

## SHORTER ARTICLE

### A JUDICIAL PERSPECTIVE ON CROSS-BORDER INSOLVENCIES

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*This article discusses the recent case of HSBC Bank plc v Tambrook Jersey Ltd and whether there is a need for a purposive approach to the issue of assistance in cross-border insolvency.*

#### **Introduction<sup>1</sup>**

1 A bank lends money on the basis that the loan will be duly repaid to it in accordance with the terms agreed with the customer. When the customer does not repay the loan or otherwise defaults the bank can invoke contractual remedies and judicial enforcement procedures. Insolvency law is also available to deal with the more serious situation of a customer who does not remedy the default and is apparently without the means of discharging liabilities to the bank in respect of a loan which has become repayable. The purpose of this part of the law is to ensure that the insolvency procedure invoked results in an orderly and efficient management of the insolvent's estate: collecting in debts, realising assets and paying creditors, all to be done, as far as possible, with the minimum of difficulty, delay and expense.

2 Reform of insolvency law is necessary from time to time in order to improve the prospects of achieving those objectives. The innovation of administration orders was an improvement in the law of corporate insolvency in the UK. "Rescue culture" is the dominating theme of the new administration regime. The procedure was designed to be less drastic and aggressive than the full scale liquidation of a company. The purpose of administration is to achieve better outcomes all round for the company and its creditors. Administrators may be appointed, provided that specified conditions are satisfied, in order to rescue a company from an insolvency situation. The aim is to avoid putting an

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<sup>1</sup> This article is based on a paper given at a conference on "The Enforcement of Creditors' Rights in the Channel Islands: Issues in Asset Security and Insolvency" organised by the Institute of Law, Jersey on 13 October 2014.

end to the company and its business and to secure their survival by finding a purchaser for the company's business as a going concern, or by selling off assets, or by other measures less extreme than a total winding up.

3 Cross-border insolvencies are more likely than others to involve jurisdictional complications, particularly in the sensitive area of the territorial jurisdiction of national courts. The recent judgments in *HSBC Bank PLC v Tambrook Jersey Ltd*<sup>2</sup> explore lesser known aspects of the jurisdiction of the High Court in England to make an administration order against an insolvent Jersey company.

4 An administration order could not be obtained from the High Court on an application by the bank in the ordinary way. The High Court had no power under the relevant UK legislation: the Insolvency Act 1986 ("1986 Act") to make an administration order against a Jersey company on an application made directly to the High Court. The High Court was only brought into the frame as the result of a letter of request sent to it by the Royal Court of Jersey to perform its duty to co-operate under general assistance provisions in s 426(4) of the 1986 Act. The particular request in this case was to assist by making an order putting an insolvent Jersey company, Tambrook, into administration.

5 The letter of request was triggered by three circumstances: first, both the bank and the company preferred administration to a Jersey liquidation (a *désastre*); secondly, there was no Jersey insolvency legislation conferring jurisdiction on the Royal Court to make administration orders against Jersey companies; and, thirdly, it was considered that Tambrook's cross-border situation was one in which the Royal Court could properly call on the High Court to perform its statutory duty of assistance by making an order of a kind that could not be made in Jersey.

6 The cross-border flavour was strong. At the Jersey end, Tambrook was incorporated in Jersey, had its centre of interests there and its sole director was resident there. At the English end, the sole business of the company was investing in property in England for residential development and that property was subject to a charge governed by English law securing the very substantial indebtedness of Tambrook to a UK bank. The jurisdiction issue turned on statutory interpretation: did the assistance provisions in s 426(4) confer on the High Court jurisdiction to assist by making an administration order against

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<sup>2</sup> [2013] EWHC 866 (Ch); [2013] 2 WLR 1249 (Mann J) and [2013] EWCA Civ 576; [2013] WLR (D) 193 (Court of Appeal).

Tambrook? The decision of the High Court held that there was no jurisdiction. The decision of the Court of Appeal held that there was jurisdiction.

