2254 of 2015

Neutral citation number: [2015] EWHC 2697 (Ch)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
MANCHESTER DISTRICT REGISTRY

Manchester Civil Justice Centre,
1 Bridge Street West,
Manchester,
M60 9DJ.

Monday, 14th September 2015.

Before:

HIS HONOUR JUDGE HODGE, QC
(Sitting as a Judge of the High Court)

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IN THE MATTER OF OMNI TRUSTEES LTD (IN LIQUIDATION)

Between:

THE OFFICIAL RECEIVER

Applicant

and

TRISTRAM MICHAEL NORRISS

Respondent

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MISS LUCY WILSON-BARNES (instructed by *Wragge Lawrence Graham & Co LLP,* 2 Snowhill, Birmingham, B4 6WR) appeared for the Applicant.

The Respondent did not appear and was not represented.

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JUDGMENT

Monday, 14th September 2015.

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JUDGE HODGE QC:

01 This is my extemporary judgment in the matter of Omni Trustees Ltd, No 2254 of 2015. This is the adjourned hearing of an application under Section 236 of the Insolvency Act 1986. The Respondent to this application is a Hong Kong resident, Mr Tristram Michael Norriss. The Applicant is the Official Receiver in his capacity as the liquidator of Omni Trustees Ltd. On 27th May 2015 the Secretary of State presented a Petition to wind up Omni Trustees Ltd on public interest grounds. On 3rd June 2015 the Official Receiver was appointed as provisional liquidator of Omni Trustees Ltd; and on 22nd July 2015 a winding-up order was made in relation to the company. Both of those orders were made by His Honour Judge Pelling QC (sitting as a Judge of the Chancery Division). On 12th June 2015 the Official Receiver, acting in his capacity at that time of provisional liquidator of the company, had issued the application which is presently before the court. At that time there were two Respondents to the application, Mr Mark Carter and Mr Tristram Michael Norriss. I am not presently concerned with the position of Mr Carter. He is present in court here today as a litigant in person, but he has no interest in the relief which is being sought against Mr Norriss otherwise than as an interested observer of these proceedings. He has made no substantive submissions to me. Mr Norriss does not appear before me today. Mr Carter had thought that he might travel from Hong Kong to be present in court today but that does not appear to be the case.

02 The Official Receiver is represented by Miss Lucy Wilson-Barnes (of counsel), who has produced a detailed written skeleton argument dated 10th September 2015. The evidence formally in support of the application is contained within the second report of Mr Kenneth David Beasley, an Official Receiver with the Public Interest Unit of the Insolvency Service, based at Manchester. His second report is dated 12th June 2015, and various documents are exhibited to it as Ex. KDB/2. In addition, there is a substantial volume of (largely email) exchanges that have taken place involving the Official Receiver, his solicitors (who are Wragge Lawrence Graham), and both Mr Carter and Mr Norriss. Those have been placed before me, and I have been taken to various of them. There are now a little over 180 pages of such email exchanges, commencing on 12th June 2015, the date of Mr Beasley's second report, and continuing up until early this morning (14th September).

03 The background to the present application can be shortly stated: The company, Omni Trustees Ltd, is the Trustee of an Occupational Pension Scheme known as the Henley Retirement Benefit Scheme. On or about 25th July 2014, at a time when the assets of the Henley Retirement Benefit Scheme held by the company amounted to some £8.6m sterling, a little over £3.7m sterling was transferred from the company to the Timoran Small Self-Administered Scheme located in Hong Kong. The transfer was effected by a firm of solicitors in Leeds, Metis Law LLP, acting on behalf of the company, apparently on the instructions of a Mr Karl Dunlop. The transferee, Timoran SSAS, apparently acted by Mr Tristram Michael Norriss. On the evidence, he would appear to be the principal, and possibly the sole, trustee of Timoran SSAS. The object of the present application is to find out what has happened to the sum of just over £3.7m that was so transferred to the Timoran SSAS.

