[2015 Gib LR 30]

IN THE MATTER OF REGENT CENTRE LIMITED and IN THE MATTER OF THE FORDGATE GROUP

SUPREME COURT (Jack, J.): November 12th, 2014

Companies—compulsory winding up—petition—date of petition—winding-up petition filed before November 1st, 2014 may be continued as application for appointment of liquidator under Insolvency Act 2011—procedural steps taken under Companies (Winding-up) Rules 1929 incorrect under Insolvency Rules 2014 but proceedings not invalidated

European Law—insolvency—winding-up procedures—EC Insolvency Regulation inapplicable when winding-up order made in England before November 1st, 2014—if winding-up order made in England after November 1st, 2014, EC Insolvency Regulation applies to require court to state whether Gibraltarian proceedings "main" or "secondary"

Winding-up petitions were filed by a creditor against 17 different Gibraltarian companies, all of which were members of the Fordgate group.

The companies were all single-purpose companies incorporated for the purpose of holding investment properties in England and Scotland. The business of the companies was carried out from Gibraltar, where all the directors were resident. The properties had been purchased with loans from the creditor and all the companies had defaulted on those loans. The creditor issued winding-up petitions in Gibraltar on September 25th, 2014.

In issuing the petitions, the creditor followed the procedure set out in the Companies (Winding-up) Rules 1929 ("the 1929 Rules"), which were the rules in force on September 25th, 2014. On November 1st, 2014, the new Insolvency Act 2011 ("the 2011 Act") and the new Insolvency Rules 2014 ("the 2014 Rules") came into force. The petitions complied with the procedure set out in the 1929 Rules but not with the new procedure in the 2014 Rules.

H.M. Revenue & Customs ("HMRC") issued winding-up proceedings in the English Companies Court in respect of most of the companies and, in at least 10 cases, obtained winding-up orders from that court. Two petitions were due to be heard on November 17th, 2014.

Held, continuing the petitions:

(1) The procedural steps taken by the creditor under the 1929 Rules remained valid under the new procedure in the 2014 Rules and the

petitions should be continued as if they were applications for the appointment of a liquidator under the 2011 Act. The 2014 Rules did not have retrospective application and there was therefore no procedural defect in the petitions. Regulation 8(2) of the Insolvency (Transitional Proceedings) Regulations 2014 indicated that the legislature intended existing winding-up proceedings commenced under the 1929 Rules to remain valid after November 1st, 2014 and continue as proceedings under the new regime. A corollary to this was that procedural steps taken under the 1929 Rules which were incorrect under the 2014 Rules would not invalidate proceedings commenced before November 1st, 2014 (paras. 11–13).

(2) If the above conclusions were wrong, the creditor's failures to observe the new procedure in the 2014 Rules might still not have been fatal to the application because the court could have used its general power under s.293(1) of the 2011 Act to vary time periods set down in the 2011 Act or the 2014 Rules. This would not have permitted the court to waive the new requirement for the affidavit to be made at the same time as the originating application was issued; this defect could possibly have been resolved under the Civil Procedure Rules, r.3.10, but there was no need to make any final determination on this issue (paras. 14–18).

(3) Although it was not necessary to decide the point, as a provisional view, the EC Insolvency Regulation should be taken to apply to applications for the appointment of a liquidator, even though this was not expressly stated in Annex A to that Regulation (para. 22).

(4) The EC Insolvency Regulation had no application to cases in which the winding-up order in England had been made before November 1st, 2014, because, until reg. 3 of the Insolvency (Cross Border Insolvencies) Regulations 2014 came into force on November 1st, 2014, England and Gibraltar were treated as the same EEA State. In these cases, there was therefore no need for the court to state whether the winding-up proceedings in Gibraltar constituted the main or secondary proceedings, although the court should do so due to the possibility that there could be insolvency proceedings in other EEA States as well as the UK, and it was open to the Supreme Court of Gibraltar to determine that Gibraltar was the centre of main interests ("COMI") of these companies even though this would be inconsistent with the determination of the English High Court that England was the COMI (paras. 26–28).