### **The rulings**

7 Parties to litigation are usually in a dispute of some kind or other between themselves at most stages in the progress of the case. A different situation can sometimes arise when there is a preliminary question of jurisdiction. The court itself must always be satisfied that it has legal power to do what it is being asked to do, even when there is no dispute between the parties about what they want the court to do or about the power of the court to do what they want. In this instance, the parties were in agreement on the overall advantages of putting Tambrook into administration rather than declaring the company *en désastre*. The advantages of an administration order, if the conditions specified for making one are satisfied in a particular case, are, as already explained, well known.

8 The differences in this case about the jurisdiction of the High Court to make an administration order were not between the parties: they were between them and the High Court, and then between the High Court and the Court of Appeal. At first instance, a highly experienced Chancery judge, Mann J, rightly pointed out that, even though the making of the order was not opposed, he had to resolve a preliminary question of whether the High Court could make the administration order as requested. Jurisdiction turns on a short (but by no means easy) point of interpretation of the 1986 Act, which not only confers jurisdiction to make administration orders in certain cases, but also contains the provision in s 426(4) imposing on the High Court, as the insolvency court in England, a duty, in defined circumstances, to assist the insolvency court of another country or territory. In this instance the territory was Jersey and the court was the Royal Court of Jersey. Mann J concluded that, although the merits of making an administration order in this case were undisputed, the High Court had no jurisdiction to make such an order by way of assistance. It was being asked to make an order in circumstances that fell outside the assistance provisions of the 1986 Act.

9 The main objection was that there was no insolvency proceeding, either existing or proposed, in the Royal Court for which assistance from the High Court could be requested under s 426(4): there was no application for a declaration *en désastre*, which the Royal Court would have jurisdiction to order but the parties did not want, and, as the bank and the company recognised, the Royal Court could not itself grant the order which they wanted a court to make. The Court of Appeal did not agree with Mann J's ruling. It held that his interpretation of the 1986

Act was too narrow in the light of the language and purpose of the assistance provision and the general principle of “modified universalism” mentioned below. It reversed his decision and itself made an order appointing administrators of Tambrook.

### **A letter of request**

10 The crucial point is that, on the application to the Royal Court to send a letter of request to the High Court for it to take insolvency action in the form of an administration order, it was clearly established that a cross-border insolvency situation existed in the case of Tambrook and that the assistance of the High Court, if available, was needed in order to deal with it in a way that would be in the interests of all concerned. It should be emphasised that this was not a case of the Royal Court of Jersey requesting the High Court to make an administration order in respect of a Jersey company where there were no English connecting factors, but simply on the basis that Jersey law contained no provision for administration orders against Jersey companies in any circumstances.

11 In this case, in addition to the land owned by Tambrook in Margate and the development business carried on by it in England, by far its biggest creditor was HSBC Bank, the holder of security documentation governed by English law. The bank preferred to put Tambrook into administration rather than into a *désastre*. The insolvency had arisen from Tambrook’s inability to repay its debt to the UK bank, which wanted the English properties sold in order to recover an indebtedness exceeding £8m at the time of the hearing. There would be a major shortfall for the bank and nothing left for unsecured creditors. The sole director did not oppose administration, nor did any other creditors.

12 The absence from Jersey law of any insolvency procedure for making administration orders necessitated the adoption by the bank of the roundabout route of first applying to the Royal Court for a letter of request to be sent to the High Court asking it to make an administration order in accordance with its powers of assistance under s 426(4). The Royal Court acceded to the application and made that request for assistance to the High Court. This was not the first time that the letter of request procedure had been invoked in similar cross-border situations. The procedure followed by the Royal Court in this case had been used in earlier cases without any jurisdictional objection being taken at the High Court end. There were, however, no reported or reasoned decisions given in the earlier cases of the High Court appointing administrators in accordance with a letter of request.

### **The 1986 Act**

13 Mann J made it clear that, if that assistance procedure were available in this case, there was no dispute about the merits of an administration order. The only potential problem was one of jurisdiction. That jurisdictional issue turned on the interpretation of s 426(4), which provides for co-operation between insolvency courts of different parts of the UK and of different countries and territories in the following terms—

“The court having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory.”