04 The application first came before Judge Pelling on 17th June 2015. At that time there were questions as to the sufficiency of the service of the application upon Mr Norriss. Mr Norriss had written a letter to the court which is to be found at pp. 36-37 of divider 8 of the application bundle. The letter was placed before Judge Pelling on 17th June. The letter from Mr Norriss, which I am told was in similar terms to a letter from Mr Carter, described the application by the Official Receiver as "oppressive" and "unreasonable". The Official Receiver was said to have failed properly to serve Mr Norriss with the application and to have failed to give him proper or even reasonable – considering his residence in Hong Kong – notice of the hearing. Particulars of the failure to serve and to provide proper notice were given. Furthermore, the letter asserted that, in any event, Mr Norriss did not accept that the English court had jurisdiction to grant an order with such extra-territorial effect as the Official Receiver was then seeking. I should mention that at that stage what was sought was not simply the production of a witness statement, with supporting documents, addressing various identified matters but, in addition, that Mr Norriss, who had held himself out as being a trustee of the Timoran SSAS, should attend to be examined on oath at a place and time to be fixed by the court. The lack of jurisdiction to make an extra-territorial order was addressed in Mr Norriss's letter in these terms:

> *'In relation to jurisdiction I have been advised that the English court does not have the power to summon people from abroad to appear before it and that Section 236 Insolvency Act 1986 is not an exception to this rule and so I do not accept that the English court has the jurisdiction to grant the order sought. Even if it did have jurisdiction, which I do not accept, the terms of the order sought by*

your client appear to go well beyond the scope of what is seemingly permitted by Section 236.'

Judge Pelling adjourned the hearing of the application and gave directions for service by email on Mr Norriss.

05 The application came back before Judge Pelling on 21st August 2015 by which time, as I have mentioned, the Judge had already made an order winding-up Omni Trustees Ltd so that the Official Receiver was now acting in his capacity as liquidator rather than provisional liquidator.

06 On 21st August Judge Pelling had placed before him a further letter from Mr Norriss dated 20th August 2015, which is to be found at pp. 97C and D of the application bundle. That letter made certain proposals to return assets from the Timoran SSAS to the Official Receiver in his capacity as liquidator of Omni Trustees Ltd. It is unnecessary for me to refer further to the detailed terms of that letter. Having read that letter, Judge Pelling adjourned the application and relisted it to take place today, 14th September 2015, before me, with a time estimate of half a day. Paragraph 2 of Judge Pelling's order gave permission to Mr Norriss to file and serve, by four o'clock on 4th September 2015, any evidence upon which he relied, in default of which he should not be permitted to rely on any evidence without the court's permission. No such evidence has been filed. There is therefore no evidence from Mr Norriss before the court; and, as I have mentioned, he does not appear before me today. The costs were reserved, and there was liberty to apply generally.

07 Miss Wilson-Barnes has placed before me today an email received apparently just after nine o'clock this morning from Mr Norriss, apparently sent from his iPhone, stating that he was still negotiating to effect a transfer of funds from Hong Kong to the Official Receiver of some £3.6m sterling which he had apparently promised would be transferred last Friday, 11th September, but which has not yet been forthcoming. The email shortly states that Mr Norriss has been negotiating the transfer and all is good if the Official Receiver could confirm that the figure was in full and final settlement to Omni. As they were said to be so close, Mr Norriss requested that the court should allow him until Thursday 15th October to conclude the transaction. That is the present position.

08 Miss Wilson-Barnes has made it quite clear that the Official Receiver is not seeking the examination of Mr Norriss, either in this jurisdiction or even in Hong Kong. What the Official Receiver is seeking is an order that Mr Norriss shall, within seven days, produce to the Official Receiver's solicitors a witness statement, with supporting documents, detailing and exhibiting various matters (as identified in para. 3 of the Application Notice). This is an application made by the Official Receiver in his capacity as liquidator of the company. It is said that Mr Norriss is a person who is capable of giving information concerning the business, dealings, affairs and property of the company of which the Official Receiver is now liquidator. Mr Norriss therefore falls within the scope of Section 236(2) Insolvency Act 1986. I am satisfied on the evidence that that is indeed the case. Mr Carter, who is also the Respondent to a similar application by the Official Receiver, but without the added complication that Mr Carter is not permanently resident in Hong Kong, has made it clear, in response to requests for information and documents from the Official Receiver's solicitors, that there are many

matters upon which he is dependent for instructions, and for further information and documents, upon Mr Tristram Norriss. Reference in that regard can be made to the supplemental witness statement of Mr Carter that accompanied an email that he sent on 9th September to the Official Receiver's solicitors.

