THE HIGH COURT

2004 No 33 cos

IN THE MATTER OF

EUROFOOD IFSC LIMITED

AND

IN THE MATTER OF

THE COMPANIES ACTS 1963 - 2003

JUDGMENT of Mr. Justice Kelly delivered on 23rd day of March 2004.

The Question

Did the presentation of a petition for the winding up of Eurofood IFSC Limited (Eurofood) and the appointment of a provisional liquidator to it by this court on the 27th January, 2004 bring about the opening of main insolvency proceedings under Article 3 of Council Regulations (EC) 1346/2000? That is the central issue which falls for determination in this judgment.

The answer to the question has international implications as will be evident when I come to consider the factual background against which the question is posed.

Eurofood

Eurofood was incorporated in Ireland as a company limited by shares on the 5th November, 1997. It has a paid up capital of US$100,000 and €2.54. Its registered office is now and has at all times been in Dublin. It is a wholly owned subsidiary of Parmalat SpA (Parmalat) a major global food company incorporated in Italy.

Eurofood's principal business activity was that of providing financing facilities for companies in the Parmalat group.

Eurofood operated pursuant to a certificate issued by the Irish Minister for Finance pursuant to s. 39 (b) (2) of the Finance Act 1980. That certificate was granted subject to a number of conditions. Amongst the conditions was a requirement that the company keep available for inspection by the Irish Revenue Authorities its records and accounts and furthermore that it would commence and continue to carry on its trading operations within a specified area within the State. A further condition was that any material change in the control of the company, including shareholding, should be pre-cleared with the Department of Finance in Ireland. The company was therefore subject to supervision by the Irish Ministry of Finance, the Irish Revenue Authorities and the Central Bank of Ireland. The tax benefits enjoyed by Eurofood were conditional upon it being managed and operated in Ireland.

The day to day administration of Eurofood was conducted on its behalf by the Bank of America in Ireland in accordance with the terms of an administration agreement which was governed by Irish law and contained an Irish jurisdiction clause.

Eurofood's annual accounts were prepared and audited in accordance with Irish law and accounting principles. Its books of account were maintained in Dublin. Its auditors and solicitors were Irish. It paid corporation tax in Ireland on its trading operations.

Until the 12th November, 2003 it had four directors. Two of these were Irish and two Italian. On the 12th November, 2003 one of the Italian directors resigned. The second Italian director resigned on the 20th January, 2004. On the date of presentation of the petition to this court both of these Italian former directors were in custody in Italy.

All of the Board Meetings (15 in all) with a single exception, namely the meeting of the 2nd September, 1998 were held in Dublin. That meeting was held by telephone between Dublin and Italy. At all Board Meetings two Irish directors or their nominees were present at all times.

Eurofood was involved in three large transactions which were described as the Brazilian, Venezuelan and Swap transactions respectively.

Eurofood is hopelessly insolvent. Virtually all of its assets are represented by debts due by Parmalat companies or are guaranteed by the ultimate Parmalat parent and for the reasons which will appear in a moment, they are of little value.

Bank of America NA presented a petition for the winding up of Eurofood on the 27th January, 2004 alleging a debt due to it of in excess of US$3.5 million. Whilst a dispute has been raised concerning that debt it is no of relevance to the matter that I have to adjudicate on here because other creditors represented by Metropolitan Life Insurance Company, (the note holders) have debts of in excess of US$122 million due to them and are prepared to take over the petition of Bank of America if needed. There is no dispute as to the debt due to the note holders.

The Parmalat Group

Parmalat SpA is part of a group of companies which has operations in over 30 countries throughout the world with in excess of 30,000 employees. Parmalat Finanziaria SpA is listed on the Italian stock exchange. The group had a turnover of in excess of €7.5 billion for the year ending December 2002.

It is a matter of notorious fact that the group is in a deep financial crisis which has led to the insolvency of many of its key companies, the making of allegations of fraud on a large scale and the arrest in Italy of a number of persons associated with it

including the two directors of Eurofood. The group is the subject of legal and regulatory investigations not only in Italy but also in other countries including the United States of America.

On the 23rd December, 2003 the Italian Parliament passed into law decree No. 347 which permits of extraordinary administration of companies.

On Christmas Eve 2003, Parmalat SpA, the parent company of Eurofood was admitted to extraordinary administration proceedings by the Italian Ministry of Productive Activities and Signor Enrico Bondi was appointed the extraordinary administrator. On the 27th December, 2003 the Civil and Criminal Court of Parma ('the Parma court') confirmed that Parmalat SpA was insolvent and placed it into extraordinary administration. On the 30th December, 2003 Parmalat Finanziaria SpA applied to the same Italian Ministry to be, and was in fact, placed in extraordinary administration also. Signor Bondi has been appointed extraordinary administrator of it also.

The Events of late January, 2004

On the 20th January, 2004 the second Italian director of Eurofood resigned. That left the remaining two Irish directors in situ.

