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The bonfire of the charities - winding up unregistered entities

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***S.L.T. 63** The authors discuss the contexts in, and principles upon, which the courts admit administration proceedings of entities which differ widely from registered companies.*

It is an accompaniment of the interesting times in which we live that there appears to be a small but growing number of not for profit entities which is plumbing the depths of absolute insolvency. Typically, these are charities, but they need not necessarily be. A common feature is, however, that they are controlled by volunteer directors or other office bearers who, quite understandably, have no stomach for exposing themselves to the risk of running ever deeper into insolvency and who lack the optimism, borne of perceived self-interest, which makes many directors of commercial concerns mistake for light at the end of the tunnel what is really an approaching train. They want to get out. But the question arises: how do you put an end to the concern? Or, how do you save what is worth saving by administration or whatever?

The answer depends on the nature of the entity. It comes readily to hand if, for example, you are dealing with a company limited by guarantee. But as soon as you leave the straight and narrow paths of Companies Acts entities and venture on the byways of incorporation by charter and the law relating to friendly societies, the answer is not so easily got -- and it can be far from straightforward. Can you wind up the entity under the Insolvency Act 1986 ("the 1986 Act")? Does the court have jurisdiction -- and what jurisdiction -- to wind it up or place it in administration?

Whilst charitable companies incorporated by Royal Charter are the context for, or at any rate a leitmotif running through, this article, readers may find the article of more general interest and/or use as an exploration of some of the more unusual contexts in, and principles upon, which the courts admit winding up/administration proceedings of entities which differ widely from the usual registered company.

Companies limited by Royal Charter

The fact that chartered companies are such a familiar part of the public/charitable trust landscape might at first blush suggest that the way in which such entities are brought to an end would be clear. In one sense that is so. Just as the granting of a Royal Charter establishing a chartered company is an aspect of the prerogative, so one might expect that its surrender would be. And such is, indeed, the position. There is a well established procedure whereby the Charter may be surrendered by petition to the Privy Council. The effect of the granting of such an application is the equivalent, if you will, of the dissolution of a company incorporated under the Companies Acts. It is the writers' understanding, however, that the Privy Council expects that before such an application is made the winding up of the corporation will be concluded. It is obvious why: if the entity were simply dissolved its liabilities would go unadministered and its assets fall to the Crown as *bona vacantia.*

In the ordinary case of a registered company incorporated under the Companies Acts, the procedure of winding up tends to obscure the separate steps of winding up and dissolution. That is particularly so in view of the fact that there is no longer any court order for dissolution, which instead occurs automatically after the expiry of three months from the Registrar of Companies' receipt of statutory notice: see the 1986 Act, s.205.

Is an application to the court required?

It is not unknown for the constitution of such an entity to include powers which on their face might, at least as a matter of language, appear wide enough so as to be capable of being exercised to enable the winding up of the entity. A degree of caution is required in arriving at such a conclusion, because such powers are likely to be fiduciary powers. Thus it would not be surprising to find that it is implicit that they are exercisable only for the ends of the entity as a going concern. And even if one could conclude that there were powers which entitle those having control of the entity to take steps to pay its creditors with a view to what amounted to an informal winding up and to eventual dissolution, they would do well to be wary of adopting that course where the entity is absolutely insolvent.

Generally speaking the director (by whatever name called) of an absolutely insolvent entity which is not a registered company who finds himself in the absolute insolvency hole is well ***S.L.T. 64** advised to stop digging. In both English and Scots law the provisions of the 1986 Act relating to misfeasance etc and wrongful trading need to be considered. Whilst these occur (as ss.212 and 214) in Pt IV of the 1986 Act, s.229 appears to extend the powers which are conferred upon the liquidator and the court to unregistered Pt V companies.

