Neutral Citation No. [2010] NIQB 90 | *Ref:* **COG7920**

Judgment: approved by the Court for handing down | *Delivered:* **06/09/10**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

CUSP LIMITED

Plaintiff;

-and-

TONI AND GUY (IRELAND) LIMITED

Defendant.

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COGHLIN LJ

[1] In these proceedings the plaintiff claims £95,512.98 in respect of rent and service charges, together with interest thereon amounting to £7,326.29, alleged to be due on foot of a lease dated 10 October 2005 made between the plaintiff and the defendant in respect of the defendant's occupation of premises at Unit 14, Lisburn Square, Lisburn. At the date of hearing the rent arrears stood at £127,546.19 together with interest of £10,735.32. The only defence raised by the defendant, apart from simple denial, is that the plaintiff is precluded from bringing a claim in respect of the said sums by virtue of an Order of the High Court in Ireland dated 4 October 2007 to which the plaintiff did not object and, as a consequence of which, a Scheme of Arrangement was entered into between the defendant, its members and creditors which came into effect on 8 October 2007. Mr Colmer appeared on behalf of the plaintiff while the defendant was represented by Mr Michael C W Lavery and Mr Michael Lavery QC. I am indebted to both sets of counsel for their carefully prepared and economically delivered submissions.

Background facts

[2] It appears to be common case that, apart from the lease of the premises in Lisburn, the majority of the defendant's business activities were carried on in the Republic of Ireland. Unfortunately, it seems that those activities have not proved commercially successful and on 22 June 2007 an Interim Examiner was appointed by order of the High Court in Dublin in response to a petition lodged with that court on 9 July 2007 pursuant to the Companies (Amendment) Act 1990 ("the 1990 Act"). That legislation does not extend to the jurisdiction of Northern Ireland.

[3] In accordance with the requirements of the 1990 Act the Examiner formulated Proposals for a Scheme of Arrangement ("the proposals") which were sent to all creditors on 6 September 2007. Included with the proposals was an Explanatory Memorandum providing a summary of the proposals and their effect upon the various classes of members of the company and its creditors. That documentation also included notice and proxy forms for the relevant meetings for the class or classes of members or creditors. Such meetings were subsequently held on 13 September 2007. The covering letter, which accompanied the proposals, drew attention to the amount of each claim as recorded in the company's records and the proposals contained specific provisions, with strict timetables, which, if they were approved, were required to be followed if a creditor wished to dispute the amount recorded.

[4] It seems that the plaintiff's then solicitors corresponded with the interim examiner and the documentation, including the proposals, was sent to that firm on 6 September 2007. A claim for the amount of €422,388 was included in respect of the plaintiff in the unsecured unagreed creditors section of Appendix F.

[5] The proposals contained detailed provisions for the resolution of claims by unagreed creditors with such claims to be filed within 21 days of 8 October 2007 being the date fixed by the court upon which the proposals became binding on creditors in accordance with Section 24(9) of the 1990 Act.

[6] It appears that the interim receiver did not receive a returned proxy from the plaintiff's then solicitors nor did the plaintiff or any representative upon its behalf attend the relevant meeting for unsecured unagreed creditors. No claim was forwarded by the plaintiff or its representative within 21 days from 8 October 2007 and the plaintiff did not apply for the appointment of an expert to determine the amount of its claim in accordance with one of the options set out in the proposals. On 29 August 2007 the plaintiff's then solicitors wrote to the defendant's then solicitors referring to the defendant vacating the unit in Lisburn and stating that:

> "For the avoidance of any doubt, this firm is instructed to issue immediate proceedings against

> Tony and Guy (Ireland) Limited, (Tony and Guy (Lisburn City) Limited) and Ciaran Green (a guarantor) as necessary."

However, it appears that no such proceedings were issued and counsel explained that the plaintiff had not wanted to participate in the examinership proceedings in Dublin.

The European legislative framework

[7] The defendant relies upon Council Regulation (EC) No. 1346/2000 on insolvency proceedings ("the Regulation") the relevant provisions of which are as follows:

(*i*) Article 3 which provides that:

> "*Article 3*
>
> **International jurisdiction**
>
> (1) The courts of the Member State within the territory of which the centre of a debtor's main interest 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.
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> (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.

(*ii*) Article 4 which provides that:

> "*Article 4*

Law Applicable

(1) Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereinafter referred to as the 'state of the opening of proceedings.'

(*iii*) Article 5 which provides that:

"*Article 5*

Third parties rights in rem

(1) The opening of insolvency proceedings shall not effect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets – both specific assets and collections of indefinite assets as a whole which change from time to time – belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.

(*iv*) Article 8 which provides that:

"*Article 8*

Contracts relating to immoveable property

The effects of insolvency proceedings on a contract conferring the right to acquire or make use of immoveable property shall be governed solely by the law of the Member State within the territory of which the immovable property is situated'."