(5) The EC Insolvency Regulation applied to cases where the winding-up order in England was made on or after November 1st, 2014 and so the court should state whether the Gibraltarian proceedings were main or secondary. As a provisional view, the Supreme Court of Gibraltar would be bound by the determination of the English court as to the location of the COMI, based on reg. 3 of the Insolvency (Cross Border Insolvencies) Regulations 2014 (para. 29).

(6) The court would inquire of the English Companies Court as to whether its winding-up orders had been made on the basis that they were the main or secondary proceedings (paras. 31–32).

Cases cited:

(1) *Eurofood IFSC Ltd.*, *In re*, [2006] Ch. 508; [2006] 3 W.L.R. 309; [2006] All E.R. (EC) 1078; [2006] BCC 397; [2006] I.L.Pr.23; [2006] E.C.R. I-3813, referred to.

(2) *L'Office Cherifien des Phosphates* v. *Yamashita-Shinnihon SS. Co. Ltd. (The Boucraa)*, [1994] 1 A.C. 486; [1994] 2 W.L.R. 39; [1994] 1 All E.R. 20; [1994] 1 Lloyd's Rep. 251, referred to.

Legislation construed:

Insolvency (Cross Border Insolvencies) Regulations 2014, reg. 3: The relevant terms of this regulation are set out at para. 21.

Insolvency Rules 2014, r.2(1): The relevant terms of this sub-rule are set out at para. 16.

r.321: The relevant terms of this rule are set out at para. 16.

Insolvency (Transitional Provisions) Regulations 2014, reg. 8(2): The relevant terms of this sub-regulation are set out at para. 9.

Supreme Court Rules 2000, r.6(1): The relevant terms of this sub-rule are set out at para. 17.

Council Regulation (EC) No. 1346/2000 (Insolvency Proceedings), art. 43: The relevant terms of this article are set out at para. 26.

J. Triay for the petitioner/applicant;
The respondent companies did not appear and were not represented;
T. Rocca for the Official Receiver.

1 **JACK, J.:** On Tuesday, November 11th, 2014, I started hearing a set of matters against 17 different Gibraltarian companies, in all of which Mr. Julian Triay was acting for the creditor, a Luxembourgeois company, KW Investment One Lux SARL ("KWI").

2 The facts in relation to all the companies are similar. They are single-purpose companies incorporated for the purpose of holding investment properties, in each case with one company holding one property. They are all parts of the Fordgate group of companies. No insolvency proceedings have been commenced against the holding company. The greater number of the properties held by the respondents are in England, with the balance in Scotland. The properties were purchased with loans from KWI. When the loans defaulted, KWI appointed Law of Property Act receivers in England and the equivalent in Scotland. In the current proceedings, KWI rely on the companies' failure to pay the unsecured portion of their loans.

3 I am told, and KWI will make an affidavit confirming this, that the directors of all the companies were based in Gibraltar and all formal business of the companies was carried out in Gibraltar. If that is right, then Gibraltar would seem to be the centre of main interests ("COMI") of the companies under the EC Insolvency Regulation (Council Regulation (EC) No. 1346/2000): see *In re Eurofood IFSC Ltd.* (1).

4 However, H.M. Revenue & Customs ("HMRC") in the United Kingdom appears to take a different view of the COMI. HMRC has issued winding-up proceedings in the English Companies Court in respect of most, if not all, of the companies. In at least 10 cases, HMRC has obtained winding-up orders from the English court. There are two petitions due to be heard by the Companies Court on November 17th, 2014.

5 The petitions in Gibraltar were all issued on September 25th, 2014 under the Companies Act 1930. The procedure at that time was governed by the Companies (Winding-up) Rules 1929, which were the English rules in force in 1930. The difficulty in the current set of cases is that, on November 1st, 2014, the new Insolvency Act 2011 and the new Insolvency Rules 2014 were brought into force. The interaction of the new procedures with the old needs to be considered. In addition, whereas previously the mutual recognition of insolvency procedures between Gibraltar and the United Kingdom was governed by colonial legislation, the new legislation provides that the EC Insolvency Regulation should apply between Gibraltar and the United Kingdom as if they were separate Member States.