In Scots law there is also the common law principle (Bell, *Commentaries,* Ch.II, Pt I, Book VI) that a person who knows that he is absolutely insolvent is in a position analogous to that of a trustee for his creditors. No doubt that applies with equal force to a company by Charter. As Lord President Emslie was at pains to stress in *Nordic Travel Ltd v Scotprint Ltd,* 1980 S.C. 1; 1980 S.L.T. 189 at p.10 (p.193), this is not to be taken too literally; for example, payments of debts subsisting and prestable in ordinary course of business cannot be challenged, even though the recipient knows of the insolvency. But as is discussed, *ibid,* persons who sought to use their powers informally to wind up the affairs of some entity could find themselves under a peculiar obligation to refrain from procuring it to make voluntary dispositions and to refrain from giving preferences which could be regarded as fraudulent. The observations in *Nordic Travel* follow a long line of authority, including *What mough's Trustee v British Linen Bank,* 1934 S.C. (H.L.) 51; 1934 S.L.T. 392. Understood with the Lord President's warnings against taking too literally the trustee analogy, there are echoes of this in English and Commonwealth cases too: see *Liquidator of West Mercia Safetywear Ltd v Dodd* [1988] B.C.C. 30, an appeal in a misfeasance application under what is now s.212 of the 1986 Act, per Dillon LJ at p.33, under reference to Street CJ in *Kinsela v Russell Kinsela Pty Ltd (in liq)* [1986] 4 N.S.W.L.R. 722, at p.730; (1986) 4 A.C.L.C. 215, at p.221 ("It [the absolutely insolvent company's estate] is in a practical sense [the creditors'] assets and not the shareholders' assets that, through the medium of the company, are under the management of the directors pending either liquidation, return to solvency.")

As if these were not problems enough, in Scotland the consent of Office of the Scottish Charities Regulator ("OSCR") appears to be required before such informal winding up could take place. Section 16(2) of the Charities and Trustee Investments (Scotland) Act 2005 stipulates certain actions, *viz* a charity's (a) amending its constitution so far as it relates to its purposes; (b) amalgamating with another body; (c) winding itself up or dissolving itself; or (d) applying to the court in relation to any action set out in paras (a) to (c) -- which (subs.(1))maybe taken only with OSCR's consent and in accordance with any attached conditions. Subsection 16(3) disapplies subs.(1) in relation to any action (a) in pursuance of an approved reorganisation scheme; or (b) for which OSCR's consent is required by virtue of any other enactment. If, however, it were proposed to exhaust the assets of a charity in payment of its debts it would seem to be the case that OSCR's consent would be required irrespective of whether the company incorporated by Charter were dissolved. Section 16(2)(c) draws what appears to be a studied distinction between winding up and dissolution -- it refers to such steps alternatively so that OSCR's consent would seem to be required for either. We put matters in terms of what appears to be the case because there must be some question as to whether directors of an absolutely insolvent charity, who judged it to be their duty to make application to the court for a winding up order, could be impeded in that course by the absence of such a consent. Consideration of such matters is beyond the scope of this article. Moreover, in the only case of which we are aware, OSCR were commendably rapid in providing their consent, so that it was not an issue. There would appear to be no equivalent requirement in England other than in the context of there being unexpended (e.g. endowment) funds.

It is difficult to find a convincing basis on which it can be said that a judicial application is not required. At lowest, where an entity's liabilities exceed its assets, the intervention of the court is desirable, not least as a protection for those who are its governing mind.

What sort of application to the court?

Winding up under the 1986 Act

So you have concluded on the basis of these sorts of considerations that an application to the court is desirable. What kind of entity may be wound up under the 1986 Act? It is submitted that the Court of Session, like the High Court, has jurisdiction to wind up companies, including foreign companies, and analogous associations where there is some sufficient connection with the jurisdiction. That jurisdiction does not depend on the subsistence of the entity undissolved or on there being a subsisting trade within the jurisdiction. It is enough if there be sufficient connection with the jurisdiction coupled with benefit to creditors including the petitioning creditor.

***S.L.T. 65** There is a body of old authority which might appear to suggest that the provisions of what is now Pt V apply only to trading companies: see *Re St James Club,* 42 E.R. 920; (1852) 2 De GM. & G. 383, and *Re the Bristol Athenaeum* (1890) 43 Ch. D. 236. The reasoning underpinning the latter case was that, to come within the provisions of s.199 of the Companies Act 1862, the unregistered company required to "be wound up at its place of business, and 'business' must ordinarily be trading under the Act". In the former case St Leonards LC at 42 E.R., p.924, appears to go a little further. Speaking of an ordinary members' club he observes that "it might be classed under the head of companies yielding convenience and benefit, yet clearly not among those yielding profit fromtrade. No man can receive profit in that sense from a club". Read in one way it might be thought to be part of the reasoning which led the court to the conclusion that the club could not be wound up under the Winding up Acts that the trading should be trade with a view to profit. Indeed, St Leonards LC might appear to require this to be so in the rather special sense of trading with a view to *distributable* profit. Plainly a club may have a trade; so may a charity: see now the provisions relating to a "charitable trade" in s.479 of the Corporation Tax Act 2010 where it is provided that a trade carried on by a charitable company "is a charitable trade if (a) the trade is exercised in the course of carrying out a primary purpose of the charitable company, or (b) the work in connection with the trade is mainly carried out by beneficiaries of the charitable company".