The parties' submissions

[8] Mr Colmer on behalf of the plaintiff emphasised that the 1990 Act does not extend to Northern Ireland and, therefore, does not apply to his client. While he accepted that Article 4(1) of the Regulation deals with the usual underlying position in respect of the legal effects of insolvency proceedings opened in the Member State in which the debtor has its centre of main interests, he drew the attention of the court to the fact that the usual position was specifically made subject to the qualificatory words with which Article 4(1) of the Regulation commences, namely, "save as otherwise provided in this Regulation …". In that context he relied upon Article 8 as establishing a specific exception to the usual position in respect of contracts for the lease of property in Member States other than that in which the insolvency proceedings have been opened. On the basis that the contract of lease which is the subject of these proceedings falls to be dealt with in accordance with Article 8, Mr Colmer further submitted that the effects of the defendant's insolvency should be dealt with solely in accordance with domestic proceedings of an equivalent nature within the law of Northern Ireland. In support of that submission he relied upon the Virgos-Schmit report on the Convention on Insolvency and paragraph 30-250 of the 14th Edition of Dicey, Morris and Collins "The Conflict of Laws" (2006). In the absence of any direct parallel to company examinership within this jurisdiction, Mr Colmer argued that the closest equivalent procedure in Northern Ireland was that of company administration in accordance with Schedule B1 to the Insolvency (Northern Ireland) Order 1989 ("the 1989 Act"). He submitted that the basic purpose of both procedures was rescuing or facilitating the survival of the relevant company as a going concern through the formulation of proposals. However he contended that, in Northern Ireland, an administrator is the agent of the company and not personally liable for the company's obligations, past, present or future and that in such circumstances, the company's liability for rent and other covenants under a lease is not affected.

[9] By way of response Mr Lavery focused upon the particular need to ensure that rights in rem should be determined in accordance with the lex *situs* and not be affected by the opening of insolvency proceedings set out in paragraph (25) of the recitals to the 2000 Regulation. He submitted that both Articles 5 and 8 should be interpreted as implementing the principle set out in paragraph (25) and that, accordingly, their effect should be restricted to rights in rem asserted by third parties or creditor's of the debtor. On that basis he argued that no right to use or possess a right in rem arose in the course of these proceedings which were concerned solely with an action for a personal debt. Such a debt, according to Mr Lavery's argument, clearly fell within the jurisdiction of the examiner appointed by the court in Dublin and, accordingly, should be subject to the proposals that had been incorporated into the final order of that court.

Discussion

[10] This court recognises that it is subject to a strong duty to interpret European legislation purposively in accordance with the principle set out in case C-106/89 Marleasing SA v La Comercial Internacional de Alimentacion SA [1990] ECR 1-4135 and confirmed in subsequent authority. The recitals to the 2000 Regulation emphasise the need for cross-border insolvency proceedings to operate efficiently and effectively in order to ensure the proper functioning of the internal market. Paragraph (4) provides that:

> "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)."

Accordingly, paragraph (12) of the recitals records that the Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of his main interests with those proceedings having universal scope and being aimed at encompassing all the debtors assets. Secondary proceedings are permissible, to protect the diversity of interests, in other Member States where the debtor has an establishment but the effects of such secondary proceedings are limited to assets located within that other state. The recitals acknowledge that the application without exception of the law of the state of opening of proceedings would frequently lead to difficulties and that, therefore, provision should be made for special rules on applicable law in the case of particularly significant rights and legal relationships (eg. rights in rem and contracts of employment). Paragraph (20) recognises that the main insolvency proceedings and any secondary proceedings can, however, contribute to the effective realisation of the total assets only if all the concurrent proceedings pending are co-ordinated and paragraph (21) specifies that in order to ensure equal treatment of creditors the distribution of proceeds must also be co-ordinated. Thus, it seems clear that in seeking to achieve fairness between all relevant parties the general purpose of the Regulation is to ensure, as far as may be practical, that the insolvency proceedings are concentrated in and dealt with according to the laws of the Member State in which the debtor's main interests are situated while at the same time providing sufficient flexibility to accommodate a number of specific exceptions in respect of which relevant issues should be determined in accordance with the equivalent laws of other Member States.

[11] The Regulation incorporates the flexibility necessary to protect the certainty of some transactions and legitimate expectations in Member States other than that in which the original proceedings were opened. Recital (11) envisages that account of differing laws may be taken in two different ways. On the one hand, provision is made for special rules as to applicable law and, on the other, national proceedings covering only assets in the State of opening

are to be allowed alongside the main insolvency proceedings with universal scope.. Some articles establish specific exceptions in respect of the rights of particular parties, namely, the rights in rem of creditors or third parties in respect of assets belonging to the debtor (Article 5), the creditors right of set off where such a set off is permitted by the law applicable to the insolvent debtor's claim (Article 6) and both the seller's right to reserve title and the purchaser's right to acquire title where the relevant assets of the debtor are situated within the territory of a Member State other than that of the opening of proceedings. Articles 8, 9, 10, 11, 14 and 15 recognise the importance of accepting that certain transactions should be governed solely by the law of the Member State concerned rather than the state in which the original proceedings have been opened. However, whether it is a question of considering the applicable law of another Member State or, in certain cases, opening secondary proceedings in another Member State the philosophy of the Regulation seems to clearly reflect the need for any relevant transactions, including secondary proceedings, to be properly and effectively co-ordinated and considered as a whole.

