SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 40
P1086/13; P1087/13; P1088/13

Lord Justice Clerk
Lord Drummond Young
Lord Malcolm

OPINION OF THE COURT

delivered by LORD DRUMMOND YOUNG

in the Petitions of

HOOLEY LIMITED

Petitioner and Reclaimer

against

GANGES JUTE PRIVATE LIMITED

Respondent

for

Declarator in relation to actions of the Administrator of Titaghur PLC, The Victoria Jute Company Ltd and The Samnuggur Jute Factory Ltd

Petitioner and Reclaimer: Sandison, QC; Dentons
Respondent: No appearance

19 July 2019

[1] The petitioner has presented three petitions in which it seeks certain declarators relating to dealings involving the assets of three Scottish-registered companies, Titaghur PLC ("Titaghur"), The Victoria Jute Company Ltd ("Victoria") and The Samnuggur Jute Factory Ltd ("Samnuggur"). Although the companies were registered in Scotland, their

commercial activities were carried out almost entirely in India, where they were engaged in the production of jute cloth and jute products in the state of West Bengal.

[2] Until August 2001 Victoria and Samnuggur were subsidiaries of Titaghur. Each of the companies was made subject to an order of an Indian authority, the Employees' Provident Fund, seizing its entire assets in consequence of an alleged failure to meet obligations to pay contributions to employers' pension funds. The sums involved are very substantial. Various orders were made by the Indian High Court in Calcutta in respect of Victoria and Samnuggur. Special managers were appointed to each company by the Employees' Provident Fund, and since about 1998 the business of both companies has been carried on by a licensee of the special managers; that licensee is Ganges Jute Private Limited ("Ganges"), who appeared as respondents to the present petitions throughout the proceedings in the Outer House. They have subsequently withdrawn from involvement. The appointment of special managers and their licensee was intended to generate profits from the trading activities of the three companies, and those profits were to be applied in payment of the debts due by the companies to their employees' pension funds.

[3] Titaghur's shares in Victoria and Samnuggur were sold by the Employees' Provident Fund in 2001. Titaghur was ordered to be wound up by an order of the Indian High Court dated 12 December 2006, and has been in liquidation since that date. A petition to wind up Samnuggur is also before the High Court. The present petitioner has challenged the validity of various orders pronounced by the Indian High Court in relation to all three companies, including the winding up order in respect of Titaghur.

[4] Victoria and Samnuggur granted Scottish floating charges in favour of a company called Aurburn Properties Ltd; the charges were dated 11 July 2001 and registered in the Register of Charges on 27 July 2001. The benefit of those charges was assigned to the

petitioner on 25 May 2005. On 24 October 2011 the petitioner in its capacity as floating charge holder appointed an administrator to Victoria and Samnuggur, and by interlocutor dated 16 March 2012 the Court of Session appointed an administrator to Titaghur, in proceedings at the instance of the present petitioner. Ganges claims that at the time of the appointment the Scottish judge was not informed of the winding up order that had been pronounced by the Indian High Court. Furthermore the validity of all of the floating charges is disputed by Ganges.

[5] On 7 November 2011 the administrator offered to sell and the petitioner agreed to purchase the whole business and assets of Victoria and of Samnuggur. A similar agreement was reached in respect of the business and assets of Titaghur on 11 April 2012. In each case missives of sale were concluded. It is averred that each of the agreements covered the sale and purchase of the selling company's plant and equipment, leasehold property, heritable property (which no doubt covers Indian real property), book debts, jute mills and shares, which in Titaghur's case included its shares in Victoria and Samnuggur and in another subsidiary, The Angus Jute Company Ltd. The consideration for the sale is averred as being £205,000 in the sale by Titaghur and £30,000 in the sales by Victoria and Samnuggur. The petitioner avers that most if not all of the tangible assets of the three companies are situated in India, and that at the time when the contract of sale concluded the parties were unable to ascertain with certainty the full nature and extent of the three companies' proprietary rights in certain assets. The contract of sale applied to such right, title and interest as the seller had in and to the assets transferred.

