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Modified Universalism comes to Scotland: *Hooley Ltd, Petitioners*

The opinion of Lord Tyre in *Hooley, Petitioners*¹ offers rare consideration of the issues raised by cross-border insolvencies from the standpoint of Scots law. Importantly, it contains the first Scottish endorsement of the principle of “modified universalism.” It will be suggested, however, that the narrow formulation adopted therein runs counter to the spirit of that principle.

A. FACTS

Three Scottish companies, each with their head office in Dundee, operated jute mills in India: Titaghur, Samnugger, and Victoria. The three companies came under associated control in the late 1880s, before merging formally in 1969, with Titaghur as parent. In 1976, the central administration of all three companies was moved to India. Subsequently, after liquidity problems, each incurred substantial pension liabilities that went unpaid. From 1985, an Indian enforcement agency sought satisfaction of these liabilities. On its application, a Calcutta court made a series of orders. First, it placed the control of the mills in the hands of licensees. Secondly, it granted an order precluding Samnugger and Victoria from dealing with or granting any further security over their assets. Thirdly, it ordered that Titaghur’s shares in its two subsidiaries be sold. Liquidation of Titaghur was ordered in 2006, and a petition to wind up Samnugger was presented just prior to the Scottish action. Yet more Indian litigation was pending at the time of decision, three decades after the attempts to recoup the pension liabilities were initiated.

Hooley Ltd, the petitioner and pursuer, was an assignee of floating charges granted by the three jute companies. It appointed an administrator on the basis of being the holder of a qualifying floating charge, and then agreed to purchase the assets of the three companies. Ganges Ltd, the respondent and defender, was an Indian creditor of those three companies and sought to challenge the purported sale of those assets.

B. PROCEDURE AND ISSUES

Hooley raised a petition craving a declarator affirming the validity of the sales. Ganges challenged the procedural competency of declaratory relief in petition procedure,² so Hooley raised a parallel ordinary action.³ Two substantive issues were debated: first, did the principle of modified universalism justify the Scottish court in deferring to the Indian courts to decide

¹ [2016] CSOH 141; 2017 SLT 58.

² Lord Tyre upheld this at paras 9-10.

³ Ganges argued, on the basis of the *lis pendens* rule, that the ordinary action was precluded by the prior, incompetent, petition. This was rejected at para 15.

whether or not the administrators had the power to deal with Indian assets? Secondly, Ganges challenged the appointment of the administrator by Hooley on the basis that the floating charges did not relate to the “whole or substantially the whole of the company’s property”⁴ and were not “enforceable”,⁵ on the basis that the assets were primarily located in India where, as it had not been registered there, the charge was unenforceable. The Court rejected both arguments, but this note will focus on its treatment of the first issue, the second being primarily a matter of statutory interpretation.⁶

C. PRINCIPLES OF CROSS-BORDER INSOLVENCY

(1) Introduction

The rules of cross-border insolvency consist of a complex layering of various statutory regimes – the European Insolvency Regulation (“EIR”),⁷ the Cross Border Insolvency Regulations 2006 (“CBIR”),⁸ and section 426 of the Insolvency Act 1986 (the “1986 Act”) – on top of the residual common law doctrine of ancillary liquidation. Despite these different sources, the principle which animates all of these regimes, to some degree, is “modified universalism”. “Universalism” refers to the ideal that the insolvency of a debtor should take place in a single jurisdiction, and that the effects of those proceedings should be recognised across the world. It may be contrasted with a purely territorial approach, requiring the fragmentation of a debtor’s insolvency in as many jurisdictions as there are assets and creditors. “*Modified* universalism” is a compromise between these two polar opposites, recognising the practical reality that there are situations where it may be legitimate for the desideratum of organised universal co-operation to give way to supervening local interests. That principle is inherent in the design of the EIR and the CBIR, and also has been judicially confirmed in the context of section 426 of the 1986 Act.⁹

⁴ As required by the Insolvency Act 1986, Schedule B1, para 14.

⁵ *Ibid*, para 16.

⁶ In outline, Lord Tyre first held that para 14 simply laid out “formal requirements” and that the inquiry need not “proceed further than the terms of the instrument creating the charge” (*Hooley*, para 38). Secondly, His Lordship held that the criterion of “enforceability” only required that the debtor’s conduct constituted a crystallisation event under the terms of the charge (e.g. a default or breach of covenant) (*Hooley*, para 41).

⁷ Previously Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, which was replaced from 26 June 2017 by Recast Regulation (EU) 2015/848. The post-Brexit shelf life of this new Regulation in Scotland is not yet known.

⁸ Implementing the 1997 UNCITRAL Model Law on Cross-Border Insolvency.

⁹ *Re HIH Casualty and General Insurance Ltd* [2008] UKHL 21, [2008] 1 WLR 852 at para 8 per Lord Hoffmann.