On the 23rd January, 2004 Eurofood wrote to *inter alia* the petitioning creditor. The letter pointed out the media reports concerning Parmalat and its financial difficulties. It pointed out that Eurofood had no information concerning the financial position of any other member of the Parmalat Group beyond that which had been disclosed in the media. The letter pointed out that Eurofood had written to certain of its obligors, including Parmalat, requesting their confirmation that they would comply

with contractual obligations to Eurofood. In its final paragraph the letter stated as follows

> *"We understand that a meeting of Parmalat management has been scheduled for the evening of Tuesday 27th January, 2004, to consider various issues relating to Eurofood. You might note that mention has been made of the possibility of Parmalat appointing new directors to Eurofood. An alteration to the structure of the current Board of Directors of Eurofood may, of course, impact on the location of Eurofood's management and the jurisdictions in which certain procedures in respect of Eurofood may be commenced.*
> *You may wish to take advice as to your position as a creditor of Eurofood in the light of the above".*

The evidence establishes that it was not within the contemplation of the Board of Eurofood at stage (consisting as it did of two Irish directors) to attempt to alter the company's centre of main interests to Italy. It was of course within the power of Parmalat to remove these directors and to replace them with non- Irish resident directors should it wish to do so, provided of course that the relevant statutory provisions were met and that there was compliance with the conditions of the licence granted by the Minister for Finance.

The 23rd January, 2004 was a Friday and it is quite clear that when the petitioning creditor was apprised of the contents of the letter of that date it moved swiftly to take steps to deal with the situation.

On the following Tuesday a petition seeking the winding up of Eurofood was presented to this court and on the same day an application to appoint a provisional liquidator was successfully made.

The principal affidavit which was utilised to grant the application for the appointment of the provisional liquidator was that of Wayne Robert Porritt. He is the managing director of Bank of America NA and his lengthy grounding affidavit sets out the background to the presentation of the petition.

It is quite clear on a fair reading of that affidavit that the case was being made that Eurofood's centre of main interests, within the meaning of Council Regulation (EC) No. 1346/2000 was in Ireland and that Bank of America was greatly concerned at the information contained in the letter of the 23rd January, 2004. It felt that the appointment of new directors by Parmalat might be the commencement of steps to alter Eurofood's centre of main interests to Italy with a view to subjecting it to an Italian insolvency proceeding as part of the extraordinary administration of the Parmalat group. It was accepted that whilst the appointment of further directors would not change the centre of main interests to Italy, it was thought that would be the beginning of a process designed to bring such about. The affidavit pointed out that the only connection which Eurofood had with Italy was its shareholder which had guaranteed a number of Eurofood's liabilities. The affidavit further pointed out that the bank, in extending credit to Eurofood, was at all times dealing with an Irish registered company subject to both Irish law and Irish regulation. It was not anticipated by the bank that any change in the location of the company's centre of main interests would occur because of its registration in Ireland for tax purposes and the conditions attached to the Irish licence. The affidavit evidence went on to assert that as the creditor of an insolvent Irish company the bank was entitled to have Eurofood wound up in accordance with Irish law and that any attempt to do otherwise would be both unusual and inappropriate. The affidavit went on paragraph at 25 as follows:-

> *"While the bank is advised that the mere appointment of foreign directors in substitution for Irish directors is not sufficient of itself to alter the location of Eurofood's centre of main interests, it may be the first step in such a move. The bank fears that by the time the petition and the within entitled action is heard other steps may have been taken which could result in Eurofood's centre of main interests being relocated abroad and that insolvency proceedings may have opened in another jurisdiction. Were this to occur it may prevent this Honourable Court from winding up Eurofood other than as secondary proceedings as defined in the Council Regulation (EC) No. 1346/2000. I am advised and believe that in secondary proceedings the local insolvency practitioner appointed is limited to having recourse to local assets and it is not clear to the bank that the debtors and investments constituting Eurofood's assets are in fact Irish".*

The affidavit went on to express the deponent's view that any insolvency practitioner appointed to Eurofood should protect the interests of the creditors of Eurofood itself.

The affidavit sought the appointment of a provisional liquidator with power to manage the affairs of Eurofood which would terminate the powers of the directors wherever situate and "prevent Eurofood's centre of main interests from being changed thereby preserving the *status quo*".

On the 27th January, 2004, Lavan J. made an order appointing Pearse Farrell as provisional liquidator of Eurofood with liberty to act immediately and with powers to take possession of all of the assets of the company, to manage its affairs, to open a bank account in the name of the company and to retain the services of a solicitor.

Mr. Farrell took up his appointment in accordance with that order.

The Provisional Liquidator

Following his appointment the provisional liquidator took steps to preserve the assets of the company insofar as that was possible. He met with representatives of Bank of America in its capacity as administrator of the company and sought to understand the company's position within the Parmalat worldwide organisation particularly having regard to the appointment of Signor Bondi as extraordinary administrator to the Italian based parent company. He notified the creditors of his appointment and in particular the note holders. On the 30th January, 2004 he notified Signor Bondi of the fact that he had been appointed provisional liquidator of Eurofood.

Events in Italy

On the 9th February, 2004 Signor Bondi was appointed extraordinary administrator of Eurofood by the Italian Ministry for Productive Activities. This appointment was made notwithstanding knowledge on the part of Signor Bondi's that this court had appointed a provisional liquidator to Eurofood almost two weeks beforehand.

On the 10th February, 2004 the provisional liquidator received a fax communication from Signor Bondi giving notice that he was appointing three Italian gentlemen as directors of Eurofood with immediate effect and was also removing Ms. Catherine Meenaghan as a director of the company. No consent was sought or obtained from the Irish Department of Finance in respect of this purported change of directors.

