

JERSEY / JUDGMENT

Metlife -v- Dalton Airfield Estate

[2012] JRC 192 (17 October 2012)

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judgment

the commissioner: 1. On 2 nd October, 2012, the Court granted the application of the representor ("Metlife") to issue a letter of request seeking the assistance of the Court of Session in Scotland in placing the respondent ("Dalton") into administration under the provisions of the United Kingdom Insolvency Act 1986 ("the 1986 Act"). 2. I sat alone on the application pursuant to the provisions of Rule 17/2 of the Royal Court Rules 2004 which provides as follows:- "17/2 Non-contentious business which may be transacted before the Bailiff The following non-contentious business of the Court may be transacted in chambers before the Bailiff alone, namely - ... The making of an order seeking aid from a court outside Jersey exercising jurisdiction in relation to insolvency;" 3. Dalton is incorporated in Jersey. Its shareholders are a closed group comprising Highland Properties LLC, a company incorporated in the State of Wyoming, USA and Circle Trust Limited (a Jersey incorporated company) as trustee for Highland Properties LLC. Dalton's principal management functions are carried out in New York, USA and its assets are located in the United Kingdom comprising six commercial properties, five situated in Scotland and one in England. 4. Metlife has provided finance to Dalton on commercial terms by way of a loan facility in the extended sum of £25,150,000. The facility provided for the repayment of the principal on 7 th June, 2012, but as no repayment has been received, an event of default occurred. 5. The application was supported by an affidavit of Mr Gary Waistnidge, an operating director of MetLife Investments Limited, an affiliate of MetLife, and Mr Robert Caven, a partner of Grant Thornton, one of the two joint administrators designate, and they both conclude that Dalton is cash flow insolvent; balance sheet insolvency is a concern. 6. Dalton has been notified of the application and has confirmed in writing that it does not contest the application. Furthermore, it has by letter dated 6 th September, 2012, confirmed:- (i) that it is a property holding special purpose vehicle with no employees and that it has not at any time had any employees in Jersey; (ii) that it has not at any time had any interest in, whether by ownership, lease or licence, nor has occupied any real property in Jersey and (iii) that accordingly, it has no obligation to make any payments by way of Income Tax for its own account, nor Income Tax for any employee nor any form of Social Security payments in respect of Jersey. 7. The Court has issued letters of request in the past in the exercise of its inherent jurisdiction, a jurisdiction which was explored and confirmed in the case of Re REO Powerstation Limited and Others

[2011] JRC 232A, where Bailhache, Deputy Bailiff, concluded at paragraph 16 that:- "(1) The Court does lend its assistance in an appropriate case to a process by which formal proceedings against a debtor can be suspended in order to achieve an orderly realisation of the debtor's assets; (2) In insolvency matters generally, the Court has in the past exercised an inherent jurisdiction in a number of different respects." 8. Mr Pallot, for the representor, submitted that following *RE REO Powerstation Limited and Others*, the Court should consider the following:- (i) Whether, if a letter of request is issued, the Court of Session could properly consider an application for the appointment of administrators. (ii) Whether, if the Court of Session considers an application for the appointment of administrators, the Court of Session will make such an order; and (iii) Whether it is in the interests of creditors, Dalton and/or in the public interest for it an appointment of administrators be made? 9. I was referred to the opinion of Mr D P Sellar, QC, a member of the Scottish Bar specialising in insolvency law, who confirmed that:- (i) The Court of Session's jurisdiction to consider a letter of request from the Court for the appointment of administrators arises pursuant to section 426 of the 1986 Act and the exercise of that discretion is regulated by Schedule B1 of the 1986 Act. (ii) The Court of Session is a court in the UK, having jurisdiction in relation to insolvency law as required by section 426(4) of the 1986 Act. (iii) This Court is a court which has a corresponding jurisdiction, as required by section 426(4) of the 1986 Act. (iv) This Court is a court in a relevant country or territory as per section 426(4) and (11) of the 1986 Act. 10. In the premises, Mr Sellar advised that the Court of Session could properly receive a letter of request from this Court requesting that it consider an application for the appointment of administrators. 11. Mr Sellar could see no reason why the Court of Session would not make an administration order. Its approach, following *Hughes-v-Hannover*

