Neutral Citation [2012] IEHC 604

THE HIGH COURT

BANKRUPTCY

[2011 No. 655 P.]

IN THE MATTER OF A PETITION OF BANKRUPTCY AGAINST NIALL McFADDEN BY DANSKE A/S TRADING AS NATIONAL IRISH BANK

BETWEEN

DANSKE BANK A/S TRADING AS NATIONAL IRISH BANK

APPLICANT

AND

NIALL McFADDEN

RESPONDENT

JUDGMENT of Ms. Justice Dunne delivered the 27th day of January 2012

The applicant herein seeks to have the respondent adjudicated bankrupt. A petition for bankruptcy was presented to the court on the 1st June, 2011. A challenge to the petition was brought by the respondent on a number of grounds and a judgment was delivered on the 21st September, 2011, in respect of that challenge to the petition. The background to this matter is set out in that judgment and it is not necessary to make any further reference to it in this judgment. The last paragraph of that judgment is of relevance to the matter to be decided in this judgment. It was stated as follows:-

> "In reaching that conclusion, I am not making any decision on whether or not the courts of England and Wales have jurisdiction pursuant to Article 3(1). The issue of COMI remains to be considered."

Following the delivery of that judgment, directions were given in relation to various matters for the purpose of determining the issue of the centre of main interest (COMI) of the respondent. The respondent was to deliver an affidavit by the 7th October, 2011, a response, if any, was to be delivered by the 14th October, 2011 and the matter was to be listed again on the 17th October, 2011 for the purpose of fixing a date for the hearing of the issue in respect of COMI. The respondent failed to comply with the directions of the court made on the 21st September, 2011 and asserted the view that the determination of COMI should not take place in this jurisdiction on the basis that the courts of England and Wales were seised of the matter by virtue of a petition issued by Anglo Irish Bank Corporation on the 17th February, 2011. Given that approach on behalf of the respondent, I fixed a date for hearing of the question as to whether the issue of COMI should be determined in this jurisdiction or in the courts of England and Wales. Accordingly the matter came before me on the 30th November, for that purpose.

The issue to be determined by me at this stage therefore, is whether or not this Court should proceed to hear and determine the question of COMI or should this Court defer to the High Court in England and Wales and await its determination of the issue of COMI.

I was furnished with a number of submissions in relation to this issue, commencing with what was described as an issue paper dated the 28th October, 2011, which was furnished on behalf of the respondent. The response to that issue paper dated the 4th November, 2011, was also provided. In addition there were further submissions on behalf of the respondent dated the 18th November, 2011. Finally I was furnished with submissions of the petitioner dated the 28th November, 2011.

The dispute between the parties centres on the role of this Court in relation to the determination of the dispute as to COMI. It is the respondent's case that this Court should defer the hearing of the COMI issue to allow the issue to be dealt with in the courts of England and Wales because the court dealing with the proceedings in that jurisdiction is the court "first seised of the issue". By way of response the petitioner has characterised the respondent's approach as suggesting that the court in this jurisdiction has a discretion as to whether it should or should not hear and determine the issue of COMI and the petitioner strongly contends that there is no such discretion vested in this Court in respect of determining the issue of COMI. It is contended on behalf of the petitioner that provided there is jurisdiction under domestic law to hear the matter, the court, once faced with a request for the opening of main insolvency proceedings under the Regulation, must entertain the application and proceed to determine it.

Submissions

Both parties in the course of their submissions referred to "The report on the Convention of Insolvency Proceedings by Virgos and Schmit (hereinafter referred to as the Virgos Schmit Report) which has been referred to in a number of decisions on the Regulation and has been found to be of great assistance in interpreting the provisions of the Regulation. In the previous judgment in this matter I referred to the report as being a form of "explanatory memorandum" in relation to the Insolvency Regulation. Reference was made in the written submissions of the petitioner and the respondent to para. 79 of the Virgos Schmit Report which is as follows:-

> "79. The convention does not provide any express rule to resolve cases where the courts of two Contracting States concurrently claim jurisdiction in accordance with Article 3(1). Such conflicts of jurisdiction must be an exception, given the necessarily uniform nature of the criteria of jurisdiction used.

