Neutral Citation Number: [2010] EWHC 2595 (TCC)

Case No: HT-10-130 and HT-10-173

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 19/10/2010

Before :

THE HONOURABLE MR JUSTICE EDWARDS-STUART

- -

Between :

Gibraltar Residential Properties Limited **Cla**

- and -

Gibralcon 2004 SA **Defe**

- -

- -

Gabriel Moss QC (instructed by **Systech Solicitors**) for the **Claimant**

Manus McMullan QC (instructed by **Pinsent Masons LLP**) for the **Defendant**

Hearing date: 29 September 2010

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Judgment

The Honourable Mr Justice Edwards-Stuart :

Introduction

1.
The Claimant ('GRPL") has brought two actions against the Defendant ("Gibralcon”). In each action Gibralcon has applied for a declaration that the English court has no jurisdiction to hear these claims because, prior to the commencement of each action, Gibralcon became the subject of insolvency proceedings in Spain. Gibralcon is a company registered in Spain. GRPL is a company registered in Gibraltar.

2.
This is the judgment on those two applications.

3.
The first action, HT 10 130, is a Part 8 claim and was commenced on 16 April 2010. The second action, HT 10 173, is a claim brought under Part 7 and was commenced on 14 May 2010. Gibralcon became the subject of insolvency proceedings in Spain when they were opened by an order of a Spanish court dated 8 March 2010.

4.

Each action arises out of a very substantial property development to build over 500 new dwellings and retail units in Gibraltar. GRPL engaged Gibralcon to construct the development under a JCT 98 form of contract, Private with Quantities, with various bespoke amendments. Clause 1.10.1 of the contract, as amended, provides that:

“. . . the Law of Gibraltar shall be the law applicable to this Contract and the parties hereby irrevocably submit to the exclusive jurisdiction of the Courts of England and Wales.”

5.
During the course of the works there were four referrals to adjudication, of which the first was discontinued and the last two were consolidated. In each of the two adjudications which remained the adjudicator made decisions in favour of Gibralcon. In the first decision issued on 11 February 2010 the adjudicator ordered GRPL to pay Gibralcon a sum in excess of £500,000 (which he found was owed in respect of a claim in respect of reinforcement bars) by 18 February 2010. In the second decision, issued on 19 February 2010, the adjudicator ordered GRPL to pay Gibralcon in excess of £200,000 by 26 February 2010.

6.
Apart from the fact that in each action GRPL seeks a stay of enforcement of the adjudicator's decisions because of the insolvency of Gibralcon, the two actions are straightforward commercial disputes arising out of a construction contract that are typical of the type of dispute which this court frequently has before it. On the face of it, therefore, neither action constitutes insolvency proceedings or can be described as an action connected with insolvency proceedings. However, this is a point challenged by Gibralcon on these applications.

7.
A further and important matter in relation to these applications is that by a judgment given in Madrid on 24 September 2010, the week before this hearing, by Javier Garcia Marrero, Magistrate-Judge of Commercial Court No 5, that court made an order declaring that this court "does not have jurisdiction to adopt any kind of measures, either precautionary or executive, relating to the assets or rights comprising the company equity of [Gibralcon]”. Further,the Spanish court requests this court to abstain from hearing action HT 10 130 and to leave the proceedings on file.

8.
A notable feature, both of the judgment of the Commercial Court in Madrid and Gibralcon's submissions in support of these applications, is that no mention is made of the European Union Jurisdiction and Judgments Regulation 44/2001. Reference is made only to the European Union Insolvency Regulation 1346/2000 and the Spanish Insolvency Act.

9.
GRPL's primary answer to these applications is a short one. I can do no better than quote from the skeleton argument of Mr Gabriel Moss QC, who appeared for GRPL:

“The question of which Member State of the EU has jurisdiction to hear these two sets of proceedings, in view of the lack of any material insolvency issue being raised by them, is governed by the Jurisdiction and Judgments Regulation 44/2001 ("J + J Regulation") and not the insolvency regulation 1346/2000. This is a point of EU law clearly established in a binding way by the ECJ and also by English case law. It does not depend on any expert evidence. Article 23 of the J + J Regulation awards exclusive jurisdiction to the UK on the basis of the exclusive English jurisdiction clauses agreed between the parties. That is the end of the matter."

