THE SUPREME COURT

147/04

Murray CJ
Denham J
McGuinness J
Geoghegan J
Fennelly J

IN THE MATTER OF EUROFOODS IFSC LIMITED

AND IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2001

JUDGMENT delivered on the 27th day of July, 2004 by FENNELLY J.

The main judgment of this Court delivered today concerning the reference of questions for preliminary ruling to the Court of Justice sets out fully the background facts relating to Eurofoods IFSC Limited (hereinafter "the Company") and the history of the proceedings. This judgment is concerned only with the appeal from the judgment of the High Court insofar as that Court decided that the decision of the Parma Court of 20th February 2004 should not be recognized.

In his judgment of 23rd March 2004, Kelly J, in the High Court, decided primarily that the Civil and Criminal Court at Parma (hereinafter "the Parma Court") did not have jurisdiction to open insolvency proceedings in respect of the Company, since, as he held, such proceedings had already been opened in this jurisdiction. He also held that the centre of main interests of the Company was in Ireland and not in Italy.

In addition, he held that the court should not give recognition to the judgment of the Parma Court. He relied on the provisions of Article 26 of Council Regulation (EC) No

1346/2000 ("the Regulation"). He said that the affidavit evidence showed 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 learned judge continued:

> *"The certificate holders were not given the opportunity of putting the evidence before the Parma Court which they placed before this court. The 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 learned judge then referred to general principles of law regarding the right to a fair hearing. He cited the decision of the Court of Justice in *Krombach v Bamberski* [2000] ECR I-1935 regarding the interpretation of Article 27.1 of the Brussels Convention. Applying those principles to the facts, he found that "*the creditors of Eurofood were not heard on the petition and no proper opportunity was given them to be heard in the Parma Court"*. He went on to refer also to the manner in which the Provisional Liquidator was put on notice. He said:

> *"He was notified after close of business on Friday 13th February that there would be a hearing before the court 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."*

The Appellant, Dr Enrico Bondi, the Extraordinary Administrator appointed by the Parma Court, in his Notice of Appeal to this Court, alleges that the learned High Court judge "*misdirected himself in his interpretation of Article 26 of the Regulation and in particular in finding that there had been a breach of public policy or fundamental principles in the conduct of the proceedings in the Parma Court*."

The High Court judgment proceeds on the basis that there was an absence of a fair hearing at the Parma Court both in respect of the creditors and of the Provisional Liquidator.

Article 26 of the Regulation provides:

> *"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 state's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual."*

Before addressing this matter further, I consider that it is necessary to restate the relevant facts which are of particular relevance to the issue of recognition.

On 24th December 2003, an extraordinary administrator, Dr Enrico Bondi, the Appellant, was appointed in Italy to Parmalat Spa, the parent of the Company.

On 23rd January 2004, the Company wrote to its creditors giving notice of the possibility of appointment by Parmalat of new directors and that this might impact on the location of Eurofood's management and the jurisdiction in which procedures might be commenced. Both Italian directors had, by then, resigned.

On 27th January 2004, Bank of America presented its petition to the High Court in Ireland. On an ex parte application, that court appointed Mr Pearse Farrell (hereinafter "Mr Farrell") to be Provisional Liquidator of the Company. It gave him powers to:

1. Take possession of the assets of the Company

2. Manage the affairs of the Company

3. Open a bank account in the name of the Company

4. Retain the services of a solicitor

One of the grounds on which the petitioning creditor sought the appointment of a Provisional Liquidator was its fear that an effort might be made to transfer the "*centre of main interests*" of the Company to Italy in order to facilitate the inclusion of the Company in an Italian insolvency process, which would be "*main proceedings*," so as to exclude the jurisdiction of the Irish courts. The High Court (Lavan J) did not determine the issue of "centre of main interests" when making the order appointing a Provisional Liquidator. The legal consequences of the appointment of a provisional liquidator are described in the main judgment of this Court delivered today. They are, in particular, that the directors are no longer empowered to conduct the affairs of the Company. The provisional liquidator represents and is bound to protect the interests of all creditors and to take possession of the assets.

On 30th January 2004, Mr Farrell notified the certificate holders and the Appellant of his appointment.

