

International Corporate Rescue



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Ronelp Marine Ltd & Others v STX Offshore & Shipbuilding Co. Ltd [2016] EWHC 2228 (Ch)

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Introduction

This case is an example of the Court lifting the automatic stay on proceedings under the Cross-Border Insolvency Regulations 2006 ('CBIR'), and allowing an English Commercial Court action, i.e. an unsecured claim, to continue on the basis of exceptional factors.

Background

Where foreign insolvency proceedings are recognised by the English Court under the CBIR as foreign main proceedings, there is an automatic stay on other proceedings against the insolvent company (article 20(1)(a), schedule 1, CIBR). The Court can, however, modify or terminate this stay under article 20(6), Schedule 1, CBIR.

In an earlier recent decision, *Seawolf Tankers Inc and another v Pan Ocean Co. Ltd* [2015] EWHC 1500 (Ch), the Court held that the test it had to apply when deciding whether to lift the automatic stay under the CBIR was the test applicable to the lifting of a stay in administration proceedings. Although, oddly, that decision is not referred to in the instant case (which also concerned Korean insolvency processes).

Facts

STX Offshore & Shipbuilding Co. Ltd ('STX') was a Korean shipbuilding company with a registered office in London. It had given an English law governed (performance bond) guarantee in respect of its wholly-owned Chinese subsidiary, also a shipbuilder, in relation to the construction of five ships that the subsidiary had contracted to build. The shipbuilding contracts were also governed by English law. The subsidiary entered into Chinese insolvency proceedings and the ships were not built.

The various buyers of the ships ('the Buyers') commenced proceedings in Commercial Court in London against STX under the guarantee in January 2015. STX filed a defence which included that the shipbuilding contracts were illegal and unenforceable. The

illegality argument was based on a sideletter between the parties to the shipbuilding contracts which had the effect of reducing the price by \$6 million for each ship from the price stated in the contracts. STX argued that this was intended to mislead third parties as to the true price payable for the ships.

The Commercial Court gave directions for the conduct of the litigation but, some 14 months after the litigation commenced, STX itself entered into rehabilitation proceedings in Korea. The effect was to stay litigation against STX, as the Korean administrator duly obtained recognition of the Korean rehabilitation proceedings under CBIR, and the Court granted an automatic stay that no legal process could be continued against STX except with the consent of the Korean administrator or the permission of the Court. The Buyers applied to the English Court to lift the stay in order to continue the Commercial Court proceedings against STX.

Decision and reasoning

Norris J lifted the stay. In doing so, he held that the creditor applying for permission to continue existing proceedings bore the burden of making out its case for relief. To discharge this burden, it was held that [29]:

- (1) The applicant must identify the nature of the interest that it wished to promote by obtaining the relief.
- (2) The applicant must address the question of whether the grant of such relief is likely to impede the achievement of the purpose of the insolvency proceedings.
- (3) The applicant must enable the Court to balance the applicant's legitimate interests against the interests of other creditors, having regard to the nature and probability of prejudice on either.
- (4) The applicant must, in addressing the above questions, bear in mind that it is seeking to persuade the domestic court to interfere in the processes of the foreign insolvency court.

The Court emphasised that such considerations were not an exhaustive list.

The Court held that, in the context of unsecured money claims such as the instant case, it will only be in exceptional cases that the Court gives a creditor a right, by the taking of proceedings, to override and pre-empt the statutory machinery. Although noting the necessarily protean nature of the term 'exceptional', Norris J held it to mean: a circumstance or combination of circumstances of sufficient weight to overcome the strong imperative to have all claims dealt with in the same way. [31]

In the instant case, the following factors persuaded the Court to lift the stay:

