

EUInsVO Art. 3**Zulässigkeit eines englischen Insolvenzverfahrens nach Umzug eines deutschen Schuldners auch bei möglicher Gläubigerbenachteiligung („Londoner Radiologe II“)**

High Court of Justice London, Judgment of Mr. Registrar Baister. v. 22. 6. 2007 – No. 1338/07 (rechtskräftig)

Leitsätze der Redaktion:

1. Nach Art. 3 Abs. 1 EuInsVO ist das Gericht des Mitgliedstaats, in dessen Gebiet der Schuldner bei Stellung seines Antrags auf Eröffnung des Insolvenzverfahrens den Mittelpunkt seiner hauptsächlichen Interessen hat, für die Eröffnung zuständig (EuGH ZVI 2006, 108 – Staubitz-Schreiber).
2. Verlegt ein Schuldner seinen Wohnsitz von Deutschland nach England, dann kann er die Eröffnung eines Insolvenzverfahrens nach englischem Recht beantragen. Dem steht weder entgegen, dass sein Ehepartner weiter in Deutschland lebt und er diesen regelmäßig besucht, noch dass die Berufstätigkeit befristeten Charakter (hier als Urlaubsvertreter von Ärzten) hat.
3. Dass alle Gläubiger des Schuldners in Deutschland ansässig sind, ist für die Zulässigkeit des englischen Insolvenzverfahrens unbeachtlich.
4. Die möglicherweise missbräuchliche Ausgestaltung eines in England abgeschlossenen Arbeitsverhältnisses des Schuldners (hier mit einer durch den Ehepartner vertretenen Limited) berührt die Zulässigkeit des englischen Insolvenzverfahrens nicht. Ob eine missbräuchliche Vertragsgestaltung vorliegt, kann im Laufe des Verfahrens englischen Insolvenzverfahrens geklärt werden.

Background:

1. On 1 February 2007 Ms Registrar Derrett made a bankruptcy order against Mr E. on his own petition presented to the court on that date. The debtor's petition disclosed that his centre of main interests was within England and Wales and that for the greater part of six months immediately preceding presentation he had been residing at 7 A.-Road, England. The affidavit and statement of affairs sworn in support of the petition indicated that the debtor, who was born in A., Germany, was employed by R. Limited, was working as a locum consultant for radiology and nuclear medicine, and was earning 500 £ per month. He had no significant assets. He had only three creditors totalling 206.700 £, Ms A. and Mr B. whom he owed some 200.000 £, and a bank to which he owed 6.700 £. All three creditors were in Germany. There were no UK creditors. The sum due to the two principal creditors arose as a result of a judgment given against the debtor in proceedings brought in Germany.
2. On the basis of that, and other information before her, the registrar made the bankruptcy order, declared that the EC Regulation on Insolvency Proceedings applied and that the proceedings were main proceedings.

The application:

3. On 22 February 2007 the Official Receiver applied to the court for directions as to whether or not the bankruptcy order should have been made on the basis that the debtor's centre of main interests was in fact in Germany, That application is supported by a report of R. B. (*Official Receiver*). Mr B. makes the following points:
 - i) The debts of the debtor were incurred entirely in Germany and the creditors are all located there (paragraph 4);
 - ii) The debtor moved to England on 9 October 2006 and lives in temporary accommodation provided in connection with his employment as a locum radiologist (paragraph 5);

iii) The debtor's wife continues to live in Germany (paragraph 6).

On that basis, he contends, „It appears ... that the bankrupt's main centre of interests [*sic*] is in Germany, despite his possibly having an establishment in England“ (paragraph 7). Mr B. attaches to his report some notes on interpretation of the EC Regulation on Insolvency Proceedings produced by the Insolvency Service. He gives no sources for his knowledge but this matters little since most are plainly derived from the petition and the supporting evidence and the others are not in issue.

4. When the application came before me on 18 April 2007 I declined to hear it, since notice had not been given to Mr E. That step was taken, and when the matter came back before me on 19 June 2007 Mr E. was present. Ms S. (*Official Receiver*) contended that the bankruptcy order ought to be annulled on the basis that centre of main interests was in Germany. Mr E. disagreed and maintained that it was here.

I considered whether further directions for evidence might be required (and possibly an order for cross-examination) but concluded that they were not since it soon became apparent that the main facts were not in issue, only the law.

The submissions:

5. In support of the Official Receiver's position Ms S. made the following submissions. First, she submitted that Mr E. was in this country only on a temporary basis. Secondly, she relied on his wife's continuing to live in Germany. Thirdly, she pointed out that there were no creditors in the UK. Fourthly, she contended that Mr E. had owned a property in Germany some time ago which had been transferred into his wife's name; proceedings to investigate and undo the effects of that transaction, if appropriate, could more conveniently be taken in Germany than from there. Finally she contended that the conduct of the insolvency here, as opposed to in Germany, could be prejudicial to the creditors.