On 9th February 2004, the Italian Ministry of Productive Activities ("Ministero delle Attivita Produttive) admitted the Company, as a group company, to the extraordinary administration of Parmalat Spa. On 10th February, the Parma Court made an order in which it acknowledged the filing of a petition to declare the insolvency of the Company. It scheduled a hearing before the court in camera for 17th February and directed that a "*copy to be sent to the petitioner for the communication to the parties interested to attend, if necessary also by fax, not later than 48 hours before the hearing*." (the foregoing is based on an English translation exhibited in the proceedings). The word "*copy*" clearly refers to the petition, as no other document is referred to in the order. The reason given for the urgency was "*in order not to jeopardise the measures aimed at protecting the creditors.*"

On 10th February 2004 Mr Farrell received a fax communication from Parmalat Spa purporting to appoint three new Italian directors to the Board of the Company and to remove one Irish director, Ms Catherine Meenaghan, with immediate effect.

On Friday 13th February 2004 at approximately 17:15 Irish time, Mr Farrell, without any prior notice from or communication from the Appellant, was personally served by the Irish solicitors for the Appellant with a copy, dated 13th February of the notice of an urgent hearing before the Parma Court on Tuesday 17th February at 12 noon (11:00 Irish time). Mr Farrell was not, however, served, as would have been normal in this jurisdiction, and as had been clearly ordered by the Parma Court, with any copy of the petition or copies of the papers upon which the extraordinary administrator proposed to rely. As will be mentioned later in this judgment, the Appellant does not dispute this fact. The Appellant has exhibited what he describes as the "documentation grounding the application" with his affidavit in these proceedings. It appears that nineteen documents were annexed. None of these were served on or made available to Mr Farrell.

On 16th February, the Bank of America, the petitioning creditor, relying on a report of an investigation by the of the affairs of the Company, which showed it to be insolvent, applied to the High Court for an order to bring forward the date of the hearing of the winding-up petition. This application was apparently prompted by the impending application in the Parma Court. The High Court refused this application but granted liberty to Mr Farrell to appear in the proceedings before the Parma Court. Both the petitioning creditor and Mr Farrell were clearly conscious of the desire and intention of the Appellant to open main insolvency proceedings in Italy.

Mr Farrell was legally represented before the Parma Court. However, despite what he has described as "*repeated written and verbal requests*" to the Appellant from Mr Farrell's Italian lawyers, he had not received any of the documents filed with the Parma Court. Nonetheless, he filed a "*defence brief*" with the court on 17th February 2004. In this, he argued that he was not allowed to defend and argue properly during the hearing, since he had not been served with the petition, which he said was a breach of his constitutional right to defend. Mr Farrell, through his Italian lawyers, asked the court for an adjournment of the hearing. This was refused by the court. The Parma Court, therefore, embarked on the hearing of the Appellant's application in the knowledge that Mr Farrell had not received any copies of the essential papers. The court entered on discussion and argument regarding the issue of centre of main interests of the Company. The hearing lasted about one hour. The parties were given permission to file further briefs before 11:00 on 19th February. However, the presiding judge stated that the court was not prepared to defer decision to a date which would allow the Irish court to determine the matter first. The court also allowed Mr Farrell's Italian lawyers to photocopy the petition and the attached documentation on the court file. Due to time constraints, and limited photocopying facilities, Mr Farrell's lawyers had to be selective in the documents which they copied. Mr

Farrell's lawyers and those of the Appellant agreed before the court a deadline of 7 pm on 18th February for service by fax of the second brief.

In the event, Mr Farrell filed a second defence brief and the Appellant a counter brief prior to the decision of the court on 20th February 2004. There was, however, no further hearing. It is clear from the affidavits filed in these proceedings that the parties, at the hearing on 17th contested both the question of whether the Irish court had already "*opened*" insolvency proceedings and the issue of centre of main interests. At that time, Mr Farrell, as Provisional Liquidator, had been denied sight of any of the papers grounding the application.

The Civil and Criminal Court of Parma delivered its written judgment on 20th February 2004. That judgment deals principally, if not entirely, with the issue of where the "centre of main interest" of the Company lay. It includes several references to the arguments of Mr Farrell. For the purpose of ruling on the present issue of possible non-recognition of that judgment on grounds of public policy, it would be quite inappropriate to pass any comment on the court's views on that issue, which may present itself before another judicial forum. It suffices to say that the Parma Court appears to have considered Mr Farrell's arguments on their merits.

