Liverpool

Case No: 0042 of 2003
Neutral citation number: [2003] EWHC (Ch) 128

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 February 2003

Before:

THE HONOURABLE MR JUSTICE LLOYD

IN THE MATTER OF

BRAC RENT-A-CAR INTERNATIONAL INC

Lexa Hilliard (instructed by Eversheds for the Petitioner,
BRAC Rent-A-Car International Inc)
Louise Hutton (instructed by S J Berwin for the Judgment Creditors,
Francesco Dragotto and Giuseppe Dragotto, trading as Italy by Car)

Hearing date: 14 January 2003

JUDGMENT: APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

Mr Justice Lloyd:

1. On 14 January 2003 I heard a petition for an administration order in relation to BRAC Rent-A-Car International Inc ("the Company"). I made the order but reserved my reasons for holding that I had jurisdiction to do so. This judgment sets out those reasons.

2. The petition was issued on 7 January, the Company being the petitioner. There was no-one on whom the Insolvency Act 1986 required it to be served other than the proposed administrators. However, the Company's solicitors had been in correspondence with Messrs. S J Berwin, who act for creditors (to whom I will refer as the Judgment Creditors) who have the benefit of an Italian arbitration award in Italy for a sum exceeding £1.1 million, which has been registered as a judgment in England. They also have an interim charging order over property of the Company. Following earlier correspondence, the Company's solicitors supplied copies of the petition and the first affidavit to S J Berwin. That led to the Judgment Creditors being represented by Counsel at the hearing before me.

3. On their behalf Miss Hutton first applied for an adjournment so that her clients could have more time in which to consider the figures appearing from the report under rule 2.2. I rejected that application for reasons given in a judgment at the time, which I do not need to reiterate. Then she argued that the court had no jurisdiction to make an administration order. Having heard that argument, and contrary submissions from Miss Hilliard for the Company, I was satisfied that the court does have the necessary jurisdiction. I was also satisfied that it was appropriate to make such an order on the facts, for reasons which I do not need to go into in this judgment. Because the question of jurisdiction is novel and of some importance, it seemed to me that I ought to take more time than was then available to express my reasons for holding that the jurisdiction exists.

4. The Company is incorporated in Delaware, and has its registered address in the United States. However, that is not an address from which it trades, and it has never traded in the US. Its operations are conducted almost entirely in the UK. It was until recently part of the Budget group, and its business is that of managing the European, Middle Eastern and African operations formerly carried on by that group. It has subsidiaries in many Western European countries, each of which has, in turn, agreements with various franchisees. In countries where the company does not have a subsidiary it enters into franchise agreements directly with franchisees.

5. It trades from an address in Hemel Hempstead, in England. It has for a long time been registered under the Companies Acts as an overseas company. It has no employees in the US, and all its employees work in England, with contracts of employment governed by English law, apart from a small number in a branch office in Switzerland. Its trading activities are carried out by way of contracts with subsidiaries and franchisees. All of these are governed by English law. It has of course other contracts entered into in the course of its business, such as for telecommunications services; these are also governed by English law.

6. The Company is, with other members or former members of the Budget group, in Chapter 11 administration in the US. That procedure has some similarities with

administration under the Insolvency Act 1986, but the moratorium effect as regards creditors is not directly effective in this jurisdiction. Accordingly the need was felt for an administration order by way of protection against creditors in England.

7. Section 8 of the Insolvency Act 1986 gives the court power to make an administration order in relation to a company. The Act does not define what is meant by a company, and the general definition in the Companies Act 1985 is therefore applied by section 251. Thus it means a company registered under the 1985 Act or an earlier Companies Act. As originally enacted, therefore, an administration order could not be made as regards a foreign company. By contrast, as regards winding-up orders the jurisdiction is expressly extended beyond locally incorporated companies to unregistered companies, which includes foreign companies, by section 221 of the Insolvency Act 1986: see *Re Latreefers Inc.* [2001] 2 BCLC 116. The only exception as regards administration orders was that such an order could be made pursuant to a request from a court of a relevant country or territory under section 426 of the Insolvency Act 1986: see *Re Dallhold Estates (UK) Pty* [1992] BCLC 621. In relation to other provisions of the Insolvency Act 1986 different views have been expressed as to whether the general definition in the Companies Act was displaced by a sufficient contrary intention, but in relation to section 8 the view was that the general rule did apply.

