Nos. 15584 & 15585 of 2009

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

IN THE MATTER OF STOCZNIA GDYNIA SA
AND
IN THE MATTER OF STOCZNIA SCZCECINSKA NOWA SP. ZO.O.
AND
IN THE MATTER OF THE CROSS-BORDER INSOLVENCY REGULATIONS 2006

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 June 2009

Before:

Mr Registrar Baister

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BUD-BANK LEASING SP. ZO. O. **Applicant**

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Mr Glen Davis (instructed by **Middleton Potts**) for the **Applicant**

Hearing date: 22 June 2009

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR REGISTRAR BAISTER

Mr Registrar Baister:

The applications

1. On 22 June 2009 I made recognition orders under the provisions of the Cross-Border Insolvency Regulations 2006 in relation to compensation proceedings brought in respect of the above named Polish corporations. In view of the fact that the applications raised some novel points I set out my reasons for making those orders.

2. The applications are supported by comprehensive evidence in the form of affidavits of Roman Eugeniusz Nojszewski and Miroslav Janusz Bryska of the Applicant and of Edwin Cheyney of their solicitors. In addition I have had the benefit of a comprehensive skeleton argument, 20 pages in length and running to 114 paragraphs, and accompanying material prepared by Mr Davis. I am grateful to him for the considerable thought and attention which he has given to these applications and the issues to which they give rise and do not hesitate, therefore, to draw extensively on his material for the purposes of this judgment.

3. The applications are virtually identical in nature and background, so I will treat them as one.

The background

4. Stocznia Gdynia SA ("SG") and Stocznia Szczecinska Nowa SP zo.o. ("SSN") are shipyards which received substantial state aid from the Polish government. The European Commission undertook an inquiry into the propriety of the state subvention and declared it illegal under the EC Treaty rules on state aid. The need to repay sums in excess of €1.4 billion (in the case of SG) and €600 million (in the case of SSN) made both companies insolvent.

5. To deal with the situation the Polish government enacted a Law of 19 December 2008 on Compensation Proceedings (Journal of the Laws of the Republic of Poland, 2008, No 233, 1569) designed specifically to rescue and restructure the businesses of SG and SSN. The purpose of the Compensation Act is summarised in paragraph 18 of Messrs Nojszewski's and Bryska's affidavit as follows:-

> "The Compensation Proceedings are designed to protect the Company and the other shipyards while their assets are auctioned through a transparent sale process, and to enable the state aid to be repaid (to the extent possible after taking other priorities into account) in a liquidation process. This will mean that the purchasers can acquire the assets free of any obligation to repay the illegal subsidies so that they can conduct their business in the future unhindered by such a burden".

In paragraph 8 they describe the proceedings briefly in these terms:-

> "[T]he regime provides for a period during which the Company is protected from claims of creditors while the Compensation Administrator effects a sale of the business and assets and uses the proceeds to pay employees and creditors according to

> priorities set out in the Polish Act. The distribution of the assets is governed by the same statutory provisions which would apply in a conventional bankruptcy under the Polish Law on Bankruptcy and Rehabilitation…and the distribution plan is subject to the approval of the Polish Court. At the end of the Compensation Proceedings, the restructured business can be carried on by the purchaser while the Company itself will proceed into a conventional liquidation".

6. The Compensation Act came into force on 6 January 2009. On the same day the president of a body called the Agencja Rozwoju Przemyslu SA ("ARP"), the Industrial Development Agency, appointed Mr Nojszewski as the provisional administrator of the companies. That was followed on 7 January 2009 by a decision to initiate compensation proceedings and to convene a meeting of creditors. On 20 January 2009 the creditors formed a creditors' committee and appointed Bud-Bank Leasing SP. zo.o. as compensation administrator (under the Act the administrator may be either a natural person or corporate). Messrs Nojszewski and Bryska are both directors of Bud-Bank Leasing.

7. The effect of the foregoing steps has been to divest the boards of SG and SSN of their powers and to put the assets of the companies under the control of the compensation administrator.

