45 Orders accordingly. Unless they are able to agree, I shall hear the parties as to the calculation of loss of earnings, interest and costs.

Orders accordingly.

[2010–12 Gib LR 267]

IN RE WIDEN

SUPREME COURT (Dudley, C.J.):February 6th, 2012

Bankruptcy and Insolvency—enforcement of foreign insolvency proceedings—foreign revenue law—rule against recovery of foreign tax debts abolished, by Council Regulation (EC) No. 1346/2000, art. 39, if enforcement sought of foreign collective insolvency proceedings in other Member States

The foreign official receiver of an estate sought to recover assets from the estate in order to ensure the enforcement of foreign tax liabilities.

The applicant was the Swedish official receiver of the estate of the deceased, having been appointed by the Swedish court in Swedish collective insolvency proceedings. The deceased was the beneficial owner of shares in a Gibraltar company that were held by trustee companies. He had also been a signatory of three bank accounts in Gibraltar, of which, following his death, the trustee companies had *de facto* control. The applicant sought to recover the deceased's assets, which related to the enforcement of Swedish tax liabilities.

The applicant submitted that he should be able to recover the assets because (a) Council Regulation (EC) No. 1346/2000, art. 39 had, in insolvency proceedings involving persons resident in Member States, abolished the rule against the enforcement of foreign tax debts and precluded any public policy objection to enforcement; (b) he was entitled, by art. 18, to exercise the powers given to him by Swedish law, including the power to recover assets; and (c) alternatively, the court should act in aid of the foreign insolvency proceedings, under the Bankruptcy Act 1934, s.98(2) or the Mutual Legal Assistance (European Union) Act 2005.

The trustee companies remained neutral as to the outcome, but submitted that *ex post facto* approval should be given to their disclosure of certain information about the deceased to the applicant.

Held, allowing the application:

(1) The applicant would be entitled to recover the assets of the

deceased, notwithstanding that the debt related to tax liability in Sweden. Council Regulation (EC) No. 1346/2000, art. 39 had abolished the exclusionary rule against the enforcement of foreign tax debts in insolvency proceedings in other Member States. It had been demonstrated that Swedish collective insolvency proceedings had been properly opened and that the applicant had been validly appointed by the Swedish court as the official receiver. Therefore, public policy objections could not be raised to the exercise by the trustee of his power under Swedish law, by s.18, to recover the assets. It was unnecessary to have recourse to the powers of the court to act in aid of foreign insolvency proceedings, by the Bankruptcy Act 1934, s.98(2), or have recourse to the Mutual Legal Assistance (European Union) Act 2005, as the Regulation had direct effect (paras. 10–15).

(2) Further, *ex post facto* approval was not required in respect of the disclosure of information to the applicant, as he stood in the shoes of the deceased and was entitled to disclosure as of right (para. 16).

Legislation construed:

Bankruptcy Act 1934, s.98(2):

> "The Supreme Court and the officers thereof shall also act in aid of courts in the European Community (other than the United Kingdom) in respect of insolvency proceedings falling under Council Regulation 1346/2000 on insolvency proceedings."

Council Regulation (EC) No. 1346/2000 on insolvency proceedings (O.J. 2000, L. 160/1), art. 18:

> "The liquidator appointed by a court which has jurisdiction pursuant to Article 3(1) may exercise all the powers conferred on him by the law of the State of the opening of proceedings in another Member State . . ."

art. 39: The relevant terms of this article are set out at para. 7.

J.J. Neish, *Q.C.* and *D. Bossino* for the applicant;
K. Azopardi for the trustee companies.

1 **DUDLEY, C.J.:** On January 10th, 2011, I ruled that, *inter alia*, the applicant, Jan Grustad, appointed pursuant to Swedish law as the official receiver in the bankruptcy of the estate of Niclas Widen, deceased ("the Swedish official receiver") was, notwithstanding that the principal debt related to a tax liability to the Swedish State, for the purposes of recovering the assets of the deceased, entitled to take in Gibraltar all such steps as he was empowered to take under Swedish law. I indicated that my reasons would follow and these are they.

