Omni* and *Wallace*), and thirdly with the other relevant decisions not already covered in the cases already mentioned. I will conclude with a discussion of the jurisdiction issue in this case.

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3 See *Law of Insolvency* at paragraph 22-021ff, *McPherson & Keay's Law of Company Liquidation* at paragraph 15-069ff, *Lightman & Moss* at paragraph 8-025ff, and 30-008 to 30-017, *Totty, Moss & Segal* at F1-05, *Palmer's Company Law* at paragraph 15.329ff.

Tucker

25. It is necessary first to recite section 25 of the Bankruptcy Act 1914 ("section 25") which was construed in *Tucker* as follows:

> "(1) The court may, on the application of the official receiver or trustee, at any time after a receiving order has been made against a debtor, summon before it the debtor or his wife, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person whom the court may deem capable of giving information respecting the debtor, his dealings or property, and the court may require any such person to produce any documents in his custody or power relating to the debtor, his dealings or property.
>
> (2) If any person so summoned, after having been tendered a reasonable sum, refuses to come before the court at the time appointed, or refuses to produce any such document, having no lawful impediment made known to the court at the time of its sitting and allowed by it, the court may, by warrant, cause him to be apprehended and brought up for examination.
>
> (3) The court may examine on oath, either by word of mouth or by written interrogatories, any person so brought before it concerning the debtor, his dealings, or property.
>
> (4) If any person on examination before the court admits that he is indebted to the debtor, the court may, on the application of the official receiver or trustee, order him to pay to the official receiver or trustee, at such time and in such manner as to the court seems expedient, the amount admitted, or any part thereof, either in full discharge of the whole amount in question or not, as the court thinks fit, with or without costs of the examination.
>
> (5) If any person on examination before the court admits that he has in his possession any property belonging to the debtor, the court may, on the application of the official receiver or trustee, order him to deliver to the official receiver or trustee such property, or any part thereof, at such time, and in such manner, and on such terms, as to the court may seem just.
>
> (6) The court may, if it thinks fit, order that any person who if in England would be liable to be brought before

> it under this section shall be examined in Scotland or Ireland, or in any other place out of England".

26. In *Tucker,* Mr Tucker's trustee in bankruptcy applied under section 25 for the issue of a summons requiring Mr Tucker's brother to attend court and to produce documents. The brother was resident in Belgium and applied to rescind the order authorising the service on him, on the basis that the court did not have jurisdiction to order service outside the jurisdiction. The Court of Appeal (Sir Nicolas Browne-Wilkinson V-C, Dillon and Lloyd LJJ) held that on its true construction section 25 did not assert jurisdiction over British subjects resident abroad, so that rule 86 of the Bankruptcy Rules 1952 did not provide a procedural power to permit service out of the jurisdiction of summonses issued under section 25(1). Dillon LJ said this at pages 158-9:

> "I look, therefore, to see what section 25(1) is about, and I see that it is about summoning people to appear before an English court to be examined on oath and to produce documents. I note that the general practice in international law is that the courts of a country only have power to summon before them persons who accept service or are present within the territory of that country when served with the appropriate process. There are exceptions under R.S.C., Ord. 11, but even under those rules no general power has been conferred to serve process on British subjects resident abroad. Moreover, the English court has never had any general power to serve a subpoena ad testificandum or subpoena duces tecum out of the jurisdiction on a British subject resident outside the United Kingdom, so as to compel him to come and give evidence in an English court. Against this background I would not expect section 25(1) to have empowered the English court to haul before it persons who could not be served with the necessary summons within the jurisdiction of the English court….
>
> Finally, and to my mind conclusively, by section 25(6) the court is given a power (the scope of which will have to be considered on the respondent's notice) to order the examination out of England of "any person who if in England would be liable to be brought before it under this section." This wording carries inevitably, in my judgment, the connotation that if the person is not in England he is not liable to be brought before the English court under the section.
>
> Thus the words which I have quoted from subsection (6), "liable to be brought before it under this section," must mean "liable to be brought before it by summons under this section." Subsection (6) thus confirms that a person who is not at any relevant time in England, and so cannot be served with a summons of the English court in England, cannot be examined by that court under subsection (1). His period in England may be very brief, and if he is served in England with an appropriate summons during a brief visit, that will be enough, since, as

> Lord Esher M.R. observed in In re Bradbrook, Ex parte Hawkins (1889) 23 Q.B.D. 226, 227, in relation to the predecessor of section 25 in the Act of 1883, the moment the summons was served the requirements of the section would be fulfilled. If, however, he has never been in England at all at any relevant time, then he is outside section 25(1) and cannot be examined in England".

The trilogy of inconsistent cases

27. In *MF Global*, the company in administration held open positions with a French clearing house. The clearing house closed those positions, causing substantial losses. The administrators applied against the clearing house under section 236 for documents relating to and a description of the sales or auction process by which the positions were closed. The order was resisted on the basis that section 236 did not have extra-territorial effect. The 2000 Regulation did not apply because the company was a credit institution, and article 1(2) of the 2000 Regulation excluded its application. At [21], David Richards J said that the French clearing house relied on *Tucker*: "a decision on [section 25] which, as applied to bankruptcy, was in substantially the same terms as sections 236 and 237". In particular, he said, section 25(6) was re-enacted as section 237(3) of the IA 1986. Having cited from Dillon LJ's judgment in *Tucker*, David Richards J said:

> "23. Where a statutory provision is re-enacted in substantially the same terms, it is a principle of construction that the re-enactment is intended to carry the same meaning as its predecessor. No doubt the principle could be displaced, for example, if new provisions in the new legislation showed that the re-enacted provision was intended to have a different meaning. The principle is particularly in point if the earlier provision has been the subject of authoritative decision. In such circumstances, it is presumed that, if substantially the same words are used in the new provision, Parliament did not intend to change the meaning as held by the court. [*Tucker*] is clearly an authoritative decision on the lack of extraterritorial effect of section 25 of the Bankruptcy Act 1914 and, although it was decided after the enactment of the Insolvency Act 1986, it is a binding interpretation of section 25 which will apply equally to the successor sections in the Insolvency Act 1986, unless the context of the new legislation shows that the meaning must be taken to have changed".

