

**Re Akkurate Ltd: The latest instalment on the  
extraterritoriality of s236 Insolvency Act 1986**

1. On 4 June 2020 the Chancellor handed down his decision in *Re Akkurate Ltd (in Liquidation)* [2020] EWHC 1433 (Ch). In doing so he brought to an end (at least for now) an ongoing debate as to whether s236 Insolvency Act 1986 (“IA 1986”) has extraterritorial effect, concluding that he was bound by precedent to conclude that it does not but carving out an exception where the Council Regulation (EC) No 1346/2000 on Insolvency Proceedings applies (“**the Insolvency Regulation**”).
2. This short article summarises the law as it was before Akkurate, explores the decision itself, and considers where may be next for questions of extraterritoriality and s236 IA.

**Section 236 IA 1986 and its statutory precursor**

3. Section 236 IA 1986 is one of the key information-gathering provisions of domestic insolvency legislation. In short, it provides that upon the application of an office holder of a company in liquidation the court may summon to appear before it any officer of the company, any person known or suspected to have property of the company or be indebted to it, and/or any person whom the court thinks capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the company: s236(2) IA 1986.
4. The court may additionally require “any such person” (i.e. any person falling within the preceding paragraph) to submit an account of their dealings with the company and/or to produce any books, papers or other records in their possession or control relating to the company or its promotion, formation etc: s236(3) IA 1986.
5. The court’s enforcement powers under s236 IA 1986 are set out in s237 IA 1986. Subsection 237(3) IA 1986 in particular provides as follows:

*‘(3) 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 any part of the United Kingdom where he may for the time being be, or in any place outside the United Kingdom’.*

(emphasis added)

6. The statutory precursor of ss236 and 237 IA 1986 was s25 of the Bankruptcy Act of 1914 ("BA 1914"). That section provided as follows:

*'(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 respecting 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 may, 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.'*

(emphasis added)

7. The similarity between s237(3) IA 1986 and s25(6) BA 1914 will be immediately apparent. Their relevance to the issues at hand is explained below.

### **The Court of Appeal's decision in *Tucker***

8. In *Re Tucker (a bankrupt)* [1990] Ch 148 the Court of Appeal considered an appeal from an order made under s25 BA 1914 requiring the bankrupt Mr Tucker's brother to attend court for questioning. The brother was resident in Belgium. The question for the court was therefore whether it was able under s25 BA 1914 to require the brother to attend before it, notwithstanding that he was resident outside of the jurisdiction.
9. The Court of Appeal allowed the appeal and held that s25 BA 1914 did not permit the court to summon the brother before it. In delivering the leading judgment of the court, Dillon LJ (with whose judgment Lloyd LJ and the Vice Chancellor agreed) held that the rationale behind s25(1) BA 1914 was '*about summoning people to appear before an English court to be examined on oath and to produce documents*'. He then noted that the '*general practice in international law is that the courts of a country only have power to summon before them persons who accept service or are present within the territory of that country when served with the appropriate process*'.
10. Having set out this general principle, Dillon LJ applied it to s25 BA 1914, holding that '*he would not expect section 25(1) to permit the English court to haul before it persons who could not be served with the necessary summons within the jurisdiction of the English court*'. He held that language used in s25(6) BA 1914 carried with it the inevitable connotation that if the person in question was not in England he would not be liable to be brought before the English Court under s25 BA 1986 and that subsection 25(6) must therefore be read as if it provided '*liable to be brought before it by summons under this section*'.

11. Having set out the above reasoning Dillon LJ concluded – crucially for present purposes – that the wording of subsection 25(6) BA 1914 ‘*confirms that a person who is not at any relevant time in England, and so cannot be served with a summons of the English court in England, cannot be examined by that court under subsection (1).*’ The Court therefore allowed the appeal and confirmed that s25 BA 1914 did not have extraterritorial effect.

