THE HIGH COURT

BANKRUPTCY

[----No. 538 P]

IN THE MATTER OF A PETITION FOR ADJUDICATION OF BANKRUPTCY BY EMO OIL LIMITED, PETITIONING CREDITOR AGAINST EAMONN MULLIGAN DEBTOR

JUDGMENT of Ms. Justice Dunne delivered the 13 day December 2011

This is an application to recognise a judgment of the High Court of Northern Ireland made on the 7th July, 2010, in which the debtor was adjudicated bankrupt and to have bankruptcy proceedings in this jurisdiction stayed having regard to the provisions of Council Regulation (EC) No. 1346/2000 (The Insolvency Regulation).

It will be necessary to refer in due course to a previous judgment of this Court delivered herein on the 29th November, 2010 in these proceedings. It is also necessary to set some of the background to this matter although the background was considered in some detail in the previous judgment of this Court.

The petitioner herein obtained judgment against the debtor in the sum of €235,001.68 on the 10th February, 2009. That judgment was in respect of money due and owing by the debtor to the petitioner in respect of the supply of fuel and oil by the petitioner to the debtor for sale in his petrol station. A bankruptcy summons was issued on the 18th May, 2009 and served on the debtor at Tateetra, Newtownbalregan, Co. Louth on the 30th July, 2009, time for service of the summons having been extended.

Subsequent to the service of the bankruptcy summons, correspondence ensued between solicitors for the petitioner and solicitors for the debtor in an attempt to reach some form of compromise. The petitioner's solicitor sought information in regard to the debtor's financial position over the preceding years with a view to considering a proposal made by the debtor through his solicitors. As a result of this correspondence, the petitioner was furnished with a trading profit and loss account of the debtor and his tax returns for the previous five years. In the meantime, a bankruptcy petition was presented and given a return date of the 16th November, 2009. Ultimately, after return dates were given on two occasions, a notice of appointment of solicitors was lodged on behalf of the debtor by the solicitors who had been corresponding on his behalf. The petition was then adjourned from time to time at the request of the debtor with the consent of the petitioner.

On the 14th June, 2010, a further proposal was made by the debtor to the petitioner in respect of payment by instalment. It was also indicated that the debtor was attempting to refinance with a view to settling his liability to the petitioner. Although the petitioner was anxious to proceed at that stage, the matter was adjourned to allow the debtor the opportunity to refinance as, if he was successful, that would be in the interest of both parties. Accordingly the matter was adjourned until the 26th July, 2010. Before the matter was listed before the court again on the 26th July, 2010, the solicitors for the debtor, by letter of the 22nd July, 2010, wrote to the petitioner solicitors stating that their client had been adjudicated a bankrupt in Northern Ireland. When the matter came before this Court on the 26th July, 2010, the court was informed as to the fact that the debtor had been adjudicated bankrupt in Northern Ireland and an adjournment was sought by the petitioner to consider its options. The matter was then adjourned to the 18th October, 2010.

Ultimately, two affidavits were furnished to the court by the debtor and submissions were furnished to the court and a hearing took place in which the issue of "the opening of proceedings" and the question of COMI was considered.

I ruled that the bankruptcy proceedings in this jurisdiction did not come within the definition of the opening of the proceedings within the meaning of the Insolvency Regulation. I also concluded that the centre of main interest of the debtor was in this jurisdiction and concluded that it was not appropriate to recognise the adjudication of the debtor as a bankrupt by the High Court of Northern Ireland given the circumstances. I invited the parties to furnish further submissions on what steps should be taken in the light of the judgment. It is in that context that counsel on behalf of the debtor averred that notwithstanding the judgment of this Court that, having regard to the Insolvency Regulation, this Court should recognise the adjudication of the debtor as a bankrupt and should stay any further proceedings in this jurisdiction.

