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ARTICLE

# A Scottish Take on Modified Universalism and Charges over Foreign Assets?

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## Overview

In the recent decision of the Court of Session in *Hooley Limited v The Victoria Jute Company Limited, the Samnuggar Jute Factory Limited and Titaghur PLC* [2016] CSOH 141, Lord Tyre, at first instance in the Outer House, has set out a series of propositions for cross-border security and insolvency law in Scotland. These would appear to be:

(1) a floating charge need not be valid and enforceable under the law governing foreign assets charged in order to be considered valid and enforceable over such assets for the purposes of appointing an administrator out of court under the Insolvency Act 1986 (the 'IA');

(2) a pre-existing or pending liquidation in a jurisdiction outside the European Union in which the business and assets of a Scottish company are located (here being India) does not prevent administration in or out of court of that company taking place in Scotland under the IA; and

(3) such a Scottish administration should be considered by the Scottish courts to be primary and such a liquidation ancillary relative to each other by virtue of the incorporation in Scotland of the company in question.

In coming to his first conclusion above, Lord Tyre also appeared to call into question the apparently extra-territorial effectiveness of English equitable securities under the decision in Re The Anchor Line (Henderson Brothers) Limited [1937] Ch 483 ('Anchor Line') and following on from his third conclusion above Lord Tyre held off (at least initially) from seeking to enforce the primacy favoured in principle for the Scottish administrations over the relevant foreign liquidations.

## Facts

Titaghur PLC ('Titaghur'), The Victoria Jute Company Limited ('Victoria') and The Samnuggar Jute Factory Limited ('Samnuggar') were all incorporated in Scotland, with Titaghur being the holding company of the other two companies. All three companies carried on business solely in India and had their assets seized by order of the Employees' Provident Fund of India (the 'Indian EPF') in respect of unpaid pension contributions. Events then took place broadly as follows:

(a) 1990 – Indian court order prohibiting Victoria and Samnuggar from charging or otherwise disposing of their assets;

(b) from 1998 – businesses of Victoria and Samnuggar carried on by licensee of special managers appointed by Indian EPF;

(c) 2001 – floating charges granted by Victoria and Samnuggar purporting to charge all of their assets;

(d) 2005 – floating charges assigned to Hooley Limited ('Hooley');

(e) 2006 – Indian court winding up of Titaghur;

(f) October 2011 – administrators appointed out of court in Scottish form under IA to Victoria and Samnuggar by Hooley as holder of qualifying floating charges;

(g) November 2011 – administrators agree to sell Victoria and Samnuggar businesses/assets to Hooley;

(h) March 2012 – administrator appointed by Scottish court to Titaghur at instance of Hooley; and

(i) April 2012 – administrator agrees to sell Titaghur business/assets to Hooley.

Titaghur's shares in Victoria and Samnuggar were sold by the Indian EPF in 2001, although this and its relationship with the 2001 floating charges granted by those companies, with the sale by the administrators of their businesses in 2011/12 and with the Indian winding up of Titaghur in 2006 are not discussed.

## Judgment

Hooley sought a declarator that the administrators were entitled as a matter of Scots law to sell such interest as the three companies had in and could transfer in their businesses and assets and that as a matter of Scots law it had acquired such of those interests as could be transferred by operation of the sale contracts.

Part of the judgment related to the procedure adopted and the competence of issuing a declaratory order in that context. It is not proposed to discuss these procedural issues further, save to note that Lord Tyre was of the view that he was in a position to issue a declarator if required.

The appointment of the administrators to Victoria and Samnuggar was challenged on the basis that Hooley was not a holder of 'qualifying floating charges' entitled to appoint administrators out of court under paragraphs 14 and 16 of Schedule B1 to the IA as the floating charges were not valid and enforceable under Indian law in respect of their Indian assets – and that accordingly no charge over all or substantially all of their assets existed at the relevant time entitling Hooley to appoint administrators out of court. Lord Tyre took the view (at [37]) that these were 'formal requirements concerning the terms of the instrument' and that there was 'nothing ... to indicate that the inquiry ... need proceed further than examination of the terms of the instrument creating the charge', drawing some support (at [40]) from the comments of Lewison J in *BCPMS (Europe) Limited v GMAC Commercial Finance plc* [2006] EWHC 3744 (Ch) (at para.63) regarding the continuing validity of an administration appointment despite a dispute regarding enforceability of the relevant charge.

