Neutral Citation: [2014] IEHC 355

The High Court

High Court Record No 2014 269 COS

IN THE MATTER OF McARTHUR GROUP LIMITED (IN ADMINISTRATION) AND IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2012

Rathville Limited

petitioning creditor

and

The McArthur Group Limited (In Administration)

respondent

and

Myles Kirby

notice party

Judgment of Mr Justice Charleton delivered ex tempore on the 8th of July 2014

1. The relevant circumstances seem to me to be as follows: the company in question, the McArthur Group Limited dates back as a business some hundreds of years and is a manufacturer of fencing with its place of establishment in the United Kingdom. Its presence in Ireland also dates back a lengthy period. Since prior to the Second World War it had been supplying fencing in this country to a significant extent. The firm was incorporated in the United Kingdom in 1945 and established a branch in Ireland, first registering it in 2004 under the European Communities Branch Disclosure Regulations, S.I. No. 395 of 1993 (the Regulations of 1993).

2. Now, I make no comment as to whether there was complete compliance with the Regulations of 1993, I shall assume that there was. There are, however, two notable requirements therein I will point to. The first is the requirement that the company notify the Registrar of Companies as to a place to which people can have resort in the event that they have problems. In the present case this was a firm of solicitors, in other words, very much like a registered office for a company as opposed to an establishment under European law. The second requirement is that two persons be nominated as the persons in respect of whom people can go to in the event that they have issues. That was done. There is also a provision for the filing of certain limited returns in the Companies Registration Office. The last one of these returns, as regards the McArthur Group, took place on the 31 December 2004.

3. The problem presently before this Court has arisen from the fact that the McArthur Group in the United Kingdom has decided that it should shut down. It is now in administration. That has been variously described in the affidavits. It seems to me that the best view that I can take on it at the present time is that this administration is not, as such, a liquidation but can become a liquidation. Instead, it is a process whereby the company is in administration and is in the process of being sold on. Whether that process will be successful or not I do not know but, as a matter of law, there is a process of insolvency taking place in London in the normal way, under Council Regulation EC 1346/2000 of the 29 May 2000 on insolvency proceedings. This Regulation has been given full effect in Irish Law by the European Communities (Corporate Insolvency) Regulations 2002 (S.I. No. 333 of 2002). Since the parties have agreed to reference the European text, I shall do so as well (the Regulation). Under European law, insolvency proceedings can have effect in two jurisdictions or more, but here what is in question is the United Kingdom and Ireland. The creditors of the company and in particular the petitioning creditor here, Rathville Limited, had concerns over the sufficiency of any protection they would have in the event that this insolvency were to be run entirely from the United Kingdom.

4. To some extent there has been a degree of emotional overlay in this case. This is completely unnecessary. This judgment will deal with the facts, as opposed to any views that people involved may have had. This particular creditor has presented a petition in insolvency and that is what is now before this Court. The petition seeks to have secondary insolvency proceedings commenced in Ireland, and it appears that Rathville, the petitioning creditor, is owed €58,000. In the course of the United Kingdom proceedings a large number of creditors were identified by the administrators and these were notified by post of the insolvency proceedings in that jurisdiction by means of letters posted on the 22 May 2014. These letters included a letter to Rathville, which is included as one of the creditors, and there are a number of other Irish creditors that are set out therein. Curiously, the Irish creditors which are not set out include Dublin City Council which claims to be owed €87,000 in rates and the Revenue Commissioners which claims to be owed €840,000 in respect of unpaid VAT returns. Just to particularise that: €154,000 for the returns for January-February 2014 and an estimate of €274,000 in respect of returns for March and April of 2014. I emphasise that the second is an estimate. I am sure the Revenue Commissioners do not act irresponsibly, but on a proper examination it may turn out to be less. It may also turn out to be more, but in terms of the way things are coming out it seems that it will probably turn out to be somewhat less.