8. Since 31 May 2002, however, the 1986 Act has included a section 8(7) in the following terms:

> "In this Part a reference to a company includes a reference to a company in relation to which an administration order may be made by virtue of article 3 of the EC regulation."

9. This provision is, strictly speaking, unnecessary because the EC regulation referred to, Council regulation 1346 / 2000 of 29 May 2000 on Insolvency Proceedings (which I will call the Regulation), has direct effect in all the Member States (except Denmark, which exercised a right to opt out) as of 31 May 2002. Accordingly, the question whether this court has jurisdiction to make an administration order in relation to a company requires reference to the Regulation.

10. The context of the Regulation is described in its 33 recitals. These also help to cast light on some of the substantive provisions. I will therefore start by referring to those of the recitals which are relevant for present purposes.

11. Recital (2) refers to the need for cross-border insolvency proceedings to operate efficiently and effectively, and for the Regulation to be adopted to achieve this objective. Recital (3) speaks of the activities of undertakings having more and more cross-border effects and being therefore increasingly regulated by Community law. It states that the insolvency of such undertakings affects the proper functioning of the internal market and that there is a need for a Community act requiring co-ordination of the measures to be taken regarding an insolvent debtor's assets. In turn, recital (4) refers to the necessity, for the proper functioning of the internal market, to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position. Recital (8) refers to the need to use a Community law measure which is binding and directly applicable.

12. Recital (12) opens with the proposition that the Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the

centre of his main interests. That recital is then enlarged on by recitals (13) and (14), as follows:

> "(13) The 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.
>
> (14) This regulation applies only to proceedings where the centre of the debtor's main interests is located in the Community."

13. Recital (15) points out that the Regulation is only concerned with international jurisdiction, as between the courts of different Member States, and thus does not deal with territorial jurisdiction within a given Member State. Recital (21) deals with creditors, in particular in a situation in which two or more insolvency proceedings have been opened in different Member States. I quote the first sentence:

> "Every creditor, who has his habitual residence, domicile or registered office in the Community, should have the right to lodge his claims in each of the insolvency proceedings pending in the Community relating to the debtor's assets."

14. The question I have to decide turns on article 3, of which I need to set out paragraphs 1 and 2.

> "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.
>
> 2. Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State."

15. Article 2 contains definitions, but there is no definition of "debtor", and the only definition that I need to read is of "establishment", as follows:

> "'establishment' shall mean any place of operations where the debtor carries out a non-transitory economic activity with human means and goods"

16. There is no definition of "centre of a debtor's main interests" and, apart from the rebuttable presumption in the second sentence of article 3.1, the meaning of the phrase is only illuminated by recital (13).

17. Following from the general reference in recital (21), the location within a Member State of the habitual residence, domicile or registered office of a creditor is mentioned in articles 3.4(b), 39, 40, and 42.2. By contrast, article 32.1, which deals with the general question of the exercise of creditors' rights, says at paragraph 1:

"Any creditor may lodge his claim in the main proceedings and in any secondary proceedings."

18. I do not need to refer to the other articles of the Regulation. They are concerned with its detailed effects, as regards the law applicable to insolvency proceedings and to various rights and obligations which may have to be considered in the course of such proceedings, recognition of insolvency proceedings as between Member States, the taking of secondary insolvency proceedings in other Member States than that where the centre of the debtor's main interests is to be found, provision of information for creditors, and various incidental matters. None of these casts any light on the fundamental question, whether the debtors in relation to whom the insolvency proceedings governed by the Regulation may be taken are (in the case of legal persons) limited to those incorporated in the Community, or are not so limited.

19. Miss Hutton showed me a commentary on the Insolvency Act 1986 which refers to section 8(7) and to article 3 of the Regulation and says that it follows that an administration order may now be made against a company that is incorporated in another Member State, but which satisfies the conditions of having the centre of its main interests in the UK, or, in the case of secondary proceedings, has an establishment here. Plainly that is correct. The commentary does not expressly consider whether the relevant jurisdiction extends to a company incorporated outside the Community, but which satisfies the conditions.

