Neutral Citation [2012] IEHC 596

THE HIGH COURT

[2011 No. 5843 P]

BETWEEN

IRISH BANK RESOLUTION CORPORATION LIMITED, QUINN INVESTMENTS SWEDEN AB AND LEIF BAECKLUND

PLAINTIFFS

AND

SEAN QUINN, CIARA QUINN, COLLETTE QUINN, SEAN QUINN JUNIOR, BRENDA QUINN, AOIFE QUINN, STEPHEN KELLY, PETER DARRAGH QUINN, NIALL MCPARTLAND, INDIAN TRUST AB, FORFAR OVERSEAS SA, LOCKERBIE INVESTMENTS SA, CLONMORE INVESTMENTS SA, MARFINE INVESTMENTS LIMITED, BLANDUN ENTERPRISES LIMITED, MECON FZE, CJSC VNESHKONSULT, OOO STROITELNYE TECKNOLOGII, OOO RLC-DEVELOPMENTS AND KAREN WOODS

DEFENDANTS

JUDGMENT of Mr. Justice Clarke delivered the 22nd November, 2012

1. Introduction

1.1 This judgment follows on from a previous judgment delivered by me in these proceedings on the 13th September, 2011 ("the earlier judgment") [2011] IEHC 356. For the reasons set out in that judgment, I refused an application brought by some of the defendants for an order under Article 23 of the Brussels Regulation declaring that the Courts of Sweden and Cyprus respectively had jurisdiction in respect of many of the issues which then arose in these proceedings. As an alternative, the same defendants sought an order that the court should decline jurisdiction and dismiss, or alternatively stay, these proceedings under Article 28 of the Brussels Regulation pending the determination of what was said to be a related action (No. 4324/2011), which was then pending before the Courts of Cyprus. So far as that latter as aspect of the application was concerned, and for the reasons set out in the earlier judgment, I referred certain questions to the European Court of Justice ("ECJ") for preliminary ruling.

1.2 In this judgment, subject to what follows, terms are used in the same manner as in the earlier judgment. However, there have been some changes in the description and identity of the parties to this litigation since the earlier judgment. First, the principal plaintiff has now changed its name to Irish Bank Resolution Corporation ("IRBC") and I will refer to it in that way in this judgment. Second, a number of additional defendants, who were not parties to these proceedings at the time of the earlier judgment, have since been added. Nothing turns on that fact. However, the phrase "the Quinns" is used in the same manner as in the earlier judgment and refers to those of the defendants who were the moving parties in the application to stay or dismiss these proceedings on jurisdictional grounds.

1.3 The matter has now come back before the court. IRBC applied to the court suggesting that a request should be submitted to the ECJ which would have, in substance, the effect of withdrawing the order of reference already made. It was said that circumstances had now changed so that a reference was no longer necessary to enable a proper resolution by this Court of the issues which arise under Article 28 of the Brussels Regulation. That application on behalf of IRBC has had a slightly complicated procedural history to which I will shortly turn. However, this judgment is ultimately concerned with that question of whether it is, in all the circumstances, appropriate to inform the ECJ that answers to the questions raised in the order of reference are no longer considered necessary. I turn first to the procedural history.

2. Procedural History

2.1 When the application for a withdrawal of the reference was first listed for hearing, both sides were represented by solicitor and counsel. Argument was addressed as to the merits or otherwise of that application. The hearing took place on the 18th July, 2012. On the 25th July, 2012, I indicated that it would be necessary for me to reconsider the original motion brought by the Quinns under Article 28 of the Brussels Regulation, in the light of any relevant change in circumstances, for the purposes of deciding whether the issues raised in the reference were any longer of material significance to a determination of that application to dismiss or stay. I afforded the parties an opportunity to file such additional evidence or submissions as they might feel appropriate.