5. Now, because this particular petitioner was apprehensive as to what might happen in the United Kingdom insolvency proceedings, they applied on the 30 May 2014 to Gilligan J for the appointment of a provisional liquidator and that was granted. The Court appointed Myles Kirby, Chartered Accountant of Ferris & Associates, 27 Upper Mount Street, Dublin 2, as provisional liquidator with liberty to act immediately, and without security, in secondary insolvency proceedings in relation to the company, under section 226 of the Companies Acts 1963 to preserve the assets of the company situated in the State. Section 226 provides:

> (1) Subject to subsection (2), the court may appoint a liquidator provisionally at any time after the presentation of a winding-up petition and before the first appointment of liquidators.
>
> (2) Where a liquidator is provisionally appointed by the court, the court may limit and restrict his powers by the order appointing him.

6. So what are those assets that the order of Gilligan J indicates should be preserved? Again from the affidavits, doing the best I can with the large number of facts that are before the Court, it seems that the United Kingdom insolvency proceedings have involved the sale of certain stock in Ireland before this order; and there is nothing wrong with that. No one has acted in this case, in my view, in any way untoward or in any manner that would excite any suspicion or any feeling that there was sharp practice on either side of the Irish Sea. In addition to that, there is land in Dublin that has a value, at its height, of €2.5 million, but in respect of which in the time it has been on the market, an offer has been received of about €1.5 million. That process, like all processes involving the sale of real

estate, is ongoing.

7. Then we come to what is at the nub of these proceedings which is this: that given that there was a decision that the United Kingdom company was to go into insolvency and that consideration has been given in relation to the purchase of that business,, the Irish branch shut down its activity on the 24 February 2014 by way of a notice to creditors. In the United Kingdom, the firm of Price Waterhouse Cooper (or PWC) were appointed in the insolvency proceedings on the 8 May 2014. In the intervening time, February, March, April, again as far as I can gather from the affidavits in terms of the facts available and what has been stated by counsel, the company went from a situation of having about twenty or more employees in this country to having about two. These it seems were not made redundant, and I am not placing a great deal of emphasis on this. They were left in place in order to ensure that there was an orderly windup of affairs here and they continued through February, March and into the end of April. After that one or two of them were on what is called 'garden leave' to the end of May, in other words, working out their holiday entitlements. So, there is a degree of overlap in terms of what was going on between the two jurisdictions but it is certainly the case that there was general notice that the Irish branch was to be shut and that an orderly wind down of the business was taking place. It was, in effect, the worry which arose for this creditor Rathville, it seems to me, from the start of the administration or insolvency proceedings in England that caused the application to be made to Gilligan J on the 30 May 2014 to which I have referred.

8. The application here is that there should be, effectively, a secondary winding up and this is permitted under the insolvency Regulation. I want to just refer briefly to some aspects of that now. This is the governing law. Although I have been referred to cases from Hungary, England and from the European Court, it seems to me that taking a plain interpretation of what this Regulation means is by far the most direct guide to enabling me to say whether or not this secondary insolvency proceeding should continue by way of the appointment of a liquidator in secondary insolvency proceedings in Ireland.

9. The recitals to the Regulation are of course a very important aid to its interpretation:

- Recital 10 indicates that once insolvency proceedings are opened they should be "legally effective in the Member State in which the insolvency proceedings are opened", in this case the United Kingdom, "and should be collective insolvency proceedings". In other words the proceedings should cover establishments both in the United Kingdom and in Ireland and elsewhere in the European Union.

- Recital 11 records that there are "widely differing substantive laws" throughout the Member States and that "it is not practical at this time to introduce insolvency proceedings with universal scope in the entire Community" but, as it says, "[o]n the other hand, national proceedings covering only assets situated in the State of opening", meaning secondary insolvency proceedings, "should also be allowed alongside main insolvency proceedings with universal scope". I place the main emphasis on the words "should also be allowed", this phrase seems to me to set up a discretionary jurisdiction in the court.

