THE HIGH COURT

2015 No. 8 MCA

BETWEEN/

BELAIR HOLDINGS LTD.

APPLICANT

AND

ETOLE HOLDINGS LIMITED AND AVIARETO LIMITED

RESPONDENTS

JUDGMENT of Ms Justice O'Malley delivered on 26th of March 2015

This is the application by the applicant, Belair, for orders compelling the first named respondent, Etole, and the second named respondent, the Registrar, to discharge a registration from the International Register made by Etole. The central issue in the application is whether the registration was validly made within the terms of the Cape Town Convention. This is a technical question depending on the proper application of the rules and principles of the Convention.

The ruling does not therefore make any findings as to the conduct of the contractual dealings at the heart of a dispute between the parties or on the question of the jurisdiction of this court to adjudicate on matters arising from that dispute. Those issues have yet to be determined.

However it is common case that, pursuant to Article 44 of the Convention, the High Court of Ireland has exclusive jurisdiction to make orders directed to the Registrar with regard to the discharge of invalid registrations. Etole has submitted to the jurisdiction and no issue arises in that regard.

The entry made on behalf of Etole on 30th December 2014 purported to register a registrable non-consensual interest.

I now want to look at the relevant provisions of the Convention, starting with the definition of an international interest. By virtue of Article 1(o), that means an interest held by a creditor to which Article 2 applies. An international interest may be registered by either party with the consent in writing of the other.

For present purposes, the relevant part of Article 2 is that which defines an international interest as being an interest:

"(a) granted by the chargor under a security agreement;

(b) vested in a person who is the conditional seller under a title reservation agreement; or

(c) vested in a person who is the lessor under a leasing agreement."

This type of agreement is not relevant in this case.

An interest falling within subparagraph (a) does not also fall within subparagraph (b) or (c). It is apparent that these subparagraphs deal with situations where the interest is conferred by virtue of an agreement between the parties.

A security agreement is defined as an agreement by which a chargor grants or agrees to grant an interest, including an ownership interest, in or over an object to secure the performance of any existing or future obligation of the chargor or a third person.

A title reservation agreement means an agreement for the sale of an object in terms that ownership does not pass until fulfillment of the condition or conditions stated in the agreement.

It should be noted that the word "agreement" in the Convention means a security agreement, a title reservation or a leasing agreement. It does not include a contract for sale of a relevant object.

A registered interest means an international interest,a registrable non-consensual right or interest or a national interest specified in a notice of a national interest registered pursuant to the provisions of the Convention. The concept of national interest does not arise in these proceedings.

It is possible under the Convention to register certain legal rights and interests which are not created by agreement. A registrable non-consensual right or interest means a non-consensual right or interest registrable pursuant to a declaration deposited by a Contracting State under the provisions of Article 40. Such a declaration lists categories of non-consensual right or interest which shall be registrable as if the right or interest were an international interest.

According to Professor Goode, declarations made under this Article typically cover judgments or orders permitting attachment of equipment covered by the Aircraft Protocol and State liens for taxes or unpaid charges. A registrable non-consensual right or interest may be registered by the holder and the consent of the other party is not required.

Article 39 deals with the existence of rights that have priority without registration. In the relevant part it provides for the deposit by Contracting States of declarations which declare, either generally or specifically, those categories of non-consensual right or interest other than a right or interest to which Article 40 applies which under that State's law have priority over an interest in an object equivalent to that of a holder of a registered international interest and which shall have priority over a registered international interest whether within or outside insolvency proceedings.

According to Professor Goode, the priority given to the rights or interests covered by such declarations is a priority given under the law of the Contracting State, not under the Convention, and it is not entitled to recognition in another State except to the extent provided by that State's conflict of laws rules. He also points out that Article 39 declarations are limited to non-contractual rights and interests and that most of them deal with liens in favour of unpaid employees, repairers and bailees.

Professor Goode comments that Articles 39 and 40 are intended to be mutually exclusive in the sense that a category appearing in a declaration under Article 39.1, and thus given priority without registration, ought not also to appear in a declaration under Article 40 for which registration is required.

The applicability of the Convention

The Convention will only apply if the five conditions listed by Professor Goode at page 26 of his commentary are satisfied. In this case three of the five are in issue. That is, number one, whether the parties have entered into a security agreement or title reservation agreement, i.e. a conditional sale agreement, or a leasing agreement. That refers to the definitions under Article 2. Number four, whether the agreement is constituted in accordance with the formalities prescribed by the Convention. And number five, whether the debtor is situated in a Contracting State at the time of conclusion of the agreement, creating or providing for the international interest.

For the purposes of the Convention, the debtor is the chargor under a security agreement or the conditional buyer under a title reservation agreement or the lessee under a leasing agreement or a person whose interest in an object is burdened by a registrable non-consensual right or interest. The debtor is situated in a Contracting State if (a) it was incorporated or formed under the law of that State, (b) it has its registered office or statutory seat there, (c) it has its centre of administration there or (d) it has its place of business there or, if it has more than one place of business, its principal place of business or, if it has no place of business, its habitual residence.

Article 4.1 of the Aircraft Protocol also makes the Convention applicable in relation to an airframe if at the time of the conclusion of the applicable agreement it is registered in the aircraft registry of a Contracting State.

Finally, I wish to refer to Article 25.4 and Article 44.

Article 25.4 provides that where a registration ought not to have been made or is incorrect, the person in whose favour the registration was made shall, without undue delay, procure its discharge or amendment after written demand by the debtor, delivered to or received at its address stated in the registration.