2.2 During the summer vacation the solicitors then on record for the Quinns came off record. In addition, proceedings alleging contempt of court were brought against three of the Quinns being Sean Quinn, Sean Quinn Junior and Peter Daragh Quinn, as a result of which the High Court (Dunne J.) concluded that all three were in contempt of court. An appeal was brought by Sean Quinn Junior to the Supreme Court in respect of the funding of contempt and in respect of certain other orders made consequential on that finding of contempt. The appeal was unsuccessful in respect of the primary finding of contempt made against Sean Quinn Junior and in respect of the period of imprisonment imposed on him in respect of that contempt. The appeal was successful in respect of other coercive orders made consequent on the finding of contempt. In the course of the contempt hearings in question, there was representation for certain of the Quinns and, in particular, Sean Quinn Junior in relation to the appeal to the Supreme Court and Sean Quinn in respect of further hearings conducted in the High Court to determine whether a penalty should be imposed in respect of the earlier finding of contempt. In the events that happened, Dunne J. imposed a period of imprisonment of nine weeks on Sean Quinn as a result of those hearings.

2.3 It had been my intention to list the resumed hearing of these matters in the early weeks of the new term. However, in the light of the fact that many other controversial aspects of this case were under active consideration in various courts and in the light of the somewhat unclear position as to legal representation for the Quinns, I decided to defer matters for a short period of time. However, it became clear that the hearing of the reference before the ECJ had become imminent so that it was necessary to decide this question one way or the other for if it were not decided quickly any further delay would have the same effect as a refusal of the IRBC's application (whether same was merited or not) for the hearing of the reference would go ahead in any event. For those reasons, I arranged to have the matter listed.

2.4 At the hearing, Sean Quinn was represented by counsel. Other members of the Quinn family were not legally represented but one of their number acted as an agreed spokesman. In the intervening period IRBC had filed additional evidence and submissions. The Quinns confined themselves to drawing the court's attention to certain additional facts which, it was urged, should properly be taken

into account by the court in reaching a conclusion. While the application was listed for mention and while it had originally been intended that, if necessary, a date would be fixed for hearing further submissions, IRBC was content to rest on the additional evidence and written submissions which it had filed. The Quinns were content to rest on the additional points made orally. On that basis, I indicated that I would deliver judgment on the substance of the matters raised in early course. This judgment is directed to that end. The starting point must be a brief review of the earlier judgment.

3. The Earlier Judgment

3.1 As is clear from the discussion on the issues which arose in respect of Article 28 of the Brussels Regulation, to be found in section 7 of the earlier judgment, a particular complication arose in respect of that aspect of the application deriving from the fact that there were three sets of proceedings whose status needed to be considered. On the basis of the argument put forward on behalf of IRBC, the proper analysis of those three sets of proceedings was to treat the Quinn Irish proceedings as being the first proceedings for the purposes of Article 28 and that, thus, the Courts of Ireland were first seised in accordance with the terms of that Article. The submissions made on behalf of the Quinns disputed that proposition. The questions referred to the ECJ all derive from that complication.

3.2 I should add that it seemed to me, at the time when the hearing which led to the earlier judgment was conducted, that, in the absence of any reliance on the existence of the Quinn Irish proceedings, and looking at the matter purely by reference to the Quinn Cypriot proceedings and these proceedings, the arguments as to whether it would have been appropriate to exercise the court's discretion to stay under Article 28 raised difficult questions. It is clear from the relevant jurisprudence that the underlying rationale behind Article 28 is that the courts of the member states should endeavour to act in a way which minimises the risk of either conflicting judgments or the incurring of unnecessary expense which might otherwise result from the conduct of related proceedings in two or more separate jurisdictions. Where, therefore, proceedings are truly related in the sense in which that term is used in Article 28, the courts of a jurisdiction other than that first seised should lean in favour of a stay. See, for example, Case C- 406/92 *The Tatry v. the Maciej Rataj* [1994] ECR 1-5439. If, therefore, the Quinns were correct in asserting that, on a proper analysis, the Quinn Cypriot proceedings were the first related proceedings for the purposes of Article 28 and that, thus, the Courts of Cyprus were first seised, then it would follow that this Court should incline towards a stay or dismissal in favour of the Courts of Cyprus. It would have required significant countervailing factors to displace that inclination. If, on the other hand, the argument put forward on behalf of IBRC to the effect that, on a proper analysis, the earlier existence of the Quinn Irish proceedings could be described as giving rise to a situation where the Irish Courts were first seised, then very different considerations would have applied. On that basis, the question raised on behalf of IRBC as to the proper approach to be adopted in the light of there arguably being three sets of proceedings which needed to be considered, had the potential to be of considerable significance to the outcome if not necessarily absolutely decisive.