### **Uncontroversial points**

14 Some uncontroversial points on the structure, wording and application of the sub-section are worth noting at this stage—

- (1) The assistance provision is mandatory. The UK court having insolvency jurisdiction “shall assist” specified courts having corresponding jurisdiction. The exact form that the assistance takes in a particular case would, however, seem to be a matter of discretion for the High Court.
- (2) The assistance to be provided is cross border. That includes assistance to courts in any relevant country or territory, not just to courts in another part of the United Kingdom. Jersey is not part of the United Kingdom, but it is a “relevant territory” within the sub-section.
- (3) The court providing the assistance must be one “having” insolvency jurisdiction, in this case the High Court.
- (4) The court to which assistance is to be provided must be one “having” the corresponding jurisdiction in insolvency law in a relevant country or territory. The Royal Court is the court “having” insolvency jurisdiction in Jersey, though that jurisdiction does not extend to the making of administration orders against companies.
- (5) An important general principle permeates the culture of cross-border insolvencies. The sub-section implements the general principle of “modified universalism” and co-operation between insolvency courts, which—

“requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure

that all the company's assets are distributed to its creditors under a single system of distribution."<sup>3</sup>

### **The judgments**

15 The excellent judgments at both levels of decision are of interest both on cross-border insolvency law, and, more generally, on the approach to statutory interpretation.

#### ***Mann J in the High Court***

16 In holding that the English court did not have jurisdiction under s 426(4) to make the order pursuant to the request of the Royal Court for assistance, Mann J explained that the sub-section contained three requirements in relation to a request for assistance: a UK court exercising jurisdiction; a foreign court exercising a similar jurisdiction; and assistance of the latter by the former. The sub-section existed "to improve co-operation between actual processes", but it did not exist to fill gaps in the insolvency law of another jurisdiction, such as that of the Royal Court in Jersey.

17 Mann J said that he afforded full respect to the fact that the Royal Court had requested assistance and that other judges had acted on such requests in the past. However, he had to apply the sub-section. The jurisdictional difficulties could not be ignored. The High Court did not acquire jurisdiction to make an order merely because the Royal Court requested the court to make it. There had to be existing or planned insolvency proceedings in Jersey which the High Court could assist. There was none. The High Court could not "assist" a court that was not actually doing or intending to do anything. The application was to provide a substitute for insolvency proceedings in Jersey. It was an attempt to fill a gap in the jurisdiction of the Royal Court under Jersey insolvency law. This was not a case of assistance to a court exercising a corresponding insolvency jurisdiction. The request fell outside s 426(4). It could not be acted on by the High Court.

#### ***Court of Appeal***

18 Davis LJ gave the leading judgment with which McFarlane and Longmore LJ agreed. The Company did not appear and was not represented at the hearing, having decided not to oppose the appeal. No *amicus curiae* or advocate to the court had been appointed to assist the court, such as by advancing contrary arguments on the jurisdiction point. The Court of Appeal allowed the appeal on the ground that

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<sup>3</sup> *In re HIH Casualty & General Insurance Ltd* [2008] 1 WLR 852, para 30.

Mann J's interpretation of s 426(4) was too narrow. It favoured a broader interpretation giving effect to the purpose of the assistance provisions *i.e.* to provide mutual cross-border co-operation between insolvency courts and to aim at one set of insolvent proceedings.

19 On its precise wording, the sub-section referred to the UK court "having" jurisdiction and to the courts "having" corresponding jurisdiction in insolvency law, not to courts "exercising" insolvency jurisdiction, as concluded by Mann J on his interpretation. Both the High Court and the Royal Court satisfied the requirement of "having" insolvency jurisdiction. Further, there was no need for there to be separate formal insolvency proceedings in Jersey and in England. One set of insolvency proceedings was what was contemplated by the legislation. The English courts had jurisdiction to make the order requested by the Jersey court, as it would "assist" the Royal Court, which was unable to make the order.

20 What the Royal Court was able to do in the cross-border insolvency situation facing Tambrook was to make the request to the High Court for assistance. The making of the request itself was, in any event, a sufficient exercise of its insolvency jurisdiction of the Royal Court to invoke the procedure under s 426(4) for obtaining the assistance of the High Court in its insolvency jurisdiction.