### The “trilogy of inconsistent cases”

12. *Tucker* was decided in relation to s25 BA 1914. Its application to s236 IA 1986 has been the subject of three differing authorities, with David Richards J (as he then was) in *Re MF Global UK Ltd* [2015] EWHC 2319 (Ch) holding that it did apply and bound the court, and HHJ Hodge QC and Adam Johnson QC (sitting as a deputy High Court Judge) in *Re Omni Trustees (No 2)* [2015] EWHC 2697 (Ch) and *Re Carna Meats (UK) Ltd* [2019] EWHC 2503 respectively holding that it did not and/or could be distinguished.

13. The reasoning employed in this trilogy of cases may be summarised as follows:

- a. In *MF Global* David Richards J held that s237(3) IA 1986 was in effect a statutory re-enactment of s25(6) BA 1914 and that he was therefore bound by *Tucker* to hold that s236 IA 1986 did not have extraterritorial effect. He concluded:

*[32] In the absence of authority and in the absence of what is now section 237(3), there would in my view be a good deal to be said for concluding that section 236 was intended to have extraterritorial effect, leaving it to the discretion of the court to keep its use within reasonable bounds. But it is in my judgment impossible to overlook the authoritative standing of the decision in [Tucker] the re-enactment of the earlier private examination provisions in substantially the same terms and the presence of what is now section 237(3). I conclude that section 236 does not have extraterritorial effect...’*

- b. In *Omni* HHJ Hodge QC held that s236 IA 1986 was sufficiently different from s25 BA 1914 that *Tucker* did not need to be followed. In particular, he noted that the power to order the production of documents under s25 BA 1914 was ‘*merely ancillary to, and dependant upon*’ the power to summon a party to appear before court, whereas s236 IA 1986 contains a free-standing provision to this effect. Relying on this difference in drafting, HHJ Hodge QC held that *Tucker* could be distinguished as the thrust of the decision (namely that the court could not extraterritorially compel someone to attend before court) went to a wholly different issue to that then before the court (namely whether the court could compel the production of documents),
- c. Adam Johnson QC in *Carna Meats* held similarly. In his judgment he recognised that although ‘*the presumption in favour of territorial application [of provisions concerned with requiring attendance before the court] must be very strong*’, there was no absolute rule in favour of territorial application. To the contrary, he recognised that the presumption had been subject to a number of exceptions

within an insolvency context. For example, the Court of Appeal had determined in *Re Seagull Manufacturing Co Ltd* [1993] Ch 345 that s133 IA 1986 (public examinations) had extraterritorial effect and in *Re Paramount Airways Ltd (No 2)* [1993] Ch 223 that s238 IA 1986 (transactions at an undervalue) had extraterritorial effect. Similarly, in *Bilta (UK) Ltd v Nazir* [2015] UKSC 23 the Supreme Court held that s213 (fraudulent trading) did not have any territorial limitation. In light of these authorities the deputy Judge concluded that *Tucker* could be distinguished, particularly where what was sought was the production of documents, not the attendance of a party before court: at [54].