It is also necessary to consider the position of the largest creditors of the Company, the certificate holders.

Ms Jacqueline Jenkins has sworn an affidavit making specific complaint that the certificate holders were unrepresented before the Parma Court. She says that they were given no opportunity to outline to that court their perception in relation to the centre of main interests of the Company. The appellant did not notify them of the intended application. Notice was received by them via Mr Farrell on Sunday 15th February. Ms Jenkins says that she does not believe Mr Farrell was in a position to explain the perception of the certificate holders, which was "*so crucial to the determination of the centre of main interests*." They did, however, write a

brief letter to the Provisional Liquidator setting out their perception on this issue and that was an exhibit to the second defence brief before the court. Ms Jenkins' affidavit contains the evidence referred to by the learned High Court judge on this issue.

Moreover, the petitioner, Bank of America, makes complaint in its submissions to this Court that it "*understood from conversations between the Provisional Liquidator and the Appellant's Irish solicitors that the petitioner was not an interested party for the purpose of appearing in the Italian proceedings*." This is stated in an affidavit of Mr Diarmuid Connaughton, an executive of the petitioner, who does not state, however, that the petitioner was prevented from appearing before the Italian court.

The Appellant, in reply, points out that, having been informed of the impending hearing by the Provisional Liquidator, the certificate holders were aware of the proposed hearing and that there was nothing to prevent them being represented. He claims that they appear to have been satisfied that the Provisional Liquidator could put the case fully to the Italian court.

In his submissions to this Court, the Appellant says that he satisfied the requirements of the Parma Court by notifying Mr Farrell of the intended application, as the latter represents all creditors. This, he says, is demonstrated by the fact that the Italian court embarked on the matter without requiring that further notices be given. Both the petitioner and the certificate holders were, in fact, aware of the hearing, having been informed by Mr Farrell. Both are very large, according to the Appellant, organisations, which would have had no difficulty instructing lawyers to appear at very short notice. They appear, in fact, to have decided to allow their interests to be represented by Mr Farrell. In fact, they could even have appeared after the judgment of the Parma Court. Under Italian procedure, it is possible to apply to the same court to set aside its earlier order. The Appellant does not, however, offer any explanation for his undisputed denial of any copies of the essential papers grounding his application to Mr Farrell.

Mr Farrell, in his written submissions to this Court, supported by the certificate holders, says that, without question, the manner in which the Parma Court proceeded seriously circumscribed his ability to participate effectively in the proceedings and that the decision of the court was rendered in the absence of detailed evidence from the certificate holders. He emphasises, in particular, that the court made it clear that it was determined to render its decision before the date on which the petitioner's petition came before the High Court.

The certificate holders strongly criticise the proceedings of the Italian court, especially the haste with which it proceeded so as to open insolvency proceedings before the High Court could hear the winding-up petition. Since they represented 70-75% of the Company's indebtedness, they should have been put on notice. They rely on those provisions of the Regulation which indicate that the centre of main interests should correspond to the place where the debtor conducts and administers its business so that it is known to third parties.

Consideration of the Issue

The task of this Court, on this appeal, is to decide whether recognition of the decision of the Italian court would be contrary to Irish public policy. The provisions of Article 26 of the Regulation are matters of Community law. Insofar as the decision of this Court involves an interpretation of that Article, the Court will be obliged to refer any such question for preliminary ruling to the Court of Justice of the European Communities. However, it is for this court to decide the issue of Irish public policy. It is only if it comes to the conclusion that the decision of the Parma Court should not, as matter of Irish public policy, be recognised that it will need to consult the Court of Justice. It is also the function of this Court to make any findings of relevant fact.

The principle of fair procedures in all judicial and administrative proceedings is, in Irish law, a principle of public policy of cardinal importance. It derives both from the rules of

natural justice of the common law and from constitutional guarantees of personal and individual rights.