- Recital 12 declares that "[t]o protect the diversity of interests, this Regulation permits", and again I emphasis the word "permits" as it seems to allow for discretion, secondary proceedings to be opened and to be run in parallel with the main proceedings. The "[s]econdary proceedings may be opened in the Member State where the debtor has an establishment. The effects of such secondary proceedings are limited to the assets located in that State". Again this recital is helpful.

- Recital 13 states that the "centre of main interest" is to "correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties". Just to comment briefly here in terms of bankruptcy proceedings and in terms of insolvency proceedings that are governed by European law the key test is well known, and can be set out as follows: are there objective factors which are ascertainable by third parties? In other words how would a person who is interacting with a company or with a branch in another country regard it in terms of ordinary plain common sense?

- Recital 16 says that "the court competent for the main insolvency proceedings should be able also to order provisional protective measures" but, "[o]n the other hand, a liquidator temporarily appointed prior to the opening of the main insolvency proceedings should be able, in the Member State in which an establishment belonging to the debtor is to be found, to apply for the preservation measures which are possible under the law of those States"..

- Recital 18 declares that there is an ability to request the opening of insolvency proceedings in a Member State where there is an establishment outside the main establishment, in other words outside the centre of main interest.

- Recital 19 points out that there are, of course, "differences in the legal systems concerned" and "that difficulties may arise from the extension of effects" hence, perhaps, the need to allow secondary proceedings or to consider whether these are necessary.

- The main insolvency proceedings, according to recital 20, and secondary proceedings can "contribute to the effective realisation of the total assets only if all the concurrent proceedings pending are coordinated". So that is part of the job of any court hearing either a main insolvency proceeding or a secondary one.

10. When one turns to definitions I am conscious of the fact that there is no doubt and no dispute in this case that the centre of main interest is the United Kingdom jurisdiction, one might say country A. There can be secondary proceedings, and I say can be, where there is an establishment in another country, one might say country B, in this case Ireland.

11. It is useful to set out here the Articles of the Regulation that are most relevant to the current proceedings.

Article 3

International jurisdiction

1. The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.

2. Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the

assets of the debtor situated in the territory of the latter Member State.

3. Where insolvency proceedings have been opened under paragraph 1, any proceedings opened subsequently under paragraph 2 shall be secondary proceedings. These latter proceedings must be winding-up proceedings.

4. Territorial insolvency proceedings referred to in paragraph 2 may be opened prior to the opening of main insolvency proceedings in accordance with paragraph 1 only:

(a) where insolvency proceedings under paragraph 1 cannot be opened because of the conditions laid down by the law of the Member State within the territory of which the centre of the debtor's main interests is situated; or

(b) where the opening of territorial insolvency proceedings is requested by a creditor who has his domicile, habitual residence or registered office in the Member State within the territory of which the establishment is situated, or whose claim arises from the operation of that establishment.

Article 27

Opening of proceedings

The opening of the proceedings referred to in Article 3(1) by a court of a Member State and which is recognised in another Member State (main proceedings) shall permit the opening in that other Member State, a court of which has jurisdiction pursuant to Article 3(2), of secondary insolvency proceedings without the debtor's insolvency being examined in that other State. These latter proceedings must be among the proceedings listed in Annex B. Their effects shall be restricted to the assets of the debtor situated within the territory of that other Member State.

Article 33

Stay of liquidation

1. The court, which opened the secondary proceedings, shall stay the process of liquidation in whole or in part on receipt of a request from the liquidator in the main proceedings, provided that in that event it may require the liquidator in the main proceedings to take any suitable measure to guarantee the interests of the creditors in the secondary proceedings and of individual classes of creditors. Such a request from the liquidator may be rejected only if it is manifestly of no interest to the creditors in the main proceedings. Such a stay of the process of liquidation may be ordered for up to three months. It may be continued or renewed for similar periods.