Procedural issues under the Gibraltarian legislation

6 I shall deal first with the procedural issues under domestic law. The differences between the new and the old legislation, so far as material, are these. First, under the old legislation, the form of originating process was a petition to wind up the company; under the new, it is an (originating) application for the appointment of a liquidator: see ss. 149–153 of the Insolvency Act 2011. Secondly, under r.81 of the Insolvency Rules 2014, the affidavit in support must be filed with the originating application, whereas, under the old rules, it could be filed within four working days of issuance of the petition. Thirdly, under the old rules, advertisement of the petition had to be no less than seven clear days before the hearing of the petition and there was no minimum period: see r.27 of the 1929 Rules; whereas, under the new rules, advertisement must be no less than seven days before the hearing nor earlier than seven days after the service of the application: see s.155 of the 2011 Act.

7 I can take the facts of Regent Centre Ltd. as typical. The petition was issued on September 25th, 2014. The affidavit verifying the petition was sworn on September 30th, 2014. This was in time under the old rules, because there was a weekend of September 27th and 28th intervening. The

petition was served on October 24th, 2014. This was more than the 14 days required by the new rules: r.83(1). It was advertised in *Panorama* on October 28th, 2014 and in the *Gibraltar Gazette* on October 30th, 2014, in both cases less than seven days after service.

8 Thus, under the old rules the petition was compliant, but under the new rules there are defects.

9 Regulation 8(1) of the Insolvency (Transitional Provisions) Regulations 2014 provides that the 2011 Act shall not apply "where the winding up commenced prior to the commencement date and the former law continues to apply in relation to any such liquidation or winding up." That, however, has no application to the current cases because no winding-up order (or appointment of a liquidator) has yet been made (it was not argued that an order for the appointment of a liquidator would have retrospective effect from the date of issue of the winding-up petition). The only other relevant provision is reg. 8(2), which says:

> "Where a petition presented to the Court for the winding up of a company under the former Companies Act has not been determined at the commencement date, the petition shall be treated as if it was an application for the appointment of a liquidator under the Act."

10 Nothing is said about the differences between the old and the new procedures. Does the new law render procedural steps that were valid under the old law non-compliant under the new law? 11 *Halsbury's Laws of England,* 5th ed. (2009 Reissue), para. 8 says:

> "In construing a statute which affects only the practice and procedure of the courts, the presumption against retrospective interpretation has no application, and unless the statute otherwise provides, expressly or by necessary implication, any changes effected by such a statute will apply to pending proceedings and indeed will have retrospective effect."

This would suggest that the steps under the old law need to be viewed through the lens of the new law.

11 However, the law is not, in my judgment, quite so inflexible. In *L'Office Cherifien des Phosphates* v. *Yamashita-Shinnihon SS. Co. Ltd. (The Boucraa)* (2), Lord Mustill, delivering the lead speech in the House of Lords, said ([1994] 1 A.C. at 528):

> ". . . [W]hilst keeping the distinction [between procedural and substantive rights] well in view, I prefer to look to the practical value and nature of the rights presently involved as a step towards an assessment of the unfairness of taking them away after the event."

12 It is necessary to consider what the legislator's intention was in enacting reg. 8(2) but making no further transitional provisions for

outstanding winding-up petitions. Clearly, the legislator intended existing petitions to continue, but, in view of the abolition of winding-up proceedings and their substitution by applications for the appointment of a liquidator, some automatic provision for their continuance as proceedings under the new regime needed to be made. In my judgment, it is a corollary of this that the legislator envisaged that a petition, validly issued under the old regime, would remain valid under the new. A further corollary is that steps will have been taken under the old procedure which were incorrect under the new procedure, but that the legislator did not perceive this as a difficulty for which special provision needed to be made.

