FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 59
P447/22

Lord President
Lord Woolman
Lord Pentland

OPINION OF THE COURT

delivered by LORD PENTLAND

in the Reclaiming Motion

by

KINGSTON PARK HOUSE LIMITED

Petitioners and Respondents

against

GRANTON COMMERCIAL INDUSTRIAL PROPERTIES LIMITED

Respondents and Reclaimers

Petitioners and Respondents: McBrearty KC, Roxburgh; MacRoberts LLP
Respondents and Reclaimers: McIlvride KC; Turcan Connell

16 December 2022

Introduction

[1] When should a Scottish court order the winding-up of an overseas company? The issue arose sharply in this reclaiming motion (appeal), which came before the court for urgent disposal. It is not a question that has often arisen. The Lord Ordinary made a winding-up order on 3 November 2022. In terms of his interlocutor of 3 November he

appointed two insolvency practitioners carrying on business in Edinburgh to be joint *interim* liquidators of the reclaimers. The reclaimers argued that he had no jurisdiction to do so.

[2] Having heard oral submissions on behalf of the reclaimers on 16 December, we refused the reclaiming motion and found the respondents entitled to the expenses of the reclaiming motion. We now give our reasons.

[3] The background can be briefly stated. The reclaimers are a private limited company, incorporated and registered in Jersey. They owe the respondents, a private limited company incorporated and registered in England and Wales, a substantial sum, in excess of £7 million, advanced to them under a series of loan agreements. The details of the contractual arrangements do not matter for present purposes. The loans were to allow the reclaimers to purchase a number of plots of land at Granton Harbour Estate in Edinburgh with a view to developing them for housing. The project foundered and the reclaimers defaulted on the loans. The plots are their only significant asset anywhere.

[4] The respondents do not have a place of business in Scotland. They sought an order for winding-up on the ground that the reclaimers were unable to pay their debts. We were told that the management and control of the reclaimers is exercised from Jersey. They have an agent based in an office in Edinburgh, who carries out the reclaimers' instructions in regard to the plots.

The statutory scheme

[5] The Insolvency Act 1986 regulates matters. There is no dispute that the reclaimers are an unregistered company for the purposes of section 220.

[6] Section 221 confers on the court a discretionary power to order the winding-up of such a company. It provides:

"(1) Subject to the provisions of this Part, any unregistered company may be wound up under this Act; and all the provisions … about winding-up apply to an unregistered company with the exceptions and additions mentioned in the following subsections.

…

(3) For the purpose of determining a court's winding-up jurisdiction, an unregistered company is deemed—

(a) to be registered in England and Wales or Scotland, according as its principal place of business is situated in England and Wales or Scotland, or

(b) if it has a principal place of business situated in both countries, to be registered in both countries;

and the principal place of business situated in that part of Great Britain in which proceedings are being instituted is, for all purposes of the winding-up, deemed to be the registered office of the company.

…

(5) The circumstances in which an unregistered company may be wound up are as follows—

(a) if the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs;

(b) if the company is unable to pay its debts;

(c) if the court is of opinion that it is just and equitable that the company should be wound up."

[7] Section 426 provides:

"(1) An order made by a court in any part of the United Kingdom in the exercise of jurisdiction in relation to insolvency law shall be enforced in any other part of the United Kingdom as if it were made by a court exercising the corresponding jurisdiction in that other part."

The "constraints" on the discretionary power

[8] Although the discretion conferred by section 221 is expressed in entirely general terms, over the years the courts in England and Wales have developed a number of

principles to guide them in exercising the discretion; these have come to be referred to as the "three core requirements". At one time the overarching requirement that there should be a sufficient connection with England and Wales was strictly applied, so that it had to be shown that the insolvent company had or had previously had a place of business in England and Wales (*Goode on Principles of Corporate Insolvency* Law, 5th ed. 2018, para 16-49). Over time this was relaxed.

