In Practice

Authors Kate Davies and Simon Camilleri

A purposive approach to "Modified Universalism": CA favours a single system of distribution in cross-border insolvencies

In *HSBC Bank v Tambrook Jersey Ltd* [2013] EWCA Civ 576, the Court of Appeal overturned the High Court's decision not to grant assistance under s 426 Insolvency Act 1986 (the 1986 Act). A Jersey registered debtor has now been placed in administration.

FACTS

In 2007, HSBC Bank Plc (HSBC) granted a £6m secured loan facility to Tambrook Jersey Ltd (Tambrook), a Jersey registered company, whose centre of main interests (COMI) was in Jersey but whose main business activity was in England. The purpose of the facility was to fund a development in Kent. It was secured by various properties and securities in the usual way.

The development was unsuccessful. In 2013, HSBC demanded repayment. Tambrook was unable to meet the demand. Although Tambrook and HSBC had provisionally arranged to sell the Kent development to prospective buyers, it was in HSBC's interests that an insolvency procedure be triggered before the sale. The obvious solution in the circumstances would be a sale by administrators.

Tambrook could not be placed conventionally into an English administration because it was Jersey-registered and therefore not a company within the meaning of the 1986 Act. Moreover, as Tambrook's COMI was in Jersey, rather than in England, precedent decisions by the English Court (to extend the application of Art 3 of Council Regulation (EC) 1346/2000 even to a non-EU member state debtor) could not be applied to establish an alternative route to an English administration.

The closest equivalent Jersey law procedure, *désastre*, was not a desirable substitute. Ownership of all secured properties would vest in the administering officer (leading to inevitable cross-border and costs issues relating to their ownership and management). The administering officer would need to seek the English Court's recognition of any actions regarding secured assets located in England and there would be no moratorium. Crucially, contracts would automatically terminate, and this could hinder the planned sale of the Kent development.

The parties therefore applied by consent to the Royal Court of Jersey to ask the Jersey court to issue a letter of request for assistance under s 426(4) of the 1986 Act. Section 426(4) requires the English Court to assist a foreign court in its functions as an insolvency court. The assistance proposed by the Jersey court was an English administration order.

THE HIGH COURT

At first instance, Mann J rejected the Jersey court's request because there were no actual or contemplated Jersey insolvency proceedings. He found that the Jersey Court was not acting in its capacity as an insolvency court. In his view, the English court was being asked to provide insolvency proceedings in lieu, rather than assistance.

THE COURT OF APPEAL (CA)

Davis LJ, McFarlane LJ and Longmore LJ found, unanimously, that Mann J's interpretation of s 426(4) was "*unduly and unnecessarily restrictive*", for four reasons:

- First, s 426(4) only required the foreign court to have an insolvency jurisdiction – it did not require the foreign court to have exercised or even considered exercising that jurisdiction.
- Secondly, the authorities considered by the CA supported interpreting ss 426(4) and (5) broadly; in particular, the word "assistance". There was no reason to restrict "assistance" to a scenario where the foreign insolvency court had in fact exercised or contemplated exercising its jurisdiction.
- Thirdly, Mann J had wrongly considered that to grant the Jersey Court's letter of request would infringe the principle of modified universalism. This is the fundamental principle underpinning s 426(4); namely that an insolvent company's assets should be distributed under a single system of distribution. Rather than avoid parallel insolvency proceedings, Mann J's interpretation of s 426(4) and the principle of modified universalism would have had the opposite effect; it would have required HSBC to commence a purposeless and costly, initial set of insolvency proceedings in Jersey, upon which to base the s 426(4) application.
- Finally, Mann J. wrongly found that the Jersey court had not exercised its insolvency jurisdiction. On the contrary, its letter of request was "*the very stuff of insolvency*" and the Jersey court had indeed exercised its insolvency jurisdiction.

COMMENT

This decision should be welcomed by banks and other financial institutions. It underpins what should surely be the key objective of a cross-border insolvency; namely a clear and cost-proportionate route to the fair distribution of assets, without multiple proceedings. Had Mann J's decision stood, a precedent would have been set requiring a creditor in similar circumstances to HSBC to apply for two sets of insolvency proceedings – even though the sole purpose of the initial proceedings would be to act as a gateway for the subsequent English proceedings. ■

Biog box

Kate Davies is a senior associate in the Commercial Disputes Group at Reed Smith, specialising in complex commercial disputes. Email: kdavies@reedsmith.com

Simon Camilleri is a trainee in the Commercial Disputes Group at Reed Smith, with an interest in private international law and international commercial arbitration. Email: scamilleri@reedsmith.com