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THE SUPREME COURT

Murray C.J.
Denham J.
McGuinness J.
Geoghegan J.
Fennelly J.

IN THE MATTER OF EUROFOOD IFSC LIMITED AND IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2001

JUDGMENT delivered on the 3rd day of July, 2006 by FENNELLY J.

In July 2004, this Court referred questions to the Court of Justice of the European Communities (hereinafter "the European Court") for preliminary ruling pursuant to Article 234 of the Treaty Establishing the European Community. These questions concerned the interpretation of Council Regulation (EC) No. 1346/2000 of 29th May 2000 ("the Insolvency Regulation"). They arose in the context of an appeal to this Court from the judgment of Kelly J delivered on 23rd March 2004, whereby he ordered the winding up of Eurofood IFSC Limited ("the company"). By order of Lavan J dated 27th January 2004, the High Court had appointed a Provisional Liquidator. The appeal concerns insolvency proceedings for the purposes of the Insolvency Regulation. The legal basis for that measure was Title IV of the Treaty. Accordingly, only this Court had jurisdiction to refer the questions by virtue of Article 68 of the Treaty. This judgment concerns the orders that should now be made by the Court in the light of the answers provided by the European Court in its judgment of 2nd May 2004.

This judgment should be read together with the two judgments which I delivered on behalf of the Court on 27th July 2004, principally the first or principal of those judgments. As will become apparent, it will not be necessary to refer in any detail to my second judgment of that date concerning the question of recognition of the judgment of the Civil and Criminal Court of Parma in Italy.

This Court referred the following questions to the European Court:

1. *Where a petition is presented to a court of competent jurisdiction in Ireland for the winding up of an insolvent company and that court makes an order, pending the making of an order for winding up, appointing a provisional liquidator with powers to take possession of the assets of the company, manage its affairs, open a bank account and appoint a solicitor all with the effect in law of depriving the directors of the company of power to act, does that order combined with the presentation of the petition constitute a judgment opening insolvency proceedings for the purposes of Article 16, interpreted in the light of Articles 1 and 2, of Council Regulation (EC) No 1346 of 2000?*

2. *If the answer to Question 1 is in the negative, does the presentation, in Ireland, of a petition to the High Court for the compulsory winding up of a company by the court constitute the opening of insolvency proceedings for the purposes of that regulation by virtue of the Irish legal provision (section 220(2) of the Companies Act, 1963) deeming the winding up of the company to commence at the date of the presentation of the petition?*

3. *Does Article 3 of the said Regulation, in combination with Article 16, have the effect that a court in a Member State other than that in which the registered office of the company is situate and other than where the company conducts the administration of its interests on a regular basis in a manner ascertainable by third parties, but where insolvency proceedings are first opened has jurisdiction to open main insolvency proceedings?*

4. *Where,*

    a) *the registered offices of a parent company and its subsidiary are in two different member states,*

    b) *the subsidiary conducts the administration of its interests on a regular basis in a manner ascertainable by third parties and in complete and regular respect for its own corporate identity in the member state where its registered office is situated and*

    c) *the parent company is in a position, by virtue of its shareholding and power to appoint directors, to control and does in fact control the policy of the subsidiary, in determining the "centre of main interests",*

    are the governing factors those referred to at b) above or on the other hand those referred to at c) above?'

5. *Where it is manifestly contrary to the public policy of a Member State to permit a judicial or administrative decision to have legal effect in relation persons or bodies whose right to fair procedures and a fair hearing has not been respected in reaching such a decision, is that Member State bound, by virtue of Article 17 of the said Regulation, to give recognition to a decision of the courts of another Member State purporting to open insolvency proceedings in respect of a company, in a situation where the court of the first Member State is satisfied that the decision in question has been made in disregard of those principles and, in particular, where the applicant in the second Member State has refused, in spite of requests and contrary to the order of the court of the second Member State, to provide the provisional liquidator of the company, duly appointed in accordance with the law of the first Member State, with any copy of the essential papers grounding the application?"*