09 Miss Wilson-Barnes has taken me to the classic test for the making of an order under Section 236, as set out by the House of Lords (speaking through Lord Slynn of Hadley) in the case of *British and Commonwealth Holdings plc v Spicer & Oppenheim* [1993] AC 426 at 438 between C and F. Adopting a previous judicial statement, Lord Slynn made it clear that the powers conferred by what is now Section 236 are powers directed to enabling the court to help a liquidator to discover the truth of the circumstances in connection with the affairs of the company, information of trading, dealings and so forth, in order that the liquidator may be able, as effectively as possible, and with as little expense as possible, to complete his function as liquidator, to put the affairs of the company in order, and to carry out the liquidation in all its various aspects, including the getting in of any assets of the company available in the liquidation. It is therefore said to be appropriate for the liquidator, when he thinks that he may be under a duty to try to recover something from some officer or employee of the company, or some other person who is in some way concerned with the company's affairs (such as Mr Norriss in the present case), to be able to discover, with as little expense as possible, and with as much ease as possible, the facts surrounding any such possible claim.

10 I am satisfied on the facts and evidence in the present case that, subject to the possible difficulty that Mr Norriss is resident and at present in Hong Kong, that it would be appropriate for the court to exercise its powers under Section 236 in relation to him in

the manner sought by the Official Receiver in para. 3 of his Application Notice. I am satisfied that this is a case where the Official Receiver reasonably requires to see the documents he has identified in his Application Notice in order to carry out his statutory functions. I am also satisfied that production of the documents would not impose any unnecessary or unreasonable burden on Mr Norriss in the light of the Official Receiver's requirements. Indeed there is no suggestion in any of the letter or email exchanges I have seen coming from Mr Norriss that the production of the information sought would impose any unnecessary or unreasonable burden upon him. I am satisfied that the case is a proper one for the court to exercise its discretion to make an order in the terms sought if it has the necessary jurisdiction to do so. I am satisfied that the Official Receiver has discharged the onus of satisfying me that the relief sought comes within the powers conferred by Section 236 and that, as a matter of discretion, it is appropriate for the court to make the orders sought, provided, of course, that it has the necessary jurisdiction to do so. It is to that which I now turn.

11 Miss Wilson-Barnes has placed before the court the recent decision of Mr Justice David Richards in the case of *MF Global (UK) Ltd* [2015] EWHC 2319 (Ch). She has taken me through that case at considerable length up to the end of the relevant part of the judgment at para. 33. Mr Justice David Richards's conclusion, after considerable citation of authority, at para. 32 was that, in the absence of authority, and in the absence of what is now Section 237(3) of the Insolvency Act 1986, there would, in his view, be a good deal to be said for concluding that Section 236 was intended to have extra-territorial effect, leaving it to the discretion of the court to keep its use within reasonable bounds. But in Mr Justice David Richards's judgment it was impossible to overlook the authoritative standing of the Court of Appeal's decision in the earlier case of *Re Tucker*

[1990] Ch 148 and the re-enactment of the earlier private examination provisions in substantially the same terms, and the presence of what is now Section 237(3) of the Insolvency Act 1986. In the light of those matters, Mr Justice David Richards's conclusion was that Section 236 does not have extra-territorial effect and that therefore an order could not be made under it against a company based in France. It is important to appreciate that in the *MF Global (UK) Ltd* case what was sought was the production of documents and a full description, by way of witness statement, of certain dealings relating to the company. The French respondent company had submitted that the court has no jurisdiction to make such an order under Section 236; and Mr Justice David Richards upheld that contention.

12 I have to give considerable weight to Mr Justice David Richards's judgment. It is a very recent judgment, handed down on 31st July 2015, after argument that had apparently extended over three days in the middle of May 2015. It is therefore a reserved judgment, delivered after full argument from leading counsel, both well-known specialists in company and insolvency law, on both sides, and where there was full adversary argument, unlike in the case before me. Mr Justice David Richards - himself now on his way to the Court of Appeal - is an acknowledged expert in company and insolvency matters. But two things are to be noted. First, that Mr Justice David Richards did record that in the absence of authority, and what is now Section 237(3), there would have been a good deal to be said for the conclusion that Section 236 was intended to have extra-territorial effect, leaving it to the court's discretion to keep its use within reasonable bounds. Secondly, that any judgment - even a reserved judgment from an acknowledged expert in company and insolvency law - is only as good as the argument that has been presented to the court. Mr Justice David Richards's judgment

was, in terms, founded upon the Court of Appeal's decision in the earlier case of *Re Tucker* (previously cited). That was a case under the former provisions of Section 25 of the Bankruptcy Act 1914.