8. The compensation administrator has sought recognition on an urgent basis to protect the assets of the companies from claims in the Admiralty Court (and possibly elsewhere).

The EC Regulation on Insolvency Proceedings and the Cross-Border Insolvency Regulations

9. Poland joined the European Union on 1 May 2004. The EC Regulation on Insolvency Proceedings 2000 therefore takes effect in Poland as it does in the United Kingdom. Article 16(1) of the Regulation provides that any judgment opening insolvency proceedings handed down by a court of a Member State must be recognised in all other Member States. (The terms judgment and court have special meanings, but it is unnecessary to go into them now.) Article 17(1) provides for automatic recognition of the effects of any such judgment (i.e. recognition "with no further formalities"). Why, then, has the compensation administrator applied under the Cross-Border Regulations rather than availing itself of the automatic recognition afforded by the EC Regulation?

10. The answer is simple. The compensation proceedings of which recognition is sought are not a procedure to which the EC Regulation applies (see article 2(a) and Annex A).

11. How, then, do the Cross-Border Regulations assist?

12. The Cross-Border Regulations provide a mechanism for the recognition of certain foreign proceedings in this country. Because the Cross-Border Regulations apply to proceedings anywhere in the world without any requirement of reciprocity, there is no list of proceedings capable of recognition as there is in the EC Regulation.

13. The requirements for recognition are set out in Article 17(1) of the Model Law in Schedule 1 of the Cross Border Regulations:

    i) the proceedings must be a foreign proceeding within the meaning of article 2(i) of the Model Law; they must not be excluded proceedings as defined by article 1 paragraph 2;

    ii) the foreign representative must be a person or body within the meaning of article 2(j);

    iii) the application must meet the requirements of article 15(2) and (3) of the Model Law; the relevant procedural requirements must be satisfied, specified information must be given in the evidence and certain documents must be exhibited;

    iv) the application must have been made to a court as defined by article 4 of the Model Law (in these cases this court).

14. Regulation 3 of the Cross-Border Regulations provides that British insolvency law now applies "with such modifications as the context requires for the purpose of giving effect to the provisions of these Regulations" and that in the case of any conflict between British insolvency law and the Regulations the latter prevail. Regulation 2(1) gives force to the UNCITRAL Model Law set out in Schedule 1. Regulation 2(2) specifies documents which the court may consider as an aid to ascertaining the meaning or effect of the Model Law. Mr Davis submits that the general position is that the Model Law is intended to facilitate recognition and cross-border cooperation in respect of a wide variety of administrative and court procedures provided that the proceedings in the foreign jurisdiction of which recognition is sought have the necessary attributes (as to which see Article 2(a) of the Model Law and the *Guide to Enactment of the UNCITRAL Model Law* (UNCITRAL document A/CN9/442) which is expressly mentioned in Regulation 2(2)(c)). As he says, the intention is that the Model Law should provide a "simple, expeditious structure for a foreign representative to obtain recognition" (*Guide* § 112).

15. A foreign proceeding is defined in Art 2(i) of the Model Law as meaning:

    > "a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency, in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation."

    The *Guide* makes clear that this definition is to be construed broadly and "inclusively". As long as the proceedings possess the relevant attributes, they should be recognised. It sets out the following propositions:-

    > "23 To fall within the scope of the Model Law, a foreign insolvency proceeding needs to possess certain attributes. These include: basis in insolvency-related law of the originating State; involvement of creditors collectively; control or supervision of the assets and affairs of the debtor by a court

> or another official body; and reorganization or liquidation of the debtor as the purpose of the proceeding (art. 2(a)).
>
> "24 Within those parameters, a variety of collective proceedings would be eligible for recognition, be they compulsory or voluntary, corporate or individual, winding-up or reorganization or those in which the debtor retains some measure of control over its assets, albeit under court supervision (e.g. suspension of payments; 'debtor in possession').
>
> "25 An inclusive approach is used also as regards the possible types of debtors covered by the Model Law. Nevertheless, the Model Law refers to the possibility of excluding from its scope of application certain types of entities, such as banks or insurance companies specially regulated with regard to insolvency under the laws of the enacting State (art. 1(2))".