The European Court gave judgment on the reference for preliminary ruling on 2nd May 2006. It altered the order of the questions and decided that it was unnecessary to answer Question no. 2. Its answers are as follows:

1. *"Where a debtor is a subsidiary company whose registered office and that of its parent company are situated in two different Member States, the presumption laid*

down in the second sentence of Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, whereby the centre of main interests of that subsidiary is situated in the Member State where its registered office is situated, can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which location at that registered office is deemed to reflect. That could be so in particular in the case of a company not carrying out any business in the territory of the Member State in which its registered office is situated. By contrast, where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by that Regulation.

2. *On a proper interpretation of the first subparagraph of Article 16(1) of Regulation No 1346/2000, the main insolvency proceedings opened by a court of a Member State must be recognised by the courts of the other Member States, without the latter being able to review the jurisdiction of the court of the opening State.*

3. *On a proper interpretation of the first subparagraph of Article 16(1) of the Regulation, a decision to open insolvency proceedings for the purposes of that provision is a decision handed down by a court of a Member State to which application for such a decision has been made, based on the debtor's insolvency and seeking the opening of proceedings referred to in Annex A to the Regulation, where that decision involves the divestment of the debtor and the appointment of a liquidator referred to in Annex C to the Regulation. Such divestment implies that the debtor loses the powers of management that he has over his assets.*

4. *On a proper interpretation of Article 26 of the Regulation, a Member State may refuse to recognise insolvency proceedings opened in another Member State where the decision to open the proceedings was taken in flagrant breach of the fundamental right to be heard, which a person concerned by such proceedings enjoys."*

The Court has received written submissions on behalf of the principal creditors of the company, namely the Noteholders, and the Bank of America as well as on behalf of the Director of Corporate Enforcement. Each of these parties submitted that it was clear from the judgment of the European Court that the appeal should be dismissed. Counsel for the Provisional Liquidator, acting consistently with the stance his client had adopted at the hearings in 2004, abstained from comment on the merits of the referred questions but made some observations which relate only to the question of recognition covered by question No. 5 referred by this Court and paragraph No. 4 of the answers.

On the other hand, the appellant, Dr Enrico Bondi, (hereinafter "the appellant"), the Extraordinary Administrator under Italian law of the Parmalat group and the person appointed by the Parma Court as extraordinary administrator of the company does not at all accept that the answers provided by the European Court are determinative of the matter and wishes, in effect, to reopen several fundamental aspects of the proceedings.

The Court heard oral submissions from all parties on 19th June 2006.

A number of preliminary observations will help to focus the issues now to be determined by the Court. Firstly, no question of recognition or otherwise of the judgment of the Parma Court arises, if it follows from a proper application of the answers provided by the European Court that the main insolvency proceedings were first opened in Ireland. Secondly, in the light of its ruling in relation to the first question referred (No 3 of the European Court answers), it was clearly not necessary to answer the second question referred: if the appointment of the Provisional Liquidator constituted the opening of the main insolvency proceedings, there was no need to consider the effect of section 220(2) of the Companies Act, 1963. Thirdly, and most importantly, the core of the rulings, so far as this Court is concerned is in answer no 3 (which provides the answer to Question No 1). The Court, by which main insolvency proceedings are opened determines the centre of main interests of the company. It seems that the European Court regarded the interpretation of the notion of centre of main interests as being of more general and widespread application and importance. That is why it placed it first. But once the Irish Court had opened insolvency proceedings, it was that court which should determine the centre of main interests.

It follows that, in reality, the most important question is the first one referred by this Court, answered by the European Court at Number 3.