[9] The starting point of the modern approach taken in England and Wales may be found in the judgment of Sir Raymond Evershed MR in *Banque des Marchands de Moscou (Koupetschesky)* v *Kindersley* [1951] Ch 112, at 125-126, where his Lordship considered a similar provision contained in section 338 of the Companies Act 1929:

> "As a matter of general principle, our courts would not assume, and Parliament should not be taken to have intended to confer, jurisdiction over matters which naturally and properly lie within the competence of the courts of other countries. There must be assets here to administer and persons subject, or at least submitting, to the jurisdiction who are concerned or interested in the proper distribution of the assets. And when these conditions are present, the exercise of the jurisdiction remains discretionary."

[10] In *Banco Nacional de Cuba* v *Cosmos Trading Corp* [2000] 1 BCLC 813, at 819G-H Sir Richard Scott V-C reiterated that the principle of international comity was of fundamental importance in this context:

> ''In my opinion, the courts of this country should hesitate very long before subjecting foreign companies with no assets here to the winding-up procedures of this country. Of course, if a foreign company does have assets in this country, the assets may need to be distributed among creditors, and a winding-up order here, sometimes ancillary to a principal winding-up order in the place of incorporation of the foreign company, may be necessary. But a winding-up order here, while the foreign company continues to trade in its country of incorporation and elsewhere in the world, is in my view thoroughly undesirable. I would not say a winding-up order in those circumstances could never be right, but I do say that exceptional circumstances and exceptional justification would be necessary.''

[11] In *Stocznia Gdanska SA* v *Latreefers Inc. (sub nom Re Latreefers Inc)* [2001] BCC 174, at 179B-D Lloyd J explained that the constraints which the courts had laid down as regards the circumstances in which the discretionary jurisdiction would be exercised had changed over time; in particular, the presence of assets in the jurisdiction was no longer regarded as essential. His Lordship said this at 179E-F:

> "As a result of the decisions of Megarry J in *Re Compania Merabello San Nicholas SA* [1973] Ch 75, Nourse J in *Re Eloc Electro-Optiek and Communicatie BV* [1982] Ch 43 and Peter Gibson J in *Re a Company No. 00359 of 1987* … [1988] Ch 210 … the statement of the relevant principles has evolved to the point at which they were summarised, most recently, by Knox J in *Re Real Estate Development Co* [1991] BCLC 210 at p. 217, as consisting of three core requirements, as follows:
>
> (1) There must be a sufficient connection with England and Wales which may, but does not necessarily have to, consist of assets within the jurisdiction.
>
> (2) There must be a reasonable possibility, if a winding-up order is made, of benefit to those applying for the winding-up order.
>
> (3) One or more persons interested in the distribution of assets of the company must be persons over whom the court can exercise a jurisdiction."

In an appeal against Lloyd J's decision, which was refused, the Court of Appeal (at 194A-C) followed that approach.

[12] In *HSBC, Petitioner* 2010 SLT 281 Lord Hodge sitting in the Outer House expressed the view (at para [12]) that the Scottish courts should adopt the same approach in such circumstances. At para [13] his Lordship referred with approval to the three core requirements. At para [14] he held that they were satisfied in the circumstances of the case.

[13] In their written submissions, parties agreed that the three core requirements should be applied. We acknowledge that it is obviously desirable that in applying the provisions of the 1986 Act the courts throughout Great Britain should follow the same approach. Counsel for the reclaimers initially said in his oral submissions that the requirements informed the

exercise of the court's discretion. Later he suggested that they were minimum requirements, each one of which had to be satisfied before the power given could be exercised. We will return to the question of whether the requirements are matters that may feature in the exercise of the court's discretion, or if they are in the nature of pre-conditions for establishing jurisdiction.

