

International Corporate Rescue



Published by:

Chase Cambria Company (Publishing) Ltd

4 Winifred Close

Barnet, Arkley

Hertfordshire EN5 3LR

United Kingdom

www.chasecambria.com

Annual Subscriptions:

Subscription prices 2017 (6 issues)

Print or electronic access:

EUR 730.00 / USD 890.00 / GBP 520.00

VAT will be charged on online subscriptions.

For 'electronic and print' prices or prices for single issues, please contact our sales department at:

+ 44 (0) 207 014 3061 / +44 (0) 7977 003627 or sales@chasecambria.com

International Corporate Rescue is published bimonthly.

ISSN: 1572-4638

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CASE REVIEW SECTION

Wallace (as liquidator of Carna Meats (UK) Ltd) v Wallace

Lydia Ream, Trainee Solicitor, and Kevin Connolly, Associate, Freshfields Bruckhaus Deringer LLP, London, UK

Synopsis

The recent High Court decision in *Wallace (as liquidator of Carna Meats (UK) Ltd) v Wallace*¹ clarifies whether an order for the production of documents under s.236(3) of the Insolvency Act 1986 (the 'Act') can be made against a person resident abroad.

In *Wallace v Wallace*, Johnson J made the requested order, requiring the former bookkeeper of a company in compulsory liquidation (the 'Bookkeeper') to produce all documents, books and records in his possession relating to the company, even though he was resident in the Republic of Ireland.

The Court found that the power to require the production of documents under s.236(3) is a standalone power, independent of the power to summon a person to appear before the Court under s.236(2). That being so, the Court held that it was natural to construe this power as capable of extending to persons outside the jurisdiction. In this case, the Court found that the Bookkeeper was sufficiently connected with the jurisdiction to justify making the requested order.

The law

Where insolvency proceedings are opened, including for the purposes of this article where a compulsory winding up order is made against a company, on the application of the insolvency office-holder, the Court has the power to make orders to aid the office-holder's enquiry into the company's dealings under s.236 of the Act. Section 236 provides relevantly as follows:

- 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 sub-section 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 sub-section.

Background

A winding-up order was made against Carna Meats (UK) Limited (the 'Company'), which was within the scope of the European Council's Insolvency Proceedings Regulation 2000 (the 'Insolvency Regulation').² The last accounts filed by the Company included significant debtors, likely to be a key asset in the liquidation. Although the liquidation was impeded by a lack of any internal books or records, the liquidator (the 'Liquidator') was able to identify the Company's former bookkeeper with a correspondence address in the Republic of Ireland. The Liquidator and his solicitors wrote to the Bookkeeper three times requesting information about the Company's books and records before they received a response. In his response the Bookkeeper did not deny that he had been the Company's bookkeeper and had access to the Company's books and records. Instead, he stated that he was owed a considerable sum of money by the Company. The Liquidator's solicitors asked him to provide a proof of debt and repeated their initial request. When no response was received, the Liquidator filed an application seeking an order that the Bookkeeper deliver up all documents, books and records of the Company in his control or possession (the 'Requested Documents') within 28 days.

Decision

Johnson J found that s.236(3) of the Act confers upon the Court a standalone power to require any individual

Notes

¹ [2019] EWHC 2503 (Ch)

² Council Regulation (EC) 1346/2000 of 29 May 2000 on Insolvency Proceedings

falling within s.236(2)(a)-(c) to produce documents in their possession or under their control relating to the company. The Court held that it is just and proper to make an order against a person resident abroad, where they are sufficiently connected with the jurisdiction. Accordingly, the Court ordered the Bookkeeper to deliver the Requested Documents to the Liquidator.

Can an order be directed to a person resident abroad?

The Court analysed whether the phrase ‘any such person as is mentioned in subsection (2)(a) to (c)’ of s.236 was confined to persons within the jurisdiction.

The Court acknowledged the presumption that English statutes do not have extraterritorial effect but noted that this depended on context. Where a provision involved the power to require attendance before the Court, the presumption in favour of it being limited to the jurisdiction of England and Wales was very strong. As such, Johnson J agreed with the analysis of Dillon LJ in *Re Tucker (RC) (A Bankrupt), ex p Tucker (KR)*³ that s.25 of the Bankruptcy Act 1914 (the ‘Bankruptcy Act’) did not empower the Court to summon a person resident abroad to appear before it.