10.
For the reasons which I will give in this judgment, I accept that submission, which in my view is plainly correct.

The two actions in this court and the question of relief

11.
In the first action (the Part 8 action), HT 10 130, commenced on 16 April 2010, GRPL claims:

(1)
An order for repayment of an advance payment in excess of £1.3 million made to the Defendant under a Deed of Variation.

(2)
That in his second decision the adjudicator, when ordering payment to be made to the Defendant, failed to take into account previously certified and paid sums so that it is entitled to a declaration that the decision is unenforceable and/or should not be enforced.

(3)
That the sums awarded by the adjudicator should have been set off against various sums said to be due to GPRL, namely the advance payment, general overpayment by means of interim certificates and an entitlement to liquidated damages in the sum of about £1.48 million.

(4)
A stay of enforcement of the two decisions pending determination of separate proceedings in respect of the Defendant’s claim in respect of the reinforcement.

12.
In the second action, HT 10 173, commenced on 14 May 2010, GRPL claims:

(1)
a declaration that GRPL validly terminated Gibralcon’s employment under the contract;

(2)
a declaration that Gibralcon is entitled to certain extensions of time under the contract (but no more);

(3)
a declaration that GRPL is entitled to recover liquidated and ascertained damages in the net sum of £1,482,247;

(4)
a declaration that the value of the works completed by Gibralcon prior to termination is £47,991,614;

(5)
a declaration that GRPL is entitled to recover from Gibralcon the costs of employing another contractor to complete the works, together with any direct loss and/or damage caused to GRPL as a result of the termination of Gibralcon’s employment under the contract, and a declaration that if the preparation of the account required under clause 27.6.4.2 of the contract shows that there is a net sum owing to GRPL, that sum shall be payable by Gibralcon to GRPL;

(6)
an order for payment of the sums found due by the declarations, together with interest.

13.
I should say at once, so that there is no misunderstanding about it, that because Gibralcon is now the subject of insolvency proceedings (the fact that they happen to be in Spain does not make any difference) this court would not make orders directing Gibralcon to pay money to GRPL if the court found that, after all claims and cross claims had been taken into account, money was owed by Gibralcon to GRPL. Instead, the court would make declarations in relation to the matters set out above and then order a stay of execution so that GRPL could prove that debt in the Spanish insolvency proceedings.

14.
So I must make it entirely clear that this court, having made declarations as asked, would then leave the question of GRPL's entitlement to payment to be dealt with in the insolvency proceedings in Spain. In the alternative, if it was found that a net sum was due to Gibralcon, the court would make directions for payment of that sum to the administrators in Spain or, at least, order a stay of such payment in order to give the administrators an opportunity to intervene and seek an appropriate order from this court.

15.
Accordingly, there is no question whatever that this court would take any step to prejudice or interfere with the Spanish insolvency proceedings. This court will do no more than determine the rights of the parties under this contract, disputes which are subject to the exclusive jurisdiction of the courts of England and Wales, and make declarations accordingly, and, in particular, determine so far as it can which party is owed money by the other and how much.

16.
In addition, as I made clear during the hearing, there is no question that this court would permit GRPL to make claims in the insolvency proceedings in Spain without making proper allowance for the sums awarded by the adjudicator. At this point I should perhaps emphasise the fact that an adjudicator’s decision is provisional: it is binding unless and to the extent that the issues determined by the adjudicator are finally determined by a judgment of the Court or an arbitrator’s award. For example, there would be no question of declaring that Gibralcon owed a sum of money to GRPL without taking into account the sums awarded by the adjudicator whilst at the same time ordering enforcement of the adjudicator's decisions to be stayed (so that Gibralcon was deprived of sums equalling the amounts determined by the adjudicator).

