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UK Court Considers Insolvency Jurisdiction over Russian Company: *OJSC ANK Yugraneft, Re, Millhouse Capital UK Ltd and Roman Abramovich v Sibir Energy plc and others* [2008] EWHC 2614 (Ch)

Anna Thomander, Associate, and **Zulon Begum**, Trainee Solicitor, Restructuring Group, Orrick, Herrington & Sutcliffe, London, UK

Introduction

In this case the High Court considered the court's jurisdiction to wind up a Russian company, and the circumstances in which the exercise of the court's discretion was appropriate to make a winding-up order.

The outcome of the case ultimately turned on issues of non-disclosure and the dismissal of underlying substantive proceedings. This notwithstanding, the court undertook a detailed analysis of the issues relating to whether the appointment of an English provisional liquidator was appropriate. Two key issues considered by the court were whether there was sufficient connection to England for the court to exercise jurisdiction and whether there was a reasonable possibility of benefit to the party applying for the winding-up order.

The facts

Yugraneft (or the 'Company') was a Russian company being wound up in Russia. In May 2007, the Company was declared insolvent and a Russian liquidator was appointed. In November 2007, Sibir (Yugraneft's parent company), together with another subsidiary (the 'Petitioners'), applied to the English Companies Court for an order that the Company be wound up and that a provisional liquidator be appointed. Such order was granted on 14 November 2007.

The purpose of the appointment of the provisional liquidator was to pursue substantive proceedings in the English Commercial Court on behalf of the Company against Roman Abramovich and Millhouse Capital UK Ltd (the 'Applicants') in relation to an alleged fraud directed by the Applicants (the 'Fraud Claim') against the Company. The complex and protracted dispute between the Company and the Applicants began eight years ago and has involved a series of unsuccessful attempts to bring proceedings against the Applicants in both Russia and the British Virgin Islands (the 'BVI').

The Applicants applied for the Fraud Claim to be dismissed on the basis that there was no realistic prospect of success and that the claims brought were an abuse of process. The Applicants also sought an order setting aside the appointment of the provisional liquidator together with a declaration that the court decline to exercise its insolvency jurisdiction over Yugraneft and an order dismissing the petition to wind up Yugraneft (the 'Insolvency Claim').

Both the Fraud Claim and the Insolvency Claim were heard by Mr. Justice Christopher Clarke.

Clarke J dismissed the Fraud Claim, in light of which the Petitioners accepted that the petition to wind up Yugraneft should be dismissed, at which point the appointment of the provisional liquidator would automatically terminate. Clarke J nevertheless dealt with the Insolvency Claim as a standalone application and proceeded to consider the issues as if the Fraud Claim had not been dismissed.

The issues

The issues before the court were:

1. Whether the English court had jurisdiction.
2. Whether the Petitioners were in breach of their duty of full and frank disclosure when applying for the order appointing the provisional liquidator and to wind up Yugraneft in England.

Jurisdiction, sufficient connection and benefit

As a foreign company Yugraneft was an 'unregistered company' within the meaning of section 220 of the Insolvency Act 1986 (as amended) (the 'Act'). As the Company was carrying on business only for the purpose of winding-up its affairs and was unable to pay its debts, it came within section 221 of the Act and the

English courts had the power to wind it up. As such, the issue was whether the court should exercise its discretion to do so.

The court considered, generally, its duty to provide assistance to foreign insolvency representatives (emphasised in cases such as *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112 and since codified by the incorporation into English law of the UNCITRAL Model Law by the Cross-Border Insolvency Regulations 2006), and the need to maintain international comity by not exercising jurisdiction unless there was a legitimate interest to do so (see *Re Drax Holdings Ltd* [2004] 1 WLR 1049).

The judge referred to a number of authorities on the English courts' jurisdiction in relation to the insolvency of overseas companies and, in particular, the core requirements set out in *Re Real Estate Development Co* [1991] BCLC 210:

1. There must be sufficient connection with England and Wales;
2. There must be reasonable possibility of benefit to those seeking the winding-up order; and
3. One or more persons interested in the distribution of assets of the company must come within the jurisdiction of the courts.