The English courts might have come to the view, on the basis of Anchor Line, that an English charge that was invalid and unenforceable under the law governing relevant foreign assets was nevertheless valid and enforceable in respect of such assets in equity and thus for the purposes of establishing existence of an enforceable charge over all assets for out of court appointment of administrators by a floating charge holder. As equitable charges do not exist in Scots law, Lord Tyre took the view that Anchor Line was of no assistance on this point in Scotland and indeed noted (at [41]) the doubts expressed by Lord Keith in *Carse v Coppen* 1951 SC 233 (at p.248) that Anchor Line had been correctly decided.

The argument against the declarator regarding Titaghur was based around the common law modified universalism doctrine in cross-border insolvency, which has not hitherto been discussed expressly in such terms in a reported Scottish court decision. It was argued that, even though Titaghur was incorporated in Scotland, it was appropriate under the modified universalism doctrine to recognise the Indian winding up of Titaghur as all of its business and assets were Indian and that the declarator should not be granted as it would hinder the Indian winding up. This argument was also made regarding the out of court administration of Samnuggar as an Indian winding up continued to be pending in respect of Samnuggar.

Lord Tyre agreed that the modified universalism doctrine was applicable in Scotland, but took the view that it favoured proceedings under the jurisdiction of incorporation of a company over proceedings in another jurisdiction in which a company's business and assets may be located, noting (at [35]) that 'any proceedings in India must ... be regarded as ancillary to insolvency proceedings in Scotland'. In doing so, Lord Tyre supported his rejection of some contrary suggestions of Lord Hoffman in Re HIH Casualty and General Insurance Limited [2008] WLR 852 ('HIH') with reference to the more restrictive approaches favoured in *Rubin v Eurofinance SA* [2013] AC 236 ('Rubin') and *Singularis Holdings Limited v PricewaterhouseCoopers* [2015] AC 1675 (PC) ('Singularis') and found no support for a contrary approach to be taken in Scotland.

The formal declarators sought were not however then immediately granted, with Lord Tyre taking the slightly unusual approach of indicating (at [42]) 'the best course is simply for me to issue this opinion and put the case out by order ... so that parties may address me as to what further procedure, if any, is necessary'. In various places throughout his opinion, Lord Tyre expressed his consciousness of the effectiveness or otherwise in India of a Scottish court order he might make and of the usefulness of a Scottish decision in ongoing court proceedings in India. At the time of writing, no further order in the case has been reported.

## Commentary

The 'formal' approach taken by Lord Tyre to effectiveness and enforceability of a floating charge over foreign assets when appointing administrators out of court is most welcome – and probably something of a relief to practitioners who will largely have assumed this approach should be followed. A floating charge holder accordingly requires to review its finance documents to check that all assets are purported to be charged and that the charge is enforceable in accordance with the default and enforcement mechanisms contained in those finance documents and other applicable rules of Scots law and of any other law governing relevant finance documents. It is not necessary to go to the trouble and expense of verifying the location and governing law of all of the chargor's assets and the validity and enforceability of the floating charge under the laws disclosed before appointing an administrator.

While this will mean that as a matter of Scots law the administrator will have been validly appointed, it does not of course mean that the administrator can easily realise foreign assets nor that the charge holder will be treated as secured over foreign assets purported to be charged. As recognised by Lord Tyre, this will be the remaining problem for Hooley. While this may be an extreme case, given all assets were in a foreign jurisdiction where the charges and administrations may not be recognised, it seems preferable to let the administrators' appointments stand, for what they are otherwise worth.

This seems equally to be the case for the court-appointed administrator to Titaghur, whose actions may not be recognised in India either. It seems sensible that the initial appointment should be considered valid in itself under Scots law, with its effects being a separate matter.