13 Miss Wilson-Barnes has made the point that the structure of that Section is different to the structure of the provisions now to be found in Section 236 of the 1986 Act. She has taken me at length through the leading judgment of Lord Justice Dillon in *Re Tucker*. She points to the fact that the section of the 1914 Act which the court was then considering was in the following terms:

> Section 25(1): *The court may, on the application of the official receiver or trustee, at any time after a receiving order has been made against a debtor, summon before it the debtor or his wife, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person whom the court may deem capable of giving information respecting the debtor, his dealings or property, and the court may require any such person to produce any documents in his custody or power relating to the debtor, his dealings or property.*
>
> 25(2): *If any person so summoned, after having been tendered a reasonable sum, refuses to come before the court at the time appointed, or refuses to produce any such document, having no lawful impediment made known to the court at the time of its sitting and allowed by it, the court may, by warrant, cause him to be apprehended and brought up for examination.*

14 I am satisfied that Section 25 of the 1914 Act conferred a power on the court to order the production of documents which was merely ancillary to, and dependent upon, the principal power conferred by Section 25, which was to summon a respondent falling within the scope of the Section to attend for examination before the court. In other words, the power to order the production of documents was ancillary to, and dependent upon, the power to summon an individual to attend for examination before the court. That is not the way in which Section 236 is structured. By subsection (2), the court may summon any of three categories of person to appear before it. By subsection (3), the court may require any such person to submit to the court an account of his dealings with the company, or to produce any books, papers or other records in his possession or under his control relating to the company or the matters mentioned in Section 236(2)(c). I am satisfied that Section 236 is structured differently to the former Section 25 of the Bankruptcy Act 1914, and that it confers a freestanding power, independent of the power to summon a person to appear before the court for examination, to submit to the court an account of dealings and to produce books, papers and records.

15 I was taken at length through the relevant parts of Lord Justice Dillon's leading judgment, beginning at p. 155C and going through to p. 159G. The basis for the decision seems to me to be what is said at p. 158, between D-E. There Lord Justice Dillon looked to see what Section 25(1) was about, and he saw that it was about summoning people to appear before an English court to be examined on oath and to produce documents. He noted that the general practice in international law was that the courts of a country only had power to summon before them persons who accepted service or were present within the territory of that country when served with the appropriate process. In other words, the thrust of the decision in *Re Tucker* is that the

court will not compel someone to come to this jurisdiction to be examined on oath and to produce documents.

16 Miss Wilson-Barnes submits that a crucial distinction is to be drawn between compelling a respondent to a Section 236 application to attend court for examination and requiring a respondent to such an application to produce documents and submit an account of his dealings. Miss Wilson-Barnes criticises Mr Justice David Richards, and, perhaps more pertinently, counsel for the Applicant in that case, for not having drawn the distinction between compelling a respondent to attend before an English court to be examined on oath and requiring a person resident abroad to produce documents and submit an account of dealings. The latter jurisdiction, she submits, is far less intrusive than the former; and had that distinction been identified before Mr Justice David Richards, he would have been entitled to regard the latter aspect of the jurisdiction as falling outwith the scope of the decision in *Re Tucker*. Had the case been presented in that way, Mr Justice David Richards might well have felt able to conclude that Section 236(3) is intended to have extra-territorial effect, leaving it to the court's discretion to keep its use within reasonable bounds.