The petition for the winding up of Eurofood was due to be heard by this court on the 23rd February, 2004.

At about 5.15pm on the afternoon of Friday 13th February, 2004 the provisional liquidator was personally served by the Irish solicitors acting for Signor Bondi with a short form notice of a hearing which was to take place before the Parma court at 11.00am (Irish time) on Tuesday 17th February, 2004. The notice made it clear that the Parma court was going to hear an application concerning Eurofood with a view to declaring the insolvency of that company, it having been admitted to extraordinary administration. The notice from the Parma court made it clear that a copy of that document was to be sent to the petitioner (Signor Bondi) for the communication to the parties' interested to attend no later than 48 hours before the hearing. That fact is also attested to in the affidavit of Francesco Gianni (sworn on behalf of Signor Bondi) of the 1st March, 2004 where he says

> *"The Parma court directed that interested parties be given notice of the hearing to declare the company's insolvency pursuant to the relevant Italian legislation. As a consequence of this direction of the Parma court, the Irish provisional liquidator and the directors of the company were given notice of the hearing. The Italian directors expressly declined to attend the hearing. The Irish director, Ambrose Loughlin, did not respond to such notice. The main objective of the hearing is to determine whether or not the company is insolvent and allow the company to defend itself against the allegation of insolvency".*

Despite the direction of the Parma court neither the Bank of America or the note holders were given notice of the Parma court hearing of the 17th February, 2004.

The failure to do so and to afford them the opportunity of being heard is a matter of major complaint by them.

The Provisional Liquidator acts

The provisional liquidator was spurred into action. Although he had only received a bare notice of the proposed hearing in Parma and did not have sight of the petition which had been presented to that court or any of the other documents he thought it likely that the application to be heard there was with the view to admitting the company into insolvency proceedings before the Parma court. He took the view that the Irish court had already opened main insolvency proceedings and it was only open to the Parma court to open secondary proceedings. However the notice which he had received suggested to him that the Parma court might not appear to regard itself as so restricted. He therefore made an application to this court on the 16th February, 2004 and was given leave by Lavan J. to appear at and participate in the hearing before the Parma court for the purpose of putting before that court such arguments and evidence in relation to the affairs of the company, the issue of jurisdiction and in particular the location of Eurofood's centre of main interests as the provisional liquidator might consider appropriate.

On the same day (16th February, 2004) the petitioning creditor also applied to this court for an order bringing forward the hearing date of the winding up petition, but this application was refused by Lavan J.

The Events of the 17th February, 2004

As of this date neither Signor Bondi nor his representatives had furnished a copy of the petition which grounded his application before the Parma court to the

provisional liquidator. This was so despite repeated written and verbal requests from the provisional liquidators Italian lawyers. The provisional liquidator appeared, together with his Italian lawyers, at the hearing in Parma on the 17th February, 2004. He filed with the court what was described as a defence brief and an oral hearing took place in chambers. Three Italian judges conducted the hearing which lasted for about one hour. The proceedings were apparently conducted with a degree of informality and of the three judges on the panel dealing with the matter only one was present for the entire duration of the hearing.

In addition to seeking to defend the substance of the case which did indeed seek to have Eurofood brought into extraordinary administration and a determination that the company's centre of main interests was in Italy, the provisional liquidator's Italian lawyer sought an adjournment of the hearing on the basis that Signor Bondi's petition had not even been received. The Parma court refused an adjournment but granted both parties permission to file further briefs by 11.00am on the 19th February, 2004. This second defence brief did however have to be furnished to Signor Bondi's lawyers by 7.00pm on the following day the 18th February, 2004. This was done and a counter-brief was filed by Signor Bondi's lawyers on Thursday 19th February, 2004.

The Parma court reached its decision on Friday 20th February, 2004. It declared the company to be insolvent and went further and found that the centre of it's main interest was in Italy.

Neither the petitioning creditor nor the note holders were given notice of the hearing despite the order of the Parma court and what is averred to at paragraph 13 of Mr. Gianni's affidavit of the 1st March, 2004 where he makes it clear that that court directed that interested parties be given notice of the hearing to declare Eurofood's insolvency. Both creditors only became aware of the proceedings informally. In the

case of the note holder that occurred in the United States on the Sunday night of the 15th with the following day being a public holiday there. So neither the petitioning creditor nor the note holders, both of whom are independent third party creditors, had the opportunity of either placing evidence before, or addressing the Parma court.

The Parma court admitted Eurofood into insolvency but went further and found that its centre of main interests was in Italy rather than Ireland.

Considerable criticism has been levelled against Signor Bondi for behaving as he did. In the light of the appointment of the provisional liquidator by the this court it is said that he ought not to have sought the order in question from the Parma court and furthermore he ought to have put on proper notice and given an opportunity to be heard to the third party creditors, in particular the note holders and the petitioning creditor.

Criticism was also made of the reasoning of the Parma court in coming to the conclusion which it did. It is said for example that in finding that the centre of main interests of the company was in Italy it applied a test other than that prescribed under the regulation and made a number of factual errors.

