



Neutral Citation Number: [2019] EWHC 2503 (Ch)

Case No: CR-2016-000565

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES (ChD)

COMPANIES COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 September 2019

Before :

ADAM JOHNSON QC SITTING AS A JUDGE OF THE HIGH COURT

Between :

**Philp Stephen Wallace (as Liquidator of Carna
Meats (UK) Limited)**

Applicant

- and -

George Wallace

Respondent

Emma Read (instructed by Clarke Mairs LLP) for the Applicant
The Respondent did not appear and was not represented

Hearing date: 11 July 2019
Further Written Submissions: 16 July 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Adam Johnson QC :

Introduction

1. The present Application raises an interesting question about the scope of section 236 of the Insolvency Act 1986 ("IA"). This has been described as the question whether the section has extraterritorial effect. More particularly, the question is whether an Order may be made under the section directed to a Respondent resident abroad, in this case in the Republic of Ireland. I should say straightaway that in addressing this question, I have been greatly assisted by the thorough submissions (both oral and in writing) which I have received from Ms Emma Read, who appeared before me on behalf of the Applicant.

Facts

2. The factual background could not be more straightforward.
3. Carna Meats (UK) Limited ("*the Company*") was incorporated on 4 May 2010 and carried on business as a meat wholesaler. A winding-up Order was made against it on 8 December 2015 and Mr Philip Stephen Wallace was appointed Liquidator on 13 June 2016. He is the present Applicant.
4. The last accounts filed by the Company were those for the year ended 31 May 2014. The assets listed in those accounts include debtors in the amount of £809,791. As the Liquidator therefore explains in his evidence, it appears that the Company's debtors are likely to be a significant asset in the liquidation.
5. The Applicant also says, however, that he has been hampered in his investigations into the Company's affairs by a lack of any books and records. The Directors as at the date of liquidation were a Mr and Mrs Mallon. They say they do not have any books and records themselves, but in a Preliminary Information Questionnaire Mr Mallon gave details of a Mr Craen of BFS (Sussex) Limited as someone who had acted for the company in connection with its financial affairs, and identified the Respondent, Mr George Wallace ("*Mr Wallace*"), as the Company's former bookkeeper. Mr Mallon gave an address for Mr Wallace in the Republic of Ireland.
6. Correspondence followed with both Mr Craen and Mr Wallace. Mr Craen, in his letter of 16 September 2016, said that all records of the Company were held by Mr Wallace. As regards Mr Wallace himself, the Liquidator wrote to him on 5 July 2016, and the Liquidator's solicitors wrote on 10 October 2016. Both letters referred to the Liquidator's understanding that Mr Wallace had been the Company's bookkeeper and asked for information about the Company's books and records. Neither letter prompted a response. A further letter followed on 1 November 2016, in which the Liquidator's solicitors said that unless they heard from Mr Wallace as a matter of urgency they would seek instructions from their client to apply to the Court for his examination under the Insolvency Act 1986.
7. Mr Wallace eventually replied on 21 November 2016. Notably, in his short response he did not deny that he had been the Company's bookkeeper or deny that he had access to the Company's books and records. Instead, he said he was owed "*a considerable sum of money by [the Company] which remains outstanding.*"

8. In a further letter dated 19 December 2016, the Liquidator's solicitors acknowledged Mr Wallace's comment, and asked him to provide a proof of debt for forwarding to the Liquidator. Nonetheless, they pointed out that Mr Wallace was under a statutory duty to assist their client, and repeated their request that he respond to the Liquidator's inquiries as a matter of urgency.
9. No response was received. An Application Notice was then issued on 27 November 2017, seeking an Order that:
 - "1. *The Respondent shall deliver up all documents, books and records of Carna Meats (UK) Limited ('the company') in his control or possession to the Applicant within 28 days, to include but not limited to:*
 - 1.1 *Full copies of the annual accounts.*
 - 1.2 *Any draft or management accounts.*
 - 1.3 *Details of the fixed asset register.*
 - 1.4 *A breakdown of the company's debtors and any documents relating to the debts owed to the company.*
 - 1.5 *Sage records.*
 - 1.6 *The company's cashbook.*
 2. *The Respondent shall pay the costs of this application".*
10. Upon issuing the Application Notice, the Liquidator's solicitors completed Form N510, headed: "Notice for Service out of the Jurisdiction where permission of the Court is not required". Under the heading "Part 2" on Form N510, which is headed "Service of the Claim Form in any jurisdiction other than England and Wales, Scotland and Northern Ireland", the Liquidator's solicitors completed the first box, and thus gave the statement below, certifying the case as one falling within CPR 6.33(1). The relevant statement was:

"I state that each claim made against the defendant to be served and included in the claim form is a claim which the court has power to determine under [the Civil Jurisdiction and Judgments Act 1982] or [the Lugano Convention], and