Where disputes do arise, to solve them, the courts will be able to take account of:

> 1. The Convention's system according to which:
>
> (a) each court is obliged to verify its own international jurisdiction in accordance with the Convention;

(b) the principle of Community trust, according to which once the first court of a Contracting State has adopted a decision, the other States are required to recognize it (see points 202 and 220).

2. The possibility of a request for a preliminary ruling to the Court of Justice ofthe European Communities, guaranteeing the uniformity of the contents of the criteria for international jurisdiction and its appropriate interpretation in the given case;

3. The general principles of procedural law which are valid in all Contracting States; these principles include those derived from other Community Conventions such as the 1968 Brussels Convention."

Mr. Sanfey S.C. in the course of his submissions on behalf of the respondent referred to an article in Insolvency Intelligence by Gabriel Moss Q.C. on "*When is a Proceeding Opened*' in which he spoke of what he described as the "danger of a race to the court". He wrote: "the problem with using a winding up order or its equivalent as the time of opening is that there will be a danger of a race in different Member State to the finishing post. Debtors, creditors or the court in each jurisdiction may hasten the hearing of the request in order to arrive at the opening first. The Virgos Schmit Report was well aware of this danger and provided a remedy for it."

Moss referred to para. 79(3) of the Virgos Schmit report set out above and he then went on to quote from the European Insolvency Regulations: Law and Practice, Virgos and Garcimartin (2004) a p. 52 in which it is written:

"If the petition is first made in [Member State] F1 and before the proceedings are opened, it is also requested in [Member State] F2, then the courts of the second state must wait to hear the decision of the courts of the first state (even when the Regulation takes the time of opening as general reference); this application of the 'first in time' rule is justified, in order not to incentive the presentation of 'competitive' requests in different Member States. This solution is parallel to the one given to the problems of lis pendens by Article 25 of regulation 44/2001 on Jurisdiction and the recognition and enforcement of judgments on civil and commercial matters. The complimentary nature of both regulations support this analogy. The [Virgos Schmit] Report provides further authority for this interpretation: a reference to the 1968 Brussels Convention (now Regulation 44/2001) was expressly included in its [paragraph] 79 to suggest the courts do apply, where appropriate, the general solutions already established in the area of intra-community judicial co operation. Accordingly, any court, other than the court first seised shall on its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established, during which period it may only order provisional, including protective measures."

Mr. Hennessey S. C. in his replying submissions on this issue accepted that in general terms the solution to a "competing courts" situation is to be found by applying the principles referred to the Virgos Schmit Report and the academic commentary on the regulation. He went on to submit that it was accepted that where appropriate, and subject to the particular circumstances of the case and the purposes and objects of bankruptcy, the court should consider whether another court has, properly, been "first seised" of the issue in respect of which there is said to be a competing claim. It was also accepted that the principal of lis pendens, as reflected in Brussels Regulation 1, may assist in informing the outcome as could the principle of estoppel. In this regard, the petitioner referred to a statement of general principal articulated by Goode, *Principles of Corporate Insolvency Law*, 4th Ed. para. 15-47 as follows:-

"While it is clear that a judgment opening insolvency proceedings in one Member State must be respected in all other Member States, there is a singular lack of clarity as to the effect of a request to open proceedings ... on the other hand, to allow a creditor who has notice of such a request to institute proceedings in another forum with a view to establishing main proceedings in that forum first would be to encourage the self same forum shopping which the regulation is designed to avoid. Similarly, allowing the debtor to move its COMI to another Member State ... would facilitate evasion of the regulation. . . . it is thought that, by the same reasoning, if in one Member State an application is made for a winding up order, courts in other Member States should refrain from opening insolvency proceedings in their own jurisdiction until the winding up proceedings have been determined. If a winding up order is made, this would establish the main proceedings, and any proceedings elsewhere will be territorial proceedings. If, on the other hand, the application is dismissed, this leaves it open to the courts of another Member State to open proceedings themselves if the jurisdictional requirements of the regulation are satisfied. This deferment to proceedings pending in another Member State not only reflects the spirit of the regulation but can properly be founded on the principal lis pendens or, where the facts justify, on the principal of estoppel by which the debtor company cannot be heard to say that its COMI is located at a place other than that at which the company held it out as located ...."