20. Miss Hutton's essential proposition is that a legal measure of the Community should not be presumed to apply to entities which are not incorporated in a Member State, and that there is nothing in the Regulation which indicates that it is intended to apply to such entities. Rather, she submitted, the Regulation deals with the position as between different Member States, and not as between Member States and the rest of the world, and should not be read as having extra-territorial effect outside the Community.

21. Miss Hutton asked rhetorically why, if the legislation were intended to have the effect for which Miss Hilliard contended, section 8(7) had not been drafted so as to say, for example, that a company, for the purposes of that part of the Insolvency Act 1986, includes a company whose centre of main interests is in the UK. There are several answers to that, not least that the easiest way to avoid a mismatch between domestic legislation and Community legislation is simply to refer directly to the latter. However, even if one were to attempt to set out the criteria for jurisdiction laid down by the Regulation in the Act, it would have to be done at greater length, whichever side's submission is correct. It would have to cover both the case where the centre of the debtor's main interests is in the UK and also that where the centre of the debtor's main interests is in another Member State but the debtor has an establishment in the UK.

22. In support of her submission that the Regulation does allow insolvency proceedings to be opened in relation to a company incorporated outside the Community if the centre of its main interests is in a Member State, Miss Hilliard pointed out that the only test stated in the Regulation is that of the location of the centre of a debtor's main interests. She also referred to other Community legislation which extends to companies incorporated outside the EU. An example is the Eleventh Company Law Directive, 89/666/EEC. The Company is registered as a branch under Companies Act 1985 section 690A, which gave effect to the relevant provision of this Directive.

23. Another example is the Brussels Convention (now replaced by regulation 44/2001) which refers to the "seat" of a company as the test for its domicile. In *The Deichland* [1990] 1 QB 361, the Court of Appeal held that a company incorporated in Panama but in relation to which central management and control was exercised in Germany had its seat in Germany (even if it may also have had a seat in Panama). On that basis, the Brussels Convention applied and the company was entitled to insist on being sued in the courts of its domicile, being another Contracting State, rather than in England. The concept of "seat" may be different from "centre of a debtor's main interests" in this respect, since the Court of Appeal envisaged that one company might have seats in two different states, one that of incorporation and the other that of central management and control, whereas there can only be one centre of a debtor's main interests. Nevertheless, this does demonstrate that Community legislation is by no means necessarily limited to legal persons incorporated within a Member State.

24. In my judgment, Miss Hilliard is correct in her submission that the Regulation gives jurisdiction to the courts of a Member State to open insolvency proceedings in relation to a company incorporated outside the Community, if the centre of the company's main interests is in that Member State. As a matter of textual interpretation, it seems to me that this is the effect of the Regulation. It defines the scope of its application only in terms of the location of the centre of the debtor's main interests. By contrast, there are several references, already noted, to the habitual residence, domicile or registered office of creditors being within the Community. If it had been intended that, as regards legal persons, only debtors incorporated in a relevant Member State should be affected by the Regulation, it would have been easy to say so. It seems to me that, if such a limitation was intended, it is surprising that it does not appear at all in the rather discursive recitals, let alone in the substantive provisions of the Regulation.

25. It might perhaps be argued, as regards the references to creditors, that there is an interesting contrast between recital (21), quoted in paragraph 13 above, which refers to creditors based (using that word as shorthand for habitually resident, domiciled or registered) in the Community having the right to lodge claims in each of the insolvency proceedings pending in the Community relating to the debtor's assets, and article 32.1, quoted at paragraph 17 above. The proposition would be that, in the light of the recital, the plain words "any creditor" in the article should be understood as meaning a creditor based in a Member State, as set out in the recital, and that by analogy, the word "debtor" should be understood as limited in the same way.