 - (a) *no proceedings between the parties concerning the same claim are pending in the courts of any other parts of the United Kingdom or any other Convention territory; and*
 - (b) *the defendant is domiciled in a Convention country, namely the Republic of Ireland".*
11. Thereafter, the Application Notice was provided to the Foreign Process Section at the Royal Courts of Justice and was sent on to the relevant authorities in Ireland. I have

been provided with a Certificate of Service signed by an official at the Circuit Court in Monaghan, Ireland, stating that on 28 December 2017 the Application was sent by registered post to the Respondent at Cuanmuire, Monaghan Road, Bally Bay, Co. Monaghan, Ireland. That is the address used in previous correspondence with Mr Wallace and indeed is the address given by him in his own letter dated 21 November 2016.

Section 236 IA 1986

12. Section 236 is headed "*Enquiry into company's dealings, etc*", and provides relevantly as follows:

- "(1) *This section applies as does section 234; and it also applies in the case of a company in respect of which a winding-up order has been made by the Court in England and Wales as if references to the office-holder included the official receiver, whether or not he is the liquidator.*
- (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."*

13. The section goes on to set out machinery for enforcing attendance by persons who have been summoned by means of a bench warrant (subsections 236(4)-(4)). The following section, section 237, confers additional and complementary powers on the Court, and provides at section 237(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 of the United Kingdom".

14. It is clear that the purpose of an order under section 236 is to facilitate the functions of the liquidator. In *British & Commonwealth Holdings plc (Joint Administrators) v. Spicer and Oppenheim* [1993] AC 426, Lord Slynn of Hadley (at p. 438D) adopted the following statement of Buckley J. in *In Re Rolls Razor Ltd* [1968] 3 All ER 698, at p.700 (made in connection with s. 268 Companies Act 1948) as a description of the overall purpose of section 236:

"The powers conferred by [the section] are powers directed to enabling the court to help a liquidator to discover the truth of the circumstances in connection with the affairs of the company, information of trading, dealings and so forth, in order that the liquidator may be able, as effectively as possible, and, I think, with as little expense as possible ... to complete his function as liquidator, to put the affairs of the company in order and to carry out the liquidation in all its various aspects, including, of course, the getting in of any assets of the company available in the liquidation."

15. At pp. 439-440, Lord Slynn explained that the power under section 236 is a discretionary one, which involves a balancing of factors (see at p.439D-E and p. 439F-p.440A):

"The proper case is one where the administrator reasonably requires to see the documents to carry out his functions and the production does not impose an unnecessary and unreasonable burden on the person required to produce them in the light of the administrator's requirements. An application is not necessarily unreasonable because it is inconvenient for the addressee of the application or causes him a lot of work or may make him vulnerable to future claims, or is addressed to a person who is not an officer or employee of or a contractor with the company in administration, but all these will be relevant factors, together no doubt with many others."

16. Bearing this guidance in mind, and leaving aside for the moment any complications arising from the fact that Mr Wallace is in the Republic of Ireland, to my mind the case for an order under s.236 is clearly made out. First, as a matter of the language of the section, it seems to me that Mr Wallace falls within either s236(2)(b) or (c): I say that on the footing that the Company's books and records would seem to me to qualify as "property of the company" within subsection (2)(b), or alternatively that Mr Wallace has information concerning the "business, dealings, affairs or property of the company" within subsection(2)(c).
17. Second, as a matter of discretion, in circumstances where the Company's last filed accounts suggest the existence of debts which might yield some recovery, it is reasonable for the Liquidator to seek documents which will shed light on whether such recoveries might be made or not, and if so, where action might be taken. Mr Wallace has not suggested that providing the information and documents requested would be unduly onerous or would impose an unreasonable or unnecessary burden. He has said only that he is himself owed monies by the Company, but there I think the Liquidator must be right in saying that the proper course is for him to put in his own proof of debt.

The fact that he may be owed monies is not a good reason for refusing to make available information and documents concerning the Company's affairs which came into his possession in the course of his acting as bookkeeper.

18. Against that background, I turn to the question of jurisdiction.

Jurisdiction

19. It seems to me that in this case, the concept of jurisdiction is relevant in a number of different senses. It is helpful to separate them out.

Jurisdiction over the Insolvency of the Company

20. In her further Written Submissions dated 16 July 2019, Ms Read drew attention to the fact that the winding up of the Company falls within the scope of Council Regulation (EC) No. 1346/2000 of 29 May 2000 on Insolvency Proceedings ("*the 2000 Regulation*"). (The insolvency proceedings were opened by means of the winding-up Order of 8 December 2015, before the coming into effect of the later EU Insolvency Regulation 2015 (Regulation (EU) 2015/848)).