The Petitioners argued that the court should exercise its discretion to satisfy the wishes of the majority of Yugraneft's creditors and shareholders. Moreover, the petition to wind up the company was supported by Yugraneft's Russian liquidator who acted in the interests of creditors as a whole. As to the issues of sufficient connection and benefit, the Petitioners' contention was that (on the assumption that the substantive claims were not dismissed) the Fraud Claim against the Applicants was an 'asset' for the purposes of establishing a sufficient connection with England, and, that it would be significantly beneficial to the Petitioners for the litigation to be conducted by an English licensed insolvency practitioner experienced with litigation in England.

The Applicants submitted that even if the court had not dismissed the Fraud Claim, it would still be inappropriate for the court to exercise its winding-up jurisdiction in respect of the Company. The main reasons were: (i) there was no need for it as the Russian liquidator had powers equivalent to those of an English liquidator and was entitled at common law to be recognised in England; (ii) there would be no benefit derived by the Petitioners since the Russian liquidator could have authorised the commencement of proceedings by Yugraneft himself; and (iii) there was a more substantial connection with Russia. Yugraneft had never carried on any business in England and, apart from the Fraud Claim, had no assets in England.

Clarke J accepted that an asset within the jurisdiction did not automatically mean that the court should exercise its discretional winding-up jurisdiction. The asset might be so small or of such a character that the link with the jurisdiction was too tenuous to justify invoking the winding-up jurisdiction. However, in the present case, Yugraneft was bringing a multi-billion dollar claim against an English company and Abramovich, would (on the assumption that the substantive proceedings were not dismissed) be subject to the jurisdiction of the English courts. Accordingly, such claim was an asset which constituted a sufficient connection with England.

Clarke J disagreed with the Applicants' submissions that the court's winding-up jurisdiction could not be exercised if the same or similar benefit could be achieved by some other means. He stated that although the fact that a similar result could be achieved by other means might be a reason for declining to exercise jurisdiction, it would be determined on a case-by-case basis taking into account all of the circumstances.

The judge was of the opinion that there was a real advantage to the Petitioners in having an English liquidator appointed to superintend the Fraud Claim on behalf of the Company and, also, that it was important to take into account the views of the foreign liquidator and the majority of the company's creditors and shareholders (who both supported the appointment of the provisional liquidator). Furthermore, the Cross-Border Insolvency Regulations 2006 exemplified the need to provide assistance to foreign insolvency representatives. Accordingly, Clarke J concluded that the court could validly exercise its discretional winding-up jurisdiction in this case.

Non-disclosure

The Applicants argued that the appointment of the provisional liquidator had been procured by materially misleading statements and a failure to comply with the duty of full and frank disclosure. They submitted that when applying for the order the Petitioners had failed to disclose matters of relevance and importance to the court.

The judge accepted that the Petitioners had not complied with their duty and, in particular, the Petitioners should have disclosed: (i) that the BVI courts had accepted Mr Abramovich's assertion that he was resident in Russia; (ii) the terms of the refusal of the Russian prosecutor to commence criminal proceedings; and (iii) the fact that the question of civil recovery on any basis, including fraud, had been addressed in the BVI courts.

Clarke J stated that the extent of the non-disclosure was such that, if he had not already struck out the Fraud Claim, he would have set aside the order appointing the provisional liquidator and dismissed the Fraud Claim. This would have been necessary to ensure that the Petitioners gained no advantage by having obtained the provisional liquidation order. The commencement of

substantive proceedings in such circumstances (where there had been a significant non-disclosure) was an abuse of process. In this instance however, the judge was only required to order that the winding-up petition be dismissed.

Conclusion

The decision in this case does not change the law on the English court's jurisdiction over foreign insolvencies. It does contain, however, a detailed analysis of the case law on this area and highlight the need to maintain the delicate policy balance between providing assistance to foreign insolvency representatives and preserving international comity. In this respect, the views of a foreign insolvency office holder and the company's creditors and shareholders may be taken into account when deciding whether to exercise the court's insolvency jurisdiction.

The decision confirms that a cause of action in the jurisdiction may constitute an asset for the purposes of establishing a connection to England. However, the existence of an asset within the jurisdiction does not automatically constitute a connection. The circumstances as a whole, and the nature and value of the asset, are factors that the court will take into consideration when deciding this point.

The case also provides a helpful reminder of the importance of complying with the duty of full and frank disclosure when making an application to appoint a liquidator without notice. Where petitioners for winding-up order relief are unclear as to whether particular evidence is material to the application, they ought to err on the side of caution and ensure that it is placed before the judge so that he can decide its materiality.

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