To that extent it will be seen that there is agreement between the parties as to the principles to be applied in considering the question of competing jurisdiction. Indeed the same passage was referred to the written submissions on behalf of the respondent.

It is now necessary to see what assistance can be derived from a consideration of lis pendens in the context of Brussels Regulation 1. Reference was made in the submissions of the respondent to Article 25 of Regulation 44/2001 (Brussels Regulation 1) which provides as follows:-

"Where a court of a Member State is seised of a claim which is principally concerned with a matter over which the courts of another Member State have exclusive jurisdiction by virtue of Article 22, it shall declare of its own motion that it has no jurisdiction."

The respondent then went on in his submissions to refer to Article 22 of Brussels Regulation 1 which specifies which courts have exclusive jurisdiction to deal with matters under that Regulation and likened this provision to Article 31 of the Insolvency Regulation which provides that the courts of the Member State in which the debtor's COMI is situated shall have exclusive jurisdiction to deal with his insolvency.

Reference was then made to Article 27 of Brussels Regulation 1 which is in the following terms:-

"1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court."

It is interesting to note that the petitioner in its submissions accepts in general terms that the solution to a "competing courts" situation is to be found by applying the principles referred to in the Virgos Schmit Report and expanded upon in the academic commentary. Accordingly the petitioner accepted that the court should consider whether another court has been "first seised" of the issue in respect of which there is said to a competing claim. Thus the petitioner accepted that the principle of lis pendens as reflected in Brussels Regulation 1 could be of assistance in resolving the question of the competing court, as mentioned previously. It was submitted on behalf of the respondent that the petitioner herein intervened in the proceedings in the courts of England and Wales between Anglo and the respondent for the purpose of raising the issue of COMI with a view to determining whether the High Court of England and Wales does in fact have exclusive jurisdiction based on the respondent's COMI to deal with the insolvency of the respondent. That is the issue sought to be litigated in this jurisdiction between the petitioner and respondent. Thus, it could be said that the situation that pertains is one "involving the same cause of action and between the same parties" albeit that the petitioner in the proceedings in the United Kingdom is different. To that extent, the respondent contends that as the same issue is before the courts of two different jurisdictions, in order to comply with the spirit and intent of Brussels Regulation 1, this Court should defer to the High Court of England and Wales as the court "first seised" in relation to the question of COMI.

The petitioner in its submissions suggested that the more appropriate provision of the Brussels Regulation 1 to be considered is Article 28 which provides as follows:-

> "1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.
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> 2. Where these actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.
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> 3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."

As I have already said, there is agreement between the parties as to the general principles of law to be applied to the effect that in deciding the issue of "competing courts", the court should have regard to the provisions of Brussels Regulation 1. The difference between the parties centres on whether it is more appropriate to have regard to the provisions of Article 27 of Article 28 of Brussels Regulation 1. The petitioner places emphasis on Article 28, whilst the respondent prefers to rely on Article 27. In that context it is interesting to refer to the decision in the case of *Anglo Irish Bank Corporation Limited v. Quinn Investments Sweden AB and Others* [2011] I.E.H.C. 356 in which Clarke J. at p.---- stated:-

> "Both Articles 27 and 28 form part of s. 9 which operates under the heading '*Lis Pendens*- Related Actions'. Article 27 requires the court of a member state other than the court first seised 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. As can be seen from the terms of Article 28 as cited earlier, the difference between Article 27 and Article 28 is that Article 27 is concerned with proceedings involving the same cause of action and the same parties, whereas Article 28 is concerned with what are described as related actions in the sense in which that term is used, most particularly in Article 28.3."