It is submitted that the remarks of St Leonards LC should not be read as holding that the absence of distributed/distributable profit determines that there is nothing to be described as a "trade". They proceed upon what may be thought to be a much narrower ratio at p.924 where he notes that, though "associations" are mentioned in the legislation, he does not think that they include such an association as the club with which the case was concerned. In reaching that vie whe focuses upon the fact that members of such a club are not partners, nor do they incur liability as such. He says: "Though' associations' are mentioned, I cannot think that word is to be treated without regard to the particulars with which it is associated. … I will not say what associations are within the Acts; but, bearing in mind that the individuals who form a club do not constitute a partnership, nor incur any liability as such, I think associations of that nature are not within the Winding-up Acts. I find in all these Acts to which I have referred, that every provision is inconsistent with including such an association as this club is. If such had been the intention of the Legislature, why should not the word 'club' have been expressly mentioned? If, however, the Legislature has used ambiguous expressions, I will not extend their signification beyond their natural import. At first sight, the word 'association' would seem to include the case of clubs, but in looking at the context, I am clearly of opinion that it does not."

So, really, St Leonards LC focuses on the nature of the entity. If that narrow ratio were not ascribed, it might seem to follow that a charity would never come within Pt V of the 1986 Act, which is peppered with references such as "carrying on business" (*passim*; e.g. s.225). It is true that in *Re Bristol Athenaeum* (1890) L.R. 43 Ch. D. 236, which concerned a not for profit scientific institution, there are dicta at p.239 to the effect that whereas "an unregistered company under [s.199 of the Companies Act 1862] must be wound up at its place of business", "'business' must ordinarily be trading under the Act". That view -- which, anyway, does not necessarily subsume a need for profit, never mind distributable profit, being in prospect -- can only have been obiter, since Kay J held that: "The objects of the society are entirely within the 33rd section of the Literary and Scientific Institutions Act, 1854 , to which I have been referred. Therefore, undoubtedly it is an institution within that Act of Parliament" (p.239). This had the consequence that its property was to be given to some other institution. Such a view would not sit with the proposition, for which there is ample authority, that an unregistered friendly society may be wound up under the Companies Acts. Friendly societies often do not, and certainly need not, carry on business in the nature of trade still less with a view to distributable profit.

Language of the sort to which St Leonards LC's strictures applied persists in the 1986 Act (see s.220). Similar provisions in earlier legislation have been held to apply to unregistered friendly societies: see *Re Alfreton District Friendly & Provident Society* (1863) 7 L.T. 817; *ReVictoria Friendly Society, Knottingley* [1913] 1 Ch. 617 (a case under s.267 of the Companies (Consolidation) Act 1908) and to companies incorporated under Royal Charter. By ss.220 and 221 of the 1986 Act the court is afforded jurisdiction to wind up "Unregistered Companies". That expression is said in s.220 to include "any association and any company" subject to certain exceptions which are immaterial for present purposes. It is very broad. References fixing jur ***S.L.T. 66** isdiction by "principal place of business" persist (i.e. of the sort occurring in Kay J's dicta in *Bristol Athenaeum*), notably in s.221 (allocating inter-UK jurisdiction), but they persist against the backdrop of such breadth. It is suggested that where, for example, there is an undertaking of the nature of a charitable trade there will be a place of business in the relevant sense.

Re Oriental Bank Corporation (1885) 54 L.J. Ch. 481, provides an example of a company under Royal Charter wound up under the unregistered companies winding up provisions. It was considered by Bagallay LJ to be quite clear from the provisions of ss.199, 180 and 183 (which contained express reference to unregistered companies and those incorporated by charter) that unregistered companies might be wound up under that Act.

In *Re Dairy Farmers of Great Britain Ltd* [2009] EWHC 1389 (Ch); [2010] Ch. 63; [2010] 2 W.L.R. 311, Henderson J addressed the question whether a bank could appoint joint receivers and managers to Dairy Farmers of Great Britain Ltd ("DFB"), an industrial and provident society ("IPS") registered under the Industrial and Provident Societies Act 1965 ("IPSA"). This involved consideration of whether Pt III, "Receivers and Managers (England and Wales)", of the 1986 Act as it then stood had application to an IPS. Henderson J held that it did not. The detailed reasoning in that case turned substantially on the terms of provisions concerned with the application to companies of Pt III of the 1986 Act which have been amended, but in that context he touched upon various authorities concerned with the scope of other parts of the 1986 Act, including those concerned with jurisdiction respecting unregistered companies.