(2) Universalism Approved

Its application to the common law – which was at issue in *Hooley* – is more contestable. Despite forthright endorsement by Lord Hoffmann,¹⁰ subsequent panels of the UK Supreme Court¹¹ and boards of the Judicial Committee of the Privy Council¹² have done much to denude the scope of its potential operation in England and offshore jurisdictions. In *Hooley*, the Lord Ordinary observed that the principle of modified universalism had not yet been discussed by the Scottish courts, but noted that there was nothing in argument that made him doubt its general application.¹³ This is a rather hesitant endorsement, and no sustained theoretical attack was made on the principle in argument. Nevertheless, the recognition that ancillary liquidation in Scotland proceeds from the same basis as it does elsewhere in the Commonwealth is to be welcomed.

(3) Universalism Restricted

What is less welcome, however, is His Lordship's formulation of the principle, which follows in the trend of the UK Supreme Court and Privy Council in restricting its ambit. His Lordship cites¹⁴ Lord Sumption's explanation of modified universalism *Singularis*, which describes it as being:

founded on the public interest in the ability of foreign courts exercising insolvency jurisdiction *in the place of the company's incorporation* to conduct an orderly winding up of its affairs on a worldwide basis, notwithstanding the territorial limits.¹⁵

The emphasised phrase demonstrates the Court's approach that a company's place of incorporation is the pre-eminent jurisdiction for its winding-up. In other words, insolvency proceedings taking place there are the “main” or “primary” proceedings, with any other proceedings being “ancillary” or “secondary”. His Lordship then held that modified universalism could not justify the courts of the main insolvency jurisdiction assisting or deferring to the secondary proceedings. With respect, issue may be taken with both limbs of this reasoning.

¹⁰ *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26; [2007] 1 AC 508 (PC, Isle of Mann) at paras 16 to 20.

¹¹ *Rubin v Eurofinance SA* [2012] UKSC 46; [2013] 1 AC 236.

¹² *Singularis Holdings Ltd v PricewaterhouseCoopers* [2014] UKPC 36; [2015] AC 1675 (PC, Bermuda); *Stichting Shell Pensioenfonds v Krys* [2014] UKPC 41; [2015] AC 616 (PC, BVI).

¹³ *Hooley*, para 35.

¹⁴ *Ibid.*

¹⁵ *Singularis*, para 23. The emphasis is supplied by Lord Tyre: whether Lord Sumption intended for this emphasis is unclear.

D. PRIMACY OF PLACE OF INCORPORATION?

Though reflecting orthodoxy, it is by no means self-evident that the courts of the place of incorporation should still enjoy a monopoly over insolvency jurisdiction. Certainly, the concept plays no role under the EIR or the CBIR. Further, the problem with the place of incorporation, noted by Lord Hoffmann in *Re HIH* is that this may be located in “some offshore island with which the company's business has no real connection”.¹⁶ His Lordship then suggested that the “centre of main interests”, or COMI, test – which applies under both the EIR and the CBIR¹⁷ – may be a more appropriate connecting factor for the common law of cross-border insolvency. It focuses upon the “place where [the company] conducts the administration of [its] interests on a regular basis”.¹⁸ The starting point is a presumption that the COMI is located at the place where the company has its “registered office”,¹⁹ but this may be rebutted where it would be apparent to third parties that the company was centrally administered elsewhere.²⁰

All three companies in *Hooley* had been centrally administered in India for around forty years, and the Dundee head office seems to have retained merely a “letterbox” function with which the business had no real connection. That being so, it is indubitable that the COMI of each debtor would be held to be located in India.

The Lord Ordinary made reference to this point in *Hooley*, but rejected its relevance by reference to *Rubin v Eurofinance*.²¹ His Lordship described that decision as having:

characterised the formulation of a new rule for the identification of courts which were to be regarded as courts of competent jurisdiction as being a matter for the legislature and not for judicial innovation.²³

However, it would seem that the judgment in *Rubin* does not bear directly upon the question at issue in *Hooley*. Lord Collins's observations related to the recognition and enforcement of foreign judgments, not the recognition of foreign insolvency proceedings. They do not preclude the adoption of a more extensive approach to the question of whether or not judicial assistance should be extended to such proceedings.

¹⁶ *Re HIH*, para 31.

¹⁷ See *Re Stanford International Bank Ltd (In Receivership)* [2010] EWCA Civ 137; [2011] Ch 33, applying the European definition of COMI to the CBIR.

¹⁸ EIR, Recital (13) (now Article 3(1) of the Recast).

¹⁹ EIR, Article 3(1).

²⁰ See Case C-341/04 *Eurofood IFSC* [2006] ECR I-3813.

²¹ *Hooley*, para 36, referring to *Rubin* at para 129.