28. David Richards J then rejected the submissions that *Tucker* should not be followed because (a) it was decided *per incuriam*, (b) Dillon LJ's reasoning suffered from the logical fallacy of contraposition, and (c) the reference in section 237(3) to "any person who if within the jurisdiction of the court would be liable to be summoned to appear before it under section 236" referred not to the physical location of the person but to whether that person fell within the jurisdiction conferred by section 236. David Richards J referred to *Seagull* as having considered *Tucker* "without any suggestion that it was wrong". He said in relation to *Seagull* at [27] that:

> "[t]he conclusion that the provisions for private examination did not have extraterritorial effect was distinguished on the grounds that the persons who could be the subject of a public examination under section 133 were more narrowly confined, being limited to officers of the company and persons who have been concerned or taken part in its promotion, formation or management, whereas under section 236(2)(c) an order for private examination can be made against any person whom the court thinks capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the company. Secondly, while section 25(6) which Dillon LJ considered to be conclusive was re-enacted in section 237(3), no similar provision applies in relation to section 133".

29. At [28]-[29], David Richards J noted that in *Bilta (UK) Ltd v. Nazir (No 2)* [2016] AC 1 (Supreme Court) ("*Bilta*"), and *In re Paramount Airways Ltd* [1993] Ch 223 (Court of Appeal) ("*Paramount*") had held that section 213 of the IA 1986 (fraudulent trading) and section 238 of the IA 1986 (transactions at an undervalue) had extraterritorial effect. Lord Sumption JSC had said at [108] in *Bilta* that "[i]n the case of a company trading internationally, it is difficult to see how such provisions can achieve their object if their effect is confined to the United Kingdom".

30. David Richards J also referred at [30] to *Masri v. Consolidated Contractors International (UK) Ltd (No 4)* [2010] 1 AC 90 ("*Masri*"), where Lord Mance had discussed *Tucker* at [19]–[24] "without any suggestion that it was wrongly decided". He noted also that Lord Mance had drawn attention to the significance of section 25(6) which Dillon LJ in *Tucker* had regarded as "conclusive".[4]

31. David Richards J concluded at [32] in *MF Global* as follows:

> "32. In the absence of authority and in the absence of what is now section 237(3), there would in my view be a good deal to be said for concluding that section 236 was intended to have extraterritorial effect, leaving it to the discretion of the court to keep its use within reasonable bounds. But it is in my judgment impossible to overlook the authoritative standing of the decision in [*Tucker*] the re-enactment of the earlier private examination provisions in substantially the same terms and the presence of what is now section 237(3). I conclude that section 236 does not have extraterritorial effect and that therefore an order cannot be made under it against LCH France".

32. In *Omni*, the official receiver made an uncontested application under section 236(3) against Mr Norriss, the principal trustee of a Hong Kong company to which Omni Trustees had transferred £3.7 million. The 2000 Regulation did not apply because Mr Norriss was resident in Hong Kong. HHJ Hodge gave an *ex tempore* judgment. He

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[4] At [31], David Richards J mentioned *McIsaac and Wilson (Petitioners (Joint Liquidators of First Tokyo Index Trust Ltd))* [1994] BCC 410, where the Outer House of the Court of Session in Scotland had given extraterritorial effect to section 236. He said that neither party relied on it, agreeing that it was based on the mistaken belief that the United States fell within the definition of a relevant country or territory for the purposes of section 426(5) of the IA 1986.

concluded first at [10] that it was appropriate for the court to exercise its discretion to grant the order sought. He then turned to the question of jurisdiction referring to *MF Global* and to *Tucker* on which David Richards J had relied. He said at [12] that he had to give *MF Global* considerable weight, but noted (a) that David Richards J had said that, in the absence of authority, and what is now section 237(3), there would have been a good deal to be said for the conclusion that section 236 was intended to have extra-territorial effect, leaving it to the court's discretion to keep its use within reasonable bounds, and (b) that any judgment was only as good as the argument presented to the court, and *MF Global* was, in terms, founded on *Tucker*.

33. Having drawn attention to differences in structure between section 25 and section 236, he said this at [14]:

> "I am satisfied that s.25 of the 1914 Act conferred a power on the court to order the production of documents which was merely ancillary to, and dependent upon, the principal power conferred by s.25, which was to summon a respondent falling within the scope of the section to attend for examination before the court. In other words, the power to order the production of documents was ancillary to, and dependent upon, the power to summon an individual to attend for examination before the court. That is not the way in which s.236 is structured. By subs.(2), the court may summon any of three categories of person to appear before it. By subs.(3), the court may require any such person to submit to the court an account of his dealings with the company, or to produce any books, papers or other records in his possession or under his control relating to the company or the matters mentioned in s.236(2)(c). I am satisfied that s.236 is structured differently to the former s.25 of the Bankruptcy Act 1914, and that it confers a freestanding power, independent of the power to summon a person to appear before the court for examination, to submit to the court an account of dealings and to produce books, papers and records".

34. At [15], HHJ Hodge distinguished *Tucker* on the basis that the thrust of that decision was "that the court will not compel someone to come to this jurisdiction to be examined on oath and to produce documents". He accepted counsel for the Official Receiver's submission that a crucial distinction was to be drawn between "compelling a respondent to a s.236 application to attend court for examination and requiring a respondent to such an application to produce documents and submit an account of his dealings". HHJ Hodge then referred to the Court of Appeal's decision in *Re Mid East Trading Ltd* [1998] B.C.C. 726 ("*Mid-East*"), where the court made an order requiring the production of documents situated in a foreign jurisdiction. Although the respondent was not in that case itself situated outside the jurisdiction, reliance was placed upon what Chadwick LJ had said at page 754A-B that there was "force in the submission that, in so far as the making of an order under s. 236 of the Insolvency Act 1986 in respect of documents which are abroad does involve an assertion of sovereignty, then that is an assertion which the legislature must be taken to have intended the courts to make in appropriate cases".

