IT IS "AKKURATE" TO SAY THAT THE ENGLISH COURT HAS JURISDICTION TO MAKE EXTRA-TERRITORIAL ORDERS UNDER S.236 OF THE INSOLVENCY ACT 1986 AGAINST EU RESIDENT PARTIES

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Introduction

1. Sir Geoffrey Vos, the Chancellor of the High Court, has today (4 June 2020) handed down a very important judgment concerning the extra-territorial effect of s.236 of the Insolvency Act 1986 (**IA 1986**). The case is *Wolloff and Short (as Joint Liquidators of Akkurate Limited) v Calzaturificio Rodolfo Zengarini SRL and another*[2020] EWHC 1433 (Ch). This decision will undoubtedly be of great interest to many insolvency practitioners, lawyers, and businesses around the world. There has, in recent years, been much debate about (and inconsistent case law concerning) whether s.236 itself has extra-territorial effect, and, even if it does not, whether the Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (**the 2000 Regulation**) operates so as to confer on the English court jurisdiction to make an extra-territorial order against EU residents under s.236 IA 1986.

2. In his judgment, the Chancellor (in summary, on the jurisdiction questions) held:

(1) S.236(3), in its own terms, does not have extraterritorial effect, following the case of *Re Tucker (a bankrupt)* [1990] Ch 148.

(2) However,following CJEU jurisprudence, the 2000 Regulationdoesconfer extra-territorial jurisdiction on the English court to make orders under s.236 against EU resident parties.

3. As the Respondents to the Liquidators' applications under s.236 were incorporated and operating in Italy, the question accordingly then became one of whether the discretion should be exercised to make the order sought. In the circumstances, the Chancellor did go on to make a s.236 order against the Respondents.

4. James Pickering QC of Enterprise Chambers successfully represented the Liquidators at the hearing, and was instructed by Spring Law.

Background

5. Akkuratewas placed into compulsory liquidation by the English court on 18 May 2015, upon HMRC's petition. It was not in dispute that Akkurate's COMI was in England and Wales or that the English court had jurisdiction to open insolvency proceedings in respect of Akkurate under art.3 of the 2000 Regulation.Akkurate's Liquidators brought 2 applications under s.236(3) against two Italian companies seeking ordersrequiring them to produce certaindocuments, and to provide an account of their dealings with Akkurate.

6. John Richmond, a well-known fashion designer, and Saverio Moschillo were the directors of Akkurate. Akkurate's business consisted in the ownership, and licensing to manufacturers of clothing and fashion accessories, of trademarks associated with the John Richmond brand.

7. R1 is a designer, manufacturer and marketer of footwear and accessories. It is owned by Rodolfo Zengarini (as is R2). Design agreements were entered into with Akkurate in 2008 and 2014 where licenses were granted to use Akkurate's trademarks. R1 allegedly paid an upfront fee of €2m for 14 fashion seasons around a year before Akkurate was wound up.

8. The Liquidators had brought and compromised misfeasance proceedings against John Richmondregarding matters pre-liquidation. They now wanted to access to documentation in the Respondents' possession so as to be better placed to decide whether to issue proceedings in Italy against the directors/the Respondents/others in relation to what occurred in a period of time *after* Akkurate had been placed into compulsory liquidation. Akkurate's original liquidators sold (most of) Akkurate's trademarks, soon after it was wound up, to Fashioneast SARL; the Liquidators now were seeking to find out about how it cameto be that the Respondents were using certain trademarks between April 2015 - December 2016 without paying Akkurate: both Respondents appear to have entered licence agreements with Fashioneast.

9. The Liquidators said they had been trying to investigate and obtain information and documents from the Respondents for some time on a voluntary basis, but to no,or little, avail. The Respondents had, in fact, initiated proceedings against Akkurate in Italy on 29 May 2019 claiming some €3.70m. The Liquidators then obtained a stay of those proceedings under s.130(2) IA 1986 and arts.4 and 17 of the 2000 Regulation by order of ICCJ Prentis.

10. Under the present s.236 applications, the Liquidators sought various accounts and documents from the Respondents concerning: their dealings with John Richmond; various trademarks and licence agreements (including with new owners of the trademarks); revenue and profits; various payments made; marketing activities; alleged breaches of various agreements; samples and unsold stock.