17.
I have gone out of my way to make these points because I suspect that the concern of the Commercial Court in Madrid is that assets of Gibralcon, in the form of a debt owed to it by GRPL (if that is what is found), will not be diverted away from the administrators. That court need have no such fear.

The question of jurisdiction

18.
Where there is a potential question as to which court within the European Union should have jurisdiction over any particular dispute involving a civil or commercial matter, in my judgment the answer is to be found in the Jurisdiction and Judgments Regulation 44/2001, which for all purposes material to this application restates the provisions of the Brussels Convention of 1968, unless the dispute in question falls within one of the exceptions set out in Article 2(1). But for these applications, I would have regarded this as self-evident.

19.
Recital (2) of the Regulation is as follows:

“Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States around by this Regulation are essential."

20.
Recital (6) of the Regulation is as follows:

“In order to attain the objective of free movement of judgments in civil and commercial matters, it is necessary and appropriate that the rules governing jurisdiction and the recognition and enforcement of judgments be governed by a Community legal instrument which is binding and directly applicable.”

And, by Recital (7):

“The scope of this Regulation must cover all the main civil and commercial matters apart from certain well-defined matters.”

21.
The well-defined matters referred to in recital (7) are defined in Article 1 of the Regulation, the relevant provisions of which are:

“(1) This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.

(2) The Regulation shall not apply to:

(a) . . .

(b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements compositions, and analagous proceedings;

(c) . . .

(d) arbitration."

22.
By Article 2, the general rule is that persons domiciled in a Member state shall, whatever their nationality, be sued in the courts of that Member State. However, paragraph 1 of Article 23 provides that:

“If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing; or

. . .”

23.
As already noted, by the terms of the contract in this case the parties agreed that the courts of England and Wales were to have exclusive jurisdiction over disputes arising out of the contract.

24.
Thus, unless one of the exceptions under Article 2 applies, this court clearly has jurisdiction in respect of the disputes raised in these two actions. Each is an action that falls within the definition of a civil and commercial matter: the disputes between the parties are contractual disputes about the performance and termination of a contract.

25.
To my mind it is obvious that these two actions cannot be described as "proceedings relating to the winding-up of insolvent companies" or "analogous proceedings". The claims, as I have summarised them above, in my view speak for themselves.

26.
However, Mr Manus McMullan QC, who appeared for Gibralcon, submitted that these proceedings did fall within the exception in Article 2(1). He relied principally on two grounds. First, the fact that at paragraph 64 in the Particulars of Claim in the first action GRPL was seeking, "as a result of Gibralcon's insolvency", a stay of enforcement of the adjudicator's decisions pending a final determination of the reinforcement proceedings. Second, that the state of accounts under the contract remained unresolved and that that was a type of dispute falling within the jurisdiction of the administrators in the Spanish insolvency proceedings.

27.
In spite of Mr McMullan's valiant submissions, I regard these points as hopeless. The mere fact that a party seeks a stay of execution of an adjudicator's decision in the context of a wider contractual dispute because the other party is in liquidation does not alter the nature of the dispute. Second, the fact that a particular dispute could be resolved within insolvency proceedings, if the parties chose to confer jurisdiction on the liquidator or a court dealing with the insolvency, again does not alter the nature of the dispute.

28.
It is now established that the fact that a defendant in commercial proceedings is the subject of insolvency proceedings in another Member State is not of itself a ground for depriving the Jurisdiction and Judgments Regulation of application: see the decision of the European Court of Justice in German Graphics Graphische Maschinen GmbH v Van der Schee [2010] I.L.Pr. 1, which followed the earlier decisions of the ECJ in Gourdain v Nadler [1979] ECR 733, and Seagon v Deko Marty Belgium NV [2009] 1 WLR 2168.