The petitioners' averments relating to procedure required in India

[6] It is averred by the petitioner that it now requires to take further steps to obtain

judicial recognition in India of its title to the assets transferred by the three sets of missives. The process required for the valid disposal of assets by a corporate insolvency practitioner in India in court-monitored insolvency proceedings is averred to be as follows. First, the insolvency practitioner is entitled to sell any part of the property of an insolvent company by virtue of provisions in the Provincial Insolvency Act 1920 and the Presidency-Towns Insolvency Act 1909. Secondly, any such sale is a "voluntary act subject to superintendence by the Court" in terms of section 59 of the 1920 Act, and must in every case subsequently be ratified by the appropriate Indian court. Thirdly, any sale made by the insolvency practitioner in court-monitored insolvency proceedings will be invalid unless the necessary ratification is obtained from the Indian court.

[7] Against that background, the petitioner avers that it will require to gain legal recognition of its title to the assets of the three companies that it claims to have purchased, through ratification of the sale of those assets by the Indian High Court. As a precondition of the grant of such ratification, the Indian court will require to be satisfied that in agreeing to and executing the sale the administrator of each of the companies acted in accordance with the powers conferred upon him by the United Kingdom Insolvency Act 1986, and that the sale was otherwise valid according to the law of Scotland. It is averred that that will be achieved by presentation to the Indian court of an appropriate certified copy interlocutor of the Court of Session.

[8] Thereafter, it is averred, an application will be made to the District Court in India with jurisdiction over the territory in which any particular asset is situated in order to satisfy that court that the sale under the missives was lawful as a matter of Scots law and that, following implementation of the missives, title to the relevant business and assets now invests in the petitioner. That, it is said, will require filing of the decree of the Court of

Session. If the District court is so satisfied, it would pronounce a decree conform. Following that, a further application would be presented by the petitioner to the High Court in Calcutta under section 44A of the Code of Civil Procedure 1908 to obtain authority to execute the District Court's decree conform. That would have the result that the petitioner was named in Indian public records as the owner of the relevant business and assets.

The dispute between the parties and the orders sought

[9] In its answers to the petition Ganges denies the foregoing averments, and avers that because the assets of the three companies are situated in India or are governed by Indian law, and are under the control of the Indian liquidator, all of the property of each company is deemed to be in the custody of the Indian court by virtue of section 456(2) of the Indian Companies Act 1956. It is contended that as a result the administrators appointed in Scotland had no power to authorize the sale of any of those assets to the petitioner. It accordingly appears that a dispute exists between the petitioner and Ganges as to the effectiveness of the sale by the administrator of the assets of the three companies to the petitioner. That dispute is likely to turn on the interaction of a range of institutions and rules of Scots law and of Indian law, and the application of the principles of conflict of laws (private international law) to those institutions and rules. Ultimately the decision will be for the Indian court, as the assets sold are generally located there, either physically or because they represent intangible property that is governed by Indian law. (The obvious exception to this is Titaghur's shares in its two subsidiaries, Victoria and Samnuggur, which are both Scottish companies). Nevertheless, the present proceedings are designed to provide clarification as to the legal effectiveness as a matter of Scots law of the procedures that have been carried out between the administrators appointed to the three companies in Scotland

and the petitioner as the person who entered into the missives of sale with the administrators.

[10] In each of the petitions the petitioner seeks a series of declarators relating to the validity and practical effectiveness of the missives of sale concluded with the Scottish administrators of each of the three companies. In short, the declarators sought are to the following effect:

(1) that the petitioner contracted by missives of sale dated 11 April 2011 to purchase such right, title and interest as each of the three companies to the business of owning and operating, or in the case of Titaghur, licensing jute mills, together with the relevant plant and machinery, immoveable property, stock-in-trade, goodwill, shares in subsidiaries, book debts and other intangible property;

(2) that the petitioner, provided for in the missives (£205,000 in the missives with Titaghur and £30,000 in the missives with each of Victoria and Samnuggur) has rights, title and interest to those assets in terms of Scots law; and

(3) that the administrator of each of the companies was entitled to sell their assets in terms of paragraph 60 of Schedule B1 and paragraph 2 of Schedule 1 to the Insolvency Act 1986 and that, in terms of Scots law, that sale does not require the subsequent approval of the Scottish courts.