### The decision in *Akkurate*

14. *Akkurate* concerned an application brought by joint liquidators in respect of a company incorporated in England and Wales and being wound up compulsorily under the IA 1986.
15. The joint liquidators of *Akkurate Ltd* applied under s236 IA 1986 for orders requiring two respondent companies incorporated in Italy to provide them with certain information and documentation. The applications were made against a long history of discussions, negotiations and litigation between the parties, including litigation commenced in Italy.
16. In determining whether the Court had jurisdiction to grant the orders sought the Chancellor made clear his view that '*the current legal position must be determined by the strict application of the doctrine of precedent*'. He also recognised that s236 IA 1986 should not be construed in a vacuum and that it was appropriate to recognise that other provisions of IA 1986 had been held to have extraterritorial effect, such as those mentioned in paragraph 13(c) above.
17. Having conducted a thorough analysis both of *Tucker* and of the so-called trilogy of inconsistent cases outlined above the Chancellor reached the '*clear view*' that *Tucker* was binding authority on the High Court as to the proper interpretation of s236 IA 1986 and that, accordingly, he was bound to hold that s236 does not have extraterritorial effect. In doing so he disagreed with the approach taken by the Judge and deputy Judge in *Omni* and *Carna Meats*, holding that '*the modernisation of the language and division between subsections [in s236 IA 1986] cannot be seen as a substantive change [from the position under s25 BA 1914]*': at [49]. The Chancellor also held to be '*crucial*' the fact that *Tucker* has been considered in both the Court of Appeal and the House of Lords without disapproval, despite the general trend towards the extraterritoriality of the IA 1986 reflected in the decisions summarised at paragraph 13(c) above.
18. It is worth noting that in reaching the above conclusion the Chancellor held *obiter* that although it was '*probably not helpful*' for him to comment on the correctness of *Tucker*, he agreed with what David Richards J said in *MF Global* at [32], namely that in the absence of authority and in the absence of section 237(3) there would be a very good deal to be said for concluding that section 236 IA 1986 was intended to have

extraterritorial effect. This comment followed an earlier caveat recorded by the Chancellor that his decision on the binding effect of *Tucker* was reached ‘irrespective of [his] views as to whether it was correctly decided’.

19. Having concluded that s236 IA 1986 did not have extraterritorial effect, the Chancellor went on to consider whether a different conclusion may be reached in cases to which the Insolvency Regulation applied. In particular, he considered whether s236 IA 1986 may have extraterritorial effect where the respondent party is resident within the European Union.
20. In respect of this secondary question the Chancellor concluded “yes”: section 236 IA 1986 does have extraterritorial effect where the Insolvency Regulation applies. He reached this conclusion for ‘one simple reason’, namely that ‘[t]he jurisprudence of the CJEU has made clear...that the 2000 Regulation can and does extend the territoriality of purely domestic insolvency provisions’.
21. Against this background, the Chancellor held that the Insolvency Regulation does confer extraterritorial jurisdiction on the English court to make orders against EU resident parties under s236 IA 1986. In so doing he noted that in *MF Global* the Insolvency Regulation was inapplicable as the company in liquidation was a credit institution and thus excluded by art 1(2) of the Insolvency Regulation from its scope. His decision was therefore consistent with the decision of David Richards J in that case.

### **Where does *Akkurate* leave us, and where next with s236 IA 1986?**

22. The decision in *Akkurate* will be of considerable interest to insolvency practitioners and litigators alike.
23. Whilst the decision will be seen as providing welcome clarification to the availability of s236 relief within the EU under the Insolvency Regulation (and presumably its successor, Regulation (EU) 2015/848 on Insolvency Proceedings) it will provide little comfort to those seeking to obtain information from parties located outside of the EU and/or to those with an eye to the post-Brexit insolvency world.
24. Lawyers reviewing the decision will be aware that, in light of the Chancellor’s careful and detailed analysis of prior case law, the chances of persuading another High Court Judge to distinguish or disagree with the decision are likely to be slim. It therefore seems probable that unless and until this issue reaches the Court of Appeal or Supreme Court the decision in *Akkurate* will be treated as bringing the run of inconsistent first instance cases on s236 to an end.
25. It is yet to be seen whether there will be an appeal in *Akkurate*. Given the importance of the decision to the domestic and international insolvency community it must surely only be a matter of time before this issue is put before the Court of Appeal and/or Supreme Court for clarification, whether on appeal in *Akkurate* or in some new proceedings directly concerning the application of s236 IA 1986 outside of the EU.

26. Any party leading the way in an appeal will take comfort from the clear indications given by both the Chancellor in *Akkurate* and David Richards J in *MF Global* that *Tucker* may have been wrongly decided. They will also no doubt argue that, even if it is correct, *Tucker* is on proper analysis only binding as to the question of whether the court can require a person to attend before it, as distinct from requiring the production of documentation. There is a natural attraction to such arguments. Whether they will succeed in due course is yet to be seen.

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