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2014/120539

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
CHANCERY DIVISION

RE CLOUGHVALLEY STORES (NI) LIMITED (IN ADMINISTRATION)

MASTER KELLY

[1] This judgment relates to an examination of the Centre of Main Interests (“COMI”) of Cloughvalley Stores (NI) Ltd (“CVSNI”) which took place on 21st April 2016. At the hearing the Administrator of CVSNI, Thomas Keenan, was represented by Mr Dunlop, and the directors, Michael and Brigid Quinn, were represented by Mr Coyle. I wish to express my gratitude to counsel for their helpful and learned submissions, both oral and written. I should also say that in arriving at my decision I have taken into account all of those submissions, even if I do not make express reference to each one in this judgment.

[2] The facts in the case may be shortly outlined. CVSNI traded under the name of “Quinns Superstore” from premises at 8 Newry Road Crossmaglen, County Armagh. The nature of the business was that of a convenience store. On 17th October 2011 CVSNI was placed into administration in accordance with the provisions of Schedule B1 to the Insolvency (Northern Ireland) Order 1989 (“the 1989 Order”). It was an out of court administration whereby the directors appointed Mr Thomas Keenan, a licensed Insolvency Practitioner, as the Administrator of the company (“the Administrator”). The appointment was with the consent of Northern Bank Limited as holder of a qualifying floating charge over the assets of CVSNI.

[3] It was Mr Quinn who, on behalf of CVSNI and its directors, executed the requisite statutory Notices pursuant to paragraphs 15 and 23 of Schedule B1 of the 1989 Order. Each Notice, which was completed under oath, contains a statutory declaration that the COMI of CVSNI is located in Northern Ireland, as is its registered office. The Notices further provide that EC Regulation 1346/2000 (“the Regulation”) applies, and that the proceedings are to be main proceedings as defined by Article 3 of the Regulation.

[4] On 27th November 2014, the Administrator presented a winding up petition against CVSNI pursuant to Article 103 of the 1989 Order. The petition likewise asserts that the COMI of CVSNI is in Northern Ireland (per its registered office). Annexed to the petition is a copy of the Administrator's Progress Report and a letter sent to all known creditors of CVSNI giving notice of his intention to seek the winding up of CVSNI and his discharge as Administrator.

[5] Having never done so before, and contrary to the statutory declarations made in connection with the Administration of CVSNI, Mr & Mrs Quinn now contend that the COMI of CVSNI lies in the Republic of Ireland and that the High Court in Belfast lacks jurisdiction to make a winding up order against the company. No other party - in particular the creditors of CVSNI - has at any stage from 17th October 2011 to date raised a jurisdictional issue. That also includes Mr Ken Fennell who is apparently the receiver of Mr & Mrs Quinn's other company, Cloughvalley Stores Limited. Cloughvalley Stores Limited is a separate company registered in the Republic of Ireland. For the sake of convenience, I shall refer to that company as CVSROI.

The relevant legal principles

[6] Article 3(1) of the Regulation provides:

"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."

[7] The thirteenth recital of the Regulation provides guidance as to where the COMI is located in the following terms:

"The "centre of main interests" should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties."

Thus there are two parts to the test. The first is the factual question of where the debtor conducts the administration of his interests on a regular basis. The second is the question as to whether that place is transparent, and ascertainable by third parties, in particular creditors and potential creditors of the debtor (See: Case C-369/09 Re Interedil Spl [2011] BPIR 1639 at [49]; Eurofood IFSC Limited case C-341/04 at 33; [2006] Ch. 508;

[8] The case being made by Mr & Mrs Quinn - namely that the COMI of CVSNI lies in the Republic of Ireland - rests entirely on the fact that CVSROI is the main shareholder of CVSNI. They do not, for example, argue that the COMI of CVSNI changed at some stage (see: Shierson v Vlieland-Boddy [2005] EWCA Civ 974,

[2005] 1 WLR 3966 at [43]), or that it moved from one jurisdiction into another. Rather, they assert that as CVSROI owns 98% of the shareholding of CVSNI, it is the parent company of CVSNI, and that the COMI of the latter is the same as that of the former. The issue for this court to determine therefore is whether or not Mr & Mrs Quinn are correct in that assertion.

