

Hans Brochier Ltd v. Exner
Case No: 5618/06
[2006] EWHC 2594 (Ch)

High Court of Justice Chancery Division

Ch D

Before: Mr Justice Warren

Tuesday, 15 August 2006

Representation

Mr D Allison appeared on behalf of the Claimant.
Mr M Todd and Mr J Potts appeared on behalf of the Defendant.

Judgment

Mr Justice Warren:

1 This is an application by Messrs William David Joseph and Ian John Allen who were, on 4 August 2006, with effect from 12.34pm, appointed by the directors of the applicant company, Hans Brochier Holdings Limited (HBH) as joint administrators. They were appointed on the basis that the centre of main interest of the company of HBH was in England. It now appears that the centre of main interest may be in Germany. The applicants seek a declaration to that effect and various related relief.

2 I should give some history, which I take from Mr Joseph's witness statement. HBH is a company incorporated in England and Wales under the Companies Act 1985. It is a member of a group of companies, the ultimate parent of which is Aubach Holdings Limited, which is based in Mauritius. Aubach was established in late 2003 as an investment vehicle with the objective of acquiring industrial companies and assets in Germany as long-term holdings. Its main area of focus is distressed companies in chemical, construction and real estate sectors.

3 The Aubach group acquired HBH in December 2004. In January 2005, HBH acquired a 94.9 per cent stake in Brochier Fervaltuns, which was a general partner in Hans Brochier GmbH & Co. KG (HB GmbH), a German construction pipeline business.

4 HB GmbH is now part of HBH. It specialises in plant engineering and the construction and maintenance of pipelines, predominantly for sewers and sewerage works. There are around 720 workers in total, 120 of whom are part of a plant engineering business based throughout Germany.

5 HBH's assets and liabilities were formerly the assets and liabilities of HB GmbH. As a result of a reorganisation described below the assets and liabilities of HB GmbH passed to HBH under the German law of universal succession. This occurred in November 2005 and all the assets and liabilities of HB GmbH passed to HBH under that law.

6 Mr Joseph was consulted in his capacity as an insolvency practitioner in relation to the financial position of HBH and the possibility of restructuring it. By the time of his involvement, or that of his firm Smith and Williamson, involvement, the directors had already failed to pay the wages owed to the employees on 28 July 2006. This resulted in a great deal of unrest amongst the workforce, culminating in protest at HBH's Nuremberg office, which ended in HBH's legal advisors and shareholder representatives being barricaded in an office for several hours.

7 Mr Joseph was informed that on Friday, 4 August 2006, employees had again attended the Nuremberg office and were removing assets from the premises. It is reasonable to infer that the employees being referred to were German employees and not perhaps a few of the English employees who might have got onto an aeroplane, which one could do in those days, to get to Nuremberg.

8 In addition to these factors, the goodwill of the business of HBH was being rapidly

eroded owing to the failure of certain employees to turn up for work and debtors failing to pay such sums. This necessitated prompt action and administrators were consequently appointed under paragraph 14 of Schedule B(1) to the Insolvency Act 1986.

9 Mr Joseph says that prior to agreeing to act, he considered the location of HBH's centre of main interest to be its registered offices in London. Information provided to him by the directors of the company indicated to him that the employment contracts were with HBH; creditors knew that they were owed debts by an English company; HBH's bank account was in the UK; the company's financial statements were prepared in the UK by the consolidation of the trading results of the various German branches; and a creditor had issued a statutory demand in London for a sum of approximately £5,000 and was threatening a petition.

10 He also says that he was told, although he does not say by whom, but presumably the directors, that the employees of HBH had requested that an English insolvency practitioner be appointed on the basis that HBH is an English company.

11 He goes on to say that following the guidance of the European Court of Justice in Eurofood IFSC Ltd (Case C-341/04), which I will come to in a moment, and upon consideration of the facts provided, which I have just mentioned, the administrators took the appointment as administrators of HBH on the basis that they fell within the ambit of Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings and would be main proceedings as defined in article 3.

12 Article 3(1) provides that:

"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"

13 Article 3(2) provides for the opening of insolvency proceedings of a secondary nature. It reads:

"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."

14 There is a definition in Article 2Ch of "establishment", which means:

"Any place of operations where the debtor carries out a non-transitory economic activity with human means and goods."

15 Article 3(3):

"Where insolvency proceedings have been opened under paragraph 1, any proceedings opened subsequently under paragraph 2 shall be secondary proceedings. These latter proceedings must be winding-up proceedings."

There is debate about whether winding up proceedings include out of court administrations in England.

16 Article 3(4) provides that:

"Territorial insolvency proceedings [those are the ones referred to in paragraph 2] may be opened prior to the opening of main insolvency proceedings in accordance with paragraph 1"

Only where one or both of two conditions are fulfilled. The first is where:

"insolvency proceedings under paragraph 1 cannot be opened because of the conditions laid down by the law of the Member State within the territory of which the centre of the debtor's main interests is situated."