3.3 It should, however, also be recalled that the provisions of Article 28 of the Brussels Regulation (which were the subject of the application in question) differ significantly from those of Article 27. Article 27 is concerned with a situation where the same issue arises in two proceedings. A court of a member state other than the court first seised is required to stay its proceedings "where proceedings involving the same cause of action and between the same parties" are brought in the courts of different member states. However, Article 28 involves cases of related actions as opposed to actions involving the same cause of action. For that reason, the jurisdiction conferred on the court under Article 28 is permissive of a stay or dismissal, rather than mandatory even though the court should, as already pointed out, incline towards a stay or dismissal.

3.4 In the light of that position, it is next appropriate to turn to the proper approach to be adopted.

4. The Proper Approach

4.1 It seemed to me that the first question which I should address on this application is to assess the arguments as to whether these proceedings should be stayed or dismissed under Article 28 in the light of current circumstances without having regard to any of the complications which derive from the prior existence of the Quinn Irish proceedings. If, ignoring the fact that the Quinn Irish proceedings were in being in this jurisdiction prior to the Quinn Cypriot proceedings, and considering only the question of whether, in the light of the parallel existence of the Quinn Cypriot proceedings and these proceedings, it would be appropriate to dismiss or stay these proceedings under Article 28, the answer was clear, then those of the issues which were considered in the earlier judgment and which are the subject of the order of reference to the ECJ, would no longer be material to the court's consideration.

4.2 It was for that reason that I invited the parties to place before the court any additional materials referable to any relevant change in circumstances that had arisen since the earlier judgment. On that basis, it seems to me that the question which I should now ask is whether, in the light of all relevant considerations as they now stand, there would be any legitimate basis for dismissing or staying these proceedings, under Article 28, in favour of the Quinn Cypriot proceedings ignoring completely, for the purposes of this aspect of the argument, the prior existence of the Quinn Irish proceedings. If there would be no such basis, then it would clearly follow that the complications brought about by the argument raised on behalf of the IBRC in respect of the existence of three sets of proceedings would no longer be material to the overall result of this application and, therefore, an answer to the questions posed in the order of reference would no longer be needed to assist in determining this application. Before going on to consider those matters, I should touch briefly on the basis on which it might be considered appropriate to invite the ECJ not to proceed with the reference.

5. The Jurisdiction to Withdraw a Reference

5.1 In *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] E.C.R. 629, the ECJ said the following:-

> "On this issue it should be borne in mind that in accordance with its unvarying practice the Court of Justice considers a Reference for a Preliminary Ruling, pursuant to Article 177 of the Treaty, as having been validly brought before it so long as the Reference has not been withdrawn by the court from which it emanates or has not been quashed on appeal by a superior court."

5.2 It seems clear, therefore, that a referring court has jurisdiction to withdraw a reference. In Anderson & Demetriou ,*References to the European Court*, 2nd ed., (2002), the authors observe, at p. 304, that the:-

> "...right of the referring court to withdraw a reference may become a duty where the reference has become purposeless owing to some supervening event such as a discontinuance, compromise of amendment of the pleadings."

