

## **INSOL-Europe: Monaco Conference**

### Judgment in the Case Smallco. Ltd. v. D & D GmbH

**Presented by Ottmar Hermann**

HERMANN RAe WP StB

Dear Ladies,

Dear Sirs,

It is my great pleasure to sit here before you playing the role of an English Judge and to deliver to you now my judgment. Less fortunate is the reason why I am here as panellist. It was planned that my good friend Bjorn Feijen from Stockholm should deliver this judgment. Now being ill he is unable to attend. We wish him all the best and good health. As a German lawyer and insolvency practitioner I have unfortunately no wig with me to impress you with the real outfit of an English Judge. But I trust that you all - like me – enjoy now attending this great conference in Monte Carlo and actually prefer staying here instead of appearing for an English court today. However, to be as original English as possible I had the great honour and pleasure of the magnificent assistance and great help of Loyd Tamlyn, from 3 / 4 South Square Chambers, to deliver this judgement in a true and most authentic manner.

Let us now come to the presentation of the judgement:

1. Smallco Limited has applied today at the INSOL Europe High Court in Monte Carlo for the making of a winding-up order against D & D GmbH. Hence, I am asked to decide according to English law on a winding-up petition. If that were all there were to this matter, I would not hesitate to make a winding-up order against D & D.
2. However, there are a number of special features of this case. First, the case has an international aspect. Secondly, a number of parties represented by very fine participants of this conference have appeared before me today to argue either that a

winding-up order should be made, or that no winding-up order should be made. I must say something now about the international aspects of this case. In this matter counsel for the various parties have all assisted me greatly. I have been referred to the EC Regulation on insolvency proceedings, which all of you in the audience might know. One of the effects of the EC Regulation is that the type of winding-up proceedings which will be opened if I make a winding-up order today depends upon where the “Centre of Main Interests” of D & D is situated. I am happy to say that all parties before me today are agreed that the Centre of Main Interests of D & D is in Germany, but that D & D has what is called an “establishment” in England. The parties have also informed me that there are no insolvency proceedings on foot in Germany. Therefore, if I decide to make a winding-up order today, the type of proceeding which will be opened is something called “territorial proceedings”. The effect of this, as I understand it, is that the liquidator who will be appointed in these territorial proceedings in England will only be able to take control of the assets which are situated in England. The parties are also agreed that the COMI of the Parent, G Co and many of the other subsidiaries is in Germany.

3. I will set out the arguments of the parties that appeared before me today:
  - 3.1. Smallco Limited says briefly that it is an unpaid creditor of D & D and wants to be paid. Now the Court should make a winding-up order.
  - 3.2. G Co. as a substantial creditor says that no winding-up order should be made. As I understand it, G Co. is itself unable to pay its debts (partly because D & D has not paid its debt to G Co): indeed, provisional liquidators have recently been appointed to G Co. in Germany;
  - 3.3. The Parent also argues that no winding-up order should be made. As I understand it, the Parent is itself unable to pay its debts, in particular a large debt which it owes to the Bank. The Parent with the support of the whole group is actively negotiating with the Bank for further funding. It is hoped that the Bank will advance substantial further funds, and thus that the Group (including D & D) can continue to trade. Even if that does not happen, the Parent and other subsidiaries will enter insolvency proceedings based mainly in Germany.
  - 3.4. The Bank has appeared to support the arguments of the Parent and G Co.

4. What of D & D itself? I have been very concerned to establish what would happen to D & D, and in particular the English establishment, if I made a winding-up order today. I was concerned that a liquidator of English “territorial-proceedings” would have no control over assets in the rest of Europe. I was concerned that the effect of a winding-up order would be that there would be no business in England which could be sold to a purchaser.
5. However, I understand from the evidence filed by D & D that my concerns are unfounded. I am satisfied that if I made a winding-up order today, a liquidator could, very probably, sell the assets in England to a purchaser and the employees could stay with the company.
6. Indeed, according to the evidence filed by D & D, the price for the English assets (including the employees) would be more than the total of the debts owed by D & D to all its creditors. So, this is a rare case in these courts. It seems as if a winding-up order might produce a happy ending!
7. However, that evidence further suggests that if the assets of D & D, in England and elsewhere, could be sold as part of an overall sale of the assets of the whole Group, a much higher price could be obtained. The Parent, G Co. and the Bank, therefore also argue that I should make no winding-up order in England today.
8. To begin with, D & D supported the Parent and G Co. Counsel for D & D argued that no winding-up order should be made. I was a little surprised at this, but it became clear to me that the ultimate management of D & D in Germany were simply following their “leader”, the Parent who I understand is controlled by Mr. Schmidt. But at the end of this day it is now D & D’s new position that D & D would leave it in the Court’s hands as to what was best for them.
9. My decision is now as follows. I am not satisfied that the Bank will advance sufficient funds to the Group to enable it to continue to trade outside of formal insolvency proceedings and the Group has reached no agreement. Even funding to pay off Smallco has not happened so far.
10. Nor am I satisfied that I should refuse to make a winding-up order on the basis that insolvency proceedings should be opened in respect of the Parent, G Co and D & D in Germany.

11. As to G Co the evidence suggests that if I were to make a winding-up order, a speedy sale of D & D's assets would result in all D & D's creditors being paid in full. So, as a *creditor* of D & D, it *should* have argued for a winding-up order to be made by me. It did not.
12. That leaves me with the Parent. It stands to gain if no winding-up order is made. If the Bank advances funding, then the Group can continue to trade. If the entire Group enters into insolvency proceedings in Germany, the value of the Group's assets will increase. Indeed, a sale of the entire Group's assets will produce a return to the Parent as shareholder of D & D.
13. But in my judgment, this is the point. The Parent will benefit as *shareholder*. My main concern is, in my judgment, with the creditors of D & D, who are, as matters stand, not being paid. I was told in the hearing, Mr Schmidt has given a guarantee to the Bank. I suspect that, in part, the arguments addressed by the Parent, but also, initially at least, D & D, were in truth the arguments of Mr Schmidt himself. It is his management which is ultimately responsible for the poor financial state of the Group.
14. I will therefore make a winding-up order today. The proceedings will be territorial proceedings.
15. My decision does not necessarily mean an unhappy ending for the Group. It is possible still that a sale of the Group's assets as a whole could be arranged. I have been referred to the duty of co-operation under Article 31 of the EC Regulation. As I understand it, it seems to me that if the Group enters insolvency proceedings based in Germany, including D & D, then an English liquidator would need to co-operate with the German insolvency administrators of D & D. I have also been referred to articles 33 and 36, which suggested to me that a German liquidator could apply to stay the proceedings in this country: so it is possible that, if German liquidators are appointed, they could try to stop the English liquidator selling the assets of D & D in the UK. So, it seems that, one way or the other, there could be a happy ending after all! But Mr Schmidt will need to act quickly.

Finally, I can now leave my imaginary wig aside and think “German” again. As a German lawyer or judge I would not hesitate to come to the same conclusion. A German insolvency court has to act in the best interest of the creditors and not of the shareholders one as well. If a case is well presented like this the German court would start territorial proceedings, too. You may only read the first words of the German Insolvenz-ordnung of 1999 which reads: “*The insolvency proceeding shall serve for the collective satisfaction of the creditors ...*” but not for the benefit of a shareholder or one single creditor alone.