Discussion

One of the issues in this case that has to be determined is whether or not the issue of COMI that arises herein, is one which could be considered as being analogous to the proceedings coming within Article 27 of Brussels Regulation 1, in the sense that it is "proceedings involving the same cause of action and between the same parties" or whether the issue of COMI could be described more properly as a related action within the meaning of Article 28. To resolve that issue, one has to look again at the provisions of Article 3(1) of the Insolvency Regulation which confers jurisdiction upon the courts of the Member State within which the debtor's COMI is situated. The courts of that Member State have jurisdiction to open insolvency proceedings. Anglo Irish Bank issued a petition for the bankruptcy of the respondent in the UK on the 1ih February, 2011. That petition had a return date of the 21st June, 2011. The petition for bankruptcy in this jurisdiction was presented on the 1st June, 2011. Although the hearing date for the Anglo petition had been fixed for the 21st June, 2011, it was adjourned to the 4th October, 2011, as a result of the application by the respondent in the High Court in England and Wales, for an interim protection order pursuant to s. 252 of the Insolvency Act 1986. It was determined by the High Court of England and Wales on the 15th June, 2011, that the question of COMI required to be established and that issue was also adjourned to the 4th October, 2011, for the purpose of giving directions on that date regarding that issue. The petitioner in the course of its submissions makes the point that following the discharge of the interim order in the High Court of England and Wales, the only court "actively seised with the issue of Mr. McFadden's COMI was the Irish court on foot of the petition herein". I should say at this point that I do not think that the question of whether or not, one court is "actively seised" of the issue of COMI is a relevant consideration. I have already referred to the Virgos Schmit Report and in particular para. 79 thereof, and to the points made therein. The term "actively seised" is not a term of art. So far as this court is concerned, it seems to me that the courts in both jurisdictions have taken steps to deal with the issue of COMI. The time scales involved may be different but that does not mean that one jurisdiction is "actively seised" of the issue any more than the other. I have already referred to Brussels Regulation 1 and inparticular to Articles 27 and 28 previously and I do not propose to refer to them again in detail, save to note that they speak of the court "first seised" as opposed to the court "actively seised" of a claim. I think it is important to bear that in mind.

That raises the issue of what is meant by the phrase "first seised". Goode on *Commercial Law* at p. 1202 states as follows:-

> "A court becomes seised of a case when the document instituting the proceedings (or an equivalent document) is lodged with the court (provided the claimant does not then fail to have service affected on the defendant) or, where a document has to be served before being lodged with the court, at the time the authority responsible for service receives it (provided the claimant this is when the claim form issued by the court at the request of the claimant, the date of issue being the date entered on the form by the court."

In Halsbury's Laws of England, 5th Ed. Vol. 19 at para 404, the following observation is made:-

> "Under the Brussels Convention, the date at which a court is seised must be determined by the national law of the court seised by ascertaining when proceedings became definitively pending between the parties. As far as English law is concerned this date is, for the purpose of Convention, the date of service (as distinct from the issue) of the claim form. This remains so, even if the court has already made orders in the litigation prior to the service of the claim form in the

substantive proceedings."

The proceedings in the United Kingdom brought by Anglo Irish Bank against the respondent are first in time. Bearing in mind the manner in which the court can have regard to the provisions of Brussels Regulation 1 to inform its decision as to the competing courts issue, the question then arises as to whether or not this is a case which falls more closely within the confines of Article 27 of the Brussels Regulation 1, or Article 28. I now propose to consider that issue. As mentioned previously Article 27 relates to proceedings involving the same cause of action and between the same parties. The position is that the parties to the proceedings in the High Court of England and Wales are different to the parties in these proceedings. The petitioner in those proceedings is Anglo Irish Bank. The respondent is obviously the same in both jurisdictions. The petitioner in these proceedings has intervened in the English court proceeding to challenge the issue of the respondent's COMI. There is no doubt that the same issue arises in each jurisdiction, namely, the question as to the respondent's extent it seems to me that Article 27 should not be viewed as being the relevant Article to consider. I therefore agree with the submissions furnished on behalf of the petitioner herein to the effect that Article 28 appears to be the relevant Article to bear in mind. I appreciate that counsel on behalf of the petitioner did indeed suggest that there might be some debate as to whether the separate bankruptcy proceedings brought against the respondent by Anglo in the UK and the petitioner herein can be properly described as "related proceedings" nonetheless, if one bears in mind para. 79(3) of the Virgos Schmit Report, one is simply attempting to derive assistance from the principles contained in Brussels Regulation 1, in reaching a view on the question of the competing courts. To that extent it is clear that under Article 28, any court other than the court first seised may stay its proceedings. In the circumstances, I accept the submission that this Court has discretion as to whether or not to stay these proceedings.