The authors cite case 166/73 *Rheinmuhlen-Dusseldorfv. Einfuhr- und Vorratsstellefur Getreide und Futtermittel* [1974] E.C.R. 33 for that proposition. In addition, the Court of Appeal for England and Wales formed the view in *Royscot Leasing Limited v. Commissioners of Customs & Excise* [1999] 1 CMLR 903 (per Schiemann L.J.) that the power to withdraw should only be exercised "when it is manifest that the reference will not fulfil any useful purpose". However, the view of the Court of Appeal was that the court did not require the agreement of both parties to withdraw a reference.

5.3 It is clear, therefore, that the real question which a court, when requested to withdraw a reference, should ask is whether it is clear or manifest that the reference will no longer serve any useful purpose. If the court is so satisfied, then the court should withdraw the reference. In that context, it is appropriate to ask what the original purpose of the reference in this case was. That purpose was to deal with the complex issues which arose on foot of the argument raised by IBRC deriving from the existence of three sets of arguably relevant and related proceedings. However, that purpose was dependent on there being a realistic basis on which the answers to those complicated questions might affect the overall result of the application to dismiss or stay. If, wholly independent of any argument raised by IBRC deriving from the existence of three sets of proceedings, there had been no basis for a dismissal or stay under Article 28 in the first place, then there would have been no point in making the order for reference. It equally follows that, if circumstances have changed to a sufficient extent that there is now, again independent of any argument deriving from the existence of the earlier Quinn Irish proceedings, no longer any proper basis for dismissal or stay under Article 28, then the order of reference has become redundant and should be withdrawn. It is for that reason that the course of action identified earlier in this judgment seems to me to be in conformity with established practice and the relevant jurisprudence.

5.4 Against that background, it is next necessary to turn to what are said to be the changed circumstances.

6. The Changed Circumstances

6.1 As a preliminary point, IBRC seeks to place reliance on a contention that at least those three defendants who are the subject of contempt findings ought not be heard for, it was asserted, they were persons found in contempt of court who had not yet purged their contempt. However, subsequent to the filing by IBRC of their written submissions in this regard, the question of the status of the contempt of the three individuals concerned (with the undoubted exception of Peter Daragh Quinn who has, apparently, fled the jurisdiction so as to evade the consequences of the finding of contempt) is less clear and it would, in my view, without a significantly more detailed analysis, be unsafe to conclude that either Sean Quinn or Sean Quinn Junior can properly be described as persons who have failed to purge their contempt. Those issues are more properly dealt with those judges who have seisen of any relevant contempt application. I do not, therefore, propose to deal with this application on the basis of the contempt findings.

6.2 In any event, it does not seem to me that much turns on those questions in reality. The court should only withdraw a reference if it is appropriate to do so. Some of the Quinns were not the subject of any allegation or funding of contempt. It would be meaningless to seek to withdraw the reference in respect of some but not all of the relevant parties. The same questions of European law arise in respect of all of the relevant parties to this application. If, therefore, some of the Quinns are entitled to be heard on this application, it does not seem to me to be either necessary or appropriate to determine whether there may be any problems about others being also entitled to be heard. The question of withdrawal of the reference should be decided on its merits. I do not, therefore, take into account any issues arising out of the findings of contempt made against some of the Quinns. I propose to decide this jurisdictional question on its own merits.

6.3 While a number of issues were raised on behalf of IBRC, it seemed to me that the central changed circumstance relied on was the fact that the Quinn Cypriot proceedings now stand struck out, as I understand it for non-disclosure at the time of the making of an *ex-parte* application. There is an appeal pending to the Supreme Court of Cyprus against the orders striking out the proceedings in question. IBRC raised the question as to whether it can properly be said that there are, any longer, any proceedings pending, in the sense in which that term is used in Article 28, before the Cypriot Courts in those circumstances. However, it does not seem to me to be necessary to reach a definitive conclusion on that point. Even if the proceedings in Cyprus may be said to be "pending" then same is only so in the very limited sense in which it is possible that the Supreme Court of Cyprus may overturn the decision to strike out and, thus, restore the proceedings in question to being.