The dictum of Gannon J as to the scope of this fundamental principle, in *State (Healy) v Donoghue* [1976] I.R. 325, at page 335, has been repeatedly approved. It is:

> "*Among the natural rights of an individual whose conduct is impugned and whose freedom is put in jeopardy are the rights to be adequately informed of the nature and substance of the accusation, to have the matter tried in his presence by an impartial and independent court or arbitrator, to hear and test by examination the evidence offered by or on behalf of his accuser, to be allowed to give or call evidence in his defence, and to be heard in argument or submission before judgment be given. By mentioning these I am not to be taken as giving a complete summary, or as excluding other rights such as the right to reasonable expedition and the right to have an opportunity for preparation of the defence.*"

These principles apply to all forms of proceedings, civil and criminal. In an appropriate case, they may be invoked both by bodies corporate and by non-citizens. There would be no doubt at all, in my opinion, insofar as principles of Irish law are applicable, that Mr Farrell, as the Provisional Liquidator, appointed by the Irish court, and bound, as such, to represent the interests of the creditors of the Company was entitled to receive fair notice of the intended application of the Appellant. Equally, there is no doubt that both the petitioner and the certificate holders have the right to rely on these principles, if this Court holds that they were deprived of the right to a fair hearing to which they were entitled.

The question of recognition arises in a context of international law. In Irish law, where a person, which includes both natural and legal persons, is liable to be affected by a

decision to be made by a court or tribunal, that person is entitled to reasonable notice of the nature of the decision which is sought and of the evidence to be used in applying for it. Failure of a court or an administrative body to respect these rights will lead the courts to exercise their rights of Judicial Review and to quash or annul any decision made in such circumstances. This Court should, therefore, approach the present matter by asking itself whether an Irish superior court, faced with a decision made by an Irish judicial or administrative body in like circumstances, would quash or set aside that decision.

The facts which ground the complaint made by Mr Farrell and the certificate holders are not in dispute. The Appellant does not contest, in particular, that he did not provide Mr Farrell with any copy of the petition or other supporting papers either before or during the hearing at the court in Parma on 17th February or that he was repeatedly asked for these papers by Mr Farrell's Italian lawyers. The Appellant has had ample opportunity to respond to Mr Farrell's complaints about the unfairness of the procedures as set out in his affidavit of 23rd February. The Appellant swore a further affidavit, prior to the High Court hearing, on 1st March. In that he replied to the affidavit of Ms. Jenkins, but he made no attempt to contest Mr Farrell's evidence. More remarkably, at the hearing of the appeal in this Court, counsel for the Appellant was specifically invited by this Court to explain why his client had refused to supply Mr Farrell with any copy of the petition. Counsel's answer was that he had no instructions on the matter. I find this extremely difficult to understand, since the learned High Court judge had ruled that the decision of the Parma Court should not be recognised as having been reached in breach of the rights to due process of Mr Farrell and of the certificate holders. Indeed, the Appellant was specifically appealing against that decision. It is clear, therefore, that the Appellant instructed his counsel to appear before this court without offering any explanation for his extraordinary behaviour in refusing to provide Mr Farrell with the essential documents necessary to defend the interests of the creditors of the Company before the Parma Court. Furthermore, it is not

contested that the Parma Court was determined to proceed with the hearing on 17th February and to render its decision before the Irish High Court could make a winding-up order, an attitude clearly adopted at the behest of the Appellant. The Appellant must clearly have known that, by refusing to furnish him with the essential documents, he was putting Mr Farrell at a severe disadvantage at the hearing in Parma. His silence on the issue before this Court provides eloquent support for that conclusion.

The position of the certificate holders is slightly different. It is not clear that the Parma Court intended that they be served with the papers. They were, of course, as that Court stated in its decision, by far the largest creditors of the Company. It is not clear, however, whether that fact suffices to entitle them to notice. Small creditors may be no less grievously affected by the insolvency of its debtor. Furthermore, there is force in the point made by the Appellant that the certificate holders were amply funded and equipped to ensure representation before the Court at Parma on 17th February, if they had chosen to do so.

In reaching a conclusion on the question of whether Irish public policy manifestly requires that the decision of the Italian Court be recognised, all the circumstances must be considered. It is not possible to refrain from criticising the behaviour of the Appellant in the strongest terms. He failed, without explanation, to serve Mr Farrell with any copies of the petition or other papers grounding his application to the Court in Parma. He further declined to do so in spite of several verbal and written requests from Mr Farrell's Italian lawyers. This placed Mr Farrell in the difficult, certainly the embarrassing, position of having to get the permission of the judges to photocopy the documents on the Court file. Finally, the Appellant, in full knowledge of these complaints, instructed counsel to appear before this Court on appeal from the judgment of Kelly J in the High Court without offering any explanation for this extraordinary behaviour.

