Re Flightlease (Ireland) Limited
In the Matter of Flightlease (Ireland) Limited (In Voluntary Liquidation) and in the Matter of the Companies Acts 1963-2005 and in the Matter of an Application pursuant to section 280 of the Companies Act 1963, Paul McCann and Stephen Akers, Joint Liquidators, Applicants [2012] 2 ILRM 461 23rd February 2012
Ireland
Supreme Court of Ireland

Key Words
Nature of Foreign Judgment (Order in Insolvency or Order *in personam*); Conflict of Laws

Summary of Facts of the Case

Flightlease Ireland ('Flightlease') was incorporated in Ireland in 1997 and was a wholly owned subsidiary of Flightlease AG. In July 2004, a resolution for its winding-up was passed at an extraordinary shareholder meeting and joint liquidators were duly appointed. Flightlease AG, alongside a number of other subsidiary companies including Swissair (also part of the S Air Group), was in a debt restructuring process initiated post liquidation in Switzerland. Flightlease leased certain aircraft to Volare, which also purchased services from other companies within the S Air Group, but by 2001, Volare was in arrears of payments to those companies including Flightlease and Swissair. The S Air Group decided to withhold payments due to Volare and using that money, discharge the indebtedness of Volare to the relevant companies within the group. In September 2001 CHF8 million was remitted to Flightlease, however, Swissair, through its liquidator, claimed an entitlement to the repayment of CHF8 million (transferred to Flightlease). The claim was rejected by the Flightlease joint liquidators. Swissair then instituted proceedings in the Swiss courts seeking the repayment, which were served on the joint liquidators of Flightlease without notice.

In the Irish High Court, the Flightlease liquidators sought either an order allowing them to distribute the assets of Flightlease without reference to the claim submitted by Swissair or an order fixing the time for the taking of any challenge or appeal to their rejection of Swissair's claim. The joint liquidators also sought a preliminary ruling as to whether an order granted by the Swiss court would be enforceable in Ireland, if such a situation transpired. The High Court identified four questions:

(i) First, would such a judgment be excluded from recognition and enforcement under the common law by virtue of its arising from a proceeding in insolvency? Or, would it be an

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order *in personam*?

(ii) Second, if it was an order *in personam*, which test applied to its recognition; Dicey's Rule 36 or the 'real and substantial connection' test?

(iii) Third, once the test was established, could recognition be permitted given the facts of the case?

(i) Fourth, was Swissair not using their right of appeal under section 280 of the Companies Act and instead applying to the Swiss court material to the recognition issue?

The High Court ruled that the substance of the order of the Swiss court would not be so closely connected to the insolvency proceedings so as to exclude it from enforcement; such an order would be properly categorised as *in personam* and its enforceability in Ireland would depend on the common law rules for the enforcement of *in personam* orders. On the issue of the relevant test for recognition of the Swiss Court – the 'real and substantial connection' test or the traditional common law test summarised in Dicey Rule 36 - the High Court held that the adoption of the 'real and substantial connection' test would be a significant alteration to the principles applicable to the recognition of foreign judgments *in personam*, therefore the appropriate test was Dicey's Rule 36. Under the traditional common law rules, Flightlease had no presence in Switzerland for the purpose of conferring jurisdiction on the Swiss court, as Flightlease was in liquidation and its affairs were conducted in Ireland by the joint liquidators at the time of the commencement of the proceedings before the Swiss court.

Swissair appealed to the Supreme Court and Flightlease filed a notice to vary and argued that the High Court judge had erred in finding that a decision of the Swiss court would be an order *in personam* and not an order in a proceeding in insolvency.

Cooperation and / or Coordination Issue

Recognition; Enforcement

What was the nature of the order of the Swiss Court?

On what basis was such an order enforceable or unenforceable in Ireland?

Resolution

The Supreme Court dismissed the appeal and the notice to vary, instead upholding the ruling in the High Court. It found:

(i) The effect of any order for Flightlease to repay money to Swissair made in the Swiss proceedings would be *in personam* order and not an order in a proceeding in insolvency. Such an order would only be enforceable in Ireland if Flightlease was present in Switzerland at the commencement of the action or had submitted to the jurisdiction of the Swiss court, neither of which had occurred.

(ii) Irish conflict of laws rules as to recognition of a judgment *in personam* are as set out in Dicey Rule 36 and not established by the 'real and substantial connection' test, which, in the view of the Supreme Court, 'had not received sufficient support in other jurisdictions and should not be adopted'.

(iii) Developments in conflict of laws should take place in the context of an international consensus by way of treaty or convention to be given effect in national law.

(iv) Where a party is sued in a foreign jurisdiction, it will be required to make an important

decision as to whether such judgment would be recognised in Ireland. As parties will order their affairs based on a view of the law, a change to that law should not be undertaken lightly. Instead, significant change to the law in this respect should be done by legislation.