### **Some points arising**

21 I would select three main points for special emphasis.

22 First, from the practical point of view, the judgment of Mann J was bound to cause concern to financial institutions which had made loans to Jersey companies. They had probably received advice based on orders made by the High Court in earlier cases that they would have the option of applying for administration orders using the letter of request procedure. If they could no longer do that there was a concern that financial institutions might be less willing to lend to Jersey companies in the future.

23 Precedents of orders made in the apparent exercise of jurisdiction are not in themselves proof of the existence of jurisdiction. There have been other instances of the High Court making orders which were later held to have been made without jurisdiction *e.g.* orders for the variation of trusts before the Variation of Trusts Act 1957 and, as discussed at the 2013 conference organised by the Jersey Institute of Law on "*Futter and Pitt: Mistakes by Trustees*",<sup>4</sup> orders made by the High Court upon a supposed, but mistaken, jurisdiction originating in

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<sup>4</sup> 2014, edited by Scott Atkins, published by Institute of Law, Jersey.

*Re Hastings Bass*.<sup>5</sup> In my view, Mann J was not prevented by judicial precedent from reaching his conclusion he did on the interpretation of s 426(4). It was for him to reach his own interpretation of s 426(4) in accordance with normal principles of statutory interpretation.

24 Secondly, as a general rule, I would adopt the cautious approach of Mann J. Caution on jurisdictional questions is always advisable, especially in relation to affairs involving other countries or territories. This was a case of a company incorporated in Jersey where it had its main interests. Further, the Royal Court had an insolvency jurisdiction under which it could have made an insolvency order, *i.e.* an order to wind up the company if the bank had asked it to do so. That particular jurisdiction had neither been invoked by the bank nor did it propose to do so. It is certainly not a usual procedure for an English court to exercise its jurisdiction to grant a remedy simply because the appropriate local court in another jurisdiction is unable to grant it.

25 Thirdly, for understandable reasons neither the bank nor the company wanted the extreme measure of a Jersey law declaration *en désastre*. It would have been counterproductive to the bank's interests as a secured creditor and the interests of the company and those interested in it. A proposed pre-pack administration would serve their interests better. Thus the problem facing the Royal Court and the High Court was that the preferred insolvency procedure of those affected did not exist in Jersey law.

26 In those circumstances was it permissible for the High Court to make an administration order? The key points were that s 426(4) gave it jurisdiction to make an order to assist the Royal Court on request and that assistance would in fact be given in the insolvency of Tambrook by making the administration order. The fact that the Royal Court could not make an administration order in this cross-border case meant that assistance was needed in the insolvency. That was relevant in considering the scope and application of s 426(4). The fact that the Royal Court made the request in the absence of a formal existing or planned insolvency proceeding for a *désastre* did not take the case outside the scope of the provision of assistance.

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<sup>5</sup> [1975] Ch 25.

### **Concluding comments**

27 Finally, three general comments are offered in the overall context of asset security, insolvency and the enforcement of creditors' rights in the Channel Islands. Insolvency specialists may think that the comments are all so obvious that they are not worth the effort, but, as has been wisely said, "There are great strengths to be derived from not being afraid of the obvious". That is, in general, a sound approach in giving legal advice, making submissions to a court, reaching decisions and giving judgments.

#### ***The merits and their relevance***

28 First, a comment on the underlying merits of the case and their relevance to the judgments on jurisdictional points. It will be obvious to any lawyer that, whatever the merits of an application, a court cannot properly hand out an order simply because it is requested by a court in another country or territory to co-operate with it by making an order it cannot itself make, or because the parties agree that an order should be made, or because no-one opposes the making of the order. Jurisdiction to make the order must be established before the court can consider the exercise of a judicial discretion. This is not always appreciated by the parties, who are sometimes under the misapprehension that in insolvency matters the court should be able to make any order that it thinks fit and just in all the circumstances.