The appellant submits that a question now arises as to whether the *ex parte* appointment of the Provisional Liquidator was duly justified. His principal submissions on this point are as follows:

- The appointment of the Provisional Liquidator was not justified. The petitioning creditors' application to Lavan J on 27th January 2004 was based on the apprehension that the Italian parent company (in reality, by that stage, the appellant as Extraordinary Administrator) would move the centre of main interests of the company from Ireland to Italy. A subsequent decision of the European Court, Case C-1/04 *Staubitz-Schreiber* demonstrates that, if the centre of main interests of a company was in a particular Member State at the time of the petition to a court in that state, the jurisdiction of that court would not be lost by any subsequent move of the centre of main interests of the debtor company;

- The appointment of the Provisional Liquidator was obtained *ex parte,* without notice to any party, including the company, not in order to preserve the assets of the company, but to prevent this move of the centre of main interests; it is added that there were no assets in Ireland and any liquid assets outside Ireland were under the control of Bank of America;

- This Court should either amend or dismiss the winding-up order made in the High Court, as the Irish Court lacked international jurisdiction to open main insolvency proceedings; alternatively, this Court should declare that the winding-up order and/or the order appointing the Provisional Liquidator opened only territorial and not main proceedings within the meaning of Article 3 of Council Regulation;

- This Court should recognise the "*decision of the Italian Minister for Production Activities dated 9th February 2004 admitting Eurofood to the extraordinary administration procedure appointing Dr Bondi as the Extraordinary Administrator and/or the decision of the ……Court of Parma of 20th February 2004 holding that*

Eurofood's centre of main interests was in Italy and the declaration of insolvency made by that court…";

It seems to me that these submissions, in their entirety, amount either to a total misunderstanding or an implicit rejection of the decision of the European Court. Under the system of cooperation between the national courts and the European Court, it is for the former to decide whether questions need to be referred for preliminary ruling to the latter. I am quite satisfied that the entire basis of the very detailed arguments of all parties before this Court in 2004 was that the appellant contended that the decision of the Parma Court made on 20th February 2004 and not that of the High Court (Lavan J) dated 27th January 2004 constituted the opening of main insolvency proceedings for the purposes of the Insolvency Regulation. The appellant contended, in his notice of appeal that Kelly J had erred *"in holding that the Order of the High Court made on an ex parte basis constituted the opening of main insolvency proceedings"* (emphasis added). The principal submission of counsel for the appellant before this Court in 2004, as recorded in my judgment, was that insolvency proceedings had first been opened in Italy and that the appointment of a provisional liquidator was not the opening of insolvency proceedings. It is perfectly clear that the entire debate concerned the opening of main insolvency proceedings. It is clear beyond argument that this Court referred questions to the European Court in order to resolve the issue of priority between the Irish and Italian proceedings. It would have been a total waste of time for the Court to refer the questions if answers to them were not going to resolve that central issue.

I am also perfectly satisfied that the European Court has clearly resolved the issue. By its answer No. 3, the European Court has ruled that, for the purposes of Article 16(1) of the Insolvency Regulation, a decision to open insolvency proceedings has been made *"where that decision involves the divestment of the debtor and the appointment of a liquidator referred to in Annex C of the Regulation."* At paragraph 57 of its judgment the European Court attaches particular importance to the fact that the High Court had *"appointed a provisional liquidator referred to in Annex C and ordered that the debtor be divested."* It is absolutely clear that the European Court took particular note of the appointment of the provisional liquidator by the High Court, its effect in Irish law and the inclusion of a Provisional Liquidator in Annex C to the Insolvency Regulation.