The question is whether these Polish compensation proceedings fall within the definition of article 2(i).

The nature of compensation proceedings

16. Mr Davis took me on a whistle-stop but nonetheless thorough tour of the Polish legislation, which is in evidence in translation. The salient features are set out in paragraph 19 of Messrs Nojszewski's and Bryska's affidavit in the SG application from which I take the following:-

    i) The purpose of compensation proceedings is, as we have seen, the sale of assets, the satisfaction of creditors' claims and the protection of the rights of employees (article 1).

    ii) The proceedings are initiated under the supervision of the competent minister of the Treasury by the president of the ARP and carried out by a compensation administrator (art 2(1)).

    iii) The president of the ARP is the "organ of first instance" (art 9(1)) who appoints a provisional administrator and initiates the proceedings (article 18(1)).

    iv) The provisional administrator draws up an inventory and values the assets as well as taking other preliminary steps (articles 19(1) and 29(1)).

    v) The president of the ARP convenes a meeting of creditors and requires creditors to submit their claims (article 23(2)).

    vi) The meeting of creditors appoints a compensation administrator and a committee of creditors (articles 22 and 24(3)).

vii) When the proceedings are opened the directors lose their powers which are taken over by the compensation administrator; the assets are surrendered to it ; there are obligations to provide it with information (article 28(1)).

viii) The administrator is empowered to run the business to the extent necessary to protect the assets and to enable them to be sold for the benefit of the creditors (article 70(1)).

ix) The administrator is obliged to prepare a sales plan, a list of public law creditors' claims and a list of claims of ordinary creditors (article 77). The sales plan is submitted to the president of the ARP who decides whether to approve it, taking into account the views of the creditors' committee (article 79).

x) The assets are then sold (articles 80 and 82).

xi) Creditors' claims are then submitted to the president of the ARP and considered by the compensation administrator who adjudicates on them. There is a procedure for disputes to be dealt with by the district court (articles 85, 91, 93, 94, 102, 103 and 105).

xii) A distribution plan is then drawn up which must be approved by the court (articles 108-109). After approval distribution takes place in accordance with the provisions of the Law on Bankruptcy and Rehabilitation (article 113).

xiii) The proceedings are closed by the president of the ARP (article 130) and the company is then put into bankruptcy (articles 137-138).

17. Although the proceedings are not initiated before the court, they are supervised by the court at key stages:

i) the court adjudicates on disputed claims of creditors (articles 85-102);

ii) the court must approve the proposed distribution to creditors (article 109(1)).

There is, then, some similarity with our creditors' voluntary winding up where the process is initiated out of court but the jurisdiction of the court may be invoked when required.

18. The above summary makes clear, in my view, that these proceedings are of a kind sometimes encountered in European and other jurisdictions (cf. Mr Davis's comparison with the *amministrazione straordinaria* initiated by the Italian authorities to deal with the collapse of Parmalat Spa) and which have some characteristics readily recognisable as similar to those of some of our insolvency procedures.

19. The proceedings are plainly collective in that they take account of the interests of all creditors and the interests of employees: Mr Davis draws attention to article 3 which requires them to be conducted so as to ensure that employees' rights are safeguarded and so that "the claims of creditors can be settled at least to the same extent possible as in the event of a declaration of bankruptcy". He also draws attention to the obligation to run the business "solely in the scope necessary for the protection of assets to be sold and [the] interests of creditors". He points to the significance of the

initial meeting of creditors (article 24), the provision for the formation of a committee of creditors (article 25), the settling of a list of creditors, the suspension of rights to pursue actions and the right to what we would call a dividend. These are all plainly characteristics of collective proceedings.

20. The proceedings are judicial, in that there are provisions for the court to decide certain issues (see paragraph 17 above).

21. They are also administrative in that decisions are made by a minister and by an agency, the ARP. They are initiated by executive decision pursuant to a statutory power (article 23(1).

