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ARTICLE

# A Reach Too Far? A Review of the Extra-Territorial Scope of the Court's Powers to Support Office-Holder's Investigations

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Table 1

| Power | Extra-territorial scope? | Authority |
|---|---|---|
| Public examination (s.133) | Full | *In re Seagull Manufacturing Co Ltd*[1] |
| Fraudulent trading (s.213) | Full | *Bilta (UK) Ltd v Nazir (No 2)*[2] |
| Private examination (s.236(2)) | Undecided | |
| Account of dealing and/or books, papers or records (s.236(3)) | Full | *Wallace* (although divergent High Court authority)[3] |
| Private examination abroad (s.237(3)) | Partial | Express |
| Transactions at an undervalue (s.238) | Full | *In re Paramount Airways*[4] |

## Synopsis

This article considers whether, following the case of *Wallace (as liquidator of Carna Meats (UK) Ltd) v Wallace*, the power to summon persons for private examination under section 236(2) of the Insolvency Act 1986[5] ('the IA') also has full extra-territorial effect. In addressing that open question, it reviews judicial comment to date and the extra-territorial reach of the IA more generally. The current position is found to be incoherent and ripe for review at the highest level, although on the present authorities the s.236(2) power appears likely to be territorially limited.

## The current position

Successive cases have found that many of the office-holder's investigatory powers, and the court's supportive powers, were intended by the IA to have full extra-territorial scope. This reflects the intention of Parliament in 1986 that, given the strong public interest in ensuring that a company's failure is properly investigated including by holding those responsible to account, the office-holder's task ought not be stymied by either papers or persons being located in a foreign jurisdictions. A summary of some of the major powers is given in Table 1.

It is clear from the above that, at least at first glance, the power to order private examination under s.236 would be a significant outlier were it to be territorially limited.

## *Obiter* consideration of the territorial scope of section 236(2)

One might detect a certain degree of judicial relief thus far in cases referring to this issue. In each case, the judge has not ultimately had to determine whether

*Notes*

1 [1993] Ch 325.
2 [2016] AC 1.
3 [2019] EWHC 2503 (Ch).
4 [1993] Ch 223.
5 S.236(2) states that 'the court may, on the application of the office-holder, summon to appear before it- (a) any officer of the company, (b) any person known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or (c) any person whom the court thinks capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the company.'

Parliament intended section 236(2) of the Insolvency Act 1986 to have full extra-territorial scope.

Most recently, in *Wallace*, Adam Johnson QC, sitting as a judge of the High Court, differentiated the power under s.236(3) and said at §54:

> 'whatever may be the correct position under section 236(2), I am concerned in this case only with section 236(3), and even if it is correct that the power to issue a summons under section 236(2) should be confined to persons within the jurisdiction, it seems to me that the power to require the production of documents and information is different. It is less invasive, and does not involve the exercise of anything akin to the Court's subpoena power. In the modern world of cross-border business practices, it is natural to construe that power as extending to any of the categories of person identified, whether within or outside the jurisdiction.'

The issue could have fallen for determination by Burton J in 2001 in *Re Casterbridge Properties Ltd (in liq.) Jeeves v Official Receiver*[6] where the Receiver sought in the alternative an order for private examination of the applicant if the order for public examination under s.133 was set aside. However, having heard full argument on the point, Burton J did not set aside the s.133 order and concluded that he 'need not and [would] not resolve the interesting issue between the parties as to whether there would be jurisdiction to make such an order' (§51).

So how might this 'interesting issue' be determined?

## The intended jurisdictional scope of s.236(2) – the position in *Re Tucker*

The scope of a statutory provision will turn on who was within the legislative grasp or intendment of s.263(2) – a principle of statutory interpretation most recently restated by the House of Lords in *Masri v Consolidated Contractors (UK) Ltd and others (no 4)*.[7] Further, in considering such intendment, absent express enactment or plain implication, English legislation will only apply to British subjects or to foreigners within the jurisdiction: *Ex parte Blain; In re Sawers.*[8]

The main difficulty facing an argument that s.236(2) was not intended to be territorially limited is the earlier House of Lords case *In Re Tucker (R.C.) (A Bankrupt), Ex parte Tucker (K.R.)*.[9] In *Re Tucker*, the trustee in bankruptcy applied for the issue of a summons under s.25 of the Bankruptcy Act 1914 requiring the bankrupt's brother (living in Belgium) to attend court (in England) for examination. It was held that the power was territorially limited.

As it is a principle of construction that absent a different context, a re-enactment is intended to carry the same meaning as its predecessor, it is necessary to revisit this case in some detail, as well as the context to the IA generally, to assess *Re Tucker*'s continued impact on s.236.

Section 25 of the Bankruptcy Act 1914 provided that:

> '(1) the court may, on the application of the official receiver or trustee, at any time after a receiving order has been made against a debtor, summon before it the debtor or his wife, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor or any person whom the court may deem capable of giving information respect the debtor, his dealings or property, and the court may require any such person to produce any documents in his custody or power relating to the debtor, his dealings or property. [ … ]
>
> (6) the court many, if it thinks fit, order that any person who if in England would be liable to be brought before it under this section shall be examined in Scotland or Ireland, or in any other place out of England.'