I do not propose to analyse, still less criticise, the reasoning of the Parma court for concluding as it did. My task is to decide whether or not to wind up Eurofood in Ireland in the context of this being the main insolvency proceeding which ante-dated by a period of some weeks the application to and the order of the Parma court. My task is therefore jurisdictional in nature but in the course of my findings I will of necessity have to comment upon observations made by the Parma court as to certain aspects of Irish insolvency law.

The Insolvency Regulation

Council Regulation (EC) No. 1346/2000 (the Regulation) entered into force on 31 May, 2002 (See Article 47 thereof).

Its second recital makes it clear that the proper functioning of the internal market requires that cross-border insolvency proceedings should operate efficiently and effectively. The Regulation has been adopted to achieve that objective.

The fourth recital makes it clear that the regulation seeks to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another with the view to obtaining a more favourable legal position. This it aptly describes as 'forum shopping'.

The eighth recital makes it clear that in order to achieve the aim of improving the efficiency and effectiveness of insolvency proceedings having cross border effects it is both necessary and appropriate that the provisions on jurisdiction, recognition and applicable law should be contained in a Community law measure which is binding and directly applicable in Member States.

The eleventh recital envisages two categories of insolvency proceedings, namely main insolvency proceedings and secondary insolvency proceedings. Main insolvency proceedings can have extra territorial effect, but secondary ones are confined to assets within the jurisdiction in which such proceedings are opened.

The twelfth recital is most important and reads as follows:-

> *"This Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of his main interests. These proceedings have universal scope and aim at encompassing all the debtors assets. To protect the diversity of interests, this Regulation permits secondary proceedings to be opened*

to run in parallel with the main proceedings. Secondary proceedings may be opened in the Member State where the debtor has an establishment. The effects of secondary proceedings are limited to the assets located in that State. Mandatory rules of co-ordination with the main proceedings satisfy the need for unity in the Community."

The location of "the centre of main interests" is essential to the granting of jurisdiction to open main insolvency proceedings.

The following recital makes it clear that "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.

The fifteenth recital makes it clear that the rules of jurisdiction in the regulation designate the Member State in whose courts insolvency proceedings may be opened. Territorial jurisdiction within the Member State is to be established by the national law of that State.

Recital number 22 provides that the regulation should provide for immediate recognition of judgments concerning the opening, conduct and closure of insolvency proceedings which come within its scope and of judgments handed down in direct connection with such insolvency proceedings. Automatic recognition should therefore mean that the effects attributed to the proceedings by the law of the state in which the proceedings were opened extend to all other Member States. Recognition of judgments delivered by the courts of the Member States should be based on the principal of mutual trust. To that end the Regulation seeks to reduce grounds for non-recognition to the minimum necessary. Mutual trust is also the basis on which any dispute should be resolved where the courts of two Member States both claim competence to open the main insolvency proceedings. The decision of the first court

to open proceedings should be recognised in the other Member States without those Member States having the power to scrutinise the first courts decision.

The recitals are mirrored in the precise wording of the various articles of the Regulation.

Article 1 which defines the scope or the Regulation provides that it is to apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.

Article 2 defines insolvency proceedings as the collective proceedings referred to in Article 1 (1) and they are then listed in annexe (a) to the Directive. In the case of Ireland, compulsory winding up by the court falls within the definition. In the case of Italy amminstrazione straordinaria likewise falls within the definition.

The term 'winding up proceedings' is also defined. In the case or Ireland it includes compulsory winding up. In Italy, however, it does not extend to extraordinary administration.

The term liquidator for the purposes of the Regulation is to be found in annexe (c). The definition of that term means any person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his affairs. In the case of Ireland it specifically includes a provisional liquidator. It does not include an extraordinary administrator in the case of Italy.

The term 'judgment' is also defined in relation to the opening of insolvency proceedings or the appointment of a liquidator as including the decision of any court empowered to open such proceedings or to appoint a liquidator. The term "the time of the opening of proceedings" means the time at which the judgment of opening proceedings becomes effective, whether it is a final judgment or not.

Article 3 of the Regulation provides that 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. In the case of a company or legal person the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.

Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings is restricted to the assets of the debtor situated in the territory of the latter Member State.

Article 3.3 provides that where insolvency proceedings have been opened under Article 3.1, any proceedings opened subsequently under paragraph 2 are to be secondary proceedings. These latter proceedings must be winding up proceedings.

Paragraph 4 of Article 3 provides that territorial insolvency proceedings (referred to at paragraph 2) may be opened prior to the opening of the main insolvency proceedings in certain circumstances.

Article 4 deals with the law applicable, it states:-

> *"Same as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as 'the State of the opening of proceedings'".*

Article 16 of the Convention sets forth the statement of principle dealing with recognition of insolvency proceedings. It recites:-

> *"Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3*

shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings".

Article 17 provides that the judgment opening the proceedings referred to in Article 3 (1) shall, with no further formalities, produce the same effects in any other Member State as under this law of the State of the opening of proceedings, unless the Regulation provides otherwise, and as long as no proceedings referred to in Article 3.2 are opened in that other Member State.

One further Article is deserving of mention and that is Article 26. It deals with public policy. It provides that any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that states public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.