6. There was another factor on which the Official Receiver relied. Ms S. pointed out, that E's earnings of 500 £ were in reality a fiction. His services were contracted through a company of which he had been a director (he had now resigned); his wife remained a director, and the company was taking the benefit of his true earnings, leaving nothing for the Official Receiver to seek to attach by way of income payments. The set up was a sham to deprive creditors of money they might otherwise expect to go towards the payment of a dividend.

7. Finally Ms S. pointed out that locum work was by its very nature temporary, which pointed again against Mr E.'s centre of main interest being here.

8. Ms S. drew my attention to only one authority, *Stojevic v Official Receiver* [2007] BPIR 141, ChD, a recent decision of Mr Registrar Jaques. She cited first a passage from *The EC Regulation on Insolvency Proceedings - A Commentary and Annotated Guide, Gabriel Moss QC and others* (Eds.) (Oxford, 2002) set out in the judgment:

„The centre of main interests is linked to the type of activity from which the insolvency or need for rescue or restructuring arises. Thus, where an individual is carrying on business activities and it is the business that is the root of the insolvency or need for rescue or restructuring, the centre of main interests may well be in the place of business rather than the place of habitual residence (if different)“ (paragraph 27, page 156 of the learned registrars judgment).

She submitted that in this case the insolvency had arisen as a result of a judgment given against Mr E. in connection with his business affairs in Germany, the business he carried on with his now judgment creditors. She also relied on a passage in the registrar's judgment where he cites from counsel's written submissions as follows:

„In the case of an individual:

3.1 for a professional person [the centre of main interests] is the place of professional domicile [paragraph 75 of the *Virgos/Schmit* Report]“ (see paragraph 26, page 154).

E's insolvency and business connection were with Germany and those factors pointed to his centre of main interests being in that country as opposed to here.

9. No submissions were advanced in support of Mr B.'s tentative suggestion that Mr E. may have an establishment here.

10. Mr E.'s submissions were very brief. He pointed out that he had genuinely moved to this country to work here and remained working here. To that extent his address in England was a true address. The move was not temporary and there was no evidence to support the contention that

it was such. It was true that his wife remained in Germany, but he spent more time here in connection with his work than he did in Germany. He denied that there had been any impropriety in the transaction transferring his property interest to his wife. He denied that the arrangements by which his services were contracted were a sham. In addition to giving him a wage, the company which employed him paid for his accommodation and transport; it also arranged insurance, and there were other expenses which had to be covered. (These matters were not in evidence but were not challenged.)

11. In summary, Mr E. submitted, in common with many EU qualified doctors, he had come here to work as he was entitled to. His being here was not temporary, as his continued presence demonstrated. He regarded this country as his centre of main interests and he was entitled to invoke the bankruptcy jurisdiction of the courts of this country, which is what he had done after taking advice.

Conclusions:

12. This application raises an important issue. It is becoming increasingly common for debtors with foreign connections (be they UK citizens with connections abroad or foreign nationals with connections here) to come to this court to seek bankruptcy orders on their own petitions. The general practice of the court is to accept at face value the evidence sworn in support of such petitions but to make inquiries of the debtor if it appears that there is no justification for invoking this jurisdiction (although necessarily the scope of that inquiry is often limited at the petition stage). It is unfortunate therefore that I find myself having to decide this case on the basis of very thin evidence and very limited submissions as to the law.

13. The starting point is article 3.1 of the EC Regulation on Insolvency Proceedings (1346/2000 of 29 May 2000) which provides,

„The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. [...]“

A debtor's „centre of main interests“ is not defined in the Regulation, but Recital (13) provides,

„The ‚centre of main interests‘ should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.“

Proceedings brought in a debtor's centre of main interests, if opened, are main proceedings.

14. There is a small but significant body of authority on what constitutes a debtor's centre of main interests to which I was not referred in the course of the hearing but to which I drew the attention of the parties, inviting submissions as appropriate, and on which I am bound to draw in reaching my conclusions. The first is *Shierson v Vlieland-Boddy* [2004] EWHC 2752 (Ch); [2005] EWCA Civ 974; [2005] BPIR 1170 and 1190. Chadwick LJ cited with approval a passage from the judgment of Mann J which was the subject of the appeal by saying,

„The judge observed, correctly in my view, that there is nothing in that concept [as set out in Recital (13)] which prevents a debtor's centre of main interests from being changed from time to time“ (paragraph 42).

It follows that Mr E., whose centre of main interests appears at one stage to have been Germany, was not fixed with Germany for all time but was at liberty to change his centre of main interests (as Mr Vlieland-Boddy did).