I note that main proceedings can be opened in one jurisdiction and independent territorial proceedings may also be opened in another jurisdiction under the Insolvency Regulation. Thus, the position as to which proceedings are opened first in time may not always be easy to resolve. Having said that, this is a case in which the issue of COMI arises given that the question of COMI requires to be determined before main proceedings can be opened. There is no suggestion that the proceedings in either jurisdiction could be regarded as or should be regarded as independent territorial proceedings. In the circumstances of this case, I am satisfied that the court first seised of the issue of COMI is the High Court of England and Wales.

That being so, it then becomes necessary for me to consider the question of whether I should exercise my discretion to defer dealing with the issue of COMI until such time as that issue has been determined in the High Court of England and Wales. I note the comments of Goode, referred to above, to the effect that "deferment to proceedings pending in another Member State not only reflects the sprit of the Regulation, but can be properly found on the principle lis pendens ...". I am conscious of the need for consistency between the courts of different jurisdictions in dealing with issues such as COMI. I am also conscious of the concerns that have been expressed in much of the academic commentary as to the undesirability of forum shopping. The comments by Virgos and Garcimartin in the European Insolvency Regulation: *Law and Practice* at para. 70 discuss this issue at some length and I think one of the paragraphs contained therein is helpful. It states:

> "Consequently, lis pendens problems must be solved in keeping with the following rules: (i) if, once main proceedings have been opened in Member State F1, the opening of main proceedings is requested in a different Member State F2, then the second petition must be rejected. (ii) If, lacking knowledge of the first proceedings, main proceedings are opened in F2, then these second proceedings must be dismissed or transformed into territorial proceedings. (iii) If the petition is first made in Fl and, before the proceedings are opened, it is also requested in F2, then the courts of the second State must wait to hear the decision of the courts of the first State (even then the regulations takes the time of opening as general reference); this application of the "first in time" rule is justified, in order not to incentive the presentation of "competitive" requests in different Member States. This solution is parallel to the one given to the problem of lis pendens by Article 25 of the Regulation 44/2001 on jurisdiction and the recognition ad enforcement of judgments on civil and commercial matters. The complimentary nature to both regulations support this analogy. The explanatory report provides further authority for this interpretation: a reference to the 1968 Brussels Convention (now regulation 44/2001) was expressly included in its margin No. 79, to suggest the courts to apply, where appropriate, the general solutions already established in the area of intra community judicial cooperation. Accordingly, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established, during which period it may only order provisional, including protective, measures."

The basis upon which the discretion of the court is sought to be exercised appears to be the suggestion that the respondent is engaged in a form of forum shopping. It was suggested that the respondent was seeking to manipulate the court processes in both jurisdictions with a view to advancing the forum of his choice as the forum for determination of the issue of COMI. I am not entirely convinced that this is a fair characterisation of the situation. In practical terms it has to be borne in mind that the respondent did not initiate proceedings in either jurisdiction. The overriding view I take is that having regard to the spirit of the Insolvency Regulation and to the Brussels Regulation 1, as contended for by the Virgos Schmit Report that, unless it is clear that the respondent is acting in such a way as to prevent the High Court of England and Wales from dealing with the matter in that jurisdiction, this Court should not deal with the issue of COMI. In considering this issue, it does seem that there is a certain irony in the fact that the petitioner, having been the party that first raised the issue of COMI in the High Court of England and Wales, now appears to be reluctant to deal with that issue there.

In any event, I propose to stay these proceedings pending the decision on the issue in the High Court of England and Wales. If there is any difficulty in having those proceedings determined as a result of any conduct on the part of the respondent, then, in such circumstances, it might be appropriate to permit the petitioner in these proceedings to come back to this court for the purpose of having the matter dealt with in this jurisdiction. The issue must be determined at some point in one jurisdiction or another. I will hear the parties further on this aspect of the matter, but for the time being, I propose to stay the proceedings herein.