[9] It is not a matter of dispute that this particular issue was expressly considered by the European court in Eurofood IFSC Limited (case C-341/04; [2006] Ch. 508) wherein the Irish Supreme Court posed the question of “What the determining factor is for identifying the centre of main interests of a subsidiary company, where it and its parent have their respective registered offices in two different Member States?”. In answer to that question, the European court held at paragraphs 31-33:

“31. The concept of the centre of main interest is peculiar to the Regulation. Therefore, it has an autonomous meaning and therefore must be interpreted in a uniform way, independently of national legislation.

32. The scope of that concept is highlighted by the thirteenth recital of the Regulation, which states that the ‘centre of main interest’ should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.

33. That definition shows that the centre of main interest must be identified by reference to criteria that are both objective and ascertainable by third parties. That objectivity and that possibility of ascertainment by third parties are necessary in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open main insolvency proceedings. That legal certainty and that foreseeability are all the more important in that, in accordance with Article 4(1) of the Regulation, determination of the court with jurisdiction entails determination of the law which is to apply.”

It follows then from Eurofood that the COMI of a parent company and its subsidiary will not necessarily be the same. Simply put, the Regulation must be applied (i) to the legal entity (i.e. debtor) subject to the insolvency proceedings, and (ii) by reference to the aforementioned criteria. For present purposes, that means that the COMI of CVSNI is presumed to be the place of its registered office in the absence of proof to the contrary. However, the registered office of CVSNI was at all relevant

times in Northern Ireland. Therefore, as it is Mr & Mrs Quinn who contest the question of the COMI of CVSNI, the burden of proof that the presumption in Article 3(1) is rebutted falls on them. The real question for the court then is whether Mr & Mrs Quinn have discharged that burden of proof.

[10] The parties are agreed that the relevant date for the COMI of CVSNI to be determined is the date of the appointment of Mr Keenan as Administrator, i.e. 17th October 2011, and not some earlier or later date. I am content to accept that consensus and shall proceed on that basis.

[11] As at 17th October 2011, the material facts are as follows:

- (i) the registered office of CVSNI was 8 Newry Road, Crossmaglen, County Armagh;
- (ii) the main interests of CVSNI was that of a convenience store (“Quinns Superstore”) - the economic activity of which was conducted by CVSNI on a day to day basis from its business premises and/or registered office at Newry Road, Crossmaglen, County Armagh, Northern Ireland;
- (iii) CVSNI’s bank and banking arrangements were conducted in Northern Ireland;
- (iv) CVSNI’s statutory compliance obligations in respect of tax and VAT were to HMRC in Northern Ireland;
- (v) CVSNI’s regulatory obligations in respect of annual returns etc were to Companies House in Northern Ireland;
- (vi) CVSNI was ascertainable to third parties - particularly creditors and potential creditors - in Northern Ireland.

Further to those facts, there is no evidence that CVSNI holds assets or pursues economic interests in any other jurisdiction.

[12] Applying the relevant legal principles, in order to rebut the presumption of COMI in Article 3(1) of the Regulation, Mr & Mrs Quinn would have to successfully

argue that as at 17th October 2011 CVSNI met the two parts of the test as per recital 13 in the Republic of Ireland. Moreover, to achieve this, they must do so by reference to criteria that is objective and ascertainable by third parties. But aside from reference to the shareholding of CVSNI, which they argue is ascertainable by third parties from Companies House, they offer no evidence that CVSNI could or did meet both parts of the test in the Republic of Ireland on the relevant date. On the other hand, it is abundantly clear on the facts that on the relevant date CVSNI did meet the two parts of the test in Northern Ireland. This is also consistent with both the presumption in Article 3(1) of the Regulation and the guidance in thirteenth recital. Accordingly, I find that the presumption of COMI as per Article 3(1) of the Regulation has not been rebutted. I find therefore that the COMI of CVSNI lies in Northern Ireland and thus in the jurisdiction of the High Court in Northern Ireland.