11. This information was sought because the it was said that several important issues concerning the 2014 Agreements with Akkurate warranted full investigation by the Liquidators, including: R1's failure to pay licence fees, and to account for its continuing liabilities, during certain periods; R1's continuing to do business with Akkurate's directors even though Akkurate was in liquidation; R1's entering into licences with the new owners of Akkurate's trademarks and conferring benefits on them instead of Akkurate (which, they said, would affect R1's entitlement, if there was one, to the €2m credit which it claims); R1's failure to return samples/materials/unsold stock; R1's conduct which may be capable of suggesting collusion with Mr Richmond or certain new trademark owners to ensure

Akkurate's trademarks were acquired at an undervalue; R1's substantial claim for lost income against Akkurate based on a loss of a right to use its trademarks when it appears it retained the right to use them and generated income from them under new agreements.

S.236 IA 1986

12. Those who work in insolvency law will no doubt be familiar with s.236 IA 1986. It provides that an office-holder may apply:
    (1) Under subsection (2): for an order summoning to appear before the court (a) any officer of the company, (b) any person known/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; and/or

    (2) Under subsection (3): for an order requiring such persons 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).

13. An office-holder must demonstrate that it is a proper case for the order to be made. That will involve the court considering a question of discretion where it must balance the legitimate requirements of the office holder against any factors which may suggest that the order would be unreasonably burdensome or oppressive to the respondent.

14. As will be appreciated, Akkurate's Liquidators sought the kind of order that can be made under s.236(3): requiring the Respondents to provide accounts of their dealings with Akkurate and to produce certain information and documents.

S.236does <u>not</u>, of itself, have extra-territorial effect

15. The Chancellor squarely set out, at [21], that there had been conflicting and divergent decisions about whether s.236 has, on a proper construction, extra-territorial effect; he

said that, in his judgment, "*the current legal position must be determined by the strict application of the doctrine of precedent.*"

16. At first instance, David Richards J in *Re MF Global UK Ltd*[2016] Ch 325; [2015] EWHC 2319 (Ch) decided that s.236 did not have extra-territorial effect. However, again at first instance, HHJ Hodge QC in *Re Omni Trustees (No 2)* [2015] EWHC 2697 (Ch) and Adam Johnson QC in *Re Carna Meats (UK) Ltd; Wallace v Wallace* [2019] EWHC 2503 (Ch) held that s.236 did have extra-territorial effect. The Chancellor labelled these three cases the "trilogy of inconsistent cases".

17. The first case examined by the Chancellor, however, was the 1990 decision of *Tucker* (ante) which concerned s.25 of the Bankruptcy Act 1914 and the power, set out in that section, of the court to summon persons to attend court and to produce documents. The respondent was a resident in Belgium and applied to rescind the order authorising service of the summons on him on the basis that the court did not have jurisdiction to order service out of the jurisdiction upon him. The Court of Appeal held that s.25 did not assert jurisdiction on British subjects abroad and so the bankruptcy rules of the time did not confer a procedural power allowing for the service out of s.25 summonses. Dillon LJ said –

> "*I look…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 when served with the appropriate process. There are exceptions under RSC Ord.11, but even under those rules no genera power has been conferred to serve process on British subjects resident abroad. … As 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…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 I 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). …"

18. As to the "trilogy of inconsistent cases":

(1) *MF Global:* a company's administrators sought a s.236 order against a French clearing house. The respondent resisted on the basis that s.236 did not have extra-territorial effect. The 2000 Regulation did not apply because the company was a credit institution (see effect of art.1(2)). The respondent relied on *Tucker*, which David Richards J said was "*a decision* [on s.25] *which, as applied to bankruptcy, was in substantially the same terms as sections 236 and 237*"; he also said that s.25(6) was re-enacted as s.237(3) IA 1986. Given the foregoing, David Richards J said that s.236 should have the same meaning and effect as s.25, absent any clear indications in the statute that it was intended to have a different meaning/effect. He thus regarded *Tucker* as authoritative on the lack of extra-territorial effect of both s.25 and s.236-237 (s.25's successor sections). His Lordship rejected the submissions that *Tucker* should not be followed, nothing cases[1] that referred to *Tucker* without any suggestion that it was wrong. He concluded that "*it is 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…".*

(2) *Omni:* this concerned an application under s.263(3) against a principal trustee of a Hong Kongcompany (to whom the Company trustees had transferred £3.7m). The 2000 Regulation did not apply because the respondent was resident in Hong Kong. On the question of jurisdiction, HHJ Hodge QC considered *Tucker* and *MF Global*. He noted the differences in structure between s.25 and s.236, saying: "*I am satisfied that…the power to order production of documents* [under s.25] *was ancillary to, and dependent upon, the power to summon an individual to attend for examination before court. That is not the was in which s.236 is structured. By subs.(2) the court may summon any of*