17 I pause here to remark that that could be of relevance in the present case because the German procedure, which I shall come to in a moment, is the commencement of the insolvency regime in Germany but is not the opening of insolvency proceedings for the purposes of article 3 and the question arises whether paragraph A is referring to an absolute impossibility of opening insolvency proceedings or whether it includes a temporary prohibition whilst preliminary proceedings take place."

18 The second is:

"Where the opening of territorial insolvency proceedings is requested by a creditor who has

his domicile, habitual residence or registered office in the Member State within the territory of which the establishment is situated, or whose claim arises from the operation of that establishment."

19 Article 16 provides for the recognition by one Member State's courts of the opening of insolvency proceedings in another Member State. Article 16(1) reading:

"Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings."

20 The centre of main interest is perhaps best described by the decision of the European Court of Justice in Eurofood IFSC Ltd (Case C-341/04). At paragraph 31 to 34 the court said this:

"(31) The concept of the centre of main interests is peculiar to the Regulation [that is insolvency regulation]. Therefore, it has an autonomous meaning and must therefore be interpreted in a uniform way, independently of national legislation.

(32) The scope of that concept is highlighted by the 13th recital of the Regulation, which states that 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'.

(33) That definition shows that the centre of main interests must be identified by reference to criteria that are both objective and ascertainable by third parties. That objectivity and that possibility of ascertainment by third parties are necessary in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open main insolvency proceedings. That legal certainty and that foreseeability are all the more important in that, in accordance with Article 4(1) of the Regulation, determination of the court with jurisdiction entails determination of the law which is to apply.

(34) It follows that, in determining the centre of the main interests of a debtor company, the simple presumption laid down by the Community legislature in favour of the registered office of that company can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect."

21 Mr Joseph goes on to explain that during the afternoon of 4 August 2006 and after he and his co-administrator had been appointed, he was informed by certain employees of HBH that a German insolvency practitioner had also been appointed in respect of HBH. He later discovered that the office holder in question was Herr Joachim Exner of the firm of Beck & Partner. Herr Exner had been appointed the preliminary administrator approximately 45 minutes after Mr Joseph's appointment.

22 It is common ground that under German law there is a preliminary appointment, which is then formalised later on with an opening of proceedings. The German proceedings are therefore not open for the purposes of the Regulation and will not be until formalisation, which normally occurs within three months of the preliminary appointment.

23 Mr Joseph, having been appointed on Friday, attended the Nuremberg offices of HBH the following Monday morning. Upon speaking to the employees and Herr Exner on site, he learnt of new information, which indicated that HBH's centre of main interest may in fact be in Germany, not in England. He says that this information was not previously available to him prior to his appointment, nor was he able to obtain it given the urgency of his appointment and the workers' sit-in, which I have described.

24 The information included the following. First, while HBH did have a UK bank account it also had German accounts and most transactions, certainly of late, were effected through the German accounts. There was a strong feeling amongst a significant proportion of the employees that an English Insolvency Practitioner was not the appropriate office holder and, in fact, Herr Exner was appointed upon the application of the employees of HBH. And thirdly, the financial statements were not always prepared in England.

25 Following further consideration, Mr Joseph's belief is now that the centre of main interest is indeed in Germany and he points to the following facts. First, that the majority of the employees work in Germany and do not accept that an English insolvency practitioner should be appointed. I interpose here that the fact that the majority of the employees work in Germany is important but it is not really relevant that they do not

accept that an English insolvency practitioner should be appointed. Secondly, a large part of HBH's business is run from Germany. Thirdly, most of HBH's banking has occurred through German accounts.

26 Herr Exner himself has given evidence and he remarks that at the time of his appointment he was not aware that any appointment had been made over the company in England. I accept his evidence, which is contained in paragraphs 7 to 11 of his witness statement, and which for the record I will read. It is only one page:

"Although the company's registered office is in England, there are no branches in England and the company has never traded in England. It appears to me that all the trading activities of the company are carried out from Nuremberg, Germany [he attaches pages of the company's website and general purchase terms prepared in March 2006, which are subject to German law in support of that conclusion].