- (1) Although a money claim, it was a particularly complex one. Particular complications arose from whether the underlying contracts were unenforceable on the ground of illegality. The fact that English law is engaged by a jurisdictional clause is not sufficient of itself. The facts of this case, as applied to the uncertain and complex state of the law of illegality (recognised by the Supreme Court in a number of recent decisions on illegality), made this unsuitable for expert evidence via a summary review procedure in the Korean Rehabilitation Court. Further complexities arose as to whether, upon construction of the contracts, common law remedies were excluded, the interaction of which has also been expressed to be complex in reported decisions.
- (2) The proceedings in the Commercial Court were already at a relatively advanced stage and considerable costs had been spent on preparation for a trial in December 2016. Although not decisive in of itself, it was a factor, and the nearer the outcome of the proceedings, the greater weight to be attached.
- (3) The Buyers wanted an adjudication and quantification of their claim under the guarantees to be determined more speedily than would be likely under the confirmatory review and objection proceeding process in Korean.
- (4) Rather than impede the achievement of the Korean Rehabilitation Plan, lifting the stay would assist it. It would enable the Korean Rehabilitation Court to suspend the Buyers' confirmatory action, and would provide a quicker adjudication on the issues, which the Korean Court could adopt, promote or ignore, if dissatisfied. The steps left to take in the English proceedings would not interfere in any material way with the formulation and prosecution of the Rehabilitation Plan, not least given the size of STX's insolvency. The fact that the Korean Court gave permission for the administrators to defend the instant application was not evidence of interference, and the Korean Rehabilitation Court

no doubt wanted the application properly tested before the domestic Court.

Finally, the Court moved to balancing the interests of the Buyers (to obtain a verification and quantification of their claim as quickly and economically as possible to play a part in the Rehabilitation Plan) and of other creditors of STX (ensuring the same rules applied to all claims, that the Rehabilitation Plan proceeded efficiently, and that the administrator was not put to undue expense causing a reduction in the amounts then available to creditors). The Court held that resolving a difficult issue of foreign law would assist, and not impede, the insolvency process and that treating the Buyers' claim differently was justified because of the nature of the dispute and extant nature of the proceedings in the Commercial Court, where a trial was imminent. Although the costs of the Commercial Court action would be slightly higher, it was not significant in the scheme of a Rehabilitation Plan involving approximately US\$6.7 billion, and the English proceedings would be shorter, especially if the confirmatory proceedings in Korea were followed by objections. Further, there was (i) no disorder to the administration; (ii) no basis in evidence for suggesting other creditors would follow suit if the Buyers were given this relief; (iii) a judgment in respect of the illegality defence may in fact assist other cases; and (iv) there was no question of piecemeal/unequal distribution which would undermine the objective of having a single insolvency estate. [45]

Commentary

This is a clear and well-reasoned decision on both the facts and the law, and it is also a very pragmatic decision.

Although the wider context of this case is increasingly familiar to the English Courts – the fall-out from Korean insolvencies in the shipping market – the facts were of course unique and the decision to find 'exceptional' factors rested very squarely on those facts.

However, there is useful guidance as to what the creditor applying for permission to continue existing proceedings should do to discharge its burden. Further, at the end of his judgment, in granting the relief sought, Norris J encapsulated the four key reasons for his decision [43]: (i) the complexity of the foreign law issue (illegality here); (ii) proceedings already being at an advanced stage; (iii) continuing the proceedings would not impede the administration; and (iv) it did not advance the interests of the applying creditor over others. These may be useful indicators for future cases.

It is also a highly practical decision, not least in view of the Courts increased focus on proportionality, noting the advanced stage of the Commercial Court process and the costs/time of continuing, as opposed to not continuing.

It further shows that, when subject to scrutiny, it is far from impossible to lift a stay in this context, and that many of the perceived obstacles, such as the potential prejudice to the foreign insolvency process and other creditors, are often more forensic than they are real. The factors that persuaded Norris J may also not be as unusual or uncommon as they may seem (i.e. difficult points of English law, a litigation at an advanced stage, and no real prejudice to other creditors/the foreign insolvency process). I would, however, caution that in many cases where the rehabilitation plan is not as sizeable as it was in the instant case, the costs and speed of the English Court process (including an appeal, which may be likely if it involves a complex issue of English law) may not be as advantageous, compared with the foreign insolvency jurisdiction, as was the case here.

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