Dillon LJ noted that at the time s.25 had been enacted, and until 1962 and an amendment to the Bankruptcy Rules, there was no power to serve process in bankruptcy proceedings on any person other than the debtor who was not in England.[10] In 1962, however, the rules were amended such that any process or order of the court could be served on any person who was not in England in such a manner as the court saw fit (rule 86 of the Bankruptcy Rules 1952).

Counsel for the trustee suggested that s.25 ought to apply to a person anywhere in the world, being the natural meaning of the words 'any person'. It was accepted, however, the 'eyebrows might be raised at the notion that Parliament had in 1914 or 1883 given jurisdiction to any bankruptcy court, which might well be a county court, to summon anyone in the world before it to be examined and produce documents'[11] and in consequence the trustee conceded that jurisdiction instead extended at least to any British subject anywhere in the world.

**Notes**

6 [2002] BCC 453.
7 [2010] 1 AC 90.
8 [1879] 12 Ch.D 522.
9 [1990] Ch. 148.
10 Ibid, p. 153 at [H].
11 p. 157.

Dillon LJ held that s.25(1) did not have extra-territorial effect, relying on, as background, (1) the general practice being that the courts of a country only have power to summon before them persons who accept service or are present within the territory; (2) the English court had never had a general power to serve a *subpoena ad testificandum* or *subpoena duces tecum* out of the jurisdiction on a British subject and, conclusively, on the fact that s.25(6) gave the power to order examination out of England of any person who if in England would be liable to be brought before it under this section. Those words, he said, inevitably carried the connotation that if the person is not in England, he is not liable to be brought before the English court under the section.[12]

Before we can consider whether the court would likely be bound by that case in relation to s.236(2), it is necessary to also explore more widely the intended scope and purpose of the IA.

## The scope of the IA more widely

Turning to other powers under the IA, *In re Seagull*,[13] Peter Gibson J had to consider whether s.133 of the IA (public examination) had extra-territorial scope. He remarked that it must be construed 'in the light of circumstances existing in the mid-1980s when the legislation was enacted. By use of the telephone, telex and fax machines English companies can be managed perfectly well by persons who need not set foot within the jurisdiction' and that relevant background was the 'public worry and concern over company failures on a large scale, and the need to safeguard the public against such failures' (pp. 354). Arguably, he did regard the context as *significantly different* then that present in 1914 or 1883.

Further, and importantly for present purposes, he remarked that the legislative intention had been that 'there should be a proper and effective investigation through public and private examination' (p. 356). Leaving open the question as to whether s.236 was intended to be territorially limited, he held that whatever was the case there, s.133 could be distinguished by reason of the absence of any provision corresponding to s.25(6), and that it was 'plain' that s.133 applied to 'any person' notwithstanding their absence from the jurisdiction.

As I explained above, the issue was also left open in *Re Casterbridge*. In that case, counsel for the Receiver in submitted that there was no justification for any differentiation either between s.236 or s.238 and s.133, both of which had by that time been held to have extra-territorial scope. In particular, that given the words 'any person' in s.238 had been held to mean any person anywhere, a similar construction should be given to those words in s.236. It was further suggested that s.237 was merely facilitative and did not imply a territorial limit to s.236.

Finally, as to the relevance of context when considering legislative intention, it is useful to review the 2009 case of *Masri v Consolidated Contractors International (UK) Ltd and other (No 4)*.[14] There, the House of Lords considered the scope of Part 71 of the Civil Procedure Rules, which relates to the examination of judgment debtors in court. *Re Tucker*, *Re Casterbridge*, and *Re Seagull* were all before the House. In determining that Part 71 did not have extra-territorial scope in relation to officers outside the jurisdiction, Lord Mance held the intention of Part 71 lacked the 'critical considerations which enabled the Court of Appeal in In re Seagull to hold that the presumption of territoriality was displaced.'

Lord Mance reflected that Peter Gibson J in *Re Seagull* had distinguished *Re Tucker* because s.25 related to private examination and a wider class of persons. As to the 'critical considerations', Lord Mance referred to Peter Gibson J's articulation of the public interest in seeing that those responsible for the company's affairs are subject to investigation, that public examination was necessary to obtain material information for the administration of the estate, to form the basis of reports for submission to the department, and to give publicity for creditors and the community at large.[15]

Could the context of the IA and the interpretation of other sections as set out above be sufficient to displace the findings of *Re Tucker* in relation to s.236(2)? To reach a conclusion, it is also important to review the consideration of s.236 specifically.