35. At [19] HHJ Hodge said that it was "crucial" to his decision that "it would not appear that [*Mid-East*] was cited to David Richards J". He then accepted counsel's submission that "David Richards J's judgment failed properly to distinguish between, on the one hand, requiring a respondent to attend to be examined on oath and, on the other, requiring a respondent to give an account of dealings or to produce documents". "He did so because his attention had not been drawn to the structural difference between" section 25 and section 236, and "[h]e was also not referred to the helpful guidance given in [*Mid-East*]. As a result, he failed to appreciate that a distinction should be drawn between requiring a respondent to attend court and be cross-examined, on the one hand, and producing documents and giving an account of dealings, on the other".

36. In *Wallace*, the liquidator of Carna Meats applied for an order that the company's former book-keeper based in the Republic of Ireland deliver up specific documents, books and records of the company, pursuant to section 236(3). The application was uncontested, but the judgment was reserved. Mr Johnson considered a number of authorities including *Tucker*, *MF Global* and *Omni*, concluding with *Willmont & Sayers v. AS Citadele Banka* [2018] EWHC 603 (Ch) at [44]-[45] ("*Willmont*"). He explained that, in *Willmont*, an order was sought by a trustee in bankruptcy under section 366(1)(c) of the IA 1986 (the successor to section 25) against a Latvian bank. Clive Freedman QC, sitting as a deputy judge of the High Court, had approved an order requiring the bank (which consented) to provide a written account of information concerning certain bank accounts associated with the bankrupt. Having confirmed that the bankrupt's COMI was in England, Mr Freedman had said that "[i]n cases not involving the [2000 Regulation], there were questions about the extraterritorial effect of an order under section 366 but in view of the fact that the respondent in this case is within the EC (that is Latvia) and in view of the application of the [2000 Regulation], I am satisfied that jurisdiction applies here to make an order under section 366 against a Latvian bank". In his discussion, Mr Johnson described the authorities as presenting "a somewhat fragmented picture", making it appropriate for him to "approach the analysis in this case from first principles". He said that "where a provision is concerned with requiring attendance before the court, and either reflects directly or is closely modelled on the court's subpoena power, the presumption in favour of territorial application must be very strong" (referring to Lord Mance in *Masri* at [12]). He referred to *Seagull* in relation to the extra-territorial application of section 133, distinguishing *Tucker*. He cited Lord Mance in *Masri* at [23] as explaining *Seagull* on the basis that "the public interest that those responsible for the company's state of affairs should be liable to be subjected to a process of investigation in public" and the "universality of a winding up order, in the sense that it relates at least in theory to all assets wherever situate". He referred to Sir Donald Nicholls V-C in *Paramount* not having thought that "it was possible to read down the words "any person" in [section 238 of the IA 1986]", and that "the risk of injustice was sufficiently addressed by the fact that both in determining whether to permit service out, and in determining whether to make any order as a matter of discretion, the court would need to be satisfied that there was a "sufficient connection" with England and Wales (see [pages] 240C and 241G)". The same analysis was adopted in *Bilta* by Lord Sumption at [110].

37. Mr Johnson concluded at [54] that, in light of Lord Mance's comments regarding the nature of the court's subpoena power, *Tucker* was readily understandable: "[a]s the

court recognised in that case, [section 25] is really concerned with enforcing the attendance of persons before the court. That is what Dillon LJ was referring to when he said he did not think the intention was to empower to the court to "haul before it" persons who could not be served with a summons within the jurisdiction". Mr Johnson agreed with and adopted HHJ Hodge's analysis in *Omni*. The power to require the production of documents in section 25 was not a standalone power, but was inextricably linked to the power to summon persons before the court under section 25(1). In contrast, the power under section 236(3) was a standalone power, divorced from the power to summons parties in section 236(2): "the power to require the production of documents and information under section 236(3) may be exercised even if no summons is issued under section 236(2)".

38. Mr Johnson said that the power to require the production of documents and information was different from the power to require attendance: "[i]t is less invasive, and does not involve the exercise of anything akin to the court's subpoena power. In the modern world of cross-border business practices, it is natural to construe that power as extending to any of the categories of person identified, whether within or outside the jurisdiction". The relevant safeguards, by analogy with *Paramount* and *Bilta* were "for the court to ask itself whether, in respect of the relief sought against him, the respondent is sufficiently connected with the jurisdiction for it to be just and proper to make an order despite the foreign element". In practice, such considerations were adequately addressed by the application of Lord Slynn's discretionary test in *Re British and Commonwealth Holdings plc (Nos 1 and 2)* [1993] AC 426 ("*B&C*").

39. At [55], Mr Johnson was satisfied that the order was justified in *Wallace*. The universality of a winding up order had particular relevance in a case falling within the 2000 Regulation. Consistent with *Willmont*, the provisions of the 2000 Regulation expressly recognised the English liquidator's legitimate interest in taking actions abroad, within other member states, in the exercise of his statutory function. The overall result was consistent with *Mid-East*, *Omni*, and *Willmont*, and "with the overall logic and approach of Hoffmann J in *Mackinnon [1986] Ch 482*, of the Court of Appeal in [*Paramount*], and of the Supreme Court in [*Bilta*]".

Other relevant cases on jurisdiction

40. Many of the other relevant cases have been touched upon already in summarising the decisions in the trilogy of cases.

41. Four recent cases seem to me to be of particular significance. In *Masri*, Lord Mance (with whom the other members of the House of Lords' committee agreed) reviewed the law on public and private examinations as has already been mentioned. He was dealing with the question of whether there was power under CPR Part 71.2 to examine officers of an extra-territorial judgment debtor, who were themselves resident overseas. It is worth citing at a little length from Lord Mance's speech at [19]-[25] as follows:

> "19. I accept that the existence of a close connection between a subject matter over which this country and its courts have jurisdiction and another person or subject over which it is suggested that they have taken jurisdiction will be relevant in determining whether the further jurisdiction has been taken. It

> will be a factor in construing, or ascertaining the grasp and intendment of, the relevant legislation or rule. Mr Layton submits that in the present case the connection between the judgment obtained in the proceedings against CCIC and Mr Khoury is weak: no or little stronger than that which exists between the court in ongoing proceedings and a witness who could give important evidence that would assist the court to resolve issues of liability or quantum. He cites [*Tucker*]".