13 My conclusion is that steps which were proper and valid under the old procedure remain valid under the new procedure. Accordingly, there is, in my judgment, no procedural defect in the Regent Centre Ltd. application for the appointment of a liquidator.

14 If I am wrong about that, I would need to consider whether any of the failures to observe the new procedure were fatal to the application. Section 493(1) of the 2011 Act gives the court a general power to vary and abridge time periods set down in the Act or the 2014 Rules. This would allow me to vary the times so as to validate the service and the advertisement of the petition. If necessary, I would have done so.

15 This provision as to time would not, in my judgment, permit the court to waive the requirement for the affidavit to be made at the same time as the originating application was issued. It was suggested that the court's general power in the Civil Procedure Rules, r.3.10 could be used to remedy such an error.

16 The difficulty is that the Civil Procedure Rules do not apply generally to insolvency proceedings in Gibraltar. Rule 2(1) of the new Insolvency Rules provides:

> "'the Court Rules' means the Supreme Court Rules or, in the event that the Supreme Court Rules do not apply in relation to any matter, the [English] Civil Procedure Rules . . .
>
> 'Supreme Court Rules' means the Supreme Court Rules 2000 and 'SCR' followed by a Part or rule by number means the Part or rule with that number in those Rules."

Rule 321 then provides:

> "Except so far as inconsistent with the Act or the Rules or a practice direction issued under rule 325, the Supreme Court Rules apply to insolvency proceedings, with any necessary modifications."

In view of the terms of r.2(1), the draftsman's decision to refer only to the Supreme Court Rules, rather than "the Court Rules," appears to be deliberate.

17 There is not, so far as counsel were able to show me, any provision in the Insolvency Rules 2014 which directly applies the CPR. So far as the Supreme Court Rules 2000 are relevant, the parts of r.7 which apply English insolvency rules have been repealed. Rule 6(1) of the Supreme Court Rules provides that "the rules of court that apply for the time being in England in the High Court shall apply to all original civil proceedings in the court." Insolvency proceedings would not generally be considered "original civil proceedings," and the existence of the old (unamended) r.7 shows that that was the legislator's understanding too.

18 In the light of my decision on the transitional provisions, however, I do not need to make any final determination on this issue.

The Insolvency Regulation

19 I turn now to the application of the EC Insolvency Regulation. The importance of this is in relation to the issue as to whether a liquidation in Gibraltar would be the main or only the secondary insolvency proceedings. Gibraltar, as part of the European Union, has always been subject to the EC Regulation, but the Regulation did not apply as between Gibraltar and the United Kingdom, so its relevance was limited to insolvency proceedings commenced in EEA Member States other than the United Kingdom. (Mr. Rocca told me there had not been a case involving another EEA state in the previous eight years.)

20 Before November 1st, 2014, therefore, the applicability of the EC Insolvency Regulation was not an issue in relation to Gibraltarian companies against which the English Companies Court had made a winding-up order: the Supreme Court of Gibraltar could and did make a winding-up order regardless of the English order.

21 Regulation 3 of the Insolvency (Cross Border Insolvencies) Regulations 2014 provides that "[f]or all purposes connected to the operation of the EC Insolvency Regulation, and its application to the Act, Gibraltar and the United Kingdom shall be treated as if each were a separate EEA State." This provision came into force on November 1st, 2014.

22 The EC Regulation lists, in Annex A, the type of proceedings which constitute insolvency proceedings for the purposes of the Regulation. "Winding up by or subject to the supervision of the court" is listed but "appointment of a liquidator" is not. My provisional view is that this is merely a change of wording, rather than a change of substance, so that the EC Regulation will apply to the new Gibraltarian procedure, but this may be subject to further argument if the matter arises.