Ganges' challenge to the competency of the petition

[11] Ganges challenged the competency of the granting of declaratory orders in petition procedure in the Court of Session. It further contended that the Court ought not to grant any of the declarators sought. Following the challenge to the competency of petition procedure, the petitioner raised three ordinary actions containing conclusions for declarator

in similar terms to the declarators sought in the petitions. The three petitions and the three ordinary actions proceeded together to debate on the pleadings to consider Ganges' challenge to the competency of granting declaratory orders in petition procedure, and also certain questions of *lis pendens* and a number of substantive issues. Hooley, in its capacity as petitioner in the three petitions and as pursuer in the three actions for declarator, and Ganges were both represented at the debate, and made detailed submissions on the matters raised. The original debate was held before Lord Jones, but unfortunately he died before issuing an opinion. Thereafter all six processes were remitted to Lord Tyre, as a judge of the Commercial Court, to listen to the recording of the debate, to consider the parties' notes of argument, and to proceed as he thought fit. He invited supplementary submissions on a number of matters.

[12] On 11 October 2016 Lord Tyre issued an opinion dealing with the matters that had been debated between the petitioner and Ganges. He repelled the plea of *lis pendens* and upheld Hooley's arguments in relation to the substantive issues raised by the declarators that had been debated. Those parts of his decision are not now challenged, and consequently it is not necessary for us to say more about them, although we would record that we find his reasoning to be compelling. On the competency issue, however, he found in favour of Ganges and held that it was incompetent to obtain the declaratory orders sought in the three petitions by means of petition procedure. It is against that part of his decision alone that the petitioner has reclaimed.

[13] As a result of Lord Tyre's decision on the substantive matters debated between Hooley and Ganges, Hooley has obtained declarators in the three ordinary actions that are in similar terms to those sought in the three petitions. Thus as a matter of substance it has not been prejudiced by the decision on competency. That decision has, however, had

consequences in expenses, and for that reason the petitioner has reclaimed against the decision on competency in each of the three petitions. For that reason it is necessary to consider the general competency of petition procedure, with particular reference to cases such as the present.

Competency of petition procedure

[14] The distinction between petitions and ordinary actions, and the competency of using one of those procedures rather than the other, has been discussed in a number of cases and textbooks. Perhaps the most helpful explanation of the distinction is found in the concurring opinion of Lord Keith in *Tomkins* v *Cohen*, 1951 SC 22, at 23:

> "The summons and the petition have different historical origins and the purpose of the summons is different from the purpose of the petition. A summons was a writ issued in the King's name, directed to messengers-at-arms, charging a defender to appear within a certain period, if he wished to resist decree passing against him, and the procedure in the event of his non-appearance was settled by a very long course of practice and regulation. A petition is an *ex parte* application addressed to the Lords of Council and Session and seeks their aid for some purpose or other, *e.g.*, by supplying some deficiency of power in the petitioner, in protecting pupils and minors, by exercising some statutory jurisdiction, or the *nobile officium*, in a variety of matters".

In the report of the Royal Commission on the Court of Session, etc (Cmd 2801, 1927), at pages 49-50, it is stated that

> "The object of the summons is to enforce a pursuer's legal rights against a defender who resists it, or to protect the legal right which the defender is infringing; the object of the petition, on the other hand, is to obtain from the administrative jurisdiction of the court power to do something or to require something to be done, which it is just and proper should be done, but which the petitioner has no legal right to do or require, apart from judicial authority".

Other statements of the law are to similar effect.

[15] The essential feature of the ordinary action is therefore that it involves adjudication on the existing rights and obligations of the parties. What the court does is to decide what

those rights and obligations (or powers and liabilities) are and to provide mechanisms for their enforcement. Petition procedure, by contrast, involves intervention by the court that goes beyond the determination of existing rights and obligations. The need for intervention by the court is in our opinion the critical feature that determines whether or not petition procedure is required. If petition procedure is required, it must obviously be competent. The court's intervention will normally involve an important element of judgment, in some cases going as far as a discretion. While in ordinary procedure, especially in granting equitable remedies, the court may have a discretion as to whether to grant the remedy sought, that is exceptional. In petition procedure, on the other hand, the element of judgment or discretion will usually be central.