42. Lord Mance then dealt at some length with the reasoning under section 25 in *Tucker*, before explaining how it was distinguished in *Seagull*, and commenting that "[i]mpracticality of enforcement is in my opinion a factor of greater relevance than Peter Gibson J's words [in *Seagull* at page 355] suggest. It is in particular a relevant factor when considering whether CPR Pt 71 covers officers abroad". He continued as follows:

> "23. The present case stands between [*Tucker*] and [*Seagull*]. The category of persons embraced by CPR Pt 71 is confined to "an officer" of the company or other corporation—on the face of it probably only a current officer at the time of the application or order, whereas section 133 extended (unsurprisingly since it deals with a company being wound up) to past officers and some other closely connected persons. There is in the context of CPR Pt 71 no equivalent of the provision in section 25(6) which was for Dillon LJ "conclusive" in [*Tucker*]. On the other hand, CPR Pt 71 is concerned with obtaining information in aid of the enforcement of a private judgment. The public interest that "those responsible for the company's state of affairs should be liable to be subjected to a process of investigation and that investigation should be in public" [*Seagull* at page 354] is absent. The universality of a winding up order, in the sense that it relates at least in theory to all assets wherever situate, is also absent. Private civil litigation is different. A fair and efficient legal system is of course a cornerstone of the rule of law, and it can also be said that there is a public interest in a court getting to the bottom of litigation and ensuring that parties have the means of obtaining full information to enable it to do so. Yet the parties have no right to ask the court to summon witnesses from abroad for that purpose. …"
>
> 24. In my view Dillon LJ's observation in [*Tucker* at page 157] that "eyebrows might be raised" at the notion that Parliament had in 1914 or 1883 given jurisdiction to any bankruptcy court to summon anyone in the world before it to be examined and produce documents has weight also in the context of CPR Pt 71. The historical origin of CPR Pt 71 consists in an amendment of the Rules in 1883 made in the light of the decision in Dickson v Neath and Brecon Railway Co LR 4 Ex 87 in 1869. The Court of Exchequer there held that the pre-

existing power to order oral examination of a judgment debtor did not enable examination of the company's three directors, about whose presence within the jurisdiction there was clearly no doubt. The Rule Committee in 1883 is likely to have been focusing on domestic judgments and domestically based officers. If it thought at all about foreign judgments, which might be enforced in England, it is unlikely to have contemplated that a judgment creditor, having come here for that purpose, would then need assistance abroad to make the enforcement effective. The extreme informality of the process by which the rules enable an order for examination to be obtained continues to point towards a purely domestic focus. An application for an order may under CPR Pt 71 be made without notice, may be dealt with ministerially by a court officer and will lead to the automatic issue of an order (albeit with the general safeguard of the right to apply to set aside which exists under CPR r 23.10 in the case of any order made without service of the relevant application notice). These considerations all tend to point against the application of CPR Pt 71 to company officers outside the jurisdiction.

25. Sir Anthony Clarke MR [said at [16]] that it would "defeat its object" if CPR r 71.2 were restricted to persons within the jurisdiction. That is, I think, to put matters substantially too high. Small though the world may have become, relatively few officers of companies are likely to contemplate, let alone be able to undertake, emigration or flight to a different country in order to avoid giving information about their company's affairs. For the same reason, the deployment in [*Seagull*] of the possibility of "deliberate evasion" by an officer removing himself from the jurisdiction seems to me a factor of greater forensic than real weight, although such weight as it may have may be greater after the calamity of compulsory winding up (when something has evidently gone wrong and may require embarrassing or even potentially incriminating investigation) than in the context of an unpaid judgment debt.

26. In my view CPR Pt 71 was not conceived with officers abroad in mind, and, although it contains no express exclusion in respect of them, there are lacking critical considerations which enabled the Court of Appeal in [*Seagull*] to hold that the presumption of territoriality was displaced and that the relevant statutory provision there, on its true construction and having regard to the legislative grasp or intendment, embraced a foreign officer. Although CPR Pt 71 is limited to officers of the judgment debtor company, I regard the position of such officers as closer to that of ordinary witnesses than to that of officers of a company being compulsorily wound up by the court. I conclude that CPR Pt 71 does not contemplate an application and order in relation to an officer outside the jurisdiction".

43. In *Bilta*, Lord Sumption considered the extraterritoriality of insolvency proceedings at [107]-[110] as follows:

> "The appellants' case is that the provision [in section 213 of the IA 1986 on fraudulent trading] has no extraterritorial effect and therefore no application to Jetivia which is domiciled in Switzerland or Mr Brunschweiler, who is domiciled in France. In effect the submission is that in subsection (2) "any persons" means only persons in the United Kingdom. In my opinion this argument is misconceived.
>
> 108. Most codes of insolvency law contain provisions empowering the court to make orders setting aside certain classes of transactions which preceded the commencement of the liquidation and may have contributed to the company's insolvency or depleted the insolvent estate. They will usually be accompanied by powers to require those responsible to make good the loss to the estate for the benefit of creditors. Such powers have been part of the corporate insolvency law of the United Kingdom for many years. In the case of a company trading internationally, it is difficult to see how such provisions can achieve their object if their effect is confined to the United Kingdom.
>
> 109. The English court, when winding up an English company, claims worldwide jurisdiction over its assets and their proper distribution. That jurisdiction is not universally recognised, but it is recognised within the European Union by articles 3 and 16 of [the 2000 Regulation]. In *Schmid v Hertel (Case C-328/12) [2014] 1 WLR 633* ["*Schmid*"] the Court of Justice of the European Union considered these articles in the context of the jurisdiction of the German courts to make orders setting aside transactions with a bankrupt. It held not only that articles 3 and 16 applied to such orders, but that member states must be treated as having power to make them notwithstanding any limitations under its domestic law on the territorial application of its courts' orders.
>
> 110. Section 213 is one of a number of discretionary powers conferred by statute on the English court to require persons to contribute to the deficiency who have dealt with a company now in liquidation in a manner which has depleted its assets. None of them have any express limits on their territorial application. Another such provision, section 238 , which deals in similar terms with preferences and transactions at an undervalue, was held by the Court of Appeal to apply without territorial limitations in [*Paramount*]. Delivering the leading judgment in that case, Sir Donald Nicholls V-C observed (i) that current patterns of cross-border business weaken the presumption against extraterritorial effect as applied to the exercise of the courts' powers in conducting the liquidation of a