First instance

[14] The Lord Ordinary considered each core requirement in turn. The first was undoubtedly satisfied, as the reclaimers' only substantial assets were in Scotland. Their agents had an office at Granton from where asset management services and supervision of the development were carried out. There was no evidence of any business or trading having taken place in another jurisdiction. The reclaimers' principal place of business was in Scotland.

[15] As to the second, winding-up was not a last resort for a secured creditor. The respondents did not have to show that winding-up would be of greater benefit than enforcement of their standard securities. There was a reasonable possibility of benefit simply because the winding-up procedure could give rise to satisfaction of the respondents' claim; it therefore served a purpose.

[16] In any event, further benefits would accrue to the respondents beyond those arising from serving calling-up notices. They would not have to sell the plots; instead matters would be handled by independent insolvency practitioners subject to statutory duties. Finally, winding-up in Scotland would be of greater benefit than such an order being granted in Jersey, since all the assets were here.

[17] As regards the third, the fact that the respondents had invoked the court's jurisdiction would not in itself suffice. There had to be a connection between them, or other parties interested in distribution of the assets, and this jurisdiction. The test would be met where the court would be able to exercise jurisdiction in the event that litigation was brought against the respondents or where a court order had to be enforced against them.

[18] The respondents had rights *in rem* over the secured properties; these were subordinate real rights. In any proceedings which had as their object rights *in rem* in immovable property this court had exclusive jurisdiction (paragraph 5 (1)(a) of Schedule 8 to the Civil Jurisdiction and Judgments Act 1982). The respondents could bring or defend proceedings in relation to the standard securities. They had made themselves subject to, or had submitted to, the jurisdiction of the court on matters concerning the standard securities. That of itself would satisfy the third requirement.

[19] A stronger basis for satisfying the third requirement lay in the terms of section 426(1) of the 1986 Act. It allowed the court to exercise its jurisdiction over the respondents "in matters relating to insolvency law". The provision had a wide scope. An order made by this court in the exercise of jurisdiction in relation to insolvency law would have to be enforced in England as if it were made by a court exercising the corresponding jurisdiction there. Such persons are therefore, in effect, subject to the jurisdiction of this court in relation to insolvency law.

[20] There was no jurisdiction with a stronger claim than Scotland in relation to the winding-up of the reclaimers. All the principal and substantive assets were here; the key feature of any liquidation process was to take over the assets. There was an advantage in having the winding-up proceedings in this jurisdiction and none in leaving the process to the Jersey courts.

The reclaimers' submissions

[21] There was no dispute that the first requirement was satisfied. The reclaimers have assets in Scotland; indeed their only significant assets are here.

[22] The second of the core requirements was not satisfied. The respondents held standard securities over the plots. They could use their powers as heritable creditors to call up the loans and sell the plots in exercise of their security rights. In the circumstances, no substantial benefit would accrue to the respondents from a winding-up order; the benefit identified by the Lord Ordinary was *de minimis*. Reference was made to *Re a Company (No. 003102 of 1991), ex p. Nyckeln Finance Co Ltd* [1991] BCLC 539, Harman J at 541h-542a. The court should weigh up the advantages and disadvantages for the petitioning creditor of deciding to proceed by means of a petition for winding-up of its debtor as against other options for recovery of the debt that might be available.

[23] The third requirement was also not satisfied. While section 426(1) of the 1986 Act allowed enforcement of insolvency orders in other parts of the United Kingdom, this was not apt to give this court jurisdiction over the respondents in the present proceedings. Under reference to *Hynd's Trustee Ptnr* 2009 SC 593, paras [8] and [11] it was suggested that there would be a need to enforce any Scottish order by means of an application to the corresponding English court, although it was accepted that the English court would have no option but to grant the application. Further, the fact that the Scottish courts had exclusive jurisdiction in respect of rights *in rem* (such as the standard security rights) under para 5 of Schedule 8 to the Civil Jurisdiction and Judgments Act 1982 did not avail the respondents.