21. Ms Read submitted that the Company's centre of main interests was in England & Wales, and that therefore the English Court had jurisdiction to open insolvency proceedings in relation to the Company under Art.3(1) of the 2000 Regulation (headed, "*International Jurisdiction.*") Further, she said that under Art.16 of the 2000 Regulation, the English Court's judgment opening the insolvency proceedings is entitled to recognition in all other Member States, including the Republic of Ireland. It seems to me, based on the information I have available, that Ms Read's submissions on these points are all correct, and further that they have significance in terms of my assessing the appropriateness of the Order I am invited to make against Mr Wallace in Ireland, in particular in light of the facts that:

- i) under Art.4(2)(c) of the 2000 Regulation, the law of the State of the opening of proceedings (here, English law) shall determine "*the respective powers of the debtor and the liquidator*";
- ii) under Art.18, the Liquidator appointed by a court which has jurisdiction under Art.3 "*may exercise all the powers conferred on him by the law of the State of the opening of proceedings in another Member State*" (subject to certain qualifications, none of which seem to me to apply here); and
- iii) under Art.25, any judgment rendered by this Court concerning the course of the insolvency proceedings is entitled to recognition in other Member States without further formality.

Service on Mr Wallace

22. At the hearing before me, I queried the basis on which service out was effected, having regard to the Form N510 filed by the Liquidator, and the Liquidator's certification that the case fell within either the Civil Jurisdiction and Judgments Act 1982 or the Lugano Convention. Neither is concerned with insolvency proceedings. In light of these queries, in her Written Submissions, Ms Read submitted as follows:

- i) In fact, authority to serve out was derived from a combination of (1) the Insolvency Rules 2016 (SI/1024) ("*IR 2016*"), Schedule 4; (2) the Practice Direction: Insolvency Proceedings [2014] B.C.C 502 (the "*IPPD 2014*") (which at the time of service in late 2017 was the applicable Practice Direction); and (3) the 2000 Regulation itself.
- ii) By means of IR 2016 Schedule 4, paragraph 1, service is to be carried out in accordance with CPR, Part 6. For the purposes of service, an Application Notice is to be treated as if it were a claim form.
- iii) By means of IPPD 2014, paragraph 6.5:

"An application which is to be treated as a claim form ... may be served out of the jurisdiction without the permission of the court if:

(1) the application is by an office-holder appointed in insolvency proceedings in respect of an individual or company with its centre of main interests within the jurisdiction exercising a statutory power under the [IA 1986], and the person to be served is within the EU."

- 23. Again, it seems to me that Ms Read's further submissions on these points are correct, and that therefore the case was one in which the Liquidator was entitled to serve his Application out of the jurisdiction on Mr Wallace without permission.
- 24. I should say that Ms Read also drew my attention to the fact that at the time of service, by means of a Practice Note issued by the Chancellor dated 7 April 2017 (Practice Note (Ch D: Relating to the Insolvency Proceedings Practice Direction) [2017] BCC 221), IPPD 2014 was to be treated as not in effect in cases where it contradicted the newly introduced IR 2016 (which came into force on 6 April 2017). Ms Read submitted that the analysis above involves no contradiction between the two, and I agree. It is correct to say that IR 2016 Schedule 4, paragraph 1(8) provides that CPR Part 6 is to apply to the service of documents outside the jurisdiction, which might have been thought to exclude the operation of IPPD 2014, paragraph 6.5. But in fact CPR 6.33 (which deals with the categories of case in which service out may be effected without permission) provides as follows in CPR6.33(3):

"The claimant may serve the claim form on a defendant out of the United Kingdom where each claim made against the defendant to be served and included in the claim form is a claim which the court has power to determine other than under the 1982 Act, the Lugano Convention, the 2005 Hague Convention, or the Judgments Regulation, notwithstanding that –

- (a) the person against whom the claim is made is not within the jurisdiction; or*
- (b) the facts giving rise to the claim did not occur within the jurisdiction."*

25. It seems to me that service of the Application in this case, based on a combination of the IR 2016, the IPPD 2014 and the 2000 Regulation, fell within this catch-all language. To put it another way, at the time IPPD 2014 paragraph 6.5 described one of the categories of case for service out without permission expressly recognised by CPR Part 6, and therefore there was no inconsistency between them or between IPPD 2014 and IR 2016.
26. It follows from this conclusion that in my view, the certification provided by the Liquidator's solicitors in Form N510 was the wrong certification. No permission to serve out was required, but the relevant provision was CPR6.33(3) not CPR6.33(1). Here, however, I agree with the approach of HHJ Hacon in *BDI-BioEnergy International AG v. Argent Energy Limited* (unreported, 19 December 2017, 2017 WL 06519516), that the critical question is not whether the correct box has been completed on the Form, but substantively whether the case is an appropriate one for service without permission or not (see at [19]). For the reasons already given, it seems to me it is, and that the defect in Form N510 is a minor, formal irregularity which causes no prejudice and which does not invalidate the service effected: see IR, Rule 12.64.