In particular, Henderson J noted *ReNorse Self Build Association Ltd* (1985) 1 B.C.C. 99436, in which Harman J held that s.55 enables an IPS to be wound up by the court in exactly the same way as if it were a company under the Companies Acts and that it is unnecessary to have resort to the power to wind up unregistered companies in what is now Pt Vof the 1986 Act.

In relation to Pt V Henderson J observed ([2010] Ch., p.70): "The scope of Part V is very wide, because s.220(1) defines 'unregistered company' as including 'any association and any company' with the exception (broadly speaking) of companies registered in any part of the United Kingdom. There seems to be little doubt that an IPS would fall within this definition, and could therefore be wound up as an unregistered company under Part V, even though separate provision for the winding up of such societies is undoubtedly made by s 55 of IPSA 1965." The breadth of the definition of 'unregistered company' in s.220 of the 1986 Act would lead one to the same conclusion.

The provisions of what is now Pt V have been used to wind up a foreign company dissolved in the jurisdiction of its incorporation: *Re Azoff Don Banking Corp* [1954] Ch. 315; [1954] 2 W.L.R. 654; [1954] 1 All E.R. 947. One of the grounds on which an unregistered company might be wound up under s.338(1)(d)(i) of the Companies Act 1929 was: "(i) If the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs." Section 339(5)(a) of the Companies Act 1948 included a provision in the same terms.

That ground is in terms identical to s.221(5)(a) of the 1986 Act. Section 225 of the 1986 Act now expressly sanctions such procedure in relation to dissolved companies.

The company in *Azoff Don* was a prerevolution Russian company which had been wound up in Russia but whose assets remained in the jurisdiction. A winding up order was made under the quoted provision of the 1929 Act in the teeth of the Crown's objection that the property was *bona vacantia* (the legislation rendered that right defeasible) and notwithstanding the inability to identify a place of business within the jurisdiction.

The fact that there is nothing which can be identified as a place of business in the sense of a place where some trade is conducted, has not precluded a finding of jurisdiction in practice. *Re Alfreton District Friendly & Provident Society* is an example; the case concerned an unregistered friendly society administered under rules which was not a trading entity. It was wound up under the Winding-up Act of 1862. Unfortunately, the report could barely be briefer. In *Canavan, Petr,* 1929 S.L.T. 636, the Court of Session made a winding up order under the Companies (Consolidation) Act 1908 in respect of a friendly society which was unable to comply with the "dissolution" procedure (but it subsumed winding up procedure) under s.78 of the Friendly Societies Act 1896. *Re Alfreton* was cited at the Bar in support of the application. Again, the reasoning is vanishingly sparse. The Scottish court has also held in *Smith's Trs v Irvine & Fullerton Property and Investment Building Society* (1903) 6F. 99, that a building society formed under the Building Societies ***S.L.T. 67** Act 1836, which had subsequently been repealed, subsisted for the purposes of winding up, was an unregistered company within s.199 of the Companies Act 1862, and might be wound up under the 1862 Act.

It is suggested above that the Court of Session, like the High Court, has jurisdiction to wind up foreign companies and analogous associations where there is some sufficient connection with the jurisdiction: in England see *Re Eloc Electro-Optieck and Communicatie BV* [1982] Ch. 43; [1981] 3 W.L.R. 176; [1981] 2 All E.R. 1111. But at any rate, the presence of a trading entity is not a prerequisite.

There may be a question as to just where the outer limits lie in regard to the type of entity which may be wound up, but paradoxically the assets and/or undertaking of non-entities is apparently embraced in them. It is suggested that Pt Vof the 1986 Act will amply accommodate the type of insolvent charitable chartered company with which we are concerned.

Inherentjurisdiction

There would appear to be a parallel jurisdiction in the High Court to wind up entities other than under the 1986 Act (and the equivalent provisions in former Companies Acts). In *Re Lead Co's Workmen's Fund Society* [1904] 2 Ch. 196, Warrington J found that the High Court had what he apparently regarded as an exorbitant jurisdiction to wind up an unregistered friendly society which he seems to have considered to have been of the nature of the partnership. Certainly it was not of a trading sort. Observations at [1904] 2 Ch., p.204, suggest that the finding of such jurisdiction turned upon there being a holding of "funds which belong to a number of persons who have individually certain interests therein regulated … by a body of rules". His Lordship expressly refrained from stating what particular jurisdiction was being exercised. *Re Alfreton* was cited at the Bar for the proposition that an unregistered friendly society might be wound up under the Companies Act 1862 though this did not oust the court's inherent jurisdiction (this under reference to *Jones v Lord Charlemont* (1848) 16 Sim. 271; *Clement v Bowes* (1852) 17 Sim. 167).