6.4 The fact that the proceedings currently stand struck out has, in my view, had a very radical effect on the factual matrix with which I am faced. A letter was produced at the hearing from the Quinns' Cypriot lawyers which suggests that the Supreme Court of Cyprus will, on the 161h January, 2013, hear the Quinn Cypriot proceedings but only for the purposes of directions. I should, at this stage, make clear that I do not consider it either possible or appropriate for me to form any view as to the likely ultimate result of the appeal currently pending before the Supreme Court of Cyprus. I must, I think, operate on the basis that it is possible that the appeal will be successful. Likewise, I am prepared to take the Quinns at their word that it is their intention to appoint new lawyers (the existing lawyers no longer being instructed) to prosecute that appeal. However, it is manifestly clear that the appeal is unlikely to be heard for some time yet and that, even if the appeal is successful and the proceedings are reinstated, any potential trial of the Quinn Cypriot proceedings is a very long way off indeed.

6.5 I should emphasise that it is not the fact that the proceedings in Cyprus may, if they come to be reinstated, take a very long time to reach a conclusion that I have taken into account. Rather, it is the fact that those proceedings are, at best, frozen in a manner which, at least for the moment, leaves no proceedings in being coupled with the fact that it may take quite some time to decide whether the proceedings may be reinstated, that I consider important. That is a radically different situation to the one with which I was faced at the hearing which led to the earlier judgment. The case is no longer one where an application is imminent before a foreign court, arguably first seised, to determine jurisdiction so that the considerations which applied in *Bentinck v. Bentinck* [2007] EWCA Civ. 175 do not apply.

6.6 That situation in relation to the Cypriot proceedings needs to be contrasted with the situation which now exists in this jurisdiction. These proceedings have not been stayed and are already at the defence stage in the commercial list of the High Court with a final extension of time having recently been given to the Quinns which requires the delivery of their defence within days. When asked at the hearing of this application as to a possible trial date for these proceedings, all appeared confident that same were likely to come to trial before the summer vacation of next year. In that context, it is also important to note that, as a matter of practicality, it may be that at least some of the important issues which arise in these proceedings (it will be recalled that the Quinns defence included a claim that the underlying security which is at the heart of these proceedings was invalid it being that claim which created the possible connection or "relation" between all three sets of relevant proceedings) may also come to be decided in the Quinn Irish proceedings where an attack on the validity of that security is central to the claim. The Quinn Irish proceedings are themselves, I was again given to understand, likely to be heard within a similar timeframe to these proceedings. It follows that there is likely, in any event, to be a finding at first instance in the Courts of Ireland in respect of more or less all of the matters which the two Irish proceedings have in common with the Cypriot proceedings in relatively early course. Indeed, there seems every possibility that such a finding of first instance before the Irish Courts will occur even before the Supreme Court of Cyprus has decided whether to reinstate the Quinn Cypriot proceedings, let alone there being any progress towards those proceedings being determined even at first instance.

6.7 In that regard, it also needs to be noted in passing that IBRC had, as far back as the time when the hearing which led to the earlier judgment took place, intimated that, in the event that the application which at that time was pending before the Cypriot Courts for dismissal was unsuccessful, it would be the intention of IBRC to make a jurisdictional application before the Cypriot Courts seeking to have the Quinn Cypriot proceedings dismissed on jurisdictional grounds or stayed pending a resolution of the proceedings in

Ireland. Such a jurisdictional application has been postponed for obvious reasons (the proceedings to which it relates stand struck out) and will only be revived if the proceedings are reinstated by the Cypriot Supreme Court on appeal. However, in that eventuality it would be necessary for the Courts of Cyprus to consider and determine the jurisdictional application, which would be brought by the IBRC, before the substantive proceedings could progress. It should be noted that, in the earlier judgment, I did make reference to the likelihood that IBRC would bring such a procedural motion before the Courts of Cyprus which would have had the effect of clarifying whether those courts considered that Cyprus was the appropriate forum for these proceedings having regard, *inter alia*, to relevant Cypriot law and the provisions of the Brussels Regulation. However, an application designed to determine the position, so far as the Courts of Cyprus are concerned, on those jurisdictional issues can no longer be brought because the proceedings stand struck out. It is only if the Cypriot proceedings are reinstated that the Courts of Cyprus will be able to address those questions at all.