Summary of the Principal Arguments

Both the petitioning creditor and the note holders contend that the centre of main interests of Eurofood is and always was in Ireland. They say that the appointment of the provisional liquidator on the 27th January, 2004 constituted main insolvency proceedings being opened in Ireland. Even if that appointment did not amount to the opening of main insolvency proceedings they contend that by virtue of the relation back concept to be found in s. 220(2) of the Companies Act 1963, the winding up of Eurofood will, on the making of such an order, have effect retrospectively to the date of the presentation of the petition. Thus the Irish winding up order ante dates the purported Italian insolvency proceedings.

They contend that the Parma court had no jurisdiction to purportedly open main insolvency proceedings since there was already an order of the Irish High Court in being doing that. Thus by virtue of Article 16 (1) of the Regulation the order of the Parma court is one which this court does not have to recognise and indeed should not recognise. They argue that the Parma court failed to honour the provisions of Article 16.

It is further contended that this court should as a matter of public policy refuse to recognise the order of the Parma court pursuant to Article 26 of the Regulation because its proceedings were inherently flawed in that the court failed to observe an elementary rule of natural justice, namely *audi alteram partem* because of the exclusion from the hearing of the creditors of Eurofood. Furthermore they contend that where an insolvency process has been commenced before the courts of one Member State, persons objecting to that courts jurisdiction should make their case on the merits before that court and should not seek to open proceedings elsewhere unless and until their opposition has been successful.

Signor Bondi contends that the jurisdiction of this court is limited to making an order commencing secondary insolvency proceedings but as such an order is confined to assets within the jurisdiction, and he contends there are none, a winding up order should be refused. The principal basis upon which this contention is made is the decision of the Parma court of the 20th February, 2004 which, having heard Signor Bondi and the provisional liquidator, concluded that Eurofood was a conduit for the financial policy of Parmalat and whilst incorporated abroad had as its exclusive point of reference the interests of the parent company of which it could be considered merely a financial division. The Parma court therefore concluded that the main office, in the sense of actual operating office, coincided with the office in which

Parmalat's driving management centre acted. Thus jurisdiction on the part of the Italian judge existed and the Parma court was competent.

It is further contended that the mere submission of a petition for liquidation and the appointment of a provisional liquidator by the Irish High Court was no hindrance to a declaration of bankruptcy by the Parma court or to such qualifying as the main proceedings because, it is said, no main proceedings had yet been formally opened in Ireland which required recognition under Article 16. The Parma court went on to state that simply submitting a petition cannot qualify as opening the proceedings given that only a measure which confirms the state of bankruptcy, even with

> *"also provisionally but potentially final executive effect can have the trial and substantial effects which the Rule links to same (Article 2(b)) nor can the High Court Order appointing the provisional liquidator qualify as such as this is clearly a cautionary measure (which in fact contains nothing concerning bankruptcy and which while implicitly considering competence does not tackle ex professo the issue in which no one in that court was able to raise).*

As part of the submissions of Signor Bondi it is said that the petition presented to the High Court sought no relief in the terms of the Regulation and that the court itself made no declaration or order of any kind in respect of it. He further contends that there was no evidence to suggest that the judge who made the order reached a decision on the question whether main insolvency proceedings should be opened in this jurisdiction or not. He points to the provisions of recital 22 of the Regulation to the effect that:-

> *"Where the courts of two Member States both claim competence to open the main insolvency proceedings the decision of the first court to*

open proceedings shall be recognised in the other Member States without those Member States having the power to scrutinise the courts decision".

They say that as there is no decision by this court opening main insolvency proceedings either in express or in implicit terms and so the conflict envisaged in recital number 22 does not therefore arise. It would of course arise in the event of this court declaring that, on the making of a winding up order these proceedings are main insolvency proceedings.

Signor Bondi furthermore contends that the creditors of Eurofood are not prejudiced as they are entitled to claim in the main insolvency proceedings opened before the Parma court and would thereby have access to the assets of the company. This is a proposition which is strongly denied by the creditors who correctly point out that the Italian proceedings are not winding-up but rather restructuring in nature.

In summary therefore Signor Bondi alleges that the Parma court has already opened main insolvency proceedings. In so doing it was referred to the petition which had been presented in Ireland for the winding up of Eurofood and the appointment of the provisional liquidator by this court. Any argument that the Parma court did not have jurisdiction is, he submits, on the basis of a misunderstanding of the Regulation. If any of the creditors disagree with the determination of the Parma court they can seek to have it set it aside and if dissatisfied with that result may then appeal right up to the Italian Supreme Court. That is the course which should be followed rather than what has occurred.

I should mention that submissions were also made on behalf of the Director of Corporate Enforcement. He was served with notice of these proceedings in circumstances where he was already engaged in an investigation into the affairs of

Eurofood. He did not purport to deal with the substantive points made by the other parties or the arguments concerning the judgment of the Parma court. He did however make some general observations concerning the appropriate interpretation of the Regulation having regard to the facts of this case.

The Winding Up Petition

Two elements are necessary in order to give rise to the opening of main insolvency proceedings in Ireland. They are

(a) that the centre of main interests of the company be in Ireland

and

(b) that insolvency proceedings should actually be opened in Ireland.