The debtor swore two further affidavits following the judgment of the 29th November, 2010. The first of these was sworn on the 25th February, 2011 and the second was sworn on the 19th April, 2011. In the first of these affidavits, the debtor pointed out that in an affidavit sworn in the Northern Ireland bankruptcy proceedings, he made known the fact that he was "involved in bankruptcy proceedings in the Republic of Ireland ..." He said that he had been advised that as the insolvency proceedings had been opened in Northern Ireland, the judgment opening proceedings there had to be recognised in this jurisdiction and that the proceedings here should be stayed. The second affidavit exhibited the file of his Northern Ireland solicitors in relation to his application in that jurisdiction.

Article 16(1) of the Insolvency Regulation provides as follows:-

> "Any judgment opening insolvency proceedings handed down by a court of a Member State shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings."

Recital 22 of the Insolvency Regulation provides as follows:-

> "This Regulation should be provided for immediate recognition of judgments concerning the opening, conduct and closure of insolvency proceedings ... recognition of judgments delivered by the courts of the Member States should be based on the principal of mutual trust. To that end, ground for non recognition should be reduced to the minimum necessary. This is also the basis on which any dispute should be resolved where the courts of two Member States both claim competence to open the main insolvency proceedings. The decision of the first court to open proceedings should be recognised in the other Member States without those Member States having the power to scrutinise the court's decision."

I do not think there can be any doubt about the general application of Article 16. Indeed in the case of *Re. Eurofoods IFSC Limited* [2006] B.C.C. 397 paras. 39 to 40 it was stated:-

> "... the rule of priority laid down in Article 16(1) of the Regulation, ... is based on the principle of mutual trust. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect, and as a corollary the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of decisions handed down in the context of insolvency proceedings ..."

I do not think that there is any difficulty at all with the application of Article 16(1) of the Insolvency Regulation in most cases. The question is whether this is one of the exceptional cases in which such recognition should be refused. In order to consider this issue further it is necessary to consider the provisions of Article 26 of the Insolvency Regulation. Article 26 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."

I should say at this point that I had the benefit of very helpful and useful written submissions by counsel for the debtor and counsel for the petitioner. I was referred in the course of those submissions to *Virgos Schmit Report* which was intended to be an interpretative aid to the Insolvency Regulation although not formally adopted as such; nevertheless it is a comprehensive and useful document. It s frequently called in aid in the interpretation of the Insolvency Regulation despite some uncertainty as to its precise status. I was also referred to a number of decisions which were of some assistance in considering the issues to be determined herein. A number of the decisions are decisions given in the context of Council Regulation (EC No. 44/2001 of the 27th December, 2000(Brussels 1 Regulation)). The point was made by counsel for the petitioner that Brussels 1 Regulation expressly excludes bankruptcy, but having said that, it is in my view the case that decisions on the interpretation of the question of public policy in respect of Brussels I Regulation are of assistance in considering the issue of public policy as understood in Article 26 of the Insolvency Regulation.

The *fons et origo* of the principles to be considered in the context of public policy is to be found in the case of *Bamberski v. Krombach* case C-7/98 2000 ECR 1- 1935. At para. 44 of its judgment in that case the court stated:-

> "It follows from the foregoing developments in the case law that recourse to the public policy clause must be regarded as being impossible in exceptional cases where the guarantees laid down in the legislation in 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 to Origin, as recognised by the ECHR. Consequently, Article 2 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 27.1 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 offences solely on the ground that the person was not present at the hearing."

At an earlier point in the judgment at para. 40 it was stated: "it follows from that case law that a national court of a contracting state is entitled to hold that a refusal to hear the defence of an accused person who is not present at the hearing constitutes a manifest breach of a fundamental right". That conclusion was reached having considered a number of judgments of the European Court of Human Rights.