22. They are proceedings "pursuant to a law relating to insolvency" in as much as the proceedings themselves have the characteristics of insolvency proceedings and specifically incorporate or feed off provisions in the Law on Bankruptcy and Rehabilitation. The assets and affairs of the company fall under the control of an administrator subject to the supervision of the courts. The purpose of the proceedings is both reorganisation (in that the business or part of it is intended to survive the procedure) and liquidation (in that claims of creditors are stayed and satisfied by a dividend and the proceedings end in bankruptcy).

23. The company is divested of its assets which are controlled by the administrator. It follows that the assets and affairs of the company are subject to the control of a foreign court, albeit via the administrator.

24. It is true that while the compensation proceedings are in force the companies cannot be declared bankrupt and the members of the board cannot be penalised for failing to present a petition (article 58(4)). However, that apparent exclusion of bankruptcy does not detract from the nature of proceedings but is, rather, akin to the moratoria provided for by many insolvency processes including proceedings under UK law.

25. It follows that the conditions to meet the broad definition of a foreign proceeding within the meaning of article 2(i) of the Model Law as elucidated by the *Guide* are amply met and that, as Mr Davis submits, these proceedings are capable of recognition under the Cross-Border Regulations.

26. The proceedings are not excluded by reason of any provision of article 1.2 of the Model law.

Policy considerations

27. Article 6 of the Model Law provides a public policy exception enabling the court to refuse assistance where to do so would be "manifestly contrary to the public policy of Great Britain or any part of it". There would appear to be no public policy reason for refusing recognition in these cases and certainly no manifest reason. The fact that foreign proceedings may differ from those of this country, as they invariably do, even in relation to creditors' rights in respect of priorities, would not of itself be a reason to refuse relief (see, for example, the recent decision of the House of Lords in *McGrath v Riddell* [2008] UKHL 21).

28. There is no apparent conflict with any provision of the EC Regulation on Insolvency Proceedings.

The status of the administrator as foreign representative

29. A foreign representative is defined by article 2(j) of the Model Law as:

> "a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding"

The applicants plainly fall within that definition.

Centre of main interests

30. Under article 16(3) of the Model Law the debtor's centre of main interests is presumed to be its registered office in the absence of proof to the contrary. Both SG and SSN are registered in Poland so the presumption as to the location of their centres of main interests arises and there is no evidence to rebut the presumption. It is plain that the affairs of both companies are being administered on a regular basis by the administrator which is located in Poland where the shipyards are.

Other formal requirements

31. There are other formal requirements relating to the form and content of the application and the affidavit in support. They are uncontroversial. All were considered in the course of the hearing and I was satisfied they had been complied with. I will, however, mention two points.

32. The first is the question of service which is dealt with in paragraphs 21 and 22 of Schedule 2 to the Regulations. Paragraph 21(2) provides for service on a number of persons "unless the court otherwise directs". There is plainly no person on whom it would be sensible or appropriate to serve in a case such as this where the management of the affairs of the company (which would otherwise have to be served under paragraph 21(2)(b)) is in the hands of the administrator.

33. The second point concerns article 15(3) of the Model Law in Schedule 1 to the Regulations which requires the application to be accompanied by a statement identifying all foreign proceedings, proceedings under British insolvency law and section 426 requests in respect of the debtor that are known to the foreign representative. Paragraph 4(1)(a) of Schedule 2 to the Regulations includes that "Article 15(3) Statement" in the list of matters which must be contained in or exhibited to the affidavit in support of the application. In the case of both these companies there are no such proceedings known to the administrator, and relevant statements to that effect have been included in the affidavits. Paragraph 11 of the Form ML1 refers to the article 15(3) statement being "exhibited" to the affidavit, but the statutory forms may be amended under Schedule 2 paragraph 73(1) of the Regulations. I am satisfied that it is appropriate to include the "Article 15(3) Statement" in the affidavit (particularly when, as here, the statement is negative) and to amend Form ML1 accordingly.

Conclusion

34. For the reasons advanced by Mr Davis and summarised above it is plain that the court should recognise these proceedings.