²³ *Ibid.*

The Court's opinion may be contrasted with the Singaporean decision of *Re Opti*²⁴ which was delivered a few months prior to *Hooley*. In recognising the Japanese winding up of a BVI company, the court noted that the COMI criterion "provided a strong connecting factor" which reflected "a greater sensitivity to Universalist notions".²⁵ The judge also endorsed the sentiment that the primacy of the place of incorporation may not command as much juristic support as Lord Collins surmised in *Rubin*,²⁶ and that its practical merits as a connecting factor may be null where, as in *Hooley*, the entirety of the company's business is conducted elsewhere.²⁷

Nevertheless, as Lord Tyre maintained the primacy of the place of incorporation, any Scottish proceedings would be "main" or "primary" proceedings, with the Indian proceedings being "ancillary" or "secondary". Here, one may observe the paradox that, if the office-holder conducting the insolvency in India had come to Scotland and applied for assistance under the CBIR, the opposite conclusion would be reached. As each of the companies would have their COMI in India, the Scottish courts would be obliged to designate the proceedings there as "main" proceedings, and its own proceedings as secondary.

E. PRIMACY OF PRIMARY PROCEEDINGS?

The Court's rejection of the role of COMI would be of little consequence if no stock was placed in the distinction between primary and secondary proceedings. However, His Lordship held that modified universalism is a one-way street: while it may justify the tendering of assistance to main proceedings by the courts of the jurisdiction where secondary proceedings take place, it did not provide any basis for the courts of the main insolvency jurisdiction assisting secondary proceedings. Lord Tyre found "no support" for the proposition that modified universalism "ought to be applied to a court in the country of incorporation with regard to insolvency proceedings in another jurisdiction".²⁸ However, it is possible to advance arguments in favour of this rejected approach.

First, there is no reason why the courts of the place of incorporation should not, in appropriate cases, be entitled to lend assistance to foreign proceedings. This would not mean deferring automatically to the foreign proceedings, but to take those proceedings into account

²⁴ [2016] SGHC 108.

²⁵ *Ibid*, para 18 per Abdullah JC.

²⁶ *Ibid*, paras 21 to 22, citing R Sheldon (ed), *Cross-Border Insolvency*, 4th edn (2015) para 6.80.

²⁷ *Ibid*, para 24.

²⁸ *Hooley*, para 36.

when making a decision which may affect them. In *Hooley*, the Indian proceedings would be ancillary to any Scottish proceedings in only the most formal of senses. It seems that the preponderance of assets and creditors were located in India; the Indian proceedings had been afoot for a number of years, and had already reached an advanced stage, and the Indian state had a manifest interest in the ensuring that the proceedings resulted in the best possible outcome for the Indian employees. The desiderata of comity and international co-operation – of which modified universalism may be a specialised instantiation - would require these matters to be taken into account before the making of any decision.

An analogy may be drawn with the principles applied when deciding whether or not an anti-suit injunction should be granted to restrain foreign proceedings. In *Barclays Bank v Homan*,²⁹ Maxwell Communications Corporation plc was subject to administration proceedings in England and Chapter 11 proceedings in the United States. A creditor applied to the English court to restrain potential US unfair preference proceedings, alleging that, as England was the place of incorporation, the US proceedings were vexatious and oppressive. The injunction was refused, and the case is therefore effectively an example of the courts of the primary insolvency jurisdiction deferring to a secondary proceedings. Moreover, the decision emphasises the courts of the place of incorporation need not insist upon their pre-eminence, but may defer to foreign insolvency proceedings if doing so serves the interests of comity.

Secondly, while the distinction between main and secondary³⁰ proceedings is employed under the CBIR, that regime permits the court responding to a request from a foreign administrator or liquidator to offer the same level of assistance regardless of whether those proceedings are main or secondary.³¹ As this position derives from the 1997 UNCITRAL Model Law, it can be said to reflect international consensus on the relationship between primary and secondary proceedings. There is no evident justification for a different approach at common law, which will be applicable where a third party, such as a debtor, seeks the assistance of the court.³²

F. CONCLUSION

²⁹ [1992] BCC 757.

³⁰ Technically, “non-main proceedings”.

³¹ eg Article 21: “Upon recognition of a foreign proceeding whether main or non-main... [the court may grant appropriate relief].”

³² See *Re African Minerals* [2015] HCMP 865/2012 at para 9, where a Hong Kong court assumed, without deciding, that assistance could be given at common law to insolvency proceedings taking place outside the place of incorporation.

While the result in *Hooley* may be unobjectionable in itself, it could have been reached as a result of an application of modified universalism. Furthermore, the endorsement given to that principle is not a ringing one, and the limitations imposed upon it are significant. Unlike the decisions of the Supreme Court and the Privy Council, *Hooley* does not limit the forms of assistance which courts may give to foreign insolvency proceedings. Instead, it limits – substantially – the class of foreign proceedings which the courts are entitled to assist at common law. For that reason, it is respectfully submitted that it may prove to have a more adverse impact on the efficacious administration and co-ordination of cross-border insolvencies than those earlier decisions.

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