6.8 The net affect of all of those factors is that it seems to me to be overwhelmingly likely that these proceedings will be completed (including the conclusion of any relevant appeals - with the advance of more focused case management in the Supreme Court complex civil appeals can be determined within a much shorter timeframe than heretofore) long before any conceivable resolution of the Quinn Cypriot proceedings could occur and, indeed, it is entirely possible that these proceedings could be fully completed within the same sort of timeframe as any final decision on the part of the Cypriot Courts as to whether those courts are to entertain the Quinn Cypriot proceedings could be finalised (involving as it would a hearing and decision on the appeal against dismissal and a determination of the intimated IBRC jurisdictional application).

6.9 In addition, these proceedings have now progressed to some significant extent while, by reason of the success of the application brought by IBRC for dismissal in Cyprus, the Quinn Cypriot proceedings have not progressed at all.

6.10 In my view, even viewing these proceedings and the Quinn Cypriot proceedings alone and disregarding the existence of the earlier Quinn Irish proceedings, the case for refusing a stay or dismissal under Article 28 is overwhelming in the light of those changed circumstances. These proceedings will be over long before the Quinn Cypriot proceedings can, in the circumstances which now pertain, even get significantly off the ground. The Quinn Cypriot proceedings stand struck out and no application concerning the jurisdiction of the Cypriot Courts to entertain those proceedings can currently be brought. In those circumstances, it will be a matter for the Cypriot Courts to decide whether, and if so to what extent, the Cypriot Courts are bound by any findings of the Irish Courts. However, the normal situation which pertains, which is that proceedings which are commenced first in one jurisdiction should be given the chance to be completed so as to avoid the risk of conflicting judgments and the like, is of very little weight in the unusual circumstances which now pertain where the proceedings which were first commenced stand dismissed and where, even if reinstated, the relevant proceedings are not likely to progress until long after these proceedings have been finally determined.

6.11 It follows that, even if the questions raised in the order of reference were to be determined in the way which the Quinns would suggest, the remaining, and now radically changed, factual backdrop would nonetheless lead to a refusal of the application to dismiss or stay under Article 28.

6.12 It follows that it is clear and manifest that no useful purpose would be served by continuing with this reference and that an order for withdrawal should be made.

6.13 In coming to that conclusion, I have not ignored the argument put forward on behalf of the Quinns that it is somewhat unfortunate that an order for withdrawal is being sought at a late stage when a date for the hearing of the reference is relatively imminent. However, it seems to me that the overriding factor to be taken into account is as to whether there is any remaining purpose in the reference. If there were possible answers to the questions raised in the reference which might, if answered in a certain way, influence a proper decision on the application for dismissal or stay in favour of the Quinns, then the fact that the hearing was imminent would be an added reason not to withdraw the reference. However, it seems to me that the issues referred, while relevant at the time of the earlier judgment, are now moot and should, therefore, be withdrawn.

7. Conclusions

7.1 I am, therefore, satisfied that it is appropriate to withdraw the reference made to the ECJ in these proceedings. In those circumstances, I will direct that a letter be sent to the Registry of the ECJ indicating that this Court has concluded that an answer to the questions referred to in the order of reference is no longer considered material to the issues which arise before this Court as a result of a material change in circumstances.

7.2 For completeness, I will also direct that a copy of this judgment accompany the letter in question so that the ECJ can be fully appraised of the reasons which have led to the withdrawal of the reference.