> United Kingdom company; (ii) that the absence in the statute of any test for what would constitute presence in the United Kingdom makes it unlikely that presence there was intended to be a condition of the exercise of the power; and (iii) that the absence of a connection with the United Kingdom would be a factor in the exercise of the discretion to permit service out of the proceedings as well in the discretion whether to grant the relief, which was enough to prevent injustice. These considerations appear to me, as they did to the Chancellor and the Court of Appeal, to be unanswerable and equally applicable to section 213".

44. Lord Sumption referred at [109] above in *Bilta* to the CJEU's decision in *Schmid*, where it said the following at [30]:

> "Article 3(1) of the [2000] Regulation itself states unequivocally that "The courts of the member state within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings". Any other element is irrelevant to the determination of the competent court. Thus, the location of the debtor's assets is irrelevant, except in so far as it may be a factor to be taken into account in determining where the centre of the debtor's main interests is and/or whether secondary proceedings need to be opened under article 3(2). The place of residence of any potential defendant to an action which may (if necessary) subsequently be brought within those proceedings by the liquidator to set a transaction aside and recover additional assets for the benefit of the creditors is likewise irrelevant to the question of which is the competent court to open proceedings. Such an action comes within the jurisdiction of the court that has (already) opened such proceedings because it is an action that derives directly from such proceedings and is closely connected to them: see *Seagon v Deko Marty Belgium NV (Case C-339/07) [2009] 1 WLR 2168; [2009] ECR I-767* ["*Seagon*"], paras 21 and 28, and also recital (6) in the Preamble to the [2000] Regulation".

45. The CJEU in *Schmid* referred specifically to its previous decision in *Seagon*, where it had said at [21] that "article 3(1) [of the 2000 Regulation] must be interpreted as meaning that it also confers international jurisdiction on the member state within the territory of which insolvency proceedings were opened in order to hear and determine actions which derive directly from those proceedings and which are closely connected to them". The CJEU said that this improved the effectiveness and efficiency of insolvency proceedings having cross-border effects, and avoided forum shopping (see [22]-[23] in *Seagon*).

Discussion

46. With that necessarily lengthy introduction, I shall address the jurisdiction question in the following stages: (i) whether *Tucker* is binding authority on this court for the

proposition that section 236(3) does not have extraterritorial effect, (ii) which of *MF Global* on the one hand, or *Omni* and *Wallace* on the other hand, is to be preferred, and (iii) whether the 2000 Regulation gives section 236(3) extra-territorial effect?

47. In relation to the first stage, namely the precedential effect of *Tucker*, I have formed the clear view that it is, and was, not open to this court to decline to follow *Tucker*. I have formed this view irrespective of my views as to whether it was correctly decided. There are 5 main reasons.

48. First, Dillon LJ in *Tucker* construed section 25(6), which is in materially the same terms at section 237(3), as meaning that: "if the person is not in England he is not liable to be brought before the English court under [section 25]". Section 25, like section 236, provided powers (a) to summon to appear before it certain specified persons including those whom the court thinks capable of giving information concerning the insolvent person's dealings or property, and (b) to require any such person to produce documents relating thereto. Accordingly, the Court of Appeal's construction of section 25 is, as David Richards J held in *MF Global*, a "binding interpretation of section 25 which will apply equally to the successor sections in the [IA 1986], unless the context of the new legislation shows that the meaning must be taken to have changed". The fact that *Tucker* was decided after the IA 1986 had been enacted, does not mean that the decision is not an authoritative interpretation of the words used in substantially the same terms in both statutes. It would, in the absence of compellingly different context, be surprising if almost the same wordings were to be construed as having different meanings in different statutes covering the same subject matter, namely private insolvency examinations.[5]

49. Secondly, I respectfully disagree with the judges in *Omni* and W*allace* who suggested that the different statutory structure of section 236, as compared to section 25, can make all the difference. I was referred to *Joddrell v. Peakstone Ltd* [2012] EWCA Civ 1035 at [41], where Munby LJ had held in relation to a different part of the Companies legislation that "the fact that what in section 653 of the 1985 Act appeared as two parts of a single sentence divided by a semicolon now appears in two separate sentences (indeed in two separate subsections) divided by a full stop cannot possibly … make the slightest difference". The same, in my judgment applies here. The fact is that both legislative provisions allow the court to summon specified persons and to require those persons to produce documents. The modernisation of the language and the division between sub-sections cannot be seen as a substantive change.

50. Thirdly, *Mid-East* does not, in my judgment provide any firm foundation for a departure from *Tucker* by a court of first instance. The *ratio* of that case did not concern the making of an order under section 236 against a person outside the jurisdiction.

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5 Bennion on Statutory Interpretation, 7th edition, at paragraph 24.6 refers to the principle (or presumption of varying strength) arising from *Barras v. Aberdeen Steam Trawling and Fishing Co Ltd* to the effect that "... where a word of doubtful meaning has received a clear judicial interpretation, the subsequent statute which incorporates the same word or the same phrase in a similar context, must be construed so that the word or phrase is interpreted according to the meaning that has previously been assigned to it". The principle is not directly applicable here because the judicial interpretation succeeded the second statute.

51. Fourthly, *Tucker* has been considered in both the Court of Appeal and the House of Lords without disapproval. This is, in my judgment, crucial. It is the reason why I cited at length above from Lord Mance's speech in *Masri*. I have been unable to find anything in these passages to suggest that he thought *Tucker* was wrong. Indeed, he specifically said that the case he was deciding stood between *Tucker* (concerning private examinations) and *Seagull* (concerning public examination). He explained Dillon LJ's judgment without any suggestion that it was mistaken. The same can also be said of *Seagull* itself as David Richards J pointed out in *MF Global* at [27].