In a subsequent judgment, *Re MF Global UK Limited (in special administration) (No. 7)*,⁴ David Richards J applied *Re Tucker*’s analysis to s.236(3) of the Act and (deeming this section to be a re-enactment of s.25 of the Bankruptcy Act) declined to order a French company to produce documents in relation to an administration in England.

The Court here disagreed with *MF Global* and instead adopted the later analysis of HHJ Hodge QC in *Official Receiver v Norriss*,⁵ where the Court made an order for a Hong Kong resident to produce documents in relation to a liquidation in England. In making that order, the Court found that s.236 of the Act is not a direct re-enactment of s.25 of the Bankruptcy Act, as there is a material difference in the structure of the two provisions. The power to order the production of documents under s.25 of the Bankruptcy Act was ancillary to, and dependent on, the principal power to summon a respondent to appear before the Court, whereas the same power under s.236(3) is a standalone power.

In adopting the analysis of *Norriss*, Johnson J noted that the power to require the production of documents is less invasive than the power to order a person to appear before the Court and commented that,

‘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.’

This is in line with an earlier decision in *Re Mid East Trading Limited, Lehman Brothers Inc v Phillips and others*,⁶ where the Court of Appeal took an equally expansive view of s.236 and ordered the production of documents located in New York, concluding that extra-territorial orders may be made where the office-holder reasonably requires the documents to carry out their statutory function and the production does not impose an unreasonable or unnecessary burden, considering whether compliance with the order would expose the respondent to any civil or criminal claims.

When will an order be made?

The Court noted that the categories of individual falling within s.236(3) are very broad. In particular, s.236(2)(c) could catch third parties with a limited connection to the company in question. By analogy to *Re Paramount Airways Ltd (No. 2)*⁷ and *Bilta (UK) Ltd (In Liquidation) v Nazir*,⁸ Johnson J held that the relevant safeguard to prevent the excessive exercise of jurisdiction is to ask whether the respondent is sufficiently connected with the jurisdiction for it to be just and proper to make the requested order, despite the foreign element. In particular, the Court should consider the international dimension when assessing whether to make an order at all and the Court must be wary of making orders seeking to regulate the conduct of respondents abroad in respect of matters with no real connection to the jurisdiction.

In *Wallace v Wallace*, the Court found that the case for an order under s.236(3) was clearly established and that the order sought did not involve an excessive exercise of jurisdiction. There was sufficient connection with the jurisdiction because the winding-up of the Company fell within the scope of the Insolvency Regulation, which expressly recognises the jurisdiction and authority of the Court, alongside the Liquidator’s legitimate interest in taking actions within other Member States.⁹ In addition, the Bookkeeper was not a third party removed from the Company’s business but instead was an important part of the Company’s operations. It was likely that he had exclusive access to documents which were critical to the winding-up.

Notes

3 [1990] Ch. 148

4 [2015] EWHC 2319 (Ch)

5 [2015] EWHC 2697 (Ch)

6 [1998] 1 All ER 577

7 [1993] Ch. 223

8 [2015] UKSC 23

9 See articles 3(1), 4(2)(c), 16, 18 and 25 of the Insolvency Regulation

The Court found it had an entirely legitimate interest in regulating the Bookkeeper's conduct abroad and requiring him to provide the Liquidator with the Requested Documents, stating:

'It seems to me that a person who takes on the role of bookkeeper to an English company, and in that capacity has possession of the company's books and records, cannot complain that an order requiring him to make those books and records available on a winding-up involves any excess of jurisdiction by the English Court.'

Comment

In *Wallace v Wallace* the Court conceded that the previous cases of *MF Global* and *Norriss* presented a 'fragmented picture', and so it is positive that we now have some clarity as to the jurisdictional reach of the Court when making orders under s.263(3) of the Act. In our view, it is logical for s.236(3) to have extraterritorial effect, subject to the clear safeguards that have been put in place to ensure that any exercise of this power is proportionate. This decision significantly bolsters the ability of office-holders to seek documents and records outside the jurisdiction and provides clear guidance for advisers as to the likely success of any proposed application for an order against a respondent resident abroad.

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