[12] As noted earlier in this judgment Mr Colmer has submitted that administration in accordance with Schedule B1 to the Insolvency (Northern Ireland) Order 1989 is the equivalent of examinership in the Republic of Ireland relying, in particular, upon paragraph 4-(1) in accordance with which the administrator of a company is required to perform his functions with the objective of, inter alia, "rescuing the company as a going concern". He has also directed the attention of the court to the Administration section of Hill and Redman "Landlord and Tenant Law" at paragraph [4089] in which the learned authors note that:

> "Following the making of an application to court or, in the case of the appointment of an administrator out of court, the filing at court of a notice of appointment or intention to appoint an administrator, an initial moratorium on insolvency proceedings or other legal process comes into effect …"

In such circumstances, Mr Colmer argues there was no obligation upon the plaintiff to participate in the Dublin proceedings. By way of response Mr Lavery pointed out that a similar moratorium applied for as long as the company was under the protection of the court in examinership in the Republic of Ireland by virtue of Section 5 of the 1990 Act but he did not accept that, in either jurisdiction, a party in the position of the plaintiff could simply await the ending of the moratorium or protection of the court and then assert the full amount of the relevant rent.

[13] In my opinion the purpose of the 2000 Regulation was clearly to establish a system under which insolvency proceedings could be centralised

in the Member State in which the debtor's main interests were located and the outcome of which, subject to a limited number of exceptions, would be formally recognised by other Member States – see Article 16. In certain cases, the Regulation provides for the opening of secondary proceedings restricted to any assets of the debtor situated in the territory of another Member State (Article 3(2)) but such proceedings are limited in the United Kingdom by Annex B to winding by or subject to the supervision of court, creditors voluntary winding up (with confirmation by the court), bankruptcy or sequestration. This case does not involve assets of the debtor or secondary proceedings for insolvency in this jurisdiction but concerns a claim for personal debt, namely, rent owed in respect of a lease of immoveable property situated within Northern Ireland. Such a claim falls to be determined in accordance with the law of the United Kingdom in accordance with Article 8. However, in my view, there was absolutely no reason why the plaintiff could not have participated in the examinership proceedings conducted in Dublin in the course of which that court would have been perfectly competent to consider, interpret and apply the nearest equivalent relevant UK legislation. Such a course of action would have conformed with the structure and purpose of the Regulation which, in my view, would be fundamentally thwarted if, despite being fully aware of the relevant proceedings, the plaintiff was entitled to simply ignore the efforts of all those concerned in an attempt to successfully preserve the existence of the defendant company and to later issue its own proceedings in a separate jurisdiction. Mr Colmer has argued that the result of restricting the law governing the effects of insolvency procedures on a contract conferring the right to acquire and make use of immoveable property contained in Article 8 is to entitle the plaintiff to issue proceedings in this jurisdiction. In my view that is a submission that should be rejected. Article 8 simply restricts the relevant law solely to that of the Member State within which the relevant property is situated and, as such, constitutes an exception to the law generally applicable to insolvency proceedings specified in Article 4(1). In the Virgos-Schmit Report the learned authors refer to the exceptions to the general rule that the effects of insolvency should be determined in accordance with the law of the state in which the proceedings have been opened in the following terms at paragraph 92:

> "1 In certain cases the Convention excludes some rights over assets located abroad from the effects of the insolvency proceedings (as in Articles 5, 6 and 7).
>
> 2. In other cases, it ensures that certain effects of the insolvency proceedings are governed not by the law of state of the opening (F1), but by the law of the State concerned (see Articles 8, 9, 10, 11, 14 and 15). In such cases, the effects to be given to the proceedings opened in other Contracting States are the same

> effects attributed to a domestic proceedings of equivalent nature, liquidation, composition or re-organisation proceedings, by the law of the State concerned."

In the circumstances I am satisfied that the appropriate jurisdiction for this claim, if it is to be pursued, is that of the Dublin court and the proceedings in this jurisdiction currently disclose no reasonable cause of action or are vexation or otherwise an abuse of the process of the court in accordance with Order 18 Rule 19 of the Rules of the Supreme Court (Northern Ireland) 1980. I shall hear counsel further with regard to costs and remedy including whether the appropriate order is to stay or dismiss these proceedings.