Scope of IA 1986 s.236

27. I come on to the principal issue of jurisdiction on which Ms Read addressed me, namely the scope of IA 1986 section 236, and specifically, whether it empowers the court to make an order against a Respondent abroad. Differing views have been expressed in the authorities as to the proper scope of the section and as to whether its reach extends as far as allowing orders to be made directed to parties overseas.
28. I should deal with the principal authorities on this issue which Ms Read took me to in her submissions.
29. It is convenient to start with *In Re MF Global UK Limited (in special administration)* (No. 7) [2015] EWHC 2319 (Ch), [2016] Ch 325. In that case, administrators were appointed to MF Global UK Limited ("*MF Global*") under the Investment Bank Special Administration Regulations 2011 (SI 2011/245). The administrators applied for an Order directed to a company in France, LCH Clearnet SA ("*LCH France*"). The proposed Order sought production of documents and a description by way of witness statement of the sales or auction processes by which LCH France had closed out certain of MF Global's open trading positions at a time of extreme financial turbulence. The suspicion was that the processes followed had magnified the losses for which MF Global was liable. The case was not one falling within the 2000 Regulation. That was because of the status of MF Global as an investment undertaking providing services involving the holding of funds or securities for third parties. Its special administration was therefore excluded from the 2000 Regulation by means of Article 1(2) (as the parties in *MF Global* were agreed: see at [32]).
30. David Richards J declined to make the Order sought. This was based on his analysis of section 236, and of the decision of the Court of Appeal in an earlier case, *In Re Tucker (RC) (A Bankrupt), ex p Tucker (K.R.)* [1990] Ch. 148. *Re Tucker* was concerned with Section 25 of the Bankruptcy Act 1914 (the "*1914 Act*"), which David Richards J described as in "*substantially the same terms as Sections 236 and 237*" IA 1986 (see at [21]). The Court of Appeal in *Re Tucker* had determined that Section 25 was territorial in scope (i.e., that it could only be used to make Orders directed at

persons within the jurisdiction). The logic of David Richard J's position was that section 236 IA1986 is a re-enactment of section 25 of the 1914 Act; that it is a principle of construction that a re-enactment is intended to carry the same meaning as its predecessor; and consequently, section 236 had to be regarded as subject to the same territorial limitation as section 25 (see in particular David Richard J's reasoning at [23] and [32]).

31. In *Re Tucker* itself, a trustee in bankruptcy obtained orders for the issue of two summonses directed to the bankrupt's brother, who was a British subject resident in Belgium. The brother objected on the footing that the Court had no jurisdiction to order service of the summonses out of the jurisdiction. The Court of Appeal agreed, based on its construction of section 25 of the 1914 Act which provided (in material part) as follows:

"(1) *The Court may, on the application of the official receiver or trustee, at any time after a receiving order has been made against a debtor, summons before it the debtor or his wife, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person whom the Court may deem capable of giving information in respect to the debtor, his dealings or property, and the Court may require any such person to produce any documents in his custody or power relating to the debtor, his dealings or property.*

...

(6) *The Court may, if it thinks fit, order that any person who if in England would be liable to be brought before it under this section shall be examined in Scotland or Ireland, or in any other place out of England".*

32. Dillon LJ, giving the leading judgment, said that the important question was to assess the meaning of the statutory language. He went on as follows, at page 158 D-H (in a passage referred to expressly by David Richards J in *MF Global* at page 337):

"I look, therefore, 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 have accepted service or are present within the territory of that country when served with the appropriate process. There are exceptions under RSC, Ord. 11, but even under those rules no general power has been conferred to serve process on British subjects resident abroad. Moreover, the English Court has never had any general power to serve a subpoena ad testificandum or subpoena duces tecum out of the jurisdiction on a British subject resident outside the United Kingdom, so as to compel him to come and give evidence in an English Court. 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 (the scope of which will have to be considered on any respondent's notice) 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 if the person is not in England he is not liable to be brought before the English Court under the section".