52. Fifthly, the compelling reasons for thinking that section 236 ought, in the contemporary commercial environment, to have extra-territorial effect, does not affect the reasoning in *Tucker*. Dillon LJ was considering whether wording originating in a much earlier era was intended to have such effect. If the legislature had not employed similar wording in the IA 1986, the argument for extra-territorial effect would have been far stronger. It would still be open to the Supreme Court to over-rule *Tucker* or to say that it was not applicable to the construction of section 236 and 237(3), but until it does so, it seems to me that courts of first instance (and indeed the Court of Appeal itself) should follow it.

53. It is probably not helpful for me to go further than I have in saying what I think about the correctness of *Tucker*. Suffice it say that I agree with David Richards J, when he said in *MF Global* at [32] that: "[i]n the absence of authority and in the absence of what is now section 237(3), there would in my view be a good deal to be said for concluding that section 236 was intended to have extraterritorial effect, leaving it to the discretion of the court to keep its use within reasonable bounds".

54. I conclude, therefore, at the first stage of the argument, that *Tucker* is binding authority on this court for the proposition that section 236(3) does not have extraterritorial effect. I decline to follow *Omni* on the grounds that I think it was clearly wrongly decided. I disagree with the reasoning on this point in *Wallace*.

55. This gives a sufficient answer to the question I posed as the second stage of the argument. In my judgment, on the state of the current law, and applying the doctrine of precedent, *MF Global* is to be preferred to *Omni* and *Wallace*.

56. That brings me to the third stage of the argument, namely whether the 2000 Regulation gives section 236(3) extra-territorial effect. This aspect of the matter was, I think, not given adequate attention by either party in argument. It was suggested by the liquidators in their skeleton argument that the 2000 Regulation automatically conferred "the jurisdiction of the opening state in relation to insolvency matters on other member states", placing reliance on the decision of Mr Freedman in *Willmont*. In that uncontested case, Mr Freedman said at [17] that the net effect of [articles 3, 4(2), 16, 18, 25 and 26 of the 2000 Regulation] was that it conferred "international jurisdiction on a member state where main insolvency proceedings have been opened in relation to other proceedings falling within the scope of the [2000 Regulation], those which are closely connected with the insolvency proceedings. An order under [section 366 of the IA 1986 – the equivalent of section 236 for bankruptcy] is specific to insolvency proceedings and thus falls within the scope of the [2000 Regulation]."

57. None of the articles that I have mentioned, beyond article 3(1), expressly provide that they give extra-territorial effect to a purely domestic insolvency provision. Article

3(1) itself gives the courts of the member state within which the company's COMI is situated jurisdiction to open insolvency proceedings. Article 4 applies the law of that member state to the insolvency. Article 16 provides that a judgment of the courts of that member state shall be recognised in other member states. Article 18 provides that a liquidator appointed in that member state shall be able to exercise his powers, not including coercive measures,[6] in another member state. Article 25 makes judgments of the courts of that member state concerning the course of those insolvency proceedings to be recognised and enforced in other members states without further formalities.

58. In my judgment, however, the respondents' submission that the 2000 Regulation makes no difference in this case, is wrong for one simple reason. The jurisprudence of the CJEU has made clear, as I have said, that the 2000 Regulation can and does extend the territoriality of purely domestic insolvency provisions. This is clear from:

    i) Lord Sumption's judgment in *Bilta*, where he said at [109] that "[t]he English court, when winding up an English company, claims worldwide jurisdiction over its assets and their proper distribution", and that jurisdiction is recognised within the European Union by articles 3 and 16 of the 2000 Regulation. The CJEU had held in *Schmid* that "member states must be treated as having power to make [orders setting aside transactions] notwithstanding any limitations under its domestic law on the territorial application of its courts' orders".

    ii) The CJEU in *Seagon* held at [21] that article 3(1) of the 2000 Regulation conferred "international jurisdiction on the member state within the territory of which insolvency proceedings were opened in order to hear and determine actions which derive directly from those proceedings and which are closely connected to them" (see also *Schmid* at [30]).

59. Proceedings under section 236(3) are proceedings which "derive directly from [the insolvency proceedings] and which are closely connected to them". This conclusion seems to me to be the inevitable consequence of these cases. The objective of the 2000 Regulation was to give the courts of the member state of the COMI of the insolvent entity jurisdiction over the insolvency, and to apply its domestic law to that insolvency. There is no meaningful distinction in this context, it seems to me, between an application to set aside a transaction entered into by a debtor, and an application for the production of documents. They are both inherent parts of the insolvency process that derive from the opening of the insolvency proceedings themselves.

60. I, therefore, hold, in agreement with Mr Freedman in *Willmont* and Mr Johnson in *Wallace*, that the 2000 Regulation confers extra-territorial jurisdiction on the English court to make orders against EU resident parties under section 236. I reach this conclusion, notwithstanding that I have held that I should follow *Tucker* and *MF Global*. In *MF Global*, of course, as I have said, the 2000 Regulation was inapplicable.

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[6] The Supreme Court of the Netherlands decided in Handelsveem BV v. Hill [2011] BPIR 1024 that an order under section 366 of the IA 1986 (the equivalent of section 236) was not be regarded as a coercive measure for the purposes of article 18(3) of the 2000 Regulation.

Issue 2: How should the court exercise its discretion under section 236?