In Scotland there would appear to be no exact counterpart inherent jurisdiction in the court. The appointment of a judicial factor on the estate of the insolvent charity might relieve the embarrassment of directors and preserve the *status quo* in an emergency, but it cannot (we suggest need not) be looked to as providing a route to winding up the company. It might be an appropriate, if expensive, stop gap solution in a case where directors were justifiably concerned about the risks of trading into insolvency but where, at least on one view, there may be a business worth preserving. To this extent, it may provide a partial substitute for administration, the obstacles in the way of which are canvassed below. Experience suggests that insolvency practitioners are reluctant to captain the judicial factory ship upon such a voyage in largely unchartered waters.

The competency of the appointment of a judicial factor to a company is vouched by *Fraser Petr,* 1971 S.L.T. 146. The interim appointment in *Fraser* was really aimed at putting in place a judicial manager who could stem in the short term unlawful conduct on the part of the directors having control. The brief report is concerned primarily with the competency of the application -- both absolutely and having regard to the fact that it was an application to the *nobile officium* but brought in the Outer House. No particular role for the judicial factor seems to have been canvassed and it may be inferred that it was -- as in principle it is -- preservative.

McGuinness v Black, 1990 S.C. 21; 1990 S.L.T. 461, arose out of a company domestic dispute between two 50 per cent shareholders. The petitioner believed that the respondent wanted the business for himself. In an unfair prejudice application under ss.459 and 461 of the Companies Act 1985 (see now ss.994 and 996 of the Companies Act 2006) he sought interim interdict of the respondent from appropriating the business. It was common ground that the parties could not continue to run the business together. In cross petitions the petitioner moved for the appointment of an interim judicial factor. The respondent and cross petitioner moved for the appointment of a provisional liquidator in a winding up under s.122(1)(g), the (registered companies) just and equitable clause, founding upon deadlock.

Lord McCluskey, following *Fraser,* held the appointment of the judicial factor competent. He considered that there was definitely a business to save. For that reason he thought the appointment of a Judicial Factor more appropriate than a winding up order. Consideration of the relative merits of appointing a judicial factor as compared, say, with administration is beyond the scope of this article. *Fraser* and *McGuinness* have been followed by Lord Caplan in *Weir v Rees,* 1991 S.L.T. 345.

***S.L.T. 68** In *Governors of the Royal Aberdeen Workshop for the Blind and Disabled, Petrs ("RAWBD"),* 13 November 2009, unreported, in which the Scots member of the authorship team appeared, Lord Glennie made a winding up order on the just and equitable ground upon the application of the governors of a charitable company by Royal Charter which was absolutely insolvent to a substantial extent. The petition narrated the inability of the governors/directors to continue to trade the company by virtue of the conflicts which they faced. It prayed for the appointment of a provisional liquidator with the powers in Pt II of Sch.4, a winding up under s.221(5)(c) (the unregistered just and equitable ground) of the 1986 Act (with s.224(2) -- deemed inability of an absolutely insolvent company to pay its debts -- relied upon in the alternative), which failing, the sequestration of the estate of the company and the appointment of an interim Judicial factor with the powers contemplated by Sch.2 to the 1986 Act, being the powers of a Scottish receiver (additional to those conferred on him by the instrument of charge). The court appointed a provisional liquidator. Unfortunately, as is so often the case with such applications, no written judgment was issued. It is understood that part of the charitable trade was salvaged out of the winding up.

What about an administration order?

It is for consideration whether an administration order might be sought in relation to an incorporation by Royal Charter such as *RAWBD.*We think not. The reasons for this could barely be more convoluted.

Section 9(1) of the 1986 Act provides: "An application to the court for an administration order shall be by petition presented either by the company or the directors, or by a creditor or creditors (including any contingent or prospective creditor or creditors), or by all or any of those parties, together or separately."

In s.9 of the 1986 Act, in dealing with applications to "the court" for administration, the quoted language falls to be construed under reference to s.251 which provides that in the group of parts (including Pt II), "except in so far as the context otherwise requires -- 'the court', in relation to a company, means a court having jurisdiction to wind up the company". As is noted above, such jurisdiction extended to unregistered and, indeed, foreign companies having a sufficient connection with the jurisdiction. This has the look of a promising start but, as we shall see, the reality appears to be that the particular amending provisions focusing upon administration and applicable to most entities displace in a studied way what might at first blush once appear to have been the rule.