15. The second point which *Shierson v Vlieland-Boddy* establishes is that the country in which a debtor's debts were incurred is not

a relevant consideration in establishing where his centre of main interest might be. Chadwick LJ said this:

„If counsel had gone so far as to submit that the centre of main interests was fixed at the place where it was when the debts were incurred, the judge was plainly right to reject that submission for the reasons which he gave. To hold that the centre of main interests was fixed by some past event would be inconsistent with the language of Art 3.1. The Article requires the court to look at the position as it is at the date of the decision to assume (or decline) jurisdiction, not at the position as it was at some earlier date. Further, to fix the centre of main interests at the place where the debts were incurred, would be illogical and unworkable. As the judge put it: ‚If it is possible to change a centre of main interests, why should it be fixed by reference to certain debts? If it is to be so fixed, by reference to which debts is it to be fixed?‘ (paragraph 41).

16. *Re Staubitz-Schreiber* (Case C-1/04) [2006] BPIR 510 upholds the right of a debtor to change his centre of main interests. When Frau Staubitz-Schreiber applied to the German court for insolvency proceedings to be opened her centre of main interests was in Germany. Before the proceedings were opened she moved to Spain. The European Court of Justice ruled that Article 3.1 of the EC Regulation had to be interpreted as meaning that the court of the Member State, within the territory of which the debtor's centre of main interests was situated at the time when she lodged her request to open proceedings, retained jurisdiction to open them even if the debtor moved her centre of main interests to the territory of another Member State after lodging proceedings but before they were opened.

17. Returning to *Stojevic v Official Receiver*, Mr Registrar Jaques held „that the true inquiry ... must be as to [the debtor's] habitual residence“, which on the facts of that case he decided was Austria. The reasoning leading him to that position is set out in his judgment and need not be repeated here. Suffice it to say he concluded that that was the scope of the inquiry on the basis of Recital (13) of the EC Regulation, fortified by reference to paragraph 75 of the *Virgos-Schmit* Report,

18. I have little difficulty in concluding that at the date when these proceedings were opened (which was the same as the date on which they were presented) Mr E.'s centre of main interests was in the United Kingdom. It is likely that before he came here it was in Germany, but it is clear from the authorities to which I have referred that he was free to change it and that he did so. He appears to continue to work here, so there is no basis on which I can conclude that his being here is purely temporary. This country appears to be, at present, the place where he is conducting the administration of his interest on a regular basis; it is readily ascertainable by third parties. It may well be that he returns to Germany from time to time, but it is also plain that his habitual residence, in the sense of the residence where he most often to be found, is here. Certainly, there is no evidence to the contrary. To the extent that it may be relevant (which I doubt) it would also appear that his professional domicile is here if all expression means that it is the place where he is carrying on his profession at the present time.

19. Even if it could be said that Mr E.'s presence here were purely temporary that would not necessarily, of itself, prevent his centre of main interests from being here. As far as I am aware there is no authority which establishes any minimum period of time which a person must spend in a Member State before it can be said to

have become his centre of main interests. Common sense would seem to indicate that a few days (or even a few weeks) would be unlikely to suffice because that would be at odds with conducting the administration of one's interests in a place „on a regular basis“ (as well as being at odds with the idea of an „habitual residence“). It is unnecessary for me to form a view, however, as that is not the case here.

20. As we have seen, the fact that Mr E.'s creditors are in Germany is not relevant.

21. This is not the context in which to speculate about the difficulties which the Official Receiver or any trustee appointed may or may not experience in setting aside the property transfer in Germany. To the extent that English insolvency law applies, there are adequate remedies which the trustee can invoke (for example s. 423 Insolvency Act 1986). The EC Regulation provides for the recognition of English insolvency proceedings in Germany and elsewhere in the EU. In any event, questions of convenience as to the relief which might be available to the trustee are not proper matters for consideration on this application or when the court considers whether or not to open proceedings. Nor is it appropriate to take into account whether the basis on which Mr E. is employed is a sham. This is a matter which can be investigated in an English insolvency more conveniently than it could be in a German one. Nor yet, I should say, is there any evidence that E.'s creditors will be prejudiced. The Official Receiver or any trustee appointed is obliged to investigate his affairs and realise any assets which may be available so as to pay a dividend to creditors irrespective of their location.

22. As I have remarked, no submissions were made in support of the contention that Mr E. has an establishment in the UK. There is no basis on which I can conclude that he has.

23. For all the reasons I have given it would seem to me that the bankruptcy order made on 1 February 2007 was properly made and that the declaration as to the applicability of the EC Regulation and the nature of these proceedings was similarly properly made. No direction is required. There can be no basis on which the bankruptcy order should be annulled. Accordingly I propose to make no order on this application.

Anmerkung der Redaktion:

Der Schuldner, Dr. E., wurde vom OLG Koblenz (vorstehend ZVI 2008, 166 – Londoner Radiologe I) zur Rückzahlung von rd. 200.000 EUR an die Gläubiger A. und B. verurteilt. Er zog dann nach England und stellte dort Insolvenzantrag mit der Aussicht auf Restschuldbefreiung nach einem Jahr (vgl. dazu auch den Gläubigervertreterbericht von *Pal*, ZVI 2008, 152 – Londoner Radiologe III).