Lord Tyre's judgment proceeded on the basis that the court appointing the administrator to Titaghur was unaware of the pre-existing Indian winding up, but did not really consider fully whether the appointment should have been made if the court had been so aware. In Re Harrods (Buenos Aires) Limited [1991] 4 All ER 348, the English courts declined to wind up an English company with little practical connection with England while in *Smyth & Co. v The Salem (Oregon) Capital Flour Mills Co. Limited* (1887) 14 R 441 the Scottish courts wound up a Scottish company where that winding up was thought unlikely to be recognised in the USA where its business and assets were located. However, in neither case were there pre-existing insolvency proceedings in the relevant foreign jurisdiction and in the Smyth case there was doubt over whether insolvency proceedings would be commenced in the USA.

Neither of these cases (nor various further Scottish bankruptcy jurisdiction cases) appear to have been discussed in the Hooley case. Given the discretion generally inherent in court appointment of an administrator and the need to assess the likely achievement of administration objectives in making an appointment, it is difficult to see how pre-existing insolvency proceedings where the relevant business and assets are located and the likelihood of recognition there of an administrator cannot be relevant to an initial court decision to appoint an administrator.

However, Lord Tyre indicated that insolvency proceedings in the jurisdiction of incorporation should always be primary and those at the location of a company's business and assets therefore ancillary. This suggests that Lord Tyre was of the view that the administrator should have been appointed to Titaghur even if the appointing court had then been aware of the pre-existing Indian winding up.

This automatic primacy of insolvency proceedings at the jurisdiction of incorporation is the critical issue in this context and the possible ineffectiveness of this supposed primacy appears to be the source of Lord Tyre's reluctance simply to grant the declarators sought. Co-existence of multiple insolvency proceedings is much less of a problem than how they interact. The modified universalism doctrine in England is clearly becoming more asymmetrical with Rubin and Singularis following on from HIH, but it is suggested that it does not require the courts of the jurisdiction of incorporation of a company to seek to impose primacy of its insolvency proceedings over those at what would clearly be its 'centre of main interests' were the UNCITRAL model law invoked under the Cross-Border Insolvency Regulations 2006.

Lord Tyre's support for the modified universalism doctrine in Scotland is therefore to be welcomed but not, it is suggested, its focus on primacy of the jurisdiction of incorporation. Lord Tyre referred in this context to the decision in *Queensland Mercantile Agency Co. Limited v Australasian Investment Co. Limited* (1888) 15 R 935 in which there was a principal liquidation in the Australian state of incorporation and an ancillary liquidation in England. The Scottish court in that case did, however, assist the English ancillary liquidation in a pragmatic manner rather than requiring assistance to be sought from Australia.

Indeed, while the history of Scottish assistance provided to foreign insolvency proceedings and of the imposition of its own has been mixed, the Scottish courts have often been open and co-operative – from what can be read as protecting a German creditor arrangement from non-acceding creditors in *Rhones v Parish and Schreiber* 6 August 1776 FC, through permitting a French syndic to invoke Scottish rules against undervalue transactions in *Obers v Paton's Trustee* (1897) 24 R 719 to indicating in *Araya v Coghill* 1921 SC 462 that a Chilean insolvency receiver could act direct in Scotland without further ado. This 'tartan thread' may be woven rather more in with its now slightly less 'golden' English cousin by Lord Tyre's remarks on the modified universalism doctrine as developed in the English courts and Privy Council, but it would be unwise to assume it may no longer have any different shades of colour.

As something of a footnote, it may also be interesting to work out the implications of Lord Tyre's apparent support for the criticism in *Carse v Coppen* of Anchor Line. Clearly, from the English perspective, equity acts in personam – and giving practical effect regarding assets brought to England to security interests that are valid in English equity but not under the law otherwise governing the assets in question theoretically relates to the 'consciences' of the creditors involved in an English insolvency or other procedure. Lord Tyre recognised this was the position in Anchor Line. As Lord Keith inferred in *Carse v Coppen*, it nevertheless clearly rankles in a jurisdiction in which a foreign security interest is ineffective if the foreign jurisdiction is seen to make that security interest effective for practical purposes by the back door. It may therefore be wondered if Lord Tyre's comments may be used to try to prevent assets subject only to equitable charges (or their proceeds) being removed from the jurisdiction if that back door security will be the likely result? Lord Tyre's comments more clearly suggest that he would not have favoured the Scottish courts according a preference to a floating charge holder over foreign assets if the charge did not create a security interest under the relevant foreign laws.

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