33. The wording of section 25(6) of the 1914 Act is effectively replicated in the wording of section 237(3) IA 1986 (see above at [13]).
34. The upshot is that *MF Global* supports the proposition that section 236 is territorially limited in its scope, and does not empower the court to make Orders directed to persons outside the jurisdiction.
35. In a case decided in 1997, however, some years before *MF Global*, the Court of Appeal appeared to take a more expansive view of section 236: *Re Mid East Trading Limited, Lehman Brothers Inc v. Phillips and others* [1998] 1 All ER 577. There, an overseas company incorporated in the Lebanon was made the subject of winding-up proceedings in England. The Liquidators applied to the Court for an Order under section 236 for production of (amongst other things) documents held by a Lehman Brothers entity in New York ("*LBI*"), which it was said might shed light on a fraud perpetrated via the medium of the company. The Court of Appeal affirmed (with some modifications) the Order made at first instance by Evans-Lombe J (see [1997] 3 All ER 481).
36. In the Court of Appeal, the principal challenge to the Order by *LBI* rested on a principle said to be derived from the decision of Hoffmann J (as he then was) in *MacKinnon v. Donaldson Lufkin and Jenrette Securities Corp* [1986] Ch. 482. That principle, as identified in *Re Mid East Trading Limited*, is as follows (the text is taken from the headnote in *MacKinnon*: see [1986] Ch. 482, at 482G):

" ... save in exceptional circumstances, the court should not require a foreigner who is not a party to an action, and in particular a foreign bank which would owe a duty of confidence to its customers regulated by the law of the country where the customer's account was kept, to produce documents outside the jurisdiction concerning business transacted outside the jurisdiction ..."
37. In *MacKinnon*, a Plaintiff in English litigation had obtained both an *ex parte* order under Section 7 of the Bankers Books Evidence Act 1879, and a *subpoena duces tecum*, against an American bank (Citibank) which had offices in England & Wales and carried on business here. The order and subpoena, however, were for the production of

documents in New York. Hoffmann J set both aside. This was on the basis that, although Citibank was within the personal jurisdiction of the Court, the order and the subpoena involved an excess of subject matter jurisdiction (see page 493C-E). That was so in the sense that they were directed to a non-party to the litigation and sought to regulate its conduct abroad. Hoffmann J thought that "[t]he principle is that a State should refrain from demanding obedience to its sovereign authority by foreigners in respect of their conduct outside the jurisdiction"(page 493G), and that (page 494C-D):

" ... the subpoena and Order in this case, taking effect in New York, are an infringement of the sovereignty of the United States."

38. In dealing with the effect of *MacKinnon* in *Re Mid East Trading*, Chadwick LJ, delivering the judgment of the Court, thought there was force in the submission that the making of an order under section 236 in respect of documents abroad involved an assertion of sovereignty (see at page 592 g-h). He went on to say, however, that any such assertion of sovereignty was one which "*the legislature must be taken to have intended the courts to make in appropriate cases*" (p. 592h) He continued (592h-593b):

"If that is a correct view, then it is not for the courts to erect the additional hurdle of 'exceptional circumstances'. The power to make an order under s236 is to be exercised in accordance with the principles explained by the House of Lords in the British and Commonwealth case. The applicant must satisfy the court that, after balancing all the factors, there is a proper case for such an order to be made. A proper case is one where the liquidator reasonably requires to see the documents in order to carry out his statutory functions and production of the documents does not impose an unnecessary or unreasonable burden on the person required to produce them in the light of the liquidator's requirements. In applying that test – and, in particular, in considering what burden would be imposed on a bank required to disclose details of another customer's affairs – the court will, of course, give weight to any risk that compliance with the order would or might expose the bank to claims for breach of confidence, or to criminal penalties, in the jurisdiction in which the documents are. Where there is a real risk, it seems to us likely that the Companies Court will be slow to order production, at least if there is some other route by which the documents can be obtained which affords protection to the bank. But that is because the risk that the bank will be exposed to liability is a factor – albeit an important factor – to be weighed with others; and not because there is some special hurdle of 'exceptional circumstances' to be overcome by the applicant".

39. The next case is *Official Receiver v. Norriss* [2015] EWHC 2697 (Ch), [2016] BPIR 188, a decision of His Honour Judge Hodge QC (sitting as a Judge at the High Court) in September 2015, just a few months after the judgment of David Richards J in *MF Global*.