12. Some other brief references are also necessary. An 'establishment' under Article 2(h) of the Regulation means "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods". Now there is no doubt that there was definitely an establishment in Ireland. The argument however, put forward on behalf of the administrator from the United Kingdom, is that this ceased when the Irish firm shut. The main jurisdiction is established in Article 3. Jurisdiction under Article 3(1) is within the territory of which the centre of a debtor's main interests and courts where this is situated shall have jurisdiction to open insolvency proceedings. Article 3(2) states that where the debtor's centre of their main interest is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor, only if the company possesses an establishment within the territory of the other Member State. It is argued on behalf of the United Kingdom administrator that the use of the present tense means that where a company has shut its doors permanently that there is no jurisdiction in this country anymore, ie in country B. Article 3(3) indicates that such insolvency proceedings, if same are opened, shall be secondary proceedings. Article 27 provides for the opening of secondary proceedings. It indicates that Article 3(1) shall permit the opening in another member state of secondary proceedings before a court which has jurisdiction under Article 3(2) and that the exercise of creditors' rights is provided for in Article 3(2). The wording is, again, permissive as opposed to mandatory in expression. A stay of the process of liquidation is provided for in Article 33, and I am taking the current proceedings to be an application for such a stay. The position is that a stay may be requested and, pursuant to the sub-Article, shall be granted by the courts in the secondary insolvency proceedings and such a request can only be rejected if it is of manifestly no interest to the creditors in the main proceedings.

13. I want to deal that issue first. What does the Article mean in referencing secondary insolvency proceedings of "manifestly of no interest to the creditors in the main proceedings"? Well, here we have debts in respect of this petitioner of €480,000 to the Revenue Commissioners and €87,000 to Dublin City Council of €58,000. That is clearly of interest to the creditors in the main proceedings in the sense that it cuts down the availability of assets available to the repatriated and used in the United Kingdom administration in the event that those debts are proven in liquidation. That is a matter which, it seems to me, enables this court to exercise its jurisdiction.

14. Turning to the case law in this matter and in particular to the main point which is made on the use of the present tense in what is argued to be the most operative part of the Regulation, I have been referred to a number of cases. I appreciate, in particular, the case of *Olympic Airlines SA Pension & Life Insurance Scheme v Olympic Airlines SA* [2014] 1 WLR 1401, decided before the Court of Appeal in England and Wales. There has been a huge amount of emphasis on the facts of that particular case. The facts of *Olympic Airlines*, however, do not result in a statement of principal which, it seems to me, is of assistance to the Court beyond the quotation, as quotation there has been in all of the other cases of both the Regulation, the recitals, the case of *Interedil Srl, in liquidation v Fallimento Interedil Srl and Intesa Gestione Crediti SpA. (Case C-396/09)* [2011] ECR I-09915 and of the commentators on the Convention which led ultimately to the Regulation – Miguel Virgos & Etienne Schmit, *Report on the Convention on Insolvency Proceedings*, Council of the European Union, Doc. 6500/96/EN (1996), which again I have read and which again I find to be of assistance. It is from those cases and from the commentary that I am attempting to put together what it seems to me the correct approach of a court should be in secondary insolvency proceedings.

15. Of the cases that have been decided it seems to me that the most authoritative pronouncement on the law has been that of the Court of Appeal (Civil Division) England and Wales 27 July 2005, *Malcolm Brian Shierson v Clive Vlieland-Boddy* [2005] EWCA Civ 974, wherein is quoted the Virgos and Schmit Report in terms of the rationale behind the rule as to where there is an establishment in country B in addition to country A. They comment that it is understood to mean a place of operations in which the debtor carries on economic activity, that is no more than a quote so far, and a place of operation means where the market is being engaged, which is a helpful amplification, and they indicate that the term establishment indicates that a certain stability is required. It is not, therefore, a question of a firm appearing for a week in a particular place and disappearing; like a tailor from London coming to Dublin and selling goods in the Law Library. That would not be enough: stability is necessary. In relation to this firm, the McArthur Group, there is clearly stability in the sense that there has been establishment in this country for at least ten years and probably more than that.

