Summary judgment in the context of insolvency set-off

Summary

On 14 May 2007 the High Court[1] gave judgment on an appeal against summary judgment in favour of claimants, Swissport (UK) Limited (in liquidation) ("**Swissport**"), against Aer Lingus Limited ("**Aer Lingus**"). This judgment contains useful comments on the Court's approach to summary judgment in the context of claimant insolvency. It also emphasises, in relation to insolvency set-off, the requirement on the "decision-maker" to estimate any cross-claim, rather than simply taking it at face value.

Factual background

Swissport's claim against Aer Lingus

This decision arises out of the provision by Swissport of ground handling services to Aer Lingus at Heathrow airport (the "**Services**").

The Court at first instance[2] gave summary judgment in favour of Swissport against Aer Lingus for unpaid charges for the Services rendered before the administration of Swissport (the "**Unpaid Charges**"). On appeal Aer Lingus did not dispute the amount of the Unpaid Charges but contended that summary judgment was not appropriate as it had a cross-claim whose value exceeded that of the Unpaid Charges.

Historically Aer Lingus had employed its own staff to provide ground handling services for its flights into and out of Heathrow airport. However, in 1999 Aer Lingus transferred this business to Swissport and the latter contracted to provide the Services to it. This contract was to be in force until 2009. On 16 November 2004 Swissport ceased to provide the Services and later that day went into administration. Subsequently it went into liquidation.

1 *Swissport (UK) Limited (in liquidation) v Aer Lingus Limited* [2007] EWHC 1089 (Mr Peter Prescott QC (sitting Deputy Judge of the High Court of Justice).

2 Deputy Master Hoffman, 15 September 2006 (prior to the liquidation of Swissport).

MAYER BROWN ROWE & MAW

Aer Lingus' contingent cross-claim

As a result of the collapse of its business at Heathrow, Swissport dismissed a number of employees, some of whom found jobs with Aer Lingus or with the outside contractors providing ground handling services to Aer Lingus (in place of Swissport). Many of those employees brought claims relating to the termination of their employment not only against Swissport but also against Aer Lingus. They did so claiming that, prior to 16 November 2004, there had existed an "undertaking" within the meaning of the Transfer of Undertakings (Protection of Employment) Regulations 1981 ("**TUPE**") which was in the hands of Swissport and which undertaking (or part thereof) was transferred to Aer Lingus.

The employment claims (or a segment of those claims) came before the Employment Tribunal which ruled that such an "undertaking" did not exist and that therefore there was no transfer of undertaking to which TUPE applied. An appeal to the Employment Appeal Tribunal ("**EAT**") was brought but, as at the date of the judgment in this case, that decision had not been delivered.

It was Aer Lingus' position that the EAT might allow the appeal in which case the employment claims would be allowed to proceed and this, in turn, could result in successful claims against it. Aer Lingus argued that, pursuant to a clause in the 1999 business transfer agreement between it and Swissport, the latter was required to indemnify it in respect of any successful employee claims or, alternatively, that Swissport's failure to provide the Services on and after 16 November 2004 was a breach of contract for which Aer Lingus was entitled to claim damages including any loss which it would sustain if the employee claims were successful.

However, the Court was concerned that the cross-claim upon which Aer Lingus sought to rely was dependent upon an "*accumulation of contingencies*", for instance, not only would the EAT have to reverse the decision currently before it but the tribunal would have to be satisfied that the employees lost their jobs as a result of that transfer and not because of Swissport's insolvency. Ultimately, it was the Court's view that it was "pretty unlikely" that all of the contingencies required to establish the cross-claim would be established in the end.

Summary judgment in the context of insolvency

Civil Procedure Rules, Rule 24.2 states that the Court may give summary judgment if it considers that the defendant has no real prospect of successfully defending the claim and that there is no other compelling reason why the case should be disposed of at trial. "May" imports a discretion and the Court noted that it must exercise this discretion in order to promote the overriding objective to do justice between the parties. Such exercise must depend on the circumstances of each particular case.

The Court made two general statements in relation to summary judgment in the context of insolvency. If the claimant is insolvent then summary judgment in his favour may produce unjust consequences as the defendant may never recover in full any cross-claim which he later successfully prosecutes. However, a rule that the Court would never give summary judgment in favour of an insolvent claimant whenever the defendant might have a good cross-claim would also result in unjust consequences and was therefore inappropriate.

Insolvency set-off

The Court considered Insolvency Rules 1986, Rule 4.90 which provides, *inter alia*, that "*an account shall be taken of what is due from each party to the other …*".

Aer Lingus argued that, if its cross-claim (founded on contingent employment claims) has any real prospect of success, the Court had no option but to refuse summary judgment as, to the extent that set-off under Rule 4.90 operates, there was no debt due from it to Swissport.

However, the Court did not agree with this argument. It found that the "account" which is required to be taken properly involves the valuation of the cross-claim. The Court referred to the judgment of Lord Hoffmann in *Stein v Blake*[3] (noting that similar principles would apply in relation to both personal and corporate insolvency) and concluded that a cross-claim does not have to be taken at face value, the "decision-maker" is entitled and required to estimate it and "*if the cross-claim is, to say the least, shadowy … nobody is forced to proceed on the basis of a fiction*".

The Court rejected the submission that, once a cross-claim is shown to be barely arguable, it must be estimated at face value and then set-off for summary judgment purposes against an undoubted claim on which summary judgment would otherwise be available.