61. In *B&C*, the House of Lords upheld the grant of an order under section 236(3). Lord Slynn explained the appropriate approach as follows at pages 239-240:

> "I am therefore of the opinion that the power of the court to make an order under section 236 is not limited to documents which can be said to be needed 'to reconstitute the state of the company's knowledge' even if that may be one of the purposes most clearly justifying the making of an order.
>
> At the same time it is plain that this is an extraordinary power and that the discretion must be exercised after a careful balancing of the factors involved - on the one hand the reasonable requirements of the administrator to carry out his task, on the other the need to avoid making an order which is wholly unreasonable, unnecessary or 'oppressive' to the person concerned. The latter was stressed by Bowen L.J. in *In re North Australia Territory Co., 45 Ch.D. 87*, 93: …
>
> Such an approach was stressed more recently by Brightman J. in respect of oral examination in In re Bletchley Boat Co. Ltd. [1974] 1 W.L.R. 630 .
>
> The protection for the person called upon to produce documents lies, thus, not in a limitation by category of documents ('reconstituting the company's state of knowledge') but in the fact that the applicant must satisfy the court that, after balancing all the relevant factors, there is a proper case for such an order to be made. The proper case is one where the administrator reasonably requires to see the documents to carry out his functions and the production does not impose an unnecessary and unreasonable burden on the person required to produce them in the light of the administrator's requirements. An application is not necessarily unreasonable because it is inconvenient for the addressee of the application or causes him a lot of work or may make him vulnerable to future claims, or is addressed to a person who is not an officer or employee of or a contractor with the company in administration, but all these will be relevant factors, together no doubt with many others".

62. I have to apply this approach to the request for documents in this case.

63. It is submitted that, even if I were to decide the jurisdictional question as I have, the extra-territorial nature of the order sought is a factor that should weigh heavily against the making of an order. Moreover, it is said that the dispute between the liquidators and the respondents is firmly connected to Italy rather than to England. Whilst it is true that the dispute has its centre of gravity in Italy, the Company's COMI is in England and the liquidators' and the court's powers have to be exercised under English law.

64. The respondents also submit that the order sought is broadly drawn and would require much work in gathering documents and explanations over a long period of time some years ago.

65. I have balanced these factors and considered particularly the breadth of the order sought. As it seems to me, some order is justified, bearing in mind the liquidators' contention that they do not expect to be able to obtain the information they need from Mr Richmond. They say that the proceedings they brought against him related only to what happened up to the point of the winding up and not to the issues that arose within it. Generally, I accept that, although it is unusual to seek documents and accounts of dealings in relation to matters that occurred after the winding up, it is within the scope of section 236 insofar as the requests concern the business dealings affairs or property of the Company.

66. I bear in mind also that the respondents have already provided some information to the liquidators as summarised in **appendix 1**. The liquidators contend that the respondents have been obstructive in their conduct of the winding up, by, for example, bringing proceedings in Italy, and refusing to accept service of the proceedings on Luxury. I am not sure that these contentions have much effect on the appropriateness of an order under section 236.

67. I have looked carefully at the dates in the order sought to ensure that the liquidators are not seeking information that goes beyond what they might reasonably need before reaching a decision on whether to instigate litigation against either the directors of the Company or the respondents themselves. Generally, it seems to me that the liquidators may be unable, without the order sought, to ascertain whether Zengarini was dealing with Mr Richmond and Mr Moschillo and their other companies in respect of the Company's trademarks or other assets after the winding up. The liquidators are entitled to documents that might indicate how the seamless transition occurred by which Zengarini continued to use the Company's trademarks through all the fashion seasons after the winding up without paying the Company anything for that privilege after April 2015.

68. In the light of the need to avoid oppression to the respondents and the other factors I have mentioned, I have redrafted the order that I am prepared to make by narrowing the categories requested. I have taken specifically into account that the respondents are overseas in Italy and that they are not company insiders. I will make the following order for production under section 236(3):

> 1. <u>In relation to [Mr Richmond]</u>
>
> (a) An account of each of the respondents' dealings with Mr Richmond in relation to the Company's trademarks and/or other Company business from 1 April 2015 to 31 December 2016; and
>
> (b) Copies of all correspondence with Mr Richmond from 1 April 2015 to 31 December 2016, including all letters, emails and attachments in relation to the Company's trademarks and/or other Company business.
>
> 2. <u>In relation to the New Trademark Owners</u>

a) details of any payments made, or credits given, to any of the New Trademark Owners on account of each of the respondents' use of the Trademarks for Spring/Summer 2015, Fall/Winter 2015/16 and Spring/Summer 2016 (the "Seasons"), including how much was paid, when and to whom;

b) copies of all licence or design agreements that each of the respondents entered into with any of the New Trademark Owners, or any other party as licensor of the Trademarks in respect of the Seasons; and

c) in relation to the above agreements, the total licence or design fees paid pursuant to such agreements in respect of the Seasons.

3. In relation to payments to the Company under Article 2.4 of the 2014 Agreements

a) an account of the basis on which these payments were agreed between the parties, with supporting evidence;

b) an account of all communications with Mr Richmond or the New Trademark Owners concerning these payments; and

c) confirmation as to whether each of the respondents have made any payments (or given other forms of credit) to Mr Richmond or the New Trademark Owners that was the same or similar in nature and purpose to these payments, with details of any such payments made.

4. In relation to marketing activities in 2015 relating to the Company's trademarks:

a) an explanation as to why each of the respondents continued to make payments to Moschillo srl from April 2015 to July 2016 whilst no payments were being made to the Company; and

b) details of the products purportedly sold to the Company after the Company had been wound up, including in June, September and November 2015 under invoices 1565, 2363 and 2767, with documents evidencing who ordered the products, when and for what purpose.

5. In relation to alleged breaches of the 2014 Agreements:

a) an explanation as to why each of the respondents stopped payment of licence fees to the Company in April 2015, before the Company's winding up and before the Company is alleged to have committed any breach of the 2014 Licence Agreements; and

b) an account of the breaches the Company is alleged to have committed in 2015, on which each of the respondents relied in purporting to terminate the 2014 Agreements, stating when the breaches are alleged to have taken place.

6. In relation to samples and unsold stock:

a) an account of what happened to all samples and unsold stock in the possession of each of the respondents after the (purported) termination of the 2014 Licence Agreements, providing copies of all relevant documents.

69. In the light of the correspondence between the parties and their lawyers, I regard the draft order above as proportionate and reasonable in the light of all the factors I have mentioned.