Section 9 -- indeed, Pt II -- now applies only to (broadly) utilities and building societies, and all other administrations are now carried out under Sch.B1 to the 1986 Act.

Paragraph 111(1A) of Sch.B1 provides:

"In this Schedule, "company" means -- (a) a company registered under the Companies Act 2006 in England and Wales or Scotland, (b) a company incorporated in an EEA State other than the United Kingdom, or (c) a company not incorporated in an EEA State but having its centre of main interests in a member State other than Denmark."

The discussion of the case law which follows turns on the legislation as it stood before that change.

In *Re Salvage Association* [2003] EWHC 1028 (Ch); [2004] 1 W.L.R. 174; [2003] 3 All E.R. 246, Blackburne J commented upon the effect of the provisions the 1986 Act as it then stood in so far as these were concerned with jurisdiction in the opening of administration proceedings in respect of companies other than those registered under the Companies Acts. The case concerned the Salvage Association, an incorporation under Royal Charter, and the question whether it could be the subject of administration. Blackburne J began his treatment of this issue by adverting to the fact that there had been a conflict amongst commentators on the 1986 Act as to whether "section 8(1) of the 1986 Act -- the provision which empowers the court to make an administration order in relation to a company -- includes unregistered companies which could be wound up under the Act" (p.176). Of this he said: "With effect from May 31 2002, however, the 1986 Act contained in section 8(7) a provision making clear that a reference to a 'company' in Part II goes beyond a company registered under the Companies Act. Inserted by Reg.5 of the Insolvency Act 1986 (Amendment) (No. 2) Regulations 2002 (SI 2002/1240) ('the 2002 Regulations'), section 8(7) provided: 'In this Part a reference to a company includes a reference to a company in relation to which an administration order may be made by virtue of Article 3 of the EC Regulation.' The reference is to Council Regulation (EC) 1346/2000 on insolvency proceedings." Section 8(7) was put in that form at the instance of the Insolvency Service with a view to attaining compliance with the regulation.

S.L.T. 69 In the *Salvage Association* case, Blackburne J held that as there was jurisdiction to open administration proceedings in respect of foreign companies, the location of whose main interests was within the UK, as well as English or Scottish companies, it followed that unregistered UK companies generally could also be the subject of such proceedings. He based that conclusion on the decision of Lloyd J in *Re BRAC Rent-A-Car International Inc* [2003] EWHC 128 (Ch); [2003] 1 W.L.R. 1421; [2003] 2 All E.R. 201. *BRAC* concerned whether the court had jurisdiction to make an administration order in respect of a company incorporated in Delaware, with a registered office in the USA, where it had never traded, and which was registered under the Companies Acts as an overseas company. Lloyd J considered that the answer depended on whether the jurisdiction to open insolvency proceedings conferred by art.3 of the EC Regulation is limited, in the case of legal persons, to those incorporated within the European Union. He held that it was not. He rejected a submission that, having regard to the expression "a company or legal person" appearing in art.3(1), the regulation was confined to entities incorporated in a relevant member state. Had it been accepted, that contention would have required the court to decline jurisdiction in relation to the Delaware company.

Blackburne J considered *BRAC* to be significant because, in the case of what the EC Regulation terms "main proceedings" (see e.g. art.32), provided the centre of main interests of the company is within the United Kingdom, jurisdiction in relation to insolvency proceedings set out in annex A to the regulation (so far as capable of relating to a company) is allocated to the United Kingdom. This was so irrespective of whether the company was incorporated in a member state or elsewhere in the world.

On the assumption that *BRAC* was rightly decided, Blackburne J addressed the question whether s.8(7) was effective only in relation to companies incorporated outside the United Kingdom, so that, in relation to a company incorporated within the UK it was left to United Kingdom domestic law -- irrespective of the location of that company's centre of main interests -- to determine whether it had jurisdiction to open insolvency proceedings (and what proceedings), with respect to the company. He concluded that such was not the position.