Virgos and Schmit comments as follows:

> The rationale behind the rule is that foreign economic operators conducting their economic activities through a local establishment should be subject to the same rules as national economic operators as long as they are both operating in the same market. In this way, potential creditors concluding a contract with a local establishment will not have to worry about whether the company is a national or foreign one. Their information costs and legal risks in the event of insolvency of the debtor will be the same whether they conclude a contract with a national undertaking or a foreign undertaking with a local presence on that market.

16. Now let us turn to the facts, given that this quotation is a statement of principle, which I would respectfully apply to the circumstances here and which, in addition, is clearly accepted by the European Court in *Interedil* case.

17. The circumstances that we are dealing with here are actually pretty stark. The reality is that there is land in Dublin, a business establishment, which has been here for at least 10 years or so and there is thus that degree of stability required under the Regulation. In addition to that, there has been a provisional liquidator appointed, Myles Kirby. That appointment has proven not to be a wasted exercise in the sense that a potential debt of nearly half a million euros of public money in terms of fiduciary taxes has been uncovered due to his efforts; which debt was not known of in the United Kingdom proceedings. Again, I emphasise, I am not even slightly suspicious in relation to the United Kingdom administrators who are doing a proper job according to what they know. There is another public debt to the City Council here in Dublin of €87,000 and then there are these proceedings in insolvency for non payment of a debt which, with no disrespect to the petitioner, are less important. Their interests were noted in the series of letters sent from the United Kingdom administrator, to which the Court has already made reference.

18. Where is the centre of main interest and is there, in reality, a secondary centre of interest such as it could be said is an establishment? Well, it seems to me, that having regard to the case law, what I have quoted from the Regulation and the assistance of counsel which has been useful in that respect, that there are a number of factors that assist in analysing this question. The approach of the court has to be one of ascertaining objective factors, the kind of factors that are ascertainable by third parties. This is the requirement emphasised in the *Interedil* case. What is to be looked, firstly, is; has there been economic activity and to what extent? It seems to me that a minimum standard only is set in the directive and it is a question thereafter of sensible interpretation.

19. How long, secondly, has this activity gone on for? Here it is ten and more years; hardly transitory. One also asks, thirdly, are there assets which are secondary, in the territory of the court that is asked to open secondary insolvency proceedings? One also asks, fourthly, when did the activity begin? When, fifthly, did it cease? Then, sixthly, in what manner was it run down? Given that a wind down is essentially territorial, that is a factor that has to be looked to with some particular care. One looks, seventhly, to the question of, in terms of time and business activity, how embedded was the establishment in the secondary jurisdiction? The jurisdiction in this case being Ireland. A court might look, eighthly, to what extent the establishment in the secondary country continues to have remaining insolvency issues notwithstanding that main proceedings have been opened in the centre of main interest. One looks, as a ninth potential factor, to the extent to which the prime insolvency proceedings bypass any secondary obligations that there are in the other Member State. It is clear that there are remaining insolvency issues. It is clear that there is a large portion of land here, it is clear that there are substantial debts here in terms of the public purse.

20. Turning to the question of, to what extent will the prime insolvency proceedings bypass the secondary obligations? I heard counsel on behalf of the United Kingdom administrator in that regard and I am certain that they are acting in good faith. There is a serious issue, notwithstanding that, as to how the collection of fiduciary taxes in Ireland will be ranked in terms of priority in the United Kingdom proceedings. Some assurance has been given to this Court in that regard. Equally, however, the degree of assurance that is available is not the degree of assurance whereby the court can say that it is now certain that priority will be accorded to the Revenue Commissioners in the same way as if a secondary insolvency proceeding were allowed to continue by way of an order of the court in liquidation here.