29.
Although the German Graphics case did not establish that proposition in so many words, it is implicit in the decision itself as well as its reasoning. The brief facts of the case were that the defendant, a company registered in the Netherlands, had purchased machines from the claimant, a company registered in Germany. In November 2006 the defendant was put into in voluntary liquidation in the Netherlands. The following month the Brunswick Regional Court in Germany granted an application for the adoption of protective measures in relation to certain machines which had been sold by the claimant and were at the defendant’s premises in the Netherlands. The application was made on the ground that the machines were the subject of a retention of title clause. The Court held, at paragraph 32, that:

“The action concerning that reservation of title clause constitutes an independent claim, as it is not based on the law of the insolvency proceedings and requires neither the opening of such proceedings nor the involvement of a liquidator."

If it was a good answer to such a claim that the defendant was already the subject of insolvency proceedings at the time when the proceedings in the other Member State were started, the German Graphics case could not have been decided as it was.

30.
The difficulty with Gibralcon's submissions on these applications is that they proceeded from the wrong starting point. To consider the Insolvency Regulation 1346/2000 in isolation is, in effect, to assume that which one is seeking to prove: namely, that the proceedings in question fall within the exception in Article 1.2 (b). As I have already noted, the remarkable feature about Mr McMullan's skeleton argument was that the Jurisdiction and Judgments Regulation was not mentioned at all.

31.
For these reasons, I consider that the applications fail and must be dismissed. However, I should perhaps summarise and deal briefly with the argument mounted by Mr McMullan, which was broadly along the lines of the judgment of the Commercial Court in Madrid.

The argument based on the Insolvency Regulation

32.
The lynchpin of Gibralcon's argument was Article 4 of the Insolvency Regulation, which provides:

“1. Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as the “State of the opening of proceedings.”

(Emphasis added by Mr McMullan)

33.
Article 4.2 then provides that the law of the Member State opening the insolvency proceedings shall determine the conditions for the opening of those proceedings, their conduct and closure. It then provides that:

“It shall determine in particular:

...

(b) the assets which form part of the estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings;

(c) the respective powers of the debtor and the liquidator;

...

(f) the effects of insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending;

(g) the claims which are to be lodged against the debtor’s estate and the treatment of claims arising after the opening of insolvency proceedings;

(h) the rules governing the lodging, verification and admission of claims;

(i) the rules governing the distribution of proceeds from the realisation of assets, the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right in rem or through a set-off;

...

(m) the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors."

34.
Mr McMullan relied principally on Article 4.2(f). Article 4 is headed "**Law applicable**". So this article, as both this heading and its text indicates, is concerned with applicable law, not with questions of jurisdiction. This is for the simple reason that Article 3 of the Regulation deals with jurisdiction and provides for international jurisdiction to open insolvency proceedings. It provides for the courts of the Member State within the territory of which the centre of a debtor's main interests is situated to have jurisdiction to open insolvency proceedings, but where the debtor also possesses an establishment within the territory of another Member State, the courts of that state shall also have jurisdiction to open insolvency proceedings. However, if the latter proceedings are opened subsequently to insolvency proceedings in the state in which the debtor's main interests are situated, they are treated as secondary proceedings. Thus the importance of Article 3 is that it is concerned with jurisdiction in relation to insolvency proceedings, not other types of proceedings.

35.
Gibralcon's argument then goes on to assert that the Insolvency Regulation clearly permits the local law (in this case, Spanish) to determine the effects of an insolvency in any particular jurisdiction, subject to some exceptions.

36.
However, in my judgment, this does not follow. The Insolvency Regulation 1346/2000, as its name suggests, applies to insolvency proceedings. Recitals (6)-(8) are worth quoting in full:

"(6) In accordance with the principle of proportionality this Regulation should be confined to provisions governing jurisdiction for opening insolvency proceedings and judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings. In addition, this Regulation should contain provisions regarding the recognition of those judgments and the applicable law which also satisfied that principle.

(7) Insolvency proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings are excluded from the scope of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Convention on Accession to this Convention.