[16] The reason for the court's intervention will usually take one of two forms. First, in some cases the intervention is required because the court is asked to innovate on the parties' existing rights and obligations. This is the basis for the use of petition procedure for applications to the *nobile officium*, the extraordinary equitable jurisdiction vested in the Scottish supreme courts, which permits a remedy to be granted in cases that are not covered by existing law or legal norms: see *R* v *Kennedy*, 1993 SC 417, especially per LP Hope at 421; *Cumbria County Council*, *Petitioner*, [2017] SC 451, at paragraphs [20] *et seq*. In such cases it is clear that it is the decision of the court that creates new norms, designed to deal with the particular problem under consideration, which will frequently result from a *casus improvisus* in existing legislation. Secondly, the court's intervention may be required because the order sought has what may be described as "real" effects, in the sense that the consequences of the court's decision go beyond the rights and obligations of the parties who are represented and affect third parties who are not represented. In such a case, if the effect on third parties is direct and reasonably significant, it is clearly desirable that the court should give

independent consideration to the potential consequences of its order, to ensure that such third parties are not unfairly affected by it.

[17] The majority of the cases where petition procedure is used in preference to an ordinary action probably fall into this second category. Obvious examples at common law were the forms of petition used in applications relating to the administration of trusts and the custody and care of children. These areas of law are now largely governed by statutory powers, but some forms of common law petition remain competent. For example, it remains competent to raise a petition at common law to vary the purposes of a public trust (the *cy-pres* jurisdiction; compare *RS McDonald Charitable Trust* v *SSPCA*, 2009 SC 6), and common law petitions in relation to children are still competent, although because of the comprehensive statutory regulation of this area of law such petitions will usually be presented to the *nobile officium* on the basis that they deal with a *casus improvisus* in the statutory regulation: see *Cumbria County Council, Petitioner*, *supra*. Even in cases where petitions proceed under a statutory power, however, the reason that petition procedure is chosen is precisely because the court's order is likely to affect third parties, as in trust and company petitions, or persons who lack legal capacity, as with petitions relating to children.

[18] Two examples may be given to illustrate the effects of an order in petition procedure on third parties. Applications to the court under section 1(1) of the Trusts (Scotland) Act 1961 for the variation of trust purposes invariably proceed by way of petition. The court's function in such applications is to give consent to the proposed arrangement to vary the trust purposes on behalf of minor and unborn beneficiaries. The invariable practice is to appoint a *curator ad litem* who considers the interests of the minor beneficiaries, but the ultimate decision as to whether to approve of the arrangement is that of the court itself, after proper consideration of the interests of those beneficiaries and any beneficiaries who may be

born in future. It is the requirement to consider those interests, which differ from the interests of the represented parties, the trustees and the adult beneficiaries, that explains why petition procedure is used. Under section 1(4) of the same Act the court may authorize an arrangement varying or revoking trust purposes containing an alimentary liferent. In this case the reason for the court's intervention is that the liferent is designed to protect the interests of the alimentary beneficiary, by restricting the beneficiary's ability to deal with the funds. That protection deliberately overrides the wishes of the beneficiary, and before it is removed the court must ensure that the beneficiary's general financial position is not prejudiced. Once again, the court must consider matters going beyond the immediate rights and obligations of the parties who present the petition.

[19] A second illustrative example is found in petitions for reduction of capital under section 645 of the Companies Act 2006. The reduction of capital inevitably has potential implications for the creditors of the company, and in many cases it may raise questions as among the various classes of shareholders. The reason for using petition procedure in such cases is that the court must give independent consideration to the proposals to ensure that the reduction is fair as among the various classes of shareholder, and must ensure that there is no material prejudice to creditors, who are obviously third parties to the reduction. Similar considerations apply to petitions for approval of schemes of arrangement between a company and its members or its creditors under section 899 of the 2006 Act.

[20] Similar considerations apply to other forms of statutory petition. For example, applications for sequestration and applications relating to the various forms of corporate insolvency invariably proceed by petition if they are in the Court of Session. In these cases it is very obvious that third parties are affected by the order. Consequently it is essential that the court should give independent consideration to such applications, which explains why

petition procedure is used. The same is generally true of applications relating to trust administration, such as applications for new trustees or for directions. Third parties may be affected by any such order.