2 Niclas Widen ("the deceased") was the beneficial owner of shares of a Gibraltar company, Pinto Lago Ltd. ("Pinto Lago"). The shares are held

by trustees in Gibraltar, Canis Nominees Ltd. ("Canis") and Sinac Nominees Ltd. ("Sinac"), through which Clifton Management Services Ltd. ("Clifton") provides corporate services. Pinto Lago holds three accounts at Jyske Bank (Gibraltar) Ltd. of which the deceased was signatory and, therefore, upon his death, the bank looked to Canis and Sinac as the persons in *de facto* control of the funds. The balances in the accounts stand at £905, SEK1,101,329 and €194,124.

3 The issue requiring determination is whether the Swedish official receiver can, through the medium of s.98(2) of the Bankruptcy Act 1934 and/or Council Regulation (EC) No. 1346/2000 on insolvency proceedings ("the Regulation"), take steps against the assets of the deceased or Pinto Lago in Gibraltar if the effect is to enforce directly or indirectly any of the deceased's tax revenue liabilities outside Gibraltar.

4 Canis, Sinac and Clifton are neutral as to outcome, subject to the court's being satisfied that the appointment of the Swedish official receiver and the indebtedness of the deceased is properly made out and subject to the court's determining that the traditional rule that foreign tax debts cannot be enforced has, by virtue of the Regulation, been reversed.

5 Of significant assistance in this case is an opinion placed before the court by Canis/Sinac/Clifton, which supports the propositions advanced for the Swedish official receiver. Not surprisingly, Mr. Bossino in his skeleton relies upon it extensively. It is unusual to draw assistance from an opinion, however, the fact that it is written by someone with the academic pre-eminence of Prof. Ian Fletcher means that such an authoritative view cannot be easily overlooked.

6 It is trite law that the general principle is that this court will not enforce the revenue laws of another country. This proposition is to be found in Rule 3 of Dicey, Morris & Collins, 1 *The Conflict of Laws*, 14th ed., para. 5R–019, at 100–101 (2006), which states:

> "**Rule 3—English courts have no jurisdiction to entertain an action:**
>
> **(1) for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign State; or**
>
> **(2) founded upon an act of State.**"

7 However, art. 39 of the Regulation provides that—

> "any creditor who has his habitual residence, domicile or registered office in a Member State other than the State of the opening of proceedings, including the tax authorities and social security authorities of Member States, shall have the right to lodge claims in the insolvency proceedings in writing."

8 Dealing with that article, the learned editors of *Dicey, Morris & Collins* (*op. cit.*, para. 30–213, at 1448–1449) state the following:

> "Normally, it will be for the national law of the State of opening to determine whether a creditor situated in that State has the right to lodge a claim. Similarly, it would seem that that law will determine whether a creditor from outside the Regulation States has the right to lodge a claim. Article 39 specifically provides, however, that any creditor who has his habitual residence, domicile or registered office in a Regulation State other than the State of the opening of proceedings, including the tax authorities . . . of Regulation States, shall have the right to lodge claims in the insolvency proceedings in writing. *The most significant aspect of this provision is that it excludes the normal rule that the forum will not enforce foreign tax claims from cases falling within the Regulation*." [Emphasis supplied.]

9 Evidently they opine that art. 39 amounts to a derogation from Rule 3. As Prof. Fletcher puts it in his opinion, although not a proposition which has been judicially affirmed in any reported decision of the English courts, "that conclusion happens to coincide with my own, independently formed opinion which I have expressed in several publications among my academic writings."