In my view requirement (b) is clearly satisfied in the present case. The definition of "judgment" in Article 2 of the Regulation is defined in relation to the opening of insolvency proceedings or the appointment of a liquidator and includes the decision of any court empowered to open such proceedings or to appoint a liquidator. The definition of "liquidator" in Article 2 (b) and annexe (c) with reference to Ireland includes a provisional liquidator. Thus, having regard to the very wording of the Regulation, it is in my view beyond argument that for the purposes of the Regulation a decision of the Irish High Court appointing a provisional liquidator is a judgment in relation to the opening of insolvency proceedings within the meaning of Article 3.1. Furthermore, "the time of the opening of proceedings" is expressly defined in Article 2 (f) as "the time at which the judgment opening proceedings becomes effective, whether it is a final judgment or not". The order appointing the provisional liquidator became effective on the day upon which it was made, namely the 27th January, 2004. That date therefore was the time of the opening of insolvency proceedings within the

meaning of the Regulation. Of course an order appointing a provisional liquidator is not a final judgment but that does not matter having regard to the definition contained in Article 2 (f) of the Regulation.

The argument which is advanced on behalf of Signor Bondi to the effect that the definition of the "time of opening of proceedings" in Article 2 is when the final winding up order is actually made is completely inconsistent with the definition in Article 2 (f). Indeed, even if there had never been a provisional liquidator appointed it is clear that under Irish insolvency law and in particular s. 220 (2) of the Companies Act 1963, an order appointing an official liquidator becomes effective as of the date of presentation of the petition which in this case was the 27th January, 2004 even though an order directing the winding up of the company post dates the date of presentation of the petition. This provision of Irish insolvency law mirrors a similar provision in the law of England and Wales. Such a provision may appear peculiar in other jurisdictions but it has long been a part of the law of this State and its nearest neighbour and was known to the drafters of the Regulation.

I am therefore quite satisfied that insolvency proceedings were actually opened in this jurisdiction as of the 27th January, 2004 and it is now necessary to consider whether the centre of main interests of Eurofood was situate in Ireland so as to confer jurisdiction on the Irish court to open main insolvency proceedings.

It is convenient to deal here with an argument which was made on behalf of Signor Bondi to the effect that even if the centre of main interests was in Ireland, it would have been necessary for the Irish court to have expressly declared that fact when making the order which it did. It is correct to say that the court did not make such an express declaration but there is no requirement under Irish law or practice that it should do so. I note that in England and Wales in the draft form of petition which

has been prescribed, express reference is now made to the Regulation with a statement, verified by affidavit, being required as to whether the Regulation applies or not, and if so whether the proceedings will be main or secondary proceedings. It would perhaps be desirable if a similar averment were directed either by rule of court or by practice direction in this jurisdiction. But there is in fact no such requirement. It does not however appear to me that it is necessary for the court to have expressly so determined, if objectively as a matter of fact the centre of main interests is in Ireland.

In my view having regard to the wording of the Regulation and the test applicable under it, the centre of main interests of Eurofood was undoubtedly in Ireland and such a finding was implicitly contained in the order appointing the provisional liquidator on the 27th January, 2004. A consideration of the affidavit evidence which was placed before the High Court to ground that application makes it clear that there was abundant evidence of the existence of the centre of main interests in Ireland. I now consider the basis for this finding.

Location of the Centre of Main Interests

One begins with the presumption that the centre of main interests is the place of the registered office of the company in the absence of proof to the contrary. The registered office of Eurofood was, and is Ireland.

Recital 13 to the Directive provides that the centre of main interests should correspond to the place where the debtor conducts the administration of its interests on a regular basis and is therefore ascertainable by third parties. Moss, Fletcher and Issacs in their book entitled 'EC Regulation on Insolvency Proceedings' (Oxford University Press 2002) say of this recital that it indicates that the centre of main interests

"Is intended to provide a test in which the attributes of transparency and objective ascertainability are dominant factors. This should enable parties who have dealings with the debtor to found their expectations on the reasonable conclusions to be drawn from systematic conduct and arrangements for which the debtor is responsible. In principle therefore it ought not to be possible for a debtor to gain advantages, at creditors expense, from having resorted to evasive or confusing techniques of organising its business or personal affairs, in a way calculated to conceal the true location from which interests are systematically administered".

The concept of the centre of main interests was also discussed in the Virgos Schmidt report in the following terms:-

"The concept of 'centre of main interests' must be interpreted as the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties. The rationale of this rule is not difficult to explain. Insolvency is a foreseeable risk. It is therefore important that international jurisdiction (which, as we will see, entails the application of the insolvency laws of that contracting State), be based on a place known to the debtors potential creditors. This enables the legal risks which would have to be assumed in the case of insolvency to be calculated. By using the term 'interests', the intention was to encompass not only commercial, industrial or professional activities, but also general economic activities, so as to include the activities of private individuals (e.g. consumers). The expression 'main' serves as a criterion for the

cases where these interests include activities of different types which are run from different centres. In principle, the centre of main interests will in the case of professionals to be their place of their professional domicile and for natural persons in general, the place of their habitual residence. Where companies and legal persons are concerned, the convention presumes, unless proved to the contrary, that the debtor's centre of main interests is the place of his registered office. This place normally corresponds to the debtor's head office".

The Regulation also recognises the difference between the centre of main interests and what it describes as an establishment (any place of operations where the debtor carries out a non-transitory economic activity with human means and goods). Secondary proceedings may be commenced in an establishment.

