

Reference from Irish Supreme Court to ECJ: Same Proceedings Pending in a non European State

I am grateful to Michelle Smith de Bruin BL for preparing the following report on a recent reference from the Irish Supreme Court to the European Court of Justice.

On 30 January 2009, the Irish Supreme Court decided in *Goshawk Dedicated Limited and Kite Dedicated Limited formerly known as Goshawk Dedicated (No. 2) Ltd, and Cavell Management Services Ltd, and Cavell Managing Agency Ltd v. Life Receivables Ireland Limited* ([2009] IESC 7) to refer to the European Court of Justice the question of whether the Brussels I Regulation has mandatory application in circumstances where there are pre-existing proceedings between the same parties in a non-Member State.

Facts

The defendant was incorporated in Ireland and had its principal place of business in Ireland. The plaintiffs were companies incorporated in England and had their principal places of business in London. In June 2005 the defendant purchased a partnership interest in a Delaware partnership known as Life Receivables II LLP in which the defendant and Life Receivables Holdings are the only partners but in which the defendant would appear to be the only partner with a financial stake. The partnership is, in turn, a beneficiary of Life Receivables Trust whose commercial value derives from trust property, being life insurance policies purchased in the early years of this decade together with a contingent cost insurance issued by Goshawk in respect of those policies. The defendant, as plaintiff in the U.S. proceedings, alleged that it was induced into buying into the partnership as a result of misrepresentation on the part of the defendants in the U.S. proceedings. The defendant has commenced proceedings in Georgia, U.S.A., against the plaintiffs and a number of others who were involved in a series of transactions which were at the heart of the dispute between the parties.

Briefly, the complaint in those proceedings alleges securities fraud, common law fraud, negligent misrepresentation and conspiracy to commit fraud in connection with a transaction valued at a figure in excess of U.S.\$14 million. The primary

jurisdiction invoked is in respect of the securities fraud pursuant to United States law, and a supplemental jurisdiction is alleged of the common law claims, again pursuant to United States law, on the grounds that the same facts and circumstances give rise to all claims. Apart from the securities claims, one of the major allegations made is that Goshawk, relying on material furnished through or by an actuarial company located in Atlanta, Georgia, American Viatical Services, made representations appearing on the face of the life policies, to persons including Life Receivables, the defendant in the Irish proceedings. It is also alleged that Cavell, acting through one of its principals, devised a run off scheme to commute Goshawk's obligations to, *inter alia*, Life Receivables. It is alleged that at certain times that principal, acting on behalf of both Goshawk and Cavell, made material misrepresentations and omissions.

Proceedings

The proceedings commenced by the defendant in Georgia, U.S.A., on the 29th June, 2007, were first in time. The plaintiffs commenced the Irish proceedings which seek declarations that the plaintiffs did not make the misrepresentations, together with other similar relief, on the 6th September 2007. The Irish proceedings are a mirror image of the Georgia proceedings, except that none of the additional co-defendants in Georgia are parties in the Irish proceedings. On the 5th September, 2007, the plaintiffs in the Irish proceedings moved, in the U.S. District Court, by motion, to dismiss the defendant's complaint, on the basis that that court lacks "subject matter jurisdiction" over the defendants because the transactions in issue in the case are "predominantly foreign" and lack the necessary domestic conduct or effects to permit the application by that court of American securities laws. The defendant in these proceedings resisted that motion, and a ruling by the US District Court was awaited, at the time of the appeal to the Irish Supreme Court.

Judgments of Irish Courts

The High Court considered the doctrine of forum non conveniens and *lis pendens* (including the decision in *Owusu*) and held that, under the Brussels I Regulation, as and between Member States, a strict application of the doctrine of *lis pendens* applies. Courts of one jurisdiction are precluded from exercising jurisdiction over a dispute until the courts of a jurisdiction first seised with that dispute have dealt with the question of whether that court first seised has jurisdiction. The Supreme Court agreed with this.

Another issue was whether the recognition afforded to both the doctrine of *lis pendens* and the appropriateness of affording recognition, in accordance with private international law of the relevant Member State, to third party state judgments, is sufficient to warrant a departure from what seems to be the clear mandatory language of Article 2, as interpreted by the European Court of Justice in *Owusu*.

The High Court concluded that there was no basis for staying the proceedings. There is nothing wrong with negative declaratory proceedings. The Court held that a court in Ireland retains and must exercise the mandatory jurisdiction conferred on it by Article 2, notwithstanding the fact that there may be proceedings in a non-Member State.

Reference

Approximately eleven grounds of appeal were made to the Irish Supreme Court. The Supreme Court ultimately decided to refer two questions to the ECJ. The exact form and wording is still to be finalised, but the two principal issues are:

- (i) If a defendant is sued in its country of domicile, is it inconsistent with Regulation 44/2001 for the court of a Member State to decline jurisdiction or to stay proceedings on the basis that proceedings between the same parties and involving the same cause of action are already pending in the courts of a non-Member State and therefore first in time?
- (ii) What criteria is to be applied by a Member State in coming to a decision whether to stay pending proceedings in a Member State, depending on the response to the first, primary, question to be posed.