Article 44.2 confers jurisdiction on the Irish courts to make an order requiring the Registrar to discharge a registration where a person fails to respond to a demand made under Article 25 and that person has ceased to exist or cannot be found for the purpose of enabling an order to be made against it requiring it to procure discharge of the registration. Article 44.3 provides that where a person has failed to comply with an order of the Court having jurisdiction under the Convention requiring that person to procure a discharge of a registration, the Court may direct the Registrar to take such steps as will give effect to that order.

Issues for determination

Firstly, does the agreement between the parties come within the sphere of application of the Convention? For the purpose of determining this issue I will approach it on the assumption that Etole is correct in saying that the letter of intent, combined perhaps with the subsequent dealings between the parties, is a binding legal agreement capable of creating or giving rise to an international interest.

A question then arises, where was the debtor situated at the time of conclusion of the agreement?

It is argued by Mr. Sreenan, having regard to the definition of debtor, that if what was agreed amounts to a security agreement or a title reservation agreement, Etole can be characterised as the debtor. However, I am satisfied that in the circumstances of the case, where it was Etole that registered the purported interest, the relevant part of the definition is that which provides that it is the person against whose ownership or other proprietary rights the interest is registered that is the debtor for the purposes of the Convention.

Belair was, according to the evidence, incorporated or formed in the Cayman Islands and has its registered office there. The aeroplane was also registered in the Cayman Islands. It is accepted that the Cayman Islands is a British overseas territory and not competent to ratify the Convention in its own right. The United Kingdom has signed, but not ratified, the Convention. There is no evidence to suggest that as of 11th December 2014 its centre of administration, place of business or habitual residence was in a Contracting State. Accordingly, I am satisfied that the debtor was not situated in a Contracting State at the relevant time and that the conditions of applicability have not been met.

Lest I be wrong on that, I will move on to consider whether or not Etole might have an interest capable of registration stemming from Article 40 of the Convention.

Article 40 arises because the disputed registration entry uses the term "*registrable non-consensual interest*", which can only refer to the provisions of that Article. The short answer to the question is no, given that no Contracting State with any arguable connection to the dealings between the parties has lodged an Article 40 declaration.

I then consider the question, does Etole have any interest capable of being registered under the Convention? The case made by Etole is that it has a binding agreement enforceable under the law of New York which amounts to a security agreement or a title reservation agreement and that this gives it an international interest within the meaning of the Convention. However, while assuming for the purpose of argument that this analysis is correct, an interest of this nature could not be registered without the consent of Belair. It manifestly cannot be relied upon to justify the registration of a registrable non-consensual interest.

Etole also argues that the rights accruing to it are among those covered by the Article 39 declaration lodged by the United States. However, again assuming that this is correct, I am driven to conclude that it cannot justify the registration. Article 39 declarations are a form of public announcement by the states making them as to the priorities to be accorded by the law in those states. They relate, by definition, to interests that are not registered. They are not entitled to recognition in other Contracting States unless the applicable conflict of law rules accord such recognition. They do not enjoy the same degree of recognition as interests registered pursuant to Article 40.

It has been submitted that there is no technical impediment to the registration of an interest arising from an Article 39 declaration and that in fact a practice has arisen of registering such interests. I do not see that either of these matters could justify the retention on the Registry of an entry that wrongly states it concerns a non-consensual interest under Article 40. The fact that the Registry has been established in such a way as to preclude the necessity, or indeed possibility, for the Registrar to verify the details of every entry does not mean that a court should be prepared to condone a misleading registration.

The next issue is the question of whether or not there was a proper demand made by Belair.

Etole says that the terms of the Convention require that before an order can be made, a demand must be made under Article 25.4 that the person procure a discharge of the registration without undue delay. It argues that the demand in this case did not comply with the Convention requirements because, firstly, it demanded that the discharge be procured within 24 hours and, secondly, it demanded the discharge and removal of the registration.

It appears to be common case that a registration is not removed as such. A separate entry is made registering its discharge so that the viewer can see the history of the registration. I consider that this argument, if not quite purely a matter of semantics is very close to it. The Convention obligation to procure the discharge was not affected in my view by the setting of a legally ineffective time limit by Belair. If Etole had responded to the demand in any substantive manner, the fact that it could not effect the discharge within 24 hours could not have given rise to any complaint on the part of Belair. Similarly, a demand that Etole do something that was beyond its powers did not in my view render ineffective that part of the demand that related to something that *was* within its powers, namely the procurement of the discharge. In overall terms, Etole's obligation under the Convention was clear.

The demand is also said to be ineffective because it was served on the agent of Etole, whose address accompanied the registration, rather than on Etole's lawyers. Because litigation had commenced between the parties, the service is said to have amounted to a breach of the District of Columbia Code of Ethics. I do not see how the breach of a professional code, if breach it was, could render legally ineffective a service that was carried out in accordance with the rules of the Convention.

Finally, criticism was made of the ex parte application for service out of the jurisdiction and Belair is accused of a lack of candour as regards the US litigation. I do not see that there is any substance in this point. The US pleadings were before the Court when the application was made. In any event, it seems to me that the relief sought as regards rectification of the registration is of a sort that an Applicant who proves its case is entitled to more or less *ex debito justitiae*, in that it's difficult to see what conduct on the part of the Applicant would persuade a court that a registration that should not have been made should nonetheless be left undisturbed. In this regard, the Court must be conscious of the purpose and principles of the Convention and importance of maintaining the integrity of the Registry.

I therefore propose to make the order sought.

10th June 2015

Isolde O'Malley