21. The last factor, the tenth issue, in terms of deciding whether or not there is an establishment is; what are the country A and country B priorities? In that respect I feel I do not have enough information. Creditors dealing with a business in country B will do so in the expectation, normally, that the scheme of priorities afforded under nation law will be those that apply in the event of insolvency. So, it is clear to me that there is an establishment in Ireland and that on the factors that I have mentioned as being of importance, there is a strong case to be made out for these secondary insolvency proceedings.

22. But that is not the end of it. In the light of all of the foregoing, it is clear that from what I have quoted from the Regulation, and the recitals in particular, that any opening of secondary insolvency proceedings is a discretionary matter. It is urged, for instance, that I should not allow Myles Kirby to continue and instead that I should appoint Price Waterhouse Cooper Ireland (PWC Ireland) if I decide to permit secondary insolvency proceedings in Ireland. In addition, since these are insolvency proceedings and since the Regulation mentions that the insolvency proceedings are governed by the local law, that the local law empowers the insolvency proceedings. Are insolvency proceedings automatic under Irish law once a debt is proven? There is, and it is well known, discretion under the Companies Acts 1963- 2013 as to whether to wind up a company. Indeed, this discretion is exercised dozens of times every Monday in the Chancery List in relation to insolvency and it is provided for in the Regulation a most a pointed way in recital 12, where secondary proceedings are merely permitted and not mandated.

23. Among the factors therefore that are important in regard to that discretion are firstly: is this initiation of secondary insolvency proceedings a waste of resources, an unnecessary duplication? It is clear to me that Myles Kirby has, in a very short period of time, since the 30 May, 2014 uncovered substantial debts and has therefore effectively done a good job. Secondly, are there substantial claims here that are materially easier to deal with locally? The affidavit evidence shows this to be the case. And then, thirdly, what are the priorities between country A and country B for public and fiduciary debts? This factor, of necessity, must come up again in this discretionary context. In terms of that, it seems to me that I have no certainty in terms of the priorities as to how this issue would be dealt with in the courts of the United Kingdom. Thirdly, there are assets here which are materially easier to deal with in terms of properly establishing the priorities and in terms of the orderly winding up of the company. Now if this were a case where there was duplication I would, of course, pass the matter over to PWC Ireland instead of leaving the current provisional liquidator in place. I am not going to do that. I am saying that on the basis that I do not regard PWC in the United Kingdom as doing anything other than a superb job. I want to acknowledge that. However, I see Myles Kirby as doing a job here in Ireland with a thoroughness and local knowledge that might otherwise have left important debts overlooked. That is, again, not a question of criticism, it is a question of the validity of what is stated both in the text of the Regulation as informed by its recitals: namely, that there can be circumstances where there is an establishment in a secondary country and where secondary insolvency proceedings can be materially useful to the overall process.

24. Lastly, returning to the point made by the United Kingdom administrator that the present tense in the Regulation dictates that

everything finished here as of the 24 February, 2014. The principle that I have set out in this judgment seems to me to indicate why the court is not accepting that argument. In terms of the contrast between this set of circumstances and those in the *Olympic Airlines* case, *Olympic Airlines* involved the presentation of a petition nine, going on ten months, after the instruction to the Greek liquidator to commence proceedings in Athens. Here, matters moved very quickly. And, in a way, the proof of the pudding is in the eating because once Myles Kirby was appointed, factors which the main administrator in the United Kingdom could not have been aware of were immediately brought to light.

25. So that being the overall situation, in my discretion I am appointing Myles Kirby as liquidator. I am, secondly, refusing a stay because it is clear to me that it is manifestly of interest to the United Kingdom creditors that this process should continue. As is known, the normal thing in appointing a liquidator is to require a statement of affairs and to put the matter into the Examiner's List in six weeks time. These are also the appropriate steps here. In terms of a general direction, this matter should be dealt with as speedily as possible and with full cooperation by Myles Kirby here in Ireland and PWC acting as administrators of the United Kingdom insolvency.