40. In *Norriss*, the Liquidator of Omni Trustees Limited sought an order under section 236 directed to a Hong Kong resident, Mr Norriss. The Liquidator considered that Mr Norriss would have information relevant to transfers of the company's assets. The Order sought (see at [8]) was that Mr Norriss should produce a witness statement, with supporting documents, detailing his knowledge in relation to certain transactions.
41. With great diffidence, HHJ Hodge QC took a different view to that adopted by David Richards J in *MF Global*. This was on the basis that there *was*, in fact, a material difference in structure between section 25 of the 1914 Act and section 236 IA 1986. Whereas under the former, the power conferred on the Court to order the production of documents was merely ancillary to, and dependent upon, the principal power conferred by section 25, which was to summons a respondent to attend for examination before the Court, HHJ Hodge QC considered that was not true of section 236. By section 236(2), the Court may summons any of the three categories of person named to appear before it; but by section 236(3), the Court may also require any such person 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. Construing the language of those two subsections, HHJ Hodge QC held that section 236 conferred a free-standing power, independent of the power to summons a person before the Court for examination, to require a respondent to submit an account of dealings and to produce books, papers and records.
42. Since the thrust of the decision in *Re Tucker* was that "*the Courts will not compel someone to come to this jurisdiction to be examined on oath and to produce documents*" (see *Norriss* at [15]), the logic of that decision did not apply under the changed structure of section 236 to limit the free-standing power to call for documents under section 236(3). Thus, at [20]-[21], HHJ Hodge accepted the submission of the Liquidator that David Richards J's judgment:
- "... failed properly to distinguish between, on the one hand, requiring a respondent to attend to be examined on oath and, on the other, requiring a respondent to give an account of dealings or to produce documents".*
43. Applying this logic, since in *Norriss* the Liquidator sought only the production of a witness statement by the party resident abroad, no territorial limitation applied and the Order was made.
44. Finally, in *Willmont & Sayers v. AS Citadele Banka* [2018] EWHC 603 (Ch), an Order was sought by a trustee in bankruptcy under section 366(1)(c) Insolvency Act 1986 against a Latvian bank. Section 366 is the direct successor to s.25 of the 1914 Act, applicable in cases of personal bankruptcy. Section 366(1) gives the Court power to "*summon to appear before it*" certain categories of person, including (at subsection(1)(c)) "*any person appearing to the court to be able to give information concerning the bankrupt or the bankrupt's dealings, affairs and property.*" The section then goes on to provide that the court may require any such person to submit a witness statement or to produce documents relating to the bankrupt, or the bankrupt's dealings, affairs or property.
45. Mr Clive Freedman QC (sitting as a Judge of the High Court) approved an order requiring the bank to provide a written account of information concerning certain bank

accounts associated with the bankrupt. It seems that the proposed order was approved by the bank, but the Judge nonetheless sought to be satisfied that he had jurisdiction to make it and that it was appropriate to do so. In dealing with the question of jurisdiction, he drew attention to the trustee's submission that England and Wales was the bankrupt's "centre of main interests", within the meaning of that phrase in the 2000 Regulation, and went on:

"In cases not involving the EC Regulation, there were questions about the extraterritorial effect of an order under s.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 EC Regulation, I am satisfied that jurisdiction applies here to make an order under s. 366 against a Latvian bank."

Scope of section 236: Discussion and Conclusion

46. Overall, these authorities present a somewhat fragmented picture. In those circumstances, it seems to me appropriate that I should approach the analysis in this case from first principles. The point which arises is essentially one about the proper construction of section 236, and specifically as to the meaning of subsections 236(2) and (3): in subsection (3), is the phrase "any such person as is mentioned in subsection (2)(a) to (c)" confined to persons within the jurisdiction or can it extend to persons abroad?
47. In answering this question, a number of factors are in play.
48. To begin with, there is a rule of construction that English statutes are presumed not to have extraterritorial effect. Much depends on the context, however.
49. For example, it seems to me that where a provision is concerned with requiring attendance before the Court, and either reflects directly or is closely modelled on the Court's subpoena power, the presumption in favour of territorial application must be very strong. That is because, as Lord Mance explained in *Masri v. Consolidated Contractors Int. (UK) Ltd (No. 4)* [2009] UKHL 43, [2010] 1 AC 90, historically the court's power to enforce the attendance of witnesses and to fine defaulting witnesses has been limited territorially (see at p.p. 134-135):

"From the Statute of Elizabeth 1562 (5 Eliz I C 9) onwards, this has been regulated by statute and had never extended beyond the United Kingdom. The procedure enacted in relation to other jurisdictions involves the taking of evidence, on commission or otherwise, with the assistance of the foreign court. The service of a writ of subpoena is still only possible under section 36 of the Supreme Court Act 1981 in respect of persons in one of the parts of the United Kingdom. The limitation on the court's power in this respect corresponds with the principle of international law, summarised robustly by Dr Mann in his Hague lecture, 'The Doctrine of Jurisdiction in International Law', Recueil des Cours, 1964-I, The Definition of Jurisdiction, p. 137:

'Nor is a state entitled to enforce the attendance of a foreign witness before its own tribunals by threatening him with penalties in case of non-compliance. There is, it is true, no objection to a state, by lawful means, inviting or perhaps requiring a foreign witness to appear for the purpose of giving evidence. But the foreign witness is under no duty to comply, and to impose penalties upon him and to enforce them either against his property or against him personally on the occasion of a future visit constitutes an excess of criminal jurisdiction and runs contrary to the practice of states in regard to the taking of evidence as it has developed over a long period of time.'"