(8) In order to achieve the aim of improving the efficiency and effectiveness of insolvency proceedings having cross-border effects, it is necessary, and appropriate, that the provisions on jurisdiction, recognition and applicable law **in this area** should be contained in a Community law measure which is binding and directly applicable in Member States. " (My emphasis)

37.
I consider that the Insolvency Regulation 1346/2000 and the Jurisdiction and Judgments Regulation 44/2001 are intended to provide mutually exclusive codes in relation to jurisdiction: the former is

confined to insolvency and analogous proceedings, whereas the latter applies to other civil and commercial proceedings (save for those specifically excluded, such as, for example, arbitration).

38.
Gibralcon also relied on the Spanish Insolvency Act. There is no dispute that, within Spain, this statute provides a form of "long arm" jurisdiction (“vis attractiva concursus”) once insolvency proceedings have been opened in Spain. Article 8 (headed "Insolvency Court") provides that the jurisdiction of the Insolvency Court is exclusive and excludes all others in both civil actions with an economic impact lodged against the insolvent debtor’s estate and labour actions where the insolvent debtor is the employer.

39.
However, the parties did not agree as to whether this jurisdiction to bring other proceedings involving the debtor into the jurisdiction of the insolvency court extended to other proceedings outside Spain. Both sides relied on Article 11 of the Act, but drew directly opposing conclusions as to its meaning. Article 11 of the Insolvency Act is in the following terms:

“**Article 11.** International scope of the jurisdiction.

In the international field, the jurisdiction of the Insolvency Court only includes hearing and deciding actions that have their legal grounds in the insolvency legislation and that are immediately related to the insolvency proceedings."

Relying on the interpretation given to this article by its expert, Gibralcon submitted that the reference in Article 11 to "the international field” was intended to refer to disputes involving persons in states that were not Member States of the EU. GRPL, by contrast, submitted that "international” simply meant the opposite of “national” and therefore referred to any dispute that was not a domestic dispute, namely one in which both parties were domiciled in Spain.

40.
Gibralcon's expert, Mr Antoni Frigola Riera, draws a distinction between Community and non-Community cases. Mr Frigola is eminently well qualified to give evidence on Spanish law, having been counsel in the Litigation and Regulatory Department, a Senior Judge in the Court of First Instance and Investigation and ultimately a judge in the Court of Commercial Matters in Madrid.

41.
Mr Frigola contends that the application of Article 11 is confined to non-Member States of the EU. GRPL's expert, Miguel Virgos, disagrees. Professor Virgos is also extremely well qualified to give expert evidence on Spanish law, being currently the Professor of Private International Law at the University of Madrid. He was the Spanish delegate for the negotiations leading to the Convention on insolvency proceedings and its transformation into the Insolvency Regulation 1346/2000.

42.
Professor Virgos says that Article 11 is a rule of general application which has no limitation to certain regions or proceedings. He says that it is only for domestic litigation that the vis attractiva concursus applies: otherwise, the Spanish judge would have to be transformed into what he called a sort of "Judge Hercules" capable of dealing with whatever action under whatever law. He says that to permit this would result in conflicts of jurisdiction with foreign courts.

43.

In this context, the text of Article 10 is instructive. That Article is referred to and relied on by the Commercial Court of Madrid in its judgment. It states (irrelevant parts omitted):

“**Article 10. International** and territorial competence**.**

1. The confidence to declare and deal with the insolvency lies with the Mercantile Court of Law in whose territory the debtor has the centre of his main interests. If the debtor has his domiciled in Spain and such domicile does not coincide with the centre of his main interests, the Mercantile Court of Law in whose territory the domicile is situated shall also be competent, at the petitioner’s creditor choice.

The centre of main interests shall be understood as the place where the debtor usually performs the management of those interests . . .

The effects of this insolvency, which shall be considered the "main insolvency proceedings" **from an international perspective**, shall have a universal scope including all the assets of the debtor, whether they are located within or without Spain. In the event of insolvency proceedings commenced upon assets located in a foreign state, the rules of co-ordination foreseen in Chapter III of Title IX of this Act shall be taken into account.