## The scope of the s.236 powers

The scope of s.236 in its entirety appeared to be an issue resolved by David Richards J in *In Re MF Global UK Limited (in special administration) (No. 7)*[16] when he held that *Re Tucker* was an authoritative decision on the lack of extraterritorial effect of s.25 of the Bankruptcy Act 1914 and must be taken to apply equally to the successor sections in the Insolvency Act 1986 (including s.236). That was because, as I set out above, it is a principle of statutory construction that where a statutory provision is re-enacted in substantially the same

*Notes*

12 p. 158.
13 [1993] Ch. 345.
14 [2010] 1 AC 90.
15 p. 139.
16 [2015] EWHC 2319 (Ch) [2016] Ch 325.

terms, it is intended to carry the same meaning as its predecessor unless the context of the new legislation shows that the meaning must be taken to have changed (§23). Unlike Peter Gibson J in *Re Seagull*, however, he did not appear to have considered at any length the potentially different context surrounding the IA.

However, two subsequent decisions in the High Court in relation to s.236(3), *Norriss* followed by *Wallace*, have both declined to follow *MF Global*, albeit that both have done so by way of finding that because s.236 conveyed a free-standing power in relation to production of documents whereas, in the earlier s.25 of the Bankruptcy Act 1914 that power had merely been ancillary to, and dependent on, the principal power of summons, the structure was materially different. Because of that different structure, the intended scope of the power under s.236(3) fell to be considered separately, and it was natural to construe that power to have extra-territorial effect.

Thus the scope of s.236(2) remains uncertain, and I turn to that now.

## Where does this leave s.236(2)?

It is arguable that the power to summon a person for private examination under s.236(2) ought to be consider *sui generis* rather than akin to the Court's subpoena power. As Megarry J said of private examination generally *in Re Rolls Razor Ltd (no 2)*[17], 'the examinees are not in any ordinary sense witnesses, and the ordinary standard of procedure do not apply. There is here an extraordinary and secret mode of obtaining information necessary for the proper conduct of the winding up. The process, borrowed from the law of bankruptcy, can only be described as being sui generis.' Given that, it could be said that the starting point is a context much closer to that relating to public examination then to the court's wider powers in relation to witness summons or Part 71.

Additionally, since *Re Tucker*, an increasing weight of authority has held that the words '*any person*' in other sections of the IA are intended to bear their literal, natural meaning and refer to any person, anywhere. There is, perhaps, less concern about eyebrow raising than in 1914. The most recent statement to this effect being that of Lord Toulson and Lord Hodge in *Bilta* who said that the words 'any person' did have extra-territorial effect for the same reasons as had been given in relation to those words in *Re Seagull*.

Finally, given the significant overlap between persons falling within the material scope of s.133 and s.236 (e.g. officers of the company) it might seem odd if Parliament had intended that a person residing abroad can be summoned for public, but not private, examination. In *Re Seagull* this appears have been explained by pointing to the fact s.236 is wider in scope, but set against that it was stated that the legislative intention to ensure proper and effective investigation extended to *both* public and private investigation.[18]

Accordingly, in my view, many of the contextual reasons given by Peter Gibson J ought to also apply to private examination and hence s.236(2) is rather closer to *Re Seagull* than *Masri* in relation to determining Parliament's intention. It is possible that the context is sufficiently different such that the court would not consider itself bound by *Re Tucker* despite the similar wordin.

However, even if the court was not bound, could a different intention really be found given the continued presence of the wording in s.237(3) that was held to be so decisive in *Re Tu*cker: 'the court may, if it thinks fit, order that any person *who if within the jurisdiction of the court would be* liable to be summoned to appear before it under section 236 or this section shall be examined … in a place outside the United Kingdom' (emphasis added)?

As Counsel in *Re Casterbridge* suggested, one view is that the intention of s.237(3) was that it simply gave an express discretionary power to, instead of summoning a person to appear in England, instead order a private examination in the place they are. The advantage of such a construction would be that it would allow for a more consistent interpretation of the words 'any person' throughout the IA and it would arguably give effect to the purposes considered in Re Seagull that also apply to private examinations.

Standing against that though, and in my view likely to be decisive, despite the tension with the wider interpretation of the IA, is the plain meaning of the words used in s.237(3). It is hard to see beyond those words implying the same limitation as in *Re Tucker* – i.e. that persons not within the territorial jurisdiction of the court were impliedly considered to be outside of the scope of s.236(2).

On balance, whilst there is doubt, it seems to me that *Wallace* is likely the high-water mark of the court's retreat from *Re Tucker* and that the directly equivalent power to the one considered in that case – to summon for private examination – is likely to remain territorially limited in scope.

## Summary

Many of the statutory powers available to support the office-holder's investigation have been found to have extra-territorial scope. Following *Wallace*, it seems

**Notes**

17 [1970] Ch 576 at §§591.
18 p. 356 at [B].

likely s.236(3) will be amongst that group of powers and that the *Norriss – Wallace* line will be preferred in future cases. It is possible that Parliament also intended to extend the scope of private examination under s.236 extra-territorially, and, if so, this would produce a more consistent interpretation of similar wording throughout the IA. However, until the matter is considered at the highest level it may be that the continued retreat from *Re Tucker* will not extend further and a summons for private examination will remain territorially limited.

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