The decision in the case of *Renault v. Maxicar* case C-3811998, ECR 2000 I- 2973 is also worth considering. The court in that case stated at para. 33:-

> "The court of the State in which enforcement is sought cannot, without undermining the aim of the Convention, refuse recognition of a decision emanating from another Contracting State solely on the ground that it considers that national or Community law was misapplied in that decision. On the contrary, it must be considered whether, in such cases, the system of legal remedies in each Contracting State, together with the preliminary ruling procedure provided for in Article 177 of the Treaty, affords a sufficient guarantee to individuals."

The case of *Maronier v. Larmer* [2003] Q.B. 620 is a decision of the Court of Appeal in the Courts of England and Wales. It was held in that case, *inter alia*, that the objective of the Brussels Convention in facilitating the free movement of judgments by providing for a simple and rapid enforcement procedure would be frustrated if courts of an enforcing state could be required to carry out a detailed review of whether the procedures that resulted in the judgment had complied with Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms as scheduled to the Human Rights Act 1998; that courts should apply a strong presumption, albeit rebuttable, that the procedures of other signatories of the Human Rights Convention were compliant with Article 6 thereof; that, although an enforcing state could not decline, on grounds of public policy, to enforce a judgment on the ground that it infringed community law, there was a distinction in principle between a decision that resolved an issue of substantive law and a decision reached by a procedure that violated the fundamental human right to a fair trial; that the right of a defendant to a fair chance to defend himself was recognised by Article 27(2) of the Brussels Convention; that, since the defendant was unaware that the trial had been reactivated twelve years after it was stayed until even the time for an appeal had passed, he was manifestly denied a fair trial within Article 6 of the human Rights Convention; and that, accordingly, it was contrary to public policy to enforce the claimants judgment against him. The facts of that case were that the defendant had been sued by the claimant in respect of dental treatment in 1983. Proceedings commenced in 1984. In 1986 the proceedings were stayed on the claimant's application. Subsequently the defendant moved to the United Kingdom and in 1998 the claimant instructed new solicitors to proceed with the action. The defendant was not aware of this and was not made aware either by the claimant or indeed by the court dealing with the matter. Judgment was obtained against the defendant and a right to appeal against the judgment expired after three months from the date of judgment. The defendant found out about the matter when an attempt was made to enforce the judgment under the Brussels Convention. One passage from the judgment of Lord Phillips of Worth Matravers M.R. explained the thinking behind the decision. At para. 37, he stated:-

> "It may well be that, in a normal case, a defendant to an action in Holland should continue to retain lawyers to act on his behalf in relation to proceedings which have been stayed. This is not, however, a normal case. We feel sure that a stay lasting twelve years of a simple claim for medical negligence must be quite extraordinary. On the basis of the facts before us, we are driven to the conclusion that Mr Larmer was denied a fair trial in Rotterdam because he was unaware that proceedings had been reactivated until even the time for an appeal had passed. It may well be that Dutch procedure did not require Mr Maronier to ensure that Mr Larmer received notice of the reactivation of the action. Mr Linssen's letter of 24th July 1998 and Mr de Bliek's withdrawal from representing Mr Larmer put Mr Maronier's lawyers on notice that Mr Larmer was probably unaware of the fact that the action had been reactivated. Dutch procedure appears to have

> permitted the action to proceed without the presence of Mr Larmer or anyone representing him. The consequence is, none the less, that he has manifestly not received the fair trial that Article 6 of the Human Rights Convention required.
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> On the, happily, unusual facts of this case we are in no doubt that the judge was correct to conclude that it would be contrary to the public policy of this country to enforce Mr Maronier's judgment."

That case provides a helpful illustration of the role of public policy on the issue of the recognition and enforcement of a foreign judgement.