50. Even so, in some cases Court will nonetheless make orders requiring the attendance of persons abroad. Thus, it has been held that the Court has power under section 133 IA 1986 to order the public examination of a director of an English company which is in compulsory liquidation, or of other persons who were involved in the promotion, formation and management of the company, regardless of whether they are resident or present in England: *Re Seagull Manufacturing Co. Ltd* [1993] Ch 345 (CA). In that case, the decision in *Re Tucker* was distinguished (among other grounds) on the basis that the orders in *Re Tucker* were sought not against the bankrupt, but in effect against a third party (the bankrupt's brother), and that it was one thing to require attendance of a bankrupt over whom the Court had jurisdiction and in respect of whom it had made a bankruptcy order, and quite another thing to seek to enforce the attendance of third parties whom the Court suspected of having relevant property or information (see at p. 357F-H). As to s133 IA itself, that was much narrower than s.25 of the 1914 Act and was confined in its scope to directors and others who had voluntarily concerned themselves in a specified capacity in the affairs of the company which was being wound up (p. 358A). There was a strong interest in such persons being subjected to public examination in England in connection with the affairs of the company, and the Court had power to make orders requiring their attendance. In so doing, it would not be concerned with the question whether such orders could effectively be enforced outside the jurisdiction (p.355B).
51. In *Masri (No. 4)* Lord Mance, explained the result in *Re Seagull Manufacturing Co. Ltd* as resting essentially on two factors (see at [23]): first, the public interest that those responsible for the company's state of affairs should be liable to be subjected to a process of investigation in public; and second, the "*universality of a winding up order, in the sense that it relates at least in theory to all assets wherever situate ...*". At the same time, Lord Mance said at [22] that he had "*some difficulty*" with the idea that enforceability of any order outside the jurisdiction was irrelevant, and went on: "*Impracticality of enforcement is in my opinion a factor of greater relevance than Peter Gibson J's words suggest.*"
52. The presumption against extraterritoriality has been rebutted in other cases in the insolvency context which are concerned not with the attendance of witnesses and the collection of information, but instead with the setting aside of transactions which have contributed to the insolvency.
53. Thus, it has been held that section 238 IA 1986 is subject to no territorial limitation, so that it applies to allow an application to be made to set aside as against "*any person*"

(wherever situate) a transaction at an undervalue: *Re Paramount Airways Ltd* [1993] Ch 223 (CA). Sir Donald Nicholls V-C in that case did not think it was possible to read down the words "*any person*" in the section, in particular given current patterns of cross-border business which support a more expansive construction, but thought that the risk of injustice was sufficiently addressed by the fact that both in determining whether to permit service out, and in determining whether to make any order as a matter of discretion, the Court would need to be satisfied that there was a "*sufficient connection*" with England & Wales (see p. 240C and p. 241G). Essentially the same analysis was later adopted by the Supreme Court in *Bilta (UK) Ltd v. Nazir (No.2)* [2015] UKSC 23, [2016] AC 1, in deciding that the fraudulent trading provision in s.213 IA 1986 is not subject to any territorial limitation, and that "*any persons*" in that section is not confined to persons within the jurisdiction. Lord Sumption said that the considerations identified by Sir Donald Nicholls V-C in *Paramount Airways* were "*unanswerable and equally applicable to section 213.*"

54. Drawing the threads together, in light of these authorities and those mentioned earlier in this Judgment, I come to the following conclusions:

- i) Looked at in light of Lord Mance's comments regarding the nature of the Court's subpoena power (see [49] above), it seems to me that the conclusion reached in *Re Tucker* is readily understandable. As the Court recognised in that case, section 25 of the 1914 Act is really concerned with enforcing the attendance of persons before the Court. That is what Dillon LJ was referring to when he said he did not think the intention was to empower to the Court to "*haul before it*" persons who could not be served with a summons within the jurisdiction.
- ii) As regards the structure of the modern section 236, and with deference to the views expressed by David Richards J. in *MF Global*, I respectfully agree with and adopt the analysis of HHJ Hodge QC in *Norriss*. It seems to me that, as a matter of language, the power to require the production of documents expressed in section 25 of the 1914 Act was not a standalone power, but instead inextricably linked to the power to *summon* persons before the court under section 25(1). In contrast, the power under IA 1986 section 236(3) is, I think, a standalone power, divorced from the power to summons parties in section 236(2). Certainly, it seems to me that its operation is not dependent upon any of the other machinery in sections 236 and 237 for compelling attendance, including in particular that in section 237(3) which Dillon LJ in an earlier form found so conclusive in *Re Tucker* (see above at [32]). To express the same point more crisply, in my judgment the power to require the production of documents and information under section 236(3) may be exercised even if no summons is issued under section 236(2).
- iii) Whatever may be the correct position under section 236(2), I am concerned in this case only with section 236(3), and even if it is correct that the power to issue a summons under section 236(2) should be confined to persons within the jurisdiction, it seems to me that the power to require the production of documents and information is different. It is less invasive, and does not involve the exercise of anything akin to the Court's subpoena power. 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.