Assuming that the operation of Pt II of the 1986 Act (ignoring s.8(7)) was confined to companies registered under the Companies Act 1985 or one of its statutory predecessors, Blackburne J considered that ([2004] 1 W.L.R., p.178): "It would be odd if a company which had the centre of its main interests in the United Kingdom could be the subject of an administration order if incorporated anywhere in the world other than in the United Kingdom but could not be if, although a 'company' within the extended meaning of that expression ('company or legal person' [art. 3(1)]) -- it happened not to be a company registered under one of [the Companies] Acts." He accepted a submission by Gabriel Moss, QC, for the applicants to the effect that, "assuming that the purpose of the amendment to section 8 was to avoid discrimination against European Union companies in other member states in the application of English domestic law once international jurisdiction was allocated to the United Kingdom under the EC Regulation, it would have made no sense for Parliament to have used the criterion of place of registration in clarifying domestic law jurisdiction when the Regulation itself had rejected it in favour of the concept of the 'centre of main interests'. On the contrary, it makes sense to regard an European Union company for the purposes of English domestic law jurisdiction as one which has its centre of main interests in the European Union (including the United Kingdom) and to ignore the place of incorporation" (p.178).

As Blackburne J concluded at p.179, para.14: "Applying section 8(7) and the decision in the *In re BRAC* case there is plainly jurisdiction to make an administration order in this case. The centre of the association's main interests is in the European Union and, more particularly, in the United Kingdom with the result that the EC Regulation (as regards the proceedings which it covers) applies and article 3(1) allocates jurisdiction for main proceedings to the United Kingdom. Administration is within the list of insolvency proceedings covered by the article. Finally, section 8(7)makes clear that the jurisdiction of the English court to make an administration order applies to companies in the extended sense ('company or legal person') referred to in article 3(1). The association is just such a company: the royal charter by which it was incorporated was effective to constitute the association a legal person separate from its members, enjoying perpetual succession, having a common seal, capable of suing and being sued in the courts and having power, in addition to the particular powers set out in the charter, to do all matters and things incidental or appertaining to a body corporate."

S.L.T. 70 In the context of a regulation, art.3 of which makes jurisdiction depend on "the centre of the debtor's main interests" being situated within the territory of a member state and confers jurisdiction (para.1) on that member state and (para.2) on another member state within whose territory the debtor possesses an establishment, one can see why that should be so. It would be a surprising result if jurisdiction could have been had in another member state where the entity possessed an establishment, but not in England, where the debtor's main interests were.

Surprising or not, such a result appears to be what amending legislation has achieved. Section 8(7) was initially carried forward as para.111(1), item 3 of Sch.B1 to the Insolvency Act 1986 when the Enterprise Act 2000 amendments came into effect. It was repealed by the Insolvency Act 1986 (Amendment) Regulations 2005 (SI 2005/879), regs 2(1) and 4(a) with effect from 13 April 2005. Those provisions undid the effect of the *Salvage Association* case.

The 2005 Regulations took away the old s.8(7) reference to the EC Regulation and substituted a prescriptive and seemingly limitative definition for "company" in the context of administration (and CVAs). This was achieved by deleting from para.111(1) of Sch.B1 (administration) the item 3 definition of "company" and inserting after that subparagraph a new subpara.(1A), in the terms quoted above. For the purposes of Sch.B1, a "company" could be one of three sorts. First, a company within the meaning of s.735(1) of the Companies Act 1985: i.e. one registered under the Companies Acts. Second "a company incorporated in an EEA state other than the United Kingdom". EEA states consist of the 25 states of the European Union together with Norway, Iceland and Lichtenstein. Third, "a company not incorporated in an EEA state but having its centre of main interest in a member state other than Denmark". This latter category is consistent with the decision in *Re BRAC.* An unregistered UK company would fall into none of the categories.

As Gabriel Moss, QC, comments in a passage dealing with a mismatch which extends also to the treatment of IPSs: "This mismatch makes no sense. Administration Orders and CVAs are meant to be available whenever necessary to prevent liquidation and provide a better result for the company or its creditors. That is frustrated by this anomalous situation in relation to jurisdiction. Administration Orders and CVAs should be available in every case where administrative receivership or liquidation is available because they are, in principle, a preferable alternative. Again the anomalous position as to jurisdiction prevents that from happening" ("Salvage Sunk; the Insolvency Act 1986 (Amendment) Regulations 2005", *Insolvency Intelligence,* Vol.18, No.06, p.92, June 2005).