I was also referred to the decisions in the case of *Sainterdesco v. Nullifire Limited* [1993] 1 Lloyds Rep. 180 and *Adams v. Cape Industries plc* [1991] 1 All E.R. 929. I do not propose to refer to those decisions in any detail. Finally I should refer briefly to the decision in the case of *Re. Eurofoods.* The European Court in that case stated at para. 43 as follows:

"If an interested party, taking the view that the centre of the debtor's main interests is situated in a Member State other than that in which the main insolvency proceedings were opened, wishes to challenge the jurisdiction assumed by the court which opened those proceedings, it may use, before the courts of the Member State in which they were opened, the remedies prescribed by the national law of the that Member State against the opening decision".

I think it can be seen from the authorities referred to above, that in general terms a decision based on public policy to refuse recognition to a judgment of another Member State will only arise in exceptional circumstances. The exceptions which have given rise to a refusal to recognise appear to be exceptions in which a fundamental right of an individual or entity has been engaged, such as the right to a fair trial.

There is nothing in the submissions before me to suggest that the petitioner in this case cannot make an application in the High Court of Northern Ireland to have the order made in that jurisdiction set aside. Complaint was made on behalf of the petitioner to the effect that the petitioner was not represented before the Courts of Northern Ireland when the order was made in that jurisdiction. Further, the petitioner was not informed of the intention of the debtor to make an application in Northern Ireland. Nevertheless that does not alter the fact that the petitioner does have a right to make an application in Northern Ireland to have the bankruptcy set aside in that jurisdiction. That being so it does not appear to me that any fundamental right of the petitioner has been breached in the circumstances of this case. That being so, I am minded to adjourn these proceeding generally with liberty to re-enter for the purpose of permitted the petitioner to make such an application in the High Court of Northern Ireland.

One of the complaints made in this case relates to the issue of forum shopping. Forum shopping is something to be deprecated. Recital4 of the Regulation expressly criticises the activity in the following terms:-

> "It is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position: forum shopping."

Nevertheless a party can seek to establish COMI in another jurisdiction. Recognition has been given to the fact that this can be done in the case of *Shierson v. Vlieland-Boddy* [2005] E.W.C.A. 974. Chadwick L.J. noted at p. 3985 of the judgment as follows:-

> "It is a necessary incident of the debtor's freedom to choose where he carries on those activities which fall within the concept of 'administration of his interests', that he may choose to do so for a self-serving purpose. In particular, he may choose to do so at time when insolvency threatens. In circumstances where there are grounds for suspicion that a debtor has sought, deliberately, to change his centre of main interests at a time when he is insolvent, or threatened with insolvency, in order to alter the insolvency rules which will apply to him in respect of existing debts, the court will need to scrutinise the facts which are said to give rise to a change in the centre of main interests with that in mind. The court will need to be satisfied that the change in the place where the activities which fall within the concept of 'administration of his interests' are carried on which is said to have occurred is a change based on substance and not an illusion; and that that change has the necessary element of permanence."

The issue of forum shopping seems to be more germane to the question of where, in fact, the centre of main interest is to be found. It is not something which in my view gives rise to a public policy issue which would permit a court to refuse the recognition of a judgment opening proceedings in another jurisdiction.

In the course of the judgment previously delivered by me, I indicated that I was of the view that this was not an appropriate case in which to recognise the adjudication by the Courts of Northern Ireland. At that stage I had not the benefit of the careful argument that I have now heard from counsel in respect of this issue. I did indicate in that judgment that I would hear the parties further on the steps that should be taken in these proceedings and having had the opportunity to hear further argument on the question of the circumstances in relation to recognition of the judgment of the court in Northern Ireland I have come to the conclusion that it is appropriate at this stage to stay the proceedings in this jurisdiction and to permit the petitioner, should the petitioner choose to do so, to apply to the Courts of Northern Ireland to set aside the order made in that jurisdiction. I have reached this conclusion on the basis that the matters complained of in this case do not give rise to such circumstances as would come within the public policy consideration which would result in the non recognition of a judgment. For that reason, I propose to adjourn generally with liberty to re-enter the proceedings in this jurisdiction to permit the petitioner to bring an appropriate application in Northern Ireland.