

**Case:** Polymer Vision R & D Ltd & ors v Van Dooren [2011] EWHC 2951 (Comm), Beatson J, 17 November 2011

**Synopsis:** Jurisdiction to determine a personal claim for damages against a Dutch bankruptcy trustee based on an alleged misrepresentation leading to a settlement agreement entered into by the trustee exercising his powers under the relevant Dutch insolvency laws was governed by the EC Insolvency Regulation ("ECIR"). Such an action derived directly from the insolvency proceedings and was closely connected with such proceedings.

**Topics covered:** ECIR; Brussels Regulation on Jurisdiction and the enforcement of judgements

### The Facts

An English registered company ("PVL") was placed into bankruptcy proceedings in the Netherlands. Relying on an agreement entered into before the bankruptcy proceedings had been commenced (the "Agreement"), various claimants argued that they had an interest in intellectual property rights owned by PVL. The Dutch bankruptcy trustee issued proceedings seeking, among other things, to preserve PVL's intellectual property rights and an order allowing the sale of those rights. The Dutch bankruptcy trustee maintained that the Agreement constituted a disposal of assets in fraud of creditors and was therefore void. The claimants entered into a settlement agreement with the Dutch bankruptcy trustee to enable him to sell PVL's business, despite the dispute over the ownership of the intellectual property and the validity of the Agreement. The settlement agreement was governed by Dutch law and provided that all disputes arising under it should be brought before the competent court in s-Hertogenbosch in the Netherlands.

PVL's business was sold. The claimants issued proceedings before the English High Court arguing that the settlement agreement had been entered into as a result of misrepresentations made by the Dutch bankruptcy trustee and claiming breach of contract (the "English Proceedings"). The Dutch bankruptcy trustee argued that pursuant to the ECIR the English court was *forum non conveniens* and that the appropriate forum to hear the dispute was a Dutch court. The crucial question for the English court was whether jurisdiction for the claims made in the English Proceedings was governed by the ECIR or the Brussels Regulation on jurisdiction and the enforcement of judgments (the "Judgments Regulation")?

The Judgments Regulation applies to civil and commercial matters but excludes from its scope "bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings" (the "Insolvency Exclusion"). The Court of Justice of the European Union ("CJEU") has held that the Insolvency Exclusion should be interpreted in the same manner as was the case for the prior Brussels Convention (see for example *SCT Industri AB i likvidation* C-111/08). In *Gourdain v Nadler* [1979] ECR 733 the CJEU held that actions directly derived from insolvency proceedings and in close connection with such proceedings are excluded from

the Brussels Convention.

Recital 6 of the ECIR provides that the ECIR 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. Relying particularly on this recital and its similarity to the language used by the CJEU in *Gourdain, in Seagon v Deko Marty Belgium NV* (C-339/07) the CJEU held that Art.3(1) of the ECIR conferred international jurisdiction on the Member State where insolvency proceedings were opened to hear and determine actions which derive directly from those proceedings and which are closely connected with such proceedings.

It was argued by the claimants that the fact that the defendant was an insolvency officeholder and that the English Proceedings arose in the context of Dutch bankruptcy proceedings was not sufficient to bring the English Proceedings within the Insolvency Exclusion, especially as the relief was claimed against him in his personal capacity and was not a remedy only available once the bankruptcy proceedings had been commenced.

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### The Decision

It was held that the English Proceedings fell within the Insolvency Exclusion in the Judgments Regulation and therefore the Judgments Regulation had no application to the question of jurisdiction. This decision was reached on the basis that:

- the negotiations with the claimants were instigated at the suggestion of a Dutch judge so that the disputed intellectual property rights could be sold in the insolvency proceedings;
- the judge supervising the Dutch bankruptcy proceedings played a part in the negotiations surrounding the settlement agreement and approved the final settlement;
- the settlement enabled property rights to be sold for the benefit of the general creditors of PVL; and
- most importantly, the negotiations and eventual settlement were a direct result of the Dutch bankruptcy trustee exercising his powers pursuant to Dutch insolvency laws.

As the claims in the English Proceedings involved the exercise of a Dutch bankruptcy trustee's powers, they were directly derived from the Dutch bankruptcy proceedings and were in close connection with those proceedings. Jurisdiction to hear the claims therefore fell under the ECIR and not the Judgments Regulation.

On the assumption that the ECIR did not confer exclusive jurisdiction on the Dutch courts to hear the English Proceedings, the court held that the effect of the opening of the Dutch bankruptcy proceedings was that the English courts were *forum non conveniens* to hear the English Proceedings. This was because: (i) the issues surrounding the claims in the English Proceedings concerned the exercise of the Dutch bankruptcy trustee's powers and a settlement agreement, which was made as a direct consequence of the Dutch bankruptcy supervisory judge's approval; (ii) the settlement agreement contained an exclusive jurisdiction clause in favour of the Dutch courts; and (iii) it was only after one of

the claimant's applications to the Dutch supervisory judge, in respect of the way the Dutch bankruptcy trustee was carrying out his functions, was unsuccessful that the English Proceedings were commenced.

It should also be noted that, following Briggs J's decision in *Rodenstock GmbH* [2011] EWHC 1104 (Ch) ([technical bulletin 349](#)), Beatson J took the approach that the ECIR and the Judgments Regulation were intended to dovetail completely with each other.

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## Comment

It was common ground between the parties that the ECIR did not confer exclusive jurisdiction to hear and determine actions which derive directly from insolvency proceedings and which are closely connected with such proceedings. The court therefore did not need to consider this issue which is subject to a referral to the CJEU from the Lithuanian court in the *F-Tex* case (C-213/10).

Beatson J's judgment contains a useful run-through of the key CJEU and English case law which has considered the Insolvency Exclusion and the relationship between the Judgments Regulation and the ECIR. In this respect it should be noted that the CJEU's decision in *German Graphics* (C-292/08) was distinguished. In *German Graphics* the CJEU held that a claim based on retention of title (the "RoT Action") brought by a German supplier of goods against a company in Dutch bankruptcy proceedings was not derived directly from the insolvency proceedings or closely linked to those proceedings. While the RoT Action concerned the request for the recovery of assets situated in the Member State where insolvency proceedings had been opened, it was independent of the insolvency proceedings. The RoT Action was not based on the law of the insolvency proceedings (i.e. the RoT Action could have been commenced with or without the existence of the Dutch insolvency proceedings) and did not require the involvement of a liquidator. In such circumstances the mere fact that the liquidator was a party to the RoT Action was not enough to constitute the RoT Action as one deriving directly from the insolvency proceedings and being closely linked to such proceedings. While there were similarities on the facts with *German Graphics* the key difference was that *German Graphics* involved a claim based on a pre-insolvency RoT clause and did not involve either the internal management of the insolvency process or the conduct of the insolvency officeholder.

More generally, the case might be regarded as an oddity. The foreign officeholder was himself the defendant in respect of his conduct during the course of his office. As appears from paragraphs [70] to [73] of the judgment, the claimants' case was that the Dutch bankruptcy trustee was personally liable in respect of alleged misrepresentations he made whilst acting in his official capacity. This, in turn, would have required an assessment under Dutch law of whether, in making the representations, the trustee had acted outside the boundaries set by Dutch case law for the reasonable conduct of such an insolvency officeholder. This would seem to be an obvious case for the application of the Insolvency Exclusion.