17 Miss Wilson-Barnes also prays in support the decision of the Court of Appeal, delivered by Lord Justice Chadwick, in the earlier case of *Re Mid East Trading Ltd* [1998] 1 BCLC 240. In that case the issue was whether the court should make an order requiring the production of documents situated in a foreign jurisdiction. Miss Wilson-Barnes acknowledges that it was only the documents that were situated in the foreign jurisdiction in that case; and that since the respondent appears to have had a place of business within this jurisdiction, it is not a case in which the respondent was physically

outside the jurisdiction. Nevertheless, she cites extensively from pp. 254H-257B of the judgment of Lord Justice Chadwick in that case in support of her submission that Section 236(3), at least, of the 1986 Act should be taken to have extra-territorial effect. She relies in particular upon the passage beginning at p. 256H and continuing to p. 257B. I quote:

> *'In our view, there is force in the submission that, in so far as the making of an order under Section 236 of the Insolvency Act 1986 in respect of documents which are abroad does involve an assertion of sovereignty, then that is an assertion which the legislature must be taken to have intended the courts to make in appropriate cases. If that is a correct view, then it is not for the courts to erect the additional hurdle of 'exceptional circumstances'. The power to make an order under Section 236 is to be exercised in accordance with the principles explained by the House of Lords in the British and Commonwealth case. The applicant must satisfy the court that, after balancing all the factors, there is a proper case for such an order to be made. A proper case is one where the liquidator reasonably requires to see the documents in order to carry out his statutory functions and production of the documents does not impose an unnecessary or unreasonable burden on the person required to produce them in the light of the liquidator's requirements.'*

I have already indicated that on my assessment of the evidence in the present case the Official Receiver has discharged that burden.

18 Miss Wilson-Barnes also relies on what was said at p. 256E-F:

'... the making of an order under Section 236 ... in respect of documents which are not in the jurisdiction does not involve an exercise in sovereignty; alternatively, that it is an assertion of sovereignty which the legislature must be taken to have intended the courts to make.'

As I have indicated, the Court of Appeal unanimously accepted that analysis of Section 236.

19 Crucially to my decision, it would not appear that the case of *Re Mid East Trading Ltd* was cited to Mr Justice David Richards. It does not feature anywhere in his judgment, which otherwise contains a detailed analysis of a number of authorities which are said to have held that sections of the Insolvency Act 1986 do have extra-territorial effect: see, in particular, paras 27-31 of Mr Justice David Richards's judgment. Crucially, the *Mid East Trading Ltd* case is missing from that otherwise impressive citation of authority.

20 Miss Wilson-Barnes does not in any way seek to challenge the reasoning of Mr Justice David Richards set out at the end of para. 23 of his judgment, or in paras 24-25. What she says, however, is that Mr Justice David Richards's judgment failed properly to distinguish between, on the one hand, requiring a respondent to attend to be examined on oath and, on the other, requiring a respondent to give an account of dealings or to produce documents. He did so because his attention had not been drawn to the structural difference between the statutory provision (section 25 of the 1914 Act) considered by the Court of Appeal in *Re Tucker* and Sections 236(2) and (3) of the 1986 Act, which is the legislation I have to apply. He was also not referred to the helpful

guidance given in the *Re Mid East Trading Ltd* case. As a result, he failed to appreciate that a distinction should be drawn between requiring a respondent to attend court and be cross-examined, on the one hand, and producing documents and giving an account of dealings, on the other. He failed also to appreciate that the context of the new statutory provision was structurally different from the former Section 25 of the 1914 Act.

21 I accept those submissions, which I am satisfied are well-founded, with considerable reluctance and some hesitation. I decline to follow the decision of Mr Justice David Richards in the *MF Global (UK) Ltd* case. In my judgment, Section 236(3) of the 1986 Act does have extra-territorial effect; and provided the considerations identified by the House of Lords in the *British and Commonwealth* case are satisfied, the court does indeed have jurisdiction to require a person resident outside the jurisdiction to submit to the court an account of his dealings with the company, or to produce any books, papers or other records in his possession or under his control relating to the company.

22 So, for those reasons, I will accede to the Official Receiver's application and, in the exercise of my discretion, I will make an order in the terms sought, although it does seem to me that the particular documents identified in sub-para. 3.3 should be limited to those documents relating to the monies paid into the relevant bank account of the Timoran SSAS from the account of Omni Trustees Ltd because otherwise the order would be more extensive than the form of order approved by the Court of Appeal in *Re Mid East Trading Ltd*. As holding number (3) of the headnote to that case makes clear, the court's power to order the production of documents under Section 236 *only* applies to documents relating to the company in whose liquidation the application is made; and it seems to me that the production of bank statements, etc and transactions affecting the

bank account should be clearly limited to those relating to the monies paid in from Omni Trustees Ltd on or about 25th July 2014.