29 I would agree that, if an unopposed application is made to a court for an order which seems sensible and just, the courts will not usually go out of their way to find legal reasons for refusing to make it. Subject to clarifying the legal position on jurisdiction, this case presented no difficulty at all about the kind of order the court should make. An administration order was unopposed by the company, its sole director or other creditors. The appointment of administrators was in the best interests of them all as well as the bank. Everything pointed to the desirability of granting the assistance requested by the Royal Court to make an administration order. Where, however, as here the jurisdiction is statutory, the High Court must interpret the relevant legislation according to the established principles, which focus on the meaning of the words used in the light of the purpose of the provision rather than the merits of the particular case.

#### **Statutory interpretation: the purposive approach**

30 The purpose of cross-border assistance under s 426(4) is clear: to secure co-operation between insolvency courts so that, within one insolvency proceeding, the best interests of all parties and the public can be served. The Court of Appeal judgments correctly focus on the importance and value of cross-border co-operation in a case such as

this where a company may be incorporated in one country, but have assets in another which can be realised to greater advantage by a procedure available in the other country.

31 The interpretation adopted by the Court of Appeal was one open to it on the wording of the sub-section. It was also one which promoted rather than defeated the self-evident purpose of s 426(4). Mann J had interpreted “having” the corresponding jurisdiction as meaning actually “exercising” jurisdiction. The Royal Court fitted the description of the court “having” a corresponding jurisdiction in insolvency in Jersey, even though it could not exercise it by making the particular form of order sought by the bank and even though there was no formal insolvency proceeding in existence or contemplation in that court. Section 426(4) made available to the parties *via* the Royal Court the procedure of seeking the assistance of the High Court. The Royal Court had exercised its insolvency jurisdiction in relation to Tambrook so far as it could in the circumstances by acceding to the bank’s application for the letter of request.

32 The procedure under s 426(4) could in a sense be described as having the effect of filling a “gap” in Jersey law by achieving for the bank indirectly an insolvency remedy that could not be obtained directly from the Royal Court in the ordinary way. The assistance procedure did not, however, fill a gap in Jersey law in the sense of changing Jersey law by introducing administration orders into Jersey law, or circumventing Jersey law by some kind of legal device. The Royal Court enlisted the assistance of the High Court allowed by the procedure under s 426(4) in a cross-border insolvency situation. There was nothing legally objectionable about that in the circumstances, as there were connecting factors with England and the insolvency jurisdiction of the High Court.

***Procedural law and sensible outcomes***

33 Finally, and by way of general comment on procedural law, it is perhaps surprising to find that the bank was entitled to invoke procedures first in the Royal Court and then in the High Court to obtain indirectly from the High Court an order of a kind (an administration order) that it could not obtain by application to either court in the ordinary way.

34 The explanation is to be found in the unusual, mandatory and special character of s 426(4) and its objective of securing cross-border co-operation and mutual assistance between courts in sorting out problems arising in an insolvency. That procedure is subject to important limitations. It is not available to insolvency courts in all overseas countries and territories, but only between courts in other parts of the UK and in relevant countries and territories. As between

those courts the assistance procedure cannot be used to change the local insolvency law administered in those courts nor is it available in cases where there are no valid reasons for assistance by the High Court, such as where there are no relevant cross-border connecting factors.

35 Thus, to take an example cited earlier, it is difficult to see on what basis the assistance procedure could be properly invoked to obtain an administration order from the High Court where there is nothing to connect the Jersey company with England and the sole reason for invoking the procedure is to obtain an administration order against the company, which cannot be obtained from the Royal Court under Jersey Law. In those circumstances there would be no valid reason for imposing on the High Court a mandatory obligation to co-operate with the Royal Court or indeed any valid reason for the Royal Court to request co-operation.

36 In the case of *Tambrook*, it was possible to reach a sensible result in the interests of all concerned because there were sufficient connecting factors present to establish the special jurisdiction of the High Court under s 426(4) and to impose on it the duty to assist the insolvency court of Jersey by putting *Tambrook* into administration. There will be a sigh of relief from some banks and their advisers.

*The Rt. Hon. Sir John Mummery was a judge of the High Court of Justice (Chancery Division) of England and Wales 1989–1996 and a Lord Justice of Appeal 1996–2013.*