(1997) 1 B. C. L. C. 497, will be that assistance should be given unless there was a good reason why it should not. It must first be satisfied that Dalton is unable to pay its debts and secondly that the administrative order is "reasonably likely" to "achieve the purpose of administration". 12. The purpose of administration forms a hierarchy; first is the rescuing of the company as a going concern; second is achieving a better result for the company's creditors as a whole than would be likely if the company were wound up without first going into administration and the third is realising the property of the company in order to make a distribution to one or more of its secured or preferential creditors. 13. In Mr Sellar's view, the Court of Session would be satisfied of Dalton's inability to pay its debts and would accept the evidence of Mr Caven that the proposed administrators can legitimately pursue these objectives with a good prospect and expectation of achieving each of them. 14. Mr Sellars also confirmed that the 1986 Act provides that an administrator who is appointed by the Court of Session can exercise his powers in relation to property that is situated in England and Wales; thus administrators appointed in this case would be able to deal with all six properties owned by Dalton. 15. Mr Pallot submitted that it was in the interests of all of the creditors for an administration order to be made as opposed to the only practical alternatives namely no action or a declaration of *désastre*. As Mr Caven says in his affidavit that administration is likely to receive a better result for the

creditors as a whole than if Dalton was wound up without first being in administration by reason of:- (i) The benefit of the statutory protections available to Dalton as a company in administration and (ii) Having the opportunity to undertake a strategic and informed sale of Dalton's assets BY dividing and/or repackaging those assets before sale. 16. I accepted these submissions and, noting that the application was supported by the Viscount, concluded firstly that the Court of Session could properly consider an application for the appointment of administrators, secondly that it was likely to make such an order and thirdly that it was in the interests of the creditors for an order to be made. 17. A point arose in relation to the terms of the letter of request. Hitherto, when making such a request, the Court has sought a caveat to the giving of assistance to the effect that the court receiving the letter will protect priority creditors by applying the rules of distribution as set out in Article 32 of the Bankruptcy (Désastre) Jersey Law 1990 as to the priority of creditors. Such a caveat will typically be in the following form:- "giving directions to the administrators, or granting such other relief as is appropriate, to accord creditors who would have a priority status under Articles 32(1)(b) and (c) of the Bankruptcy (Désastre) (Jersey) Law 1990 (as amended) (the "Désastre Law"), if Dalton were placed en désastre, to have the same priority status in the administration in Scotland as if they were preferential creditors under the Désastre Law in Jersey and if the Court of Session is not prepared to make an Administration Order on those terms, then for the Court of Session not to make any Administration Order at all. 18. Mr Sellar had advised Mr Pallot verbally that the Court of Session might not assist with a letter of request if it was conditional upon the incorporation of priority in this way and based this on a narrow construction of Article 46 of the UK 1986 Act which provides:- "For the purposes of subsection (4) a request made to a court in any part of the United Kingdom by a court in any other part of the United Kingdom or in a relevant country or territory is authority for the court to which the request is made to apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction. In exercising its discretion under this subsection, a court shall have regard in particular to the rules of private international law." [My emphasis] Mr Sellar was concerned that the word "either" may be interpreted as being exclusive rather than inclusive. If exclusive, the Court of Session would not, in appointing administrators under UK law, be able to accord priority to certain creditors under Jersey law. 19. Mr Pallot pointed out that this concern had not been expressed before in relation to letters of request issued to the High Court in England but in view of the fact that there would appear to be no priority creditors who would fall within the class of creditors entitled to priority under Article 32, as confirmed by Dalton, which is consistent with the evidence before me as to the way Dalton has been managed, and the fact that there was no objection from the Viscount, I was prepared on this occasion to issue the letter of request without that condition to avoid the potential impact on costs if the matter was remitted back to this Court by the Court of Session on this point. Authorities United Kingdom Insolvency Act 1986. Royal Court Rules 2004. Re REO Powerstation Limited and Others [2011] JRC 232A. Hughes-v-Hannover (1997) 1 B. C. L. C. 497. Bankruptcy (Désastre) Jersey Law 1990. Page

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