The company has maintained its primary bank relationship with German banks and in fact its key trading bank accounts are held with a branch of a German bank. Although bank accounts have been opened outside Germany, these have not been used as day to day operating accounts and I understand currently have a zero or minimal credit balance. The main creditors of the company are located in Germany. [He is] informed by the main creditor of the company, AGR, that it regards the company as operating out of Germany and fully expects any insolvency proceedings in respect of the company to take place in Germany. AGR has at all times communicated with the company via its address in Nuremberg rather than with its registered address in the UK. In addition to AGR, the other main creditors of the company consider that the company operates its business out of Germany." The company has currently over 700 employees in Germany. Herr Exner is not aware that there are any English employees but his investigations are ongoing (and it does seem that there may be a few, I add, in England). It is clear, however, that all the employees in Germany are employed under contracts of employment governed by German law. Additionally, the German insolvency court, in the order appointing Herr Exner as preliminary insolvency administrator, decided that the company's centre of main interest was in Germany on the basis that Germany is the place where the company generally conducts its business and administration.

This being a judgment of the German court, the court said, 'Nuremberg is the place where the company generally conducts its business and its administration. In Nuremberg there are all functions located necessary for an operative business, such as the financial and personnel administration. All relations to customers and clients are administered and co-ordinated in Nuremberg, the websites of the company, which are in the Court's possession show that the actual seat and central administration of the company is in Nuremberg, so that as a consequence for any third party the centre of main interest will be Nuremberg.

27 Of course, the decision of the Nuremberg court is not strictly binding on me but I do pay attention to the conclusion reached, as will become apparent in a moment, because of the conclusion I reach, and so I find comfort and support in that.

28 In my judgment, the only possible conclusion to reach from the totality of the evidence, which I have recited, is that the centre of main interest is in Germany and has, at all material times, and particularly on 4 August 2006, been so. The objective and ascertainable facts point inevitably to that conclusion. I make no criticism of the administrators for taking the view, which they did, in an urgent situation on the basis of the facts then known.

29 For completeness, I should mention some of the benefits that are perceived as accruing if the main proceedings are in Germany. Herr Exner lists these in his witness statement, I summarise them very briefly. There is a large advantage in relation to German social security law, which will give the employees a significant advantage as compared with an English administration. The vast majority of the company's employees are located in Germany and are subject to German employment and social security laws and it is clear, in Herr Exner's view and I agree with this, only an experienced German insolvency administrator who will be able adequately to address those rights and interests.

30 The company's entire business operations are run out of its headquarters in Nuremberg so that all the relevant information and documents are located in Germany. The vast majority of the documents are in the German language and most of the legal and

contractual relationships of the company are subject to German law.

I think that is probably enough to list, the other benefits being less important.

31 The result of that conclusion, that the centre of main interest is in Germany, is that no main insolvency proceedings are possible in this country. The status of the appointment of the administrators is therefore not entirely clear and there are two possible views. One is that the appointment was altogether null and void. The second that it was effective as a territorial insolvency proceeding.

32 The second of those possibilities raises some problematical questions under Article 3(4), since the German proceeding is not yet a main insolvency proceeding, not having been opened. Article 3(4) has to be satisfied in order for the appointment to even to be capable of taking effect as a territorial insolvency proceeding.

33 The administrators do not seek to uphold their appointment and are content to have it regarded as entirely void, but they reserve their rights under Schedule B(1) Paragraph 34.2, which is a paragraph that permits an administrator, in case of an invalid appointment, to seek the costs from be remunerated by the person appointing him, in this case the directors of HBH. It applies where the appointment is discovered to be invalid. It is perhaps an open question, and certainly not one that has been debated before me, whether an appointment purportedly of administrators in respect of the entire operation of a company, that is to say a main insolvency proceeding, is invalid when it takes effect only as a territorial insolvency proceeding appointment.

34 I am certainly not going to resolve any of the questions that arise under Article 3(4) today, on this application, but I am asked to make certain declarations. Some I will make. One of them may be a matter for further discussion when I have completed this judgment.

35 It follows from what I have said that I am prepared to declare that the centre of main interest of HBH is in Germany and I am prepared to declare that the appointment of the administrators is invalid as an appointment under Article 3(1) and that it does not give rise to a main proceeding.

36 The more problematical issue is whether I should make a declaration that the appointment is altogether void. It seems to me that other persons who are not before the court may be affected by that, in particular the directors, whom it may be sought to make liable under Paragraph 34.1 of Schedule B(1), and may wish to argue that the appointment is effective as a territorial insolvency proceeding and that they are therefore without that paragraph.

37 Strictly, and no doubt if I did make a declaration, it would not be binding on them as a *res judicata*, but I think it is undesirable that I make such a declaration at this stage, unless there is some compelling reason in relation to the German situation for me to do so. So, I propose, subject to any further submissions, only to make the more limited declaration.

38 I make no order as to Mr Allison's costs today. They will be dealt with, if at all, on another occasion. So far as Mr Todd's team's costs are concerned, Mr Todd, you get them as an expense of the administration in Germany. I am not going to order that the administrators pay them. If you want to make an application against the directors, you may do so, but I am not going to deal with it in their absence. That is my ruling on costs. Please draw up a minute to reflect that.

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