In re Brac Rent a Car International Inc. [2003] 2 All E.R 201, Lloyd J. had to deal with a company which was incorporated under the laws of Delaware in the United States of America but had a petition presented against it in England for the appointment of an administrator. The evidence disclosed that although the company's registered office was in the United States, it had not traded from that address and indeed had never traded anywhere within the United States. Its operations were conducted almost exclusively in the United Kingdom where all its employees were based save for a small number working from a Swiss branch office. Its contracts were governed by English law. That judge concluded that the company's centre of main interests was in the United Kingdom but in the course of his judgment concluded that a company's centre of main interests is not necessarily the same as its "seat" for the purpose of determining domicile for what was formerly the Brussels Convention and what is now Brussels 1 Regulation, namely the place where its central management

and control actually abide. He also noted that whilst a company can have more than one seat it can have only one centre of main interests.

Another English decision of relevance is that of His Hon. Judge McGonigal (sitting as a judge of the High Court) in the case of *re Daisytek ISA Ltd.* There administration orders were made in respect of an English holding company as well as its German and French subsidiaries with the court holding that all had their centre of main interests in England. The evidence in the case was that the majority of the administration of the German companies was conducted from England. The court found with regard to the German companies that their financial function was operated from England and that the financial information complied with the United Kingdom accounting principles. The German companies could not purchase any goods in excess of €5,000 without the sanction of the parent company and all information technology and support was run from England. Its contracts were negotiated from England. Its corporate identity and branding was run by the parent company and the day to day business strategy was set by the English parent. Similar considerations applied to the French company. The court held that the centre of main interests was in the United Kingdom. In so concluding the judge cited with approval from the decision in *Geveran Trading Company Ltd. v. Skjevesland* [2003] BCC 209 where the registrar in that case commented

> *"It is the need for third parties to ascertain the centre of a debtors main interests that is important, because, if there are to be insolvency proceedings, the creditors need to know where to go to contact the debtor".*

Judge McGonigal went on to comment that the most important third parties in an insolvency are the creditors.

The Eurofood creditors were not heard by the Parma Court. The evidence from them as to their understanding and perception as sworn to by Ms. Jenkins is very strong. Their clear perception was that they were dealing with investments issued by a company that was located in Ireland and was subject to Irish fiscal and regulatory provisions. There is no evidence whatsoever that they considered the company was run out of Italy. That, coupled with all of the other findings which I have made concerning Eurofood (under the heading 'Eurofood at p 1 and following) earlier in this judgment is determinative of the issue. I am satisfied that not merely were main insolvency proceedings opened in this jurisdiction on the 27th January, 2004 but that the centre of main interests of the company was, and is in Ireland. Furthermore although not expressly stated in the court order of 27th January 2004, the whole basis for the making of that order was that the court was satisfied that the centre of main interests was in this jurisdiction. Indeed the whole thrust of the application and the object of it was to prevent a perceived attempt on the part of Signor Bondi to take steps to remove the centre of main interests from Ireland.

I am conscious that in so deciding I am making a determination which Signor Bondi says is impermissible because of the findings of the Parma court. In my view that submission is incorrect for reasons which I will deal with presently.

The Order of the Parma Court

At the forefront of the submissions made to this court by Signor Bondi is the contention that the Parma court has made a decision which binds this court. It is said that any argument to the effect that the Parma court did not have jurisdiction to arrive at the conclusion which it did is one which should be made to that court by the dissatisfied parties. If unhappy with the outcome of such an application (which would

seek to set aside the order) then there is a right of appeal which should be exercised.

Whilst such an argument has an initial attraction to it and if accepted would avoid an apparent clash between the courts of two European Union member states, it is not in my view a correct analysis of the position. I am of course anxious if at all possible to avoid a conflict of jurisdiction. I am however of opinion that my first obligation is to give effect to the Regulation and apply the principles and tests prescribed by it. The unfortunate position which results is brought about as a result of Signor Bondi moving the Italian court to make the order it did in circumstances where such an application was inappropriate.

Having regard to the wording of the Regulation and the evidence which was placed before this court on the 27th January, 2004 it is clear that the appointment of a provisional liquidator constituted the opening of main proceedings. Such being so that judgment given by this court which had jurisdiction pursuant to Article 3 of the Regulation to make it, must be recognised in all the other Member States from the time that it becomes effective. It became effective on the 27th January, 2004. That position is further underscored by the provisions of recital 22 of the Regulation to the effect that the decision of the first court to open proceedings should be recognised in the other Member States without those Member States having the power to scrutinise the courts decision. The fact that the Parma court purported to do so contrary to recital 22 and Article 16, cannot alter the fact that main insolvency proceedings were already extant in this jurisdiction.

The position was not dissimilar to that which obtained in the *Daisytek* case where notwithstanding the making of the administration order by the High Court in England, the Commercial Tribunal of Pontoise in France purported to make an order in respect of the French subsidiary opening main insolvency proceedings in France.