[21] Accordingly, in our opinion petition procedure will be competent in any case where either it is necessary to innovate on existing legal norms or the court's order is likely to have an effect on parties who are not represented in the proceedings (or in some cases, as in company petitions relating to schemes of arrangement, who dissent from the proposals made). We do not suggest that these are the sole criteria that may justify the use of petition procedure, but those two categories perhaps cover the great majority of such cases. The critical feature is that in such cases the court is obliged to exercise an independent element of judgment, or discretion, that goes beyond the interests of the parties and the submissions that they may make in the litigation. Furthermore, as Lord Keith indicates in *Tomkins* v *Cohen*, *supra*, a petition is an application addressed to the court and seeking the aid of the court. The grant of such aid is justified primarily in the foregoing two categories of application, where the court is asked for good reason to go beyond the existing law or where it is asked to pronounce an order that may have an effect on third parties.

The present applications

[22] The orders sought in the three petitions that we are considering are summarized at paragraph [10] above. It is apparent that they are intended to provide a statement of the legal effectiveness in Scots law of the actings of the administrators appointed to the three companies in Scotland, and in particular the effectiveness of the missives of sale that the administrators have concluded with the petitioner. That statement of Scots law will involve the general principles of the law and the application of those principles to the particular

facts of the case, in so far as Scots law may apply at a domestic level. It is intended that that statement of Scots law should be made available to the Indian courts in order that they can take the legal position in Scotland into consideration in deciding the ultimate question before them: who is entitled to the assets of Titaghur, Victoria and Samnuggur. As we have noted, those assets are almost exclusively located in India apart from Titaghur's shares in its two subsidiaries.

[23] The petitioner has made detailed averments about the procedures that will require to be followed in India if a declarator is pronounced by the Court of Session in the terms sought; these are summarized at paragraphs [6]-[8] above. Although those averments are denied by Ganges, for the purposes of determining the competency of the present application we think that the court must accept the averments *pro veritate*. If Ganges is correct, and the petitioner's statement of Indian procedures is incorrect, that is a matter that can be settled in the course of the applications to the Indian courts that are central to the petitioner's statement of future procedure; this court clearly cannot give an opinion on Indian insolvency procedure. What it is asked to do is to pronounce declarators on the application of Scots law to the transactions that have taken place in Scotland. It is intended that those declarators should be placed before the Indian courts in order to provide them with a definitive opinion as to the legal result in Scots law so far as it applies to the transactions under consideration. It is obvious that declarators of that nature go beyond the mere determination of the existing rights of the parties. They are intended to function as definitive statements by the Court of Session as to the application of Scots law in particular circumstances. In providing such statements, it is obviously expected that the court should determine the law with the total objectivity that should invariably be a feature of a court decision.

[24] In this way it is apparent that the orders sought are not confined to determining the parties' pre-existing rights; they will, or may be, relied on by an Indian court in deciding issues before it that also turn on principles of Indian law and that are likely to affect persons who have not been represented in the Scottish procedure. In these circumstances we consider that one of the potential justifications for the use of petition procedure is present: the consequences of the court's decision go beyond the rights and obligations of represented parties and may affect a range of third parties through the Indian proceedings. It is for that reason that the court must give independent consideration to the terms of any declaratory orders, to ensure that they represent the rules of application of Scots law in a wholly objective manner.

[25] The orders sought in the three petitions are for declarator. Declarator is obviously a procedure that is available in an ordinary action, and indeed that is the standard way in which a declarator is obtained. In the typical case, however, the procedure is concerned to obtain a declaration of the parties' existing rights and obligations, with a view to regulating the relationship between them. What is different in the present case is that the petitioner requires an order for presentation to the Indian courts to establish the legal position in Scotland. That in our opinion goes beyond a mere declaration of the parties' existing rights; it rather involves an authoritative statement of the application of Scots law to the transactions that have been entered into by the petitioner. Consequently we consider that this is a case where either petition procedure or an ordinary action could be used. From the point of view of presentation of Scots law to the Indian courts, use of petition procedure has definite advantages. That justifies its use by the petitioner.

Conclusion

[26] For the foregoing reasons we will allow the reclaiming motion against the Lord Ordinary's decision as to the competency of petition procedure. We hold that the use of petition procedure was competent in the present circumstances. For this reason we will recall the Lord Ordinary's interlocutor dealing with expenses, and award the expenses of the petition procedure in the Outer House until the issue of the Lord Ordinary's opinion of 11 October 2016 in favour of the petitioner.