



LEGAL BRIEFING

Commercial Marine Piling Ltd v Pierse Contracting Ltd

[2009] EWHC 2241 (TCC), Mr Justice Ramsay

The Facts

This was an application by which the defendant Irish company, Pierse Contracting Limited ("Pierse Ireland") challenged the jurisdiction of the courts in relation to a claim brought by CMP in relation to a guarantee.

Pierse Contracting Ltd ("Pierse UK"), an English company with the same name as the defendant was retained as main contractor by Belfast Harbour Commissioners to construct a new ferry terminal in the port of Belfast. Pierse Ireland provided CMP with a parent company guarantee.

A dispute arose between Pierse UK and CMP over the balance of the sums due to CMP. CMP commenced proceedings in the TCC (the first action). At the same time CMP sent a letter to Pierse Ireland enclosing a copy of the claim. They put Pierse Ireland on notice that if Pierse UK failed to satisfy any sums due to CMP, CMP would look to Pierse Ireland to fulfil their obligations to CMP.

Pleadings were exchanged but then CMP was advised that Pierse UK had decided to take steps to place the company in creditor's voluntary liquidation. Pierse's defence and counterclaim was struck out and judgment entered against them for £862,005.43.

A claim was then issued against Pierse Ireland in which CMP sought sums under the guarantee. Pierse Ireland sought a declaration that the courts of England and Wales do not have jurisdiction to hear the claim in the second action.

The issue

In this case there is a contract in the form of a guarantee so that Pierse Ireland can be sued in the court for the place of performance of the obligation in question. The issue before the court was what is that place of performance?

The Decision

It was held that the place of performance of the obligation is to be decided with the law governing that obligation according to the conflict of laws rule of the court seized.

The law governing an obligation is to be determined under the Contracts (Applicable Law) Act which gives effect to the Rome Convention. The Convention provides at Article 4(1) that the law applicable to a contract shall be governed by the law of the country with which it is most closely connected. The question in this case was whether the guarantee was to be governed by Article 4(2) which gives rise to a presumption or whether Article 4(5) applies because "it appears from the circumstances as a whole that the contract is more closely connected with another country" so that the presumption is the Article 4(2) is to be disregarded.

The presumption is that "the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract, has at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate its central administration."

In this case the performance which is characteristic of the contract is the performance of Pierse Ireland as guarantor and at the time of the contract, Pierse Ireland had its central administration in Dublin. If the presumption were to apply, Irish law would be the applicable law to determine the place of performance of the obligation to pay under the guarantee.

The court held that the relevant considerations are the place of payment under the guarantee and the place of performance of CMP's obligation. Under the guarantee there was no express statement as to where Pierse Ireland's contractual obligation to make payment was to be performed, however the court held that payment was to be made in England. CMP's obligation under the guarantee was to trade with Pierse UK and that would generally be under contracts made in England.

The relationship under the guarantee had a geographical centre of gravity in England. The only connection with Ireland was that it was an Irish company which was providing a guarantee but only in relation to an English company. The court concluded that this was a case where the presumption under Article 4(2) was displaced because, viewing matters as a whole; the guarantee was more closely concerned with England. Therefore Pierse Ireland may be sued in England.

Comment

The obligation on Pierse Ireland was to guarantee to pay such sum of money as may be due to CMP from Pierse UK. That obligation to pay was one which was not dependant upon a demand but merely on the default of Pierse UK. The general rule is that in the absence of any provision as to payment, would be that the payment should be made to CMP in England. Accordingly the court found that the obligation to pay under English law is an obligation to make payment in England.

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December 2009