Against this concern about the behaviour of the Appellant, a number of other matters have to be weighed in the balance. It is commonplace that, in the case of the insolvency of large enterprises action often has to be taken as a matter of great urgency. The accounting experts in this field and the firms of lawyers who represent them are accustomed to meeting short deadlines, to preparing complex documents and evidence for the courts overnight and over week-ends, at least where interim or interlocutory proceedings are concerned. Even there, however, opposing parties are entitled to sight of the papers to be used against them. Furthermore, parties are always entitled to reasonable time and notice where final orders of great importance are concerned. The case of Parmalat Spa and its associated companies is the most notorious large-scale insolvencies in the world in recent times. Clearly, the competing interests in Ireland and Italy were determined to endeavour to have the Company's insolvency administered in their own respective jurisdictions. The Parma Court did indeed, subject to its self-imposed deadline, facilitate Mr Farrell by providing some access to documents, but only after the hearing had effectively taken place. Its judgment shows that it considered the arguments of both parties. It is to be noted, with some concern, however, that it made no reference, in that judgment, to the refusal of the Appellant to serve Mr Farrell with a copy of the petition as it had required him to do.

Mr Farrell says that he was seriously circumscribed in his ability to participate in the hearing in Parma, because of the absence of any copy of the petition. This cannot be denied and is not seriously contested by the Appellant.

This Court accepts that this must have been so. The shortness of the notice is one matter. Mr Farrell seems to have reacted extremely well in such a short time. However, he was deprived, apparently deliberately, of the essential documents grounding the Appellant's application to the Court. In a like situation, this Court would not allow a corresponding decision of any court or administrative body under its jurisdiction to stand. It would consider the want of

fair procedures in itself as so manifestly contrary to public policy that it would regard it as having been made without jurisdiction and, consequently, void. Nor would that result be cured by the fact that the decision could be reopened before the same court. Such a fundamental failure to observe fair procedures would taint the entire proceeding.

This Court notes that, as stated in Recital 22 to the Regulation, "*recognition of judgments delivered by the courts of the Member States should be based on the principle of mutual trust*" and that "*grounds of non-recognition should be reduced to the minimum necessary.*" It must, however, be an intrinsic element in the "*principle of mutual trust*" that the decision whose recognition is sought has been made in respect for the "*general principle of Community law that everyone is entitled to fair legal process,*" as stated by the Court of Justice in its judgment in *Krombach v Bamberski* (paragraph 26). The judgment in that case also states

> "*42. …… it follows from a line of case-law developed by the Court on the basis of the principles referred to in paragraphs 25 and 26 of the present judgment that observance of the right to a fair hearing is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings in question (see, inter alia, Case C-135/92 Fiskano v Commission [1994] ECR I-2885, paragraph 39, and Case C-32/95 P Commission v Lisrestal and Others [1996] ECR I-5373, paragraph 21).*
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> *43. The Court has also held that, even though the Convention is intended to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals, it is not permissible to*

achieve that aim by undermining the right to a fair hearing (Case 49/84 Debaecker and Plouvier v Bouwman [1985] ECR 1779, paragraph 10).

44. It follows from the foregoing developments in the case-law that 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 have 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 ECHR. Consequently, Article II of the Protocol cannot be construed as precluding the court of the State in which enforcement is sought from being entitled to take account, in relation to public policy, as referred to in Article 27, point 1, of the Convention, of the fact that, in an action for damages based on an offence, the court of the State of origin refused to hear the defence of the accused person, who was being prosecuted for an intentional offence, solely on the ground that that person was not present at the hearing."

I am satisfied that it would be manifestly contrary to public policy, as a matter of Irish law, to give recognition to the decision of the Parma Court, on the ground that Mr Farrell was not given the protection of fundamental aspects of fair procedures by being refused any copy of the petition or any other papers which the Appellant intended to place before that Court for the purpose of the opening of insolvency proceedings.

I therefore agree with the conclusion of Kelly J that the decision of the Parma Court should not be recognized. Nonetheless, having decided this matter of Irish law, it is incumbent on this Court to refer a question on this subject to the Court of Justice for preliminary ruling

pursuant to Article 234 of the Treaty establishing the European Communities as modified by Article 68 of the Treaty. Such a question is included with the other questions being referred in the judgment of the Court delivered today.