Conclusions

70. For the reasons I have sought to give as briefly as possible, I have concluded that:

i) *Tucker* is binding authority on this court for the proposition that section 236(3) does not have extraterritorial effect.

ii) On the current law, the decision in *MF Global* is, in my judgment, to be preferred to the decisions as to the extra-territorial effect of section 236 in *Omni* and *Wallace* (leaving issues arising from the 2000 Regulation on one side).

iii) The jurisprudence of the CJEU has made clear that the 2000 Regulation, where it applies, can and does extend the territoriality of purely domestic insolvency provisions (see *Bilta* at [109], *Seagon* at [21], and *Schmid* at [30]). I agree with the parts of the decisions in *Willmont* and *Wallace*, which held that the 2000 Regulation confers extra-territorial jurisdiction on the English court to make orders against EU resident parties under section 236.

iv) As a matter of discretion, I should make an order against each of the respondents for an account of their dealings and the documents listed in the draft order at [68] above.

Appendix 1

71. The liquidators' first request was made to Zengarini on 17 May 2018 asking for an explanation of: (i) a €70,000 payment due to Akkurate from Zengarini which was suspended, (ii) why only half of an April 2015 invoice was paid, (iii) why Zengarini continued to make payments to Moschillo Ltd, a company responsible for marketing under the 2014 agreements, until Spring/Summer 2016 but failed to make any payments to Akkurate from April 2015, (iv) why Zengarini did not comply with the termination provisions in the 2014 agreements, (v) what happened to samples and unsold stock, and (vi) why 15.5% was used as the figure for calculating lost profits in relation to Zengarini's claim against the company. The liquidators also asked for specific information: (vii) the actual turnover for the Spring/Summer 2016 season, (viii) a copy of licence or design agreements which related to the John Richmond brand that Zengarini entered into with anyone after November 2015, and (ix) details of fees paid, sales figures and profits under any such agreements.

72. Zengarini responded on 16 July 2018. It noted that it had already provided information about payments made to Akkurate. It attached a schedule covering its updated turnovers, royalties accrued and payments made to Akkurate under the 2014

agreements. It explained that the €70,000 suspended payment was offset against a credit owed to Zengarini by a subsidiary of Akkurate, at Akkurate's request. It explained that it suspended any payments to Akkurate on a precautionary basis when Akkurate's business activities were interrupted, as it was entitled to do under Italian law. It also explained that the 15.5% rate of profits was Zengarini's historical average margin of profits on all similar licence agreements. This was therefore a response to (i), (ii), (vi) and (vii) of the liquidators' requests.

73. The Second Request: on 23 August 2018 the liquidators replied stating that they did not find Akkurate's response satisfactory. They requested: (i) reports covering the net turnover figures and fee calculations under the 2008 and 2014 agreements, (ii) the net turnover figures in relation to samples and stock sold after termination of the 2014 agreements, (iii) a schedule of all payments made by Zengarini to any party in connection with the 2008 and 2014 agreements up to and including Spring/Summer 2016, and (iv) a copy of licence or design agreements related to the trademarks concluded after November 2015, including details of all related net turnovers and fees paid.

74. On 28 September 2018 Zengarini replied and stated that it had already provided the liquidators with the information requested. Zengarini denied that it owed the sums claimed. It stated that Akkurate owed it €1,666,660 on the basis that Zengarini had paid €2 million for a licence and Akkurate only performed the contract for two fashion seasons.

75. The Third Request: on 6 October 2018 the liquidators sent a further request. They said that they had mounting evidence that Akkurate's directors had conspired with others to ensure that they retained the value of the trademarks after the company went into liquidation, to the detriment of Akkurate's creditors. They said that the extent of Zengarini's involvement was "not yet clear" but noted that there was evidence suggesting its complicity and that Zengarini had benefitted financially from the series of events that took place post-liquidation. For example, it did not have to pay for the licences from April 2015, although it continued to use the trademarks.

76. The liquidators requested: (i) a record of sales carried out in each quarter from 1 January 2011 until June 2016, including all stores and showrooms to whom Zengarini supplied products, (ii) a copy of communications between Zengarini and Mr Richmond between 1 March 2015 and 31 July 2016, (iii) details of the products supplied by Zengarini to Akkurate in June, September and November 2015 and an explanation of why the joint liquidators were not informed, (iv) an explanation of the legal basis on which Zengarini continued to make payments to Moschillo Ltd, (v) an explanation of what happened to the samples and unsold stock, and an account for the 5% of net turnover generated from subsequent sales of that stock, (vi) details of payments made by Zengarini to Fashioneast for the Spring/Summer 2015, Fall/Winter 2015 and Spring/Summer 2016 fashion seasons, (vii) confirmation of whether Zengarini made any payments to Fashioneast which were similar to those due to Akkurate, (viii) confirmation that Zengarini did not carry out design work, manufacturing and sales or other activities for the fashion season Fall/Winter 2016/2017 and that this is the only season it missed, and (ix) a copy of all licence and design agreements concluded between Zengarini and Fashioneast after November 2015 as well as details of the net turnover generated.

77. On 1 November 2018 Zengarini replied. It objected to the liquidators' "vague and unsubstantiated allegations that our client may have been involved in conduct detrimental to the Company or its creditors" and said that its conduct was equally consistent with its own case.

78. Zengarini responded specifically to each of the liquidators' requests: (i) it was disproportionate to require Zengarini to go through all their sales; it had already provided the documents requested on 28 September 2018, (ii) it was excessive and oppressive to request all communications with Mr Richmond, (iii) the products supplied were shoes for fashion shows, (iv) the liquidators were not entitled to an answer, (v) this was an issue to be determined by Italian law, (vi) the liquidators were not entitled to an answer, (vii) the liquidators were not entitled to an answer, (viii) the last season under the contract was Spring/Summer 2016, but Zengarini missed the following 9 seasons as a result of Akkurate's liquidation, and (ix) the liquidators were not entitled to an answer. Zengarini described the liquidators' requests as a "blatant fishing expedition".

79. There was further correspondence between both parties' Italian lawyers, but those letters did not contain further requests for information. The correspondence focussed on each side's differing interpretations of Italian law.