Finally, and conclusively, the European Court has stated (paragraph 49) that *"the first subparagraph of Article 16(1) lays down a rule of priority, based on a chronological criterion, in favour of the opening decision which was handed down first."* The court recalled the 22nd recital to the Insolvency Regulation to the effect that *"(t)he decision of the first court to open proceedings should be recognized in the other Member States without those Member States having the power to scrutinize the court's decision."*

In the light of this analysis, the arguments put forward on behalf of the appellant are entirely devoid of merit. Their effect is to invite this Court not to apply the decision of the European Court. The appellant seeks, at this late stage, to challenge the order of Lavan J made on 27th January 2004. The company, or the appellant, once he had been appointed by the Italian Court, if either had wished to contest the appointment of the provisional liquidator, was perfectly entitled to follow the correct procedure in the

High Court, namely by bringing a motion to set aside the order, which had been made *ex parte.* In fact, no step was taken to contest the order of Lavan J. Nor did the appellant appeal to this Court against the making of that order. The appellant has at all times simply claimed priority for the decision of the Parma Court.

It is not open to this Court to interfere with an order of the High Court against which there has been no appeal. It is unnecessary to comment on the decision of the European Court in Case C-1/04 *Staubitz-Schreiber.* That was a decision made almost two years after the Lavan J's order. It certainly does not follow that it has any bearing on the validity of the latter. It may, in any event, have been perfectly legitimate for the creditors to express concern at the possibility of the movement of the centre of main interests of the company to Italy. The principal affidavit in support of the appointment of the Provisional Liquidator was that of Wayne Robert Porritt, Managing Director of Bank of America. He explained his concern about the possibility that the centre of main interests of the company would be moved to Italy. This matter was fully considered by Kelly J. The following is a short extract from that affidavit:

> *"Were this to occur it may* [sic] *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 that in secondary proceedings the local insolvency practitioner 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."*

Mr Porritt would appear, in that paragraph, to be referring to the second sentence of Article 3(2) of the Insolvency Regulation, dealing with secondary insolvency proceedings. It reads: *"The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State."* It would be difficult to dismiss that consideration as other than a legitimate one. The decision of the European Court in Case C-1/04 *Staubitz-Schreiber* is, in my view, irrelevant. It is concerned with jurisdiction. The European Court ruled that a German Court continued to have jurisdiction to open insolvency proceedings in respect of an insolvent trader, who, subsequent to the application before the German Court, moved her centre of main interests to Spain. That is of no assistance to the appellant, who claims that the decision shows that the petitioning creditor was not entitled to rely on its apprehensions of being prejudiced by a possible change of centre of main interests. It does not show anything of the sort. In any event, this Court cannot, at this stage enter into consideration of the facts of a matter, the order appointing the provisional liquidator, which is not before it.

It is equally clearly not possible for this Court to take any of the other steps suggested on behalf of the appellant. For the reasons already given, it would be absurd for this Court to rule that the insolvency proceedings opened in the High Court were secondary insolvency proceedings of the type mentioned in Article 3(2) and 16(2) of the Insolvency Regulation. Such a proposal flies in the face of the decision of the European Court. No issue of priority arises in respect of secondary insolvency proceedings. That court gave detailed consideration to the nature of the insolvency proceedings opened by the High Court. It did so solely because of the contest as to priority with the decision of the Parma Court and because that contest was at the heart of the first question referred by this Court.

For precisely the same reasons, it is absurd to ask this Court to recognize either

the "*decision of the Italian Minister for Production Activities dated 9th February 2004 admitting Eurofood to the extraordinary administration procedure appointing Dr Bondi as the Extraordinary Administrator and/or the decision of the ……Court of Parma of 20th February 2004 holding that Eurofood's centre of main interests was in Italy and the declaration of insolvency made by that court…"* The first of these decisions is not even that of a court. The second was the subject of the reference for preliminary ruling to the European Court and has been determined by the answer to the first referred question.

Counsel for the appellant also addressed arguments to this Court on the question of whether the company possessed an "establishment" in the State for the purposes of Article 3(2) of the Insolvency Regulation. It is impossible to see how that could have any relevance to the matter, since it relates only to the opening of secondary insolvency proceedings. At no stage has an application been made to open secondary insolvency proceedings.