The Court's decision

As noted above it was the Court's view that it was "*pretty unlikely*" that all of the contingencies required to establish Aer Lingus' cross-claim would be established in the end. Accordingly, the Court held the cross-claim in "low esteem" and concluded that it constituted neither a discretionary bar to summary judgment under Rule 24.2 nor a set-off under Rule 4.90.

Summary judgment in favour of Swissport was therefore upheld but, as it appeared to the Court that the decision of the EAT on the employee claims would be available very soon, the Court ordered that the Liquidators of Swissport undertake to it not to distribute the summary judgment monies to creditors until 14 days after the EAT delivers its judgment. The purpose of this undertaking was to afford Aer Lingus the opportunity to make such application to the Court as it may be advised.

Conclusion

In relation to summary judgment the Court declined to set down any hard-and-fast rules as to the approach which should be taken to a summary judgment application by an insolvent claimant, each decision will depend on the facts of the particular case.

In the context of insolvency set-off the Court emphasised that it is not the case that any "barely arguable" cross-claim can form the subject matter of a set-off, all cross-claims must be "estimated" (a process which, in this case, included consideration of the likelihood that the contingencies to which a cross-claim was subject would be satisfied).

If you would like any further information about this please speak to you usual contact in the **Financial Restructuring & Insolvency Group**

3 [1996] AC 243.

BERLIN
Potsdamer Platz 8
10117 Berlin
Telephone: +49 (0)30 20 61 30 90

BRUSSELS
Avenue des Arts 52
Brussels 1000
Belgium
Telephone: + 32 (0)2 502 5517

CHARLOTTE
Bank of America Corporate Center
214 North Tryon Street
Suite 3800
Charlotte
North Carolina 28202-2137, USA
Telephone: + 1 704 444 3500

CHICAGO
Hyatt Center
71 South Wacker Drive
Chicago
Illinois 60603-3441, USA
Telephone: + 1 312 782 0600

COLOGNE
Kaiser-Wilhelm-Ring 27-29
50672 Cologne
Germany
Telephone: + 49 221 5771 100

FRANKFURT
Bockenheimer Landstrasse 98-100
60323 Frankfurt/Main
Germany
Telephone: + 49 69 79410

HONG KONG
7th Floor, Gloucester Tower
The Landmark
15 Queen's Road Central
Hong Kong
Telephone: + 852 3763 7000

HOUSTON
700 Louisiana Street
Suite 3400
Houston
Texas 77002-2730, USA
Telephone: + 1 713 238 3000

LONDON
11 Pilgrim Street,
London EC4V 6RW
United Kingdom
Telephone: + 44 (0)20 7248 4282

31st Floor
30 St Mary Axe
London EC3A 8EP
United Kingdom
Telephone: +44 (0)20 7398 4600

LOS ANGELES
350 South Grand Avenue
25th Floor
Los Angeles
California 90071-1503, USA
Telephone: + 1 213 229 9500

NEW YORK
1675 Broadway
New York
New York 10019-5820, USA
Telephone: + 1 212 506 2500

PALO ALTO
Two Palo Alto Square, Suite 300
3000 El Camino Real
Palo Alto
California 94306-2112, USA
Telephone: + 1 650 331 2000

PARIS
41 Avenue Hoche
75008 Paris
France
Telephone: + 33 1 5353 4343

WASHINGTON DC
1909 K Street N.W.
Washington D.C. 20006-1101, USA
Telephone: + 1 202 263 3000

Representative office

BEIJING
MBP Consulting Limited LLC
Tower W3, Oriental Plaza
Suite 1505, 15/F
1 East Chang An Avenue
Dongcheng District
Beijing 100738
China
Telephone: +86 10 8518 198

Independent alliance law firms

Jauregui, Navarrete y Nader S.C.

MEXICO CITY
Jauregui, Navarrete y Nader S.C.
Abogados Torre Arcos
Paseo de los Tamarindos No. 400-B
Col. Bosques de las Lomas
05120 Mexico D.F.
Telephone: + 5255 5267 4500

Ramón & Cajal - principal offices

MADRID
Ramón & Cajal
Paseo de la Castellana, 4
28046 Madrid
Spain
Telephone: +34 91 576 19 00

BARCELONA
Ramón & Cajal
Avda. Diagonal 613, 4a,
08034 Barcelona
Spain
Telephone: +34 93 494 74 82

Tonucci & Partners - principal offices

ROME
Tonucci & Partners
Via Principessa Clotilde, 7
00196, Roma
Italy
Telephone: +39 06 362 271

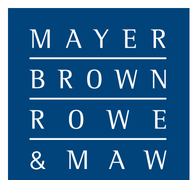
MILAN
Tonucci & Partners
20121 Milan
Via dei Bossi, 4
Italy
Telephone: +39 02 859 191

Additional offices:
Padua, Florence, Bucharest, Tirana

Copyright © 2007 Mayer, Brown, Rowe & Maw LLP. This Mayer, Brown, Rowe & Maw publication provides information and comments on legal issues and developments of interest to our clients and contacts. It is not a comprehensive treatment of the subject matter covered and is not intended to provide legal advice. Readers should seek specific legal advice before taking any action with respect to the matters discussed in this publication.

If you would prefer not to receive future publications or mailings from Mayer, Brown, Rowe & Maw LLP, or if your details are incorrect, please contact us by post or by email to businessdevelopment@mayerbrownrowe.com.

Mayer, Brown, Rowe & Maw is a combination of two limited liability partnerships, each named Mayer, Brown, Rowe & Maw LLP, one incorporated in England and one established in Illinois, USA.



0084fin
May 2007