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Re Akkurate Ltd (in Liquidation) [2020] EWHC 1433 (Ch)

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Synopsis

The High Court decision in *Re Akkurate Ltd (In Liquidation)*[1] ('*Re Akkurate*') provides clarity on recent conflicting authorities of the High Court as to whether an order for the production of documents under s.236(3) of the Insolvency Act 1986 (the 'Act') has extraterritorial effect solely on the basis of domestic insolvency law.

In *Re Akkurate*, Sir Geoffrey Vos C (the 'Chancellor') granted an application made by liquidators requiring the respondent companies to produce certain documents in their possession relating to the company in liquidation in circumstances where the companies were incorporated and operated from Italy. In doing so, while the Court found that the power to require the production of documents under s.236(3) did not have extraterritorial effect in its own right, it held that European Council Regulation 1346/2000, where it applies, can and does extend the territoriality of purely domestic insolvency provisions. This, in turn, permitted the Court to make orders under s.236(3) against EU resident parties.

The law

Section 236 of the Act is a key investigatory tool available to insolvency office-holders to apply to Court to obtain information in respect of the company to which they have been appointed. In broad terms, s.236 is intended to assist office-holders in carrying out their functions and 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.

Section 237 of the Act sets out the Court's enforcement powers under s.236. The terms of s.237(3) (and its similarity to s.25(6) of the Bankruptcy Act 1914 (the 'Bankruptcy Act')) were key to the Court's determination in *Re Akkurate* and stipulate as follows:

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.

Background

Akkurate Ltd ('Akkurate') had been the subject of a compulsory liquidation order on 18 May 2015. Having settled misfeasance proceedings against one of Akkurate's directors regarding pre-liquidation matters, the joint liquidators applied under s.236(3) for sight of documents in the possession of two companies based in Italy (together, the 'Companies'). The liquidators did so to enable them to decide whether to bring further proceedings in Italy in relation to post-winding up events, namely, the potential unlawful use of Akkurate's trademarks between 1 April 2015 and 31 December 2016 without payment.

The issues which the Court was required to decide were:

i. Does s.236(3) and/or the EU Insolvency Proceedings Regulation 1346/2000[2] (the 'EUIR') give the Court jurisdiction to make the orders sought?
ii. If so, how should the Court exercise its discretion?

Notes

1 [2020] EWHC 1433 (Ch).
2 Council Regulation (EC) 1346/2000 of 29 May 2000 on Insolvency Proceedings. The Original EU Regulation applied because the company's compulsory liquidation had begun on 18 May 2015.

Decision

The Court acknowledged that much confusion had been caused by the 'trilogy of inconsistent cases' concerning s.236(3), all of which had considered the previous decision of the Court of Appeal in *Re Tucker (a bankrupt)*[3] ('*Re Tucker*'). Prior to engaging on a careful and detailed examination of the authorities, the Court clarified that the current legal position had to be determined by a strict application of the doctrine of precedent. A thorough examination of the authorities led the Chancellor to conclude that *Re Tucker* was binding authority on the Court for the proposition that s.236(3) does not have extraterritorial effect. However, the Chancellor went on to hold that the jurisprudence of the European Court of Justice has made clear that the EUIR can and does extend the territoriality of purely domestic insolvency provisions and so conferred extraterritorial jurisdiction on the Court to make an order under s.236 in this case.

Consideration of Re Tucker *and the 'trilogy of inconsistent cases'*

Re Tucker concerned an application by the trustee in bankruptcy under s.25 of the Bankruptcy Act requiring the bankrupt's brother who was resident in Belgium to attend Court and produce documents. The importance of the decision in *Re Tucker* is that the legislative powers granted under s.25 are similar to those granted to an office-holder under s.236(3) in that they both allow the Court to summon specified persons and require those persons to produce documents. In particular, s.25(6) is in materially the same terms as s.237(3).

In *Re Tucker*, the Court of Appeal held that on its true construction, s.25 did not have extraterritorial effect to permit it to summon the bankrupt's brother before it. Central to the conclusion reached by Dillon LJ on behalf of the Court was the Court's interpretation of s.25(6), which Dillon LJ described in his judgment as inevitably carrying '… the connotation that if the person is not in England he is not liable to be brought before the English court under the section'.

In *Re MF Global UK Limited (in special administration) (No. 7)* ('*MF Global*'),[4] David Richards J held that s.237(3) was a re-enactment of s.25(6) and where this occurred, it is a principle of construction that the re-enactment is intended to carry the same meaning as its predecessor. The principle is particularly in point if the earlier decision had been the subject of authoritative decision (as has been the case in *Re Tucker*). David Richards J continued that in those 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. David Richards J therefore decided that he was bound by the decision in *Re Tucker* to hold that s.236 did not have extraterritorial effect (which resulted in his declining to order a French company to produce documents in relation to an administration in England). In *Re Omni Trustees (No 2)*[5] ('*Re Omni*'), the Court made an order for a Hong Kong resident to produce documents in relation to a liquidation in England. In making that order, HHJ Hodge QC found that there was a material difference in the structure between s.25 and s.236. The Court found that the power to order the production of documents under s.25 was ancillary to, and dependent on, the principal power to summon a respondent to appear before the Court, whereas this was not the way s.236 was structured. In contrast, HHJ Hodge QC found that the structure of s.236 conferred 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. HHJ Hodge QC further distinguished *Re Tucker* on the basis that it had been concerned with the question of whether someone can be compelled to come to the jurisdiction to be examined on oath and to produce documents, whereas, the case before him had only concerned the production of documents.