23 This leaves the first question, as to the effect of Gibraltar and the United Kingdom being treated as separate states on English winding-up orders which were made before November 1st, 2014. Of the cases before

me, this has occurred with Prospect House Ltd., Argyle (Edinburgh) Ltd., Marathon House Ltd., Traquair House Ltd., Teeside (Stockton) Ltd. and Seafield House Ltd.

24 In Traquair House Ltd., KWI has been able to obtain a copy of the English winding-up petition (Petition No. 3329 of 2014). Paragraph 9 of the petition says:

> "For the reasons stated in the witness statement of Susan Elizabeth Stone, filed in support thereof, it is considered that the EC Regulation on insolvency proceedings will apply, and that these proceedings will be main proceedings as defined in art. 3 of the EC Regulation."

I have not seen Ms. Stone's witness statement, so it is unclear how HMRC was putting its case on the COMI. It is unclear whether the English court did make a winding-up order on the basis that the company's COMI was England, although it is likely that it did.

25 In Marathon House Ltd., KWI has been able to obtain a copy of the winding-up order made by Mr. Registrar Jones on July 7th, 2014 (Petition No. 1574 of 2014). It recited that the court was satisfied that those proceedings were main proceedings under the EC Regulation. Again, the evidence adduced to support that finding of the Registrar is not available to me.

26 Article 43 of the EC Insolvency Regulation provides:

> "The provisions of this Regulation shall apply only to insolvency proceedings opened after its entry into force. Acts done by a debtor before the entry into force of this Regulation shall continue to be governed by the law which was applicable to [the time with regard to proceedings opened before] them at the time they were done."

The Regulation came into force generally in 2002. As between Gibraltar and the United Kingdom, however, it only came into force on November 1st, 2014.

27 In my judgment, this latter consideration means that the EC Insolvency Regulation has no application to cases where the winding-up order in England was made before November 1st, 2014. These cases continue to be governed by the old, colonial-era law. To date, it has not been the practice of the court to state whether a winding-up order constituted the main or secondary proceedings. In my judgment, this practice was wrong, because (at least theoretically) there could be insolvency proceedings in EEA countries other than the United Kingdom. Once the basis on which the English Companies Court made winding-up orders is known, I shall hear argument on whether the court will need to state whether the order appointing a liquidator constitutes the main or secondary proceedings and

what (if any) relevance the description attached to the English winding-up order might have.

28 My preliminary view, subject to further argument, is that, in the case of pre-November 1st English winding-up orders, if the COMI is (contrary to the determination of the English court) Gibraltar, it would be open to this court to determine that Gibraltar was the COMI. That would leave two inconsistent determinations by the English and Gibraltarian courts, but, since it would be an intra-UK matter, there would be no breach of European Union law in this court making such a determination.

29 As regards cases where a winding-up order was made by the English Companies Court on or after November 1st, 2014, there is certainly a need to state whether the Gibraltarian proceedings are main or secondary. Whether this court would be bound by the determination of the English court is a matter on which further argument is needed. My preliminary view is that, because Gibraltar and the United Kingdom are treated as separate Member States, this court would be bound. This is not as a matter of European Union law, but as a result of reg. 3 of the Cross Border Regulations. The cases in this category are Regent Centre Ltd. and Nidox Ltd.

30 In addition, there are two cases where a winding-up petition is due to be heard by the English Companies Court on November 17th, 2014: Trident Retail Park Ltd. and Rubislaw House Ltd. In relation to these, there is no difficulty in this court determining whether the COMI of the companies is in Gibraltar or elsewhere, because the English court will not have done so.

Request for information to the English court

31 Since this court needs to know the basis on which the English Companies Court made its winding-up orders, it is appropriate, in my judgment, for the court to ask the English court for assistance. A letter will accordingly be sent to the Senior Registrar of the Companies Court at Rolls House in London.

32 Mr. Triay will prepare a list of the winding-up orders and petitions in England of which KWI is aware. The letter to the English court will request that the Companies Court inform this court whether the winding-up orders were made on the basis that they were the main or secondary proceedings.

Orders accordingly.