Interesting from the perspective of our case studies was the views of the Court on *Cambridge Gas*. Finnegan J, speaking on behalf of the majority rejected *Cambridge Gas* on two grounds; first, in view of its dependence on the UK statutory framework, in other words its focus on the provisions of the Insolvency Act 1986. Second, and perhaps more interestingly, he also concluded that *Cambridge Gas* should not be adopted by the Irish Court until there was a broad consensus as to the development of conflicts of laws amongst common law jurisdictions, which was not the case vis-á-vis the judgment in *Cambridge Gas*. O'Donnell J was more equivocal, stating the he would not rule out development along the lines of *Cambridge Gas* but reserved judgment on the issue for another day. In any event, the timing of the judgment in *Flightlease* is also worth bearing in mind; at the time of the *Flightlease* judgment, the UK Supreme Court was hearing an appeal in *Rubin v Euro Finance SA [2011] 2 WLR 121*, which would subsequently depart from significant elements of the Privy Council judgment in *Cambridge Gas*.

Applicability to Preventive Restructuring

Naturally, a significant issue should a case with similar facts – proceedings in one jurisdiction to establish a liability for repayment of money by an entity based in another jurisdiction – arise in the EU, would be the applicability of the EIR Recast to the insolvency / restructuring procedure at issue. In order to ascertain the applicability of the EIR, it would be necessary to establish if the order at the heart of the case is part of the insolvency or restructuring proceeding or if it is, as was in the case of *Flightlease*, an order *in personam*. If the procedure from which the order has arisen is contained in Annex A (and clearly that order is viewed to be an order arising from that proceeding 'order in insolvency'), then the judgment has effect across the EU. If the procedure is not contained in Annex A, then questions arise as to whether the order may be enforceable across the EU, as the applicability of the Brussels I Regulation is questionable. Article 1(2)(b) specifically excludes 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings'; arguably, the judgment in *Nickel & Goeldner Spedition GmbH* for example, typifies why this uncertainty persists.

Leaving Brussels I aside, the matter of enforcement in preventive restructuring matters, at least at a higher level, across the EU is more clear-cut; applicability of the Recast renders the order effective across the EU – save in exceptional circumstances – and inapplicability of the Recast results in domestic courts deciding if the order ought to be enforced in that jurisdiction on the basis of other principles. It is also worth bearing in mind that the PRD contains a Recital with a specific reference to the EIR Recast and enforceability of judgments. Recital 13 states: 'Although this Directive does not require that procedures within its scope fulfil all the conditions for notification under [Annex A], it aims to facilitate the cross-border recognition of those procedures and the recognition and enforceability of judgments'. However, if the insolvency process, in this case a new preventive restructuring process is NOT covered by Annex A, cases such as this will arise, as the treatment of the Swiss orders would be equivalent to the question of treatment of orders of any European court in relation to a preventive restructuring process not covered by the EIR recast.

Applicability of Existing Rules and Guidelines

The importance of effective co-operation arises both in the context of the EIR Recast where the obligations apply, but as yet have been unexplored. It is also possible that co-operation obligations or obligations regarding judicial assistance may arise outside the EIR. where the procedure, from which the court order has arisen, is not contained in Annex A and therefore not covered by the EIR Recast. In such circumstances, although co-operation is not mandated, reaching a cost-effective and satisfactory solution still rests with the individual insolvency practitioners and courts involved. In such cases, prevention is better than cure; in other words, open communication between the insolvency practitioners involved in processes in the two (or more) jurisdictions is key to avoiding the need to go to court in the first place. This may well arise where a restructuring is taking place in an EU member state under a process, which although introduced under the PRD, has not been included in Annex A because of the option provided by the PRD for doing so. So, if the Swiss liquidator in this case is considered to be equivalent to an insolvency practitioner trying to restructure under such a 'non-Annex A' process, these rules and issues will apply. Accordingly, informal co-operation may be extremely important in such cases.

Arguably, upon rejection of his claim by the Irish joint liquidators, there was an opportunity for the Swiss insolvency practitioner to engage with the Irish liquidators to reach a compromise (and vice versa), particularly as the Swiss liquidator instituted proceedings in Switzerland without notice to the Irish liquidators. Furthermore, there was scope for the Swiss liquidator to apply to the Irish Court – rather than a Swiss Court – to make a determination on the issue (section 280, Companies Act 1963), thereby deciding the main issue on its merits and avoiding the need for a determination of the enforceability of the Swiss order in Ireland and the associated costs.

The EIR Recast establishes a framework for judicial co-operation, which may be informed by existing cases on judicial assistance or co-operation regardless of how the cases apply. However, this case illustrates some reluctance on the part of courts to extend their jurisdiction in this context.