. . .

3. If the centre of main interests is not in Spanish territory, but the debtor has an establishment there, the Mercantile Court of Law in whose territory it is located shall be competent and, if there are several, where any of them is situated, at the petitioner's choice.

. . .

The effects of this insolvency, which **in the international scope** shall be considered a "secondary insolvency"; shall be limited to the assets of the debtor; whether or not they are vested for his activity, that are located in Spain. In the event of the State where the debtor has the centre of main interests opening insolvency proceedings, the co-ordination rules foreseen in Chapter IV of Title IX of this Act shall apply."

(My emphasis)

44.
Title IX of the Actis headed "**On the rules of Private International Law**”, and provides that it shall be applied without prejudice to the provisions contained in the Insolvency Regulation 1346/2000, on insolvency proceedings, and "other Community or convention rules that regulate the matter”. Chapter 2º[sic]carries the heading "On the applicable law" and contains three Sections: the first dealing with the main procedure, the second dealing with secondary insolvency proceedings and the third dealing with rules that are common to both types of proceedings.

45.
Chapter 3 ºcarries the heading "On the recognition of foreign insolvency proceedings”. I was referred by Mr McMullan, in particular, to Article 224 (entitled "**Enforcement**") which provided that foreign resolutions that are enforceable pursuant to the laws of the State of opening the proceedings in which they were handed down shall require a prior “exequatur” for enforcement in Spain.

46.

There are two points to note. First, Chapter 2 º of this Title is concerned with the applicable law and Chapter 3 º is concerned with the recognition of foreign insolvency proceedings, not other foreign proceedings. Second, the reference in Article 199 to the Insolvency Regulation 1346/2000 and “other Community rules that regulate the matter” makes it clear to my mind that the word "International” in the heading "On the rules of Private International Law” must include disputes or proceedings within the EU and is not confined to disputes involving a party domiciled in a state outside the EU.

47.
For these reasons, I unhesitatingly prefer the views of Professor Virgos and conclude that the effect of Article 11 of the Spanish Insolvency Act, in cases where there is a dispute between the Spanish debtor and a party domiciled in another state, is to confine the jurisdiction of the Spanish courts to that of hearing and deciding actions that have their legal grounds in the insolvency legislation and that are immediately related to the insolvency proceedings. This leaves the question of jurisdiction over claims between the Spanish debtor and a party domiciled in another Member State to be resolved in accordance with the rules of the Jurisdiction and Judgments Regulation 44/2001.

48.
However, if I am wrong in this conclusion, European law must prevail over the laws of the Kingdom of Spain and so the answer is the same.

Set-off

49.
In relation to one of the actions, Mr Moss had an alternative argument based on the right of set-off.

50.
Since this argument was very much a fall-back on which Mr Moss only sought to rely if all else fails, I do not consider it necessary to deal with it in this judgment.

Conclusions

51.
For the reasons I have given, I am in no doubt whatever that this court has jurisdiction to hear and determine these two actions. Accordingly, these two applications must be dismissed.

52.
However, as I have already been at some lengths to explain, this court would not seek to enforce its decisions given the existence of the insolvency proceedings in Spain. So if GRPL receives decisions that are in its favour from this court, it must lodge its claim in the Spanish insolvency proceedings. There will be no question of enforcement in this jurisdiction.

53.
I am therefore not prepared to accede to the request of the Commercial Court in Madrid that this court should abstain from hearing these claims.

54.
I should make it clear that this judgment is confined to the two applications to dismiss the claims for want of jurisdiction. It is not a judgment on an application to enforce the declaratory judgment given in Madrid on 24 September 2010. That judgment was reached, it seems, without the benefit of any argument from GRPL. Any application to enforce that judgment, if in the light of this judgment one is to be made, would have to be by way of a separate application.

55.

I will hear counsel if there are any issues as to costs or the form of relief.