The appellant also introduces argument on what he describes as "*the relation back heresy*," concerning the effect of section 220(2) of the Companies Act, 1963. It is unnecessary to make any reference to this matter. The European Court decided, for very good reason, that it was unnecessary to answer the second question referred to it concerning this point. The reason was that it was sufficient for it to have answered the first question. This answer further illumines the lack of merit in the appellant's position. It could only be relevant to consider the "relation back" of the date of commencement of the winding up, by virtue of section 220(2), if it was not already sufficiently clear that the appointment of the provisional liquidator constituted the opening of main insolvency proceedings. But it is perfectly clear.

The appellant has, finally, made submissions regarding the correct test to be applied by the Court in determining the centre of main interests. These submissions are remarkable for two reasons. The appellant has, to date, abstained from disputing the issue of centre of main interests before the Irish Courts. His position has been that the Parma Court opened main insolvency proceedings and that it alone had the power to determine the centre of main interests of the company. Insofar as Kelly J did so, in the High Court, the appellant, in his notice of appeal, submitted that he had been in error as "*the Parma Court had already determined the 'center of main interests' lay in Italy and no argument was addressed to the learned Trial Judge by the appellant on the issue of 'center of main interests'.*" It was also the basic attitude of the appellant before this Court that the main insolvency proceedings had been opened in Italy and that only the Italian Court could determine the centre of main interests. Secondly, the matter now having been referred to and ruled upon by the European Court, the appellant propounds a test which is different from that provided by that Court. He submits that "the consistent case law of the United Kingdom, Germany, Hungary and France has laid down the "head office functions" test for rebutting the presumption based on the place of the registered office.

The appellant cites paragraphs 111 and 112 of the Opinion of the Advocate General in the present case, referring to reliance before the European Court by both the appellant and the Italian Government on the test mentioned. Advocate General Jacobs stated:

> *"I find these submissions sensible and convincing. They do not, however, seem to me very helpful in answering the question. They do not, in particular demonstrate that a parent company's control of a subsidiary's policy determines that subsidiary's "centre of main interests" within the meaning of the regulation."*

This remarkable and misconceived reliance on a paragraph from the Opinion of the Advocate General is followed by the following extraordinary written submission:

> *"It remains therefore for this Honourable Court (or if the matter is remitted below, for the High Court) to judge whether the "head office functions" of Eurofood were exercised in Ireland or in Italy."*

At no point do the written submissions of the appellant recognise that the European Court has ruled definitively on the test to be applied in determining centre of main interests. It is not submitted that Kelly J, in the light of the ruling of the European Court applied an incorrect test. That ruling is simply ignored.

It is clear to me that the submissions made by the appellant are, in every respect, entirely without substance. It is clear that the judgment of Kelly J was fully in conformity with the correct interpretation of the Insolvency Regulation, as interpreted by the European Court.

In these circumstances, it is unnecessary to consider the answer (no. 4) to the fifth question referred by this Court, i.e. whether recognition should be withheld from the decision of the Parma Court, by reason of its disregard for principles of fair procedures. I would merely say that, if it were necessary to do so, I would also affirm the decision of Kelly J on this point. The reasons have been fully set out in my judgment of 27th July 2004. I regret to say that it is quite shocking that the appellant should have deliberately refused to provide the Provisional Liquidator with the documents necessary for his appearance before the Parma Court in February 2004. This Court has offered several opportunities to the appellant to explain his behaviour. He has declined to do so. It can only be inferred that this was done deliberately in order to place the Provisional Liquidator at a disadvantage. It is also disappointing that the Italian court appears to have condoned this behaviour. This Court is fully conscious of the important role now accorded to the principle of mutual recognition of judicial decisions in many contexts of European Community and Union law. It is based on a principle of mutual trust. This Court respects those principles. They must, therefore, entail respect for principles of fairness that are common to the traditions of the Member States and which have been affirmed again and again by the European Court.

For the foregoing reasons, the correct order is to dismiss the appeal.