- iv) That is not to say, however, that the power should be exercised in respect of a person abroad without regard to the international dimension. The categories of individual falling within section 236(3) are very broad, and include not only officers of the company but also (see section 236(2)(b) and (c)), "*any person*" known or suspected to have property of the company, or thought "*capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the company*". The latter formulation in particular is potentially very wide, and may be apt to cover third parties who have had little direct connection with the company. The relevant safeguard, it seems to me, by analogy with the reasoning in *Re Paramount Airways Ltd* and *Bilta (UK) Ltd v. Nazir*, is for the Court to ask itself whether, in respect of the relief sought against him, the respondent is sufficiently connected with the jurisdiction for it to be just and proper to make an order despite the foreign element. In practice, it may be that in most if not all cases such considerations are adequately addressed in the Court applying the discretionary test derived from the speech of Lord Slynn in the *British & Commonwealth* case. Chadwick LJ in *Re Mid East Trading* seemed to suggest as much, in the passage from his judgment set out at [38] above, where he said that in deciding whether to make an order against a foreign bank the Court should be alive to the potential relevance of foreign banking laws. In any event, it seems to me that in a case involving a respondent overseas, it is important that in exercising its discretion the Court should take account of the international dimension in assessing whether an order should be made at all, and must be wary of making orders which seek to regulate the conduct of third parties abroad in respect of matters having no real connection with this jurisdiction. In my view, this was the focus of Hoffmann J.'s reasoning in *MacKinnon*, when he said that the court had no subject matter jurisdiction: there was insufficient connection with the jurisdiction to justify the court making an order requiring the third party bank to take action abroad (*i.e.*, make documents available in the United States), even though the third party was present in England and subject to the personal jurisdiction of the English court.
55. Turning then to the present case, it seems to me that there is a sufficient connection, and that therefore the Order sought is justified and does not involve any excessive or exorbitant exercise of jurisdiction:
- i) The Court has international jurisdiction over the winding-up of the Company under Art.3 of the 2000 Regulation. As noted above, in *Masri (No. 4)*, Lord Mance explained the outcome in *Re Seagull Manufacturing* in part on the basis of the "*... universality of a winding up order, in the sense that it relates at least in theory to all assets wherever situate.*" It seems to me that that consideration has particular relevance in a case falling within the 2000 Regulation where, as between the relevant Member States (including here most pertinently the Republic of Ireland), the jurisdiction and authority of the Court of the company's centre or main interests is expressly recognised. And all the more so given the combined effect of Arts 4(2)(c), 18 and 25, which give the Liquidator authority to exercise the powers conferred on him by English law in other Member States, and require judgments of this Court to be recognised without any formality. Consistent with the views expressed by Mr Clive Freedman QC in *Willmont & Sayers v. AS Citadele Banka*, it seems to me that these provisions expressly recognise the English Liquidator's legitimate interest in taking actions abroad,

within other Member States, in the exercise of his statutory function. It will be recalled that the special administration of MF Global (above at [29]) fell outside the scope of the 2000 Regulation, and quite aside from other matters, that seems to me an important point of distinction between that case and this.

- ii) Moreover, Mr Wallace is not a third party at some remove from the Company's business. He is not in a position analogous to the third party bank in *MacKinnon*. As bookkeeper, he was an important part of the Company's operations. It seems that he, and no-one else, has or may have documents and information which are critical to the Liquidator properly administering the winding-up of the Company. Indeed, it is difficult to see how the winding-up can proceed without access to the information and documents he is presumed to have. 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. The Court on those facts has an entirely legitimate interest in regulating his conduct abroad, and in requiring him to make such documents and information available to the Liquidator. That overall result is, I think, consistent with the decision of the Court of Appeal in *Mid East Trading*, and with the first instance decisions in *Norriss* and *Willmont & Sayers*. It is also consistent with the overall logic and approach of Hoffmann J. in *MacKinnon*, of the Court of Appeal in *Re Paramount Airways*, and of the Supreme Court in *Bilta (UK) Ltd v. Nazir*.

Disposal

56. For all the above reasons, I would propose to accede to the Liquidator's Application and to make an Order against Mr Wallace as requested. I would propose, however, in light of the time that has elapsed since the original correspondence with him, that the time period for Mr Wallace to comply with the Order should be 42 days, not 28 as in the Applicant's draft. If Mr Wallace reasonably requires additional time beyond that, he will be able to seek it; but I hope that given the slow progress in the winding-up so far, matters can now proceed efficiently and with minimal further delay.