In *Wallace (as liquidator of Carna Meats (UK) Ltd) v Wallace*[6] ('*Wallace*'), the Court disagreed with *MF Global* and instead adopted the analysis of HHJ Hodge QC in *Re Omni* to find that the power to require the production of documents under s.236(3) is: (i) a standalone power, independent of the power to summon a person to appear before the Court under s.236(2) and (ii) different to the power to require attendance before the Court in that it is less invasive and does not involve the exercise of anything akin to the Court's subpoena power. The Court therefore made on order requiring the former bookkeeper of the company to produce documents, books and records in his possession relating to the company, even though he was resident in the Republic of Ireland.

Conclusion on the authorities

Having considered the authorities, the Chancellor concluded that it was not open to the Court to decline to follow *Re Tucker.* This was because the Court of Appeal's interpretation of s.25 was binding and applied equally to successor sections of the Act, unless the context of

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3 [1990] Ch. 148.
4 [2015] EWHC 2319 (Ch).
5 [2015] EWHC 2697 (Ch).
6 [2019] EWHC 2503 (Ch).

the new legislation clearly showed otherwise. In this regard, the Chancellor noted the material similarity between both the terms and the powers contained in the two legislative provisions and concluded that:

> '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'.

The Chancellor also placed weight on the fact that *Re Tucker* had been considered in both the Court of Appeal and the House of Lords without disapproval. With respect to the decisions in *Re Omni* and *Wallace*, the Chancellor respectfully disagreed with the reasoning of the Court in those cases and concluded that *MF Global* was to be preferred. In particular, the Chancellor did not agree that the different statutory structure of s.236 as opposed to s.25 could provide a basis upon which *Re Tucker* could be distinguished, noting that 'the modernisation of the language and the division between sub-sections cannot be seen as a substantive change'.

Can the EUIR otherwise give extra-territorial effect?

The answer to this question was clear. The Chancellor held that the jurisprudence of the European Court of Justice made clear that the EUIR can and does extend the territorial scope of purely domestic insolvency provisions. In this regard, the Chancellor noted Lord Sumption's judgment in *Bilta (UK) Ltd v. Nazir (No 2)*[7] that '[t]he English court, when winding up an English company, claims worldwide jurisdiction over its assets and their proper distribution',[8] and that jurisdiction is recognised within the European Union by articles 3 and 16 of the EUIR. The Chancellor further noted that in *Seagon v Deko Marty Belgium NV,*[9] the European Court of Justice held that article 3(1) of the EUIR 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'.[10]

The Court held that the inevitable consequence of these cases was that proceedings under s.236(3) constituted proceedings which derive directly from the insolvency proceedings and which are closely connected to them. It was therefore clear that the EUIR confers extra-territorial jurisdiction on the English court to make orders against EU resident parties under s.236.

How should the Court exercise its discretion under s.236?

With regard to the question of how the Court should exercise its discretion to make such an order, a careful balancing of factors was required – on the one hand, the reasonable requirements for the liquidators to see the documents in order to be able to carry out their functions, on the other, the need to avoid making an order which is wholly unreasonable, unnecessary or oppressive to the person concerned. Applying this to the present case, the Chancellor held that the liquidators were entitled to certain documents, but redrafted the order sought by narrowing the categories of documents requested, specifically taking into account that the Companies were based in Italy and were not company insiders.

Comment

While this decision is to be welcomed as clarifying the position in respect of conflicting judgments relating to the jurisdictional ambit of s.236, it may pose a concern for office-holders who had been bolstered by the decision in *Wallace* and who may currently be faced with the task of seeking information from non-EU residents. In particular, the Chancellor's disagreement that the contemporary commercial environment should provide a basis upon which the reasoning in *Re Tucker* could be distinguished may discourage proposed applicants from seeking relief.

Further, despite the Chancellor's comments that he formed his judgment 'irrespective of [his] views as to whether [*Re Tucker*] was correctly decided',[11] his thorough examination of the authorities and reinforcement of the strict application of the doctrine of precedent mean that it will be very difficult for any High Court Judge to be persuaded by arguments that the decision should be distinguished. Indeed, the Chancellor indicated that even the Court of Appeal should be bound by *Re Tucker* meaning that a decision of the Supreme Court would be required in order to say that it was not applicable to the construction of s.236.

One can see why there may be a tendency to argue that it is logical for s.236 to have extraterritorial effect, particularly in circumstances where the jurisdictional reach of other provisions of the Act such as s.213 and s.238 have been so extended and where an order under s.236 arguably might assist office-holders in deciding whether to bring an application under either of those

Notes

7 [2016] AC 1 (Supreme Court).
8 Ibid. at [109].
9 Case C-339/07 [2009] 1 WLR 2168.
10 Ibid. at [21].
11 *Re Akkurate Ltd (In Liquidation)* [2020] EWHC 1433 (Ch) at [47].

sections. In that scenario, the jurisdictional question could be addressed in determining whether a respondent is sufficiently connected with the jurisdiction for it to be just and proper to make an order despite the foreign element.

For now, however, it seems that we will have to wait for the next instalment – whether that be an appeal in *Re Akkurate,* or separate proceedings in which the jurisdictional ambit of s.236 is once again revisited.

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