[1] *Re Seagull Manufacturing Co Ltd* [1993] Ch 345; *Masri v Consolidated Contractors International (UK) Ltd (No4)* [2010] 1 AC 90

the 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 [etc]*…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…and that it confers a freestanding power, independent of the power to summon a person to appear before the court for examination…"*

HHJ Hodge QC distinguished *Tucker* on the basis that there was "crucial" distinction between compelling a respondent under s.236(2) to attend court for examination, and requiring them under s.236(3) to produce documents and submit an account of dealings. He accepted the submission that David Richards J had failed to distinguish between the two types of cases.[2] HHJ Hodge QC ultimately exercised his discretion to make the order.

(3) *Wallace:* in this case, a liquidator sought an order under s.236(3) against the company's former book-keeper, based in Ireland. After a discussion of a number of the relevant authorities, Mr Johnson QC concluded that the *Tucker* case was concerned with enforcing attendance of respondents before the court, or "hauling" before itpersons properly served with summonses. He agreed with HHJ Hodge QC's analysis in *Omni*, categorising the s.236(3) power as a "standalone" power, divorced from the power to summons under s.236(2). He also observed that the power to require production of documents/information was "*less invasive*" than a power requiring attendance, and that in cases involving cross-border elements the court should ask itself whether the respondent is sufficiently connected with the jurisdiction for it to be just and proper to make an order – and that this was adequately addressed by the discretionary test famously set out for all s.236 applications by Lord Slynn in *Re British and Commonwealth Holdings plc* [1993] AC 426.

[2] He also said it was crucial to his decision that it appeared that*Re Mid East Trading Ltd* [1998] BCC 726 was not cited to David Richards J in *MFW* (although, however, the law report records that *MFW* was cited in argument). *Mid-East* concerned an order requiring production of documents which were located in a foreign jurisdiction (although, in that case, the respondent was not situated in the foreign jurisdiction: see Chadwick LJ at 754A-B.

19. The Chancellor also usefully discussed some other relevant cases[3] on jurisdiction at [40]-[45] of the judgment, with particular focus on how courts of high authority have dealt with *Tucker*.

20. The Chancellor ultimately held that s.236 did not of itself have extra-territorial effect. He considered that *Tucker* was binding on him in respect of that question, and so favoured *MF Global* over and above *Omni* and *Wallace*. He reached that conclusion because –

- In *Tucker* Dillon LJ construed s.25(6) – which is materially similar to s.237(3) – as meaning that "*if the person is not in England he is not liable to be brought before the English court under* [s.25]." S.25, like s.236, provided powers to summon *and* to require production of documents. The construction in *Tucker* was therefore a binding interpretation of s.25, and that construction applies equally to successors of the section unless the context of new legislation shows the meaning must be taken to have changed (quoting, again *MF Global*) The Chancellor said at [48]:

> "*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."*

- He disagreed that the different statutory structure of s.236, compared with s.25, made all the difference. In *Joddrell v Peakstone Ltd* [2012] EWCA Civ 1035, Munby LJ at [41] held in relation to a certain companies legislationprovision that "*the fact that what in section 653 of the* [old]*1985 Act appeared as two parts of a single sentence divided by a semi-colon now appears in to separate sentences (indeed in two separate subsection) divided by a full stop cannot possibly…make the slightest difference*." The Chancellor applied the same reasoning to s.25 and the newer s.236(2)-(3), concluding that "*the modernisation of the language and the division between sub-sections cannot be seen as a substantive change."*

[3] *Masri* (ante); *Bilta (UK) Ltd v Nazir (No 2)* AC 1 (Supreme Court); *Schmid v Hertel (Case C-328/12)* [2014] 1 WLR 633 (CJEU); *Seagon v Deko Marty Belgium NV (Case C-339/07)* [2009] 1 WLR 2168 (CJEU)

- He did not consider that *Mid-East* (see fn 2 above) provided any firm foundation for a first instance court declining to follow *Tucker* because *Mid-East's ratio* did not concern s.236 orders against those outside the jurisdiction.

- Crucially: *Tucker* has been considered by the House of Lords and Court of Appeal and has not been disapproved and nothing suggests in those cases that *Tucker* was wrongly decided.