The matter was appealed to the Court of Appeal in Versailles. That court noted that the effect of Article 3 (1) of the Regulation was that the only court with jurisdiction to open main insolvency proceedings is the court of the member state in which the debtor's centre of main interests is located. It further noted that on the facts the English court concluded that it did indeed have jurisdiction to open main insolvency proceedings in respect of the French subsidiary. That being so, the Court of Appeal held that the Commercial Tribunal of Pontoise had been jurisdictionally precluded by the terms of the Regulation from opening main insolvency proceedings of its own. (Judgment of 4th September, 2003)

Signor Bondi certainly received advice from Irish lawyers which in turn was placed before the Parma court to the effect that the appointment of the provisional liquidator did not amount to the opening of main proceedings nor the determination of the centre of main interests of the company for the purpose of the Regulation. In my view that advice was not a correct statement of the position and could not have been so particularly having regard to the evidence placed before this court then and the whole thrust of the application which was made on the 27th January, 2004.

It follows that I do not have to consider the merits of the Parma courts decision since in my view it lacked jurisdiction under the Regulation to do what it purported to do.

Signor Bondi's argument boils down to a contention that because the Parma court has purported to determine the issue its order is binding on this court. But that cannot be so in circumstances where there is a presumption under the Regulation that the centre of the main interests lay in Ireland, that the objective evidence establishes that fact, that the Irish court in appointing the provisional liquidator must have so concluded having regard to the evidence placed before it and its order antedated that

of the Parma court. The Parma court was obliged pursuant to Article 16 to recognise that. The Regulation does not require an express determination by a court that the centre of main interests lies in the jurisdiction of that court. Article 3 (1) merely lays down the rule of jurisdiction. If the centre of main interests lies as a fact in a given jurisdiction then insolvency proceedings opened in that jurisdiction are the main insolvency proceedings if they otherwise comply with the terms of the Regulation. Such being the case it is not open to this court to cede jurisdiction to the Parma court.

If it were necessary there is, in my view, a further reason why this court should not give recognition to the decision of the Parma court. It is based on the provisions of Article 26 of the Regulation. This permits any member state to refuse to recognise insolvency proceedings opened in another state or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to the state's public policy and in particular its fundamental principles or the constitutional rights and liberties of the individual.

General principles of European Union law, whose observance is ensured by the European Court of Justice, include respect for fundamental rights. In this regard the European Convention on Human Rights has particular significance. These general principles include the right to a fair hearing. This was elaborated on by the European Court of Justice in *Transocean Marine Paint Association v. Commission* [1974] ECR 1063 where it was stated (at par. 15) that there was a

> *"General rule that a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known".*

In the present case it is clear from the affidavit evidence that the creditors of the company were not heard on the application despite the Parma court apparently having directed that all interested parties ought to be. The affidavit of Jacqueline D. Jenkins sets out the position in that regard. The note holders were not given the opportunity of putting the evidence to the Parma court which they placed before this court. That evidence demonstrated their perception as a third party as to the centre of main interests of Eurofood. They organised their business on the basis that they were dealing with an Irish company subject to Irish law which was being administered in Ireland with its centre of main interests in this jurisdiction. The advice which they took and the business decisions made were all on this basis.

The right to a fair hearing implies that the party concerned should be given sufficient notice for the hearing in order to prepare a defence. The terms of Article 26 of the Regulation are similar to those of Article 27.1 of the Brussels Convention which has since being replaced by Article 34.1 of Regulation 44/2001. In *Krombach v. Bamberski* [2000] ECR I - 1935 the European Court of Justice considered the application of Article 27.1 of the Brussels Convention in circumstances where it was sought to recognise a foreign judgment where the adjudicating court had refused to hear a defendant solely on the ground that that person was not present at the hearing. The European Court of Justice held the recognizing court was entitled to consider this a violation of the right to a fair hearing under Article 6 of the European Convention on Human Rights and to refuse to recognise the judgment. The European Court of Justice stated (at par. 44) "*recourse to the public policy clause must be regarded as being possible in exceptional cases where the guarantees laid down in the legislation of the State of origin and in the Convention itself had been insufficient to protect the*

defendant from a manifest breach of his right to defend himself before the court of origin as recognised by the European Convention on Human Rights".

Applying those principles to the facts here it is clear that the creditors of Eurofood were not heard on the petition and no proper opportunity was given them to be heard by the Parma court. It is also correct to note that the provisional liquidator who was indeed put on notice makes complaint about the manner of the hearing. He was notified after close of business on Friday 13th February that there would be hearing in Parma at midday on Tuesday 17th February. He was not furnished with the petition or the other papers grounding the application until after the hearing before the Parma court had actually concluded. This lack of due process appears to me, quite apart from the other considerations, to warrant this court refusing to give recognition to the decision of the Parma court.

Conclusion

I am satisfied that the presentation of the petition for the winding up of Eurofood and the appointment of a provisional liquidator to it by this court on 27th January, 2004 brought about the opening of main insolvency proceedings under Article 3 of the Regulation and that the centre of main interests of Eurofood was and is within this State.

I am also satisfied that on the evidence before me Eurofood is grossly insolvent and that the creditors are entitled to have it wound up in accordance with the legislation in force in this state. They are not required to participate in a procedure under Italian law which manifestly is not a winding up but a form of re-organisation.

There will therefore be an order for the winding up of the company which pursuant to Section 220 (2) of the Companies Act 1963 relates back to the date of presentation of the petition namely the 27th January, 2004.

Approved

Peter Kelly

23.iii.2004