26. It does not seem to me that this argument is correct. First, there is no hint in the Regulation of any intention to limit debtors to those based in the Community, in this sense. Secondly, even if there were, the facts are such that the Company would be likely to satisfy a test of domicile in the UK, and this argument could not extend to imposing a test by reference only to incorporation in one of the Member States. Thirdly, there may be reasons why the freedom of choice was referred to in the recital in terms of creditors based in the Community, but the equivalent substantive provision was not so limited. For example, creditors based in a particular Member State where a debtor has an establishment have the right to request the opening of territorial insolvency proceedings in that state, even if is not that of the centre of the debtor's main interests, but that right also extends to creditors whose claim arises from the operation of the establishment: see article 3.4(b). The article does not say that creditors in the latter class are limited to those based in any Member State. Fourthly, in cases of inconsistency the text of articles prevails over that of recitals in

Community legislation: see *Société d'Importation Édouard Leclerc-Siplec v. TF1 Publicité SA and M6 Publicité SA* Case C-412/93 [1995] ECR I-179, paragraphs 45 - 47.

27. Turning to purposive interpretation, it seems to me that a reading of the Regulation which limited it (as regards legal persons) to debtors who are incorporated in any of the Member States would prevent the Regulation from achieving some of the purposes which are described in the recitals and would leave it open to avoidance, providing an incentive for artificial operations as regards the status of debtors comparable to those which, according to recital (4), it is part of the purpose of the Regulation to avoid. It would allow those who use corporate bodies to arrange that, although their business, assets and operations are based in a Member State, the relevant corporate body is incorporated outside the Community, so that the provisions of the Regulation would not apply to it or its assets. That would be inconsistent with the aim described in recital (3), and such an incentive for manipulation would be at least as inconsistent with the objectives of the Regulation as the examples of forum-shopping among Member States mentioned in recital (4). This is particularly the case since the Regulation contains no provisions dealing with affiliated companies or groups of companies, so that each debtor must be considered separately.

28. Miss Hilliard showed me a Report on the Convention on Insolvency Proceedings by Professor Miguel Virgos and Étienne Schmit. The Convention covered the same ground as the Regulation and in substantially the same terms. It did not come into effect because it was not signed by all the necessary Member States. I am not altogether clear as to the status of the Report (see Totty & Moss, Insolvency, paragraph H9-18.2 footnote 2 on this point). However it seemed to me that I ought to take some account of its contents. The Report has an introductory part, followed by a commentary on the provisions of the Convention. In the introduction, under the heading Scope, the following appears at paragraph 11:

> "The Convention deals only with the intra-Community effects of insolvency proceedings. It applies only when the centre of the debtor's main interests lies within the territory of a Contracting State (i.e. the Community). Even then, the Convention does not regulate the effect of the proceedings vis-à-vis third States. In relation to third States, the Convention does not impair the freedom of the Contracting States to adopt the appropriate rules."

29. In paragraph 75, part of the section of the Report dealing with article 3, which seems to have been in the same terms as article 3 of the Regulation, the following passage appears:

> "By using the term 'interests', the intention was to encompass not only commercial, industrial or professional activities, but also general economic activities, so as to include the activities of private individuals (e.g. consumers). The expression 'main' serves as a criterion for the cases where these interests include activities of different types which are run from different centres. In principle, the centre of main interests will in the case of professionals be the place of their professional domicile and for natural persons in general, the place of their habitual residence. Where companies and legal persons are concerned, the Convention presumes, unless proved to the contrary, that the debtor's

> centre of main interests is the place of his registered office. This place normally corresponds to the debtor's head office."

30. It seems to me that these passages are broadly neutral on the point which I have to consider. They do not contain any clearer indication than the Regulation itself does in favour of the reading for which Miss Hilliard contends, but equally there is nothing in them that is inconsistent with that reading.

31. Thus, according to the literal reading of the Regulation, the only test for the application of the Regulation in relation to a given debtor is whether the centre of the debtor's main interests is in a relevant Member State, and not where a debtor which is a legal person is incorporated. This is supported by the purposive interpretation. For those reasons, I held that the Regulation does give the courts of a Member State jurisdiction to open insolvency proceedings in relation to a corporate debtor incorporated in Delaware, such as the Company, if the centre of the debtor's main interests is within that Member State, as is the case in this instance.