For our purposes, the result of this in a context such as *RAWBD* and for similar unregistered companies would seem to be that an administration order could not be obtained in relation to them. We put matters in terms of what "seems" to be the case, because the absurdity (enormity) of the result that a UK unregistered company (e.g. one by Royal Charter) cannot be the subject of administration here, but might in some circumstances be the subject of equivalent procedure in some other EU member state is so striking. Gabriel Moss, QC, *ibid,* dealing with the first of the three categories of "company" sanctioned by the 2005 amendments, suggested that it might (just) be said that "since s.735(4) [of the 1985 Act] provides: 'The definitions in this section apply unless the contrary intention appears' this may just be enough for the courts to say that the context of administrations and CVAs is such that 'company' cannot be limited to Companies Act companies but must include all companies which are capable of being wound up under Part V of the Insolvency Act 1986: compare *Re International Bulk Commodities Limited* [1993] Ch. 77."*Re International Bulk Commodities Ltd* was a case concerned with the appointment of English Pt III, Ch.1, administrative receivers, in which it was held that "company", in the context of s.29(2)(a), should not be confined to the *prima facie* meaning of companies registered under the Companies Acts but should embrace unregistered companies liable to be wound up under Pt Vof the Act of 1986 so that it applied to foreign companies. The result in *Re International Bulk Commodities Ltd* was called into question in *Re Devon and Somerset Farmers Ltd* [1994] Ch. 57; [1993] 3 W.L.R. 866; [1994] 1 All E.R. 717, and *Re Dairy Farmers of Great Britain Ltd* (*cit supra*), in which cases it was distinguished: it had not been overruled.

It is interesting that for the benefit of England and Wales, not content with the mismatch so achieved, the legislature has built further on this shaky edifice. *Re International Bulk Commodities Ltd* has been reversed by statute in the form of an amendment (under the Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009 (SI 2009/1941) r.74) creating a new s. 28 of the ***S.L.T. 71** 1986 Act which supplies the definition of "company" for the purposes of Pt III "Receivers and Managers (England and Wales)" of the 1986 Act. The new s.28(1) provides that "'company' means a company registered under the Companies Act 2006 in England, Wales or Scotland". Detailed consideration of such matters goes beyond the scope of this treatment (but see Moss, QC, Segal and Fletcher, *Insolvency Intelligence,* Vol.23, No.4, p.57, April 2010).

The contention that the context of administrations (and CVAs) is such that "company" cannot be limited to Companies Act companies but must include all companies which are capable of being wound up under Pt V of the 1986 Act is presumably unarguable in England and Wales. There, in the context of receivership (the benefits of which the Cork Report intended should be extended through administration absent a floating charge), that very limitation has been reiterated by amending legislation in virtually the same language -- language plainly considered apt to reverse a decision involving the extension of the former statutory language to unregistered companies. In relation to Scottish receiverships, however, the holder of a floating charge may appoint a receiver over property, being "all or any part of the property (including uncalled capital), which may from time to time be comprised in the property and undertaking of an incorporated company" in so far as subject to a charge (s.51(1) of the 1986 Act). The reference to an "incorporated company" is fleshed out parenthetically "(whether a company registered under the Companies Act 2006 or not)". Such "incorporated companies" to which a receiver may be appointed are those which "the Court of Session has jurisdiction to wind up". It would seem, therefore, that in Scotland a receiver may be appointed to an unregistered company which could be wound up under Pt V. A mis-match remains.

Against that backdrop in seeking an administration order in Scotland it might at a push still be contended by one with the requisite courage that Gabriel Moss' suggested (if unendorsed) argument, borrowing upon the reasoning of *Re International Bulk Commodities Ltd,* in favour of the view that the court has jurisdiction in relation to the administration of an unregistered UK company, has some merit. With what prospect of success, we leave the reader to consider.

In a Scots context it may be felt that the appointment of a judicial factor reflects a simpler and more promising approach where it is thought that there is a business which, or part of which, can be salvaged and that is a primary aim. There are parallels in the context of judicial factories on absolutely insolvent executry estates, though we are not aware of instances of such appointment in the context of insolvent corporations.

Conclusion

The problem of the insolvent company incorporated by Royal Charter is likely to be a pressing one. The question whether there is an appropriate remedy short of winding up in relation to a company part or all of whose business is salvable is better considered at leisure than against the backdrop of the pressure which inevitably comes with clients concerned that something should be done -- and soon -- lest they find themselves at the sharp end of a wrongful trading application. For that reason we see a value in drawing together a selection of the cases which support the view that winding up under Pt V of the 1986 Act is competent and which canvass other potential and less draconian remedies. No doubt the comparative dearth of material reflects the fact that orders of this kind are typically made in uncontested interlocutory applications. It is hoped that they may have a usefulness by analogy in other contexts.

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