- The compelling reasons for thinking s.236 ought to apply extra-territorially in the modern commercial environment does not affect *Tucker's* reasoning: it was a matter of construing a statute and discerning legislative intention; if Parliament had significantly changed the wording in the s.236,away from the wording found in s.25, the argument for extra-territorial effect would have been stronger.

21. Accordingly, the Chancellor wascompelled by the doctrine of precedent and the analysis in *Tucker*to hold that s.236 could notbe construed as itself having extra-territorial effect.

The 2000 Regulation does confer on the English court the extra-territorial jurisdiction to make s.236 orders against EUresident parties

22. On this question, the Liquidators submitted that the 2000 Regulation automatically conferred jurisdiction of the opening state in relation to insolvency on other member states, relying on Clive Freedman QC' decision in *Willmont & Sayers v AS Citadele Banka* [2018] EWHC 603 (Ch) – an (uncontested) case which concerned s.366 (the bankruptcy equivalent of s.236). It was said there that "*in 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."*

23. The Chancellor very usefully summarised the effect of the various relevant articles of the 2000 Regulation at [57], and observed:

"*None of the articles* [of the 2000 Regulation] *that I have mentioned*[4]*, 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 ajudgment of the court 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*[5]*, in another member state. Article 25 makes judgment of the courts of that member state concerning the course of those insolvency proceedings to be recognised and enforced in other member states without formalities."*

24. The Respondents argued that art.25 of the 2000 Regulations only provided for UK judgments to be recognised and enforced with no further formalities. This meant that, if the English court had no power to make an extra-territorial judgment or orderunder s.236 on its own terms, the 2000 Regulation simply could not assist the Liquidators, and, as such,the Liquidators' reliance on the 2000 Regulation was misguided.

25. The Chancellor rejected this argument because of CJEU jurisprudence which has made clear that the 2000 Regulation does, in fact, extend the territoriality of purely domestic insolvency provisions. He cited Lord Sumption's speech in *Bilta* at [109] which referred to the CJEU case of*Schmid;*he also referred to also the CJEU decision in *Seagon* where it held that art.3(1) 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.*"

26. The Chancellor concluded that, inevitably, s.236(3) applications *are* proceedings which derive directly from insolvency proceedings and are closely connected to them, commenting at [59] that:

"*The objective of the 2000 Regulation was to give the courts of the member stateof 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…between an application to set*

[4] See [19] of the judgment

[5] The Chancellor, in a footnote, on this point mentioned the case of the Dutch Supreme Court which had decided that a s.366 order under IA 1986 would not be regarded as a coercive measure for the purposes of art.18(3) of the 2000 Regulation (*Handelsveem BV v Hill* [2011] BPIR 1024

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."

27. Therefore, the effect of the Chancellor's decision is that: (1) as long as the reasoning of *Tucker* stands and is not overruled/replaced by a contrary construction from a higher court, s.236 cannot be construed by a court of first instance as having extra-territorial effect on its own terms; but (2) the 2000 Regulation *does* confer extra-territorial jurisdiction on the English court to make an order under s.236 against a foreign EUresident party.

Discretion

28. The House of Lords'decision in *Re British and Commonwealth Holdings plc* made it clear that the court will only make a s.236 order when a proper case has been demonstrated; the court's powers under s.226 are extraordinary, and the court's discretion must be exercised after a careful balancing of factors involved (the reasonable requirements of the office-holders to carry out their function, versus the need to avoid making orders that are wholly unreasonable, unnecessary or oppressive to respondents).

29. The Respondents submitted that the cross-border nature of the application should weigh heavily against the making of the order, and that the case was in truth an Italian matter. The Chancellor recognised, however, that Akkurate's COMI was in England and the insolvency was governed by English law.

30. The Respondents also said the order was so broadly drawn it would be oppressive to them to require them to gather all the information sought.

31. In the end, the Chancellor decided to make an order against the Respondents under s.236. He noted that it was justified because the Liquidators contended that they did not expect to be able to obtain the information sought from John Richmond: the proceedings brought against him, and settled, concerned matters pre (not post) the winding up order. The Chancellor said that whilst it was a little unusual to seek information about post-winding up

order events, such information would be within the scope of s.236 as it concerns the business dealings affairs or property of Akkurate.

32. In view of some of the information already provided by the Respondents and the need to avoid undue oppression and for the order to be both reasonable and proportionate in the circumstances of the case, the Chancellor to an extent redrafted the terms of the order, narrowing some of the categories requested: see [68].

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