10 I can do no better than humbly adopt the reasoning in the opinion of Prof. Fletcher. For present purposes it suffices that I set out his summary of conclusions:

> "(a) It is one of the explicit policy objectives of Regulation 1346/2000 to abolish, as between Member States, the exclusionary rule against the recovery of foreign tax or social security debts ('the foreign tax rule') in the context of insolvency proceedings. This is effected by Article 39 providing that such debts shall be admissible to proof in insolvency proceedings governed by the Regulation . . .
>
> (b) As a corollary to that provision, Member States cannot invoke the exception based on public policy under Article 26 as a ground for refusal to enforce foreign tax claims of other Member States in cases falling within the Regulation . . .
>
> (c) The above conclusions are confirmed when reference is made to the unofficial *travaux préparatoires* to the Regulation's parent text, the EC Bankruptcy Convention of 1996, as well as to the writings of UK and continental European scholars . . .
>
> (d) By parity of reasoning, the abrogation of the foreign tax rule also has consequences for the exercise of their powers under the Regulation by liquidators appointed in insolvency proceedings in an EU Member State, notably where they seek to exercise such powers in another Member State pursuant to the provisions of Article 18 of

the Regulation. In such cases also the exception based on public policy under Article 26 cannot be invoked as a basis for re-applying the foreign tax rule so as to prevent the liquidator from exercising his powers as conferred by the law of the State of his appointment . . .

(e) The provisions of the Insolvency Regulation, which is a legislative act of the European Union, are automatically and directly applicable in the domestic legal orders of the Member States without any further need for implementation. Courts and other administrative authorities in the Member States are required to give effect to the rights and obligations established by the Regulation under the doctrine of supremacy of EU law. To that extent, any parallel provisions in domestic law, such as that in s.98(2) of the Bankruptcy Act, are technically unnecessary for the purpose of the exercise of the rights and obligations in question. It is not necessary for the Swedish trustee to utilise the procedure whereby a request for aid is submitted by the Swedish court under s.98 of the Bankruptcy Act . . .

(f) It is not necessary for the Swedish trustee to utilise the procedural avenue provided by the Mutual Legal Assistance (European Union) Act 2005 for the purpose of exercising in Gibraltar the powers he enjoys by virtue of the Insolvency Regulation 1346/2000 . . ."

11 That exposition makes it clear that the fundamental rule that one State will not enforce the revenue laws of another State is, by virtue of the language of the Regulation and in particular art. 39, abrogated as between members of the European Union (with the exception of Denmark by virtue of its opt-out). It is fair to say that the argument could be deployed that art. 39 merely allows for the *lodging* of a claim and not for the right to receive payment. I again humbly agree with Prof. Fletcher's opinion that such an interpretation would be "hair-splitting sophistry" and it would in my view undermine the structure and purpose of the Regulation.

12 It is clear from the evidence filed that there are no extant, nor have there ever been, bankruptcy proceedings in this jurisdiction in respect of the deceased whereby the Swedish official receiver's powers would, by virtue of art. 18 of the Regulation, have been curtailed. What is required of the Swedish official receiver is that he—

(a) establish that the Swedish proceedings have properly been opened in accordance with art. 3 of the Regulations;

(b) provide evidence of his appointment in accordance with art. 19; and,

(c) demonstrate that the Swedish insolvency proceedings can be categorized as "collective insolvency proceedings," as required by art. 1, as read with the definitions in art. 2 and Annex A.

13 Those requirements have been met because, first, it is not in issue, and indeed it can readily be inferred from the evidence, that the centre of main interest of the deceased and of his estate is Sweden and therefore the Swedish courts have jurisdiction; secondly, a certificate of appointment issued by the District Court of Malmo is exhibited to the Swedish official receiver's second witness statement; and thirdly, the evidence of the Swedish official receiver discloses the existence of three creditors and the categorization of the proceedings as "Konkurs," being proceedings which are within the ambit of Annex A to the Regulations.

14 The role for this court is therefore limited to facilitating the exercise of the Swedish official receiver's powers, as conferred to him by arts. 16 to 18 and, particularly in this case, the power to remove the deceased's assets from Gibraltar.

15 For these reasons I ruled that the Swedish official receiver was entitled to take in Gibraltar all steps as he was entitled to take in accordance with Swedish law to recover the assets of the deceased.

16 A peripheral issue also arose in this action in that Canis/Sinac/Clifton sought *ex post facto* sanction of certain disclosure of information made to the Swedish official receiver. In my view that sanction is not necessary as the Swedish official receiver stands in the shoes of the deceased and he was therefore entitled to the disclosure as of right.

Application allowed.