[24] In the exercise of its discretion the court should decline jurisdiction because (i) the debt underlying the petition arose under a contract of loan entered into by English and

Jersey companies; (ii) the loan contract is governed by English law and exclusive jurisdiction to determine any disputes arising under or in connection with the contract has been conferred upon the English courts, subject to the respondents' right to litigate in another jurisdiction; (iii) the reclaimers are registered in Jersey; (iv) there is nothing to suggest that the management and control of the reclaimers is exercised anywhere other than Jersey; and (v) there is no material before the court suggesting that the insolvency procedures available in Jersey are in any way inferior to those in Scotland.

The respondents' submissions

[25] Liquidators would be able to sell the plots and make a distribution to creditors. The respondents would not have to enter into possession and take steps to sell the plots. There was a clear and obvious benefit to the respondents from the winding-up order. As to the third requirement, the effect of section 426(1) of the 1986 Act was that any insolvency order of this court would be enforceable in England and Wales. The respondents' claim was therefore subject to the jurisdiction of this court.

Analysis and decision

[26] In *In re Drax Holdings Ltd* [2004] 1 WLR 1049 Lawrence Collins J expressed the view (at para 26) that the three core requirements went to the discretion of the court and not to the existence of its jurisdiction. We agree. The plain reading of section 221 of the 1986 Act is that a broad discretion is conferred on the court to order the winding-up of an unregistered company. Of course, the court would not make a winding-up order where it would have no legitimate interest in so doing because, as Lawrence Collins J observed (at para 24) "that would be to exercise an exorbitant jurisdiction contrary to international comity". The three

core requirements developed in the English case law should not be applied as if they were hard-edged rules of law. They are simply factors that may be relevant to the exercise of the court's discretion depending on the particular facts of the case.

[27] The Lord Ordinary correctly held that the court had jurisdiction to make a winding-up order. Essentially, that was a discretionary judgment. There is no basis for interfering with it. The reclaimers advanced a number of technical objections, but ultimately none of these has any substance. There is unquestionably a sufficient connection with Scotland. The reclaimers' only material assets are here. Liquidators appointed in this jurisdiction will be ideally placed to realise those assets and make distributions to creditors. The liquidators, as officers of the court, will be subject to the court's control. The requirement that there be some benefit to creditors is clearly satisfied. That is not a difficult test to satisfy. It would not be appropriate for the court to attempt to weigh up and compare the relative efficacy of different options that might be available to the respondents for enforcing the debt owed to them.

[28] Section 426(1) of the 1986 Act provides that any order of a court within the United Kingdom in the exercise of jurisdiction in relation to insolvency law shall be enforced in any other part of the United Kingdom. This means that any orders made by this court in the present proceedings will be capable of being enforced directly against the respondents without recourse having to be made to another court. The requirement that there be jurisdiction over parties interested in the distribution of assets is plainly satisfied.

[29] It is also significant that the respondents hold standard securities over the properties. Any dispute between the liquidators and the reclaimers in relation to those securities will 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. For example, in terms of Rule 5.37(3) of

the Insolvency (Scotland) (Receivership and Winding Up) Rules 2018, the respondents would be prevented from taking any steps to enforce their securities if the liquidators had intimated an intention to sell the security subjects. If the respondents were unhappy with the approach being taken by the liquidators, their remedy would be an application to this Court either under Rule 5.37(4) of the 2018 Rules or under section 167(3) of the 1986 Act. The existence of the securities is another factor which points towards the court having jurisdiction over the respondents.

[30] Standing back from all this, it is clear that there are strong connections with Scotland. Winding-up here is entirely appropriate. It infringes no principle of international comity.

[31] For these reasons the court refused the reclaiming motion and adhered to the Lord Ordinary's interlocutor of 3 November 2022. Since the appointment of the *interim* liquidators had been suspended pending the hearing of the reclaiming motion, we made appropriate orders to excuse their failure to comply with certain time limits.